THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Criminal:REad822847

21 February 2014

The Hon. R.S. Amery M.P.
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Amery

As you are aware, on 21 January 2014, the Premier announced a range of measures to address drug and alcohol related violence, including so called "one punch" attacks resulting in the death of the victim. The Crimes and other Legislation Amendment (Assault and Intoxication) Bill 2014 was introduced and passed following amendment on 30 January 2014. A "one punch" offence was created with an eight year mandatory minimum gaol term if the offender was intoxicated.

The package announced by the Premier also included mandatory minimum sentencing for all serious assaults committed while the perpetrator was intoxicated and resulting in injury, with minimum penalties ranging from two to five years. This proposed legislation is expected to be introduced when Parliament returns at the end of February 2014.

The Law Society strongly opposes the introduction of mandatory minimum sentencing. Mandatory sentencing is unjust, ineffective and unaffordable, and should be rejected by the NSW Parliament.

Of greatest concern is that mandatory minimum sentencing:

- has no deterrent effect on offending;
- prevents all the circumstances of the offence and offender being taken into account;
- reduces the incentive to plead guilty;
- has a disproportionately severe impact on disadvantaged groups, including Indigenous people; and
- increases costs throughout the system, from the courts through to prisons.

We note that no information has been provided on the likely costs of mandatory sentencing, which will inevitably result in more offenders receiving longer terms of imprisonment. Less people will choose to plead guilty meaning more trials and increased costs for the prosecution, defence and the courts. It is critical that both the Parliament and the community of NSW are told what the reforms will cost and how they will be paid for before this legislation proceeds.

Please find attached a copy of my letter to the Premier which sets out our very serious concerns about mandatory minimum sentencing in greater detail. These proposals need proper scrutiny and I urge you to discuss them with your Parliamentary colleagues.

Please do not hesitate to contact me (9926 0216) or the Chief Executive Officer, Michael Tidball (9926 0215) should you need any further information.

Yours sincerely

Ros Everett

Ros Everett
President

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THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Crim:REad818002

24 January 2014

The Honourable Barry O'Farrell MP
Premier of New South Wales
Level 40 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Premier,

"Lockouts & mandatory minimums to be introduced to tackle drug and alcohol violence" Premier's media release 21 January 2014

I am writing in response to the government's proposals to introduce mandatory minimum sentences and other measures aimed at dealing with drug and alcohol-related violence.

The Law Society's Criminal Law and Juvenile Justice Committees ("the Committees") have reviewed those proposals, announced by media release dated 21 January 2014, and have a number of concerns set out below.

Of greatest concern is the proposed introduction of mandatory minimum sentencing. The Committees submit that any legislation relating to mandatory imprisonment must undergo an extensive consultation process given the substantial impact this legislation will have on the criminal justice system and the community.

1. **Exclusion of judicial discretion**

   It is an established principle that the sentencing of offenders should take place on an individual basis. Mandatory minimum sentencing is a one size fits all form of justice which excludes the discretion of judges. The media release refers to "serious assaults where drugs and alcohol are involved" and a table of offences is also provided. This will create an inflexible penalty structure which excludes the operation of judicial discretion. Mandatory minimum sentencing will prevent the court from being able to give proper consideration to the objective and subjective circumstances of each case which can result in injustice. Penalties, in particular for serious crimes, must be tailored to fit the crime and the offender. It is the Committees' view that every case is unique and needs to be considered in light of the individual circumstances.

2. **Many more people imprisoned**

   The Committees are concerned with the broad language used ("for serious assaults where drug and alcohol are involved") which may expose a large number of people to mandatory minimum sentencing. The Committees anticipate that this will result in more people being imprisoned and longer prison sentences. The reasons are as follows:

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a) The media release fact sheet refers to a broad number of offences. The list of offences covers most, if not all, common offences in which an injury is occasioned. This includes all various assault type matters, affray and sexual assault.

b) Statistical reports on crime indicate that the Local Court deals with a large proportion of matters for "serious assaults involving injury". The report from BOCSAR 2012 shows 8,160 persons were charged and had their matters finalised in the Local Court for these types of matters.

c) The Australian Institute of Criminology (AIC) Drug Use Monitoring Program study in 2012 reports that two out of every three police detainees in their study tested positive to at least one drug (not including alcohol). In the same report, another study (2009) indicated that detainees self-reported that alcohol or other drugs contributed to their offending (violent offences) in 41.7% of the cases.

The Committees conclude on this point that there will not be many offences that will not be considered "serious" where a person suffers an injury and the use of alcohol or other drugs is involved.

3. Mandatory minimum sentencing has no deterrent effect on offending

It is the Committees' view that mandatory minimum sentencing has no deterrent effects on offending and that deterrence arises out of fear of being caught, not from the length of the sentence. It is the Committees' further view that mandatory minimum sentencing is very unlikely to be effective in reducing future crime[1].

