



Australian  
Human Rights  
Commission

# Criminal Code Amendment (Firearms Trafficking) Bill 2015

**AUSTRALIAN HUMAN RIGHTS COMMISSION  
SUBMISSION TO THE SENATE LEGAL AND  
CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

6 January 2016

ABN 47 996 232 602  
Level 3, 175 Pitt Street, Sydney NSW 2000  
GPO Box 5218, Sydney NSW 2001  
General enquiries 1300 369 711  
Complaints info line 1300 656 419  
TTY 1800 620 241

Australian Human Rights Commission  
[www.humanrights.gov.au](http://www.humanrights.gov.au)

## Table of Contents

<b>1</b>	<b>Introduction.....</b>	<b>3</b>
<b>2</b>	<b>Summary .....</b>	<b>3</b>
<b>3</b>	<b>Recommendations .....</b>	<b>4</b>
<b>4</b>	<b>Mandatory sentencing .....</b>	<b>4</b>
<b>4.1</b>	<b><i>Legislative history .....</i></b>	<b>4</b>
<b>4.2</b>	<b><i>Application of laws .....</i></b>	<b>5</b>
<b>4.3</b>	<b><i>Human rights issues raised by mandatory sentencing .....</i></b>	<b>7</b>
<b>(a)</b>	<b><i>Arbitrary detention .....</i></b>	<b>7</b>
<b>(b)</b>	<b><i>Inhuman or degrading treatment or punishment .....</i></b>	<b>8</b>
<b>(c)</b>	<b><i>Right to appeal against sentence .....</i></b>	<b>9</b>
<b>4.4</b>	<b><i>Canadian firearms offences.....</i></b>	<b>9</b>
<b>4.5</b>	<b><i>Mandatory minimum sentences are not effective in deterring crime ...</i></b>	<b>12</b>
<b>5</b>	<b>Increase in maximum penalty .....</b>	<b>14</b>
<b>5.1</b>	<b><i>No evidence of consultation.....</i></b>	<b>14</b>
<b>5.2</b>	<b><i>No evidence of necessity .....</i></b>	<b>15</b>
<b>5.3</b>	<b><i>Importance of consistency .....</i></b>	<b>16</b>
<b>6</b>	<b>Appendix: Penalties for unauthorised sale and purchase of a firearm or firearm parts.....</b>	<b>17</b>

## **1 Introduction**

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to its inquiry into the Australian Government’s Criminal Code Amendment (Firearms Trafficking) Bill 2015 (Cth).

## **2 Summary**

2. The Commission welcomes the opportunity to make a submission about this Bill.
3. This is the third occasion on which the Government has proposed mandatory minimum penalties for certain firearms offences. On the previous two occasions, the same provisions were rejected by the Senate. The Commission maintains that mandatory minimum sentences are inappropriate and that these provisions should be rejected again.
4. As the Commission submitted last time it was before this Committee in relation to this issue, mandatory minimum sentences run counter to the fundamental principle that punishment for criminal offences should fit the crime. By arbitrarily establishing a minimum penalty in advance for all cases of a particular type, mandatory minimums risk disproportionate outcomes in individual cases where the specified minimum is not warranted by the gravity of the offence. If the circumstances of the particular offence and offender suggest that a lesser penalty is appropriate, mandatory minimums will result in unjust outcomes.
5. In Canada, mandatory minimum penalties for certain firearms offences have been found to result in ‘grossly disproportionate’ sentences contrary to the Canadian Charter of Rights and Freedoms. Many such penalty provisions have been found to be unconstitutional. The Canadian experience shows how difficult it is to accurately describe offences in advance which will necessarily satisfy the minimum degree of seriousness to justify a mandatory minimum sentence set out in a statute.
6. In addition to the provisions relating to mandatory minimum sentences, the Government proposes to double the existing maximum penalties. The last time these provisions were considered by the Senate, a doubling of the maximum penalties was proposed by Senator Lazarus. The Government opposed those amendments. In doing so, the Parliamentary Secretary to the Attorney-General said that the Government was prepared to discuss the proposal to increase the maximum penalties for these offences but that it was necessary to ‘think seriously about the policy implications of this’ and that this ‘should involve proper consultation and consideration of its implications’.
7. The Commission considers that the Government has not adequately explained the need to double the maximum penalties for the offences referred to in this Bill. In particular, the Commission is concerned that:

- there does not appear to have been any relevant consultation with law enforcement agencies, prosecution agencies and the states and territories about the proposed increase in penalties;
- there does not appear to be any evidence that existing penalties are insufficient;
- the proposed increase to the penalties does not appear to have taken into account the penalties currently in place at state and territory level and the aim of consistent legislation as part of the national firearm law reform process.

### **3 Recommendations**

8. The Australian Human Rights Commission make the following recommendations.

#### **Recommendation 1**

The Commission recommends that the Bill not be passed.

#### **Recommendation 2**

The Commission recommends that any future proposal to increase the maximum penalty for offences in Divisions 360 and 361 of the Criminal Code be subject to consultation with law enforcement agencies, prosecution agencies and the states and territories.

