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31 October 2016

LIBERTY VICTORIA SUBMISSION ON

THE SENTENCING (COMMUNITY CORRECTION ORDER) AND OTHER ACTS AMENDMENT BILL 2016

I. Introduction

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty Victoria is actively involved in the development of Australia's laws and systems of government. Further information may be found at www.libertyvictoria.org.au.

II. The Sentencing (Community Correction Order) and Other Acts Amendment Bill 2016

1. Liberty Victoria strongly opposes the *Sentencing (Community Correction Order) and Other Acts Amendment Bill 2016* (Vic) ('The Bill'). It is an unnecessary reform to the Community Correction Order ('CCO') regime that further entrenches mandatory sentencing in Victoria.

2. The Bill would, amongst other things, establish a category of offences that cannot receive a CCO (category 1 offences), and establish a category of offences that require "special reasons" to receive a CCO (category 2 offences). It would also limit the sentence of imprisonment that can be combined with a CCO to one year (reduced

from up to two years at present), and limit the maximum duration of CCOs to five years.

3. This Bill follows a worrying trend. Successive Victorian Governments have followed a pattern of passing legislation to restrict the sentencing discretion of judicial officers as the independent umpire. That includes the *Crimes Amendment (Gross Violence Offences) Act 2013,* the *Sentencing Amendment (Emergency Workers) Act 2014,* the *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014*, the *Sentencing Amendment (Baseline Sentences) Act 2014* the *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016*, and now the *Crimes Amendment (Carjacking and Home Invasion) Bill 2016*.

4. The practical effect of the Bill would be to further entrench a system of mandatory imprisonment, because it would create a category of offences where, with the removal of the CCO option, there is no other sentence available other than immediate imprisonment. While that will not create many issues in practice for category 1 offences such as murder, rape and incest, the Bill plainly creates a framework that can and will be ratcheted up over time, as has occurred with offences now attracting mandatory minimum sentences.

5. This is particularly likely to occur as part of highly politicised "law and order auction" campaigning at state elections, with each major party attempting to wedge its opponent as being "soft on crime".

The Bill is Unnecessary

6. Contrary to the implication in the press release that accompanied the announcement of the Bill, offenders are not receiving CCOs for offences such as murder and rape.[1] No doubt if offenders did receive such sentences the Director of Public Prosecutions would appeal and the Court of Appeal would re-sentence the offender. The Government fails to provide any real world examples of CCOs being given in inappropriate cases.

[1] http://www.premier.vic.gov.au/tightening-community-correction-orders-to-keep-victorians-safe/ at 31 October 2016.

7. The fact that the Premier has described CCOs as a “slap on the wrist”[2] shows a fundamental misunderstanding of how CCOs work in practice. CCOs can involve up to 600 hours of community work. They can involve compulsory treatment conditions, such as undertaking counselling and rehabilitation or education courses. They can involve, amongst other things, non-association conditions, residence restriction or exclusion conditions, place or area exclusion conditions, curfew conditions, and alcohol exclusion conditions. There can be active judicial monitoring.

8. If CCOs are breached then an offender can be re-sentenced for the original offence. Often this will be to a term of imprisonment.

9. By limiting the use of CCOs (including in proposed category 2) the Bill is underpinned by a fundamental misconception that by sentencing more persons to imprisonment Victorians will be made safer. As French CJ observed in *Hogan v Hinch*,[3] “[r]ehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest.”[4]

10. Those with practical experience of the criminal justice system, including the Courts, have long recognised that in many cases offenders who are imprisoned pose a greater risk to the community upon release due to the harmful effects of imprisonment. The Bill must be seen in combination with the bipartisan embrace of mandatory minimum sentences – it will result in an ever larger number of offenders being sentenced to lengthy terms of imprisonment rather than receiving community based dispositions that properly balance punitive, deterrent and rehabilitative sentencing considerations.

