INQUIRY INTO THE MIGRATION AMENDMENT (REMOVAL OF MANDATORY MINIMUM PENALTIES) BILL 2012

Legal Aid NSW Submission

to the

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

March 2012

ABOUT LEGAL AID NSW

This submission has been prepared by the Legal Aid Commission of New South Wales (Legal Aid NSW) and is endorsed by Legal Aid ACT, Legal Aid Queensland, the Northern Territory Legal Aid Commission and the Legal Services Commission of South Australia.

Legal Aid NSW is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

People smuggling proceedings have been conducted for more than 10 years in the Northern Territory and Western Australia. Recently, as a result of agreement between Attorneys General at State and Commonwealth levels, a large number of individuals suspected of people smuggling have been sent to NSW and other states for prosecution.

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We assert with absolute confidence that mandatory penalties are inevitably capricious, arbitrary, unfair and unjust. [1]

[T]he prescription of an inflexible rule for differently circumstanced offenders must logically and inexorably generate unfair outcomes.[2]

If justice is not individual, it is nothing.[3]

In any democratic society, judges are the guardians of rights and fundamental freedoms. Judges and courts undertake the judicial protection of human rights and ensure the right of appeal, combat impunity and ensure the right to reparation.[4]

INTRODUCTION

Legal Aid NSW supports the repeal of section 236B of the *Migration Act 1958* (Cth) (the Migration Act) proposed by the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012 currently before the Senate.

The repeal is supported as a matter of sentencing principle, and as a result of the provision's significantly unfair effect in practice.

Since late 2010, Legal Aid NSW has coordinated the representation of over 100 Indonesian citizens charged with aggravated people smuggling under section 233C of the Migration Act (and its predecessor provision), a substantial proportion of whom have been tried and/or sentenced. Other jurisdictions have experience of mandatory minimums for these offences from 2001.

SENTENCING PRINCIPLES

Introduction

The statutory maximum penalty of 20 years imprisonment for offences of aggravated people smuggling, which is at the upper end for Commonwealth offences, provides appropriate scope for the sentencing of those convicted of aggravated people smuggling. Maximums allow the Executive to indicate the seriousness of the offence, while also allowing judicial officers appropriate flexibility in sentencing individuals. It is a fundamental principle that justice must be individual. Mandatory minimum sentences of imprisonment make individual justice impossible.

Other Australian jurisdictions have greater experience of mandatory terms of imprisonment. Judicial officers have repeatedly criticised such provisions, for example, in regard to mandatory terms for repeat property offenders in the Northern Territory.

> [M]andatory sentences by their very nature are unjust in the sense that they require courts to sentence on a basis regardless of the nature of the crime and the particular circumstances of the offender…Whatever else may be said about these provisions, Parliament, it appears, intended that courts impose the blunt instrument of

[1] D Johnson and G Zdenkowski *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory* Australian Centre for Independent Journalism 2000, p 11.
[2] Ibid.
[3] *Kable v DPP* (1995) 36 NSWLR 374, Mahoney ACJ at 394.
[4] L Despouy, UN Special Rapporteur on the Independence of Judge and Lawyers, *Civil and Political Rights Including the Questions of Independence of the Judiciary, Administration of Justice*, Impunity, 31 December 2003 E/CN.4/2004/60 at para 30.

> imprisonment in lieu of other sentencing dispositions which might more truly reflect the circumstances of the offence and of the offender...[5]
>
> Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.[6]

In a recent conference paper, the Chief Justice of Western Australia – a jurisdiction with over a decade's experience of applying mandatory minimum terms of imprisonment for aggravated people smuggling – observed as follows.

> When a legislature is considering exercising the power to set a minimum bound for the exercise of the sentencing discretion, it will hopefully take account of the fact that the prescription of a minimum sentence creates the risk that a court may be required to impose a sentence which is disproportionate to the culpability of the offender, or the seriousness of the offence, or which may prejudice the prospects of rehabilitation and which is to that extent unjust, and will evaluate those risks against the perceived advantages of a mandatory minimum sentence.
>
> Recognition of the constitutional responsibility of the legislature does not mean that it is inappropriate or undesirable for a court or judge to observe, in measured and moderate terms, that in a particular case the application of sentencing constraints imposed by the legislature may have given rise to injustice. Such observations provide both the legislature and the electorate with information which may be of assistance in the formation or revision of public policy with respect to sentencing.[7]

Mandatory minimum sentences of imprisonment have also been the subject of adverse judicial finding in a number of other Commonwealth countries with a legal system similar to Australia.

