UNIVERSITY OF CANBERRA
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28 September 2017

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

BY EMAIL

Dear Secretary,

Re: Inquiry into Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 [Provisions] (Cth)

Thank you for the opportunity to provide this submission on the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 [Provisions] (Cth) (the Bill) to the Senate Legal and Constitutional Affairs Committee (the Committee).

I am an Associate Professor and the Head of the School of Law and Justice at the University of Canberra. I am a member of the ACT Law Reform Advisory Council, the ACT Justice Reinvestment Advisory Group, the ACT Law Society Criminal Law Committee and the management committee of Prisoners Aid ACT. I am also the Sentencing Editor of the *Criminal Law Journal* and the Australian/New Zealand representative on the editorial board of the *International Journal of Offender Therapy and Comparative Criminology*. I have published extensively on a range of criminal justice issues, including sentencing, parole and responses to sex offending. A list of my key publications on these issues is set out in the Appendix.

The provisions of the Bill raise a number of issues. The principal concern relates to the proposal to introduce minimum sentences in Schedule 6 (proposed s 16AAA of the *Crimes Act 1914* (Cth)). As discussed in my forthcoming chapter with the former President of the Australian and New Zealand Society of Criminology, Professor Rick Sarre (Bartels and Sarre, forthcoming), there are numerous arguments against mandatory sentencing laws (see Cowdery, 2014; Law Council of Australia, 2014; Roth, 2014). In such circumstances, judicial

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officers, when presented with prescribed mandatory sentences, are unable to apply the generally accepted sentencing principles of proportionality, parsimony, and totality. Accordingly, judicial discretion and independence, the separation of powers, and the rule of law are undermined. Discretion is also transferred to other, less transparent, parts of the criminal justice system. At the same time, there is little incentive for defendants to cooperate with police, or to plead guilty, thereby increasing workloads, delays, costs, and adverse experiences for victims. In court, juries may be reluctant to convict, knowing the minimum sentence; that is, they may be unwilling to be a party to a guaranteed outcome. In addition, these laws arguably violate international law; indeed, the Law Council of Australia (2014) has suggested that such laws may breach the prohibition against arbitrary detention under Article 9 of the International Covenant on Civil and Political Rights (ICCPR), as well as the right to a fair trial and the provision that prison sentences must, in effect, be subject to appeal (Article 14 ICCPR). The ICCPR entered into force for Australia in August 1980.

It has also been suggested that these laws impact disproportionately on women and Indigenous peoples (as well as juveniles, who I note are exempt from the scope of the proposed section 16AAC(1)). For example, the UN Committee Against Torture has expressed concern about the disproportionate impact of these laws on Indigenous peoples and recommended that the laws be abolished (for discussion, see Law Council of Australia, 2014). These particular groups are already more vulnerable than non-Indigenous adult male offenders—who comprise the majority of offenders—and mandatory sentencing laws preclude consideration of relevant mitigating factors. In this context, it is worth noting that the inquiry by the Australian Law Reform Commission (the ALRC) into incarceration rates of Aboriginal and Torres Strait Islander Peoples is currently considering this issue, asking in its Discussion Paper:

> Noting the incarceration rates of Aboriginal and Torres Strait Islander people:
> (a) should Commonwealth, state and territory governments review provisions that impose mandatory or presumptive sentences; and
> (b) which provisions should be prioritised for review? (ALRC, 2017: Question 4-1).

The ALRC took the opportunity to 'reiterate…its previous opposition to mandatory sentencing' (2017: 80).

In addition, mandatory sentences are regarded as ineffective as a crime prevention tool, while other, less costly, options can achieve the same objectives. Specifically, such laws are designed to 'get tough' on crime, notwithstanding the fact that prison is vastly more expensive than community-based sentencing options. The Productivity Commission (2017) estimated the 2015-16 daily total cost of imprisonment at $210 per prisoner, compared with $21 for community corrections. There is also evidence that prison is no more effective than non-custodial alternatives in terms of deterrence (see eg Ritchie, 2011; Trevena and Weatherburn, 2015).

I also note that the proposed increases to sentences would have disproportionate impacts, given the current legislative maximum sentences which they seek to amend. Specifically, the Bill proposes to increase the maximum penalties for a range of offences by three years. This does not appear to be done in any principled way with respect to the existing penalties. For example, the maximum sentence for an offence under section 471.26 of the *Criminal Code 1995* (Cth) would be increased from seven to 10 years, an increase of 43%, while the increase in the maximum penalty from 15 to 18 years for an offence under s 272.9 would amount to an increase of 20%. In addition, the proposed increase under s 474.25 from 100 penalty units to 800 penalty units would seem to be out of all proportion to the gravity of the offence. Furthermore, as noted below, there have not been *any* sentences imposed under this provision, so it can hardly be said that the current penalty is inadequate.

