



6 January 2016

Senator the Hon Ian Macdonald
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator,

Criminal Code Amendment (Firearms Trafficking) Bill 2015

1. Thank you for the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee's (the Committee) inquiry into the Criminal Code Amendment (Firearms Trafficking) Bill 2015 (the Bill).
2. The Law Council acknowledges the assistance of its National Criminal Law Committee, the Bar Association of Queensland, the Queensland Law Society, the NSW Bar Association and the Law Society of South Australia in the preparation of this submission.
3. Currently, the *Criminal Code Act 1995* (Cth) (Criminal Code) imposes a maximum of 10 years' imprisonment or a fine of 2,500 penalty units, or both, for the offences of:
 - trafficking firearms and firearms parts within Australia (in Division 360 of the Criminal Code), and
 - trafficking firearms and firearms parts into and out of Australia (in Division 361 of the Criminal Code).
4. The Bill would amend the Criminal Code to set new mandatory minimum penalties and maximum penalties for these offences. For each of the offences in these Divisions, the following penalties would apply:
 - a mandatory minimum sentence of imprisonment for five years, and
 - maximum penalties of imprisonment for 20 years or a fine of 5,000 penalty units, or both.
5. The Law Council supports the measures in the Bill to increase the penalties for firearms trafficking by doubling the maximum. The joint Commonwealth-NSW Martin Place Siege Review highlighted the potential serious consequences of illegal firearms dealing. It is also noted that there are currently approximately 250, 000 illegal firearms in Australia.¹

¹ Joint Commonwealth-NSW Martin Place Siege Review Report, January 2015, vii.

6. Increasing the maximum penalty to 20 years imprisonment or a fine of 5,000 penalty units, or both, reflects community concern regarding the potential seriousness of the offence. If the Bill were to allow judicial discretion to impose a non-custodial sentence, the increase in the maximum fine would provide the judiciary the ability to impose a fine that reflects the severity of the community's attitude to the offence. The increases in the maximum penalties for illegal firearm trafficking would provide ample ability for a court to adequately punish those who seek to use weapons to do our communities harm.
7. The proposed maximum also appears appropriate when considered in light of existing firearms offences in states and territories. For example, in NSW illegal possession of a firearm may attract a maximum term of imprisonment of 14 years.²
8. However, the Law Council does not support the proposed introduction of the mandatory minimum penalty of 5 years imprisonment for the proposed offences.
9. The Law Council has previously made two submissions raising concerns with the imposition of a mandatory minimum penalty of 5 years imprisonment. I refer you to the following submissions of the Law Council:
 - 4 August 2014: [Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014](#); and
 - 7 May 2015: [Crimes Legislation Amendment \(Powers and Offences\) Bill 2015](#).
10. In these submissions, the Law Council has voiced its unconditional opposition to mandatory sentencing as a penalty for any criminal offence on the basis that raises the potential for unintended consequences, such as:
 - the imposition of unacceptable restrictions on judicial discretion and independence which is inconsistent with rule of law principles;
 - the potential imposition of unjust or unduly harsh sentences;
 - the infringement of a fundamental sentencing principle that a sentence and punishment should be proportionate to the gravity of the offence, having regard to the circumstances of the case;
 - potentially increasing the likelihood of recidivism because prisoners are inappropriately placed in a learning environment for crime. This reinforces criminal identity and fails to address the underlying causes of crime. This has particular relevance to young and first time offenders.
 - undermining the community's confidence in the judiciary and the criminal justice system as a whole. Research demonstrates that when members of the public are fully informed about the particular circumstances of a case and the offender, 90 per cent view judges' sentences as appropriate;³ and
 - unjust outcomes, particularly for vulnerable groups within society: indigenous peoples, young adults, juveniles, persons with a mental illness or cognitive impairment and the impoverished.⁴

² *Firearms Act 1996* (NSW) ss 7, 44A, 50B, 51E, 51A. See also the *Weapons Prohibition Act 1998* (NSW) ss 7, 25A, 23A.

³ K Warner, J Davis, M Waler, R Bradfield & R Vermey, "Public Judgement on Sentencing: Final results of the Tasmanian Jury Study", *Trends & Issues in Crime and Criminal Justice*, Australian Institute of Criminology, February 2011, 3.

⁴ Law Council of Australia, *Policy Position: Mandatory Sentencing*, May 2014.

11. The following example, as noted by Mr Stephen Odgers SC, a member of the Law Council's National Criminal Law Committee, at a hearing before the Committee's inquiry into the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (Psychoactive Substances Bill), sheds light on potential injustice that may be caused by the imposition of a mandatory minimum penalty.⁵

Example⁶

A prominent businessman exported gunpowder, cartridges, primer and propellant from Australia to Papua New Guinea without a permit when the Lae Pistol Club was short of ammunition after the defendant's home in Lae (where the club's ammunition was stored) was destroyed in a fire. The defendant disguised the export in order to try to get the items into Papua New Guinea quickly. The magistrate who sentenced him accepted that he was a passionate sporting shooter and was only motivated to assist the Club. Other hypothetical examples can be given where there would be agreement in the community that any period of imprisonment, let alone a sentence of 5 years imprisonment, would be an excessive punishment.

