The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012

April 2012

ISBN: 978-1-74229-614-2

This document was printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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RECOMMENDATIONS

Recommendation 1

2.68 The committee recommends that the Australian Government review the operation of the mandatory minimum penalties applied to aggravated people smuggling offences under section 236B of the *Migration Act 1958*, with particular reference to:

- **alternative approaches to mandatory minimum sentencing provisions, including where judicial officers are given discretion to impose lesser sentences where they are satisfied that the circumstances would make it unjust to impose the prescribed sentence for an offence;**
- **options for differentiating between the organisers of people smuggling operations and boat crew of these operations in sentencing; and**
- **specific concerns raised during this inquiry regarding Australia's human rights obligations under international law.**

Recommendation 2

2.69 The committee recommends that the Australian Government facilitate and support further deterrence and awareness raising activities in relation to people smuggling offences, with a focus on relevant communities in Indonesia.

Recommendation 3

2.70 The committee recommends that the Senate should not pass the Bill.

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

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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.

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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_ctte/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.

CHAPTER 2

Key issues

2.1 The committee received evidence relating to the appropriateness of the current mandatory minimum sentences imposed on people convicted of smuggling offences. The majority of submitters and witnesses supported the removal of the current mandatory minimum penalties from the Migration Act.

Appropriateness of mandatory minimum penalties

2.2 Ms Bassina Farbenblum, Director of the Migrant and Refugee Rights Project at the University of New South Wales, considered that mandatory sentencing offends basic notions of justice and the rule of law, and is inappropriate for an advanced democracy with an independent judiciary.[1]

2.3 Mr Phillip Boulten SC from the Law Council of Australia submitted that it opposes mandatory sentencing provisions in all contexts 'on the grounds that they impose unacceptable restrictions on judicial discretion and are contrary to the rule of law and human rights principles'.[2] Legal Aid NSW argued that maximum penalties are sufficient to guide sentencing of offenders in individual cases:

> 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.[3]

2.4 Professor George Williams from the Gilbert and Tobin Centre of Public Law argued that mandatory sentencing requirements in Australian jurisdictions are ineffective, citing former property law mandatory sentencing provisions in the Northern Territory as an example:

> ...where we have had mandatory minimum sentencing in other contexts it has broken down over a period of time because it has become increasingly obvious to people in the community that judges are unable to hand down just sentences. The best example of that is in the Northern Territory with the former mandatory sentencing regime for property offences, which lasted four years but came under increasing criticism because of the disconnect between the crimes and the sentences imposed.[4]

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1 *Submission 3*, p. 1.

2 *Committee Hansard*, 16 March 2012, p. 1.

3 *Submission 20*, p. 2.

4 Professor George Williams, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 16 March 2012, p. 9.

Mandatory minimum sentences for people smuggling offences

2.5 The committee recieved considerable evidence regarding the effect of the mandatory minimum sentences which currently apply to aggravated people smuggling offences. Many submitters opposed these mandatory minimum sentences, and argued for their removal from the Migration Act.[5] For example, Ms Bassina Farbenblum expressed the view that section 236B of the Migration Act has 'resulted in unjust, disproportionate sentences for people smuggling offences'.[6]

Justification for mandatory minimum sentences

2.6 The Law Council of Australia argued that, when people smuggling offences were first introduced into the Migration Act in 2001, no specific justification for mandatory sentencing provisions was provided. Further, no empirical evidence or rationale was provided for the amendments in 2010 which extended the application of mandatory sentencing for people smuggling offences.[7]

2.7 The Attorney-General's Department, however, noted the response of the former Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Philip Ruddock MP (former Immigration Minister), to concerns raised by the Senate Scrutiny of Bills Committee in 2002 regarding the introduction of mandatory minimum penalties. That response stated that mandatory minimum penalties were introduced following indications that the sentences being imposed by the courts for people smuggling offences were not adequately reflecting the seriousness of the offences.[8]

2.8 The Attorney-General's Department also noted that mandatory minimum penalties apply to a 'very limited number of serious, aggravated people smuggling offences in the Migration Act',[9] and that 'mandatory minimum penalties exist for a range of serious offences in Australia', including for repeat burglary offences in Western Australia and for murder in the Northern Territory.[10]

Low threshold for the aggravated offence in section 233C

2.9 Many submissions considered that the mandatory minimum penalties are inappropriate for aggravated people smuggling offences. In particular, the low threshold of the aggravated people smuggling offence in section 233C (organising or

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5 For example, Gilbert and Tobin Centre for Public Law, *Submission 1*, p. 2; Victoria Legal Aid, *Submission 19*, p. 4.

6 *Submission 3*, pp 1, 5.

7 *Submission 7*, p. 10.

8 *Submission 17*, p. 3.

9 *Submission 17*, p. 2.

