



**Australian
Human Rights
Commission**

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (Cth)

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

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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

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in its Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (Cth) (Bill) introduced by the Government.

2 Summary

2. The Commission welcomes the opportunity to make a submission about this Bill.
3. Given the limited time in which to make a submission, as a result of the limited time given to the Committee for reporting, the Commission has limited its submission to the amendments proposed in Schedules 4, 6 and 10 of the Bill.
4. The Commission supports the Government's proposal in Schedule 4 to expand the definition of a forced marriage. The Commission agrees that these amendments will increase the protections against forced marriage for children and persons with a disability who do not have the capacity to provide a free and full consent to marriage.
5. The Commission does not support the proposal in Schedule 6 to introduce mandatory minimum sentences for certain firearms offences. 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.
6. 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.
7. The Commission recommends that the proposed amendments in Schedule 6 not be passed.
8. Further, given that this Committee will be considering the question of mandatory minimum sentences in detail, the Commission also recommends the removal of s 236B of the *Migration Act 1958* (Cth) (Migration Act) which is the only other provision in Commonwealth law which prescribes a mandatory minimum custodial sentence.
9. In the alternative, the Commission recommends that at least the mandatory minimum non-parole periods in s 236B(4) and (6) of the Migration Act be removed. For the reasons given by the Government in relation to the present

Bill, such an amendment would preserve a court's discretion in sentencing, and would help ensure that custodial sentences imposed by courts are able to take into account the particular circumstances of the offence and the offender.

10. One aspect of Schedule 10 of the Bill involves significantly abrogating the privilege against self-incrimination for individuals who are required to respond to a notice issued by the Australian Transaction Reports and Analysis Centre (AUSTRAC). Information and documents required to be produced by a person would be able to be used against that person in a broader range of civil and criminal proceedings.
11. The powers proposed to be given to AUSTRAC are broader than powers available to the Australian Crime Commission when investigating the criminal matters that it is responsible for.
12. In the Commission's view, no real explanation has been given for the need to further abrogate the privilege against self-incrimination in these circumstances, or why the degree of further abrogation proposed in the Bill is reasonable or proportionate to a legitimate aim. The Commission recommends that the Committee seek further clarification from the Government about these issues.

3 Recommendations

13. The Australian Human Rights Commission makes the following recommendations.

Recommendation 1

The Commission recommends that items 1 to 3 of Schedule 4 of the Bill dealing with the definition of forced marriage in the Criminal Code be passed.

Recommendation 2

The Commission recommends that Schedule 6 of the Bill dealing with mandatory minimum penalties for firearms trafficking offences not be passed.

Recommendation 3

The Commission recommends that s 236B of the *Migration Act 1958* (Cth) containing mandatory minimum penalties for certain people smuggling and related offences be removed.

Recommendation 4

In the alternative to recommendation 3, the Commission recommends that s 236B(4) and (6) of the *Migration Act 1958* (Cth) containing mandatory minimum non-parole periods for certain people smuggling and related offences be removed.

Recommendation 5

14. The Commission recommends that the Committee seek clarification from the Government about the aim sought to be achieved by the further abrogation of the privilege against self-incrimination in relation to notices issued by AUSTRAC, and why the further abrogation is reasonable or proportionate to this aim.

4 Forced marriages

15. Schedule 4 of the Bill would amend the definition of forced marriage in s 270.7A of the Commonwealth *Criminal Code*.
16. The proposed amendments would expand the scope of the offence, but the core concept of the offence would remain the same. That core concept is that a marriage is a forced marriage if one party entered into the marriage without freely and fully consenting to it.
17. Currently, s 270.7A(1) provides that:

