THE Human Rights Council of Australia

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Ms J Dennett
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600
By Email: legcon.sen@aph.gov.au

Dear Ms Dennett

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

INTRODUCTION

Thank you for your letter dated 13 February 2012 inviting the Human Rights Council of Australia (HRCA) to make a submission to the abovementioned inquiry.

The HRCA welcomes the Committee's inquiry and supports the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012.

Section 236B of the *Migration Act 1958* (Cth), which the Bill would repeal if it is enacted, is very likely in breach of Australia's obligations under both the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CROC). The HRCA also has significant doubt about the constitutional validity of s 236B. For these reasons, which are developed further below, the HRCA submits that the Committee recommend that the Senate pass the Bill.

The need to ensure that the Bill is consistent with Australia's international human rights obligations is all the more important in light of the recent passage of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the forthcoming establishment of the Joint Parliamentary Committee on Human Rights.

This submission is in two parts. Part 1 sets out the relevant legislation to which the Bill relates. Part 2 analyses the Bill by reference to Australia's international human

rights obligations and provides more detailed reasoning for why, in the HRCA's submission, the Bill should be passed by the Parliament.

PART 1 — RELEVANT LEGISLATION

The Bill proposes the repeal of s 236B of the *Migration Act 1958* (Cth).

Section 236B

Section 236B provides for mandatory minimum sentences of imprisonment for those convicted of three specified offences under the *Migration Act*. Each of the specified offences involves an attempt to facilitate the unlawful entry of non-citizens into Australia. Each specified offence involves circumstances of aggravation.

Section 236B, entitled "Mandatory minimum penalties for certain offences", 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 233A

Section 233B and 233C are people smuggling offences. The basic offence of people smuggling is provided for in s 233A. It states:

(1) A person (the ***first person***) commits an offence if:

(a) the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person (the ***second person***); and

(b) the second person is a non-citizen; and

(c) the second person had, or has, no lawful right to come to Australia.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

(2) Absolute liability applies to paragraph (1)(b).

Note: For absolute liability, see section 6.2 of the *Criminal Code*.

(3) For the purposes of this Act, an offence against subsection (1) is to be known as the offence of people smuggling.

Section 233B

The circumstances of aggravation provided for by s 233B relate to the smuggled person being put at risk of exploitation, death or serious harm. It provides:

(1) A person (the ***first person***) commits an offence against this section if the first person commits the offence of people smuggling (the ***underlying offence***) in relation to another person (the ***victim***) and any of the following

applies:

(a) the first person commits the underlying offence intending that the victim will be exploited after entry into Australia (whether by the first person or another);

(b) in committing the underlying offence, the first person subjects the victim to cruel, inhuman or degrading treatment (within the ordinary meaning of that expression);

(c) in committing the underlying offence:

(i) the first person's conduct gives rise to a danger of death or serious harm to the victim; and

(ii) the first person is reckless as to the danger of death or serious harm to the victim that arises from the conduct.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

(2) There is no fault element for the physical element of conduct described in subsection (1), that the first person commits the underlying offence, other than the fault elements (however described), if any, for the underlying offence.

(3) To avoid doubt, the first person may be convicted of an offence against this section even if the first person has not been convicted of the underlying offence.

(4) In this section:

exploit has the same meaning as in the *Criminal Code*.

forced labour has the same meaning as in section 73.2 of the *Criminal Code*.

serious harm has the same meaning as in the *Criminal Code*.

sexual servitude has the meaning given by section 270.4 of the *Criminal Code*.

slavery has the meaning given by section 270.1 of the *Criminal Code*.

Section 233C

The circumstances of aggravation provided for by s 233C relate to the number of persons being smuggled. It provides:

(1) A person (the ***first person***) commits an offence if:

(a) the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least 5 persons (the ***other persons***); and

(b) at least 5 of the other persons are non-citizens; and

(c) the persons referred to in paragraph (b) who are non-citizens had, or have, no lawful right to come to Australia.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

(2) Absolute liability applies to paragraph (1)(b).

Note: For absolute liability, see section 6.2 of the *Criminal Code*.

(3) If, on a trial for an offence against subsection (1), the trier of fact:

(a) is not satisfied that the defendant is guilty of that offence; and

(b) is satisfied beyond reasonable doubt that the defendant is guilty of the offence of people smuggling;

the trier of fact may find the defendant not guilty of an offence against subsection (1) but guilty of the offence of people smuggling, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

Section 234A

Section 234A is an offence relating to the falsification of documents or the provision of false or misleading information to facilitate the entry, proposed entry or immigration clearance of non-citizens. In this regard it is similar to s 234 but it includes a circumstance of aggravation in that the proscribed conduct relates to a group of 5 or more non-citizens. The section provides:

(1) A person must not, in connection with:

(a) the entry or proposed entry into Australia, or the immigration clearance, of a group of 5 or more non-citizens (which may include that person), or of any member of such a group; or

(b) an application for a visa or a further visa permitting a group of 5 or more non-citizens (which may include that person), or any member of such a group, to remain in Australia;

do any of the following:

(c) present, or cause to be presented, to an officer or a person exercising powers or performing functions under this Act a document that the person knows is forged or false;

(d) make, or cause to be made, to an officer or a person exercising powers or performing functions under this Act a statement that the person knows is false or misleading in a material particular;

(e) deliver, or cause to be delivered, to an officer or a person exercising powers or performing functions under this Act, or otherwise give, or cause to be given, for official purposes of the Commonwealth, a document containing a statement or information that the person knows is false or misleading in a material particular.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

(2) A person must not transfer or part with possession of a document or documents:

(a) with the intention that the document or documents be used to help a group of 5 or more people, none of whom are entitled to use the document or documents, or any member of such a group, to gain entry into or remain in Australia, or to be immigration cleared; or

(b) if the person has reason to suspect that the document or documents may be so used.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

PART 2 – ANALYSIS

Prohibition on Arbitrary Detention

It is highly likely that mandatory detention breaches Australia's obligation at international law to ensure that no person is subjected to arbitrary detention. Article 9(1) of the ICCPR provides:

> "Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Detention becomes arbitrary when the deprivation of liberty is unjust, unreasonable or disproportionate to the State party's legitimate aims (UN Human Rights Committee, General Comment 31 (2004) [6]).