If the objective of the minimum sentences is to promote consistency, then the proposed model is unlikely to achieve this, given that it relates only to the 'head' sentence and not the non-parole period (see Explanatory Memorandum to the Bill, 2017: 10). There will therefore be the potential for *reduced* consistency, given the lack of any relationship (whether set by Parliament or court practice) between the head sentence and non-parole which would ensue following the proposed amendments.

The Explanatory Memorandum to the Bill states that the Commonwealth Director of Public Prosecutions 'currently appeals a high number of child sex offending cases due to manifestly inadequate sentences imposed by judges' (2017: 7). Examination of the Commonwealth Sentencing Database (CSD) reveals, however, that several of the offences which are proposed to attract increased penalties have not in fact resulted in any sentences to date. Significantly, there are no cases listed in the CSD for offences under sections 272.9, 471.25, 471.26 and 474.25 of the *Criminal Code 1995* (Cth). The CSD also records small numbers of cases for offences under sections 252.15 (n=1 between 1 July 2012 and 30 June 2017) and 474.25A (n=9).

The proposal in Schedule 1 to introduce a provision for the Attorney-General to revoke parole 'without giving notice to the person' (see proposed s 19AU(3)(b)) is objectionable on the grounds of procedural fairness. In this context, it is timely for the Government to revisit the Commission's recommendations in its inquiry on federal sentencing, most of which have not yet been implemented. Specifically, the Commission recommended

> the establishment of a federal parole authority to make parole-related decisions about federal offenders. … *In the course of the Inquiry there was strong support for the principle that decisions in relation to parole should be made by a body independent of the political arm of government. This was on the basis that, because such decisions affect an individual's liberty, they should be made, and be seen to be made, through an independent, transparent and accountable process and in accordance with high standards of procedural fairness* (ALRC, 2006: 24; emphasis added).

I also note the proposal to limit courts' ability to credit 'clean street time', making it merely discretionary for them to do so (proposed s 19AQ(4)(b)). This is in direct conflict with the Commission's recommendation in its *Same Crime* report that 'Federal sentencing legislation should provide that "clean street time" is to be deducted from the balance of the period to be served following revocation of parole or licence' (ALRC, 2006: Recommendation 24-4).

I hope these comments are of assistance to the Committee. I am happy to expand on anything in this submission as required.

Yours sincerely

Lorana Bartels

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Appendix A: Selected publications on sentencing, parole and sex offences

1. Bartels L, Fitzgerald R and Freiberg A, 'Public opinion on sentencing and parole in Australia' *Probation Journal*. Under review.
2. Freiberg A, Bartels L, Fitzgerald R and Dodd S, 'Parole, populism and penal policy', *QUT Law Review*. Under review.
3. Bartels L, 'HOPE Probation: A new path to desistance?', *European Journal of Probation: Special Issue on Innovation*. Under review.
4. Blackley R and Bartels L, 'The sentencing and treatment of juvenile sex offenders in Australia', *Trends and Issues in Crime and Criminal Justice*. Forthcoming.
5. Bartels L and Sarre R, 'Law reform targeting crime and disorder', in R Sarre and A Deckert (eds), *Australian and New Zealand Handbook of Criminology, Crime and Justice*. Palgrave. Forthcoming.
6. Bartels L and Hopkins A, 'Sentencing' in M Worthington (ed), *ACT Law Handbook*, AustLII. Forthcoming.
7. Bartels L (2017), *Submission to the Australian Law Reform Commission Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*.
8. Bartels L (2017), *Swift, certain, and fair: Does Project HOPE provide a therapeutic paradigm for managing offenders?* Palgrave Macmillan.
9. Bartels L (2017), 'Criminal justice law reform challenges for the future: It's time to curb Australia's prison addiction' in R Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform*, ANU Press, 119-132.
10. Sarre R and Bartels L (2017), 'Tougher national parole laws won't end the violence', *The Conversation*, 7 June.
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19. Bartels L (2016), 'Sentencing snapshot No 2: Common assault', ACT Government, 6 pp.
20. Bartels L (2016), 'Sentencing snapshot No 3: Assault occasioning actual bodily harm', ACT Government, 3 pp.
21. Bartels L (2016), 'Sentencing snapshot No 4: Theft and minor theft', ACT Government, 11 pp.
22. Bartels L (2016), 'Sentencing snapshot No 5: Drug possession', ACT Government, 8 pp.
23. Bartels L (2016), 'Sentencing snapshot No 6: Drive while disqualified or suspended', ACT Government, 7 pp.
24. Bartels L (2016), 'Sentencing snapshot No 7: Burglary and aggravated burglary', ACT Government, 10 pp.
25. Bartels L (2016), 'Sentencing snapshot No 8: Damage or destroy property', ACT Government, 10 pp.
26. Bartels L (2016), 'Sentencing snapshot No 9: Contravene contravention order', ACT Government, 7 pp.
27. Bradfield R and Bartels L (2016), *Phasing out of suspended sentences*, Final report No 6, Tasmanian Sentencing Advisory Council, 148 pp.
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