For the purposes of this Division, a marriage is a **forced marriage** if, because of the use of coercion, threat or deception, one party to the marriage (the **victim**) entered into the marriage without freely and fully consenting.
18. Section 270.7B contains offences of causing a person to enter into a forced marriage, and being a party to a forced marriage (other than a victim).
19. The proposed amendment would expand the definition of forced marriage to include circumstances in which a victim does not freely and fully consent because he or she 'was incapable of understanding the nature and effect of the marriage ceremony'. This could be, for example, because of age or mental capacity.
20. Further, the amendments would create a presumption that a person under the age of 16 does not understand the nature and effect of a marriage ceremony. This would put the onus on the defendant to prove on the balance of probabilities that the person did understand the nature and effect of the ceremony.
21. The amendments are designed to increase the protections against forced marriage for children and persons with a disability who do not have the capacity to provide free and full consent to marriage.
22. The Commission considers that the amended definition is consistent with the human rights principle that no marriage shall be entered into without the free and full consent of the intending spouses (*International Covenant on Civil and Political Rights* (ICCPR) article 23(3),¹ *Convention on the Elimination of All Forms of Discrimination Against Women* article 16(1)(b),² *Convention on the Rights of Persons with Disabilities* (CRPD) article 23(1)(a)).³

23. The making of forced marriage a criminal offence was consistent with the provisions of the *Convention on the Rights of the Child* that require States to protect children from abuse, including sexual abuse (CRC, articles 19 and 34).⁴ The expansion of the definition further supports these provisions and should provide better protection for children.
24. It is important to note that the criminal offences related to forced marriages extend to situations which would not be regarded as valid marriages under Australian law. For example they extend to purported marriages of children, which would not be valid. The *Marriage Act 1961* (Cth) provides that a person is of marriageable age if they have turned 18 (but that some people who are between 16 and 18 can marry in exceptional circumstances). Nothing in the offence provision in the *Criminal Code* changes the marriageable age.
25. If a defendant in a criminal proceeding rebuts the presumption that a person under 16 years of age was incapable of understanding the nature and effect of the marriage ceremony, and freely and fully consented to the marriage, the defendant may not be found guilty of an offence under s 270.7B of the *Criminal Code*. However, this does not mean that the marriage was a valid marriage.
26. The proposed amendments should not affect the ability of people with disabilities to marry. People with disabilities who are of marriageable age have the right to marry and found a family on the basis of the free and full consent of the intending spouses (CRPD article 23(1)(a)). A necessary aspect of a valid marriage in Australia is that the parties understand the nature and effect of the marriage ceremony.⁵ The proposed additional element of the forced marriage offence picks up this requirement by providing that a person has not given free and full consent if they were incapable of understanding the nature and effect of the marriage ceremony. When making assessments about the ability of a person with a disability to understand the nature and effect of marriage, it is important to distinguish between legal capacity and mental capacity.⁶ All persons with disabilities enjoy legal capacity on an equal basis with others (CRPD article 12) and a person's status as a person with a disability must not be grounds for denying legal capacity.⁷
27. The Commission supports the amendments in items 1 to 3 of Schedule 4 and recommends that they be passed. The Commission makes no submission about the proposed amendment to the penalties for breaches of the offences in s 270.7B.

Recommendation 1

28. The Commission recommends that items 1 to 3 of Schedule 4 of the Bill dealing with the definition of forced marriage in the *Criminal Code* be passed.

5 Mandatory sentencing

5.1 Summary

29. Schedule 6 of the Bill would introduce mandatory minimum penalties for two firearms trafficking offences.
30. The Commission is opposed to mandatory minimum penalties and recommends that the amendments in this Schedule not be passed.
31. 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. There does not appear to be any demonstrated need for mandatory minimums.
32. The Commission recognises that there are safeguards in this Bill which seek to mitigate the risk of imposing a disproportionate sentence. 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.
33. While these safeguards are welcome, the Commission considers that the Court should retain discretion over both the head sentence and the non-parole period.

5.2 Legislative history

34. The mandatory minimum penalties proposed in Schedule 6 of the Bill were originally found in Schedule 2 of the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (Cth) (Psychoactive Substances Bill).
35. The Psychoactive Substances Bill was considered by this Committee last year and the Committee 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.⁸ The Law Council of Australia recommended that the mandatory sentencing measures be removed from the Bill.⁹ In the alternative, it recommended amendments to the Explanatory Memorandum.
36. The Committee adopted the Law Council's alternative recommendation that:

the Government amend the Explanatory Memorandum to make clear that it is intended that: sentencing discretion should be left unaffected in respect of the non-parole period; 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’).¹⁰

37. In response to the Committee’s recommendation, the Government amended the Explanatory Memorandum to the Psychoactive Substances Bill to note that ‘the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may significantly differ from the head sentence’.¹¹ The same language is used in the Explanatory Memorandum for the present Bill.¹²
38. The relevant items were omitted from the Psychoactive Substances Bill following debate in Committee in the Senate.¹³

5.3 Application of laws

39. 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.
40. Each of these offences is subject to a maximum penalty of 10 years imprisonment, or a fine of \$425,000, or both.¹⁴ These maximum penalties indicate the seriousness with which the Parliament regards this kind of offending.
41. If the amendments proposed in Schedule 6 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.
42. 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.
43. 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.

