



18 March 2011

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The Honourable Stephen Wade MP  
Shadow Attorney-General  
Parliament House  
North Terrace  
ADELAIDE SA 5001

Dear Mr Shadow Attorney

***Controlled Substances (Offences relating to instructions) Amendment Bill 2011***

We refer to the above Bill, which was provided to the Society on 15 March 2011 by your adviser, Mr Biar. Thank you for providing the Society with the opportunity to consider this Bill.

You will appreciate that we have only had a short time to consider the Bill. However, we provide the following comments.

We support criminalising the supply of the document the subject of the Bill ("instructions document") but not the creation of different classes of supply (ie, sale or possess for sale). We consider the policy behind the Bill is sound. That is, that the supply of a document containing instructions to commit a drug offence is tantamount to encouraging a person(s) to commit that offence.

Presently, if a person aids and abets the commission of an offence he/she is liable for the commission of the offence as a principal offender: s267 *Criminal Law Consolidation Act 1935*. Criminalising the supply of an instructions document goes a step further in that proof of supply of the document is itself an offence. There is no need for the principal offence to have been committed nor does the complication of aiding and abetting an attempt arise.

Fundamentally, however, the gravamen of the conduct the Bill seeks to impugn is the provision of an instructions document to another. That is the conduct that should be criminalised. We understand that there is little or no market for the sale of an instructions document. Unlike drugs, the sale of an instructions document would not be commercial enterprise.

We understand that instruction documents are widely available over the internet. If they were sold by anybody, the price would be so low as to not be a major factor in the sentencing process. In any event, it could be dealt with as an aggravating factor (to some extent) of the supply offence.

In truth, we do not expect many prosecutions for the supply (or possess for supply) offence. Short of telephone intercept evidence or admissions, together with the wide availability of instructions documents, proof of the offence will be difficult. Possess for supply is also problematic. Unlike drugs, one would not expect a person to possess sufficient copies of the document such that a court could infer that the possession was for supply.

On reading the Bill one is struck by the similarity in the offence provisions between drugs and the instructions document. In most jurisdictions in the world there are offences for the sale and possession for sale of drugs. In our view, it is overkill to, in effect, equate drugs to the instructions document by creating similarly structured offences of sale and possess for sale. A supply offence (including possess for supply) would be more than adequate to cover the impugned conduct.

### ***Proposed Section 33GB***

We support the creation of separate offences for supply (but not sale) of an instructions document to a child. We consider that the nominal culpability for such offending should be greater than supplying to an adult. That difference should be reflected in a higher maximum penalty of imprisonment.

### ***Proposed Section 33LAB***

We believe that "to supply" is or can be more culpable than "to possess". We suggest that this should be reflected in a penalty difference (perhaps the penalty for the sale offence in the Bill should be the penalty for the supply offence).

We also recommend that there be separate offence provisions for the possess and supply offences. To do so would, firstly, reflect the different conduct and nature of the offences. Secondly, it would permit separate penalties. Thirdly, it would give the flexibility in appropriate cases, lest there be any doubt, that a person could be charged with both offences. As presently framed, arguably a person may not be charged with both offences. Clearly, if the only allegation of possession is the conduct giving rise to supply then only the supply offence would (and could) be charged. However, a person may possess independently of supplying and may, therefore, be liable to prosecution for both offences.

### ***Sections 33J and 33LB***

We note that the term "prescribed equipment" is not defined in the *Controlled Substances Act 1984* in relation to ss33J and 33LB. The regulations made under the Act, however, outline what "prescribed equipment" is for the purposes of ss33J and 33LB (reg 8AC).

The fact there is no reference to the regulations appears to be an oversight. The term "prescribed equipment" is defined in s33LA to mean, inter alia, "equipment of a kind prescribed by regulation". That definition applies only to s33LA. Regulation 8AA has been duly promulgated to provide for the meaning of that term for the purposes of s33LA.

We suggest a similar definition is required to cover ss33J and 33LB and we so recommend.

I trust these comments are of assistance. Please do not hesitate to contact me, should you require any further information.

Yours sincerely



Ralph Bönig  
**PRESIDENT**