



Australian Government
Attorney-General's Department

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Submission of the Attorney-General's Department

**Senate Legal and Constitutional Affairs References
Committee**

Criminal Code Amendment (Firearms Trafficking) Bill 2015

1. Policy to Tackle Crime

The Government released its Policy to Tackle Crime in August 2013. In the Policy, the Coalition undertook to implement tougher penalties for gun-related crimes, including through the introduction of mandatory minimum sentences of five years' imprisonment for firearms trafficking offences.

As stated in the Policy, the introduction of mandatory minimums reflects the belief that those caught trafficking firearms should receive higher penalties which are commensurate with the seriousness of their offending. Other governments which have taken a similar view include those of Queensland and the United Kingdom, which have also introduced mandatory minimum sentences for firearms trafficking. A number of other countries have also established mandatory minimums for other firearms-related offences. For example, Federal laws in the United States of America carry lengthy mandatory minimum sentences for possessing, brandishing or discharging a gun in the course of a drug trafficking crime or a crime of violence.

The Government also stated in the Policy its intention to encourage the States and Territories to adopt higher maximum penalties for serious firearms possession offences. The Government has since determined to introduce its own increased maximum penalties for firearms trafficking offences, which are intended to complement the proposed mandatory minimum sentences for those offences.

2. Introduction of new and increased penalties

Mandatory minimum sentences for firearms trafficking offences in Divisions 360 and 361 of the *Criminal Code Act 1995* were introduced on 17 July 2014 as part of the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, and on 19 March 2015 in the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*. In both cases, the mandatory minimum sentences were removed by the Senate. The *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014* also introduced new offences for international firearms trafficking, and expanded existing cross-border trafficking offences to include firearms parts. These provisions were passed.

Mandatory minimum sentences for firearms trafficking offences in Divisions 360 and 361 of the *Criminal Code Act 1995*, as well as increased maximum penalties for those offences, have now been proposed in the *Criminal Code Amendment (Firearms Trafficking) Bill 2015*, introduced on 2 December 2015. Trafficking offences in Divisions 360 and 361 include those relating to firearms and firearm parts. According to the definition under Regulation 4F in the *Customs (Prohibited Imports) Regulations 1956*, the term 'firearms' includes deactivated firearms.

The Guide to Framing Commonwealth Offences, drafted by the Attorney-General's Department (AGD), does not prohibit the use of mandatory minimum sentences. Rather, the Guide states that mandatory minimums should not be used other than in rare cases. In line with the sentiments expressed in its media release concerning the *Criminal Code Amendment (Firearms Trafficking) Bill 2015*, the Government's decision to introduce mandatory minimums for firearms trafficking offences demonstrates the seriousness with which it takes this type of offending, which can lead to the supply of firearms to those who would use them in the commission of serious crimes.

Further to limiting the national illicit firearms trade, the introduction of more serious penalties also 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.

3. Martin Place Siege Review

In February 2015, the Martin Place Siege Joint Commonwealth-New South Wales Review was released. In drafting the Review, the Commonwealth and New South Wales Governments considered gunman Man Haron Monis' access to firearms.

The Review noted that the measures included in the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, which included mandatory minimum sentences, would strengthen the Commonwealth's ability to tackle the illegal trafficking of firearms and firearms parts into and out of Australia. 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.

In conjunction with the introduction of increased penalties for firearms trafficking offences, the Government is working to implement specific firearms-related recommendations from the Review. These include a technical review of the National Firearms Agreement, and consideration of additional measures to address illegal firearms.

4. Limitation on human rights associated with mandatory minimum sentences

A number of submissions to this inquiry have raised concerns with the possible limitations mandatory minimums place on articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR). These are addressed below.

Article 9 – Arbitrary Detention

Article 9(1) of the ICCPR relevantly states 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.

Under article 9(1) of the ICCPR, Australia is obligated to protect the liberty and security of persons under its jurisdiction by preventing arbitrary arrest or detention. Detention that is in accordance with domestic law may nevertheless be arbitrary if it exhibits elements of inappropriateness, injustice, or lack of predictability or proportionality.