44. Further, as set out above, 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.¹⁵

From the context of the case, it appears likely that the same principle would apply to the setting of a non-parole period.¹⁶

45. While these safeguards are welcome, the Commission considers that the Court should retain discretion over both the head sentence and the non-parole period.
46. 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 it intends to 'ensure that custodial sentences imposed by courts are proportionate and able to take into account the particular circumstances of the offence and the offender' and ensure that 'any risk that the sentencing of lower culpability offenders could amount to arbitrary detention is removed'. If these are the Government's aims, they could be better achieved by removing the mandatory sentencing provisions altogether.
47. This would leave on the books serious offences with maximum penalties of 10 years imprisonment. 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'.¹⁷ 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 below.
48. 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.¹⁸ 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.¹⁹
49. 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;
 - c. disproportionate outcomes when mandatory sentences have been used in other Commonwealth offences.

Recommendation 2

50. The Commission recommends that Schedule 6 of the Bill dealing with mandatory minimum penalties for firearms trafficking offences not be passed.

5.4 Human rights issues raised by mandatory sentencing

51. Mandatory sentencing provisions have the potential to engage articles 7, 9 and 14 of the ICCPR.

(a) Arbitrary detention

52. 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.

53. 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.²⁰ This interpretation has been affirmed by the High Court of Australia.²¹

54. 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.
55. 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*

56. Article 7 of the ICCPR prohibits inhuman or degrading treatment or punishment. In the United States²² and Canada,²³ 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.
57. Australia does not have a constitutional Bill of Rights and the High Court has recently held that mandatory minimum sentences are not unconstitutional.²⁴ 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.²⁵

58. 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.²⁶ 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.²⁷

59. 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:²⁸

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.²⁹

(c) *Right to appeal against sentence*

60. 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.

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

5.5 Canadian firearms offences

62. 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.

63. 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.

64. 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.³⁰

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.³¹

Case study 2: Mr Christopher Lewis

Mr Lewis was charged with firearms trafficking and three counts of trafficking in cocaine.³² 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.³³ 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.

65. 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.
66. 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.³⁴
67. The Crown has appealed one of these cases, in which a mandatory sentencing provision for a firearms offence was found to be unconstitutional, to the Supreme Court of Canada. The appeal in *Queen v Nur* was heard by the Supreme Court on 7 November 2014 and judgment is reserved. Regardless of whether or not the Supreme Court upholds the judgment that these mandatory minimum sentence in this case was unconstitutional, the number of cases in which first instances judges have considered that they have been required to impose disproportionate sentences indicates that there are problems with the application of these mandatory sentencing provisions in

practice, including in relation to firearms offences which are similar to those proposed in the present Bill.

