



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: CrimJEeh1061196

3 November 2015

The Hon. David Elliot MP  
Minister for Corrections  
52 Martin Place  
SYDNEY NSW 2000

Email: [office@elliott.minister.nsw.gov.au](mailto:office@elliott.minister.nsw.gov.au)

Dear Minister,

**Crimes (Administration of Sentences) Amendment (National Security Interest Inmates) Regulation 2015**

I write to you on behalf of the Criminal Law Committee of the Law Society of NSW ("Committee"). The Committee represents the Law Society on criminal law issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee notes the *Crimes (Administration of Sentences) Amendment (National Security Interest Inmates) Regulation 2015* ("Regulation") was published on 30 October 2015. The Committee notes the following concerns regarding the introduction of the Regulation:

**1. Definition of 'national security interest inmate'.**

The definition of 'national security interest inmate' in clause 15(3A) has been drafted broadly. This markedly extends the category of individuals in relation to whom the Commissioner is able to undertake designation decisions. The individual's rights to have visitors, to receive letters or packages, to use a language other than English and to request to speak with the Minister, the Commissioner or the Official Visitor are thereby restricted. The Committee is concerned by the derogation of rights of the individual (in direct juxtaposition with the extension of rights of the Commissioner) created by this clause.

**2. Limited avenues of review.**

There are limited avenues of review available to individuals deemed to fall within the definition of 'national security interest inmate'. The Committee understands judicial review by prerogative relief will be available but notes that this avenue is very limited and may be subject to classified evidence restrictions. The Committee requests further consideration be given to appropriate avenues of review.

### 3. Commissioner's new and extraordinary power.

By virtue of the insertion of clause 17(4)-(6), a new and extraordinary power has been created allowing the Commissioner to change an individual's classification, without Review Council involvement. The Committee strongly objects to the use of subordinate legislation to extend the powers of the Commissioner in this way without public consultation. The Committee considers that the Review Council's involvement must be retained in order to provide an appropriate check and balance to the Commissioner's powers in accordance with the rule of law.

### 4. No definition for 'exceptional circumstances'.

The Committee notes there is no definition or test for the term 'exceptional circumstances' in clause 17(4). The Committee seeks clarification of the circumstances which will be deemed to be 'exceptional' and a formal definition of this term.

The Committee notes that there is an ongoing and current Legislative Council Inquiry conducted by the Law and Justice Committee to inquire into and report on the security classification and management of inmates sentenced to life imprisonment<sup>1</sup>. The Committee attaches a copy of a submission sent to the Inquiry by the Committee, dated 23 October 2015 and notes that public hearings are due to take place on 23 and 27 November 2015.

The Committee respectfully suggests the Regulation be reviewed and amended in view of the concerns outlined above.

Yours sincerely

John F. Eades  
President



Cc: The Hon. Gabrielle Upton MP – NSW Attorney General

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<sup>1</sup><http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/658CCFA6BE4ADEF6CA257EBB0012F6BC>



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: Crim:JEeh1057874

23 October 2015

The Director  
Standing Committee on Law and Justice  
Parliament House  
Macquarie St  
Sydney NSW 2000

By email: [lawandjustice@parliament.nsw.gov.au](mailto:lawandjustice@parliament.nsw.gov.au)

Dear Director,

**Security Classification and Management of Inmates Sentenced to Life Imprisonment (Inquiry)**

I write to you on behalf of the Criminal Law Committee of the Law Society of NSW ("Committee"). The Committee represents the Law Society on criminal law issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee's broad view is that rehabilitation is a fundamental role of the correctional system and that the security classification and management of inmates sentenced to life imprisonment must be the subject of clear legislation and consistent practice.

The Committee's submissions address points 2(a) to (e) of the Inquiry's terms of reference as follows:

**(a) Whether the existing legislation, policies and procedures for determining the security classification and custodial management of such inmates are appropriate and consistent with community expectations**

A sound and effective classification system is vital to the stability and reliability of an institutional climate. The Committee is of the view that the current classification system is in need of reform.