10 *Submission 17*, p. 4.

facilitating the bringing or coming to Australia of a group of at least five non-citizens who have no lawful right to come) was highlighted. The Law Council of Australia considered that the threshold has 'effectively rendered the standard people smuggling offence in section 233A redundant, given the extremely high likelihood of any boats being intercepted in Australian waters on suspicion of people smuggling having five or more passengers'.[11] The Commonwealth Director of Public Prosecutions (CDPP) confirmed that '[a]lmost all crew since September 2008 have been involved in ventures with more than 5 passengers and therefore have been prosecuted under [section 233C or its predecessor]'.[12]

Targeting boat crew rather than organisers

2.10 The CDPP provided information that 'as at 8 February 2012, there were 208 defendants before the Courts being prosecuted...in relation to people smuggling offences'. Of those 208, three were regarded as organisers and the remainder were regarded as crew.[13] Submissions supporting the Bill highlighted that the majority of those prosecuted were the crew of people smuggling vessels with little culpability to illustrate that the mandatory minimum penalties are being applied inappropriately.[14] For example, the Gilbert and Tobin Centre of Public Law commented:

> [T]he vast majority of those being brought before the courts on smuggling charges are crew members, often from impoverished fishing communities. At best they are marginal to the smuggling networks the mandatory sentencing regime purportedly targets and, given their backgrounds, it is hard to see how imposing mandatory minimum sentences upon them can be justified according to the principles either of specific and general deterrence or proportionality that underpin sentencing policy in Australian jurisdictions.[15]

2.11 Others argued that the mandatory minimum penalties are targeting poor uneducated Indonesian fishermen who are often being exploited or deceived by people smuggling organisers.[16] Victoria Legal Aid noted that 'the men arrested on boats are those who are considered by the people smugglers to be expendable'. It argued that many of the concerns with the current regime of aggravated people smuggling offences would be ameliorated if 'longer terms of imprisonment were linked to factors that are relevant to culpability, such are whether or not the person was an organiser.[17]

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11 *Submission 7*, p. 9.

12 *Submission 14*, p. 3.

13 *Submission 14*, p. 3.

14 For example, Victoria Legal Aid, *Submission 19*, p. 4.

15 *Submission 1*, p. 2.

16 For example, Australian Lawyers Alliance, *Submission 18*, pp 1-2.

17 *Submission 19*, p. 4.

2.12 The Australian Human Rights Commission suggested that many boat crew involved in people smuggling operations are themselves probably individuals who have been exploited by unscrupulous organisers of people-smuggling ventures.[18]

2.13 A representative from the Law Council of Australia claimed that the mandatory minimum sentences imposed on boat crew may lead jurors to be more likely to favour acquittals in people smuggling trials:

> 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.[19]

Deterrence effect of mandatory minimum sentences

2.14 The deterrence value of mandatory minimum penalties for people smuggling offences was also questioned in submissions.[20] Legal Aid WA noted that there has recently been a large increase in people smuggling prosecutions:

> As at 30 June 2009 there were 30 people smuggling prosecutions before the Courts;
>
> As at 30 June 2010 there were 102 cases pending;
>
> As at 30 June 2011 there were 304 cases pending.[21]

2.15 Legal Aid WA argued that 'the imposition of mandatory minimum sentences has had no effect on deterring the people smuggling organisers and, in fact, the number of cases [has] increased exponentially'.[22] The Australian Human Rights Commission agreed that the current law is not working as a deterrent.[23]

2.16 Others highlighted that the characteristics of those generally being prosecuted for people smuggling suggests that they would not be deterred by mandatory

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18 Ms Catherine Branson QC, President, Australian Human Rights Commission, *Committee Hansard*, 16 March 2012, p. 7.

19 Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 16 March 2012, p. 2.

20 For example, Law Council of Australia, *Submission 7*, pp 7-8; NSW Council for Civil Liberties, *Submission 12*, p. 1.

21 *Submission 5*, p. 4.

22 *Submission 5*, p. 4.

23 Ms Catherine Branson QC, Australian Human Rights Commission, *Committee Hansard*, 16 March 2012, p. 7.

minimum penalties. For example, the Castan Centre for Human Rights Law noted that the aggravated people smuggling offences tend 'overwhelmingly to catch impoverished Indonesian fishermen who are enticed to perform the task by promises of payments of around A$300-1200' and 'there is little evidence that these people were aware of their liability under Australian law at the time they committed the offence'.[24]

2.17 Mr Boulten from the Law Council of Australia agreed:

> [A] lot of the people being caught up in the net are very unsophisticated and no threat to their own nation's security. They have very little understanding or even any concept of Australia's border protection. They do not understand that what they are doing is regarded in Australia as very significantly wrong...It seems that the message is not getting through that if you come into Australian territorial waters as a crew member of one of these vessels you are likely to spend a long time in jail.[25]

2.18 Mr Boulten emphasised that, in supporting the Bill, the Law Council of Australia is not suggesting that the Parliament adopt lenient approaches to those found to be involved in people smuggling activities, and acknowledged community support for the development of a deterrent response to this problem.[26] Nevertheless:

> The profile of those people prosecuted for people smuggling offences is often in stark contrast to the public image of people smuggling that has generated this punitive approach. They are generally not sophisticated criminals engaged in covert entry operations designed to exploit vulnerable people. Often they are impoverished Indonesian fishermen who have not played organisational or decision making roles in the people smuggling activities, and who are themselves victims of more sophisticated criminal organisations.[27]

2.19 In relation to deterrence, the Attorney-General's Department noted the comments of the former Immigration Minister to the Senate Scrutiny of Bills Committee in 2002. In his response, the former Immigration Minister stated that courts have imposed penalties for aggravated people smuggling offence which 'have generally been much less than the maximum penalty available'. Further:

> This has not been a strong deterrent to persons who are participating in people smuggling, and some have committed repeat offences once they were released from prison.
>
> New sections 233B and 233C make it absolutely clear that Australia considers people smuggling to be a very serious offence. The provisions are

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24 *Submission 6*, p. 3. Also see, Victoria Legal Aid, *Submission 19*, p. 7.

