



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRightsGUvk:1069312

4 January 2016

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,

Criminal Code Amendment (Firearms Trafficking) 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.

1. Committee's position

The Committee has considered the Criminal Code Amendment (Firearms Trafficking) Bill 2015 (the "Bill"), and does not support the mandatory minimum sentencing provisions in this Bill.

The proposed provisions in respect of mandatory minimum penalties have already been considered and rejected in 2014, and in 2015, by Parliament.

The amendments in respect of mandatory minimum penalties (in Schedule 1 of the Bill that provide for proposed new sections 360.3A and 361.5 of the Criminal Code) are identical to those contained in:

- (1) Clauses 1 and 2, Schedule 6 of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015; and
- (2) Clauses 14 and 18, Schedule 2 of the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014.

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.

2. Opposition to mandatory minimum penalties

As a rule of law matter, the Committee is opposed to mandatory minimum sentencing. The Committee reiterates its previous submissions to the Senate Legal and Constitutional Affairs Committee Inquiry into the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2014,¹ and into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015.²

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 in respect of proposed new section 360.3A 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 [20] – [21]. The Committee notes that under any non-parole period set, the executive government, not the judiciary, has the discretion as to the actual period of detention. The Committee's view is that a mandatory minimum sentence by definition fetters judicial discretion, notwithstanding that paragraph 12 of the Explanatory Memorandum appears to suggest otherwise.

The Committee's view is that mandatory minimum sentences violate Article 9 of the *International Covenant on Civil and Political Rights* ("ICCPR") as they allow sentences disproportionate to the seriousness of the crimes committed, which amount to arbitrary detention. The Committee notes for example the UN Human Rights Committee's decision in *C v Australia* (900/1999)³ on the lack of justification for arbitrary detention.

Further, the Committee submits that the imposition of a mandatory minimum sentence is a breach of Article 14(5) of the ICCPR, which requires a sentence (not

¹ 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>. The Committee's submissions on mandatory sentencing were cited at [2.29] of the Senate Legal and Constitutional Affairs

Legislation Committee's Report on 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>.

² Submission of the Human Rights Committee of the Law Society of NSW dated 14 April 2015 available online:

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Power_and_Offences_Bill/Submissions>. The Committee's submissions on mandatory sentencing were cited at [2.54] of the Senate Legal and Constitutional Affairs Legislation Committee's Report on the Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, available online:

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Power_and_Offences_Bill/Report>.

³ *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).

only a conviction) to be reviewable on appeal. That could not happen if the sentence is the mandatory minimum. No reference is made to this in the Explanatory Memorandum.

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 submissions

Given these submissions, the Committee writes to request that the Senate Legal and Constitutional Affairs Committee recommend that the mandatory minimum sentencing provisions of the Bill not be passed.

Thank you for the opportunity to comment. The Committee would welcome the opportunity to expand on its submissions to the Inquiry. Questions may be directed to Vicky Kuek, Principal Policy Lawyer

Yours sincerely,

Gary Ulman
President