

The Senate

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Legal and Constitutional Affairs  
Legislation Committee

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Criminal Code Amendment (Firearms  
Trafficking) Bill 2016

November 2016

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# Table of contents

<b>Members of the committee .....</b>	<b>iii</b>
<b>Recommendations .....</b>	<b>vii</b>
<b>Chapter 1.....</b>	<b>1</b>
<b>Introduction and background .....</b>	<b>1</b>
Referral .....	1
Conduct of inquiry.....	1
History of the bill.....	1
Treatment of minors and individuals with significant cognitive impairment .....	3
Committee view and recommendations .....	5
<b>Dissenting Report of the Australian Labor Party .....</b>	<b>7</b>
<b>Dissenting Report by the Australian Greens.....</b>	<b>9</b>
<b>Appendix 1 - Public submissions .....</b>	<b>11</b>



# **Recommendations**

## **Recommendation 1**

**The committee recommends that the Senate pass the bill.**



# Chapter 1

## Introduction and background

### Referral

1.1 On 13 October 2016, the Senate referred the Criminal Code Amendment (Firearms Trafficking) Bill 2016 to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 7 November 2016.<sup>1</sup> The Senate Selection of Bills Committee recommended that the bill be referred as it proposes changes to the criminal law which have 'a significant impact on the rights and obligations of the Australian people, including potentially the ability to see them deprived of their liberty'.<sup>2</sup>

1.2 The bill is identical to a bill introduced in the 44th Parliament that was the subject of an inquiry by this committee. Following the prorogation of the 44th Parliament, the previous bill lapsed.

### Conduct of inquiry

1.3 In accordance with usual practice, the committee advertised the inquiry on its website and also wrote to organisations inviting written submissions by 26 October 2016. The committee received 4 submissions, listed at Appendix 1. The committee did not hold a public hearing due to the short timeframe and the fact that the committee has previously considered the bill.

### History of the bill

1.4 On 3 December 2015, the Criminal Code Amendment (Firearms Trafficking) Bill 2015 was referred to the Senate Legal and Constitutional Affairs Legislation Committee (the committee). Nine submissions were received. The committee reported on the previous bill in February 2016.

1.5 In the 44<sup>th</sup> Parliament, the committee recommended that the bill be passed, subject to amending the Explanatory Memorandum (EM) to clarify who bears the onus of proof in relation to the age of defendants, as well as the operation of mandatory minimum sentencing in relation to people with significant cognitive impairment.<sup>3</sup> Both of these amendments have since been made.

1.6 The committee notes that this is the fourth time that the parliament has considered similar provisions related to mandatory minimum sentences to those proposed in this bill. Similar provisions were included in the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014, introduced on 17 July 2014, and the Crimes Legislation Amendment (Powers, Offences and Other

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1 Journals of the Senate, *No. 11—13 October 2016*, p. 327.

2 Senate Selection of Bills Committee, *Report No. 7 of 2016*, 13 October 2016, Appendix 2.

3 Senate Legal and Constitutional Affairs Legislation Committee, *Criminal Code Amendment (Firearms Trafficking) Bill 2015 [Provisions] Committee Report*, February 2016, pp. 12–13.

Measures) Bill 2015, introduced on 19 March 2015. While both bills were passed, in each case this only occurred following amendments in the Senate that removed the mandatory minimum sentence provisions.

1.7 The Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014, the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, and the earlier version of this bill have been the subject of inquiry by this committee.<sup>4</sup> The current bill inquiry is therefore the fourth time since 2014 that the committee has examined these measures. Collectively, the inquiries that have been conducted by this committee, including receiving evidence from key stakeholders, have been significant and substantial.

### **Purpose of the bill**

1.8 The bill amends the *Criminal Code Act 1995* (Cth) (Criminal Code) to set new mandatory minimum penalties and maximum penalties for the offences of:

- trafficking firearms and firearms parts within Australia (in Division 360 of the Criminal Code); and
- trafficking firearms and firearms parts into and out of Australia (in Division 361 of the Criminal Code).

1.9 For each of the offences in these Divisions, the following penalties will apply:

- a mandatory minimum sentence of imprisonment for five years; and
- maximum penalties of imprisonment for 20 years or a fine of 5,000 penalty units, or both.

1.10 The bill implements the Government's *Keeping illegal guns off our streets and our communities safe* election policy.<sup>5</sup> The EM provides a number of reasons why the amendment is necessary. These include:

- the mandatory minimum sentence and increased maximum penalties aim to more adequately reflect the serious nature and potential consequences of supplying firearms and firearm parts to the illicit market;<sup>6</sup>
- firearms cause serious harms and the amendments are reasonable to achieve the objective of ensuring that sentences 'reflect the seriousness of their offending; and<sup>7</sup>

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4 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 Committee Report*, September 2014; *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 [Provisions] Committee Report*, June 2015; Senate Legal and Constitutional Affairs Legislation Committee, *Criminal Code Amendment (Firearms Trafficking) Bill 2015 [Provisions] Committee Report*, February 2016.