25 Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 16 March 2012, p. 3.

26 Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 16 March 2012, p. 1.

27 *Submission 7*, p. 9.

> intended to provide a deterrent to those people who might be minded to act as people smugglers.[28]

2.20 The Attorney-General's Department also outlined the other activities that the Australian Government undertakes to deter people smuggling. In particular:

> An Australian Government public information campaign was delivered by the International Organization for Migration in Indonesia in 2009-2010 to raise awareness among Indonesian communities of the dangers of people smuggling and the consequences of involvement in this activity, targeting potential crew members, fishermen, boat owners, boat builders, and coastal industry workers.[29]

Repeat offence definition

2.21 The issue of the definition of 'repeat offence' in the Act was also raised. The Attorney-General's Department noted that the former definition of 'repeat offence' meant that 'a people smuggler convicted for conduct relating to two or more ventures during the same court hearing was subject to the same lower mandatory minimum penalties as a first-time offender'.[30] However, the amendment to the definition of 'repeat offence' in subsection 236(5) of the Migration Act made in 2010 now means that 'a person who is convicted of multiple offences in the same proceeding will be subject to the higher mandatory minimum penalties of eight years' imprisonment with a non-parole period of five years'.[31]

2.22 The Law Council of Australia highlighted that this means that 'a person who is convicted of multiple offences in the *same proceeding* is to be treated as a "repeat offender" and therefore subject to higher mandatory minimum penalties'.[32] It expressed concern that 'a person may be punished unduly harshly as a recidivist, that is, as someone who has demonstrated themselves as unwilling or unable to reform, when in fact they are appearing before the Court for the first time'.[33]

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28 Senate Scrutiny of Bills Committee, *Report No. 1 of 2002*, p. 16.

29 *Submission 17*, p. 6.

30 *Submission 17*, p. 3.

31 *Submission 17*, p. 4.

32 *Submission 7*, p. 13 (emphasis in original).

33 *Submission 7*, p. 13.

Judicial discretion

2.23 Many submissions emphasised the importance of judicial discretion in sentencing as part of their support for the Bill.[34] The Law Council of Australia commented:

> Prescribing minimum sentences in legislation removes the ability of courts to consider relevant factors such as the offender's criminal history, individual circumstances or whether there are any mitigating factors, such as mental illness or other forms of hardship or duress. This prescription can lead to sentences that are disproportionately harsh and mean that appropriate gradations for sentences are not possible thereby resulting in inconsistent and disproportionate outcomes.[35]

2.24 The Judicial Conference of Australia noted that the principle of judicial discretion is embodied in subsection 16A(1) of the *Crimes Act 1914*, which states that '[i]n determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence'.[36] It emphasised that judicial decisions are not made arbitrarily and involve 'the application of established legal principles to the facts and circumstances of the individual case'.[37] In contrast to the application of sentencing principles by the judiciary, mandatory minimum penalties sometimes require judicial officers to impose severe sentences which are disproportionate to the circumstances of the case resulting in an 'injustice'.[38] Such injustice is 'directly attributable to legislative involvement in the essentially judicial function of pronouncing individual sentences on individual offenders'.[39]

2.25 A number of submitters also pointed to unfavourable judicial commentary made regarding mandatory sentencing and, in particular, in relation to the mandatory minimum penalties for aggravated people smuggling offences.[40] For example, Ms Bassina Farbenblum noted:

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34 For example, Legal Aid WA, *Submission 5*, pp 2-3; Law Council of Australia, *Submission 7*, p. 5; NSW Council for Civil Liberties, *Submission 12*, p. 1; Victoria Legal Aid, *Submission 19*, p. 5.

35 *Submission 7*, p. 5.

36 *Submission 11*, p. 2.

37 *Submission 11*, p. 2.

38 *Submission 11*, p. 2.

39 *Submission 11*, pp 2-3.

40 For example, Ms Bassina Farbenblum, *Submission 3*, p. 5; Legal Aid WA, *Submission 5*, pp 3-4; Castan Centre for Human Rights Law, *Submission 6*, p. 2; Law Council of Australia, *Submission 7*, pp 10-12; Amnesty International Australia, *Submission 10*, p. 3; Judicial Conference of Australia, *Submission 11*, p. 3; Australian Lawyers for Human Rights, *Submission 15*, pp 2-3; Australian Lawyers Alliance, *Submission 18*, p. 2.

