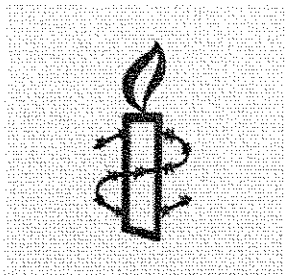
Criminal Law
Amendment Bill 2012
Submission 008



28 June 2012

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Re: Submission on Criminal Law Amendment Bill 2012

The Human Rights in Law Group of Amnesty International, Queensland-northern NSW Branch seeks to have the Criminal Law Amendment Bill 2012 amended, to ensure it is in accordance with international human rights principles and Australia's obligations as a signatory to international treaties and conventions. Two particularly relevant international standards are the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

We note that the primary effect of the Bill would be to:

(a) increase the mandatory non-parole period for multiple murders from 20 to 30 years' imprisonment (clauses 3(1) and 7 of the Bill);

(b) create a mandatory non-parole period for murder of a police officer, if the murdered person ought reasonably to have known to have been a police officer, to 25 years (clauses 3(2) and 7 of the Bill);

(c) increase the mandatory non-parole period for murder in all other cases from 15 to 20 years' imprisonment (clause 7 of the Bill);

(d) increase the maximum penalty for serious assault (including assault occasioning bodily harm, or assault by spitting on or biting, or assault armed or pretending to be armed with a weapon) of a police officer to 14 years (clause 4 of the Bill);

(e) create a mandatory minimum penalty of $5,000 and two year license disqualification for the offence of evading police (clause 21 of the Bill); and

(f) abolish the Sentencing Advisory Council (clause 17 of the Bill).

Increase in Mandatory Non-Parole Periods

Proposed amendments (a) to (c) above involve the introduction or increase of mandatory periods of incarceration. The increase of these penalties is said to be justified by the need to ensure that the punishment "fits the severity of the crime", "communicates the gravity of the offending", and "promotes community safety and protection from these serious offenders".[1] Amendment (e) also involves the introduction of a mandatory minimum penalty.

The Explanatory Memorandum focuses specifically on the need to protect police officers in their course of duty. It states:

> In particular, the amendments give effect to the Government's commitment that Queensland's criminal laws provide strengthened protection to police officers acting in the performance of their duties. The penalty increases for the murder of a police officer and the serious assault of a police officer reflect the important role performed by police officers in maintaining civil authority and the dangers faced by them in the discharge of their civic duties.

[1] Explanatory Memorandum, p 4.

This Bill proposes the introduction or increase of a mandatory period of incarceration of up to 30 years. The increase in penalties is based on the need to ensure that:

- the punishment fits the severity of the crime;
- the punishment is a deterrent to crimes potentially repeated by the offender or committed by other potential offenders; and
- the sentence adequately protects the community.

Murder is a grave offence that must be met with appropriate deterrence and punishment. Police must be afforded appropriate protection to ensure that law enforcement can be carried out effectively. We note that the second reading speech does not note any instance or pattern of instances that call for legislation to remedy problems emerging in the courts. In any event, we would argue that the imposition of higher mandatory sentences and non-parole periods would achieve neither of these goals:

- The proposed mandatory sentences would not ensure that an appropriate punishment is given to reflect the severity of the offence. A fixed minimum punishment without reference to circumstance or severity is imposed by proposed legislation.
- The proposed mandatory sentences would not be effective in protecting police or the general public. Such a course does nothing to remedy the causes of the offences and can potentially create a false sense of security, complacency and ignorance in the community.

Higher penalties have been convincingly shown not to correlate with a decrease in crime

Detailed empirical studies have repeatedly shown that crime rates are not decreased by the imposition of more severe punishments, but rather by the likelihood of being caught.[2] There is no evidence to support that the increase in the sentence and non-parole period would be effective in deterring further crime or protecting members of the public or police from further offence.

Many murders are not calculated and pre-meditated offences, but rather crimes of passion, and so the actions of offenders are unlikely to be affected by an increase in the punishment to which they may be exposed. Detailed empirical studies have repeatedly shown that crime rates are not decreased by the imposition of more severe punishments, but rather by the likelihood of being caught.[3]

The offence of murder already has a high mandatory penalty of life imprisonment. These proposed amendments are tacit acknowledgement that a long prison sentence does not act as a deterrent. In the case of two of the three amendments, high mandatory non-parole periods are already legislated. Although the increase of five and ten years respectively is an extreme incursion on the liberty of the individual once convicted, the deterrent effect, if any, already engaged by the current provisions, is unlikely to be significantly altered by these amendments. The multiple and varied causes of the crimes are not being recognised, addressed or prevented.