The Committee notes the Inspector of Custodial Services ('the Inspector') has recommended that Corrective Services NSW ('CSNSW') review and simplify the classification system<sup>1</sup>. Not only is the system overly complex (i.e. due to the use of sub categories), but of greater concern is that the application of the classification system has not been consistent with the legislation underpinning it.

The Inspector expressed concerns to the Commissioner of Corrective Services NSW ('the Commissioner') on 12 August 2015 that the decision to revoke the classifications of 12

<sup>1</sup>Lifers: Classification and regression, Inspector of Custodial Services, Department of Justice, September 2015 - Para 4.9 - <http://www.custodialinspector.justice.nsw.gov.au/Documents/Lifers%20Classification%20and%20regression.pdf>

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inmates sentenced to life imprisonment was not consistent with the *Crimes (Administration of Sentences) Regulation 2014*.<sup>2</sup>

In July 2015, CSNSW advised certain inmates that the decision taken to regress their status from a medium security to a high security A2 classification was;

*'...based on significant concerns expressed by victims of crime and other members of the community in relation to the current classification policy for inmates serving a life sentence'*<sup>3</sup>.

The Committee considers that it is an error to amend the classification of a prisoner, based purely upon concerns expressed by victims, rather than the legislative and regulatory basis for the framework. The Committee notes this has since been acknowledged by the Commissioner to the Inspector<sup>4</sup>.

The Committee submits that a clear and consistent approach to classification must be adopted. Sufficient safeguards should also be introduced to ensure the system operates solely within the boundaries of the legislation through which it was created and that the legislative intentions of Parliament cannot be circumvented or left open to interpretation.

**(b) The impact of security classification and custodial management of such inmates on registered victims and the role of registered victims in the classification and management decision making process**

The Committee understands and acknowledges the weight of pressure felt by the corrections system as a result of the views of victims, families and the general public, particularly when considered in the context of high profile, and often emotive, cases.

The Committee acknowledges that victims of crime and their families have the right to access information which informs them and supports them. Victims are provided with an opportunity to make a victim impact statement and should, wherever necessary, be provided with support and counseling services. The rights of victims are detailed in the *Victims Rights and Support Act 2013*<sup>5</sup> and the Charter of Victims Rights<sup>6</sup> and the Committee acknowledges the importance of these rights.

Details as to the management of inmates which may directly affect victims and their families (such as the granting of parole or external leave) should be communicated clearly and effectively. In these circumstances, where appropriate, an opportunity for input should be made available.

Importantly however, this information must be provided within the context of a clear understanding of the day to day operation of the correctional system. Managing victims', families' and the general public's expectations as to the remit of the correctional system, its role and the way in which it operates is key. The importance of actively engaging with victims, families and the public in relation to this issue cannot be underestimated.

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<sup>2</sup> Para 5.16 - <http://www.custodialinspector.justice.nsw.gov.au/Documents/Lifers%20Classification%20and%20regression.pdf>

<sup>3</sup> Commissioner of Corrective Services NSW, letters to inmates, 22, 27 July 2015 -

<http://www.custodialinspector.justice.nsw.gov.au/Documents/Lifers%20Classification%20and%20regression.pdf>

<sup>4</sup> Para 5.16 - <http://www.custodialinspector.justice.nsw.gov.au/Documents/Lifers%20Classification%20and%20regression.pdf>

<sup>5</sup> <http://www.legislation.nsw.gov.au/main/top/view/inforce/act+37+2013+cd+0+N>

<sup>6</sup> [https://www.police.nsw.gov.au/community\\_issues/domestic\\_and\\_family\\_violence/victims\\_rights](https://www.police.nsw.gov.au/community_issues/domestic_and_family_violence/victims_rights)

The correctional system should not, however, bow to public pressure when making decisions about the classification of an individual prisoner. These decisions are bound by legislation, and policy and procedure should cohere with that legislative framework.