The Supreme Court of Canada has found that a mandatory seven year minimum sentence for importing drugs was incompatible with the right not to be subjected to cruel and unusual punishment guaranteed by section 12 of the Canadian Charter of Rights.[8]

In 1997, the High Court of Fiji held that a mandatory minimum of three months imprisonment for possession of up to 10 grams of cannabis was unconstitutional because it was grossly disproportionate to the offence.[9] [Fiji was suspended from the Commonwealth on 8 December 2006.]

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[5] *Trenerry v Bradley* (1997) 115 NTR 1 Angel J at 9.
[6] Ibid, Mildren J at 11. These laws were repealed when the government changed in 2001.
[7] The Hon Wayne Martin, 'Sentencing Issues in People Smuggling Cases', Federal Crime and Sentencing Conference, ANU, 11 February 2012, p 11.
[8] *R v Smith* [1987] 1 SCR 1045.
[9] In *State v Audie Pickering* (unreported) 30 July 2001, Justice Shameem found that the mandatory sentence was invalid for violation of section 25(1) of the 1997 Fijian Constitution that states 'Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment'. The judgment in this stated case provides a useful summary of international case law on mandatory minimum terms of imprisonment. It should be noted, however, that the reasoning flows from the existence of a Bill of Rights in the Fijian Constitution, the fact that the mandatory penalty was introduced by way of presidential decree rather than legislation, and the particular circumstances of the defendant.

Crimes Act 1914

Section 16A of the *Crimes Act 1914* sets out a non-exhaustive list of factors to be taken into account when sentencing an offender for a Commonwealth offence, reflecting long established common law and statutory sentencing principles. Section 16A(1) frames the provision.

> In determining the sentence to be passed...in respect of any person for a federal offence, a court must impose a sentence...that is of a severity appropriate in all the circumstances of the offence.

This subsection reflects the principle of proportionality which, at common law, is the overarching sentencing consideration.

> A basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances. [10]

Section 236B of the Migration Act is inconsistent with the principles of proportionality as it does not enable the Court to take into account all the circumstances of the offence. It is also inconsistent with the 'instinctive synthesis' (rather than arithmetical) approach to sentencing preferred by the High Court of Australia.

> The synthesising task is conducted after a full and transparent articulation of the relevant considerations including an indication of the relative weight to be given to those considerations in the circumstances of the particular case.[11]

Section 16A(2) is a combination of aggravating and mitigating factors. In matters of aggravated people smuggling, factors of aggravation (beyond that implicit in the offence) can be allowed for in the sentence by increasing the sentence above the mandatory minimum – where the judicial officer is of the view that it is not sufficient. Matters of mitigation cannot be taken into account, despite the legislative requirement to do so.

Under section 17A(1) of the *Crimes Act 1914*, and at common law, a sentence of imprisonment is a sentence of last resort and in that case, the shortest sentence possible should be imposed.

> A court shall not pass a sentence of imprisonment on any person for a federal offence, or any offence against the law of an external Territory that is prescribed for the purposes of this section, unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case.[12]

By its nature, a mandatory minimum term of imprisonment does not allow for the application of individual justice or the proper application of sentencing principles. The court must impose at least the minimum, losing the ability to fully take into account the particular defendant's circumstances. Putting aside the prerogative of mercy, there is also no scope for a court of review to impose a sentence other than the minimum required by section 236B.[13] [See page 7 below.]

[10] *Hoare v The Queen* (1989) 167 CLR 348 at 354.
[11] *Markarian v R* [2005] HCA 25, Gleeson CJ, Gummow, Hayne, Callinnan JJ at para 84.
[12] *Parker v DPP* (1992) 28 NSWLR 282.
[13] See J Azize, 'The Prerogative of Mercy in NSW' *The Journal of Law and Social Justice* (2007) Vol 1, Art 6 pp 1-36.

