

# Chapter 2

## Key issues

2.1 Most submissions received by the committee expressed concerns about the use of mandatory minimum penalties and their application in the Bill, as well as the increased maximum penalties.<sup>1</sup> The issues raised by submitters were substantially the same as those discussed during the committee's inquiries into the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 and the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 which reported in September 2014 and June 2015 respectively.

2.2 Submitters and witnesses were broadly supportive of the object of the Bill: to send a strong message about the consequences of firearms trafficking in Australia.<sup>2</sup> The explanatory memorandum explains the Bill's significance in the following terms:

Due to their enduring nature, a firearm can remain within the illicit market for many years and be accessed by serious and organised crime groups for use in the commission of violent crimes. 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>3</sup>

2.3 As a means of achieving this objective, the committee heard some support for mandatory minimum penalties as well as for increasing maximum penalties. The Department of Immigration and Border Protection (DIBP) submitted the Bill would ensure:

- a cohesive deterrence message is delivered;
- firearms traffickers can be held responsible for the consequences of supplying firearms into the illicit market; and
- consistent penalties can be applied to firearms related offences at the border and domestically.<sup>4</sup>

2.4 Further, the Attorney-General's Department (AGD) submitted that the increase in maximum penalties would have international significance, as it:

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1 Civil Liberties Australia (CLA), *Submission 2*, p. 1.

2 The Hon Michael Keenan MP, Minister for Justice and Minister Assisting the Prime Minister on Counter-Terrorism, 'Tough new penalties for illicit firearms', Media release, 2 December 2015, <https://www.ministerjustice.gov.au/MediaReleases/Pages/2015/FourthQuarter/2-December-2015-Tough-new-penalties-for-illicit-firearms.aspx> (accessed 19 January 2016).

3 Explanatory Memorandum, p. 3.

4 Department of Immigration and Border Protection (DIBP), *Submission 8*, p. 1.

....supports current efforts to prevent the diversion of firearms into overseas illicit markets, and demonstrates Australia's commitment to its international obligations regarding the illegal firearms trade.<sup>5</sup>

## **Mandatory minimum sentences**

2.5 Given the Parliament has recently considered mandatory minimum sentences for firearm trafficking offences in two other bills, submitters opposed to mandatory minimum sentencing described the amendments as having already been 'considered and rejected' by the Parliament.<sup>6</sup>

2.6 Submitters also queried whether introducing mandatory minimum sentences would have an effect on the incidence of firearms smuggling. For example, the Law Council of Australia (LCA), the Australian Human Rights Commission (AHRC) and the NSW Council for Civil Liberties argued that there is no evidence that harsher penalties have a deterrent value.<sup>7</sup> Instead, they opined that non-legislative mechanisms would be more effective in reducing the supply and diversion of firearms. For example, the LCA submitted that enhanced border agency controls would be more effective than mandatory sentencing.<sup>8</sup>

2.7 By contrast, Dr John Coyne of the Australian Strategic Policy Institute (ASPI) was supportive of mandatory minimum sentencing to strengthen gun control. Writing 'from a crime prevention perspective', Dr Coyne submitted that:

Whilst minimum sentences do not always have a deterrent effect, they are taken into consideration by some in the planning of criminal activities. Regardless, the Bill sends a powerful message to criminals and the general public that reinforces two decades of strong gun control in Australia.<sup>9</sup>

2.8 Dr Coyne also recommended the insertion of an additional offence for trafficking replica and deactivated firearms.<sup>10</sup>

2.9 In response to concerns about mandatory minimum sentences, the AGD told the committee that the Bill accompanies a range of current or proposed non-legislative mechanisms to reduce illegal firearms and gun-related crime in the community. The AGD submitted that the government has:

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5 Attorney-General's Department (AGD), *Submission 9*, p. 2.

6 Law Society of NSW, *Submission 3*, p. 1; Law Council of Australia (LCA), *Submission 4*, p. 3; NSW Council of Labor Lawyers, *Submission 7*, p. 2.

7 Law Society of NSW, *Submission 3*, p. 2; LCA, *Submission 4*, p. 3; Australian Human Rights Commission (AHRC), *Submission 5*, pp 12–13; NSW Council for Civil Liberties, *Submission 6*, p. 2.

