



AUSTRALIAN
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2 August 2018

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Dear Attorney-General

RE: Justice Legislation Miscellaneous Amendment Bill 2018

Australian Lawyers for Human Rights (**ALHR**) writes to express its strong opposition to your Government's proposals in the *Justice Legislation Miscellaneous Amendment Bill 2018 (the Bill)*¹ to elevate injury offences against on-duty emergency workers, custodial officers and youth justice custodial workers (**exposed workers**) to Category 1 offences that are subject to a mandatory minimum custodial sentence or other custodial order, and to narrow the 'special reasons' exceptions. We are concerned that these complex legislative measures are being introduced without sufficient or effective consultation with the community.

¹ *Justice Legislation Miscellaneous Amendment Bill 2018* cl 72(1), amending *Sentencing Act 1991 (VIC)* section 3(1)

ALHR endorses the concerns raised by the Law Institute of Victoria (**LIV**) in its correspondence to you dated 20 July 2018² being:

- *“The introduction of mandatory custodial sentences and the removal of special reasons to protect exposed workers from harm is not justified.*
- *Several provisions of the Bill likely contravene the Victorian Charter of Human Rights and Responsibilities (‘the Charter’).*
- *The Bill disproportionately affects vulnerable members of the community, including young people and those that engage with Victoria Police.*
- *An increase in funding for the justice system, including Court funding and legal assistance funding, will be necessary to meet the increased demand resulting from the implementation of this Bill.*
- *The changes to the committal process may result in delays, increased expenses and a lack of procedural fairness for those within the criminal justice system.*
- *Any delay in cross-examination of witnesses before trial in certain sexual offence cases may deny procedural fairness and the impact of the removal of the Basha procedure is unclear.”³*

ALHR is strongly opposed to mandatory minimum prison terms on the basis that such sentencing regimes impose unacceptable restrictions on judicial discretion and independence, and undermine fundamental human rights and rule of law principles.

ALHR expresses its concern regarding section 75 of the Bill which provides for mandatory sentencing through statutory minimums and other custodial orders. We also strongly oppose the removal of the special reasons for psychosocial immaturity, impaired mental functioning caused by alcohol or drugs, and the consideration of reasonable prospects for rehabilitation for those aged 18 to 21 years of age under section 10A of the *Sentencing Act 1991*.

ALHR notes that the Victorian Government has not included an override declaration with the Bill under section 31 of the Charter.⁴

Whilst ALHR notes the declarations made in the Government’s Statement of Compatibility⁵, in our view the measures are inconsistent with the Charter, violate Australia’s international legal obligations and create a significant risk of sentences that are disproportionate to the offending behaviour. The measures are not proportionate and we share the view of the LIV that *“there is no direct relationship between mandatory sentencing and protecting exposed workers, and there are less restrictive means reasonably available to achieve the purpose of the limitations.”*⁶

² LIV Letter: [https://www.liv.asn.au/getattachment/Staying-Informed/Submissions/submissions/July-2018-\(1\)/Letter-to-Attorney-General-on-mandatory-sentencing/20180720_LET_AG_JusticeLegislationMiscellaneousAmendmentBill_FINAL.pdf.aspx](https://www.liv.asn.au/getattachment/Staying-Informed/Submissions/submissions/July-2018-(1)/Letter-to-Attorney-General-on-mandatory-sentencing/20180720_LET_AG_JusticeLegislationMiscellaneousAmendmentBill_FINAL.pdf.aspx)

³ Ibid p1-2

⁴ *Charter of Human Rights and Responsibilities Act 2006*

⁵ Parliament of Victoria *Legislative Assembly Daily Hansard*, Thursday 21 June 2018, 11.

⁶ LIV Letter Op.Cit.p2

Any legislation which impinges upon human rights must be narrowly framed, proportionate to the relevant harm it addresses, and provide an appropriate contextual response which minimises the overall impact upon all human rights.