> Thirteen Australian judges have expressed criticism of the mandatory sentences for smuggling offences – 11 in the course of imposing the five year jail term, and two extracurially. Several judges have explicitly observed that without the constraint imposed by s236B they would have handed down a sentence significantly lower than the mandatory minimum in light of the circumstances and the individual's culpability...[41]

2.26 In contrast, the CDPP and the Attorney-General's Department focused on the legal interpretation of mandatory minimum penalties by Australian courts. The CDPP noted that the operation of the mandatory minimum sentencing provision in section 233C of the Migration Act (prior to its amendment and renumbering to section 236B in 2010) had been considered by the Supreme Court of Western Australia in *Bahar v The Queen* [2011] WASCA 249.[42] The CDPP argued that this decision is applicable to sentencing pursuant to section 236B of the Migration Act as 'it expounds the general principles of how mandatory minimum penalties should be taken into account'.[43] Futher:

> 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.' 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'.[44]

2.27 Officers from the Attorney-General's Department highlighted that some judicial discretion is still retained even where mandatory minimum sentences are in place:

> ...when applying the mandatory minimum penalties, it is important to bear in mind, judges do still retain a number of discretions; in particular, they of course retain the ultimate discretion, as the arbiters of fact and law, to actually decide whether the person is guilty or not, but then to apply the penalty they believe is appropriate within the relevant minimum and maximum penalty as well, so that the court does still have the opportunity to consider the relevant factors present in a particular case with regard to a particular offender.[45]

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41 *Submission 3*, p. 5.

42 Commonwealth Director of Public Prosecutions, *Submission 14*, pp 2-3; Attorney-General's Department, *Submission 17*, p. 4.

43 *Submission 14*, p. 3; also see Attorney-General's Department, *Submission 17*, p. 4.

44 *Submission 14*, pp 2-3.

45 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 16 March 2012, p. 13.

2.28 The CDPP provided the committee with additional information regarding judicial comment in these cases, highlighting ten cases since 1 January 2011 in which judicial officers have made sentencing comments critical of the mandatory minimum requirements. These include cases from the New South Wales District Court, the Northern Territory Supreme Court, the Queensland District Court and the Queensland Supreme Court.[46]

Administration of justice

2.29 The Law Council of Australia argued that the removal of mandatory sentencing would also have potential benefits for the administration of justice. This is due to the fact that mandatory sentencing regimes remove the incentives for offenders to assist authorities with investigations (in the expectation that such assistance will be taken into account in sentencing).[47] Legal Aid NSW put forward the argument that mandatory minimum sentences for aggravated people smuggling offences operate in practice as an incentive for defendants to plead not guilty, as the only prospect of serving less than a three year imprisonment term is an acquittal.[48] Legal Aid Western Australia contended that abolishing mandatory minimum sentences would likely increase the number of guilty pleas in these cases, reducing the number of matters proceeding to trial.[49]

2.30 Several submitters raised the issue of the cost of prosecuting and incarcerating convicted people smugglers.[50] Victoria Legal Aid claimed that mandatory minimum sentences have significant financial implications, increasing the funding required for prosecutions and legal aid.[51] Legal Aid NSW estimated the cost to the NSW Government of imprisoning convicted people smugglers for at least 2.5 years of a mandatory three-year imprisonment term to be over $170 000 per prisoner.[52]

2.31 The Attorney-General's Department told the committee that it has not attempted to quantify the total costs of mandatory imprisonment terms for people smuggling offences, as the cost is borne by the states and territories through their correctional institutions, rather than being borne at a federal level.[53] The CDPP did provide figures regarding the cost of prosecuting people smuggling cases, informing

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46 Commonwealth Director of Public Prosecutions, Response to Questions on Notice, provided 23 March 2012.

47 *Submission 7*, p. 8; see also Legal Aid WA, *Submission 5*, p. 1.

48 *Submission 20*, p. 7.

49 *Submission 5*, p. 2.

50 For example Legal Aid Western Australia, *Submission 5*, pp 2-3; Legal Aid NSW, *Submission 20*, p. 9.

51 *Submission 19*, p. 8.

52 *Submission 20*, p. 9.

53 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 16 March 2012, p. 16.

the committee that it has spent the following amounts on prosecuting people smuggling cases over the last three financial years (including the current financial year):

> 2009-2010: $1.52 million
>
> 2010-2011: $6.24 million
>
> 2011-2012: $7.64 million from 1 July 2011 to 31 January 2012, with a forecast total spend for the financial year of $13.99 million.[54]

Constitutional issues

2.32 The issue of the constitutional validity of mandatory minimum penalties was also raised by submitters.[55] The Gilbert and Tobin Centre of Public Law argued that the mandatory minimum penalties imposed under the Migration Act have the potential to 'undermine the separation of powers':

> It may be that by removing the power of a federal court to exercise discretion when sentencing means that the court's independence has been compromised such that it has been invested with other than a judicial power. Establishing a mandatory minimum may so constrain the decision as to render the relevant provision in the Migration Act invalid. It cannot be said with certainty how the High Court would address this issue. It can only be said that there is arguable position that the provision is invalid.[56]