General Deterrence

At common law, the Court must take into account general deterrence when sentencing an offender for a federal offence.[14]

When mandatory minimum sentences of imprisonment for aggravated people smuggling were introduced in 2001, the second reading speech stated: 'Those provisions will send a red light to would-be people smugglers.'[15] The stated policy behind the legislation is to deter the organisers who run people smuggling networks to help asylum seekers reach Australia by sea. In our experience these organisers, who stand to make huge profits from each boat, are not the people who are prosecuted by Australian authorities. They are unlikely to be deterred by the punishment of the crew who are minnows in the hierarchy of the smuggling network, more dispensable than the passengers.

The briefs of evidence for Legal Aid NSW clients include statements from the passengers which detail how they came to be on the boats. For example, many Afghan asylum seekers start their journey after long stays in refugee camps in Pakistan by travelling on false documents by air to Kuala Lumpur. They pay bribes to local officials and then travel by boat across the Strait of Malacca to Indonesia. They are then taken overland to a series of safe houses as they make their way East through the Indonesian archipelago to a coastal village closer to Australian waters. The total journey can cost between $US5000 and $15 000. By contrast, the crew are usually promised the equivalent of around $A200-300 for their work on the boat.

The force of the mandatory minimums is felt by the Indonesian crew members who are mainly from isolated and impoverished communities, many of which do not have electricity and thus no exposure to local or international media about people smuggling.

The number of boats of asylum seekers coming to Australia has increased steadily since 2005, despite a significant drop after border protection laws were amended in 2001, including by the excising of Christmas Island and Ashmore reef from the migration zone.[16] While there is no diminishment in the persecution of people globally, those persecuted will continue to seek final asylum in first world democracies.

> Boat arrival numbers in Australia have fluctuated significantly over the last 30 years in response to global events. Government responses over the years have included measures aimed at ensuring that those arriving by boat are genuine refugees, policies aimed at protecting our borders, including through co-operation with neighbouring countries, and policies aimed at deterring unauthorised boat arrivals. The debate in both public and political arenas is likely to continue as governments seek to address these issues.[17]

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[14] *DPP (Cth) v El Karhani* (1990) 51 A Crim R 123; *Hili v The Queen; Jones v The Queen* [2010] HCA 45 at para 25, by implication.

[15] Philliip Ruddock, Minister for Immigration and Ethnic Affairs, Parliamentary Debates, H or R, Date, Page.

[16] *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) and associated Acts. Those arriving in these parts of Australia are referred to as Irregular Maritime Arrivals. The number of arrivals are also thought to have decreased in response to the then Government's 'turnaround' policy, implemented in October 2001, where a number of boats were returned to Indonesian waters by the Australian Navy: C Stewart, 'Law of the Sea Versus the Dictates of Canberra', *Weekend Australian* 10-11 March 2012, Inquirer, p 19.

[17] J Phillips and H Spinks *Background Note: Boat Arrivals in Australia Since 1976* Department of Parliamentary Services 24 January 2012 app A. 69 boats arrived in 2011 carrying a total of 168 crew of 168 and 4565 passengers. A joint media release by the Minister for Immigration and Citizenship and the Minister for Home Affairs on 22 February 2012 gives the most recent (although overlapping) figures. Between September 2011 and the date of the release, 45 boats were detained in Australian waters carrying 3465 passengers: www.minister.immi.gov.au/media/cb/2012/cb182919.htm.

People smuggling is a complex problem of international politics and policy, which is not and cannot be solved by Australian sentencing laws. Imposing disproportionate sentences on the crew is not deterring the organisers of people smugglers. However, it is imposing unwarranted hardship on these men and their families who are usually left without a breadwinner in a country with no social security payments.

Individual Deterrence

Section 16A(2)(j) requires the Court to take into account 'the deterrent effect that any sentence...under consideration may have on the person'. This section relates to individual deterrence.