Human rights implications

In ALHR's view the Bill unreasonably limits the right to be free from cruel, inhuman and degrading punishment and the right to be free from arbitrary detention which are legislated in Victoria pursuant to section 10(b) and section 21(2) and (3) of the Charter.⁷ As expressed by the LIV, "*an assault that would ordinarily be considered a low-level offence and tried summarily will be elevated to the same category as rape and murder. The behaviour exhibited in these offences should not be considered comparable and the sentencing options available to judges ought to reflect this difference.*"⁸

By limiting judicial discretion and not allowing judges to consider the circumstances of the offence, the Bill disproportionately limits the Charter right to a fair hearing.⁹

The Bill is inconsistent with section 8(3) of the Charter which guarantees the right to equality and equal protection before the law. It removes an offender's right to have their matter tried summarily¹⁰ whereas this option is open to other offenders who have been convicted of the same offence against a person who is not an exposed worker.

Section 17(2) of the Charter recognises the rights of children to protection that is in their best interests and is needed by reason of their status as a child.¹¹ Both the Charter¹² and the United Nations Convention on the Rights of the Child (**CRC**)¹³ oblige your Government to ensure that children only be detained as a measure of last resort. Yet the Bill introduces a requirement for higher courts to have regard to the existence of the statutory minimum sentencing provisions when sentencing children between the ages of 16 and 17 years.¹⁴

Further, the mandatory minimum sentencing provisions proposed are inconsistent with Australia's obligations under Articles 9 and 14 of the International Covenant on Civil and Political Rights (**ICCPR**).¹⁵ By being arbitrarily fixed in advance, mandatory sentences constitute arbitrary detention contrary to Article 9(1) of the ICCPR. Further, by removing the power of an appeal court to impose a lesser sentence, they effectively deprive persons of the right to have their sentences reviewed by a higher tribunal, contrary to Article 14 of the ICCPR.¹⁶

⁷ *Charter of Human Rights and Responsibilities Act 2006* s10(b)

⁸ LIV Letter Op.Cit "for example, injury under s 18 of the *Crimes Act 1958* will be considered a Category 1 offence. Injury in this provision includes unconsciousness, substantial pain and impairment of bodily function" p3.

⁹ *Charter of Human Rights and Responsibilities Act 2006* s. 24(1)

¹⁰ *Justice Legislation Miscellaneous Amendment Bill 2018* cl 72(1), amending *Sentencing Act 1991 (VIC)* section 33

¹¹ *Charter of Human Rights and Responsibilities 2006 (VIC)* s 17(2).

¹² *Charter of Human Rights and Responsibilities 2006 (VIC)* section 23(3)

¹³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 37(b).

¹⁴ *Justice Legislation Miscellaneous Amendment Bill 2018* cl 3 and cl 75(9), amending *Children, Youth and Families Act 2005 (VIC)* section 586, and inserting *Sentencing Act 1991 (VIC)* section 5(2J)

¹⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

¹⁶ Nicholas Cowdery AMQC, 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

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 ICCPR and urged Australia to reassess legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.¹⁷

In ALHR's view any 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. Mandatory sentencing provisions therefore breach Australia's obligations under 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. Mandatory minimum sentencing provisions represent a legislative incursion into an area traditionally reserved for judicial discretion with 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.*"

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.¹⁸

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."*¹⁹

We note that the right to a fair trial is not only a fundamental human right but a key prerequisite to a healthy democracy.

¹⁷ United Nations Human Rights Committee, *Concluding Observations on Australia* in 2000(2000) UN doc A/55/40, paragraph 522.

¹⁸ Av. Australia, Communication No.560/1993,U.N.Doc.CCPR/C/59/D/560/1993 (30 April 1997)

¹⁹ 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#Head> in g140

Unjust outcomes

Clause 75(8) of the proposed measures expressly prevents judges from exercising judicial discretion and giving adequate weight to the personal circumstances, previous good behaviour or prospects of rehabilitation of the offender in favour of general deterrence and denunciation.²⁰

Judicial discretion is critical to ensuring the integrity of our criminal justice system and if passed the Bill 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 an 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.”²¹

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.²²

If the Courts are unable to exercise discretion in sentencing, there will be no difference in outcomes despite significant differences in circumstances. For example, a young person with a clean record and a very low level of involvement in the subject offence will receive the same sentence as a person with a much higher level of seniority in the criminal endeavour. ALHR notes that where more than one offender is involved in the commission of an offence, a normal and proper consideration of sentencing involves an inquiry into the degree of participation of the offender in the offence.²³

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

²⁰ Justice Legislation Miscellaneous Amendment Bill 2018 cl 75(8).

