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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Submission on Crimes Legislation Amendment (Powers, Offences, and Other Measures) Bill 2015

Australian Lawyers for Human Rights (“ALHR”) thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to comment on the *Crimes Legislation Amendment (Powers, Offence, and other Measures) Bill 2015*.

ALHR was established in 1993 and is a network of legal professionals active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2,600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law and human rights law in Australia.

Introduction

ALHR notes that this is a large and complex Bill that amends 14 separate Acts and contains 17 separate Schedules of amendments.¹ While some Schedules of the Bill contain necessary technical amendments and are largely unproblematic, other Schedules contain significant amendments which raise human rights and rule of law concerns,

¹ *Crime Commission Act 2002, Australian Postal Corporation Act 1989, Classification (Publications, Films and Computer Games) Act 1995, Crimes Act 1914, Criminal Code Act 1995, Law Enforcement Integrity Commissioner Act 2006, Mutual Assistance in Criminal Matters Act 1987, Privacy Act 1988, Proceeds of Crime Act 2002, Radiocommunications Act 1992, Surveillance Devices Act 2004, Taxation Administration Act 1953, Telecommunications (Interception and Access) Act 1979 and the Transfer of Prisoners Act 1983.*

including:

- i. changes to the requisite fault element for certain serious drug offences from intention to recklessness as to the nature of plant or substance²;
- ii. expanding the principles of extension of criminal liability³, by inserting the concept of being ‘knowingly concerned’ in the commission of an offence as an additional form of secondary criminal liability;
- iii. introducing mandatory minimum sentences of five years imprisonment for firearm trafficking;
- iv. broadening the circumstances in which the privilege against self incrimination is removed when information - gathering powers are used under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006.

Having regard to the very serious consequences for liability under some of these provisions, ALHR has an overarching concern that **these type of changes detract from the rationale behind the *Commonwealth Criminal Code* and the *Commonwealth Guide to Framing Criminal Offences*** in that they seek to broaden out concepts of criminal liability beyond the scope of traditional criminal law principles, and thus **make it harder for clear lines of criminal liability to be drawn.**

It is noted that Schedule 3 contains welcome amendments to clarify that the war crime offence of ‘outrages upon personal dignity’ committed against a dead person or persons in a Non-International Armed Conflict applies regardless of whether or not the victims were active in hostilities prior to death.

ALHR also welcomes the Schedule 4 changes to the definition of ‘forced marriage’ to include circumstances in which a victim does not freely and fully consent, due to an incapacity to understand the nature and effect of a marriage ceremony.

Schedule 6: Mandatory Minimum Sentences for Firearm Trafficking

Background

This submission will focus on the human rights and rule of law implications of Schedule 6 of the Bill which proposes the insertion of new ss 360.3A and 361.5 into the *Criminal Code Act 1995* (Criminal Code). The proposed sections would introduce a mandatory minimum five year term of imprisonment for the existing offences of trafficking firearms and firearm parts within Australia⁴, and the new offences of trafficking firearms into and out of Australia.⁵

ALHR notes that *The Psychoactive Substances and Other Measures Bill*⁶ has already attempted to introduce mandatory minimum prison sentences for the abovementioned

² In Part 9.1 of the *Criminal Code Act 1995*

³ In Chapter 2 of the Criminal Code

⁴ Division 360 of the Criminal Code

⁵ Division 361 of the Criminal Code (included in the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* which received assent on 5 March 2012).

Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5323

The *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* (“*Psychoactive Substances and Other Measures Act*”⁶) received assent on 5 March 2015.

new firearms import and export offences⁷ as well as for the offences of trafficking firearms and firearms parts.⁸ The Parliament declined to pass those mandatory sentencing provisions. Consequently, in order to ensure the Bill's passage, the Government amended the *Psychoactive Substances and Other Measures Bill* in the House of Representatives to remove the mandatory sentencing provisions. The provisions in Schedule 6 of this Bill are identical to the abovementioned provisions removed by the Government from the *Psychoactive Substances and Other Measures Act*. As such **ALHR notes that the amendments contained in Schedule 6 have already been considered and rejected through proper parliamentary processes.**

ALHR's position is that these provisions should again be rejected. **ALHR is strongly opposed to mandatory minimum prison terms on the basis that such regimes impose unacceptable restrictions on judicial discretion and independence, and undermine fundamental human rights and rule of law principles.**

Human Rights Implications

ALHR submits that the legislative measures contained in Schedule 6 are inconsistent with Australia's obligations under Articles 9 and 14 of the *International Covenant on Civil and Political Rights* ("ICCPR").

