



Australian Government
Attorney-General's Department

October 2016

Submission of the Attorney-General's Department

**Senate Legal and Constitutional Affairs Legislation
Committee**

Criminal Code Amendment (Firearms Trafficking) Bill 2016

1. Government policy

The Government released its *Policy to Keep Illegal Guns Off Our Streets and Our Communities Safe* in June 2016. In this policy, the Coalition undertook to re-introduce legislation within its first one hundred days that would increase maximum penalties and introduce mandatory minimum sentences of five years' imprisonment for firearms trafficking offences.

The commitments in this policy follow the Government's *Policy to Tackle Crime*, released in August 2013. In the 2013 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 2013 policy, the introduction of mandatory minimum sentences reflects the belief that those caught trafficking firearms should receive penalties that are commensurate with the seriousness of their offending. Other governments, including those of Queensland and the United Kingdom, have introduced mandatory minimum sentences for firearms trafficking offences.¹

2. Introduction of new minimum and increased maximum penalties

The *Criminal Code Amendment (Firearms Trafficking) Bill 2016* (the Bill) introduces mandatory minimum sentences of five years' imprisonment and doubles the maximum penalty to 20 years' imprisonment or a fine of 5,000 penalty units, or both, for firearms trafficking offences against Divisions 360 and 361 of the *Criminal Code Act 1995*. 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 Government's decision to introduce mandatory minimum sentences and increased maximum penalties for firearms trafficking offences reflects the Government's view that these offences are serious crimes that pose a significant threat to community safety.

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. Consideration of these measures by Parliamentary committees

The provisions of the Bill were considered by the Legal and Constitutional Affairs Committee's inquiry into the *Criminal Code Amendment (Firearms Trafficking) Bill 2015*, which reported in February 2016. This inquiry took place under the previous Parliament, and the *Criminal Code Amendment (Firearms Trafficking) Bill 2015* lapsed at prorogation in May 2016. The committee recommended that that bill be passed, subject to two amendments to the explanatory memorandum, both of which have been made.

The explanatory memorandum states that the mandatory minimum penalty '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', and that the defendant bears an evidential burden regarding their age. This is consistent with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers and it directly addresses the committee's concerns regarding clarity.

¹ Mandatory minimum sentences for firearms trafficking offences are legislated in the UK under Section 51A of the *Firearms Act 1968*, and in Queensland under Section 65 of the *Weapons Act 1990*.

The explanatory memorandum also clarifies that people with significant cognitive impairment will not face a mandatory minimum non-parole period, as is the case for all offenders. It also reiterates the mental impairment defence provided for under section 7.3 of the Criminal Code.

In its report No. 7 of 2016, the Parliamentary Joint Committee on Human Rights deferred consideration of the Bill. However, it has previously considered the provisions of the Bill when considering the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*. In its twenty-fourth report of the 44th Parliament, the committee thanked the Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism for his previous input and concluded its examination of the measures. When the committee subsequently considered the *Criminal Code Amendment (Firearms Trafficking) Bill 2015* in its thirty-third report of the 44th Parliament, it referred to its previous consideration of the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*.

Further detail on consideration by the Parliamentary Joint Committee on Human Rights is in section 5 below.

4. 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 cafe, 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 a national firearms amnesty. The amnesty was agreed to by Commonwealth, State and Territory ministers at the Law, Crime and Community Safety Council meeting in October 2016. The amnesty will be conducted in mid-2017 with the aim of reducing the number of unregistered firearms in Australia.

5. Mandatory minimum sentences: Engagement with human rights

A number of submissions to this committee's inquiry into the *Criminal Code Amendment (Firearms Trafficking) Bill 2015* 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.

The Government believes that mandatory minimum sentences for firearms trafficking offences are reasonable and necessary both to deter would-be firearms traffickers, and to appropriately penalise those who commit these offences. There are appropriate limitations and safeguards in place to ensure that detention is proportionate in each individual case.

As the provisions do not impose a mandatory non-parole period, the actual time a person will be incarcerated will remain at the discretion of the sentencing judge. 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 to the Bill notes 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’. 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 conditions 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 Bill 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 6 below.

6. 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 Bill 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 to this committee's inquiry into the *Criminal Code Amendment (Firearms Trafficking) Bill 2015*, the Bill 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)*).

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.