Mandatory minimum non-parole periods remove the important sentencing discretion of the court and have an unconstrained potential to create unintended injustice

Murder must be met with an apposite sentence. Such offences are committed in a range of circumstances, which may be considerably more or less mitigating than others. Where the courts retain discretion to sentence each individual on the facts of each case, they do so in accordance with the principles set out in the *Penalties and Sentencing Act*, including the need to punish, deter and protect the community. The judgement and discretion of the courts, based on the facts, is far more likely to result in an appropriate sentence which is fair and relevant to the individual case. A court determined sentence is likely more effective in protecting the community, having regard to

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2 See for example D Ritchie, "Does Imprisonment Deter? A Review of the Evidence", Sentencing Advisory Council (Vic), April 2011, 2; David Brown, "The Limited Benefit of Prison in Controlling Crime" (2010) 22(1) Current Issues in Criminal Justice 137, 140-1; Kadish S and Schulhofer S (eds), Criminal Law and its Processes (6th ed, Aspen Publishers, New York, 1995) p 117; Witte A, "Economic Theories" in Kadish S (ed), Encyclopedia of Crime and Justice (Free Press, New York, 1992) p 206; Hessing D, Elffers H, Robben HSJ and Webley P, "Does Deterrence Deter? Measuring the Effect of Deterrence on Tax Compliance in Field Studies and Experimental Studies" in Slemrod J (ed), Why People Pay Taxes: Tax Compliance and Enforcement (University of Michigan Press, Michigan, 1992) pp 291-292; Erard B, The Influence of Tax Audits on Reporting Behaviour in Slemrod, n 200, pp 95, 113-114.

3 See for example D Ritchie, "Does Imprisonment Deter? A Review of the Evidence", Sentencing Advisory Council (Vic), April 2011, 2; David Brown, "The Limited Benefit of Prison in Controlling Crime" (2010) 22(1) Current Issues in Criminal Justice 137, 140-1; Kadish S and Schulhofer S (eds), Criminal Law and its Processes (6th ed, Aspen Publishers, New York, 1995) p 117; Witte A, "Economic Theories" in Kadish S (ed), Encyclopedia of Crime and Justice (Free Press, New York, 1992) p 206; Hessing D, Elffers H, Robben HSJ and Webley P, "Does Deterrence Deter? Measuring the Effect of Deterrence on Tax Compliance in Field Studies and Experimental Studies" in Slemrod J (ed), Why People Pay Taxes: Tax Compliance and Enforcement (University of Michigan Press, Michigan, 1992) pp 291-292; Erard B, The Influence of Tax Audits on Reporting Behaviour in Slemrod, n 200, pp 95, 113-114.

the community context and the circumstances of the case, than the application of a legislated mandatory minimum that applies to all cases, without having any regard to mitigating circumstances.

Earlier this year, the Judicial Conference of Australia made a rare submission regarding the mandatory sentencing of "people smugglers". In that submission, the JCA said:

> Mandatory minimum sentences impact upon the separation of powers between the legislative and judicial arms of government, and upon the quality of justice dispensed by the courts. ... The point should be made, however, that it is the responsibility of the judiciary, and not the role of the legislative or executive branches of government, to pronounce individual sentences on individual offenders. Mandatory minimum sentences restrict judicial discretion when giving effect to this quintessentially judicial task. They also cut across basic principles of sentencing law.[4]

These statements apply equally to the increase in mandatory minimum non-parole periods for those convicted of murder, which are already set at a high level. The imposition of a mandatory minimum of 20 years' imprisonment in all murder cases, 25 years in the case of a police officer and 30 years in the case of multiple murders will inevitably result in injustice. The Legislature is not elected to, and is poorly qualified to override and intervene in the essentially judicial role of sentencing. Article 9 of the UDHR and Article 9 of the ICCPR prohibit arbitrary detention. A legislator takes on a grave and heavy responsibility and accountability, in making judgements in Parliament to mandate that a second murder offence is more serious (as indicated by the more severe mandatory sentence) than the first, and that without reference to judicial hearing and process, the sentence on conviction, will be predetermined by the legislator.

UDHR Article 10 states that all have the right to a fair and public trial by an independent and impartial tribunal. The proposed legislation is contrary to the independence and impartiality of the judiciary and the principle of separation of powers on which our democracy and access to human rights depends.

Removal of Mitigation for Guilty Plea and Added Trauma for Victims

The *Penalties and Sentences Act* places great emphasis on the reduction in tariff for an early guilty plea. There are many well known policy reasons for this course. However, the provisions of this bill in respect of the minimum mandatory sentences for offenders will result in all matters being taken to trial. There would be no incentive to do otherwise. This will not only add to the trauma of the victim's family and witnesses but could potentially result in enormous costs and time delays for the courts.