The CCO Regime

11. In light of the phased abolition of suspended sentences and a significant increase in Victoria’s prison population, which has had the effect of overcrowding and some prisoners not being brought to Court as required, in 2011 the previous Coalition

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[2] Ibid.
[3] (2011) 243 CLR 506.
[4] Ibid, 537 [32].

Government introduced, and then further reformed, the CCO regime. CCOs replaced Community Based Orders and Intensive Corrections Orders under the *Sentencing Act 1991* as a flexible community based sentencing disposition that could balance the needs of the community and the offender.

12. As the Court of Appeal observed in the Victoria's first guideline judgment, *Boulton v The Queen* (Maxwell P, Nettle, Neave, Redlich and Osborn JJA):[5]

> *The CCO option offers the court something which no term of imprisonment can offer, namely, the ability to impose a sentence which demands of the offender that he/she take personal responsibility for self-management and self-control and (depending on the conditions) that he/she pursue treatment and rehabilitation, refrain from undesirable activities and associations and/or avoid undesirable persons and places. The CCO also enables the offender to maintain the continuity of personal and family relationships, and to benefit from the support they provide.*
>
> *In short, the CCO offers the sentencing court the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender and of those who are dependent on him/her.*

13. With regard to combined sentences of CCOs and imprisonment, the Court of Appeal observed:[6]

> *The availability of the combination sentence option adds to the flexibility of the CCO regime. It means that, even in cases of objectively grave criminal conduct, the court may conclude that all of the purposes of the sentence can be served by a short term of imprisonment coupled with a CCO of lengthy duration, with conditions tailored to the offender's circumstances and the causes of the offending.*

14. It appears likely that some judicial officers have been attracted to combined sentences because they know that an offender will be released into the community with some supervision. After the Callinan review in 2013 and consequential reforms to the Victorian parole system, there has been a significant increase in the number of prisoners who are not being released on parole, with the result that when such are eventually released into the community they are not supervised, or have only a very limited period of supervision.

[5] (2014) 46 VR 308, 335 [114].
[6] Ibid, 340 [141].

Recent Court of Appeal Judgments on CCOs

15. The Bill and extrinsic material completely disregards the impact of recent Court of Appeal judgments that limit the use of CCOs in practice. Soon after *Boulton*, and perhaps in response to a perceived overutilisation of CCOs, the Court of Appeal emphasised that *Boulton* does not offer a "get out of jail free card".[7] The practical experience of those appearing in the criminal justice system is that those recent Court of Appeal judgments have made it significantly more difficult for offenders to receive CCOs for mid to high level offences.

16. Further, the Court of Appeal has recently criticised a practice whereby combined sentences (a CCO with a period of imprisonment) were being imposed in circumstances that were inappropriate and where offenders should have been sentenced to head sentences with non-parole periods.[8] In some cases judges have refused to declare pre-sentence detention ('PSD') in order to allow for a combined sentence to be imposed without the imposition of a non-parole period. If a judicial officer imposes a sentence of imprisonment of two years or more, then generally a non-parole period must be imposed,[9] and in *Boulton* it was observed that a CCO and a non-parole period should generally be regarded as alternatives.[10]

17. With respect this is the proper way in which Victoria's criminal justice system should function and evolve. When there are issues with interpretation and/or sentencing practices with regard to recently enacted legislative provisions, the Court of Appeal considers the issue and gives binding judgments.

18. In contrast, at present the Government is engaged in a practice of rapid-fire legislative amendment without giving the Courts a reasonable opportunity to consider and embed sentencing principles. This is problematic, because it leads to the

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[7] *Hutchinson v The Queen* (2015) 71 MVR 8, [17] (Priest JA, with whom Ashley JA agreed), cited with approval in *DPP v Borg* (2016) 75 MVR 26, 48 [109] (Maxwell P, Weinberg and Priest JJA).
[8] *DPP v Hudgson* [2016] VSCA 254 and *DPP v Grech* [2016] VSCA 98.
[9] Unless the Court considers that the nature of the offence or the past history of the offender make the fixing of such a period inappropriate, see s 11 of the *Sentencing Act 1991.*
[10] (2014) 46 VR 308, 352, [199].

kind of hasty reform that may then be found to be incurably defective, as occurred with the baseline sentencing regime in *DPP v Walters.*[11]

19. If a CCO (or a combined sentence) is an inappropriate in a given case, then at present the Director of Public Prosecutions can and does appeal against such sentences, as recently occurred in *DPP v Hudgson*,[12] with the result that the offender was re-sentenced to a term of imprisonment and a non-parole period without a CCO. That is the appropriate mechanism that respects the separation of powers and judicial discretion in sentencing.