2.33 The Human Rights Council of Australia also considered that 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 power by courts provided for by Chapter III of the Commonwealth Constitution'.[57]

2.34 The Judicial Conference of Australia also highlighted the constitutional separation of powers, and the division of responsibilities between the executive, the legislature and judiciary:

> [I]t is the responsibility of the judiciary, and not the role of the legislative or executive branches of government, to pronounce individual sentences on individual offenders. Mandatory minimum sentences restrict judicial discretion when giving effect to this quintessentially judicial task.[58]

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54 Commonwealth Director of Public Prosecutions, Response to Questions on Notice, provided 23 March 2012. The CDPP noted that, in addition to prosecution costs, the figures provided to the committee include the additional costs of: CDPP liaison with various agencies; national and regional coordination of the office's people smuggling work; and the provision of law reform assistance and involvement in inquiries relating to people smuggling issues.

55 For example, Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 3; Human Rights Council of Australia, *Submission 8*, p. 8; Civil Liberties Australia, *Submission 13*, p. 1.

56 *Submission 1*, p. 3.

57 *Submission 8*, p. 8.

58 *Submission 11*, p. 1.

Human rights and international law

2.35 Submitters supporting the Bill argued that the mandatory minimum penalties imposed under the Migration Act for people smuggling are inconsistent with Australia's human rights and international law obligations.[59]

International Covenant on Civil and Political Rights (ICCPR)

2.36 A number of submissions focused on Australia's obligations under the ICCPR, in particular article 9(1) (arbitrary arrest or detention) and article 14 (the right to review of sentencing).

2.37 Article 9(1) of the ICCPR provides:

> Everyone has the right to liberty and security of 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.

2.38 The Australian Human Rights Commission noted that a sentence may still be arbitrary notwithstanding that it is authorised by law. Further, lawful detentions may be arbitrary, 'if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality'.[60] Due to its belief that the majority of those facing people smuggling charges are 'low-level crew', the Commission considered that 'the mandatory minimum sentences...are not proportionate and may violate the protection against arbitrary detention in article 9(1) of the ICCPR'.[61]

2.39 Article 14 of the ICCPR sets out procedural safeguards in civil and criminal proceedings. In particular, article 14(5) of the ICCPR provides:

> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

2.40 The Australian Human Rights Commission noted that, where a court imposes the mandatory minimum penalty provided by law for the aggravated offence of people smuggling, there is no right of appeal against the sentence. It considered that this is in breach of Australia's obligations under article 14(5) of the ICCPR.[62]

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59 For example, Gilbert and Tobin Centre of Public Law, *Submission 1*, pp 3-5; Ms Bassina Farbenblum, *Submission 2*, p. 2; Australian Human Rights Commission, *Submission 4*, p. 3; Human Rights Council of Australia, *Submission 8*, p. 7; Human Rights Law Centre, *Submission 9*, p. 1; Amnesty International Australia, *Submission 10*, p. 2; NSW Council for Civil Liberties, *Submission 12*, p. 1.

60 *Submission 4*, p. 4.

61 *Submission 4*, pp 4-5.

62 *Submission 4*, p. 5.

2.41 Another perspective was provided by Professor Ben Saul, from the Sydney Centre of International Law, who noted that the ICCPR does not explicitly address the issue of mandatory sentencing. He suggested that it is 'probably correct that there is no strict requirement under the ICCPR that courts must enjoy, in all circumstances, an absolute discretion to determine penalties'.[63] Nonetheless, he considered that plausible arguments could be made that 'if mandatory sentencing has the effect of imposing an excessive/disproportionate imprisonment on the facts of the case, then such detention may be regarded as arbitrary and/or unlawful, contrary to article 9'. Further, 'if mandatory sentencing directs a court to impose an excessive punishment in the circumstances of a given case, it is arguable that the court is unable to exercise the 'independence' and 'impartiality' required of it in criminal cases under article 14'. He concluded that the Bill's proposed elimination of mandatory sentencing would reduce the risk of Australia infringing its obligations under the ICCPR.[64]

2.42 Compliance with other articles of the ICCPR was also raised by submitters. For example, the Gilbert and Tobin Centre of Public Law contended that mandatory sentencing could raise issues under article 7 (the prohibition of cruel, inhuman or degrading treatment or punishment); article 10 (the requirement that persons deprived of liberty be treated with humanity and respect, and that 'the essential aim' of incarceration be prisoners' reformation and social rehabilitation) and article 15 (non-retrospective punishment).[65]

2.43 The Judicial Conference of Australia did not directly raise the issue of the ICCPR in its submission. It did state, however, that where mandatory minimum penalties are imposed 'there is the practical inevitability of arbitrary punishment as offenders with quite different levels of culpability receive the same penalty'.[66]

2.44 The Attorney-General's Department noted the Australian Government's obligations under the ICCPR, particularly in relation to arbitrary detention. It stated that '[t]he test for whether detention is arbitrary is whether, in all the circumstances, the detention of the particular individual is appropriate and justifiable, and reasonable, necessary and proportionate to the end that is sought'.[67] Further:

> The Australian Government considers that one of the primary purposes of mandatory minimum penalties is to ensure that courts consistently apply penalties commensurate with the seriousness of the offence. Under the current mandatory minimum penalties regime, judges retain discretion to apply a penalty within the relevant minimum and maximum penalties for

63 *Submission 2*, p. 2.