8 LCA, *Submission 4*, p. 3.

9 Dr John Coyne, *Submission 1*, p. 2.

10 Dr John Coyne, *Submission 1*, p. 2.

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- introduced National Anti-Gang Squads across Australia;
  - implemented a new CrimTrac database to help link firearms to suspects (Australian Ballistic Information Network) and a firearms tracing service;
  - invested \$88 million in screening and examination of international mail, air and sea cargo;
  - merged CrimTrac and the Australian Crime Commission; and
  - given consideration to a range of additional measures including a national firearms amnesty.<sup>11</sup>

2.10 The AGD also advised the committee that since National Anti-Gang Squads were introduced, '480 illicit firearms have been removed from the community'.<sup>12</sup>

2.11 Both the AGD and the Department of Immigration and Border Protection (DIBP) cited the Martin Place Siege as an example of the need to address firearms trafficking and the role of mandatory minimum sentences. The AGD stated:

The circumstances of the siege, in which Monis used an unregistered pump action shotgun to hold customers and staff hostage in a Sydney café, highlight the consequences of the illegal distribution and acquisition of firearms.<sup>13</sup>

2.12 Similarly, DIBP submitted that the introduction of mandatory minimum sentences as outlined in the Bill:

...supports the *Martin Place Siege: Joint Commonwealth — New South Wales Review* in relation to strengthening the ability of the Commonwealth to address the availability of illegal firearms in Australia.<sup>14</sup>

### ***Human rights implications***

2.13 The AHRC queried whether mandatory minimum sentencing would conflict with Australia's international law obligations. Civil Liberties Australia, the Law Society of New South Wales and the NSW Council for Civil Liberties were similarly concerned, submitting that mandatory minimum sentencing may engage articles 7, 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR).<sup>15</sup> The AHRC elaborated, stating that:

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

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11 AGD, *Submission 9*, p. 5.

12 AGD, *Submission 9*, p. 5.

13 AGD, *Submission 9*, p. 3.

14 DIBP, *Submission 8*, p. 1.

15 CLA, *Submission 2*, p. 1; Law Society of New South Wales, *Submission 3*, p. 2, NSW Council for Civil Liberties, *Submission 6*, pp 1–2.

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.<sup>16</sup>

2.14 Further, the Law Society of New South Wales noted that mandatory minimum sentences are not reviewable on appeal and this could breach Australia's obligations under Article 14(5) of the ICCPR. The Law Society sought further clarification of this in the explanatory memorandum.<sup>17</sup> AGD provided an explanation insofar as reiterating that the Bill would not 'prevent appeal of a conviction, or of any sentence above the mandatory minimum sentence'.<sup>18</sup>

2.15 In response to concerns about the limitations on articles 9 and 14 of the ICCPR, the AGD stated 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.<sup>19</sup>

2.16 As stated in the Explanatory Memorandum, AGD reiterated that 'the actual time a person will be incarcerated will remain at the discretion of the sentencing judge'.<sup>20</sup> This is discussed further below as a legislative safeguard.

### ***Legislative safeguards***

2.17 Several submitters commented that mandatory minimum laws contravene the rule of law, and sought further safeguards to limit or clarify their application. For example, the LCA stated that the amendments risk placing 'unacceptable restrictions on judicial discretion and independence which is inconsistent with rule of law principles'.<sup>21</sup>

2.18 To mitigate this risk, this committee previously recommended that the Explanatory Memorandum to the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 be amended to clarify that that sentencing discretion is preserved in setting non-parole periods. At that time, the committee explained that:

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16 AHRC, *Submission 5*, p. 8.

17 Law Society of New South Wales, *Submission 3*, pp 2–3.

18 AGD, *Submission 9*, p. 4.

19 AGD, *Submission 9*, p. 3.

20 AGD, *Submission 9*, p. 4.

21 LCA, *Submission 4*, p. 2.

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...in appropriate cases there may be significant differences between the non-parole period and the head sentence; and that the mandatory minimum is not intended to be used as a sentencing guidepost (where the minimum penalty is appropriate for 'the least serious category of offending').<sup>22</sup>

2.19 In response to the committee's recommendation, the government amended the Explanatory Memorandum, which was noted in the committee's report on the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015.<sup>23</sup> The explanatory memorandum to that Bill now states that:

...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>24</sup>

2.20 In addition to the amendment to the Explanatory Memorandum, the Parliamentary Joint Committee on Human Rights recommended that the relevant provisions should be amended so that the scope of discretion available to judges is clear.<sup>25</sup> This recommendation was noted by the minister in subsequent correspondence with that committee.<sup>26</sup>

2.21 The LCA noted the change to the Explanatory Memorandum, commenting that 'some of [its] concerns regarding the mandatory sentences in the Bill are mitigated', although other concerns remain.<sup>27</sup>

2.22 Describing this new safeguard as 'welcome', the AHRC stated that 'the position expressed is consistent with' a majority decision of the High Court in relation to minimum non-parole.<sup>28</sup> Overall, however, the AHRC submitted 'that the Court should retain discretion over both the head sentence and the non-parole period', noting that regardless of non-parole periods, criminal sentences of 12 months imprisonment or more would result in person failing the 'character test' in section 501 of the *Migration Act 1958* (Cth).<sup>29</sup>

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22 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, September 2014, p. 26.

23 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, June 2015, p. 25.

24 Explanatory Memorandum, p. 4.

25 Parliamentary Joint Committee on Human Rights, *Twenty-second report of the 44th Parliament*, 13 May 2015, pp 38–39 (considering the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014).

26 Parliamentary Joint Committee on Human Rights, *Twenty-fourth report of the 44th Parliament*, 23 June 2015, p. 76.

27 LCA, *Submission 4*, p. 4.

28 *Hili v The Queen* (2010) 224 CLR 520 at 526 [13] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

29 AHRC, *Submission 5*, p. 6.

2.23 Submitters raised the possibility that mandatory minimum sentences for firearms smuggling would have unintended consequences, and sought further safeguards to mitigate them. The LCA submitted that consequences could include:

- sentences that are disproportionate to the offence;
- increased recidivism, particularly for young or first time offenders;
- reduced community confidence in the justice system; and
- unjust outcomes for vulnerable groups.<sup>30</sup>

2.24 In particular, the LCA argued that younger offenders could be disadvantaged by the possible need to prove their age at the time of the offence. It was submitted that:

It is not made clear whether or not the onus lies on the defendant to establish on the balance of probabilities that s/he was under 18 at the time of the offence. Proposed section 360.3A provides that the mandatory minimum penalty does not apply if 'it is established'. However, unless the position is made clear (e.g. by saying 'the court is satisfied on the balance of probabilities...') a court may interpret the provision as placing the onus on the defendant and that would be undesirable.<sup>31</sup>

2.25 The LCA was also concerned about the application of mandatory sentencing to those with 'significant' cognitive impairment, stating:

While juveniles are exempt, nothing is said as to persons with 'significant cognitive impairment' (as has happened in other legislation, for example, in sections 25A and 25B of the *Crimes Act 1900* (NSW) – the 'one punch' laws and latest mandatory minimum sentencing legislation in NSW). Excluding sentencing discretion in such cases is manifestly unjust.<sup>32</sup>

### **Increased maximum penalties**

2.26 The AHRC raised a number of concerns with increasing maximum penalties for offences in Divisions 360 and 361 from 10 years imprisonment (or a fine of 2,500 penalty units) to 20 years imprisonment (or a fine of 5,000 penalty units). The AHRC's submission queried whether consultation about the proposed increase had occurred with law enforcement agencies, prosecution agencies and states and territories, and argued that there was 'insufficient' evidence of the need to increase the maximum penalties. The AHRC submitted that the Bill would create inconsistent penalties for equivalent offences between the Commonwealth, states and territories.<sup>33</sup>

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30 LCA, *Submission 4*, p. 2.

31 LCA, *Submission 4*, p. 5.

32 LCA, *Submission 4*, p. 5.

33 AHRC, *Submission 5*, p. 14.

2.27 Conversely, the proposed increase in maximum penalties for firearms offences was supported by the LCA which argued that the amendment reflects both 'community concern' and the 'potential serious consequences' of illegal firearms trading.<sup>34</sup> It was the submission of the LCA that:

...the increase in the maximum fine would provide the judiciary the ability to impose a fine that reflects the severity of the community's attitude to the offence. The increases in the maximum penalties for illegal firearm trafficking would provide ample ability for a court to adequately punish those who seek to use weapons to do our communities harm.<sup>35</sup>