### **4 Mandatory sentencing**

#### **4.1 Legislative history**

9. This is the third occasion on which the Government has proposed mandatory minimum penalties for the offences in Divisions 360 and 361 of the Criminal Code. On the previous two occasions, the proposal was rejected by the Senate.
10. The mandatory minimum penalties were first proposed in Schedule 2 of the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (Cth) (Psychoactive Substances Bill).
11. This Committee inquired into the Psychoactive Substances Bill and reported in September 2014. The Committee acknowledged the concerns raised by peak law organisation and state prosecution departments who were strongly opposed to the introduction of mandatory minimum sentences for firearms trafficking offences.<sup>1</sup> The relevant items were omitted from the Psychoactive Substances Bill following debate in Committee in the Senate.<sup>2</sup>
12. The mandatory minimum penalties were reintroduced in Schedule 6 of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (Cth) (Powers and Offences Bill).

13. This Committee inquired into the Powers and Offences Bill and reported in June 2015.<sup>3</sup> Again, the relevant items were omitted from the Bill following debate in the Senate.<sup>4</sup>

#### **4.2 Application of laws**

14. The mandatory minimum sentences would apply to offences under Divisions 360 and 361 of the Criminal Code. In broad terms, these offences prohibit:
  - a. the disposal or acquisition of a firearm or firearm part in the course of interstate conduct in Australia that constitutes an offence against a firearm law of a State or Territory;
  - b. taking or sending a firearm or firearm part interstate with the intention that it be disposed of while knowing or being reckless as to whether this would contravene a firearm law of a State or Territory;
  - c. importing prohibited firearms or firearm parts into Australia with the intention of trafficking them;
  - d. exporting prohibited firearms or firearm parts from Australia with the intention of trafficking them.
15. Each of these offences is subject to a maximum penalty of 10 years imprisonment, or a fine of \$450,000, or both.<sup>5</sup> These maximum penalties indicate the seriousness with which the Parliament regards this kind of offending.
16. If the amendments proposed in items 2 and 4 of Schedule 1 of the Bill are passed, a court convicting a person for any of these offences would be required to impose a sentence of imprisonment of at least 5 years.
17. As discussed in more detail below, the imposition of mandatory minimum sentences raises the real prospect that the sentence imposed will be disproportionate to the culpability of the offender or the gravity of the particular offence because it is set without regard to the individual circumstances of the offender and context of the particular offence.
18. The Commission recognises that there are a number of safeguards which seek to mitigate this risk in the present Bill. In particular:
  - a. a mandatory minimum sentence will not apply if the defendant establishes on the balance of probabilities that he or she was aged under 18 at the time of the offence;
  - b. there is no minimum non-parole period for these offences, so the court would retain discretion in relation to the appropriate non-parole period.
19. Further, the Explanatory Memorandum notes that the mandatory minimum sentence is not intended as a guide to the non-parole period. While an Explanatory Memorandum is not binding when it comes to the interpretation of

legislation, the position expressed is consistent with a decision of the High Court in *Hili v The Queen* in which the majority said:

There neither is, nor should be, a judicially determined norm or starting point (whether expressed as a percentage of the head sentence, or otherwise) for the period of imprisonment that a federal offender should actually serve in prison before release on a recognisance release order.<sup>6</sup>

From the context of the case, it appears likely that the same principle would apply to the setting of a non-parole period.<sup>7</sup>

20. While these safeguards are welcome, the Commission considers that the Court should retain discretion over both the head sentence and the non-parole period.
21. The imposition of an inappropriately high head sentence is not without consequences. To take only one example, if a person is sentenced to a term of imprisonment of 12 months or more but is given a substantially shorter non-parole period the person will still be taken to have a ‘substantial criminal record’ and will not pass the ‘character test’ under s 501 of the *Migration Act 1958* (Cth). This may result in the person’s visa being cancelled or an application for a visa being refused.
22. The imposition of mandatory minimum sentences appears to be inconsistent with certain aims articulated by the Government in the Explanatory Memorandum. In particular, the Government says that the changes are ‘proportionate’ because ‘they continue to support the courts’ discretion when sentencing offenders’.<sup>8</sup> If the Government was truly motivated to support the courts’ discretion in sentencing, then it would not mandate a minimum sentence that must be applied in all cases. Supporting judicial discretion would be better achieved by removing the mandatory sentencing provisions altogether. This would leave on the books serious offences with maximum penalties of 10 years imprisonment.
23. The Explanatory Memorandum also suggests that mandatory minimum sentences ‘must be carefully directed towards those whose individual culpability also justifies mandatory terms of imprisonment’.<sup>9</sup> That is precisely what mandatory minimums do not do. They are by their nature indiscriminate and apply irrespective of individual culpability.
24. In evidence given to this Committee in 2014, the Attorney-General’s Department has said that it was ‘not aware of specific instances where sentences for the trafficking of firearms or firearm parts have been insufficient’.<sup>10</sup> There does not seem to be any demonstrated need for these mandatory sentences. By contrast, where mandatory minimum sentences have been legislated in the past, judges and magistrates have reported concerns about unjust outcomes. This issue is dealt with in more detail in the Commission’s previous submission in relation to the Powers and Offences Bill.<sup>11</sup>
25. Mandatory sentences are also contrary to policy guidance given by the Attorney-General’s Department. The guidelines issued by the Attorney-