For laws to be effective as a deterrent, the group targeted must have sufficient understanding of the law to enable them to foresee the consequence of re-offending. As demonstrated throughout this submission, that is not the case for the Indonesian crew on the boats.

Prior Good Character and Personal Circumstances

Section 16A(2)(m) requires the Court to take into account the 'character, antecedents, age, means and physical or mental condition' of the defendant. This reflects the general sentencing principle that first offenders are entitled to some lenience. In this context, the subsection should be read with read with subsection (n): 'the prospect of rehabilitation'.

Mandatory minimum terms of imprisonment make appropriate lenience impossible, leading to disproportionate sentences. Also, they do not allow the Court to take proper account of physical and mental disabilities.[18]

Plea of Guilty

While the NSW guideline judgement on pleas of guilty was not intended to apply to Commonwealth offences, the general principles are relevant in calculating any discount on the head sentence.[19] It is permissible for a sentencing judge to identify the measure of discount allowed for a plea of guilty to a federal offence.[20] The crucial question is the extent to which the plea demonstrates the offender's willingness to facilitate the administration of justice.[21] The strength of the Crown case is a relevant consideration as to how much weight should be given to the discount for the plea.[22]

This is separate to any discount that may flow from evidence of contrition (including by way of reparation).[23]

Section 16A(2) also requires the fact that a person has pleaded guilty to be taken into account in setting the sentence. This provision is effectively void where a mandatory minimum sentence of imprisonment applies. Also, the mandatory minimum has the potential to skew the sentencing pattern if judges determine that the mandatory minimum is the starting point and so set higher sentences for all who have not pleaded guilty.

[18] See, for example, *DuRandt v R* [2008] NSWCCA 121.
[19] *R v Bugeja* [2001] NSWCCA 196.
[20] *R v Markarian* [2005] HCA 25.
[21] *R v Cameron* (2002) 209 CLR 330; *Danial v R* [2008] NSWCCA 15.
[22] *R v Tyler and Chalmers* (2007) 173 A Crim R 458 at para 114.
[23] See *R v GM Jones; R V AJL Hili* [2010] NSWCCA 108: the combined discount for a plea of guilty and assistance to authorities should normally not exceed 40%.

It could be argued that mandatory minimums operate in practice as an incentive to plead not guilty as the only prospect of serving less than a three year minimum term is an acquittal.[24]

Adequate Punishment

Section 16A(2)(k) enables the court to take into account 'the need to ensure that the person is adequately punished for the offence'. Removing judicial discretion to determine the length of sentences inevitably leads to harsh and unfair results. All defendants face the same minimum term regardless of the objective seriousness of the offence or their subjective mitigating factors.

International Obligations

International human rights instruments set benchmarks for signatory states, for implementation in domestic law at the discretion of the signatory. Australia ratified the International Covenant on Civil and Political Rights (ICCPR) in 1980. It is arguable that mandatory minimum terms of imprisonment are inconsistent with a number of the articles in the ICCPR. Other organisations have greater expertise in matters of international law, but as specialists in criminal law Legal Aid NSW makes the following observations.

Article 14 of the ICCPR guarantees the right to a fair trial. Article 14.1 provides that all persons shall be equal before courts and tribunals. Those convicted of aggravated people smuggling are the only federal offenders subject to a mandatory minimum sentence of imprisonment (and a mandatory head sentence).[25] They are the only group for whom reductions in sentence based on matters of mitigation, such as an early plea of guilty, are not available.

Article 14.5 provides that a sentence must be reviewable by a higher tribunal. Section 236B of the Migration Act removes sentencing discretion and prevents an appeal court from changing the penalty if the mandatory minimum was imposed, so any review is meaningless. A previous United Nations Special Rapporteur on the Independence of Judges and Lawyers expressed concern that mandatory minimum imprisonment laws restrict the right of appeal.[26]

Article 9.1 of the ICCPR provides that no one should be subjected to arbitrary arrest or detention. A sentence may still be arbitrary notwithstanding that it is authorised by law. Arbitrary has been interpreted more broadly to include such elements as inappropriateness, injustice and lack of predictability.[27]