2.28 In contrast with the AHRC, the LCA argued that increased maximum penalties would achieve consistency with state and territory firearms offences, for example in New South Wales where 'illegal possession of a firearm may attract a maximum term of imprisonment of 14 years'.<sup>36</sup> The AGD submitted that

...in NSW firearms trafficking offences can attract a maximum sentence of 20 years imprisonment (s.51 *Firearms Act 1996 (NSW)*), while in the ACT repeated firearms trafficking offences within a 12-month period can also attract a maximum penalty of 20 years' imprisonment (s. 220 *Firearms Act 1996 (ACT)*).<sup>37</sup>

2.29 The AGD advised the committee that the department consulted with the Australian Federal Police and the Commonwealth Director of Public Prosecutions in developing the Bill, and that those agencies 'did not raise concerns with the proposed increase'.<sup>38</sup> The department also submitted that the government, in its 2013 policy to tackle crime, had expressed 'its intention to encourage the States and Territories to adopt higher maximum penalties for serious firearms possession offences'.<sup>39</sup>

2.30 Significantly, the Explanatory Memorandum states that while providing scope for greater terms of imprisonment 'for the most serious firearms trafficking offences', the proposed increase in the upper limit of applicable penalties would 'continue to support the courts' discretion when sentencing offenders'.<sup>40</sup>

## Committee view

2.31 The purpose of the Bill is to strengthen penalties for the serious offences of firearms trafficking in order to reduce the associated social and systemic harms.

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34 LCA, *Submission 4*, p. 1.

35 LCA, *Submission 4*, p. 2.

36 *Firearms Act 1996 (NSW)*, section 36(1); LCA, *Submission 4*, p. 2.

37 AGD, *Submission 9*, p. 4.

38 AGD, *Submission 9*, p. 5.

39 AGD, *Submission 9*, p. 2.

40 Explanatory Memorandum, p. 4.

2.32 As discussed in this chapter, some submitters expressed concerns about the proposed mandatory minimum sentences and the increased maximum penalties.

2.33 In relation to mandatory minimum sentences, the arguments raised during the course of this inquiry were largely canvassed in the committee's previous inquiries into the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 and Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015. The committee notes that its report on the 2015 Bill included evidence from the AGD:

...that 'there is strong support within law enforcement for stronger laws in relation to dealing with firearms due to the size of the illicit market and the concerns they have'. The department noted that the introduction of mandatory minimum penalties would act as 'a strong deterrent against the illegal trafficking of firearms'.<sup>41</sup>

2.34 Further, the committee is aware of examples of mandatory minimum sentences being applied in other jurisdictions, including for firearms trafficking in the United Kingdom and Queensland and for firearms-related offences in the United States of America.<sup>42</sup> The committee does not, therefore, believe that the mandatory minimum sentences proposed in the Bill are inconsistent with those in force in other jurisdictions.

2.35 The committee also notes that mandatory minimum sentencing is not a new concept for the Commonwealth. In fact, in 2010 the then Australian government legislated mandatory minimum sentencing for people smuggling offences.

2.36 The LCA raised specific concerns about the Bill's impact on vulnerable groups (see paragraphs 2.23 to 2.25). The committee shares these concerns and notes that minors are specifically exempted from the mandatory minimum sentence provisions. The committee also sees merit in the government clarifying safeguards for defendants with significant cognitive impairment, to ensure that these people are not unfairly disadvantaged. The committee notes that this legislation does not impact the courts' discretion in determining parole periods for this category of defendant (see paragraphs 2.15, 2.16 and 2.18).

## **Recommendation 1**

**2.37 The committee recommends that the Commonwealth government:**

- **amend the Explanatory Memorandum to clarify who bears the onus of proof in relation to the age of defendants;**
- **clarify in the Explanatory Memorandum the operation of mandatory minimum sentencing in relation to people with significant cognitive**

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41 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, June 2015, p. 25.

42 AGD, *Submission 9*, p. 2.

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**impairment specifically relating to discretion in setting parole periods;  
and**

- **in the absence of a satisfactory explanation, consider including provisions regarding significant cognitive impairment similar to those found in the *Crimes Act 1900* (NSW) s25A(5)(b).**

2.38 On the basis of the preceding recommendation, the committee recommends that the Bill be passed.

### **Recommendation 2**

2.39 **The committee recommends that the Bill be passed, subject to the preceding recommendation.**

**Senator the Hon Ian Macdonald  
Chair**