General's Department on the framing of Commonwealth offences recommends that Commonwealth offences should not carry a minimum penalty.<sup>12</sup> The reasons given by the Attorney-General's Department include that:

- a. minimum penalties can interfere with the discretion of a court to impose a penalty appropriate in the circumstances of a particular case;
- b. minimum penalties create an incentive for a defendant to fight charges, even where there is little merit in doing so;
- c. minimum penalties preclude the use of alternative sanctions available in Part IB of the Crimes Act, such as community service orders which, in particular cases, provide a more effective mechanism for deterrence or rehabilitation;
- d. the judiciary may look for technical grounds to escape restrictions on sentencing discretion when faced with minimum penalties, leading to anomalous decisions.<sup>13</sup>

26. The following sections deal in more detail with:
- a. the human rights issues raised in relation to mandatory minimum sentences;
  - b. disproportionate outcomes when mandatory sentences have been used in Canada in relation to firearms offences; and
  - c. the evidence that mandatory minimum sentences do not deter crime.

#### **4.3 *Human rights issues raised by mandatory sentencing***

27. Mandatory sentencing provisions have the potential to engage articles 7, 9 and 14 of the *International Covenant on Civil and Political Rights* (ICCPR).

(a) *Arbitrary detention*

28. Article 9(1) of the ICCPR prohibits the arbitrary deprivation of liberty. It provides that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

29. The United Nations Human Rights Committee has held that 'arbitrariness' is not to be equated with 'against the law'; it must be interpreted more broadly to include such elements as inappropriateness, injustice and lack of predictability.<sup>14</sup> This interpretation has been affirmed by the High Court of Australia.<sup>15</sup>

30. If a sentence is fixed in advance without regard to the circumstances of the offence and the offender, and the court is not permitted to make an assessment of whether such a sentence is appropriate, then the sentence is bound to be arbitrary. There will be no rational or proportionate correlation between the deprivation of liberty and the particular circumstances of the case.
31. If a minimum sentence is fixed in advance, this is likely to cause injustice in a proportion of cases. As discussed in more detail in relation to the Canadian cases dealing with mandatory sentences for firearms offences, it is extremely difficult to state an offence in general terms and accurately predict in advance that all conduct that meets that description will be of a minimum degree of seriousness.
- (b) *Inhuman or degrading treatment or punishment*
32. Article 7 of the ICCPR prohibits inhuman or degrading treatment or punishment. In the United States<sup>16</sup> and Canada,<sup>17</sup> both countries with constitutional Bills of Rights, their highest courts have struck down mandatory sentencing provisions as unconstitutional where they were ‘grossly disproportionate’ to the gravity of the particular offence on the basis that such sentences amounted to inhuman or degrading punishment.
33. The most recent decision by the Supreme Court of Canada was *R v Nur*, which was handed down in April 2015. The court held that a mandatory sentence of 3 years for possessing a prohibited or restricted firearm when the firearm is loaded or kept with readily accessible ammunition was ‘grossly disproportionate’ in a range of reasonably foreseeable cases. For example, the offence would apply to a licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake about where it can be stored. The Court held that the relevant provision was unconstitutional.
34. Australia does not have a constitutional Bill of Rights and the High Court has recently held that mandatory minimum sentences are not unconstitutional.<sup>18</sup> However, that does not answer the question of whether or not such provisions are good public policy. As former Chief Justice of the High Court, Barwick CJ said in *Palling v Corfield*:
- It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.<sup>19</sup>
35. The key concept of proportionality was clearly explained by the Constitutional Court of South Africa in *S v Dodo*. In that case, the Court considered the validity of a law that provided for imprisonment for life for particular offences unless the court was satisfied that ‘substantial and compelling circumstances’ existed.<sup>20</sup> The Court said:



In the field of sentencing ... it can be stated as a matter of principle, that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional state.<sup>21</sup>

36. The court held that ‘the concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading’. Further:<sup>22</sup>

To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ... the offender is being used essentially as a means to another end and the offender’s dignity assailed.<sup>23</sup>

(c) *Right to appeal against sentence*

37. Article 14 of the ICCPR establishes certain procedural guarantees in civil and criminal trials. Relevantly, article 14(5) of the ICCPR provides that:

Everyone convicted of a crime shall have a right to his conviction and sentence being reviewed by a higher tribunal according to law.

38. A mandatory minimum sentence infringes this right by restricting the review of a sentence on appeal to a higher court.

#### **4.4 Canadian firearms offences**

39. Courts in Canada have found mandatory sentencing provisions for a range of firearms offences including possession and trafficking to be invalid, by applying human rights principles based on the Canadian Charter of Rights and Freedoms. The primary basis for invalidity is that the mandatory minimum would have produced a result that was grossly disproportionate to the gravity of the offence.
40. While Australia does not have an equivalent Bill of Rights, these cases demonstrate the disproportionate impacts that can occur when a mandatory minimum sentence for an offence couched in general terms meets specific circumstances where that minimum is inappropriate.
41. The examples set out below involve offences under Canada’s *Criminal Code*. The elements of those offences differ in some respects from the offences in Divisions 360 and 361 of the Commonwealth *Criminal Code* which are the subject of the amendments proposed in the present Bill. The purpose of setting out these Canadian examples is not to suggest that the offenders would be found guilty of offences under Divisions 360 and 361 if they were prosecuted in Australia. Rather, it is to indicate that similar offences in a similar legal system capture a very broad range of conduct and that setting

minimum sentences in advance can have unintended consequences when offences at the lower end of the range are prosecuted.

