

# DISSENTING REPORT BY SENATOR HANSON-YOUNG

## Introduction

1.1 This inquiry focused on an Australian Greens bill in the name of Senator Sarah Hanson-Young that seeks to remove the mandatory minimum sentencing provisions attached to certain Commonwealth people smuggling offences under the *Migration Act 1958*. It is a simple amendment but it would have a significant impact in returning fairness and justice to this area of the law.

1.2 Under the current mandatory sentencing regime, a person who is convicted of one of four people smuggling offences must be sentenced to imprisonment for a minimum five years with a non-parole period of three years.

1.3 There is no scope for the presiding Magistrate or Judge to take into account the circumstances of the offending.

1.4 There are very few instances of mandatory minimum sentencing enshrined in Australian criminal laws because it is widely accepted to be an infringement of judicial independence and separation of powers. Mandatory sentencing is widely regarded to be a breach of civil and political rights, and for that reason is subject to various international covenants which seek to discourage it in the criminal laws of signatory nations.

1.5 As the evidence in this inquiry demonstrated, the five year minimum jail sentences have been principally borne by impoverished boat crew who are the least culpable people within people smuggling operations.

1.6 The Commonwealth charges under the *Migration Act* which this Bill seeks to amend are:

- aggravated people smuggling, that is, the bringing to Australia of at least five non-citizens who have 'no lawful right to come';
- smuggling a person in such a way that a person will be exploited, or subject to cruel, inhuman or degrading treatment, or exposed to risk of serious harm or death;
- presenting false documents or misleading information to an Australian official in the context of the immigration of five or more non-citizens;
- dealing with documents that may be used by un-entitled persons to come to Australia.

1.7 This Bill was strongly applauded by all submitters to the inquiry except the Commonwealth agencies. The Judicial Conference of Australia did not comment on

the Bill but provided very useful material outlining the problems associated with mandatory sentences.

1.8 Supporters of the Bill included:

Australian Human Rights Commission

Law Council of Australia

Human Rights Law Centre

Australian Lawyers' Alliance

Gilbert & Tobin Centre of Public Law

Castan Human Rights Law Centre

Human Rights Council of Australia

Legal Aid New South Wales

Legal Aid Western Australia

Victoria Legal Aid

Migrant and Refugee Rights Project, University of New South Wales

Amnesty International (Australia)

New South Wales Council for Civil Liberties

Civil Liberties Australia

**No justification for mandatory sentences**

1.9 This Bill does not soften or negatively affect Australia's border security, nor does it seek to encourage the practice of seeking asylum in Australia by unauthorised boat arrivals.

1.10 As pointed out by Legal Aid New South Wales: the relatively high maximum jail sentence of 20 years imprisonment attached to the four people smuggling offences attests to the fact that this is a serious public policy issue:

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.<sup>1</sup>

1.11 The maximum indicates the significance of the Commonwealth offence to the sentencing judge. The court is empowered to impose a length of imprisonment up to that maximum and arrived at on the basis of well-established sentencing principles.

1.12 Other than the Commonwealth agencies, none of those appearing or submitting in this inquiry argued is anything exceptional about these offences that make it worth undermining Australia's commitment to fair legal process.

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1 Legal Aid NSW, *Submission 20*, p. 2.

1.13 Many submitters, including the Australian Human Rights Commission, expressed their dismay that the mandatory minimum penalties breach Australia's international obligations under the *International Covenant on Civil and Political Rights* article 9(1) (arbitrary arrest) and article 14 (right to review of sentencing).<sup>2</sup>

1.14 Professor Ben Saul, noting the fact that a certain group of foreign individuals would be targeted by the law, also raised concerns that the mandatory minimums could breach the *International Covenant on the Elimination of Racial Discrimination*.<sup>3</sup> There were also concerns raised about breaches of the *Convention on the Rights of the Child* considering one in ten of the accused have statistically been found to be children.<sup>4</sup>

### **Punishing boat crew, not organisers**

1.15 The Attorney-General's department implied that the risk of injustice is minimised because 'mandatory minimum penalties apply to a very limited number of serious, aggravated people smuggling offences in the *Migration Act*'.<sup>5</sup>

1.16 However, many submitters gave evidence affirming that almost all people smuggling prosecutions are run on the aggravated charges, yet almost all relate to less culpable boat crew.<sup>6</sup>

1.17 The Law Council of Australia commented that regarding the threshold for aggravated people smuggling charges of having brought five or more potential refugees, the lesser and non-aggravated charges (which do not attract a mandatory minimum sentence) are 'effectively rendered...redundant, given the extremely high likelihood of any boats being intercepted in Australian waters on suspicion of people smuggling having five or more passengers'.<sup>7</sup>

1.18 The Commonwealth Director of Public Prosecutions advised that as at February 2012, there were 208 accused before Australian courts for people smuggling charges and of those, only three were alleged to be organisers.<sup>8</sup>

1.19 The Law Council of Australia suggested that the harsh mandatory minimums are relevant to the increasingly high rate of people smuggling acquittals, a somewhat surprising trend considering most cases are relatively strong due to the fact that most

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2 Australian Human Rights Commission, *Submission 4*, pp 4-5.

3 *Submission 2*, p. 1.