5.6 Other Commonwealth offences

68. There is only one other set of Commonwealth offences that prescribes a mandatory minimum custodial sentence. Section 236B of the *Migration Act 1958* (Cth) (Migration Act) prescribes mandatory minimum sentences on conviction for offences against the following provisions of the Migration Act:
- a. the aggravated offence of people smuggling, giving rise to danger of death or serious harm or where the victim is subjected to cruel, inhuman or degrading treatment (s 233B)
 - b. the aggravated offence of people smuggling in which a person organises or facilitates the bringing to Australia of at least 5 people who do not have a lawful right to come to Australia (s 233C)
 - c. the aggravated offence of providing false documents or misleading information in relation to the entry into Australia or the application for visas of a group of 5 or more non-citizens (s 234A).
69. The most commonly prosecuted offence has been the offence under s 233C. In almost all of these cases, the defendant is charged with ‘facilitating’ rather than ‘organising’ a people smuggling venture.
70. Section 236B provides that the court must impose a sentence of imprisonment of at least 8 years on conviction for an offence against s 233B or for a repeat offence, and a sentence of imprisonment of at least 5 years in any other case. It also provides that the court must set a non-parole period of at least 5 years for an offence against s 233B or for a repeat offence, and a non-parole period of at least 3 years in any other case.
71. By setting a minimum non-parole period, s 236B of the Migration Act differs from the mandatory minimum penalties proposed in Schedule 6 of the present Bill. In relation to the present Bill, the Government has said that by not prescribing a minimum non-parole period, the amendments:
- will preserve a court’s discretion in sentencing, and will help ensure that custodial sentences imposed by courts are able to take into account the particular circumstances of the offence and the offender.
72. As with the provisions proposed in the present Bill, s 236B of the Migration Act does not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.
73. This Committee considered s 236B as part of its inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012 (Cth) (Removal of Mandatory Minimum Penalties Bill). That Bill proposed the removal of s 236B. The majority report by Labor and Coalition Senators observed:

Statistics provided by the CDPP, and other evidence received during the inquiry, clearly demonstrate that the majority of offenders convicted of people smuggling offences in Australia are boat crew, rather than the organisers of people smuggling operations. The committee notes the concerns expressed during the inquiry that boat crew members charged with people smuggling offences often have limited culpability and mitigating circumstances, which make the application of the mandatory minimum sentences inappropriate and unjust.³⁵

74. The comments by this Committee reflect comments made by judges throughout Australia who have criticised the mandatory nature of these sentencing provisions. Annexure A to this submission is a table setting out some cases in 2011 and 2012, identified by the Commonwealth DPP in evidence given to the Committee,³⁶ in which comments were made during the course of sentencing which were critical of the mandatory sentencing regime. In some of these cases, the judges expressly indicated that, but for the mandatory minimum sentence, they would have imposed a lesser sentence.
75. While the Committee did not recommend passing the Removal of Mandatory Minimum Penalties Bill, it did recommend that:
- the Australian Government review the operation of the mandatory minimum penalties applied to aggravated people smuggling offences under section 236B of the Migration Act 1958, with particular reference to:
- alternative approaches to mandatory minimum sentencing provisions, including where judicial officers are given discretion to impose lesser sentences where they are satisfied that the circumstances would make it unjust to impose the prescribed sentence for an offence;
 - options for differentiating between the organisers of people smuggling operations and boat crew of these operations in sentencing; and
 - specific concerns raised during this inquiry regarding Australia's human rights obligations under international law.³⁷
76. In response to the Committee's recommendation, on 27 August 2012, the then Attorney-General gave a direction to the CDPP not to prosecute first time offender, lower culpability crew under s 233C of the Migration Act and to consider prosecution under a lesser offence that does not attract a mandatory minimum penalty.³⁸ The Government said that it was also considering further the effectiveness of the structure of offences in the Migration Act in light of the recommendations made by the Expert Panel on Asylum Seekers.³⁹
77. Given that this Committee is again giving detailed consideration to mandatory sentencing provisions in the context of a range of criminal justice amendments, the Commission reiterates its recommendation made in the course of the inquiry into the Removal of Mandatory Minimum Penalties Bill that s 236B of the Migration Act be removed.
78. In the alternative, the Commission recommends that at least s 236B(4) and (6) of the Migration Act be removed. This would remove the requirement that a court impose a minimum non-parole period for the offences identified above. For the reasons given by the Government in relation to the present Bill, such

an amendment would preserve a court's discretion in sentencing, and would help ensure that custodial sentences imposed by courts are able to take into account the particular circumstances of the offence and the offender.

Recommendation 3

79. The Commission recommends that s 236B of the *Migration Act 1958* (Cth) containing mandatory minimum penalties for certain people smuggling and related offences be removed.

Recommendation 4

80. In the alternative to recommendation 3, the Commission recommends that s 236B(4) and (6) of the *Migration Act 1958* (Cth) containing mandatory minimum non-parole periods for certain people smuggling and related offences be removed.

6 Powers of AUSTRAC and privilege against self-incrimination

81. Among other things, Schedule 10 of the Bill proposes to significantly abrogate the privilege against self-incrimination for individuals who are required to respond to a notice issued by AUSTRAC. Information and documents required to be produced by a person would be able to be used against that person in a broader range of civil and criminal proceedings.