### **Case study 1: Mr Leroy Smickle**

According to the trial judge Mr Smickle found a gun in his cousin's apartment and was 'showing off' by using his laptop to take a photograph of himself holding the gun 'for the benefit of his friends on Facebook' when a raid of the apartment was conducted by police.<sup>24</sup>

Mr Smickle was convicted of possession of a loaded prohibited or restricted firearm, which carried a mandatory minimum sentence of three years for a first offence.

The trial judge considered that if there was no mandatory minimum, the appropriate sentence would be imprisonment for one year. This took into account the fact that the defendant was a young, first-time offender, who cooperated fully with police. Her Honour said that although possession of a loaded firearm was a serious matter, 'typically, it is the circumstances in which the gun is possessed, and what is done with the gun, that give rise to the more serious concerns affecting community safety'.

Mr Smickle challenged the constitutional validity of the mandatory minimum sentence, arguing that it was arbitrary (in violation of s 7 of the Charter), and constituted cruel and unusual punishment (in violation of s 12). He was successful at first instance and on appeal to the Court of Appeal for Ontario.<sup>25</sup>

### **Case study 2: Mr Christopher Lewis**

Mr Lewis was charged with firearms trafficking and three counts of trafficking in cocaine.<sup>26</sup> The Criminal Code made it an offence with a mandatory three year minimum to transfer *or offer to transfer* a firearm or ammunition to a person unless authorised to do so under the *Firearms Act*.

Mr Lewis had made representations to an undercover police officer that he would be able to arrange the purchase of a handgun, after the officer had 'raised the security and protection problems faced by them as drug dealers'.

The judge found that Lewis had only offered to supply a gun in order to keep the undercover officer interested in Lewis' services as a drug supplier. Mr Lewis never had access to a gun and never had any intention of carrying through with the offer to sell a gun to the officer.

While Mr Lewis had prior convictions, the judge considered the impact that the mandatory sentencing regime would have on a lower level offender:

"The offender could hypothetically be a youthful individual with no criminal record or youth antecedents and engages in similar behavior to Mr Lewis and

similarly has no gun, access to a gun or intention of transferring one. He could commonly be selling marihuana instead of cocaine. On any subjective or objective assessment ... I am satisfied that a three year penitentiary sentence for such a youthful first offender for making such a hollow offer would be grossly disproportionate and further at a level that would outrage community standards of decency.”

The Court held that the three year mandatory minimum penalty for the firearms trafficking offence amounted to cruel and unusual punishment inconsistent with article 12 of the Charter and was therefore unconstitutional.

### **Case study 3: Mr John Laponsee**

Mr Laponsee was a 48 year old man with no criminal history.<sup>27</sup> He had owned a .22-caliber Smith and Wesson for 15 years. At some point he had a possession license for a restricted weapon but it had expired.

The gun was at the home of Mr Laponsee’s mother, close to Ottawa. Mr Laponsee lived in Calgary. He had been visiting his mother and decided to bring the gun with him when he returned home to Calgary. He was arrested at the Ottawa airport when his luggage was screened and the gun was located in it. The screening officers found the unloaded gun along with an empty clip and a box of bullets wrapped in tin foil and sandwiched between two vintage license plates.

Mr Laponsee was convicted of a number of weapons offences including possessing a prohibited or restricted weapon with ammunition, which carried a 3 year mandatory minimum penalty.

42. A range of mandatory minimum sentences, particularly for firearms offences, have been successfully challenged in lower courts in Ontario, British Columbia, Manitoba and Alberta as being inconsistent with the Canadian Charter of Rights and Freedoms. Several Crown appeals against judgments to intermediate courts of appeal have been unsuccessful.

43. In one of these cases, Justice Lamoreaux in the Provincial Court of Alberta said:

Mandatory minimum penalties do not advance proper sentencing principles set forth in s. 718 of the *Criminal Code*, they do not advance any realistic goal of deterrence, they do not target dangerous offenders but rather catch in their net a very broad spectrum of citizens. Mandatory minimum penalties have an egregious impact on the groups who are already over represented in the Canadian penal system. The Court agrees wholeheartedly with the representations and submissions made by the Criminal Justice Section of the Canadian Bar Association to the standing committee when Bill C-10 was in consideration at the Committee stage. In a free and democratic society every

individual deserves to be considered as an individual before the Court in a criminal case.<sup>28</sup>

44. As noted above, in *R v Nur*, the Supreme Court of Canada confirmed that mandatory minimum sentence of 3 years for possessing a prohibited or restricted firearm when the firearm is loaded or kept with readily accessible ammunition was ‘grossly disproportionate’ in a range of reasonably foreseeable cases. As a result, the relevant provision was unconstitutional.