Australia ratified the United Nations Convention on Persons with Disabilities in 2008. Mandatory minimum sentences of imprisonment are inconsistent with the general

[24] See http://www.smh.com.au/national/people-smugglers-swamping-the-courts-20111226-1pajn.html.
[25] Section 19AG of the Crimes Act provides minimum non-parole periods (as ¾ of the head sentence) for terrorism and national security type offences but does not proscribe a mandatory minimum head sentence.
[26] 'This right of appeal, which is again part of the requirement of a fair trial under international standards, becomes nugatory when the trial court imposes a prescribed minimum sentence. There is nothing in the sentence then for the Appellate Court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of a fair trial process and may not be supported under international standards.': Param Cumaraswamy, address to UNSW Symposium, Mandatory Sentencing Rights and Wrongs, 28 October 2000, p 10. Cited in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report*, HREOC, 2001, p 115.
[27] See commentary in S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Case Materials and Commentary* 2nd ed Oxford University Press, 2005 paras 11.03-11.23, particularly para 11.20.

principles and obligations set out in the Convention, and related instruments. Such sentences do not enable judicial officers to take into account the physical and mental condition of the defendant when determining sentence. [See page 6 above.]

Article 5 of the Universal Declaration of Human Rights states that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[28] This prohibition is picked up in section 233B(1)(b) of the Migration Act which establishes the offence of aggravated people smuggling where the aggravation is subjecting the person being smuggled to 'cruel, inhuman or degrading treatment (in the ordinary meaning of that expression)'. Here, the Executive has recognised the importance of international human rights standards, and norms. This approach should also be adopted in the sentencing of offenders.

IMPLICATIONS OF MANDATORY MINIMUMS IN PRACTICE

Remarks on Sentence

A number of NSW District Court judges have expressed their concern at imposing mandatory minimum terms of imprisonment on convicted people smugglers in their remarks on sentence.

Bakri Siti pleaded guilty at committal to one count of aggravated people smuggling in the Local Court. In the ordinary course, a plea at this stage would warrant a discount on the total sentence of around 25% in recognition of the savings to the administration of justice. When sentencing Mr Siti at Sydney District Court on 27 May 2011, Chief Judge Blanch remarked as follows.

> There is no suggestion at all that he was involved in arranging the voyage or arranging for the embarkation of any of the refugees seeking illegal entry into Australia. In those circumstances, it is very difficult to see that any greater punishment should be imposed on him than on the other persons identified simply as crew members. If there is any room to suggest that he might be more marginally responsible I believe the answer to that is simply that the mandatory minimum penalties imposed are above what would be imposed in the ordinary course of events. The Court has no option but to impose these sentences and in this case, in my view, a sentence of five years with a three year non-parole period looking purely at the objective circumstances would be if anything excessive.

Mursid Karim was found guilty of aggravated people smuggling after a three week trial. In sentencing him to the mandatory minimum under section 233C of the Migration Act (renumbered as section 236B) Justice Conlon made the following remarks.

> Section 233C of the *Migration Act* provides for a mandatory penalty in respect of the present offence. It provides that the Court must impose a sentence of imprisonment of at least five years for a first offence and must set a non-parole period of at least three years. Accordingly the Court's usual sentencing discretion has been significantly diminished.
>
> In my view the present case provides a glaring example of how mandatory penalties can sometimes prohibit a court in delivering a fair and just result and a sentence, "that is of severity appropriate in all the circumstances of the offence." If I was to apply the usual sentencing principles to the present balancing exercise, I would have imposed

[28] The Declaration was adopted by the vast majority of General Assembly members, including Australia, on 10 December 1948.