6.1 Privilege against self-incrimination

82. The privilege against self-incrimination has a long history in the common law. As the Australian Law Reform Commission (ALRC) has noted in its current review of encroachments by Commonwealth laws on traditional rights and freedoms, the privilege can be traced back to the 12th and 13th centuries.⁴⁰
83. The ALRC refers to comments by William Blackstone in his *Commentaries on the Laws of England* (1765-1769) that a defendant's 'fault was not to be wrung out of himself, but rather to be discovered by other means and other men'.⁴¹
84. In its current form in Australia, the right to claim the privilege against self-incrimination in criminal law and against self-exposure to penalties in civil and administrative law is a 'basic and substantive common law right'⁴² and entitles a natural person to refuse to answer any question or produce any document if it would tend to incriminate them.⁴³
85. The privilege is also reflected in human rights treaties signed by Australia. Article 14(3)(g) of the ICCPR provides that:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...

- (g) Not to be compelled to testify against himself or to confess guilt.

86. The common law privilege against self-incrimination can be abrogated by statute. However, as the High Court has said in *X7 v Australian Crime Commission*.⁴⁴

In balancing public interest considerations and the interests of the individual, legislation abrogating the privilege will often contain, as in the case of the [*Australian Crime Commission Act 2002 (Cth)*], “compensatory protection to the witness”, by providing that, subject to limited exceptions, compelled answers shall not be admissible in civil or criminal proceedings.

6.2 Expanded enforcement powers of AUSTRAC

87. AUSTRAC is the regulator responsible for the administration of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)* (AML/CTF Act). It oversees compliance with the AML/CTF Act by thousands of Australian businesses including financial services providers, the gambling industry, bullion dealers, remittance service providers and cash dealers.
88. A person who provides a service set out in s 6 of the AML/CTF Act is a ‘reporting entity’. An authorised officer of AUSTRAC has the power under s 167 of the AML/CTF Act to issue a notice to a person if the authorised officer believes on reasonable grounds that the person is:
- a. a person who is or has been a reporting entity
 - b. a person who is or has been an officer, employee or agent of a reporting entity
 - c. a person who is or has been entered on the Remittance Sector Register
 - d. a person who has information or a document that is relevant to the operation of the AML/CTF Act, the regulations or the rules.
89. The notice may require the person to give information or produce documents to the authorised officer. A person is not excused from giving information or producing a document under s 167 on the ground that the information or the production of the document might tend to incriminate the person or expose the person to a penalty.⁴⁵ However, given that this requirement infringes the usual privilege against self-incrimination, s 169 limits the ways in which this information or these documents can be used.
90. Section 169 currently provides that the information or documents, or the fact that they have been provided, is not admissible in evidence against the person:
- a. in civil proceedings other than proceedings under the *Proceeds of Crime Act 2002 (Cth)* that relate to the AML/CTF Act; or
 - b. in criminal proceedings other than:
 - (i) proceedings for a failure to comply with the notice (s 167(3) of the AML/CTF Act); or

- (ii) proceedings for giving false or misleading information or producing false or misleading documents in response the notice (ss 136 or 137 of the AML/CTF Act or ss 137.1 or 137.2 of the Criminal Code).

