

CHAPTER 1

Introduction

Referral of inquiry

1.1 The Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012 (Bill) was introduced into the Senate by Senator Sarah Hanson-Young (Greens, SA) on 8 February 2012.¹ On 9 February 2012, the Bill was referred to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 22 March 2012.² On 28 February 2012, the Senate agreed to extend the reporting date to 4 April 2012.³

Background

1.2 The offence of people smuggling is contained in section 233A of the *Migration Act 1958* (Migration Act). A person commits this offence if they organise or facilitate the bringing, coming or entry to Australia of another person who is a non-citizen and has no lawful right to come to Australia.⁴

1.3 Section 236B of the Migration Act provides for the application of mandatory minimum penalties for certain aggravated people smuggling offences. In summary, these aggravated offences are:

- people smuggling involving exploitation, or danger of death or serious harm (section 233B of the Migration Act);
- people smuggling at least five non-citizens who have no lawful right to come to Australia (section 233C of the Migration Act); and
- presenting, making, delivering or transferring forged documents or false and misleading information in connection with the entry to Australia of non-citizens (at least five people) (section 234A of the Migration Act).

1.4 The maximum penalty for the offence of people smuggling is 10 years imprisonment or 1,000 penalty units, or both. The maximum penalty for the aggravated people smuggling offences is 20 years imprisonment or 2000 penalty units, or both. However, section 236B provides that if a person is convicted of an offence against sections 233B, 233C or 234A, the court must impose a sentence of imprisonment of at least five years, or eight years if conviction is against 233B or is a conviction for a repeat offence. Further, the court must also set a non-parole period of

1 *Journals of the Senate*, 8 February 2012, p. 2058.

2 *Journals of the Senate*, 9 February 2012, p. 2089.

3 *Journals of the Senate*, 28 February 2012, p. 2138.

4 Migration Act, subsection 233A(1).

at least three years, or five years if conviction is against 233B or is a conviction for a repeat offence.⁵

1.5 Subsection 236B(2) provides that the mandatory minimum penalties do not apply 'if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed'.

1.6 The mandatory minimum penalties for aggravated people smuggling offences were introduced in 2001, as part of the *Border Protection (Validation and Enforcement) Act 2001*. Section 236B of the Migration Act was added by the *Anti-People Smuggling and Other Measures Act 2010*, which amended and reordered the people smuggling offences in the Migration Act.⁶

Purpose of the Bill

1.7 The Bill seeks to amend the Migration Act to remove the mandatory minimum sentences relating to aggravated people smuggling offences. In the Second Reading Speech, Senator Hanson-Young highlighted that people smuggling to Australia would continue to be illegal under the Bill:

This Bill seeks to restore the ability of courts to sentence people smugglers for less than five years if that is deemed appropriate in the view of the sentencing judge. Many Australian judges have expressed their preference to sentence for less than the mandatory minimum. In doing so, it is unlikely to result in a sudden influx of boat arrivals. It was made clear to a Senate inquiry in 2010 that the mandatory minimum sentences, falling as they do on the shoulders of impoverished boat crew, have little or no general deterrence effect on stopping the arrival of boats.⁷

Key provisions of the Bill

1.8 The key provisions of the Bill amend the Migration Act and are contained in Schedule 1.

1.9 Items 1 to 4 of Schedule 1 repeal the notes under current subsections 233B(1), 233C(1), 234A(1) and 234A(2), and substitute 'Section 236A limits conviction options for offences against this section' in each case.⁸ In effect, this change removes the reference to current section 236B and sentencing options from these notes.

5 Subsection 236(5) provides the definition for 'a conviction for a repeat offence'.

6 The committee considered these amendments as part of the *Anti-People Smuggling and Other Measures Bill 2010 [Provisions]* inquiry. The committee's report is available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_c/te/antipeoplesmuggling/index.htm, (accessed 6 March 2012).

7 Second Reading Speech, *Proof Senate Hansard*, 8 February 2012, p. 69.

8 Existing section 236A of the Migration Act provides for the discharge of offenders without proceeding to conviction for certain offences. This section would be unchanged by the Bill.

1.10 Item 5 of Schedule 1 repeals current section 236B.

Conduct of the inquiry

1.11 The committee advertised the inquiry in *The Australian* newspaper on 15 February 2012 and 29 February 2012. Details of the inquiry, including links to the Bill and associated documents, were placed on the committee's website at www.aph.gov.au/senate/legalcon. The committee also wrote to a number of organisations and individuals, inviting submissions by 29 February 2012.

1.12 The committee received 20 submissions, which are listed at Appendix 1. All submissions were published on the committee's website.

1.13 The committee held a public hearing for the inquiry on 16 March 2012 at Parliament House in Canberra. A list of witnesses who appeared at the hearing is at Appendix 2, and the *Hansard* transcript is available through the committee's website.

Acknowledgement

1.14 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.15 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