The right to liberty, security of person and freedom from arbitrary detention is set out in Article 9(1) of the ICCPR.⁹ ALHR also notes the United Nations Human Rights Committee Decisions *C v Australia*¹⁰ and *A v Australia*¹¹ on the lack of justifications for deprivations of liberty. In the latter, the Committee indicated that detention is arbitrary if disproportionate in the prevailing circumstances. In our submission this would include sentences that are disproportionate to the circumstances of a crime.¹² In its *Concluding Observations on Australia* in 2000 the United Nations Human Rights Committee noted that mandatory imprisonment in Western Australia and the Northern Territory raised serious issues of compliance with various articles of the Covenant and urged Australia to reassess legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.¹³

In ALHR's view, a mandatory minimum sentencing regime that prohibits the court from attributing the weight it deems appropriate to the seriousness of the offending and the circumstances of the offender is bound to result in terms of imprisonment that are arbitrary. **The proposed provisions therefore breach Australia's obligations under**

The *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* ("Psychoactive Substances and Other Measures Act"⁷) received assent on 5 March 2015 and see Division 361 of the *Criminal Code Act 1995*

⁸ Division 360 of the *Criminal Code Act 1995*

⁹ Article 9 UN General Assembly, *International Covenant on Civil and Political Rights* 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>

¹⁰ *C. v. Australia* Communication No. 900/1999 28 October 2002 CCPR/C/76/D/900/1999

¹¹ *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997)

¹² Law Council of Australia Mandatory Sentencing Discussion Paper May 2014 available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCAPDF/discussion%20papers/MS_Discussion_Paper_Final_web.pdf. See also Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3rd ed, 2013) p. 363.

¹³ United Nations Human Rights Committee, *Concluding Observations on Australia in 2000* (2000) UN doc A/55/40, paragraph 522.

Article 9(1) of the ICCPR in that they amount to arbitrary detention.

The right to a fair trial is captured in Article 14(1) of the ICCPR, which guarantees that everyone who faces trial shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal. **The mandatory minimum sentencing provisions proposed in Schedule 6 represent a legislative incursion into an area traditionally reserved for judicial discretion, with, in ALHR’s view, concerning implications for the independence of the judiciary and more broadly for the rule of law.**

Mandatory minimum prison terms also violate the right to have one’s sentence reviewed by a higher court and therefore in ALHR’s submission constitute a violation of Article 14(5) of the ICCPR which provides that: *“Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”*¹⁴

The United Nations Human Rights Committee considers that the right to appeal is absolute. The absolute nature of the right to appeal means that it must apply to all types of crimes. In order to effectively protect the right to appeal, the appeal court cannot limit the scope of trial to the legal issues.¹⁵

The United Nations Special Rapporteur on the Independence of the Judiciary has also observed that the right of appeal contained in Article 14(5):

*“...is negated when the trial judge imposes the prescribed minimum sentence, since there is nothing in the sentencing process for an appellant court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards”.*¹⁶

ALHR submits that, while Schedule 6 of the Bill does not impinge upon the right to appeal a conviction for firearms trafficking offences, by direct operation, the mandatory minimum sentencing provisions contained within Schedule 6 effectively extinguish substantive judicial review of an offender’s sentence. In its current form Schedule 6 therefore fails to comply with important procedural safeguards with respect to criminal proceedings and in our view is inconsistent with Australia’s obligations under Article 14(5) of the ICCPR. We note that the right to a fair trial is not only a fundamental human right but a key prerequisite to a healthy democracy.

We note the suggestion in the Bill’s Explanatory Memorandum that the mandatory minimum sentencing provisions are ‘human rights compatible’ as they do not apply to children and preserve judicial discretion because there is no minimum non-parole period proposed.¹⁷ For the reasons set out above and below, ALHR respectfully rejects this suggestion.

In ALHR’s view the proposed mandatory sentencing provisions give rise to significant concerns in relation to Australia’s treatment of its citizens and as

¹⁴ *International Covenant on Civil and Political Rights, op cit.*

¹⁵ *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997)

¹⁶ Dato’ Param Kumaraswamy ‘Mandatory Sentencing: the individual and Social Costs’ (2001) 7(2) *Australian Journal of Human Rights* at <http://www.austlii.edu.au/au/other/ahric/ajhr/ajhrindex.html/2001/14.html#Heading140>.