91. That is, the only criminal offences that can be brought against someone based on information and documents that they have been required to produce pursuant to a compulsory notice are offences that relate to non-compliance with that notice.
92. Equivalent immunities apply to compulsory powers of other regulators. For example, equivalent immunities apply to notices issued by the Australian Competition and Consumer Commission (ACCC) to furnish information, produce documents or give evidence,⁴⁶ to requirements by the Australian Securities and Investments Commission (ASIC) to give information, sign records or produce books,⁴⁷ and to requirements on people being examined by the Australian Crime Commission to answer questions or produce documents.⁴⁸ In the case of notices issued by the ACCC, the privilege is confined to the provision of information and answers to questions, but not the production of documents. In the case of the powers exercised by ASIC, the privilege is confined to the making of a statement or the signing of a record, but not the production of books.
93. The proposed amendment to s 169 of the AML/CTF Act will mean that a person can required by AUSTRAC to give information and produce documents, and the privilege against self-incrimination will not apply, in relation to:
 - a. civil proceedings instituted for *any* offence against the AML/CTF Act; or
 - b. criminal proceedings for *any* offence against the AML/CTF Act or *any* offence against the Criminal Code that relates to the AML/CTF Act.
94. Little justification is given in the Explanatory Memorandum for what it correctly identifies as a 'further abrogation of the privilege against self-incrimination'.⁴⁹
95. First, it is said that the amendments are 'precise and narrow in scope'.⁵⁰ However, it appears that the amendments are neither precise, nor narrow. In terms of precision, it is not clear which offences against the Criminal Code are ones that 'relate' to the AML/CTF Act. In terms of breadth, the amendments mean that a person will be required to give evidence that may incriminate him or her, and this may be used to prosecute the person for any offence that AUSTRAC has responsibility for investigating.
96. Secondly, it is said that this approach mirrors the approach to self-incrimination taken in relation to notices given under s 205(2) of the AML/CTF Act.⁵¹ This is true, but does not deal with the differences between the two regimes which mean that the powers under s 205(2) are more tightly circumscribed. For example, notices under s 205(2) may only be given to a reporting entity, which will usually not be an individual. This is a much narrower class of people than those who may be given a notice under s 167. The kind information and documents required to be provided pursuant to a

notice under s 205(2) is limited to that described in paragraphs (a) to (c) of that section. No such subject matter limitation applies to notice under s 167. The Explanatory Memorandum does not seek to provide any reason why the privilege against self-incrimination for notices under s 167 should be reduced to the level that exists in relation to notices under s 205(2).

97. Thirdly, it is said that any harm to individual rights is minimised by the provision of use immunities.⁵² However, use immunities are what the Bill proposes to remove in relation to any offence that AUSTRAC has responsibility for investigating.
98. In the Commission's view, no real explanation has been given for the need to further abrogate the privilege against self-incrimination in these circumstances, or why the degree of further abrogation proposed in the Bill is reasonable or proportionate to a legitimate aim.

Recommendation 5

99. The Commission recommends that the Committee seek clarification from the Government about the aim sought to be achieved by the further abrogation of the privilege against self-incrimination in relation to notices issued by AUSTRAC, and why the further abrogation is reasonable or proportionate to this aim.

Annexure A

Judicial comment about mandatory sentencing for people smuggling offences

| Case | Court | Comments | Date |
|-----------|------------------------------------|--|------------------|
| R v Karim | NSW District Court Judge Conlon | “In my view the present case provides a glaring example of how mandatory penalties can sometimes prohibit a court in delivering a fair and just result and a sentence, ‘that is of severity appropriate in all the circumstances of the case’. If I was to apply the usual sentencing principles to the present balancing exercise, I would have imposed a non-parole period (minimum term) of about eighteen months.” | 27 July 2011 |
| R v Ambo | NSW District Court Judge Knox | “It is difficult to see how that mandatory minimum requirement can be reconciled with the duty imposed by the Crimes Act to deliver a sentence which is ‘of a severity appropriate in all the circumstances of the offence’: section 16A(2) Crimes Act (Cth) 1914. What value there is in having judges determine matters when there is a pre-determined legislatively imposed mandatory minimum penalty is for others to determine. I agree with respect with the comments of Mildren J of the Northern Territory Supreme Court in <i>Trenerry v Bradley</i> referred to by Kelly J in <i>R v Dokeng</i> that ‘... prescribed minimum mandatory sentencing provisions are the very antithesis of just sentencing.’ Nevertheless, I am obliged to follow the law as it is.” | 25 November 2011 |
| R v Nafi | NT Supreme Court Justice Kelly | “I am compelled by the legislation to hand down a sentence which is harsher than a just sentence arrived at on the application of longstanding sentencing principles applied by the Courts and which have been applied by those Courts for the protection of society and | 19 May 2011 |

