

**Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on the independence of judges and lawyers**

Ref.: OL AUS 2/2025  
(Please use this reference in your reply)

20 February 2025

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolutions 49/10 and 53/12.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the passage by both houses of the Australian Parliament of the Criminal Code Amendment (Hate Crimes) Bill 2025 on 6 February 2025<sup>1</sup> ("the Act"). Our comments focus only on the provisions of the Act which impose mandatory minimum sentences and maximum penalties for terrorism offences. We are deeply concerned that these provisions are inconsistent with Australia's obligation to guarantee freedom from arbitrary detention under article 9 of the International Covenant on Civil and Political Rights (ICCPR) and the right to fair trial under article 14 of the ICCPR.

The amendments amend the *Crimes Act 1914* (Crimes Act) and the *Criminal Code Act 1995* (Criminal Code) to:

- Create mandatory minimum penalties of 6 years imprisonment for most offences against Division 101 and 102 of the Criminal Code.
  - The Division 101 offences are: committing a terrorist act; providing or receiving training connected with terrorist acts; possessing things connected with terrorist acts; collecting or making documents likely to facilitate terrorist acts; and other acts done in preparation for, or planning, terrorist acts.
  - The Division 102 offences are: in relation to a terrorist organization, directing its activities, membership, recruiting, training, funding, and providing support.
- Create the mandatory minimum penalty of 12 months imprisonment for the offences of associating with terrorist organizations under section 102.8(1) or (2).
- Create mandatory minimum penalties of 3 years imprisonment for offences against Division 103 of the Criminal Code, namely financing terrorism or a terrorist.

---

<sup>1</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r7240](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7240).

- Create mandatory minimum penalties of 12 months imprisonment for the offenses of publicly displaying prohibited Nazi or terrorist organisation symbols, or performing the Nazi salute.
- Increase the maximum penalty for publicly displaying a prohibited Nazi or terrorist organisation symbol, or performing the Nazi salute, to 5 years imprisonment.

The Act does not affect the existing law requiring the courts to consider individual and mitigating circumstance when setting a non-parole period. Judicial discretion remains available to discount the sentence by up to 25% where the offender cooperates with law enforcement or up to 50% if the offender pleads guilty. The mandatory minimum sentences will not apply to children under 18 years old.

The amendments also require the Parliamentary Joint Committee on Intelligence and Security to commence a review of the operation and effectiveness of the mandatory minimum provisions within two years of their commencement.

The Act was adopted after an increase in alleged antisemitic incidents in Australia, including some involving arson or property damage. The Australian Government’s Explanatory Memorandum explains that the laws “would address inadequacies in the criminal justice system that result in outcomes that insufficiently punish or deter offenders” in terrorism cases.<sup>2</sup> The increase in maximum penalty for Nazi or terrorist symbol offences is said to be necessary because the public display of such symbols is “a serious, intentional act that causes significant harm to many Australians and can radicalise [sic] others to violence”.

In presenting the Bill, the Australian Government appended a “Statement of Compatibility with Human Rights” asserting that these measures are consistent with Australia’s international human rights obligations, including because stronger penalties protect the human rights of victims of crime.

The amendments were introduced and adopted within a single day while Parliament was sitting, without any meaningful opportunity for advance public consultation or scrutiny by any relevant parliamentary committee, including the Joint Committee on Human Rights or the Joint Committee on Intelligence and Security.

The peak legal representative body, the Law Council of Australia, strongly opposed the new laws: “Mandatory sentencing laws are arbitrary and limit the individual’s right to a fair trial by preventing judges from imposing a just penalty based on the unique circumstances of each offence and offender”.<sup>3</sup> It also called to strengthen non-criminal responses to preventing violent extremism instead of simplistically increasing criminal penalties. As a matter of policy generally, the Law Council of Australia is opposed to mandatory sentencing.<sup>4</sup>

<sup>2</sup> [https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr7240ems\\_492fd6bc-9ece-4f13-88e7-fdf7a4ef321b%22](https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr7240ems_492fd6bc-9ece-4f13-88e7-fdf7a4ef321b%22).

<sup>3</sup> <https://lawcouncil.au/media/media-releases/mandatory-sentencing-is-not-the-answer>.

<sup>4</sup> <https://lawcouncil.au/publicassets/f370dcfc-bdd6-e611-80d2-005056be66b1/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf>.

