



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRightsJEvk:947895

14 April 2015

Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Ms Dunstone,

Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ("Committee") which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

Thank you for the invitation to comment on the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (the "Bill").

The Committee has had the opportunity to consider the Bill and the Explanatory Memorandum. The Committee notes that the amendments contained in Schedule 6 of the Bill were first introduced in the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014, and have already been considered and rejected through proper Parliamentary processes. The Committee's position is that the provisions should again be opposed as they are not consistent with Australia's human rights obligations, or with the rule of law. The reasons supporting this position are set out in more detail below.

1. Background

Schedule 6 of the Bill proposes the insertion of new ss 360.3A and 361.5 into the *Criminal Code Act 1995*. These proposed sections provide for mandatory minimum sentences of at least five years for the trafficking of prohibited firearms.

The Committee notes that the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* ("*Psychoactive Substances and Other Measures Act*"), which received assent on 5 March 2015, created the offences of firearms trafficking into and out of Australia in Division 361 of the *Criminal Code Act 1995*.

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The Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (as it was at the time) attempted also to introduce mandatory minimum sentences for the new firearms import and export offences, as well as the existing offences of trafficking firearms and firearm parts in Division 360 of the *Criminal Code Act 1995*.¹

However, after the Parliament declined to pass those mandatory minimum sentencing provisions, the Government amended the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 in the House of Representatives to remove the proposed mandatory minimum sentence provisions in order to secure the passage of the *Psychoactive Substances and Other Measures Act*.²

The Committee notes that the provisions in Schedule 6 of this Bill are identical to the provisions removed by the Government from the *Psychoactive Substances and Other Measures Act*.³

2. Opposition to mandatory minimum sentences

As stated in the Committee's previous submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2014,⁴ as a rule of law matter, the Committee is opposed to mandatory minimum sentencing. Mandatory sentences are more likely to result in unreasonable, capricious and disproportionate outcomes as they remove the ability of courts to hear and examine all of the relevant circumstances of a particular case. As a result, mandatory sentencing can produce disproportionately harsh sentences and result in inconsistent and disproportionate outcomes. Further, there is no evidence that the harsher penalties provided by mandatory sentencing have any deterrent value.

The Committee notes the suggestion in the Explanatory Memorandum that the mandatory minimum sentencing provisions are human rights compatible as the provisions do not apply to children, and that judicial discretion is preserved because there is no minimum non-parole period proposed [119-124]. However, with respect, the Committee's view is that a mandatory minimum sentence by definition fetters judicial discretion.

The Committee's view is that mandatory minimum sentences violate Article 9 of the *International Covenant on Civil and Political Rights* ("ICCPR") as they amount to arbitrary deprivations of liberty. The Committee notes for example the UN Human

¹ The text of the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 as introduced is available here:

http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r5323_first_reps/toc_pdf/14179b01.pdf;fileType=application%2Fpdf (accessed 7 April 2015).

² Commonwealth, *Parliamentary Debates*, House of Representatives, 23 February 2015, 29-30 (Michael Keenan)

³ See note 1.

⁴ Submission of the Human Rights Committee of the Law Society of NSW dated 1 August 2014 available online:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Psychoactive_Substances_Bill/Submissions (accessed 7 April 2015). The Committee's submissions on mandatory sentencing were cited at paragraph 2.29 of the Senate Legal and Constitutional Affairs Legislation Committee's Report into the Inquiry into the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014, September 2014, available online:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Psychoactive_Substances_Bill/Report (accessed 7 April 2015).



Rights Committee's decision in *C v Australia* (900/1999)⁵ on the lack of justification for deprivations of liberty.

Further, the Committee submits that mandatory minimum sentences are likely to be a breach of Article 14(5) of the ICCPR because that Article requires a sentence (not only a conviction) to be reviewable on appeal. That could not happen if the sentence is the mandatory minimum.


As you will be aware, the provisions of the ICCPR are binding on Australia under international law, since that treaty was ratified by the Fraser Government in 1980.

3. The Committee's submission

Given these submissions, the Committee writes to request that the Senate Legal and Constitutional Affairs Committee recommend that the Bill be amended to remove Schedule 6.

Thank you for the opportunity to provide comments. Any questions can be directed to Vicky Kuek, policy lawyer for the Committee, on (02) 9926 0354 or at victoria.kuek@lawsociety.com.au.

Yours sincerely,



John F Eades
President

⁵ *C. v. Australia*, Comm. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999, A/58/40, Vol. II (2003), Annex V at 188 (HRC Oct. 28, 2002)