| Case | Court | Comments | Date |
|--------------|--------------------------------------|---|------------------|
| | | <p>of the individual. I have no choice.</p> <p>... Had it not been for the mandatory minimum sentencing regime, taking into account the maximum penalty prescribed for this offence and the factors I have already set out I would have considered an appropriate penalty to have been a term of imprisonment for three years with a non-parole period of 18 months.”</p> | |
| R v Mahendra | NT Supreme Court Justice Blokland | <p>“While the minimum sentence may well be appropriate for those who organise these voyages and obtain significant sums of money from asylum seekers, and exploit the poverty and vulnerability of subsistence fishermen such as Mr Mahendra, the circumstances of people like Mr Mahendra who themselves are, to a degree, victims of exploitation and a degree of trickery, in my view are disproportionately punished by virtue of the five year sentence ... In my view, a sentence proportionate to the criminality would have been, consistent with general sentencing practice, approximately one year to 18 months imprisonment. I am unable to make such an order.</p> <p>Australia is a party to the international covenant on civil and political rights.</p> <p>Article 9.1, in part states that no-one shall be subjected to arbitrary arrest or detention. Assigning a five year sentence of imprisonment, without judicial consideration of the gravity of the offence, in terms of the circumstances of the offending and the offender may, in my view, amount to arbitrary detention. In the usual sense it is understood, it must be arbitrary because it is not a sentence that is a proportional sentence.”</p> | 1 September 2011 |

| Case | Court | Comments | Date |
|--------------------|--|---|-----------------|
| R v Faeck & Warkor | Queensland District Court Acting Judge Farr | “Were it not for the statutory minimum period, I have no doubt that a sentence less than five years imprisonment would have been imposed in each of your cases.” | 8 June 2011 |
| R v Nasir & Jufri | Queensland Supreme Court Justice Atkinson | “A judge sentencing offenders under the Commonwealth law must take account of the matters set out in section 16A of the Crimes Act 1914 (Cth). However, that is qualified in this case by the requirement to impose a statutory minimum sentence because there can be little doubt that were it not for that requirement, the sentence I am obliged to pass upon you would not be in accordance with the requirements of section 16A of the Crimes Act.” | 2 December 2011 |
| R v Hasim | Queensland District Court Judge Martin | “Commonly, savage penalties are being imposed upon the ignorant who have been simply exploited by organisers. You are one such person. It is obvious that the legislation imposing a minimum mandatory penalty deprives a Court from exercising a full and proper sentencing discretion in cases such as this.” | 11 January 2012 |
| R v Mulyono | Queensland District Court Judge Martin | “I have on previous occasions remarked about the inappropriateness of mandatory minimum penalties. Most recently the remarks were made in the matter of the Queen v Hasim. It is unnecessary for me to here repeat those remarks and, indeed, even if I did, it seems to achieve little. Of course, these penalties which are designed to be a deterrent to others have little or no effect unless the fact of these penalties is published to the persons who may bring boatloads to Australia.” | 3 February 2012 |
| R v Albahruliilmi | Queensland District | [directing a verdict of not guilty]: | 22 March 2012 |

| Case | Court | Comments | Date |
|------|------------------------|--|------|
| | Court Judge Griffin | <p>“[I]n this legislation Judges are deprived of the right to pass any particular sentence. Judges are directed by the law that there is a minimum sentence of three years. So for someone in defendant’s position he would have been required to spend three years in gaol had there been proof.</p> <p>So the lowliest of a crew member or the most money-grabbing of sea captains who direct the voyage, they’re all rather lumped by the legislation into the same boat. You may draw your own conclusions about what it does to the right of Judges to make discretionary decisions about the roles of people in the commission of offences.”</p> | |