## *Right to liberty*

We are concerned that mandatory minimum sentencing for a broad range of terrorism offences would infringe the right to liberty under article 9(1) of the ICCPR. Freedom from arbitrary detention requires assessment of “elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality” (general comment No. 35, para. 12). Any term of imprisonment must therefore be necessary, proportionate and reasonable in the circumstances, and requires an assessment of factors such as the seriousness of the conduct, the personal situation of the offender, the impact on any victims, mitigating and aggravating factors, and prospects of rehabilitation. By depriving the court of any capacity to consider such factors, mandatory sentencing cannot always ensure that the specified term of imprisonment will always, or even usually, be necessary, proportionate and reasonable, thus risking routine infringements of article 9(1), notwithstanding that the Act does not dictate non-parole periods. The United Nations Human Rights Committee,<sup>5</sup> Special Procedures mandate holders<sup>6</sup> (including in terrorism cases: [SLV 4/2022](#)), and regional human rights courts<sup>7</sup> have frequently expressed concern about mandatory sentences for such reasons.

The risk of arbitrariness is heightened because the Act imposes a blanket 6-year term of imprisonment for a wide spectrum of terrorism offences of very disparate levels of gravity, ranging from the actual commission of a terrorist act to conduct which may (often) be very remote from the realization of any terrorist violence, including acts that may be minor in the circumstances, such as possessing some document or giving small amounts of money. Preparatory offences under Australian law criminalize conduct at very early stages of terrorist conspiracies, when conspirators may not yet have selected any target or acquired any means to commit an attack, any attack may not involve violence against persons, and intervening factors may be likely to prevent any proposed attack from proceeding. Some of the terrorist organization offences do not require that the offender’s conduct made any contribution whatsoever to advancing the violent terrorist activities of the organization. While the mandatory sentence for the Nazi and terrorist organization symbols offences is set at the lesser term of 12 months imprisonment, these offences set a fairly low bar for liability, notwithstanding certain exceptions, and could still capture displays where the harm caused may be relatively minor and not deserving of such term.

The necessity and proportionality of detention under article 9(1) further requires consideration of alternatives to imprisonment. While terrorist offences may often warrant imprisonment, mandatory sentences automatically exclude the consideration of appropriate non-custodial measures, particularly where an offender is vulnerable, there are weighty mitigating factors, the conduct is minor (particularly given the wide range of terrorism offences under Australian law that do not require any contribution to the commission of a violent act), and the interests in rehabilitation and reintegration outweigh a more punitive approach. The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) 1990 promote the use of non-custodial

---

<sup>5</sup> E.g. *Thompson v. Saint Vincent and the Grenadines*, Communication No. 806/1998, para. 8.2; Concluding Observations on Australia’s third and fourth periodic reports.

<sup>6</sup> Working Group on Arbitrary Detention, A/HRC/54/51/Add.1, para. 47 and Opinion No. 5/2022, para. 101; various mandate holders in SLV 4/2022.

<sup>7</sup> E.g. *Vinter and others v UK*, Applications Nos. 66069/09 and 130/10 and 3896/10, European Court of Human Rights, Judgment (2012), para. 93.

measures where appropriate. Security Council resolutions concerning terrorism also emphasize the need to consider appropriate prosecution, rehabilitation and reintegration measures for terrorist offenders.

Mandatory sentences also risk being inconsistent with international standards on the sentencing of terrorist offenders (see also SLV 4/2022). While States enjoy a considerable discretion in setting penalties, the international counter-terrorism conventions require States to punish offences “by appropriate penalties which take into account their grave nature”. The element of appropriateness is intended to incorporate a proportionality assessment, consistent with the general practice of states on criminal punishment. Further, Security Council resolution 1373 (2001) requires States to impose penalties “that duly affect the seriousness” of terrorist acts, a requirement which can only be met if the seriousness of the particular act in question is evaluated in the individual circumstances of the case, not by blanket penalty prescriptions.

Further, it is a general, cardinal principle of law that criminal responsibility must be determined on an individual basis, and this is compromised if the penalty is automatic and cannot be tailored to fit the crime in the particular circumstances.

Mandatory minimum sentencing generally also tends to have a disproportionate negative impact on particularly vulnerable groups, including juveniles, people with psychosocial disabilities, Indigenous Peoples and racial or religious minorities (see e.g. [A/HRC/57/44](#), para. 46).