5 Liberal Party of Australia, *Keeping Illegal Guns Off Our Streets and Our Communities Safe*, <https://www.liberal.org.au/coalitions-policy-keep-illegal-guns-our-streets-and-our-communities-safe> (accessed 1 November 2016)

6 Explanatory Memorandum (EM), *Criminal Code Amendment (Firearms Trafficking) Bill 2016*, p. 2.

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- firearms can remain within that market for many years and be accessed by individuals and groups who would use them to commit serious and violent crimes, such as murder.<sup>8</sup>

1.11 Further detail on the bill can be found in the committee's report of February 2016.<sup>9</sup>

### **Treatment of minors and individuals with significant cognitive impairment**

1.12 The bill provides that the mandatory minimum penalty does not apply if it can be established, 'on the balance of probabilities, that the person was aged under 18 years when the offence was committed', which allows for judicial discretion in sentencing minors.<sup>10</sup> Further, the EM also states in relation to the age of the defendant:

As this provision is framed as an exception to the law on mandatory minimums, the provisions in the Criminal Code regarding defences will apply. As a result, the defendant bears an evidential burden regarding their age, meaning they need to adduce or point to evidence that suggests a reasonable possibility that they are under 18 (see section 13.3 of the Criminal Code). If the defendant discharges that evidential burden, the prosecution must prove beyond reasonable doubt that the defendant is aged over 18 (see section 13.3 of the Criminal Code).<sup>11</sup>

1.13 The mandatory minimum penalty will also not apply for individuals with a significant cognitive impairment. The EM makes two points in relation to this issue. First, it notes that 'mandatory minimum sentences in the bill do not impose a minimum non-parole period for offenders' and that this will allow judicial discretion in relation to matters such as significant cognitive impairment. Second, it states that the mental impairment defence in the Criminal Code will also apply.<sup>12</sup>

### **Issues raised by submitters**

1.14 The Sporting Shooters Association of Australia (SSAA) believes that the bill appropriately recognises that law enforcement should focus on the illicit firearms market. However, more broadly, SSAA holds the view that:

Current legislation affecting legal firearms and private firearms ownership continues to be onerous on the licensed owner, with some legislation based on emotive political and social ideology, rather than credible and scientifically proven evidence.<sup>13</sup>

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7 EM, p. 2.

8 EM, p. 2.

9 Senate Legal and Constitutional Affairs Legislation Committee, *Criminal Code Amendment (Firearms Trafficking) Bill 2015 [Provisions] Committee Report*, February 2016

10 Subsections 360.3A(2) and 361.5(2).

11 EM, p. 5.

12 EM, p. 5.

13 Sporting Shooters Association of Australia, *Submission 1*, p. 1.

1.15 Civil Liberties Australia (CLA) opposes mandatory minimum sentences because, in their view, they contravene the separation of powers by limiting the role of the judiciary to apply 'laws to individual cases and determine what penalty should apply for contravening them'.<sup>14</sup> Further, they consider that mandatory minimum sentences are 'ineffective in reducing crime' and result in 'harsh and unjust punishments' as a result of forcing courts to apply an inflexible standard without considering the specific facts and broader circumstances associated with a particular case.<sup>15</sup>

1.16 The Law Council of Australia (LCA) has adopted a similar position to CLA. Whilst the LCA supports increasing the maximum penalties for firearms trafficking, it does not support a mandatory minimum penalty of 5 years imprisonment:

The imposition of a mandatory minimum imprisonment sentence is a partial fettering of judicial discretion that impedes the sentencing judge's ability to fashion a sentence that is of an appropriate severity in all the circumstances...<sup>16</sup>

1.17 The submission of the Attorney-General's Department (the Department) states that the amendments recognise the fact that firearms trafficking offences are serious crimes that pose a significant threat to community safety, but also that 'current efforts to prevent the diversion of firearms into overseas illicit markets [demonstrate] Australia's commitment to its international obligations regarding the illegal firearms trade'.<sup>17</sup>

1.18 According to the Department, the introduction of mandatory minimum sentences 'reflects the belief that those caught trafficking firearms should receive penalties that are commensurate with the seriousness of their offending'.<sup>18</sup> The Department also highlights the fact that the Commonwealth is not the first jurisdiction to introduce mandatory minimum sentences for this type of offence, noting that it has already been adopted in Queensland and the United Kingdom.<sup>19</sup>

1.19 The Department responds to potential human rights objections to the provisions of the bill in their submission. The Parliamentary Joint Committee on Human Rights (PJCHR) deferred consideration of the bill in its most recent report.<sup>20</sup> In the 44th Parliament, the bill was also considered by the PJCHR, which recommended that:

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14 Civil Liberties Australia, *Submission 4*, p. 1.

