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7 August 2014

Ms Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs Legislation 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

Thank you on behalf of the Bar Association of Queensland (“the Association”) for the opportunity to make a submission to the Committee.

Schedule 1- Psychoactive Substances

The Association has some concern at the methodology being used to fill what is feared to be potential legislative gaps in response to what is said to be “evidence that manufacturers design the chemical structures of psychoactive substances to avoid [existing legislative prohibitions]”.¹

The proposed definition of “psychoactive substances” is very wide capturing any substance which when consumed might induce a wide range of effects, including, as alternatives, dependence or addiction and or significant change of thinking, behaviour, perception, awareness or mood. As a result, potentially, a large number of substances have been rendered illegal imports.

The additional definition of “serious drug alternative”, which must overlap with the definition of psychoactive substance, adds to the uncertainty as to how far the prohibitions extend. The offence created² using this definition is one which would extend to importing harmless substances that are dressed up to represent that they are a serious drug alternative. It is not clear why the law should be concerned with conduct of that kind.³

¹ Explanatory memorandum, page 2

² Clause 320.3

³ It is noted that attachment A to the Explanatory Memorandum refers to a person who died eating “bath salts” and an example of two more deaths following consumption of NBOMe. A person selling mislabelled poisons runs the risk of being prosecuted for

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It is a prosaic fact that many psychoactive substances, as so defined, are not rendered illegal by our society.

The amendments recognise this and subclause 320.2 (2) sets out a long line of exceptions to the new prohibitions which include foods, tobacco and therapeutic goods.⁴

The offence of importing psychoactive substances can be made out by proving no more than recklessness as to whether the substance was a psychoactive substance.⁵ Even then, no mental element is required as to the identity of the drug or its psychoactive effect.⁶ And the defendant is required to prove his or her innocence by proving the applicability of any exemption.⁷

The Association is of the opinion that it would be preferable to legislate specifically for those substances which have been found to be causing harm, for example, through hospital emergency admissions (in this country or elsewhere). If a particular substance is being chemically imitated, then it may be appropriate, again based on the basis of the incidence of harm, to legislate, generally, against chemical imitators of that illicit substance.

This would avoid the uncertainty associated with a general prohibition of all psychoactive substances and would focus the criminal prohibition on the prevention of identified harm.

Schedule 2 - Firearms trafficking offences

The Association opposes the 5 year minimum sentences imposed by these amendments.⁸

The Association refers the Committee to the Position Paper of the Law Council of Australia on Mandatory Sentencing which sets out at significant length the many reasons why mandatory minimum penalties should not be imposed for offences.⁹

Mandatory sentences can result in injustice (including as recognised by the article 14 ICCPR right to a fair and impartial tribunal to determine criminal charges) because the punishment is determined by the legislature with no information as to the particular circumstances of the offence and the offender.

manslaughter or murder. It is noted, however, that the attachment acknowledges the lack of "quantitative data". See page 85.

⁴ It is not clear to the Association which exempted substance includes alcohol. Perhaps, alcohol falls within either food or controlled drug.

⁵ See explanatory Memorandum, page 10, drawing on s. 300.5 *Criminal Code*

⁶ Subclause 320.2 (4)

⁷ See note to subclause 320 (2)

⁸ Clauses 360.3A and 361.5

⁹ Available in a PDF format at

http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CCOQFjAC&url=http%3A%2F%2Fwww.lawcouncil.asn.au%2Fawcouncil%2Fimages%2FLCA-PDF%2FPolicy_Position_-_Mandatory_Sentencing.pdf&ei=9qfdU_rjM8Pf8AXi54CwDQ&usg=AFQjCNEJdLtk-m_GQ57ztaBG7iy64GDJ8A&sig2=BxO5DrhpYJkk8Pi5xwV9UQ&bvm=bv.72197243,d.dGc

Such penalties, frequently, result in police officers and prosecutors being the judge of the penalty by manipulating what offences are to be charged depending on their view of the offender and the offence.

Mandatory sentences also can lead to the waste of court and legal resources as defendants, who have nothing to lose by going to trial (and nothing to gain by pleading guilty), run matters to trial, unnecessarily.

Accordingly, the Association is opposed to schedule 2 so far as it seeks to impose mandatory penalties.

Schedule 3 – International Transfer of Prisoners

The Association supports the changes to widen the group of people who can consent to an application on behalf of a child prisoner.

The Association notes that some of the changes proposed are intended to save unnecessary waste of time by the Minister and his officers. The Association would suggest that there be a discretion retained, able to be exercised in exceptional circumstances, to reconsider a fresh application within 12 months. For example, the circumstances would be quite changed if a prisoner had been diagnosed with a terminal illness and had only months or weeks to live.

Schedule 4 – Slavery offences: jurisdiction

The Association supports the extension of universal jurisdiction to slavery offences.

Conclusion

Thank you again for the opportunity to provide this submission.

Yours faithfully

Shane Doyle
President