



4 August 2014

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

Dear Ms Dunstone,

CRIMES LEGISLATION AMENDMENT (PSYCHOACTIVE SUBSTANCES AND OTHER MEASURES) BILL 2014

The Law Council of Australia is grateful for the opportunity to comment in response to the Senate Legal and Constitutional Affairs Committee's (the Committee) inquiry into the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (the Bill).

The Law Council acknowledges the assistance of its National Criminal Law Committee in the preparation of this submission.

The Law Council regrets that it has not been in a position to undertake a detailed analysis of the Bill during the time allocated for this inquiry. The Bill was released for comment on 17 July with submissions sought by 4 August.

In particular it has not had the opportunity to consider whether the provisions are a necessary and proportionate response to the issues of psychoactive substances, international firearms trafficking and cross-border disposal or acquisition firearms.

This submission is focused on one aspect of the Bill, namely the introduction of a mandatory minimum five year term of imprisonment for the:

- new international firearms offences of trafficking prohibited firearms and firearm parts into and out of Australia (new Division 361 of the *Criminal Code Act 1995* (Cth)); and
- existing offences of cross-border disposal or acquisition of a firearm and taking or sending a firearm across borders within Australia in Division 360 of the Criminal Code which the Bill also seeks to amend by including firearm parts as well as firearms.

The Law Council acknowledges the potential for serious social harms associated with firearms trafficking. It notes that the inclusion of a mandatory minimum penalty for these offences are aimed at the objective of ensuring offenders receive sentences that reflect the seriousness of their offending.

However, the Law Council is unconditionally opposed to the use of mandatory minimum sentences as a penalty for any criminal offence. This position applies irrespective of the potential harm to any individual or to the community that the conduct sought to be deterred may pose.

The Law Council's new Mandatory Sentencing Policy and Discussion Paper (released in June 2014) describes in detail a number of concerns expressed by the Law Council's Constituent Bodies, the judiciary, other legal organisations and individuals regarding mandatory sentencing. A copy of the Mandatory Sentencing Policy and Discussion Paper are attached.

The Law Council notes that the mandatory minimum penalties contained in the Bill do not apply to children (those under the age of 18). We also recognise that the provisions do not impose a minimum non-parole period on offenders. This aspect is said in the Bill's Explanatory Memorandum to preserve a court's discretion in sentencing, and to help ensure that custodial sentences imposed by courts are proportionate and able to take into account the particular circumstances of the offence and the offender.

Nevertheless, the Law Council unconditionally opposes mandatory sentencing for the reasons outlined above and recommends that such measures be removed from the Bill.

If, contrary to the Law Council's recommendation, the mandatory sentences contained in the Bill are to be pursued, the Law Council considers that the Committee request the Government to revise the Bill's Explanatory Memorandum to make it clear that it is intended that:

- the sentencing discretion be left unaffected in respect of the non-parole period;
- in appropriate cases there may be significant differences between the non-parole period and the head sentence; and
- the mandatory minimum is *not* intended to be used as a sentencing guidepost (where the minimum penalty is appropriate for 'the least serious category of offending').

We suggest this approach because of our concern that the mandatory minimum sentence will be seen as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. This would mean that courts would feel constrained to impose a non-parole period that is the usual proportion (about 2/3 of the head sentence) and, even then, only in the least serious case.

The Law Council considers that, in principle, the non-parole period should be completely open-ended, so that in appropriate cases extremely low non-parole periods could be imposed. In the Law Council's view any adoption of a form of mandatory sentencing should only be to indicate that general deterrence must be given special weight in sentencing in this context. In this way, some of the Law Council's concerns regarding the mandatory sentences in the Bill may be mitigated.

Please do not hesitate to contact me should the Law Council be of further assistance to the Committee.

Yours sincerely,

Michael Colbran QC
President