64 *Submission 2*, p. 3.

65 *Submission 1*, pp 4-5.

66 *Submission 11*, p. 3.

67 *Submission 17*, p. 6.

> the offence. This enables the court to consider relevant factors present in a particular case.[68]

International Covenant on the Elimination of Racial Discrimination

2.45 Professor Ben Saul highlighted as an example that the UN Racial Discrimination Committee had found that mandatory sentences which target offences committed disproportionately by Indigenous people may have a racially discriminatory impact and violate the *International Covenant on the Elimination of Racial Discrimination*:

> There may be a question whether the current law has an indirectly racially discriminatory effect, if, for instance, it can be shown that it operates to disproportionately affect a particular racial group compared to others.[69]

2.46 However, the Attorney-General's Department stated:

> Mandatory minimum penalties under the Migration Act apply to all persons convicted of aggravated people smuggling offences, irrespective of race or nationality. While many persons convicted of people smuggling offences are Indonesian nationals, other foreign nationals are also charged with people smuggling offences, including offences involving smuggling persons by air.[70]

Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention on Transnational Organised Crime (Protocol)

2.47 Ms Bassina Farbenblum from the Migrant and Refugee Rights Project described the Protocol as 'the primary international agreement between states on the prevention and combating of the smuggling of migrants' and noted that Australia ratified the Protocol in 2004. She outlined that, while article 6 of the Protocol requires state parties to establish criminal offences for the smuggling of migrants, article 19 of the Protocol places limitations on the definition and prosecution of those offences. Ms Farbenblum highlighted that article 19 of the Protocol 'underscores that criminalisation of smuggling pursuant to the Protocol must not undermine "responsibilities of States and individuals under … international human rights law"'.[71]

2.48 Ms Farbenblum also suggested that Australia's people smuggling offences are inconsistent with those provided for in the Protocol:

> Under the Migration Act, an individual can be sentenced for the aggravated people smuggling offence (carrying the five year mandatory minimum sentence) even if she was acting for purely humanitarian reasons and had no profit motive. In contrast, article 6 of the Protocol requires that smuggling

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68 *Submission 17*, p. 6.

69 *Submission 2*, p. 1.

70 *Submission 17*, p. 6.

71 *Submission 3*, p. 3.

> only be criminalised if it is undertaken 'in order to obtain directly or indirectly, a financial or other material benefit'.[72]

United Nations Convention on the Rights of the Child (CRC)

2.49 Several submissions emphasised Australia's obligations to children under the CRC.[73] In particular submissions focused on:

- article 3(1), which requires state parties to ensure that the best interests of the child are a primary consideration in all actions concerning children;
- article 37(b), which provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily, and that detention or imprisonment should be used as a last resort and for the shortest appropriate time; and
- article 37(c), which states 'child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age'.

2.50 Submitters considered Australia's CRC obligations to be relevant since children and young people are used as crew on people smuggling vessels and there have been occasions where children have been incorrectly assessed as adults by authorities. For example, Amnesty International Australia quoted UN Office of Drugs and Crime research which indicates that children are purposely being used by organisers as crew on people smuggling vessels:

> The majority of people suspected of committing people smuggling offences [in Australia] are Indonesians who have worked as crew on such boats. In some cases, these individuals are children (under the age of 18 years) at the time of their arrest...
>
> In many regions, there have been situations of minors being used to captain the boats so as to avoid prosecution upon interception, though this is not always the result. Often the boat will be piloted by an adult and a child only placed at the helm when rescue services are spotted or where the vessel is approaching its destination.[74]

2.51 As outlined above, the mandatory minimum penalties for aggravated people smuggling offences 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' (subsection 236B(2) of the Migration Act). In relation to this restriction, the Australian Human Rights Commission commented:

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72 *Submission 3*, p. 4.

73 For example, Australian Human Rights Commission, *Submission 4*, pp 5-6. Law Council of Australia, *Submission 7*, p. 7; Human Rights Council of Australia, *Submission 8*, p. 8.

74 *Submission 10*, p. 3; United Nations Office on Drugs and Crime, *Issue Paper on the Smuggling of Migrants by Sea*, 2011, p. 30, available at: http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf (accessed 2 March 2012).

> The 'balance of probabilities' test is lower than the criminal standard of 'beyond reasonable doubt'. As a consequence, a person may be held to be an adult and subject to the mandatory minimum term of imprisonment even where doubt exists as to whether that person is an adult.[75]

2.52 The Australian Human Rights Commission explained its concerns that age assessment procedures for those accused of people smuggling offences may have led to 'some children being charged, convicted and sentenced as adults'.[76] It noted that, if this had occurred, the imposition of a mandatory sentence would be inconsistent with the obligations under the CRC.[77] Ms Catherine Branson QC, President of the Australian Human Rights Commission, told the committee, '[w]hile you have a provision and there is some risk that it will be applied to children, I think mandatory imprisonment of any kind is unacceptable'.[78]

Alternative approaches

2.53 Some submitters suggested alternative approaches that could be taken to minimise the potential adverse outcomes created by the current mandatory minimum sentencing regime.

