



THE LAW SOCIETY
OF NEW SOUTH WALES

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1 August 2014

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 (Psychoactive Substances and Other Measures) Bill 2014

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 (Psychoactive Substances and Other Measures) Bill 2014 (the "Bill").

The Committee has had the opportunity to consider the Bill, the Explanatory Memorandum and Statement of Compatibility with Human Rights ("Compatibility Statement").

The Committee has serious concerns from a human rights and rule of law perspective in relation to the aspects of the Bill that provide for the reversal of the onus of proof (ss 320.2 and 320.2, Schedule 1 of the Bill) and for mandatory minimum sentences (ss 360.3A and 361.5, Schedule 2 of the Bill).

The Committee notes that the Compatibility Statement concludes that the Bill is "compatible with human rights because it promotes some human rights and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate." With respect, the Committee is unable to agree with this conclusion.

1. Reversal of the onus of proof

In the Committee's view, proposed ss 320.2 and 320.3 represent a direct violation of Art 14(2) of the *International Covenant on Civil and Political Rights* ("ICCPR"). The Compatibility Statement argues that the reversal is reasonable because it is a

regulatory offence and the defendant would have more knowledge about the information forming the basis of the offence.

However, while the UN Human Rights Committee has determined that the onus can be reversed for civil regulatory offences (see *Moraël v France* (207/86)¹), the plain words of Article 14(2) make it clear that it is specifically prohibited in relation to criminal charges. The Committee submits that seeking to provide for more expeditious prosecutions is neither a sufficient nor legitimate reason for circumventing the presumption of innocence and the requirement that the prosecution prove every element of the offence, which are fundamental principles of human rights and criminal justice.

2. Mandatory minimum sentences

The Committee notes that mandatory minimum sentences are contained in the proposed new 360.3A and 361.5 of the Bill.

As a rule of law matter, the Committee opposes 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 Compatibility Statement that judicial discretion is preserved because there is no minimum non-parole period proposed. However, with respect, the Committee's view is that a mandatory minimum sentence by definition fetters judicial discretion.

As such, the Committee's view is that mandatory minimum sentences violate Article 9 of the ICCPR as they amount to arbitrary deprivations of liberty. The Committee notes for example the UN Human Rights Committee's decision in *C v Australia* (900/1999)² on lack of individual 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.

Thank you for the opportunity to provide comments.

Any questions can be directed to Vicky Kuek, Policy Lawyer for the Committee, on

Yours sincerely,

Ros Everett
President

¹ *Moraël v France*, Comm. 207/1986, U.N. Doc. CCPR/C/36/D/207/1986, A/44/40 (1989) Annex X at 210 (HRC Jul. 28, 1989)

² *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)