²¹ 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.

²² 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/migrationamendment_2012/report/~media/wopapub/senate/committee/legconcte/completed_inquiries/2010-13/migration_amendment_2012/report/report.ashx

²³ *Lowe v The Queen*(1984)154CLR606 per Gibbs CJ at 609;*Pastras v The Queen*(1993) 65A Crim R 584 at 588.

seriousness of the offence, while also at the same time allowing judicial officers appropriate flexibility in sentencing individuals.²⁴

It is ALHR's view that the mandatory minimum penalties proposed by the 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 as to effectively remove it 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 the discretion is exercised by police and prosecutors when determining the charges that will be pursued against individual offenders.

Violation of established principles of common law

ALHR is also of the view that mandatory minimum sentencing regimes 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.²⁵

The protective safeguards in the Bill's special reasons exceptions²⁶ are too narrow to protect vulnerable persons and violate the long-held common law principle that justice be delivered on an individualised basis according to the circumstances of the offence and the offender.

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. Mandatory sentencing regimes remove the incentives for offenders to assist authorities with investigations (which would otherwise occur in the expectation that such assistance will be taken into account in sentencing).

Further, mandatory sentencing regimes ultimately operate in practice as an incentive for defendants to plead 'not guilty', as the only prospect of serving less than the mandated term is an acquittal. This means that potentially more contested cases will appear before the courts, requiring the use of extra resources and involving additional public cost.

²⁴ Legal Aid NSW Submission to the Legal and Constitutional Affairs Legislation Committee March 2012

²⁵ *Veen v The Queen (No2)* 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].

²⁶ *Justice Legislation Miscellaneous Amendment Bill 2018* cl 75.

Constitutional issues

In ALHR's view mandatory minimum penalties have the potential to undermine the separation of powers. To have the legislature pronouncing blanket sentences for all offenders in relation to a particular offence or crime is inconsistent with the division of responsibilities between the executive, the legislature and judiciary and clearly 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.²⁷

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 that mandatory minimum sentencing has been shown to have no general deterrent effect on offending, it would seem that the significant risks of injustice that result from such provisions far outweigh any practical benefits. 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".²⁸

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 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."*²⁹

Police and protective services officers

ALHR shares the grave concerns of the LIV that police officers, protective services officers, custodial workers and youth custodial workers will be considered an 'emergency worker' under the Bill.³⁰

"It is a significant conflict of interest that under the Bill, police will have the capacity to charge an alleged offender with 'assault' with a mandated, six-month jail sentence as the

²⁷ 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.

²⁸ Dr Adrian Hoel, Dr Karen Geib, (2008), *Sentencing Matters: Mandatory Sentencing*, Victorian Sentencing Advisory Council, p14

²⁹ Tasmanian Law Reform Institute (2008), *Sentencing: Final Report No 11*, p41.

³⁰ LIV Letter Op.Cit. p7 and *Sentencing Act 1991* s 10AA

*consequence. This will significantly deter people from complaining about police misconduct. The legislation has been drafted to remove any nuance or recognition of severity of alleged offending. The legislation refers to 'reckless injury' which could be interpreted to mean a scratch, bruise or even just physical contact between two parties, police and the community member. In Victoria, police accountability mechanisms are weak and do not function effectively as police investigate police. Independent and effective oversight of police becomes even more critical where mandatory sentencing applies.*³¹

Conclusion

There is little evidence that mandatory minimum sentences are effective and moreover they 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. 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.³²

Any legislation which impinges upon human rights must be narrowly framed, proportionate to the relevant harm it addresses, and provide an appropriate contextual response which minimises the overall impact upon all human rights. ALHR is concerned that the Bill does not strike the right balance

About ALHR

ALHR was established in 1993 and is a national association of more than 800 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 Specialist National Thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Yours faithfully



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³¹ Ibid p7

³² Nicholas Cowdery AMQC, 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 p.17