Granting judicial officers discretion in enforcing mandatory minimum sentences

2.54 While the Castan Centre for Human Rights Law supported the amendments in the Bill, it also referred to approaches taken in relation to mandatory sentencing legislation in South Africa and the UK. These include clauses intended to allow judicial officers discretion to impose lesser sentences where they are satisfied that the circumstances would make it unjust to impose the prescribed sentence for an offence. The Castan Centre noted that the use of '[s]uch a clause [in Australia] would demonstrate the Government's disapprobation of people smuggling without forcing the courts to ignore compelling aspects of certain defendants' cases'.[79]

2.55 The Law Council of Australia agreed that this approach would be worthy of careful consideration if a form of mandatory sentencing is to be maintained, arguing that this approach would 'at least inject a degree of judicial discretion into the sentencing process.'[80] The President of the Australian Human Rights Commission commented:

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75 *Submission 4*, p. 3.

76 *Submission 4*, p. 6.

77 *Submission 4*, p. 6; see also Amnesty International Australia, *Submission 10*, p. 4.

78 Ms Catherine Branson QC, Australian Human Rights Commission, *Committee Hansard*, 16 March 2012, p. 7.

79 *Submission 6*, p. 4.

80 Mr Phillip Boulten, Law Council of Australia, *Committee Hansard*, 16 March 2012, p. 2.

> I am not persuaded that we need a restriction on the judiciary at all, but, if we do, I think it should be one of that character, which does allow special cases to be treated as special.[81]

2.56 The Law Council also noted that a different form of words could be adopted in the legislation to add some flexibility to the mandatory minimum requirements:

> ...for instance, in New South Wales we have a sentencing provision that requires a non-parole period to be 75 per cent of the head sentence unless there are special circumstances. If there was some form of words used that allowed a judge to exercise some discretion, even if the prima facie position is a mandatory minimum, that would at least be better than the law at the moment.[82]

2.57 The Gilbert and Tobin Centre for Public Law argued, however, that a clause allowing judicial officers to impose a lesser sentence where the prescribed penalty is considered unjust would create an unnecessarily complicated system, and that simply eliminating the mandatory minimum sentencing requirements altogether would be a more effective solution to restoring judicial discretion.[83]

Differentiating between people smuggling organisers and boat crew

2.58 Some submitters contended that incorporating a mechanism to differentiate between boat crew and organisers of people smuggling operations when sentencing offenders may be a more appropriate solution. For example, Victoria Legal Aid commented:

> A sounder and fairer model would differentiate between the criminality of those who crew these boats and the true organisers of people smuggling. If longer terms of imprisonment were linked to factors that are relevant to culpability, such as whether or not the person was an organiser rather than a boat recruit, many of the harsh effects of the regime would be removed and the concerns for the treatment of this population ameliorated.[84]

2.59 Representatives from the Law Council of Australia, however, warned that such an approach may be difficult to implement in practice:

> If you are asking whether or not the law should be structured so that there should be a law for the crew and a law for higher up, it is difficult to imagine how that would be framed so as to make the distinction. The distinction is recognised by a court when they have to determine sentence. But to actually make a law that says, 'This type of sentence should be

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81 Ms Catherine Branson QC, President, Australian Human Rights Commission, *Committee Hansard*, 16 March 2012, p. 7.

82 Mr Phillip Boulten, Law Council of Australia, *Committee Hansard*, 16 March 2012, p. 2.

83 Professor George Williams, Gilbert and Tobin Centre for Public Law, *Committee Hansard*, 16 March 2012, p. 10.

84 *Submission 19*, p. 4.

imposed on crew members, and something more severe higher up,' it is a bit hard to imagine how it would actually work.[85]

Committee view

2.60 At the outset, the committee affirms the reprehensible nature of maritime people smuggling operations which endanger the lives and safety of asylum seekers and boat crew, and notes that mandatory minimum penalties for aggravated people smuggling offences were introduced to address inconsistencies in the sentencing of offenders.

2.61 Statistics provided by the CDPP, and other evidence received during the inquiry, clearly demonstrate that the majority of offenders convicted of people smuggling offences in Australia are boat crew, rather than the organisers of people smuggling operations. The committee notes the concerns expressed during the inquiry that boat crew members charged with people smuggling offences often have limited culpability and mitigating circumstances, which make the application of the mandatory minimum sentences inappropriate and unjust.

2.62 Accordingly, the committee is of the view that the Australian Government should review the mandatory minimum sentencing regime for people smuggling offences. This view reinforces recommendation 2 of the committee's report into the Deterring People Smuggling Bill 2011, which suggested that the operation of the people smuggling offences in the Migration Act should be reviewed to ensure that these offences continue to effectively deter people smuggling.[86]

2.63 The current mandatory minimum sentences are appropriate when applied to organisers of people smuggling operations, due to the serious nature of their actions and the risk their operations pose to the life and safety of others. The committee considers, however, that there is a strong case to investigate alternative options for the sentencing of boat crew convicted of people smuggling offences. In this context, the committee does not believe that the complete removal of mandatory minimum sentences, as proposed in the Bill, is the most appropriate means of addressing this issue.

