

Dissenting Report of the Australian Greens

1.1 The Australian Greens do not support the enactment of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 as currently drafted and have particular concerns with certain features of Schedules 1, 5, 6, 7, 9 and 10 of the Bill.

1.2 The Australian Greens recommend that these Schedules be removed from the Bill and subject to further consultation with the states and territories and other relevant stakeholders, with a view to addressing the rule of law and human rights concerns raised by the Law Council of Australia and the Australian Human Rights Commission in the course of this inquiry.

1.3 The Australian Greens have particularly strong concerns with the introduction of mandatory minimum sentences of five years imprisonment for firearm trafficking offences in Schedule 6 and recommend that these provisions be removed from the Bill.

1.4 The Australian Greens support the passage of Schedule 4 of the Bill relating to forced marriage, and support Recommendation 2 of the Majority Report, relating to the need for Commonwealth, state and territory governments reviewing underage sex offences to ensure there is consistency with the federal offences of forced marriage.

Issues of Concern

1.5 This is a large and complex Bill that amends 14 separate Acts and contains 17 separate Schedules of amendments.¹ The Bill represents an increasingly ad-hoc approach to Commonwealth criminal law reform that threatens the progression towards a uniform criminal law across Australia and undermines a number of established common law principles designed to protect against unjustified or disproportionate intrusion into individual rights.

1.6 The Australian Greens are pleased that the Majority Report includes discussion of a number of key concerns raised by stakeholders with respect to this complex and lengthy Bill. These concerns include:

- (a) expanding the principles of secondary criminal liability in Chapter 2 of the Criminal Code, by inserting the concept of being 'knowingly concerned' in the commission of an offence as an additional form of secondary criminal liability;
- (b) introducing mandatory minimum sentences of five years imprisonment for firearm trafficking in identical terms as those pursued by (but

1 *Crime Commission Act 2002, Australian Postal Corporation Act 1989, Classification (Publications, Films and Computer Games) Act 1995, Crimes Act 1914, Criminal Code Act 1995, Law Enforcement Integrity Commissioner Act 2006, Mutual Assistance in Criminal Matters Act 1987, Privacy Act 1988, Proceeds of Crime Act 2002, Radiocommunications Act 1992, Surveillance Devices Act 2004, Taxation Administration Act 1953, Telecommunications (Interception and Access) Act 1979 and the Transfer of Prisoners Act 1983.*

ultimately removed) from the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014;

- (c) removing a court's discretion to issue a recognizance release order in relation to a sentence that exceeds three years imprisonment;
- (d) expanding the circumstances in which the privilege against self-incrimination cannot be claimed in the context of examinations by AUSTRAC; and
- (e) introducing a new information sharing regime between the Commonwealth DPP and the states and territories that fails to contain adequate protections for personal privacy and legal professional privilege.

1.7 The Australian Greens are also pleased that the Majority Report notes that the Parliamentary Joint Committee on Human Rights examined the Bill in its *Twenty-second Report of the 44th Parliament* and considered that the amendments proposed in Schedule 6 of the Bill were 'likely to be incompatible with the right to a fair trial and the right not to be arbitrarily detained' and also raised concerns about the amendments proposed in Schedule 10 of the Bill.

1.8 The Majority Report also expresses concern about the lack of consultation between the government and stakeholders prior to the drafting of this Bill – noting the particularly concerning inconsistency between the views expressed by the Commonwealth Attorney-General's Department and the NSW DPP and Victorian DPP with respect to the amendments proposed in Schedule 9 of the Bill.

1.9 It is of great concern, however, that despite making these observations and acknowledging the concerns of legal experts, state and territory Attorney-Generals' Departments and DPPs, the Majority Report reaches the view that the Bill should proceed unchanged.

1.10 Unlike the Majority of the Committee, the Australian Greens are not prepared to give the government a blank cheque when it comes to amending the criminal law in the name of national safety. The Australian Greens consider that it is of paramount importance that laws that: impose criminal sanctions; restrict liberty; or remove traditional common law privileges, are subject to rigorous scrutiny to ensure that they are necessary and effective – as well as being proportionate in terms of their impact on individual rights.

1.11 This Bill seeks to make changes to fundamental features of the criminal law – from the mental element required to attract criminal liability, to the court's discretion to impose appropriate sentences and the sharing of information between prosecutors. It is not good enough to acknowledge that these changes 'impact on an individual's freedoms and liberties' and should have been subject to consultation. These concerning features of the Bill must be removed and considered further.

1.12 Further consideration of whether the changes proposed are necessary, effective and proportionate should occur with the states and territories and other relevant stakeholders, with a view to addressing the rule of law and human rights

concerns raised by the Law Council of Australia and the Australian Human Rights Commission in the course of this inquiry.

1.13 The Australian Greens are particularly concerned about the changes proposed in Schedule 6 that seek to introduce mandatory penalties for firearms trafficking offences. As the Australian Human Rights Commission observes in its submission:

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.²

1.14 In addition to these in-principle concerns is the fact that the need for such penalties has not been established. As the Commission notes, the Attorney-General's Department has confirmed that it is not aware of any cases where the sentences for trafficking of firearms or firearm parts have been insufficient.³

1.15 The 'safeguards' outlined in the Explanatory Memorandum relating to the mandatory sentencing provisions (relating to child offenders and non-parole periods) fail to overcome the in-principle and practical concerns described above.

1.16 Mandatory sentences are also contrary to policy guidance issued by the Attorney-General's Department on the framing of Commonwealth offences.⁴

Recommendations

1.17 In light of the above concerns, the Australian Greens make the following recommendations.

Recommendation 1

1.18 That the Bill not be passed in its current form.

Recommendation 2

1.19 That Schedule 6 be removed from the Bill.

Recommendation 3

1.20 That Schedules 1, 5, 7, 9 and 10 be removed from the Bill and subject to further consultation with the states and territories and other relevant stakeholders, with a view to addressing the rule of law and human rights concerns raised by the Law Council of Australia and the Australian Human Rights Commission in the course of this inquiry.

2 Australian Human Rights Commission, *Submission 4*, p. 1.

3 Australian Human Rights Commission, *Submission 4*, p. 7.

4 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 37.

Recommendation 4

1.21 That Schedule 4 of the Bill (relating to forced marriage) be passed.

**Senator Penny Wright
Australian Greens**