

AMNESTY INTERNATIONAL



Standing Committee on Environment
and Public Affairs
Western Australian Legislative Council
Parliament House
Perth WA 6000

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Dear Committee,

Re: Submission to support Petition No 84 – Criminal Law Amendment (Home Burglary and Other Offences Bill) 2014

Thank you for the opportunity to provide a submission on this petition.ⁱ I have not made a complaint to the Ombudsman.

I strongly urge the Western Australian Legislative Council not to pass the Criminal Law Amendment (Home Burglary and Other Offences Bill) 2014 (the Bill) in its current form. Your petitioners ask that at the very least:

1. The legislation is amended so that it does not apply to young people (by removing all references to 'juvenile offender' and changes to the counting rules for those under the age of 18).
2. The legislation is amended to ensure adequate review. This could be done by changing the definition of 'review date' to mean 'the first anniversary of the day on which the Criminal Law Amendment (Home Burglary and Other Offences) Act 2014 section 4 comes into operation.' I further recommend you consider an annual review process to ensure that any unintended unjust consequences of the legislation are assessed and able to be addressed.
3. The Legislative Council refer the Bill to a Committee for further review prior to passing. A Committee could assess the risk the legislation poses to children and its potential impact on the rates of Indigenous young people in detention.

Concerns with the Bill in its current form are outlined below, and are extrapolated in the attached Amnesty International report published in June 2015: *'There's always a brighter future' – Keeping Indigenous kids in the community and out of detention in Western Australia.*

Disproportionate impact on Indigenous people

If passed, this Bill will have a disproportionate impact on Indigenous young people. From 2000 to 2013, WA has had one of the highest rates in Australia of imprisonment of Indigenous people.ⁱⁱ Indigenous young people in WA are heavily overrepresented at every stage of the youth justice system, and most overrepresented at the more punitive stages of the system.ⁱⁱⁱ Between July 2013 and June 2014, Indigenous young people in WA were 52 times more likely than non-Indigenous young people to be in detention; twice the national average.^{iv}

A 2001 review found that mandatory sentencing disproportionately impacted Indigenous people by the selection of offences targeted by the legislation (which were more likely to be committed by Indigenous people); and by choices made by police and prosecuting authorities about the processing of individual cases.^v The review found that 81 per cent of the 119 young people sentenced under the three-strikes burglary laws were Indigenous.^{vi} Since 2008, the Children's Court has imposed far more custodial sentences for burglaries than for any other offence,^{vii} and mostly on Indigenous children.^{viii} In 2012/2013, there were 104 custodial sentences imposed on Indigenous children for 'unlawful entry with intent/burglary, break and enter', compared with 43 of the same for non-Indigenous children.^{ix}

Changed counting rules

This Bill will amend the counting rules for determining 'repeat offender' status for those aged 16 and 17 so that multiple offences dealt with in court on one day will no longer be counted as a single 'strike'.^x Under the proposed changes, a magistrate would have no option but to impose a one year term of detention or Conditional Release Order on a 16 or 17-year-old for their first court appearance if they had been charged with three counts of home burglary. Chief Justice Martin said recently: "I think if the home burglary legislation comes into force and the counting rules around three strikes mandatory detention provisions are changed, we will see a lot more Aboriginal kids in detention...I think that's a step in the wrong direction."^{xi}

The WA Children's Court President has also expressed concerns the Bill will heighten the problem of incarceration of Indigenous people, particularly young people.^{xii} He said the Bill will: "likely result in an increase in the number of Aboriginal young people from country WA being sentenced to lengthy terms of detention ... if the Court is obliged to impose a term of detention or imprisonment of at least a year, it will have little or no scope to properly reflect the level of seriousness of the particular offence in the sentencing option and the length of the term imposed".^{xiii}

Minimum sentences for aggravated home burglary

The Bill will also introduce mandatory minimum three year terms of detention for further offences committed in the course of an 'aggravated' home burglary for 16 and 17-year-olds.^{xiv} Circumstances of aggravation include committing a burglary in company with another person, being armed or pretending to be armed with a dangerous weapon and threats to injure and detaining a person.^{xv} While the offences to which these laws apply are extremely serious in nature, they already attract considerable penalties. The Government has provided no case examples to justify why such minimum sentences are required for juveniles.

The impact of these provisions could be manifestly unjust in certain circumstances. The Bill could, for example, have the effect of imprisoning a 16 or 17 year old, who has never committed a prior offence, but is found to be an accomplice to the offence of grievous bodily harm in the course of an aggravated home burglary, because they were pressured into watching out front of the house while the crime was committed by others. In that circumstance the judge would have no choice but to sentence them to 3 years, at least one of which would be likely to be served in adult prison.

