

**Submission to the Senate Legal and Constitutional Affairs Legislation
Committee on the *Criminal Code Amendment (Firearms Trafficking) Bill 2015***

7 January 2016

The New South Wales Society of Labor Lawyers ("the Society") is opposed to the mandatory minimum sentencing provisions of this Bill.

It is useful to remind ourselves that the occupation of Australia by Europeans occurred precisely because of mandatory minimum sentencing that did not work.

Australia was occupied from 1788 because the severe mandatory minimum sentencing in place in England in the 18th century resulted in large numbers of convicts being sentenced to be transported and, after the USA became independent, an alternative place to send them was needed.

In England at that time more than 160 criminal offences were punishable by death only. For most non-capital offences the (mandatory minimum) penalty was transportation for seven years.

In addition, to avoid the bloody consequences of the large number of capital sentences, many such sentences resulted in pardons (!) - on condition that the prisoner was transported to the colonies for 14 years. This policy inevitably led to thousands of convicts, being transported to Australia, the first 750 in the First Fleet.

Yet crime was not reduced by these savage penalties and for that reason and because of the injustice involved, Britain largely abandoned mandatory sentencing. By the 20th century the Parliaments of Britain and Australia were committed to setting maximum sentences only - except for the most serious of the former capital crimes.

There are important reasons of principle why mandatory minimum sentencing is wrong. The first is that it is the role of independent courts to sentence offenders - and to determine for how long particular offenders are to be deprived of their liberty. Parliaments should not prescribe mandatory periods of detention because they are not in a position to properly consider the individual circumstances of the crime and the criminal.

If parliaments try to impose a "one size fits all" sentencing approach on the courts it will lead to injustice - sentences which are disproportionate to the circumstances of the offence or the offender, or both.

Consider these recent real life examples. In 2013 The Age reported that an Australian factory owner living in Papua New Guinea tried to import from Australia some gunpowder, cartridges and chemicals used to manufacture ammunition.¹ At

¹ See <http://www.theage.com.au/victoria/australian-pleads-guilty-to-exporting-arms-to-png-20130404-2h8ox.html>.



the time he was the President of the local pistol club in Lae in PNG which was short of ammunition after the factory owner's home burnt down - the club's ammunition had been stored there. The Melbourne magistrate who sentenced him took into account that the attempted importation was for a legal purpose, imposed a fine of \$10,000 and placed the offender on a one year good behaviour bond. If the mandatory sentence proposed in this Bill had applied, the court would have been forced to impose a 5 year prison term.

A second example occurred in October 2015 in Melbourne. An accused person was reported (again in *The Age*) as having attempted to board a plane in March 2015 with a handgun, an empty magazine and some loose cartridges in his luggage.² The accused was 68 years of age, a security consultant with no previous convictions and there was no suggestion of criminal intent. He was fined \$2,000.00 - without conviction! Again, under the proposed laws, he would get 5 years.

If mandatory sentencing worked to deter crime it might be worth considering in some circumstances. However, the evidence suggests it is the fear of being caught, not the penalty, which may have some deterrent effect. In this respect, the Society refers the Committee to the speech on Mandatory Sentencing of Nicholas Cowdery QC, the former longstanding NSW Director of Public Prosecutions, delivered on 15 May 2014.³ He lists more than 20 reasons why mandatory sentencing is poor policy. Our Society agrees.

This is the third time in the last 18 months that the current Federal government has proposed these same five year mandatory sentence provisions for firearms trafficking. The first two attempts, in separate Bills, were rejected by the Senate. For the reasons outlined above, we submit that the Committee should recommend that the mandatory minimum sentencing provisions of this Bill be once again rejected.

² See <http://www.theage.com.au/victoria/2000-fine-for-trying-to-take-gun-onto-plane-20151023-gkgrui.html>

³ Nicholas Cowdery QC AM, 'Mandatory Sentencing', Sydney Law School Distinguished Speakers Program, 15 May 2014. Accessible via: http://sydney.edu.au/law/events/2014/May/DSP_Cowdery15052014.pdf.