Criminal Lawyers Association of the Northern Territory (CLANT)

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CLANT SUBMISSION ON *JUSTICE LEGISLATION AMENDMENT (DRUG OFFENCES) BILL 2016*

The Criminal Lawyers Association of the Northern Territory (CLANT) welcomes the opportunity to comment on the *Justice Legislation Amendment (Drug Offences) Bill 2016* (the Bill). CLANT's submissions in relation to details of the proposed legislation are set out below, but by way of general introduction, CLANT urges that serious consideration be given to a more radical reappraisal of government responses to illicit drug use. Despite the concerted efforts of governments worldwide to prosecute the so-called "war on drugs", there is scant evidence that the zero-tolerance approach has been effective. By contrast, jurisdictions which have adopted policies focused on harm minimization including the decriminalization of illicit drug use (as distinct from manufacture and supply), have shown impressive results, and should be closely examined to see if there are lessons for the Northern Territory.[1]

CLANT supports the following measures contained in the Bill:

- Conversion of drug offences to bring them within the principles of criminal responsibility set out in Part IIAA of the *Criminal Code.*
- Consolidation, simplification, modernisation and harmonization of the *Misuse of Drugs Act*.
- Recognition that the commission of drug offences in the presence of a child is an aggravating circumstance.
- Strengthening of provisions designed to protect the integrity and effectiveness of police investigation and surveillance of suspected drug offending.
- Prohibition of the supply of a range of drug paraphernalia, which will help to rectify the long-standing anomaly which has permitted the public display and sale of items obviously intended for the consumption of prohibited drugs.
- Addition of the actual possession of a weapon as an aggravating circumstance for the purpose of s37 of the Act.

CLANT opposes the following measures contained in the Bill:

- <u>Increases to financial penalties</u>

  Although CLANT acknowledges that these reforms are aimed at the rational and worthwhile purpose of achieving uniformity between the schemes of monetary penalties for drug offences and other offences, the immediate effect of these measures will be to significantly increase

[1] See, for example, Greenwald, Glenn, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies* (Cato Institute, Washington DC, 2009), accessed at http://object.cato.org/sites/cato.org/files/pubs/pdf/greenwald_whitepaper.pdf

financial pressure on drug addicts, which in turn will increase the risk that they commit property offences.

- Increases to penalties of imprisonment

The Northern Territory already has an unsustainably high rate of incarceration, five times higher than the national average. These measures (for example, the proposed amendment to the *Sentencing Act* fixing a minimum non-parole period of 70% in relation to serious drug offences, and the doubling of the maximum period of imprisonment for manufacturing less than a commercial quantity of a Schedule 2 drug) will inevitably result in more Northern Territory offenders being imprisoned, and for longer periods. This entails significant additional cost to the taxpayer, the community, the justice system (with more cases likely to be dealt with in the Supreme Court), the offender and the offender's family. Conversely, no benefit will be achieved: as is discussed below, there is no evidence that increasing penalties has a generally deterrent effect.

In his second reading speech, the Attorney-General said:

> The cost and benefit – those who engage in the business of drug manufacture and supply do so because the risk of undertaking these activities is outweighed by the financial gain. In order to address this, the penalties for commercial drug related activities need to be proportionate and reflect the government's stance on illicit drugs.

With respect, this passage conflates and confuses several different issues. It is accepted that offenders who commit serious drug offences are in many cases motivated by the prospect of significant financial gain which outweighs their fear of getting caught. There is ample empirical evidence to support the conclusion that the prohibition of conduct tends to deter people from engaging in it. However, the evidence does not support the theory that the legislature can further deter offenders by increasing the penalties imposed for engaging in conduct which is already prohibited.[2]

Furthermore, the assertion, apparently based on mere assumption, that drug manufacturers and dealers are motivated solely by financial gain, is simplistic and erroneous. Financial gain is no doubt a powerful motivation for many serious drug offenders, but so is the fear of violence that has been threatened against the offender, their associates and their family, as is the addict's compulsion to obtain and use more drugs. Some drug offenders are themselves the victims of human trafficking, and should be afforded the protection of the law rather than exposure to increased punishment.[3] The experience of CLANT members in defending and prosecuting drug matters is that offenders, including many serious offenders, are often trapped in a web of addiction, violence, fear, obligation – as well as the elusive prospect of wealth.

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[2] Bagaric, Mirko and Alexander, Theo, "(Marginal) general deterrence doesn't work – and what it means for sentencing" *Criminal Law Journal* (2011) Vol. 35, pp. 269-283.

[3] Human trafficking offences are set out in the *Crimes Act 1914* (Cth) and Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) both as amended by the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) and the *Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013* (Cth). See Gerry, Felicity and Sherwill, Narelle, "Human Trafficking, Drug Trafficking and the Death Penalty", *Indonesian Law Review* (forthcoming).

The challenge of deterring potential offenders is not addressed by making penalties more "proportionate", and conversely, the fact that drug offences continue to be committed does not imply that current penalties are disproportionately low. Proportionality in sentencing is a measure of whether the punishment fits the crime, not whether it stops the crime. The second reading speech does not elaborate on the basis for the implied assertion that current penalties are in fact disproportionate, and CLANT is unaware of any such claim from members of the judiciary, prosecutors (or for that matter defence lawyers), criminologists or other experts in the field.

Finally, the Attorney-General asserts that the increase in penalties "reflect[s] the government's stance on illicit drugs". In the context of a forthcoming Northern Territory election, that is hardly surprising – announcing an increase in penalties for opprobrious behaviour is a well-known ballot box campaign technique – but it adds no weight to the untested, unproven and unsupported claim that this will somehow lead to a reduction in drug offending.

CLANT commends the detailed and carefully considered report of the Northern Territory Legislative Assembly "Ice" Select Committee, chaired by Nathan Barrett MLA. CLANT welcomes the implementation of the Report's recommendation regarding the display and sale of drug paraphernalia, but notes with concern that the Committee, after hearing extensive evidence and accepting numerous submissions, thoroughly addressed the issue of supply reduction, but did **not** recommend any increase of penalties for drug offences.

The proposed change to the *Sentencing Act* is of additional concern because, in a jurisdiction where widely criticized mandatory sentencing laws are already in force, it represents a further attack on the independence of the judiciary, and in particular, the just and proper exercise of judicial discretion. The *Sentencing Act*, together with a substantial body of common law, require judges to have regard to a broad range of factors, and to apply a well-established set of principles when fixing both a head sentence and a non-parole period. There is no need or reason to change or limit the existing law in this regard. If, as is claimed, a purpose of this Bill is to harmonise Northern Territory law with Federal law in relation to drug offences, then if anything the law with respect to the fixing of non-parole periods should be relaxed, to bring Northern Territory into line with the provisions of Part IB Division 4 of the *Crimes Act 1914* (Cth).[4] As has often been stated, "prescribed minimum mandatory sentences are the very antithesis of just sentences".[5] Similarly, prescribed minimum non-parole periods can also be antithetical to just sentencing.

Russell Goldflam

President
5 May 2016

[4] With the exception of section 19AG, which prescribes a non-parole period of at least 75% for prescribed serious terrorism, treachery, treason and espionage offences, the *Crimes Act 1914* (Cth) does not specify minimum non-parole periods for Federal offences.
[5] *Trenerry v Bradley* (1997) 6 NTLR 175 at 187 per Mildren J.