### *Right to fair trial*

Mandatory sentences under the Act could potentially result in violations of the right to a fair trial by an independent and impartial tribunal under article 14(1) of the ICCPR. Firstly, fair trial requires that “any penalty must be imposed by a tribunal that is independent in the sense that it retains full discretion in determining matters of fact and law”.<sup>8</sup> A mandatory sentence deprives the court of the discretion “which must inhere in every independent tribunal to consider” how proportionality should apply between the facts and the penalty to be imposed, including by taking into account circumstances specific to an individual offender.<sup>9</sup>

It is ultimately the responsibility of the judiciary, and not the role of the legislative or executive branches of government, to pronounce individual sentences on individual offenders, taking the particular facts and personal circumstances into account. Mandatory minimum sentences may restrict judicial discretion when giving effect to this quintessentially judicial task, and when they do so in a manner that requires the court to impose an excessively disproportionate punishment, such as a manifestly unjust sentence, they may give rise to an unfair trial [...] under article 14(1).<sup>10</sup>

Secondly, mandatory sentencing may infringe the right under article 14(5) of the ICCPR to have a sentence reviewed by a higher tribunal. The appeal court must be

---

<sup>8</sup> *Rajabu and Others v Tanzania*, Application No. 007/2015, African Court on Human and Peoples Rights (2019), para. 107.

<sup>9</sup> *Ibid.*, para. 109.

<sup>10</sup> Human Rights Committee, *Nasir v Australia*, Communication No. 2229/2012 (2016), Dissenting Opinion of Committee member Sarah Cleveland.

empowered “to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case”, and “[a] review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient” (general comment No. 32, para. 48). Mandatory sentencing precludes the appeal court from substantively reviewing the appropriateness and proportionality of the penalty, and limits its role to purely formal scrutiny of whether the mandatory sentence was applied automatically upon conviction.

*Purported justifications for restricting liberty and fair trial*

The Australian Government justifies mandatory sentences in the Act on the basis that stronger penalties are necessary to protect the human rights of victims of crime. The independence of the judiciary under article 14(1) of the ICCPR cannot be restricted by any argument for protecting the rights of others. Permitting arbitrary detention of criminal suspects under article 9 of the ICCPR is equally inadmissible purportedly to advance victims’ rights. There is, in any event, no clear empirical evidence that mandatory minimum sentencing deters and reduces crime and could thus constitute necessary restrictions.<sup>11</sup> There is also some evidence that it can increase recidivism by detaining individuals for longer periods in prisons, which are “learning environments” for criminality, and by failing to address underlying causes of crime or consider more rehabilitative alternatives to imprisonment which can both reduce crime. Research suggests that overwhelmingly, the strongest determinant of reducing crime is the effectiveness of law enforcement in detecting, arresting and prosecuting offenders. Mandatory sentencing can also have other negative effects on fair trial and the administration of justice, including heightening the risk of over-charging in the exercise of police and prosecutorial discretion, and discouraging juries from convicting, resulting in bad acquittals.

The Australian Government justifies mandatory sentences as necessary under the Act because of purportedly inadequate outcomes and penalties in the criminal justice system. There is virtually no evidence to sustain an assertion that there is any systematic failure by the courts to properly apply terrorism penalties. To the contrary, the maximum legislated penalties available to judges for terrorism offences are already very high; and in the sentencing policy adopted by the superior Australian criminal courts, and in the sentences imposed in terrorism cases, very heavy penalties have been imposed compared with similar jurisdictions. The courts have emphasized, applying the Australian parliaments’ legislative intentions, that a predominantly punitive and deterrence-oriented approach to terrorist offenders justifies presumptively heavy penalties, even for preparatory offences not involving the commission of violence, and that rehabilitation serves a lesser function in such cases.

We respectfully emphasize, consistent with Australia’s international human rights law obligations and resolutions of the General Assembly, Security Council and Human Rights Council, that all measures to counter terrorism must fully respect human rights, which also makes counter terrorism efforts more effective. Consequently, we

---

<sup>11</sup> See e.g. research by the Australian statutory bodies the Australian Law Reform Commission, <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/8-mandatory-sentencing/> and the Sentencing Advisory Council, “Sentencing Matters: Mandatory Sentencing” (2008).

urge your Excellency's Government to immediately review and repeal the Act.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following issues:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned analysis.
2. Please explain how mandatory minimum sentences for terrorism offences comply with the rights to liberty and fair trial under articles 9 and 14 of the ICCPR;
3. Please indicate whether your Excellency's Government will undertake to immediately repeal the provisions of the Act which impose mandatory minimum sentences for terrorism and related offences.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

Ben Saul

Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Margaret Satterthwaite

Special Rapporteur on the independence of judges and lawyers