20. It should also be noted that in *Hudgson* 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*:[13]

> 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.

21. The Court observed of the matters relied upon by the offender (including delay, parity issues, and post-traumatic stress disorder):[14]

> …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.

22. 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

[11] [2015] VSCA 303.
[12] [2016] VSCA 254.
[13] Ibid, [111]-[112].
[14] Ibid, [114].

when it comes to the operation and effect of the "special reasons" exception to mandatory sentences.

23. Importantly, this approach will also impact upon the consideration of the special reasons required under the Bill for offenders to receive CCOs for category 2 offences.

24. Of course the danger of the statutory "special reasons" exception to mandatory sentencing is that, even if the Court of Appeal had not taken the narrow approach in *Hudgson*, it can always be amended or repealed by Parliament as deemed necessary in order to further restrain judicial officers.

25. By completely removing the CCO option for some offences, and significantly limiting the availability of CCOs for other offences, these reforms are a further step towards a more widespread emergence of mandatory imprisonment in Victoria. Undoubtedly this will be ratcheted up over time. Such reform goes against the research and advice of the Sentencing Advisory Council.[15] There has been a failure to properly consult with relevant stakeholders.

The Problem of Mandatory Sentencing

26. As Liberty Victoria has previously argued,[16] 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.

27. The central problem caused by mandatory sentences was eloquently described by Mildren J in *Trenerry v Bradley*:[17]

> 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

[15] SAC, "Sentencing Guidance in Victoria", https://www.sentencingcouncil.vic.gov.au/publications/sentencing-guidance-victoria-report at 31 October 2016, [9.59]-[9.62].
[16] See Liberty Victoria submission to the SAC Sentencing Guidance Reference, https://libertyvictoria.org.au/content/sentencing-guidance-reference.
[17] (1997) 6 NTLR 175, 187.

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.

28. Liberty Victoria shares the Law Council of Australia's concerns that mandatory sentencing regimes:[18]

    (1) Undermine the fundamental principles underpinning the independence of the judiciary and the rule of law;

    (2) 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;

    (3) Increases economic costs to the community through higher incarceration rates;

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

    (5) Potentially result in unjust, harsh and disproportionate sentences where the punishment does not fit the crime;

    (6) Fails to deter crime;

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

    (8) Wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole; and

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

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

29. Such concerns have been echoed by the Law Institute of Victoria's comprehensive submission on mandatory sentencing in 2011, which noted *inter alia*:[19]

> 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.

30. 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.

31. 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.

Conclusion

32. The former Government was correct to introduce the CCO regime. 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 Court of Appeal

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

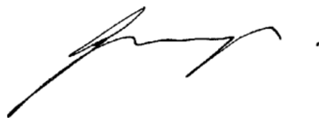
has recently provided significant guidance as to when it is inappropriate to sentence an offender to a CCO.

33. It is clear that in Victoria there is now a model of mandatory sentencing that appears to be favoured by both major political parties. It will continue to be expanded. Exceptions will be made more difficult to satisfy.

34. The reforms should be rejected. They are unnecessary. They entrench a model of mandatory sentencing that is particularly vulnerable to politicised law and order auction campaigning. They are a threat to the separation of powers and judicial discretion in sentencing and will not make Victorians safer.

35. Thank you for considering this submission. If the reader has any questions with regard to this submission, or if we can provide any further information or assistance, please do not hesitate to contact Michael Stanton, Vice-President of Liberty Victoria.

Yours sincerely



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