



28 June 2012

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4109

BY EMAIL to lacsc@parliament.qld.gov.au

Re: Submission on Criminal Law Amendment (Two Strike Child Sex Offenders) Bill 2012

The Human Rights in Law Group of Amnesty International, Queensland-northern NSW Branch seeks to have the Criminal Law Amendment (Two Strike Child Sex Offenders) 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 effects of the Bill would be to create a mandatory minimum of life imprisonment with a 20-year non-parole period for repeat child sex offenders where:

- (a) a person has been convicted of a child sex offence, whether before or after the commencement of the Bill; and
- (b) that person is then later convicted of a second child sex offence, which was committed after the commencement of the Bill.

Introduction of Mandatory Penalties

This Bill proposes the introduction or increase of a mandatory period of incarceration of 20 years. The increase in penalties is based on the premises that:

- the punishment fits the severity of the crime; and
- 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.

Child sex offences are grave offences that must be met with appropriate deterrence and punishment. 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 consider that the imposition of mandatory life imprisonment with a non-parole period of 20 years would not achieve these purposes.

- The proposed mandatory sentence would not ensure that an appropriate punishment is given to reflect the severity of the child sex offence. A fixed minimum punishment without reference to circumstance or severity is imposed by proposed legislation.
- The proposed mandatory sentence would not be effective in protecting children or the general public. The premise fallaciously suggests that the only way society can be protected is to lock offenders away and this 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.¹ There is no evidence to support that the

¹ 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

increase in the sentence and non-parole period would be effective in protecting children and the members of the public from further offence.

Child sex offences are committed in a range of circumstances. It is a frequent occurrence that offenders have been victims and abused in childhood, and/or offenders are debilitated by mental or social dysfunction. Convicted child sex offenders must serve a sentence proportionate to the severity of their crime. A more effective response to their offence for reduction of re-occurrence, is rehabilitation and treatment of their mental or social disorder, which predisposes them to commit the offences. Mandatory lengthy periods of imprisonment will not solve mental and social dysfunction.

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

Child sex offences 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 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.²

These statements apply equally to the introduction of mandatory penalties for child sex offences. The imposition of a mandatory life imprisonment in all cases will inevitably, indiscriminately result in injustice. The severity of a life sentence may be compounded by the negative stereotypical response of the community to child sex offenders, inside and outside of jails. The Legislature is not elected to, and is poorly qualified to override and intervene in the essentially judicial role of sentencing. The 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 child sex 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 repeat 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. This is of particular concern in child sex cases, where it is more likely that more child witnesses, who are already traumatised by the events constituting the offence, will then be forced to testify about them at trial.

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.

² 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

Retrospective Sentencing Laws

The new mandatory sentence for a second conviction applies even if the first conviction was committed before the commencement of that section. The Explanatory Memorandum notes at page 3 that “[t]he new mandatory sentencing regime operates with partial retrospective effect to the extent that a serious child sex offence conviction that occurred before commencement of the Bill will be recognised as the ‘first child sex offence’ for the purpose of the new regime”.

Retrospective criminal laws offend against the most basic principles of the rule of law. 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”.³

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.

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.⁴ 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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³ Senate Standing Committee for the Scrutiny of Bills, First Report of 2012, 8 February 2012, ISSN 0729-6258 at 14-17.

⁴ 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.