¹⁷ At 123 and 124: http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5430_ems_eb308543-0f14-43e8-aef5-ccdc42fa0d63/upload_pdf/501506.pdf;fileType=application%2Fpdf

regards Australia's compliance with our voluntarily - assumed international human rights obligations.

Unjust Outcomes

Mandatory minimum sentencing provisions remove the judicial discretion which, in ALHR's view, is critical to ensuring the integrity of our criminal justice system. In its current form Schedule 6 will potentially result in unjust, harsh and disproportionate sentences where the punishment does not fit the crime. It is not possible for Parliament to know in advance whether a minimum mandatory penalty will be just and appropriate across the full range of circumstances in which a firearm trafficking offence may be committed.

The Law Council of Australia has previously commented:

*"Prescribing minimum sentences in legislation removes the ability of courts to consider relevant factors such as the offender's criminal history, individual circumstances or whether there are any mitigating factors, such as mental illness or other forms of hardship or duress. This prescription can lead to sentences that are disproportionately harsh and mean that appropriate gradations for sentences are not possible thereby resulting in inconsistent and disproportionate outcomes."*¹⁸

Importantly, the principle of judicial discretion is embodied in subsection 16A(1) of the *Crimes Act 1914* which specifies that in determining the appropriate sentence to be passed for a federal offence Commonwealth courts "*must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.*"¹⁹

It is ALHR's view that mandatory minimum sentencing provisions nullify or significantly impede the ability of the Commonwealth courts to carry out the legislative intent of s. 16A(1) of the Crimes Act 1914.

The Commonwealth experience with regard to the mandatory minimum sentencing of persons convicted of people smuggling offences was the subject of a Senate Legal and Constitutional Affairs Committee inquiry, the report of which provides detailed examples of cases where mandatory sentencing has applied with anomalous or unjust results.²⁰

If the Courts are unable to exercise discretion in sentencing, there will be no difference in outcomes. For example, a young person with a clean record and a very low level of involvement in the trafficking of a firearm within Australia will receive the same sentence as a person with a much higher level of seniority in the illicit international trade of firearms. ALHR notes that where more than one offender

¹⁸ Law Council of Australia, *Submission 7*, p. 5; Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012, op cit.

¹⁹ 16A(1) of the *Crimes Act 1914*

²⁰ Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012 available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/201013/migrationamendment2012/report/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/migration_amendment_2012/report/report.ashx

is involved in the commission of an offence, a normal and proper consideration of sentencing is the degree of participation of the offender in the offence.²¹

We would submit that the setting of maximum penalties is sufficient to guide the sentencing of offenders in individual cases in that maximum penalties allow the Executive to indicate the seriousness of the offence, while also allowing judicial officers appropriate flexibility in sentencing individuals.²²

It is ALHR's view that the mandatory minimum penalties contained within Schedule 6 of this Bill are:

- unnecessary, given that existing sentencing regimes are already required to consider such factors as denunciation, general and specific deterrence in calibrating a just sentence; and
- limit judicial discretion to such an extent so as to effectively remove judicial discretion from the sentencing process.

ALHR also notes that mandatory sentencing does not eliminate inconsistency in sentencing by removing judicial discretion. It simply moves that discretion to other parts of the criminal justice system, such that it is exercised by police and prosecutors when determining the charges that will be pursued against individual offenders.

Violate Established Principles of Common Law

ALHR submits that mandatory minimum sentencing regimes such as that proposed to be established by Schedule 6 of this Bill **violate the principle that justice should be delivered on an individualised basis and offend the principle of proportionality in sentencing.** The proportionality principle requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances.²³

Justice requires a proper consideration of all the circumstances of the offence and the offender. Mandatory minimum sentences deprive people of their liberty without the balancing process required by the principle of proportionality and **make individual justice impossible.**

Counterproductive effect upon Costs of Administration of Justice

ALHR is concerned that mandatory minimum sentencing contributes to a **higher rate of imprisonment** which (often unnecessarily) increases the costs of the administration of justice. In our submission, the sentencing provisions proposed to be established by Schedule 6 will **remove the incentives for offenders to assist authorities** with investigations (in the expectation that such assistance will be taken into account in sentencing).

Further, they will ultimately operate in practice as an **incentive for defendants to plead 'not guilty'**, as the only prospect of serving less than a five year imprisonment term is

²¹ *Lowe v The Queen* (1984) 154 CLR 606 per Gibbs CJ at 609; *Pastras v The Queen* (1993) 65 A Crim R 584 at 588.