Broader concerns about WA's mandatory sentencing regime

The research to date indicates that mandatory sentencing does not reduce crime and does not have a deterrent effect. In 2001, an independent review of WA's mandatory sentencing found no evidence that the laws had deterred crime, reduced recidivism, or promoted rehabilitation.^{xvi} A Government-commissioned WA review in the same year also indicated that the laws had little impact on crime.^{xvii} On a national level, a review completed in 2008 by an independent statutory body in Victoria found that mandatory sentencing is unlikely to achieve its aims, and that existing research shows that 'making a penalty mandatory rather than discretionary will be unlikely to increase its deterrent value'.^{xviii} Similarly, a 2014 Law Council of Australia report found a lack of evidence as to the deterrent value of mandatory sentencing regimes in reducing crime.^{xix}

The Committee on the Elimination of Racial Discrimination has recommended that Australia abolish its mandatory sentencing regimes on the basis that the laws may constitute direct or indirect discrimination.^{xx} Similarly, the Committee Against Torture has noted concern with Australia's compliance with the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and recommended mandatory sentencing laws are abolished.^{xxi} Further, mandatory sentencing conflicts with Australia's obligations under the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CRC).^{xxii}

Please advise if you require further written and verbal evidence to support this submission.

Yours sincerely


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Indigenous Rights Manager

Notes

ⁱ As per letter from the Hon Simon O'Brien MLC, Standing Committee on Environment and Public Affairs, dated 6 May 2015 and received 19 May 2015.

ⁱⁱ Steering Committee for the Review of Government Service Provision, Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2014* (2014), Tables 4A.12.1, 4A.12.4.

ⁱⁱⁱ Amnesty International, *There is always a Brighter Future: Keeping Western Australia's Indigenous kids in the community and out of detention* (2015), 13, <<http://www.amnesty.org.au/indigenous-rights>>.

^{iv} Australian Institute of Health and Welfare, *Youth justice in Australia 2013–14* (2015) Cat No AUS188, Table 2.

^v Morgan, Blagg, and Williams, note 1, 112.

^{vi} *Ibid.*, 4, citing WA Department of Justice, *Review of section 401 of the Criminal Code* (2001), 24-25.

^{vii} See Government of Western Australia, *Report on Criminal Cases in the Children's Court of Western Australia 2009/10 to 2013/14* (2014), 8.

^{viii} See Department of Attorney General WA, *Report on Indigenous Defendants in the Children's Court of Western Australia 2008/09 to 2012/13* (2013), 7.

^{ix} Calculation based on difference between 147 reported in Department of Attorney General WA, note 12, 8, and 104 reported in Department of Attorney General WA, note 13, 7.

^x Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA), clause 20.

^{xi} Lucy Martin, 'WA Aboriginal children 53 times more likely to be jailed than peers, Amnesty report reveals', *ABC The World Today*, Online, 11 June 2015, <<http://www.abc.net.au/news/2015-06-11/wa-chief-justice-slams-high-rate-of-aboriginal-incarceration/6538006>>.

^{xii} President Reynolds, above n 62, 8.

^{xiii} President of the Western Australian Children's Court Dennis Reynolds, 'Youth justice in Western Australia – contemporary issues and its future direction'. Eminent Speakers Series, The University of Notre Dame, p 8.

^{xiv} Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA). These include Murder (clause 5) Manslaughter (clause 6) Unlawful Assault Causing Death (clause 7), Attempt to unlawfully kill (clause 8), Acts intended to cause grievous bodily harm or prevent arrest (clause 9), Grievous bodily harm (clause 10), Sexual offences (clauses 11 and 12), Aggravated indecent assault (clause 13), Sexual penetration without consent (clause 14), Aggravated sexual penetration without consent (clause 15), Sexual coercion (clause 16), Aggravated sexual coercion (clause 17), Incapable person, sexual offences against (clause 18).

^{xv} Criminal Code Act Compilation Act 1913, section 400.

^{xvi} Neil Morgan, Harry Blagg, and Victoria Williams, Aboriginal Justice Council, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* (2001), 5-8.

^{xvii} Western Australian Department of Justice, *Review of Section 401 of the Criminal Code* (2001), explained in Rowena Johns, *Sentencing Law: A Review of Developments in 1998-2001*, NSW Parliamentary Research Service, Briefing Paper 2/02 January 2002, 76-78.

^{xviii} Dr Adrian Hoel & Dr Karen Gelb, Sentencing Advisory Council Victoria, *Sentencing Matters: Mandatory Sentencing* (2008), 1, 14.

^{xix} Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014), [157].

^{xx} Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on Australia*, 56th sess, UN Doc CERD/C/304/Add.101 (19 April 2000) (CERD 2000), [16]; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on Australia*, 66th sess, UN Doc CERD/C/AUS/CO/14 (March 2005), [20].

^{xxi} Committee against Torture, *Concluding observations on the fourth and fifth periodic reports of Australia*, 53rd sess, UN Doc CAT/C/AUS/CO/4-5 (23 December 2014), [12].

^{xxii} See Committee on the Rights of the Child, *Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012), [84]; and Human Rights Committee, *Concluding Observations: Australia*, 69th sess, UN Doc CCPR/A/55/40 (28 July 2000), 3.