The HRCA recognises that, within the context of the *Migration Act* and, more generally, the aliens power in s 51(xix) of the *Commonwealth Constitution*, the Commonwealth has a legitimate aim of ensuring the effective operation of Australia's migration system. It is also obvious from s 233B and the Second Reading Speech for the *Anti-People Smuggling and Other Measures Act 2010* (by which s 236B was introduced into the *Migration Act*) that the Commonwealth also has a legitimate interest in deterring those who may be prepared to put the lives and safety of others at risk.

At the same time, there is a legitimate and necessary aim to preserve the integrity of the common law that underpins the criminal justice system. The proposition is well-established at common law that "a sentence should not exceed that which is appropriate to the gravity of the crime considered in the light of its objective circumstances" (*Veen v R (No 2)* [1988] HCA 14; (1988) 164 CLR 465 at [12] per Wilson J). The objective circumstances of an offence are the relevant factual circumstances in which the crime was committed. Such circumstances may include aggravating factors such as whether the crime was organised, the number of victims, the extent to which violence was involved and the extent to which the victims were vulnerable. At common law, it is also necessary for the sentencing process to take account of the subjective features of the offender such as his or her age, cultural background, previous convictions, health, character, remorse and prospects of rehabilitation (eg *Ryan v R* [2001] HCA 21; (2001) 206 CLR 267).

Mandatory minimum penalties prevent a sentencing court from determining an appropriate sentence by reference to the matrix of objective and subjective factors. These factors will be unique to each case. Almost invariably, any sentence imposed by reference to s 236B will be unjust, unreasonable or disproportionate to the circumstances of the offence. Factors that would have justified the court imposing a sentence less than the mandated minimum will not be able to be fully taken into account by the sentencing court.

Constitutional Validity

The second reason for why s 236B should be repealed is that it is arguably constitutionally invalid. There are two aspects to this argument.

First, a mandatory minimum penalty that is excessively long when regard is had to relevant objective and subjective features of the offence, arguably constitutes cruel or unusual punishment. The *Bill of Rights 1688* (UK), which forms part of the "fabric" upon which the *Commonwealth Constitution* was written, prohibited cruel and unusual punishments (*Sillery v R* [1981] HCA 34; (1994) 180 CLR 353 at [13] per Murphy J). A Commonwealth enactment such as s 236B of the *Migration Act* that offends the prohibition on cruel and unusual punishment will be invalid.

Second, it is arguable that the imposition by Parliament of a mandatory minimum penalty represents an unlawful intrusion by the legislature into the exercise of federal judicial power by courts provided for by Chapter III of the *Commonwealth Constitution*. The trial and sentencing of offenders for criminal offences under ss 233C, 233C and 234A of the *Migration Act* will necessarily involve the exercise of federal judicial power. The power of the State to detain a person in custody for the purpose of meting out a penal or punitive sanction consequent upon the person being convicted of a criminal offence, is a function reserved exclusively to the judicial branch of government (*South Australia v Totani* [2010] HCA 39 at [382] per Heydon J). It is to be distinguished from mandatory administrative detention of unlawful non-citizens under the *Migration Act* which, clearly enough, is lawful (*Chu Keng Lim v Minister for Immigration* [1992] HCA 64; (1992) 176 CLR 1; *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562). By attempting to prescribe the penalty for offences contrary to ss 233C, 233C and 234A of the *Migration Act*, s 236B improperly trespasses upon the role of the federal judicature.

Children

The third reason for why s 236B should be repealed is that it is likely that it breaches Australia's international legal obligations under the CROC. Article 37(b) of CROC provides:

> "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

The Australian Human Rights Commission (AHRC) is currently conducting an inquiry into the treatment of individuals suspected of people smuggling offences who say they are children. Many individuals suspected of people smuggling offences have reported that they are under 18 years of age. The AHRC's discussion paper in relation to its inquiry notes that current government policy is that law enforcement authorities will not seek to prosecute those who are assessed as being less than 18 years old. The AHRC's inquiry raises important questions about the veracity of the age assessment process and the time taken for suitable age checks to be completed.

If children have been assessed as adults and have been prosecuted or are at risk of being prosecuted or government policy changes, then they are at risk of being imprisoned for the minimum periods of time provided for by s 236B of the *Migration Act.* For the reasons submitted above, the imposition of minimum lengthy periods of detention is likely to be arbitrary and therefore in breach of Art 37(b) of CROC. It is also likely that s 236B offends against the requirement under Art 37(b) to ensure that any period of imprisonment of a child be the shortest appropriate period of time.

The risk that a child will be sentenced to a period of imprisonment for a minimum period of time also offends the principle articulated in s 4AA of the *Migration Act*, namely:

> "The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort."

I hope that this submission has been of assistance to the Committee's inquiry. If the HRCA can be of any further assistance, please do not hesitate to contact me.

Yours sincerely

Andrew Naylor
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Human Rights Council of Australia Inc.