**(c) Communication with registered victims prior to and following a security classification and custodial decision being made and the form that any communication should take**

A key issue is the provision and type of information given to victims, explaining the processes involved in classification decision making.

Victims, family and the public should not be able to provide input into or influence decisions regarding specific or individual classification decisions. The regulatory framework should be implemented by objective, qualified personnel, familiar with the minutiae of the custodial environment.

**(d) Whether it is appropriate to reclassify and provide inmates sentenced to life imprisonment with access to rehabilitative programs and services if they have little or no prospect of release from custody**

A fundamental role of the correctional system is to allow individuals to rehabilitate and be provided with a route towards re-introduction into society.

Where there is no possibility of release and no possibility of review, human rights issues relating to freedom from inhuman and degrading treatment arise which we as a society must carefully consider. As UK counsel Pete Weatherby Q.C. commented;

*"The imposition of a whole-life sentence crushes human dignity from the outset, as it removes any chance and therefore any hope of release in the future. The individual is left in a position of hopelessness whereby he cannot progress whatever occurs."*<sup>7</sup>

Placing inmates into their cells with no prospects of rehabilitation or parole may have a significantly detrimental effect on inmates' mental well-being;

*"During the prison period, progression may be an important antidote to mental deterioration by providing specific goals that can be achieved within a foreseeable period of time."*<sup>8</sup>

Individuals facing life sentences may require specialist programs and services to assist them in dealing with the mental health issues associated with facing lengthy custodial services. This is appropriate both in terms of preventing the mental deterioration of the individual and the ensuing detrimental effect on the remaining offender population.

Where mental deterioration does occur, the resulting elevated levels of risk can also cause numerous problems for the correctional officers charged with day to day responsibility of offenders (such as dealing with increased violence, symptoms of mental illness, and a lack of incentive to comply with directions). A correctional officer's ability to maintain good order and discipline in a correctional facility is integral to the smooth operation of the correctional system.

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<sup>7</sup> <http://www.theguardian.com/law/2013/jul/09/whole-life-jail-sentences-without-review-breach-human-rights>

<sup>8</sup> Para 3.8 - <http://www.custodialinspector.justice.nsw.gov.au/Documents/Lifers%20Classification%20and%20Regression.pdf>

Rehabilitative programs and services should be made available as tools to assist officers in addressing problematic behaviour in relation to all inmates, regardless of their classification status or custodial sentence.

Where inmates have little or no prospect of release from custody, the Committee submits it is also appropriate to ensure access to more general rehabilitative programs and services (wellbeing, educational, vocational etc). In addition to providing stimulation and something to work towards, the provision of such programmes provides an incentive and in doing so promotes appropriate behaviour and performance.

The provision of these programs and services can therefore be instrumental in both addressing existing, and preventing potential, behavioural, psychological and mental health issues.

In addition to the instrumental goals, Article 10(3) of the International Covenant on Civil and Political Rights<sup>9</sup> requires corrective services to comprise treatment of prisoners;

*"the essential aim of which shall be their reformation and social rehabilitation".*

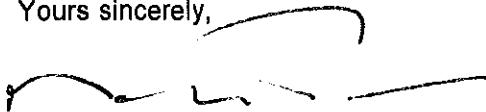
This does not exclude the treatment of long term prisoners or those subject to a life term.

**(e) The impact of inmate security classification and management decisions on the operation of the correctional system**

Where a clear and consistent framework for the classification and management of inmates is implemented, it should not directly affect the operation of the correctional system, but instead form a working part of its continued and effective operation.

Should you have any questions regarding this letter I would be grateful if you could direct them to Elaine Heaney (Senior Policy Advisor to the Committee) by email at [elaine.heaney@lawsociety.com.au](mailto:elaine.heaney@lawsociety.com.au). Miss Heaney can also be reached by telephone on 02 9926 0310.

Yours sincerely,



John F Eades  
President

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<sup>9</sup> <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>