15 *Submission 4*, p. 1.

16 Law Council of Australia, *Submission 3*, p. 4.

17 *Submission 2*, p. 2.

18 Attorney-General's Department, *Submission 2*, p. 2.

19 *Submission 2*, p. 2.

20 Parliamentary Joint Committee on Human Rights (PJCHR), *Human Rights Scrutiny Report No. 7 of 2016*, 11 October 2016.

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...the provision be amended to clarify that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence.<sup>21</sup>

1.20 The Department highlights the fact that the EM states: 'the mandatory minimum is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence'.<sup>22</sup> The Department expands on this point in their submission:

The Government believes that mandatory minimum sentences for firearms trafficking offences are reasonable and necessary both to deter would-be firearms traffickers, and to appropriately penalise those who commit these offences. There are appropriate limitations and safeguards in place to ensure that detention is proportionate in each individual case. As the provisions do not impose a mandatory non-parole period, the actual time a person will be incarcerated will remain at the discretion of the sentencing judge.<sup>23</sup>

1.21 The Department emphasises that a relevant provision of the *Crimes Act 1914* (Cth), requiring courts to take into account the character, antecedents, age, means and physical or mental conditions of the person.<sup>24</sup> Finally, it is the Department's view that 'based on the High Court's reasoning in *Magaming v The Queen*<sup>25</sup> in relation to mandatory minimum penalties for aggravated people smuggling offences, the proposed provisions are considered lawful and not arbitrary'.<sup>26</sup>

### **Committee view and recommendations**

1.22 The committee agrees that there are serious harms associated with firearms trafficking, due to the role of firearms in violent crime and the associated threat to community safety. For this reason, the committee believes that strengthening penalties in this area is necessary. The committee is pleased that the recommended amendments have been made to the EM since the bill was previously considered by the committee. These changes appropriately clarify the impact of the bill on minors and individuals with significant cognitive impairment.

1.23 The committee is satisfied that the bill includes sufficient flexibility to allow courts to take account of individual circumstances where this is appropriate, and addresses recommendations the committee made following its previous inquiry into the bill in the 44<sup>th</sup> Parliament.

1.24 The committee also notes that this is the fourth time that mandatory minimum sentencing provisions have been considered by the parliament, and by this committee.

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21 PJCHR, *22nd Report of the 44<sup>th</sup> Parliament*, 13 May 2015.

22 *Submission 2*, p. 4.

23 *Submission 2*, p. 4.

24 *Crimes Act 1914* (Cth) s. 16A(2)(m).

25 [2013] HCA 40.

26 *Submission 2*, p. 4.

The committee is pleased to note the high level of consultation and inquiry that has taken place in relation to these proposed provisions, and that amendments to the EM recommended by this committee have been made by government.

**Recommendation 1**

**The committee recommends that the Senate pass the bill.**

**Senator the Hon Ian Macdonald  
Chair**

# Dissenting Report of the Australian Labor Party

1.1 While Labor Senators agree with the report's commentary in relation to increased penalty provisions, we have serious concerns about the introduction of mandatory minimum sentences for those convicted of firearm trafficking offences.

1.2 The Australian Labor Party maintains its position that the introduction of mandatory minimum sentences for firearms trafficking offences should be avoided. We note that these provisions have now been considered three times and rejected by Parliament, including by this Parliament in relation to the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*. The government has, for a fourth time, failed to justify the need for such provisions.

1.3 Noting evidence provided to this committee during the last inquiry into this bill, Labor Senators believe that effective deterrence is achieved by increasing penalties applicable to the most serious firearms offenders, rather than by imposing prison terms on the least serious offenders. Labor Senators have previously made this point in relation to the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*. At that time, Labor recommended that mandatory minimum sentences for firearms trafficking offences be replaced with increased penalty provisions.

1.4 Increasing maximum penalties for firearms trafficking reflects community concern about the consequences of serious firearms offences, and mirrors the regime of penalties proposed by Labor when it was in Government. It would send a strong message to serious criminals about the consequences of firearms trafficking.

1.5 The explanatory memorandum offers no evidence to support the idea that mandatory minimum sentences for firearms trafficking will enhance or sustain Australia's firearms control regime by deterring potential offenders. Labor Senators note that there is evidence suggesting that imposing mandatory minimum penalties in fact has the opposite effect.<sup>1</sup>

1.6 Furthermore, the introduction of mandatory minimum penalties would impinge on the judicial discretion to impose appropriate sentences with regard to the unique circumstances of each case, and would not effectively deter potential offenders.

