

Your Ref:

Quote in reply: International Law / Relations Committee: 21000325/97

23 February 2012

Ms Margery Nicholl
Acting Secretary-General
Law Council of Australia
19 Torrens Street
BRADDON ACT 2612

Email: [REDACTED]

Dear Acting Secretary-General

MIGRATION AMENDMENT (REMOVAL OF MANDATORY MINIMUM PENALTIES) BILL 2012

Thank you for your invitation to comment on the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* ("the Bill"). This response has been prepared with the assistance of our International Law and Relations Committee who have thorough expertise in this area of the law.

The Society has long maintained its strong stance against mandatory sentencing. In our view, mandatory sentencing laws are unfair, unworkable and run contrary to Australia's international treaty obligations. The human rights instruments that discourage mandatory detention include:

- The International Covenant on Civil and Political Rights which prohibits arbitrary detention (article 9) and states that every person convicted of a crime should have the right to a review of the conviction and sentence by a higher tribunal according to law (article 14); and
- The Convention on the Rights of the Child which requires that detention is used only as a measure of last resort and for the shortest appropriate period of time (article 37), with the primary consideration of the courts being the best interests of the child (article 3).

The Society advocates that sentencing decisions should rest with the highly trained judicial officers who have expertise in the area. Therefore, we do not support a regime which would function to erode the sentencing discretion of these judicial officers.

We also note the following compelling reasons for opposing mandatory sentencing:

- To the extent that mandatory sentencing is perceived as a democratic response to the public perceptions of crime, the most appropriate response is to educate the public about sentencing, not to impose an inflexible and unfair sentencing regime. This is demonstrated by Australian and overseas research. A study published by Professor Kate Warner from the University of Tasmania asked jurors (who were fully informed about the facts of the case) to assess the appropriateness of the judge's sentence. More than half the jurors surveyed would have imposed a more lenient

sentence than the trial judge imposed. When the jurors were informed of the actual sentence, 90% said that the judge's sentence was (very or fairly) appropriate.¹

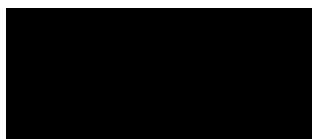
- In addition, mandatory sentencing encourages judges, prosecutors and juries to circumvent mandatory sentencing when they consider the result unjust. In some circumstances when an offender is faced with a mandatory penalty, juries have refused to convict. Furthermore, prosecutors have deliberately charged people with lesser offences than the conduct would warrant to avoid the imposition of a mandatory sentence. In effect, this shifts sentencing discretion from an appropriately trained and paid judicial officer to a prosecutor. This process is called "de-mandatorising".
- The inevitable increase in prison population as a result of the mandatory sentencing is one of many additional costs to the community without any commensurate benefit.
- Mandatory sentencing reduces the proportion of pleas of guilty, thus increasing court costs, court delays, prosecution costs, defence costs and the stress upon victims and other witnesses.

In this regard, we **attach** a copy of the cogent and persuasive arguments articulated in Queensland Parliament by the Honourable Cameron Dick MP, the former Attorney-General and Minister for Industrial Relations, when he spoke against the *Criminal Code (Serious Assaults on Police & Other Particular Persons) Amendment Bill 2010*, for your information.

Bearing these issues in mind, the Society supports the purpose and content of the Bill.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Ms Binari De Saram on [REDACTED] or [REDACTED] or our Policy Solicitor, Ms Raylene D'Cruz on [REDACTED] or [REDACTED].

Yours faithfully



Dr John de Groot
President

¹ Warner K, public judgement on sentencing: final result from the Tasmanian Jury Sentencing Study. Trends and issues in crime and criminal justice, Australian Institute of Criminology, February 2011.