#### **4.5 Mandatory minimum sentences are not effective in deterring crime**

45. The Government claims in the Explanatory Memorandum to this Bill that ‘Mandatory minimum sentences, when applied to individuals convicted of serious offences, are an effective way to deter potential offenders from firearms trafficking’.<sup>29</sup> No evidence is put forward in support of this assertion. In fact, empirical evidence from jurisdictions which have sought to employ mandatory minimum sentencing suggests the opposite.

46. This issue was considered by the Supreme Court of Canada in its recent judgment in *R v Nur* [2015] 1 SCR 773. In the majority judgment, Chief Justice McLachlin said:

Empirical evidence suggests that mandatory minimum sentences do not, in fact, deter crime ... . The empirical evidence ‘is clear: mandatory minimum sentences do not deter more than less harsh, proportionate, sentences’.<sup>30</sup>

47. In reaching these conclusions, the Chief Justice referred to the following three articles:

- a. AN Doob and C Cesaroni, ‘The Political Attractiveness of Mandatory Minimum Sentences’ (2001) 39 *Osgood Hall Law Journal* 291;
- b. AN Doob and CM Webster, ‘Sentence Severity and Crime: Accepting the Null Hypothesis’ (2003) 30 *Crime and Justice* 143;
- c. M Tonry, ‘The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings’ (2009) 38 *Crime and Justice* 65.

48. The last two of these are the most significant in terms of analysing empirical evidence across a range of previous published studies.

49. As the President of the Commission noted in her evidence before the Committee in relation to the Powers and Offences Bill, there can be difficulties in social science in ‘proving a negative’ or establishing a null-hypothesis.<sup>31</sup> That is, it can be difficult to show that there is no significant relationship between two variables such as the level of penalties and crime rates.

50. Doob and Webster (2003) considered a body of literature over a period of 30 years, but particularly through the 1990s, on the deterrent effect of sentences. They concluded as follows:

We could find no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence. Particularly given the significant body of literature from which this conclusion is based, the consistency of the findings over time and space, and the multiple measures and methods employed in the research conducted, we would suggest that a stronger conclusion is warranted. More specifically, the null-hypothesis that variation in sentence severity does not cause variation in crime rates should be conditionally accepted.<sup>32</sup>

51. Some of the most significant results that Doob and Webster refer to related to the well-publicised introduction of ‘three strikes’ laws in a number of states in the United States in the early 1990s. The combination of a sudden change to significantly higher mandatory minimum penalties in a number of jurisdictions along with a high level of publicity provided the ideal conditions to test whether harsher penalties deter crime. This is what is sometimes referred to in economics literature as a ‘natural experiment’. The result was that there was no decrease in felony rates attributable to the change in policy, and that violent crime in states that did not adopt three strikes laws fell nearly three times as fast as violent crime in states that did adopt such laws.<sup>33</sup>
52. Accepting that higher sentences do not reduce crime may seem counter-intuitive if people are acting rationally. However, the authors provide some explanation for this effect by describing the preconditions for higher sentences to have an impact on a person’s decision to commit a crime:
  - a. the person must believe that there is a reasonable likelihood that they will be caught, convicted and sentenced;
  - b. the person must know that there has been a change in the level of the penalty;
  - c. the person must be someone who will consider the penal consequences in deciding whether to commit an offence;
  - d. the person must calculate that it is ‘worth’ committing the offence for a lower level of punishment but not for the increased level of punishment.

The authors note that: ‘viewed from this perspective, the lack of evidence in favour of a deterrent effect for variation in sentence severity may gain its own intuitive appeal’.<sup>34</sup>

53. These conclusions do not mean that the criminal justice system in general does not have a deterrent effect. Rather, as Tonry (2009) concludes:

The critical question is whether marginal changes in sanctions have measurable deterrent effects. The heavy majority of broad-based reviews reach similar conclusions that no credible evidence demonstrates that increasing penalties reliably achieves marginal deterrent effects.<sup>35</sup>

54. In considering the impact of mandatory minimum sentences in particular, Tonry also examined 15 empirical studies of California’s ‘three strikes’ laws and concluded:

No matter which body of evidence is consulted – the general literature on the deterrent effects of criminal sanctions, work more narrowly focussed on the marginal deterrence hypothesis, or the evaluation literature on mandatory penalties – the conclusion is the same. There is little basis for believing that mandatory penalties have any significant effects on rates of serious crime.<sup>36</sup>

## **5 Increase in maximum penalty**

55. The Commission considers that the Government has not adequately explained the need to double the maximum penalties for the offences referred to in this Bill. In particular, the Commission is concerned that:

- there does not appear to have been any relevant consultation with law enforcement agencies, prosecution agencies and the states and territories about the proposed increase in penalties;
- there does not appear to be any evidence that existing penalties are insufficient;
- the proposed increase to the penalties does not appear to have taken into account the penalties currently in place at state and territory level and the aim of consistent legislation as part of the national firearm law reform process.