4 Evidence given in the 2012 Senate Inquiry into the Crimes Act Amendment (Fairness for Minors) Bill 2011.

5 Attorney-General's Department, *Submission 17*, p. 2.

6 Commonwealth Director of Public Prosecutions, *Submission 14*, p. 3.

7 Law Council of Australia, *Submission 7*, p. 9.

8 Commonwealth Director of Public Prosecutions, *Submission 14*, p. 3.

accused are intercepted up directly from the 'scene of the crime' on the boat with a plethora of witnesses nearby.

1.20 Mr Boulton SC of the Law Council of Australia gave the following evidence:

The judicial criticisms are getting a lot of airing in the press. I think a lot of people who are called upon to be jurors in these cases are aware that the people who they are trying are likely to receive extremely significant jail sentences if they are found guilty. There is more than half a suspicion that some sympathy is being shown to these people once the jurors realise how insignificant a role they play and where they actually really do not understand the full extent of the criminality. It is clear from the figures put into evidence before this committee that the number of acquittals has been steadily rising over the last 12 months. I expect that will continue because people in the community are actually regarding these laws as being fundamentally unfair.<sup>9</sup>

1.21 The boat crew who are serving these sentences tend to be impoverished, illiterate fisherfolk from the Indonesian archipelago. In his evidence before the Committee, Mr Boulton of the Law Council of Australia described the boat crew thus:

The people who get involved in the crews are very different from the average Australian offender. They live in circumstances that bear no resemblance to the circumstances of ordinary Australians. They do not keep abreast of Australian politics or Australian affairs. They do not understand that by coming to Australia in these vessels they will be subjected to an inevitable term of imprisonment that could be as long as five or eight years.<sup>10</sup>

1.22 The Hon Branson QC of the Australian Human Rights Commission commented that Australian judges, knowing the nature of the boat crew being subjected to mandatory minimum penalties for boat crew, should be able to take into account the offending context of each case:

...it would appear that many of the crew on these boats are themselves probably individuals who have been exploited perhaps by unscrupulous organisers of people-smuggling ventures. Their own culpability, if any, I think would often seem to be slight. We have heard stories of young people being lured onto boats by false information of what they would be doing on that boat. Sometimes there are circumstances where families have been given sums of money that would seem extremely large to them in the circumstances in which they are living. It would be appropriate, it seems to me, that where young people particularly might be being exploited that Australia should be seeking not to exacerbate the harm suffered by them in those circumstances.<sup>11</sup>

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9 *Committee Hansard*, 16 March 2012, p. 2.

10 *Committee Hansard*, 16 March 2012, p. 3.

11 *Committee Hansard*, 16 March 2012, p. 7.

## **Lack of deterrence value**

1.23 The Committee received clear evidence that there is little or no deterrence value achieved by the mandatory minimum penalties. In fact, numbers of people smuggling prosecutions have actually gone up from 30 cases in 2009 to 304 in 2011.<sup>12</sup>

1.24 Victoria Legal Aid made useful reference in their submission to a Victorian Sentencing Advisory Council discussion paper which pointed to a 'need for further research that separates deterrable from non-deterrable populations'.<sup>13</sup> Victoria Legal Aid went on to say:

It is our contention that the barely literate and poverty stricken Indonesians who ultimately crew the asylum seeker boats that travel to Australia belong to the 'non-deterrable population' to whom the Sentencing Advisory Council refers.<sup>14</sup>

1.25 Upon questioning, none of the Commonwealth agencies present were able to point to any empirical or anecdotal evidence that the mandatory minimum jail sentences are having any deterrence effect.

## **Lack of judicial discretion**

1.26 The Committee heard that many judges and magistrates have spoken out against the mandatory sentencing regime. Given that judicial bodies are generally cautious about getting involved in public policy debates, it is notable that the Judicial Conference of Australia put in a submission which stated that mandatory minimum penalties are an 'injustice' which is 'directly attributable to legislative involvement in the essentially judicial function of pronouncing individual sentences on individual offenders'.<sup>15</sup>

1.27 The Gilbert and Tobin Centre of Public Law put its similar concern a little more bluntly, in submitting that the mandatory minimum penalties have the potential to 'undermine the separation of powers'.<sup>16</sup>

## **Conclusion**

1.28 The majority report refers quite comprehensively to the volumes of evidence provided in this inquiry in support of this Bill.

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12 Legal Aid WA, *Submission 5*, p. 4.

13 D. Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Advisory Council (Vic) 2011, p. 2, in Victoria Legal Aid, *Submission 19*.

14 Victoria Legal Aid, *Submission 19*, p. 7.

15 Judicial Conference of Australia, *Submission 11*, pp 2-3.

16 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 3.

1.29 Unfortunately, the Committee's majority report only recommends a 'review', which would not have any practical reformative impact and which would largely double up the thorough survey that has just been undertaken through this inquiry.

1.30 The Australian Greens believe the only real solution is to take legislative action to reform this area of Commonwealth criminal law by removing the mandatory minimum jail sentences and allowing the judiciary to do their job unhindered.

### **Recommendation 1**

**1.31 That the Senate should pass the Bill.**

**Senator Sarah Hanson-Young**  
**Australian Greens**