²² Legal Aid NSW Submission to the Legal and Constitutional Affairs Legislation Committee March 2012

²³ *Veen v The Queen (No 2)* at 472, 485–486, 490–491, 496; *Hoare v The Queen* (1989) 167 CLR 348 at 354; *R v Dodd* (1991) 57 A Crim R 349 at 354 and *R v Whyte* (2002) 55 NSWLR 252 at [156]–[158].

an acquittal. This means that potentially more contested cases will appear before the courts requiring the use of **extra resources**.

Constitutional Issues

In ALHR's view the mandatory minimum penalties proposed under Schedule 6 of this Bill have the potential to **undermine the separation of powers**. To have the legislature pronouncing individual sentences for individual offenders is inconsistent with the division of responsibilities between the executive, the legislature and judiciary and therefore detracts from the independence of the judiciary.

No Deterrence Value

ALHR submits that mandatory minimum sentencing regimes are **not an effective method of reducing the offending behaviour** at which they are targeted. Mandatory sentencing regimes are often promoted as deterring or decreasing crime rates, however there is **no evidence** to show that they either deter individual offenders or even decrease crime rates.²⁴

Mandatory minimum sentencing does not offer individualised deterrence. Research has established that criminals are deterred more by an increase in their likelihood of apprehension than by an increase in the magnitude of their punishment, meaning that **likely capture is a more effective deterrent than a mandatory minimum sentence**.

Given mandatory minimum sentencing has been shown to have no general deterrent effect on offending, ALHR submits that the significant risks of injustice which would result from the provisions proposed within Schedule 6 of the Bill far outweigh any perceptible benefits.

Conclusion

ALHR submits that there is little evidence mandatory minimum sentences are effective. It is ALHR's view that the sentencing provisions proposed within Schedule 6 of the Bill :

- are arbitrary;
- depart from well-established principles of common law; and
- limit an individual's right to a fair trial

by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender.

Further, they are contrary to long-held principles of justice and the human rights standards that Australia is bound to uphold. By being arbitrarily fixed in advance, the provisions constitute arbitrary detention contrary to Article 9(1) of the ICCPR, to which Australia is a party. Further, by removing the power of an appeal court to impose

²⁴ The experience in the NT during the initial mandatory sentencing regime for property offences showed that property crime *increased* during mandatory sentencing, and *decreased* after its repeal. See Northern Territory Office of Crime Prevention, Mandatory Sentencing for Adult Property Offenders – The Northern Territory Experience 2003, p. 10.

a lesser sentence, they effectively **deprive persons of the right to have their sentences reviewed** by a higher tribunal, contrary to Article 14(5) of the ICCPR.²⁵

If passed by the Parliament, Schedule 6 of the Bill is likely to result in the disproportionate punishment of low level participants in the larger enterprise of firearms trafficking, with no real deterrent effect and at a large cost to the tax payer in the form of trial costs and incarceration expenses.

ALHR acknowledges the seriousness of the offences in question and the need to address the illicit movement of firearms both into and out of Australia and within our borders. We note that research indicates that most illegal guns are not trafficked into Australia, but are stolen from registered owners. The Greens Senate Inquiry into the illegal firearms market in Australia found that there is very little accurate data about the number of illicit guns in Australia and how they get into the black market²⁶. In their report the **Inquiry made several recommendations** including more funding for law enforcement agencies to tackle gun crime, nationally consistent gun registration and storage requirements and a rolling gun amnesty.

Tackling gun crime requires a more sophisticated approach than the imposition of mandatory minimum prison terms and ALHR encourages policy makers to develop comprehensive, targeted policies to address the presence and movement of illegal firearms.

ALHR considers that mandatory sentencing **offends basic notions of human rights, justice and the rule of law**, and is **inappropriate for a modern democracy with an independent judiciary**. The existence of an independent, impartial and competent judiciary is an essential component of the rule of law.²⁷

Recommendation

ALHR recommends that the Government abandon the proposal to introduce mandatory minimum sentences for firearms trafficking offences and the Bill be amended to remove Schedule 6 in its entirety.

²⁵ Nicholas Cowdery AM QC, Mandatory Sentencing, Sydney Law School Distinguished Speakers Program 15 May 2014 page 12 available at http://sydney.edu.au/law/events/2014/May/DSP_Cowdery15052014.pdf

²⁶ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Illicit_firearms/Report

²⁷ *ibid*, p.17