### **5.1 No evidence of consultation**

56. When the Powers and Offences Bill was being debated in the Senate on 19 August 2015, Senator Lazarus moved that the maximum penalty for the offence at s 360.3(1) of the Criminal Code (Taking or sending a firearm or firearm part across borders) be doubled from imprisonment for 10 years or a fine of 2,500 penalty units to imprisonment for 20 years or a fine of 5,000 penalty units.<sup>37</sup>

57. The Government opposed this amendment. At the time, Senator the Hon Concetta Fierravanti-Wells MP said that the Government was prepared to discuss the proposal to increase the maximum penalties for these offences but that it was necessary to ‘think seriously about the policy implications of this’ and that this ‘should involve proper consultation and consideration of its implications’.<sup>38</sup> Further, she said:

The government are open to any measures that will stop illegal guns at the border, but we need to think about the ramifications of quickly moving through an amendment without consulting with our law enforcement agencies, our prosecution agencies and the states and territories. We need to ask: will this amendment have a perverse effect? Will it result in more drawn out and expensive prosecutions where defendants are running to the most expensive senior counsel and will do all they can to avoid prosecution and a possible jail term of 20 years? Will more time be wasted in litigation appealing sentences? Will it mean, in fact, that fewer criminals end up being behind bars? How will these penalties for this offence affect sentencing in other criminal offences? These considerations are important, and we should consult on them through

the Law, Crime and Community Safety Council and the Firearms and Weapons Policy Working Group.<sup>39</sup>

58. The present Bill adopts Senator Lazarus' doubling of maximum penalties and applies it to each of the offences in Divisions 360 and 361 of the Criminal Code. It is not clear what consultations took place after 19 August 2015 about the implications of this proposed doubling of penalties.
59. The Firearms and Weapons Policy Working Group (FWPWG) brings together firearm registry managers and policy representatives from all jurisdictions (as well as the Australian Crime Commission, CrimTrac, the Australian Federal Police, the Australian Institute of Criminology and the Australian Customs and Border Protection Service), to facilitate improved national consistency in response to firearm and weapon issues.<sup>40</sup> The FWPWG reports to the Law, Crime and Community Safety Council.
60. The Law, Crime and Community Safety Council meets twice a year and most recently met on 5 November 2015. This meeting was chaired by the Attorney-General and the Minister for Justice. The communique that was published in relation to the meeting does not indicate that the question of increased penalties for firearms trafficking offences was discussed.<sup>41</sup>
61. The present Bill was introduced on 2 December 2015. The second reading speech by the Minister for Justice did not indicate that any consultations had been undertaken in relation to the proposed increased maximum penalties. Nor did it contain any discussion of the policy implications of the proposal. The only reference to the increased penalties merely asserted that they were necessary to ensure that the serious offences were matched by appropriate punishments.<sup>42</sup>
62. The Explanatory Memorandum for the Bill does not indicate that any consultations were undertaken in relation to the proposed increased maximum penalties.<sup>43</sup> Nor does it address any of the issues raised by Senator Fierravanti-Wells at the time the Government opposed the increase in maximum penalties in August 2015. The Explanatory Memorandum for this Bill contains no new analysis when compared to the Explanatory Memorandum for the previous Powers and Offences Bill.

## **5.2 No evidence of necessity**

63. As noted above, in evidence given to this Committee last year, the Attorney-General's Department has said that it was 'not aware of specific instances where sentences for the trafficking of firearms or firearm parts have been insufficient'.<sup>44</sup> That evidence was given on the basis of offences which carried a maximum penalty of 10 years imprisonment.
64. The Explanatory Memorandum has not identified any instances where sentences for the trafficking of firearms or firearm parts have been insufficient.

### **5.3 Importance of consistency**

65. The amendments to maximum penalties proposed in this Bill appear to be *ad hoc* and do not appear to have taken into account issues of consistency in reform of firearm laws.
66. Since the mass shootings that took place at Port Arthur in Tasmania in 1996, the Australian Government and state and territory governments have undertaken an extensive national firearm law reform process. This process has been guided by three national agreements:
- the National Firearms Agreement (1996)
  - the National Firearms Trafficking Policy Agreement (2002)
  - the National Handgun Control Agreement (2002).
67. The aim of these agreements was to encourage the adoption of consistent firearms legislation in all states and territories to ensure a uniform national approach to the regulation of firearms.<sup>45</sup>
68. In particular, the National Firearms Trafficking Policy Agreement recommended that states and territories introduce laws designed to restrict the illegal supply of firearms. This included expanding the scope of offences relating to unauthorised possession of unregistered firearms and prohibited or prescribed firearms, to also include the use, sale and purchase of such firearms. The process of implementing these national agreements in each state and territory is ongoing.
69. The table in the Appendix sets out relevant penalties for offences relating to unauthorised sale and purchase of a firearm or firearm parts. The penalties vary from jurisdiction to jurisdiction. A maximum penalty of 20 years applies in only one jurisdiction (New South Wales) and even there only to one type of offence (the supply of a pistol or prohibited firearm). Any proposal to change the penalties for firearms trafficking at the Commonwealth level should take into account the penalties applicable at state and territory level and should be part of a discussion with law enforcement agencies, prosecution agencies and states and territories about consistency in sentencing.

#### **Recommendation 1**

The Commission recommends that the Bill not be passed.

#### **Recommendation 2**

The Commission recommends that any future proposal to increase the maximum penalty for offences in Divisions 360 and 361 of the Criminal Code be subject to consultation with law enforcement agencies, prosecution agencies and the states and territories.



