



Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012

Submission by Legal Aid WA

27 February 2012

1. Legal Aid Western Australia provides legal services throughout Western Australia, Christmas Island and Cocos (Keeling) Islands and has extensive experience in the representation of people charged with people smuggling.
2. It is noted that the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* (“the Bill”) repeals section 236B of the *Migration Act 1958 (Cth)* which sets out mandatory minimum penalties in respect of aggravated people smuggling offences including offences under s233C of the *Migration Act*.
3. The Bill is supported by Legal Aid Western Australia.
4. It is considered that the abolition of mandatory minimum penalties in respect of aggravated people smuggling offences is desirable and appropriate for a number of reasons, namely:
 - a. The change would allow greater sentencing discretion for the judiciary in the sentencing of offenders;
 - b. The judiciary, in the exercise of discretion, may then impose penalties that are proportionate to the culpability level of offenders, the circumstances of their offending and other matters personal to them;
 - c. Traditional mitigating factors (including an early plea of guilty, age and lack of prior offences) will have a greater bearing on the penalty ultimately imposed (which in the current sentencing regime, realistically, have minimal impact on sentences imposed);
 - d. There may be more effective negotiation with the Commonwealth concerning cases;
 - e. It is likely that there would be more pleas of guilty if a specific sentencing discount would be applied in recognition of the plea of guilty;
 - f. This would reduce the number of matters proceeding to trial; and

- g. This would have a beneficial impact upon reducing the resources on the prosecution and defence side of a case needed for people charged with people smuggling offences and reduce the time delay associated with the resolution of cases.
5. Judges, particularly in Western Australia and Queensland, have been openly critical of the mandatory minimum sentencing regime. This is for a number of reasons, namely:
 - a. The legislature prescribing that mandatory minimum sentences be imposed creates a real risk of the judiciary imposing a sentence which, in all of the circumstances of the particular case, is disproportionate to the culpability of the offender and/or the seriousness of the offence;
 - b. Mandatory minimum sentencing has not had the legislature's desired affect of reducing or stemming the influx of boats into Australian waters.
 6. The Chief Justice of Western Australia, His Honour Wayne Martin, in a paper titled "*Sentencing Issues in People Smuggling Cases*" delivered on 11 February 2012 at the ANU in Canberra made some very appropriate and timely comments in respect of people smuggling which warrant being repeated here, namely:
 - a. "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";
 - b. "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 the legislature and the electorate with information which may be of assistance in the formation or revision of public policy with respect to sentencing."

- c. “it is appropriate for the Courts to draw the attention of the legislature to the fact that there is good reason to think that the terms of imprisonment which the Courts are required to impose are often considered to be disproportionate to the culpability of the low level offenders who come before the Courts, and the circumstances of their offending, and do not seem to be having any significant effect in deterring others who might be offered a position as crew on a people smuggling vessel.”
7. It is important to note a number of statistical facts tabled in Parliament, namely:
 - a. As at 30 June 2009 there were 30 people smuggling prosecutions before the Courts;
 - b. As at 30 June 2010 there were 102 cases pending;
 - c. As at 30 June 2011 there were 304 cases pending.
8. As observed by His Honour the Chief Justice of Western Australia (in the paper referred to above) the figures as at 30 June 2011 were 10 times as many as two years earlier.
9. It would appear that the imposition of mandatory minimum sentences has had no effect on deterring the people smuggling organisers and, in fact, the number of cases have increased exponentially.
10. It is the experience of Legal Aid WA that generally people charged with people smuggling have very limited education and very limited, if any, information about the law and Australia.
11. Apart from the justice issues referred to above, and as indicated in the Explanatory Memorandum to the Bill, the introduction and ultimate passing of the Bill is compatible with various human rights considerations. The explanatory memorandum particularly identified two human rights issues that are engaged by the Bill, namely:

- a. The right to security of the person and freedom from arbitrary detention; and
- b. Rights to equality and non-discrimination.

12. It is clear, therefore, from both justice and human rights perspectives the Bill should be strongly supported.