1.7 Considering the increased burden on the justice system from the introduction of mandatory minimum sentences, the Law Council of Australia (LCA) has previously warned of:

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1 See, Legal and Constitution Affairs Legislation Committee, *Criminal Code Amendment (Firearms Trafficking) Bill 2015 [Provisions]*, February 2016, Australian Human Rights Commission, *Submission 6*, p. 12.

[P]otentially increasing the likelihood of recidivism because prisoners are inappropriately placed in a learning environment for crime. This reinforces criminal identity and fails to address the underlying causes of crime. This has particular relevance to young and first time offenders.<sup>2</sup>

1.8 State prosecutors and the LCA have previously raised concerns with this committee that introducing mandatory minimum sentences for firearms offences could 'lead to unjust results'.<sup>3</sup> The LCA specified that these results will be 'particularly for vulnerable groups within society: indigenous peoples, young adults, juveniles, persons with a mental illness or cognitive impairment and the impoverished'.<sup>4</sup> Labor Senators do not consider that non-legislative changes can adequately mitigate the potential impact of the bill on vulnerable groups, or the risk of a miscarriage of justice.

1.9 Accordingly, in restating Labor's commitment to stronger penalties for firearms trafficking offences, Labor Senators would support the passage of the Bill without the harmful and unnecessary inclusion of mandatory minimum sentences.

### **Recommendation 1**

**1.10 Labor Senators recommend that the bill be amended to remove the provisions for mandatory minimum penalties.**

### **Recommendation 2**

**1.11 Labor Senators recommend that, subject to recommendation 1.10, the bill be passed.**

**Senator Louise Pratt**  
**Deputy Chair**

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2 Senate Legal and Constitutional Affairs Committee, *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, September 2014, Law Council of Australia (LCA), *Submission 4*, p. 4.

3 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, September 2014, LCA, *Submission 4*, p. 4.

4 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, September 2014, LCA, *Submission 4*, p. 4.

## Dissenting Report by the Australian Greens

1.1 The Criminal Code Amendment (Firearms Trafficking) Bill 2016 seeks to amend the *Criminal Code Act 1995* to introduce a mandatory minimum sentence of imprisonment for the offences of trafficking firearms or firearms parts within Australia and into and out of Australia. The bill also increases the maximum penalties for these offences.

1.2 This will be the fourth time the Government has sought to legislate for mandatory minimum sentences for firearms trafficking offences.

1.3 In the previous inquiry on the 2015 bill, the majority of submissions received by the committee raised significant concerns about the mandatory minimum penalties.

1.4 The *Migration Act 1958* contains mandatory minimum sentences for certain people smuggling related offences. These are the only Commonwealth offences that currently attract a mandatory minimum sentence. There are currently no mandatory minimum penalties in the *Criminal Code Act 1995*.

1.5 During the previous inquiry into this bill, the Law Council of Australia (LCA) submitted that:

[I]ncreasing the maximum penalty to 20 years imprisonment or a fine of 5000 penalty units, or both, reflects community concern regarding the potential seriousness of the offence.<sup>1</sup>

1.6 Many submissions also acknowledged that it was appropriate to increase to increase the maximum penalties and that an increase in penalties acknowledges the gravity of firearms trafficking offences.

1.7 The Australian Human Rights Commission (AHRC) submitted that:

[T]he 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.<sup>2</sup>

1.10 The Australian Greens acknowledge the seriousness of firearms trafficking and the need for sentences that reflect the seriousness of the offending.

1.11 The Australian Greens do not support mandatory minimum sentences for any offences.

1.12 There is no clear evidence that mandatory sentencing laws have a deterrent effect. In addition, they can result in injustice and remove the court's discretion to

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1 Legal and Constitutional Affairs Legislation Committee, *Criminal Code Amendment (Firearms Trafficking) Bill 2015*, February 2016, Law Council of Australia (LCA), *Submission 4*, p. 2.

2 Legal and Constitutional Affairs Legislation Committee, *Criminal Code Amendment (Firearms Trafficking) Bill 2015*, February 2016, Australian Human Rights Commission (AHRC), *Submission 5*, p. 5

impose a sentence that takes the individual circumstances of the offender and the offence into account.

**Recommendation 1**

**1.8 The Australian Greens recommend clauses relating to mandatory minimum sentencing be removed from Schedule 1.**

**Senator Lee Rhiannon  
Australian Greens**

# Appendix 1

## Public submissions

- 1 Sporting Shooters' Association of Australia
- 2 Attorney-General's Department
- 3 Law Council of Australia
- 4 Civil Liberties Australia