## 6 Appendix: Penalties for unauthorised sale and purchase of a firearm or firearm parts

Jurisdiction	Provisions	Maximum penalty
NSW	<p><i>Firearms Act 1996</i> (NSW)</p> <p>s 36 (sell purchase or possess unregistered firearm), s 50 (unauthorised purchase of firearm), s 50AA (unauthorised purchase of firearm parts), s 50B (giving possession of firearms or firearm parts to unauthorised persons), s 51A (purchase of firearm from unauthorised seller), s 51BA (unauthorised sale and purchase of firearm parts)</p> <p>s 51 (unauthorised supply of firearm)</p>	<p>14 years if the firearm is a pistol or prohibited firearm, or 5 years in any other case.</p> <p>20 years if the firearm is a pistol or prohibited firearm, or 5 years in any other case.</p>
Qld	<p><i>Weapons Act 1990</i> (Qld)</p> <p>ss 35 and 36 (unauthorised acquisition or disposal of a weapon)</p> <p>s 50B (unlawful supply of weapons)</p>	<p>6 months to 2 years depending on the category of weapon.</p> <p>4 years to 10 years depending on the category of weapon.</p>
SA	<p><i>Firearms Act 1996</i> (SA)</p> <p>s 14 (unauthorised acquisition or supply of firearm)</p>	<p>7 years to 15 years depending on the class of firearm.</p>

Jurisdiction	Provisions	Maximum penalty
Tas	<p><i>Firearms Act 1996 (Tas)</i></p> <p>s 10 (unauthorised acquisition of firearm); s 11 (unauthorised ‘dealing’, including manufacture, buy or sell firearm or firearm parts).</p>	2 years.
Vic	<p><i>Firearms Act 1996 (Vic)</i></p> <p>ss 93 and 94 (sale and acquisition by licensed dealers) ss 95 and 96 (sale and acquisition except to and from licensed dealers)</p>	12 months to 10 years depending on the category of firearm.
WA	<p><i>Firearms Act 1973 (WA)</i></p> <p>s 19 (unauthorised sale, disposal, delivery or purchase of firearm)</p>	3 years to 7 years (in the case of a single firearm) depending on whether convicted of a summary offence and a range of other factors.
ACT	<p><i>Firearms Act 1996 (ACT)</i></p> <p>s 177 (acquiring or disposing of unregistered firearm); ss 226 and 227 (unlawful disposal or acquisition of firearm)</p>	10 years for prohibited firearms, 5 years for any other firearm.
NT	<p><i>Firearms Act (NT)</i></p> <p>ss 62 and 63 (unauthorised purchase or sale of firearm)</p>	12 months to 2 years depending on the category of firearm.

Higher penalties apply for unauthorised acquisition and sale of multiple weapons.<sup>46</sup>

- 
- 1 Senate Legal and Constitutional Affairs Legislation Committee, *Report into the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014* (September 2014), p 22. At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Psychoactive\\_Substances\\_Bill/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Psychoactive_Substances_Bill/Report) (viewed 21 December 2015).
  - 2 Commonwealth, *Parliamentary Debates*, Senate, 9 February 2015, pp 147-148 and 155.
  - 3 Senate Legal and Constitutional Affairs Legislation Committee, *Report into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015* (June 2015). At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Power\\_and\\_Offences\\_Bill/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Power_and_Offences_Bill/Report) (viewed 21 December 2015).
  - 4 Commonwealth, *Parliamentary Debates*, Senate, 19 August 2015, pp 5725-5727 and 5811-5813.
  - 5 A penalty unit is currently \$180: *Crimes Act 1914* (Cth), s 4AA(1).
  - 6 *Hili v The Queen* (2010) 224 CLR 520 at 526 [13] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
  - 7 *Hili v The Queen* (2010) 224 CLR 520 at 528-530 [26]-[29].
  - 8 Explanatory Memorandum, Criminal Code Amendment (Firearms Trafficking) Bill 2015 (Cth), at [12].
  - 9 Explanatory Memorandum, Criminal Code Amendment (Firearms Trafficking) Bill 2015 (Cth), at [19] and [29].
  - 10 Attorney-General's Department, *Answers to questions on notice*, Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014, 27 August 2014. At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Psychoactive\\_Substances\\_Bill/Additional\\_Documents](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Psychoactive_Substances_Bill/Additional_Documents) (viewed 21 December 2015).
  - 11 Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to the Crimes Legislation Amendment (Powers Offences and Other Measures) Bill 2015 (Cth)* (16 April 2015), Annexure A. At <http://www.aph.gov.au/DocumentStore.ashx?id=4328135f-b24f-4a33-bf8c-3d9bf9ab9f82&subId=350449> (viewed 21 December 2015).
  - 12 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p 37. At <http://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx> (viewed 21 December 2015).
  - 13 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p 38.
  - 14 *Val Alphen v The Netherlands*, UN Doc CCPR/C/39/D/305/1988 (1990) at [5.8]; *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (1997) at [9.2].
  - 15 *Mabo v Queensland* (1988) 166 CLR 186 at 217 (Brennan, Toohey and Gaudron JJ).
  - 16 The Eighth Amendment of the US Constitution prohibits cruel and inhuman punishment. In *Solem v Helm* 463 US 277 (1983) the US Supreme Court held that a mandatory life sentence without the possibility of parole for a seventh non-violent felony, viz. knowingly passing a bad cheque for \$100, amounted to cruel and unusual punishment.
  - 17 Section 12 of the Canadian Charter of Rights and Freedoms provides that everyone has the right not to be subjected to cruel and unusual treatment or punishment. In *R v Smith (Edward Dewey)* [1987] 1 SCR 1045 the Supreme Court of Canada found that a mandatory minimum sentence of 7 years imprisonment for a narcotics offence was grossly disproportionate. More recently, in *R v Nur* [2015] 1 SCR 773, the Supreme Court of Canada found that a mandatory minimum sentence of 3 years imprisonment for a firearms possession offence was grossly disproportionate.
  - 18 *Magaming v The Queen* [2013] HCA 40.
  - 19 *Palling v Corfield* (1970) 123 CLR 52 at 58.
  - 20 *S v Dodo* 2001 (3) SA 382 (CC).
  - 21 *S v Dodo* 2001 (3) SA 382 (CC) at [26].
  - 22 *S v Dodo* 2001 (3) SA 382 (CC) at [36].
  - 23 *S v Dodo* 2001 (3) SA 382 (CC) at [38].
  - 24 *R v Smickle* [2012] ONSC 602.
  - 25 *R v Smickle* [2013] ONCA 678.
  - 26 *R v Lewis* [2012] ONCJ 413.