> a non- parole period (minimum term) of about eighteen months. However, the provisions of s 233C make it unnecessary to further consider the matter.
>
> Of course the courts could be faced with factual circumstances requiring the imposition of the mandatory minimum term or indeed, longer. It is simply my considered view that in respect of this offender, this is not such a case. Nevertheless I must do what is commanded by the legislation.
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> ... I have little doubt that had mandatory minimum sentence provisions not applied, the present matter would most likely have resolved by way of a plea saving much time and expense. There is simply no incentive for an offender to plea. Under the circumstances it is easy to understand why an accused person would "chance his arm" hoping to get a sympathetic jury, feeling that he has little to lose.
>
> ... This offender Mr Karim no doubt will be sent back to his family in Indonesia once he is released following the expiration of his minimum parole on 21 April 2013. A sentence appropriate to the circumstances could have seen him being returned to his country in about October 2011.

Mandatory minimum sentences of imprisonment have shown themselves to be a blunt instrument that disproportionately punish the impoverished Indonesian crew. Legal Aid NSW submits that the harshness of section 236B, and its deviation from long estalbished sentencing principles and norms, is not warranted by the problem it seeks to address. In 2010, Australia received about 3.5% of asylum seeker applications made in industrialised countries.[29] Even with the number of boats increasing, the greatest number of arrivals continues to be by plane, or overstaying a visa.[30]

In the 2010-11 financial year, over 89% of those seeking asylum in Australia who were detained as 'irregular maritime arrivals' were granted protection visas. Although they came to Australia in a way that is heavily criminalised for the crew, they are recognised as having legitimate claims as refugees. A 2009 audit of Corrections NSW found it costs $187 a day to house an inmate in a general prison. Most convicted people smugglers spend the first 4-6 months in immigration detention (administered by the Commonwealth Government) but, even allowing for that, the cost to the NSW Government to imprison them for the 2.5 year balance of the minimum term is $170 637 each. [$187 x 365 x 2.5]

Case Studies

Introduction

Legal Aid NSW notes that each of the men below was tried in open court and their stories are now a matter of public record. Each was acquitted but spent over a year in detention and custody before their trial. The case studies are included to demonstrate the similarity in personal circumstances between them and the men on page 8, whom judicial officers expressed concern about sentencing to a three year minimum.

Taslim

Before travelling to Australia, Taslim lived with his wife and three young children in a small village in North East Java. As a child, he completed five years of school before

[29] Department of Immigration and Citizenship *Asylum Trends Australia: 2010-11 Annual Publication* Commonwealth of Australia 2011, p 3.
[30] Ibid p 2.

having to leave as his parents couldn't afford to pay the tuition fees. Taslim was unable to find work in his village, and he had been unemployed for most of his life. His family had a small plot of land where they grew vegetables. The sweet potatoes Taslim and his wife grew in the plot were the family's main source of food. The family had no running water or electricity in their one bedroom house.

Occasionally Taslim travelled to the coast in search of fishing work. He had sporadic luck in finding different captains who needed crew members. On one particular occasion he met a Captain who offered him work fishing for tuna. He completed five fishing trips with this Captain. One day this Captain offered him work taking a group of foreigners camping on Roti Island. Roti Island is an Indonesian Island, approximately 150km from Ashmore Reef. Taslim had not heard of Roti Island but gladly accepted the work as his family needed the money. He was offered three million rupiah for the journey.

During the voyage, Taslim served food and drink to the passengers and provided whatever assistance he could to the Captain. On the third night, the Captain and three others unexpectedly got off the boat onto a smaller boat that was being towed behind them. The Captain told Taslim that the compass was broken and he had to go back to the mainland to get it fixed. He told him to just continue in the same direction and they would catch up with them later. Taslim was left alone on the main boat with one other Indonesian man and all the asylum seeking passengers. The next morning, upon approaching Ashmore Island Taslim's boat was intercepted by the Royal Australian Navy.

At trial, Taslim argued that he was not guilty of the offence as he did not know that he was coming to Australia. His lawyers lead evidence from him about his lack of education, the poverty in his village and his poor employment history. After an eight day trial, the jury acquitted him of the charge. He was deported to Indonesia ten days later.

Sukri

The facts in Sukri's case are similar to Taslim's. Sukri was born in a small village on the island of Sulawesi. He was brought up by his mother after his father left when he was very young. He completed two years of primary school before being required to leave to earn money to support his family. Sukri cannot read or write.