Retrospective Sentencing Laws

Clause 5 of the Bill proposes to introduce a new section 729, which provides that the new mandatory non-parole period for a second murder conviction applies even if the first murder was committed before the commencement of that section.

The Explanatory Memorandum notes at page 6 that "[t]he amendment to section 305(2) operates with partial retrospective effect in that only one offence must have been committed after commencement".

Retrospective criminal laws offend against the most basic principles of the rule of law. It is essential to the fair operation of criminal laws that citizens can ascertain illegality and consequences of an action at the time the action is made. In *Polyukhovich v Commonwealth* (1991) 172 CLR 501, Brennan J stated at [28] that "[a]t least since the time of Bentham and Mill, however, ex post facto criminal legislation has been generally seen in common law countries as inconsistent with fundamental principle under our system of government". The Australian Senate Standing Committee for the Scrutiny of Bills has recently opined that "liberal and democratic legal traditions have long expressed strong criticisms of retrospective laws that impose criminal guilt" and "retrospectivity is generally considered to compromise basic 'rule of law' values".[5]

If an act is made illegal or the punishment for it increased after it is done, then the result is manifestly unfair for those who incur the new and unforeseeable consequences of their actions. There is no "deterrent effect" justification in punishment for a retrospective crime. Aside from other problematic features of the proposed amendments, they are unfair, and an ineffective deterrent mechanism to the extent of their retrospective effect.

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4 Judicial Conference of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012, 1

5 Senate Standing Committee for the Scrutiny of Bills, First Report of 2012, 8 February 2012, ISSN 0729-6258 at 14-17.

Dissolution of the Sentencing Advisory Council

Clause 17 of the Bill proposes to dissolve the Sentencing Advisory Council, a statutory body which, inter alia, seeks the community's views and provides advice to the Attorney-General on sentencing matters. The Explanatory Memorandum at page 3 states that the proposed dissolution is to avoid duplication of the function of the Queensland Law Reform Commission (QLRC).

It is important to conserve government resources and avoid the duplication of processes within statutory bodies. The QLRC has limited resources and acts on references given to it by the Attorney-General. If the government dissolves the Sentencing Advisory Council on the basis that the QLRC will be fully resourced and empowered to seek community views, report, and advise on all sentencing matters, and its recommendations have equal range and status to those of the Sentencing Advisory Council, the merging of the Council and QLRC may be productive.

The consequence of the dissolution of the Council must not be poorly considered increases in maximum or minimum sentences in order to satisfy political objectives. If the Committee and Parliament consider that such a consequence is at all likely, then the Council should not be dissolved.

Cost of Implementation

The cost of the implementation of these mandatory sentencing regimes, which will result in more persons in state custody over time, have not been properly disclosed to the public. The Explanatory Memorandum does not address the cost of implementation, except to say:

> Any costs in relation to the amendments will be met from existing agency resources

Incarceration of offenders is an expensive form of punishment that has been estimated to cost upwards of $100,000 per person per year.[6] If the Bill proposes to introduce punishments that will increase expenditure in this area, its proponents have a duty to the public to properly justify the extent of that expenditure and why it is warranted.

Inadequacy of Reporting Period

We note that the Bill was introduced on 20 June 2012, with submissions due on 28 June 2012, and the Committee is due to report back by 6 July 2012. In effect, this gives all relevant parties only one week to consult and consider the Bill and make informed and considered submissions on the matter. Many social justice and human rights advocacy organisations operate largely on a volunteer basis. This timeframe is extremely restrictive, and likely to deny most relevant parties the opportunity to comment in proper detail, if at all.

Amendments to criminal laws, which will have the effect of the mandatory incarceration of individuals for periods up to 30 years are very serious, and deserve proper consideration. The proposed legislation is not in response to any emergency situation, and if passed hastily could have unintended and grave consequences. This consultation period is insufficient and is not indicative of a bona fide consultation.

Yours Sincerely,

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6 See e.g. John Dilulio and Anne Piehl, 'Does prison pay? The stormy national debate over the cost-effectiveness of imprisonment' (1991) 9 *Brookings Review* 28; Anne Piehl and John Dilulio, 'Does prison pay? Revisited: Returning to the Crime Scene' (1995) 13 *Brookings Review* 11. See also Pat Mayhew, 'Trends & Issues in Crime and Criminal Justice', Australian Institute of Criminology Paper, April 2003.