- <sup>27</sup> *R v Laponsee* [2013] ONCJ 295.
- <sup>28</sup> *R v Vandyke* [2013] ABPC 347 at [20].
- <sup>29</sup> Explanatory Memorandum, Criminal Code Amendment (Firearms Trafficking) Bill 2015 (Cth), at [19] and [29].
- <sup>30</sup> *R v Nur* [2015] 1 SCR 773 at [114] (McLachlin CJ, with whom LeBel, Abella, Cromwell, Karakatsanis and Gascon JJ concurred).
- <sup>31</sup> Commonwealth, Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, *Proof Committee Hansard*, 20 May 2015, p 23 (President Triggs).
- <sup>32</sup> AN Doob and CM Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143 at 187.
- <sup>33</sup> AN Doob and CM Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143 at 173-177.
- <sup>34</sup> AN Doob and CM Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143 at 190.
- <sup>35</sup> M Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38 *Crime and Justice* 65 at 93.
- <sup>36</sup> M Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38 *Crime and Justice* 65 at 100.
- <sup>37</sup> Commonwealth, *Parliamentary Debates*, Senate, 19 August 2015, p 5722 (Senator Lazarus).
- <sup>38</sup> Commonwealth, *Parliamentary Debates*, Senate, 19 August 2015, pp 5718 and 5725 (Senator the Hon Concetta Fierravanti-Wells MP, Parliamentary Secretary to the Attorney-General).
- <sup>39</sup> Commonwealth, *Parliamentary Debates*, Senate, 19 August 2015, pp 5718 (Senator the Hon Concetta Fierravanti-Wells MP, Parliamentary Secretary to the Attorney-General).
- <sup>40</sup> Australian Government, Department of Finance, 'Firearms and Weapons Policy Working Group' at <http://www.finance.gov.au/resource-management/governance/register/body/89301/> (viewed 21 December 2015).
- <sup>41</sup> Law, Crime and Community Safety Council, *Draft Communique*, 5 November 2015. At <https://www.ag.gov.au/About/CommitteesandCouncils/Law-Crime-and-Community-Safety-Council/Documents/5-November-2015-LCCSC-Communique.pdf> (viewed 21 December 2015).
- <sup>42</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2015, p 23 (The Hon Michael Keenan MP, Minister for Justice and Minister Assisting the Prime Minister on Counter-Terrorism).
- <sup>43</sup> Explanatory Memorandum, Criminal Code Amendment (Firearms Trafficking) Bill 2015 (Cth).
- <sup>44</sup> Attorney-General's Department, *Answers to questions on notice*, Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014, 27 August 2014. At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Psychoactive\\_Substances\\_Bill/Additional\\_Documents](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Psychoactive_Substances_Bill/Additional_Documents) (viewed 21 December 2015).
- <sup>45</sup> Australian Government, Australian Institute of Criminology, *Firearms trafficking and serious and organised crime gangs*, AIC Reports Research and Public Policy Series 116 (2012), p 6. At [http://www.aic.gov.au/media\\_library/publications/rpp/116/rpp116.pdf](http://www.aic.gov.au/media_library/publications/rpp/116/rpp116.pdf) (viewed 21 December 2015).
- <sup>46</sup> For example, see *Firearms Act 1996* (NSW) s 51B; *Weapons Act 1990* (Qld) ss 50B(1)(a) and (b) and 65; *Firearms Act 1977* (SA) s 14(7); *Firearms Act 1996* (Tas) s 110A; *Firearms Act 1996* (Vic) s 101A; *Firearms Act 1973* (WA) s 19; *Firearms Act 1996* (ACT) s 220; *Firearms Act 1996* (NT) s 63A.