4. Impact on disadvantaged groups in community

The Committees are concerned that since mandatory minimum penalties cannot be tailored to appropriately fit the crime and the offender, they will impact disproportionately on persons with mental health issues, on the young, on women and on the Indigenous population. In relation to offences of a sexual nature, mandatory minimum penalties can impact disproportionately on people who are intellectually disabled.

5. Impact on pleas of guilty

It is the Committees' view that from the offender's perspective, there is little to lose in requiring the prosecution to prove its case. As a result, more offenders may elect to have their matters heard at trial. Victims will therefore be required to give evidence and to relive their experience. As a result of more matters going to trial, and in the knowledge that mandatory minimum sentencing can lead to injustice, the Committees anticipate there may be reluctance by jurors to convict in some cases. Where the penalty to be imposed is severe under the circumstances, jurors may be reluctant to make a decision to convict.

6. Cost

It is the Committees' view that because mandatory minimum sentencing results in fewer pleas of guilty, it also places additional strain on the resources of the criminal justice system, including the courts, prosecution, Legal Aid and the gaol system. There will be

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[1] This is consistent with research – see, for example;
- Sentencing Advisory Council, *Does Imprisonment Deter? A review of the Evidence*, April 2011;
- Law Institute of Victoria, *Mandatory Minimum Sentencing*, 30 June 2011.

backlogs as remand and prison populations grow. This will be detrimental to an already overburdened prison system.

7. Case study

The Committees are aware of many situations where injustices will arise as a result of the introduction of mandatory minimum sentencing. Examples of these injustices have appeared in various forms of media this week. One Committee member has provided the following case study, being a matter that was heard in court this week:

> Cameron is 18 and lives with his parents and 7 siblings. Since he left school at the end of year 10, he has been working in the construction industry. He works a 6 day week and most of his wages go towards supporting his family.
>
> Cameron went out one night with friends, to celebrate a friend's 21st birthday. They rented a hotel room but, after having a few drinks, some of them were asked to leave after making too much noise.
>
> All of them left except Cameron, who was asleep. He was woken up by the police, escorted out of the hotel and asked to wait on the footpath for his friends to come back and get him.
>
> Cameron was not very drunk, but he was mildly intoxicated and he was also confused and annoyed as he had just been woken up. He swore at the police officer, who told him he was going to get a fine for offensive language and moved him against a wall. Cameron pushed the police officer in the chest, which caused him to stumble back a couple of steps but did not cause any injuries.
>
> For the offence of assaulting a police officer in the execution of his duty, Cameron was placed on a 12 month good behaviour bond and ordered to pay a fine. The Magistrate took into account the circumstances of the offence, and the fact that it was not a particularly serious assault, as well as Cameron's generally good character.
>
> Under the proposed legislation, Cameron would have received two years in gaol.

8. Other concerns

There are a number of concerns that the Committees seek clarification on, including the following:

a) In terms of the stated policy objectives, it is unclear what the massive increase to on the spot fines will achieve.

b) What have been the impacts of mandatory minimum sentencing in other jurisdictions by reference to research and informed commentary? That is:

   (i) What is the possible, or likely, impact upon the remand population and prison population in real terms? This includes impact on the numbers of people and cost to community (i.e. building prisons, daily cost of holding prisoners).

   (ii) What is the possible or likely impact on reoffending rates following an increased rate of incarceration (compared with treating drug and alcohol issues through early intervention programs and other court programs such as the Drug Court and MERIT)?

(iii) What will be the impact of the proposed legislation on vulnerable groups in our community including the mentally ill, young people and Indigenous people (who are already over-represented in the prison system)?

9. Human rights concerns

In addition to the concerns outlined above, the Human Rights Committee of the Law Society of NSW ("HRC") submits that mandatory minimum gaol sentences are a breach of Australia's international human rights obligations under the International Covenant on Civil and Political Rights. Article 9(1) precludes arbitrary imprisonment. The HRC's view is that mandatory minimum sentences are necessarily arbitrary as they remove the ability of judges to take into account individual circumstances. Article 14(5) provides for the right to have one's sentences reviewed by a higher tribunal. The HRC notes that this right of review is denied if an accused receives a mandatory minimum sentence.

In the Committees' view, the proposed changes are likely to have an unacceptable adverse impact, particularly on vulnerable sections of the community. The Committees express their serious concerns that the proposed changes have not been supported by any consultation or review.

The Committees submit strongly that the Government should undertake consultation to ensure that the measures introduced to address alcohol and drug violence are proportionate, consistent with the rule of law and capable of achieving their objectives.

Yours sincerely,

Ros Everett
President