Endnotes

- ¹ ICCPR, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally on 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia on 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).
- ² CEDAW, opened for signature 18 December 1979, [1983] ATS 9 (entered into force generally on 3 September 1981; entered into force for Australia on 27 August 1983).
- ³ CRPD, opened for signature 13 December 2006, [2008] ATS 12 (entered into force generally on 3 May 2008; entered into force for Australia on 16 August 2008).
- ⁴ CRC, opened for signature 20 November 1989, [1991] ATS 4 (entered into force generally on 2 September 1990; entered into force for Australia on 16 January 1991).
- ⁵ Marriage Act, ss 23(1)(d)(iii) and 23B(1)(d)(iii).
- ⁶ UN Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law*, UN Doc CRPD/C/GC/1 (2014) para 13. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en (viewed 8 April 2015).
- ⁷ UN Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law*, UN Doc CRPD/C/GC/1 (2014) para 9.
- ⁸ 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 (viewed 8 April 2015).
- ⁹ Senate Legal and Constitutional Affairs Legislation Committee, *Report into the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014* (September 2014), p 23.
- ¹⁰ Senate Legal and Constitutional Affairs Legislation Committee, *Report into the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014* (September 2014), p 26.
- ¹¹ Commonwealth, *Parliamentary Debates*, Senate, 9 February 2015, p 144 (Senator Zed Seselja).
- ¹² Explanatory Memorandum, Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (Cth), at [124] and [384].
- ¹³ Commonwealth, *Parliamentary Debates*, Senate, 9 February 2015, pp 147-148 and 155.
- ¹⁴ A penalty unit is currently \$170: *Crimes Act 1914* (Cth), s 4AA(1).
- ¹⁵ *Hili v The Queen* (2010) 224 CLR 520 at 526 [13] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
- ¹⁶ *Hili v The Queen* (2010) 224 CLR 520 at 528-530 [26]-[29].
- ¹⁷ 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 (viewed 8 April 2015).
- ¹⁸ 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 8 April 2015).
- ¹⁹ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p 38.
- ²⁰ *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].
- ²¹ *Mabo v Queensland* (1988) 166 CLR 186 at 217 (Brennan, Toohey and Gaudron JJ).
- ²² 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.
- ²³ 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.

- ²⁴ *Magaming v The Queen* [2013] HCA 40.
- ²⁵ *Palling v Corfield* (1970) 123 CLR 52 at 58.
- ²⁶ *S v Dodo* 2001 (3) SA 382 (CC).
- ²⁷ *S v Dodo* 2001 (3) SA 382 (CC) at [26].
- ²⁸ *S v Dodo* 2001 (3) SA 382 (CC) at [36].
- ²⁹ *S v Dodo* 2001 (3) SA 382 (CC) at [38].
- ³⁰ *R v Smickle* [2012] ONSC 602.
- ³¹ *R v Smickle* [2013] ONCA 678.
- ³² *R v Lewis* [2012] ONCJ 413.
- ³³ *R v Laponsee* [2013] ONCJ 295.
- ³⁴ *R v Vandyke* [2013] ABPC 347 at [20].
- ³⁵ Senate Legal and Constitutional Affairs Legislation Committee, *Report into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, April 2012, p 21. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/migrationamendment2012/report/index (viewed 9 April 2015).
- ³⁶ Commonwealth Director of Public Prosecutions, Responses to questions on notice, Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012, 23 and 26 March 2012. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/migrationamendment2012/submissions (viewed 9 April 2015).
- ³⁷ Senate Legal and Constitutional Affairs Legislation Committee, *Report into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, April 2012, p 22.
- ³⁸ Australian Government, *Response to the Senate Legal and Constitutional Affairs Legislation Committee Report: Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, November 2012, p 3. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/migrationamendment2012/index (viewed 9 April 2015).
- ³⁹ Australian Government, *Response to the Senate Legal and Constitutional Affairs Legislation Committee Report: Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, November 2012, p 3.
- ⁴⁰ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Issues Paper 46, 10 December 2014, p 74. At http://www.alrc.gov.au/sites/default/files/pdfs/publications/ip46_wholedoc_2.pdf (viewed 10 April 2015).
- ⁴¹ *Ibid.*, citing William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol IV, 293.
- ⁴² *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 137 [104] (Hayne and Bell JJ), citing *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 340.
- ⁴³ *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 153 [159] (Kiefel J); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.
- ⁴⁴ *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 112 [28] (French CJ and Crennan J).
- ⁴⁵ AML/CTF Act s 169(1).
- ⁴⁶ *Competition and Consumer Act 2010* (Cth), s 155(7).
- ⁴⁷ *Australian Securities and Investments Commission Act 2001* (Cth), s 68.
- ⁴⁸ *Australian Crime Commission Act 2002* (Cth), s 30.
- ⁴⁹ Explanatory Memorandum, *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015* (Cth), at [171].
- ⁵⁰ *Ibid.*
- ⁵¹ *Ibid.*
- ⁵² *Ibid.*