



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South NSW 1235
tas@alhr.org.au
www.alhr.org.au

8 May 2017

Matthew Groom MP
Acting Attorney General
10th Floor, Executive Building,
15 Murray Street,
Hobart TAS 7000

Via email: matthew.groom@parliament.tas.gov.au

Dear Minister Groom

RE: Sentencing Amendment (Mandatory Sentences for Serious Sexual Offences Against Children) Bill 2017

Australian Lawyers for Human Rights (**ALHR**) is writing to express concern at the Sentencing Amendment (Mandatory Sentences for Serious Sexual Offences Against Children) Bill 2017 tabled in Parliament yesterday.

ALHR recognises the gravity of child sex offences and the very serious enduring harm they cause to victims.

However, the use of mandatory minimum prison terms cannot be supported and is contrary to the express recommendations of two of Tasmania's respected law reform and advisory bodies, the Tasmanian Law Reform Institute and the Tasmanian Sentencing Advisory Council.

Mandatory minimum sentencing is not supported by evidence, and has not been shown to have a deterrent effect or reduce rates of offending.

A 2008 report by the Victorian Sentencing Advisory Council found that the "empirical basis for marginal deterrence is disputed", concluding that "there is little evidence to suggest a more serious penalty is a better deterrent than a less severe penalty".¹

The Tasmanian Law Reform Institute echoed this finding, stating unequivocally in its 2008 report:

The Institute's view is that mandatory minimum penalties for rape or sexual offences are inappropriate. They can lead to injustice because of inflexibility, they redistribute

¹ Dr Adrian Hoel, Dr Karen Geib, (2008), *Sentencing Matters: Mandatory Sentencing*, Victorian Sentencing Advisory Council, p14

discretion so that the (less visible) decisions by the police and prosecuting authorities become more important, they lead to more trials as offenders are less likely to plead guilty and there is little basis for believing that they have any deterrent effect on rates of serious crime.²

The evidence base for mandatory minimum prison terms is critical, when such sentencing regimes impose arbitrary restrictions on judicial discretion and independence, and undermine fundamental human rights and rule of law principles upon which our society and legal systems are based.

ALHR notes that the Tasmanian Sentencing Advisory Council made explicit recommendations that instead of mandatory sentences, increases to maximum penalties for certain offences be explored.³

It is apparent that this proposed legislation is not supported by evidence, and is in fact contrary to the recommendations of two of the State's leading legal advisory bodies.

These reasons alone should be sufficient for the Government to withdraw the Bill.

Mandatory minimum prison terms are also not supported by ALHR because they are fundamentally inconsistent with the rule of law, breach international human rights standards and 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.

The rule of law relies on the expertise of judges in weighing sentencing considerations. It is not parliament's role to intervene in this process. Indeed, the judiciary is the independent and impartial expert body upon which the rule of law is based. The judiciary is best-equipped to undertake the all-important balancing exercise in sentencing having regard to the full set of factors: specific and general deterrence, rehabilitation and retribution, the seriousness of the offence and the particular circumstances of the case⁴.

The mandatory minimum sentencing provisions proposed represent a legislative incursion into an area constitutionally reserved for judicial discretion. In ALHR's view these matters raise concerning implications for the independence of the judiciary and more broadly for the rule of law. They violate the principle that justice should be delivered on an individualised basis and offend the principle of proportionality in sentencing. □Justice requires a proper consideration of all the circumstances of the offence and the offender.

We are not alone in this view. 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."⁵

² Tasmanian Law Reform Institute (2008), *Sentencing: Final Report No 11*, p41.

³ Sentencing Advisory Council (2015), *Sex Offences Sentencing Final Report*; and Sentencing Advisory Council (2016) *Mandatory Sentencing for Serious Sex Offences Against Children Final Report No. 7*.

⁴ Sentencing Advisory Council (2015), *Sex Offences Sentencing Final Report*, at 2.3.1, p11.

⁵ 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 □

Mandatory minimum sentencing is also contrary to the right to be free from arbitrary detention and the right to a fair trial, guaranteed by Articles 9(1) and 14(1) of the *International Covenant on Civil and Political Rights (ICCPR)*, to which Australia is a party. It is generally accepted by legal academics and practitioners that 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.

Furthermore, mandatory minimum prison terms 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." 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. To effectively protect the right to appeal, the appeal court cannot limit the scope of trial to the legal issues.

We note also that it is widely acknowledged that mandatory sentencing regimes have a counterproductive effect on the costs of the administration of justice. The provisions proposed to be established by your Government 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'. This means that potentially more contested cases will appear before the courts requiring the use of extra resources without the delivery of any evidence based benefit to the community.

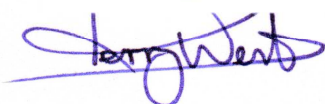
ALHR submits that the setting of maximum penalties is sufficient to guide the sentencing of offenders in individual cases in that maximum penalties allow the Executive to indicate the seriousness of the offence, while also allowing judicial officers appropriate flexibility in sentencing individuals.

We call on the Government to abandon this Bill in its entirety.

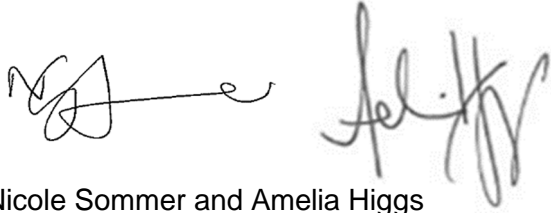
Yours faithfully



Benedict Coyne,
President ALHR
president@alhr.org.au



Kerry Weste,
Vice President ALHR
vicepresident@alhr.org.au

Two handwritten signatures in black ink. The first signature on the left is for Nicole Sommer, and the second on the right is for Amelia Higgs.

Nicole Sommer and Amelia Higgs
Tasmanian Convenors

Australian Lawyers for Human Rights (ALHR) was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.