Sukri moved to Jakarta to try and find better work. He lived with a friend, in a small one roomed house in the outskirts of Jakarta. Conditions in the house were very poor. There was no running water or electricity, and the house backed onto a rubbish dump. Each day he travelled to the harbour to try and find a boat that needed crew. One day he was approached by a man whom he recognised as an old neighbour of his. The neighbour offered him work fishing. He was not given any other details about the voyage. They did not discuss money as Sukri assumed he would be paid from the proceeds of the sale of the fish.

There were originally five crew on the boat – Sukri, his neighbour, the Captain and three others. Sukri was very surprised when, on the first day of the fishing trip, a large group of foreigners got on the boat. He asked his neighbour whether they were still going fishing, to which he was told they were. Sukri felt he was unable to ask any more questions. As the youngest, poorest and least experienced crew member he was not in the position to question his superiors. Indonesian society is based on traditional notions of hierarchy, such that it is unacceptable to question or challenge one's superior. As such, Sukri continued on the voyage, not knowing that the

intended destination was Australia and that he was taking part in a people smuggling operation.

The night before interception by the Royal Australian Navy, a smaller boat motored up to their boat and the Captain and three crew got into it and left. These men did not say anything to Sukri when they got off. Sukri was left alone with his neighbour and the passengers. The boat continued on its course, arriving at Christmas Island about fourteen hours later.

Like Taslim, Sukri argued at trial that he did not know he was travelling to Australia. Sukri gave evidence about how he was brought up not to question those in authority, and how he was an unsophisticated fisherman with no knowledge of Australian geography or the international movement of asylum seekers. He was acquitted after a fourteen day trial. After spending eighteen months in gaol on remand, he was deported to Indonesia fourteen days later.

Maynanse

Maynanse was born in a very small village on a remote island called Babar Island. Babar Island is part of the Maluku archipelago in North East Indonesia. The main industry on Babar is the drying of coconut flesh to make margarine and vegetable oil. His father worked as a garbage collector so Maynanse was lucky enough to complete primary and high school on a larger, neighbouring island.

Upon finishing school, Maynanse moved to Jakarta to find work. He had trouble finding a job, but eventually found work as a fisherman. His fishing work was unreliable, so he spent many months with no work and no income. One day, whilst waiting at the port for a job offer, he and his friend were approached by an Indonesian man who offered them work fishing. They were each offered 6 million rupiah – a very large sum of money by their standards. They gladly accepted the work. They were paid 1 million up front, and told they would get the remaining 5 million at the end of the trip.

Maynanse, his friend, the Captain and two others set off. On the second day of the trip, the boat stopped out at sea and groups of foreigners started getting on. When Maynanse asked the Captain what was going on he was told that the job had changed and he now had to take the boat to *Pulau Christmas (*Christmas Island).

Maynanse and his friend thought Christmas Island was an island of Indonesia and reluctantly agreed to do the job. The Captain and other crew got off the boat, and Maynanse started the voyage following the co-ordinates already plugged into the GPS by the Captain. About five or six hours later Maynanse received a call on his mobile from the Captain. The Captain told him not to be angry with him, but that they were going to Australia as Christmas Island was part of Australia. Maynanse was terrified. He was far out to sea with a large group of foreigners who were all physically larger than him. He was unable to communicate with them. He could sense they were desperate and was worried that if he turned the boat around they would hurt him. He felt he had no choice but to continue on the journey.

At trial, Maynanse argued that the phone call at sea amounted to a 'sudden or extraordinary emergency', and that committing the offence was the only reasonable choice he had in these circumstances. The jury accepted Maynanse's defence, and he was acquitted after a lengthy trial.

CONCLUSION

Legal Aid NSW submits that the mandatory minimum sentences of imprisonment for aggravated people smuggling offences imposed by section 236B of the Migration Act are contrary to established sentencing principles, and are unjustifiable on policy grounds as they do not impact on the organisers of these crimes. The repeal of the section would enable judges to take into account all relevant objective and subjective factors when determining the total sentence, and setting the minimum term. The maximum penalty of 20 years imprisonment reflects that gravity of the crime and provides adequate scope for punishment on an individual basis.