

DPP

Commonwealth Director of Public Prosecutions

SUBMISSION BY THE COMMONWEALTH DPP

THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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

Introduction

The Office of the Commonwealth Director of Public Prosecutions (CDPP) is responsible for the prosecution of criminal offences against the laws of the Commonwealth. The CDPP can only prosecute when there has been an investigation by an investigation agency. The CDPP does not have an investigative function.

The CDPP is responsible for the prosecution of people smuggling offences under the *Migration Act 1958* (the Migration Act) which are referred to the CDPP by the AFP or another investigation agency. The AFP is responsible for the investigation of alleged people smuggling offences and generally commence people smuggling prosecutions by way of arrest and charge.

Section 236B of the Migration Act

The *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* repeals section 236B from the Migration Act, which currently provides:

- (1) This section applies if a person is convicted of an offence against section 233B, 233C or 234A.
- (2) This section does not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.
- (3) The court must impose a sentence of imprisonment of at least:
 - (a) if the conviction is for an offence against section 233B—8 years; or
 - (b) if the conviction is for a repeat offence—8 years; or
 - (c) in any other case—5 years.
- (4) The court must also set a non-parole period of at least:
 - (a) if the conviction is for an offence to which paragraph (3)(a) or (b) applies—5 years; or
 - (b) in any other case—3 years.
- (5) A person's conviction for an offence is for a repeat offence if:
 - (a) in proceedings after the commencement of this section (whether in the same proceedings as the proceedings relating to the offence, or in previous proceedings), a court:
 - (i) has convicted the person of another offence, being an offence against section 233B, 233C or 234A of this Act; or

- (ii) has found, without recording a conviction, that the person has committed another such offence; or
 - (b) in proceedings after the commencement of the Border Protection (Validation and Enforcement Powers) Act 2001 (whether in the same proceedings as the proceedings relating to the offence, or in previous proceedings), a court:
 - (i) has convicted the person of another offence, being an offence against section 232A or 233A of this Act as in force before the commencement of this section; or
 - (ii) has found, without recording a conviction, that the person has committed another such offence.
- (6) In this section:
non-parole period has the same meaning as it has in Part IB of the Crimes Act 1914.

Section 236B was added to the Migration Act by the *Anti-People Smuggling and Other Measures Act 2010*. It replaced section 233C of the Migration Act, which provided:

- (1) This section applies if a person is convicted of an offence under section 232A or 233A, unless it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.
- (2) The court must impose a sentence of imprisonment of at least:
 - (a) 8 years, if the conviction is for a repeat offence; or
 - (b) 5 years, in any other case.
- (3) The court must also set a non-parole period of at least:
 - (a) 5 years, if the conviction is for a repeat offence; or
 - (b) 3 years, in any other case.
- (4) In this section:
 - (a) non-parole period has the same meaning as it has in Part IB of the Crimes Act 1914; and
 - (b) a person's conviction for an offence is for a repeat offence if, on a previous occasion after the commencement of this section, a court:
 - (i) has convicted the person of another offence, being an offence against section 232A or 233A; or
 - (ii) has found, without recording a conviction, that the person had committed another such offence.

The decision in *Bahar v The Queen* [2011] WASCA 249

In 2011, the Supreme Court of Western Australia considered the operation of the mandatory minimum provision in section 233C of the Migration Act in the decision of *Bahar v The Queen* [2011] WASCA 249. In particular, the Supreme Court considered how the mandatory minimum penalty should be taken into account by a Court in the sentencing of people smuggling offences.

In considering the operation of section 233C, the Supreme Court indicated that the “statutory minimum and statutory maximum penalties are the floor and ceiling respectively within which the sentencing judge has a sentencing discretion to which the general sentencing principles are to be applied.” (paragraph 54). When there is a minimum mandatory sentence the question for the sentencing judge is “where, having regard to all relevant sentencing factors the offending falls in

the range between the least serious category of offending for which the minimum is appropriate and the worst category of offending for which the maximum is appropriate.” (paragraph 58)

The Supreme Court noted that what may constitute the least serious category of offending for which the minimum is appropriate does not necessarily require a plea of guilty (paragraph 43) or presence of all mitigating factors (paragraph 55).

The Supreme Court did not endorse the approach in the *Queen v Pot, Wetangky and Lande* (Unreported, NTSC, 18 January 2011), that a Court could determine that the appropriate sentence was less than the mandatory minimum and, having done so, impose the mandatory minimum sentence.

Although the decision in *Bahar* was in relation to the operation of section 233C of the Migration Act, it is applicable to sentencing involving section 236B of the Migration Act as it expounds the general principles of how mandatory minimum penalties should be taken into account in sentencing Commonwealth offences.

Prosecutions for people smuggling offences conducted by the CDP

The Committee may be assisted by the following table which provides the number of defendants prosecuted by the CDP for people smuggling offences with finalised prosecutions¹ from 2008 until 8 February 2012.

	Convicted	Acquitted	Discontinued	Other Outcome	Total
2008-09	4	0	1	0	5
2009-10	45	0	2	2	49
2010-11	110	8	14	8	140
2011-12 (as at 8/2/12)	68	25	49	9	151
Total	227	33	66	19	345

As at 8 February 2012, there were 208 defendants before the Courts being prosecuted by the CDP in relation to people smuggling offences. Three of those defendants are regarded as organisers, and 205 defendants are regarded as crew.

If a people smuggling venture carries more than 5 non-citizens then the offending falls within the explicit words of section 233C of the Migration Act. The minimum mandatory penalties in section 236B apply to offences under section 233C of the Migration Act. Where there are fewer than 5 non-citizens, then the matters are charged under section 233A of the Migration Act which carries a maximum penalty of 10 years imprisonment with no mandatory minimum.

Almost all crew since September 2008 have been involved in ventures with more than 5 passengers and therefore have been prosecuted for offences against section 232A or the renumbered section 233C of the Migration Act. Sentences for these offences have ranged from the mandatory minimum of 5 years imprisonment with 3 years non-parole to a head sentence of 8 years with a non-parole period of 5 years.

¹ Some of the defendants counted in the table may be counted more than once, for example where a defendant is re-tried after a hung jury and the second trial is discontinued