12. The Law Council's 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.
13. While Australia's criminal justice system and penalties for firearms trafficking offences act as a general deterrent to offending, mandatory minimum penalties are unlikely to reduce or deter the importation of illicit firearms. As noted by the Australian Strategic Policy Institute:

...if the desired outcome is to reduce the availability of illegal firearms in Australian communities the focus needs be on strategies which increase the likelihood that a firearms trafficker will be caught. Those strategies should focus on continuing to enhance our border agencies' capabilities to detect and investigate illicit firearm trafficking at the border.

Mandatory sentencing of illicit firearms traffickers...won't deliver the desired results.⁷

14. In addition, the current amendments were considered and rejected by Parliament in relation to the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* (Cth) (Psychoactive Substances Act) and the *Crimes Legislation Amendment (Powers and Offences) Act 2015* (Cth).
15. The NSW Director of Public Prosecutions opposed the introduction of mandatory minimum sentences for the firearms trafficking offences on the following basis:

It was the experience in NSW when there were a number of people smuggling cases before the NSW Courts that the accused did not enter pleas of guilty because of the mandatory minimum sentence and all the trials ran the full course. This had a significant impact on the District Court to dispose of other work and on the resources of the [Commonwealth Director

⁵ Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, 22 August 2014, 9-10.

⁶ Adam Cooper, 'Australian pleads guilty to exporting arms to PNG', *The Age*, 4 April 2013 at <http://www.theage.com.au/victoria/australian-pleads-guilty-to-exporting-arms-to-png-20130404-2h8ox.html>.

⁷ John Coyne, Australian Strategic Policy Institute, 'Gun Trafficking and Mandatory Jail Terms', *The Strategist*, 18 March 2015 at <http://www.aspistrategist.org.au/gun-trafficking-and-mandatory-jail-terms/>.

of Public Prosecutions]...Additionally trials with a mixture of Commonwealth and State offences by reason alone of the combined effect of State and Commonwealth provisions are more complex cases to prosecute. The inclusion of a mandatory minimum sentence in this mix will add to the overall complexity.⁸

16. Similarly, the Tasmanian Office of the Director of Public Prosecutions noted that mandatory sentencing provisions 'can lead to unjust results' and that, if it is thought desirable to have some form of mandatory minimum sentencing scheme, then it should be drafted in such a way that allows the court to exercise its discretion and depart from the mandatory minimum sentence, if a particular case calls for it.⁹
17. The imposition of a mandatory minimum imprisonment sentence is a partial fettering of judicial discretion that impedes the sentencing judge's ability to fashion a sentence that is of an appropriate severity in all the circumstances, as is required in sentencing for federal offences by section 16A of the *Crimes Act 1914* (Cth) (Crimes Act).
18. Further, the imposition of a mandatory minimum imprisonment sentence is contrary to other sentencing principles enshrined in the Commonwealth sentencing framework, which judges apply. Specifically, section 17A of the Crimes Act provides that a sentencing court shall not pass a sentence of imprisonment unless, having considered all other sentences, it is satisfied that no other sentence is appropriate in the circumstances. While this provision can be overridden, it is an important and longstanding principle of sentencing that imprisonment ought to be imposed only where no other sentence is appropriate. This principle is derived from the recognition that imprisonment is not an effective means of achieving all sentencing objectives.
19. The Explanatory Memorandum to the Bill incorporates alternative recommendations made by the Law Council in relation to the Psychoactive Substances Bill, which were subsequently accepted by the Committee, namely that it make 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').¹⁰
20. In this way, some of the Law Council's concerns regarding the mandatory sentences in the Bill are mitigated. Others remain such as undermining the community's confidence in the judiciary and the criminal justice system as a whole by not allowing judicial discretion to impose an appropriate head sentence.
21. There are also two other aspects of the amending legislation that should receive attention:

⁸ Director of Public Prosecutions (NSW), Submission 3 to the Senate Legal and Constitutional Affairs Committee's Inquiry into the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, 1 August 2014, 1-2.

⁹ Senate Legal and Constitutional Affairs Committee's Report into the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, 24.

¹⁰ Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, 4 August 2014, 2; Explanatory Memorandum to the Bill, 4.

- (a) It is not made clear whether or not the onus lies on the defendant to establish on the balance of probabilities that s/he was under 18 at the time of the offence. Proposed section 360.3A provides that the mandatory minimum penalty does not apply if 'it is established'. However, unless the position is made clear (e.g. by saying 'the court is satisfied on the balance of probabilities...') a court may interpret the provision as placing the onus on the defendant and that would be undesirable.
- (b) While juveniles are exempt, nothing is said as to persons with 'significant cognitive impairment' (as has happened in other legislation, for example, in sections 25A and 25B of the *Crimes Act 1900* (NSW) – the 'one punch' laws and latest mandatory minimum sentencing legislation in NSW). Excluding sentencing discretion in such cases is manifestly unjust.
22. For these reasons, the proposed mandatory minimum penalties should not be enacted. If they are to proceed, the Bill should be amended to:
- allow the court full discretion in cases of individuals with significant cognitive impairment; and
 - make clear that the onus is not on the defendant to establish on the balance of probabilities that s/he was under 18 at the time of the offence.
23. The action officer for this matter is
24. Thank you again for the opportunity to provide these observations.

Yours sincerely,

S. Stuart Clark AM
President

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.