2.64 During the inquiry, evidence was received regarding mandatory minimum sentencing provisions in other jurisdictions, such as South Africa and the United Kingdom, whereby judicial officers are given the option to impose a lower sentence where the prescribed mandatory minimum sentence is clearly unjust. Such an approach in Australia would continue to demonstrate the Parliament's view of the seriousness of people smuggling offences, while allowing limited judicial discretion in

85 Mr Phillip Boulten, Law Council of Australia, *Committee Hansard,* 16 March 2012, p. 2.

86 Senate Legal and Constitutional Affairs Committee, *Deterring People Smuggling Bill 2011*, November 2011, p. 19.

exceptional cases. The committee believes that this approach has some merit, and it should be considered by the Australian Government as part of any review.

2.65 The committee notes the suggestion that some distinction could be drawn between 'organisers' and 'boat crew' when sentencing convicted people smugglers. The committee agrees with the Law Council of Australia that this distinction may be difficult to define and codify in legislation. Nonetheless, the committee considers that this possible amendment to the people smuggling offences should also be assessed as part of its recommended review.

2.66 The committee also notes the work undertaken by the International Organization for Migration in Indonesia in delivering the Australian government's public information campaign to Indonesian communities in 2009-2010. Deterrence initiatives such as this are essential in order to reduce maritime people smuggling activities originating from Indonesia. The committee believes that the Australian Government should pursue further awareness and deterrence activities in concert with any possible changes to the sentencing regime for people smuggling.

2.67 As a final point, the committee notes concerns raised by submitters during the inquiry regarding mandatory minimum sentences and Australia's human rights obligations under international law, and believes that these concerns should be specifically considered in any review of the provisions undertaken by the Australian Government.

Recommendation 1

2.68 The committee recommends that the Australian Government review the operation of the mandatory minimum penalties applied to aggravated people smuggling offences under section 236B of the *Migration Act 1958*, with particular reference to:

- **alternative approaches to mandatory minimum sentencing provisions, including where judicial officers are given discretion to impose lesser sentences where they are satisfied that the circumstances would make it unjust to impose the prescribed sentence for an offence;**
- **options for differentiating between the organisers of people smuggling operations and boat crew of these operations in sentencing; and**
- **specific concerns raised during this inquiry regarding Australia's human rights obligations under international law.**

Recommendation 2

2.69 The committee recommends that the Australian Government facilitate and support further deterrence and awareness raising activities in relation to people smuggling offences, with a focus on relevant communities in Indonesia.

Recommendation 3

2.70 The committee recommends that the Senate should not pass the Bill.

Senator Trish Crossin
Chair

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 of 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.[1]

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).[2]

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*.[3] 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.[4]

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*'.[5]

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.[6]

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'.[7]

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.[8]

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.[9]

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.[10]

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.[11]

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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.[12]

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'.[13] 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.[14]

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'.[15]

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'.[16]

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

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Gilbert and Tobin Centre of Public Law
2	Professor Ben Saul
3	Ms Bassina Farbenblum
4	Australian Human Rights Commission
5	Legal Aid Western Australia
6	Castan Centre for Human Rights Law
7	Law Council of Australia
8	Human Rights Council of Australia
9	Human Rights Law Centre
10	Amnesty International Australia
11	Judicial Conference of Australia
12	New South Wales Council for Civil Liberties
13	Civil Liberties Australia
14	Commonwealth Director of Public Prosecutions
15	Australian Lawyers for Human Rights
16	Mr Greg Hogan
17	Attorney-General's Department
18	Australian Lawyers Alliance

19 Victoria Legal Aid

20 Legal Aid New South Wales

ADDITIONAL INFORMATION RECEIVED

1 Document tabled by the Commonwealth Director of Public Prosecutions at public hearing on 16 March 2012.

ANSWERS TO QUESTIONS ON NOTICE

1 Responses to questions on notice provided by the Commonwealth Director of Public Prosecutions on 23 and 26 March 2012.

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 16 March 2012

ANDERSON, Mr Iain, First Assistant Secretary, Criminal Justice Division, Attorney-General's Department

BOULTEN, Mr Phillip SC, Member, Criminal Law Committee, Law Council of Australia

BRANSON, the Hon Catherine QC, President, Australian Human Rights Commission

CARTER, Mr James, Deputy Director, Commonwealth Director of Public Prosecutions

HINCHCLIFFE, Ms Jaala, Senior Assistant Director, Commonwealth Director of Public Prosecutions

McADAM, Professor Jane, Private capacity

MOULDS, Ms Sarah, Senior Policy Lawyer, Law Council of Australia

NOLAN, Ms Roxane, Principal Legal Officer, International Law and Human Rights Division, Attorney-General's Department

RUTHERFORD, Mr Douglas, Acting Assistant Secretary, Criminal Justice Division, Attorney-General's Department

WILLIAMS, Professor George, Private capacity