



10 September 2010

C62, 70.26
JM;rp

The Honourable Stephen Wade
Shadow Attorney-General
Parliament House
North Terrace
ADELAIDE SA 5000

Dear Mr Shadow Attorney-General

Controlled Substances (Miscellaneous) Amendment Bill 2010

I refer to your letter of 2 August 2010 seeking comment on the Controlled Substances (Miscellaneous) Amendment Bill 2010. Thank you for referring the above Bill to the Society for comment.

The Bill has been considered by the Society's Criminal Law Committee. The Committee has confined its comments to the proposed Section 32(2a) [Clause 5 of the draft Bill].

The proposed s32(2a) creates a new offence of trafficking in a controlled drug (other than cannabis, cannabis resin or cannabis oil) *in a prescribed area* ("the trafficking in a prescribed area offence"). The proposed s32(2a) is effectively the same as the existing offence of trafficking in a controlled drug (s32(3)) ("the trafficking offence") except that proof that the trafficking occurred in a prescribed area is required to make out the offence.

The same conduct gives rise to both offences, except that if the conduct happens to occur in a prescribed area it is deemed by Parliament to be much more serious. Issue is not taken with the difference in penalties for the same conduct. The problem is, they should not be separate offences. Given that it is the same conduct, it should be the same offence but that an offender is liable to a greater penalty if it occurs in a prescribed area.

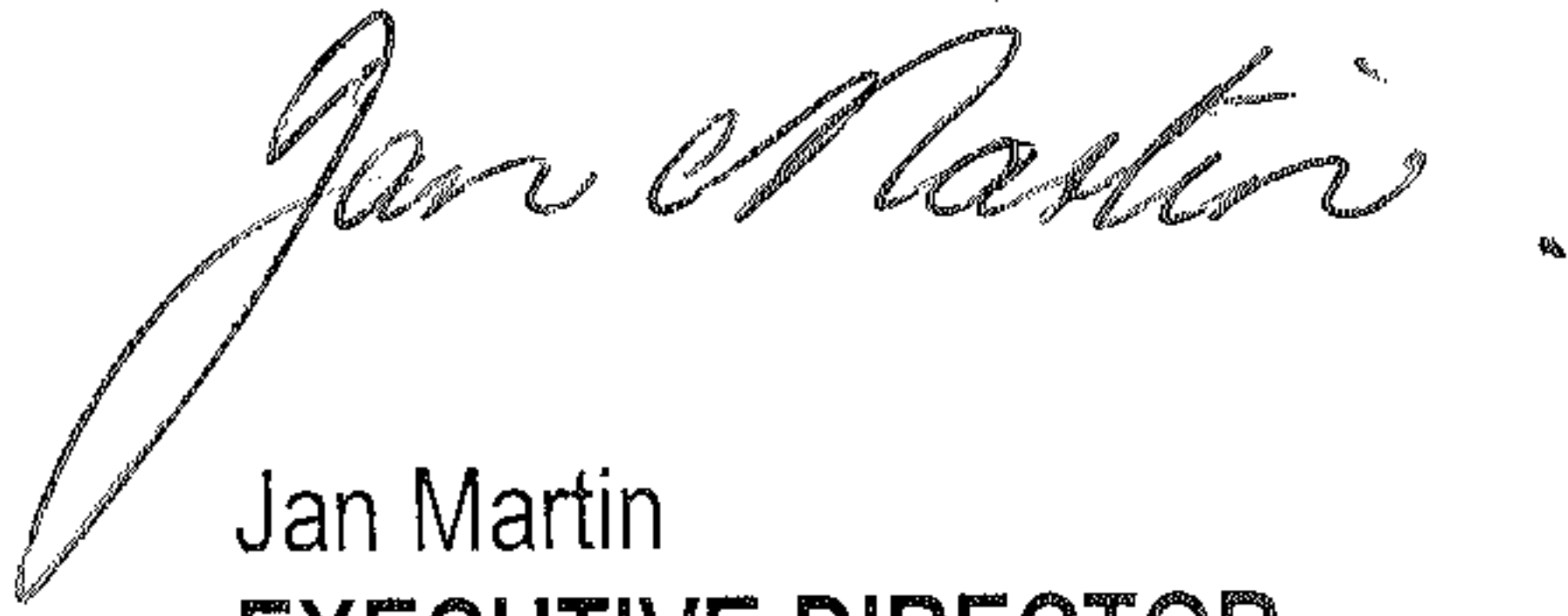
This is the usual means by which Parliament differentiates between the seriousness of the conduct. That is, it has one offence for the same criminal conduct but different penalties for circumstances of aggravation (eg, a subsequent offence within a certain period).

The problem with creating a separate offence for the same conduct is that if the additional element of in a prescribed area is not proven, the accused will be found not guilty of any offence (there not being any alternative verdict provision in the Act). This is likely to lead to the DPP not prosecuting the more serious conduct for fear that a person who traffics in a controlled drug may be found not guilty in circumstances where he/she would be guilty if charged under the less onerous s32(3).

Alternative charges are a means of getting over this, but they can be messy and are best avoided in this instance by adopting the popular drafting approach of the same offence but with different penalties for a circumstance of aggravation.

I trust this response is of assistance.

Yours sincerely

A handwritten signature in cursive script that reads "Jan Martin".

Jan Martin
EXECUTIVE DIRECTOR