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. In response to concerns raised by the Parliamentary Joint Committee on Human Rights when the mandatory minimums were first introduced in the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, the Explanatory Memorandum for the *Criminal Code Amendment (Firearms Trafficking) Bill 2015* notes that 'the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ

significantly from the head sentence'. The provisions similarly do not apply mandatory minimum penalties to children (those under the age of 18). These factors preserve a level of judicial discretion and ensure that custodial sentences imposed by courts take into account the particular circumstances of the offence and the offender. Importantly, the mandatory minimum term of imprisonment will only apply if a person is convicted of an offence as a result of a fair trial in accordance with such procedures as are established by law.

Under the *Crimes Act 1914*, courts are required to take into account the character, antecedents, age, means and physical or mental condition of the person (s. 16A(2)(m)). A sentencing judge will therefore be obliged to consider these matters in determining the amount of time an offender spends in custody if they are convicted of a firearms trafficking offence and receive the mandatory minimum head sentence of five years' imprisonment.

Based on the High Court's reasoning in *Magaming v The Queen* [2013] HCA 40 in relation to mandatory minimum penalties for aggravated people smuggling offences, the proposed provisions are considered lawful and not arbitrary.

The Government is committed to limiting the number of firearms and firearm parts entering the illicit market, which can be used in the commission of serious, violent and sometimes deadly crimes. There are clear and serious social and systemic harms associated with firearms trafficking, and the entry of even a small number of illegally acquired or distributed firearms into the Australian community can have a significant impact on the safety of its citizens.

Article 14 – Right to Appeal

Article 14 of the ICCPR states that:

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

The provisions contained in the *Criminal Code Amendment (Firearms Trafficking) Bill 2015* do not prevent appeal of a conviction, or of any sentence above the mandatory minimum sentence. The proposed revised penalties would more closely align the Commonwealth's maximum penalties with maximum penalties for trafficking offences in the States and Territories. More information on this is set out in section 5 below.

5. Introduction of increased maximum penalties

Currently, the maximum penalties for firearms trafficking offences under the *Criminal Code Act 1995* are imprisonment for 10 years, or a fine of 2,500 penalty units (equal to \$450,000), or both. The *Criminal Code Amendment (Firearms Trafficking) Bill 2015* would double those maximum penalties to imprisonment for 20 years, or a fine of 5,000 penalty units (equal to \$900,000), or both.

As noted by the Law Council of Australia in its submission, the amendments would more closely align the Commonwealth's maximum penalties with maximum penalties for trafficking offences in the States and Territories. For example, 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)*).

In developing the *Criminal Code Amendment (Firearms Trafficking) Bill 2015*, AGD consulted with the Australian Federal Police (AFP) and the Commonwealth Director of Public Prosecutions (CDPP) on increasing

maximum penalties for firearms trafficking offences. The AFP and the CDPP did not raise concerns with the proposed increase.

The introduction of mandatory minimum sentences of five years' imprisonment for firearms trafficking offences is an important aspect of the Government's strategy to stop illegal guns and drugs at the border. The simultaneous introduction of increased maximum penalties ensures that the full range of penalties associated with these offences is commensurate with their seriousness, and with the grave nature of the associated crimes they can affect.

6. Other measures to address illicit firearms

The Government is committed to removing illegal firearms from the community and tackling gun-related crime. In order to do so and as well as introducing increased penalties for firearms trafficking offences, the Government has:

- fast-tracked the roll out of National Anti-Gang Squads, which are now operational in NSW, Queensland, Victoria and Western Australia
- established a firearm tracing service within the Australian Crime Commission to understand the illicit nature of the Australian firearms market and to assist partner agency investigations
- launched the Australian Ballistic Information Network, a database developed by CrimTrac containing information to help police link firearms used in crimes to suspects, and
- invested \$88 million to increase screening and examination of international mail, air and sea cargo.

These measures will significantly disrupt the movement of illegal firearms. For example, since the introduction of the National Anti-Gang Squads, 480 illicit firearms have been removed from the community.

To further strengthen our intelligence sharing, the Government recently introduced legislation to merge two of Australia's most important law enforcement and criminal information agencies – CrimTrac and the Australian Crime Commission. This merger will leverage the strengths of these agencies, and will improve their capacity to provide accurate and timely information and intelligence to police in order to undermine the illicit firearms market.

The Government is also pursuing further measures to deal with illegal firearms in response to a recommendation made in the Martin Place Siege review. In 2016, the Council of Australian Governments will consider a suite of additional measures to address illegal firearms, including a possible nationwide firearms amnesty.