



Australian Government

Government Response to the Senate Legal and Constitutional Affairs Legislation Committee Report:

Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012

November 2012

INTRODUCTION

On 9 February 2012, the Senate referred the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012 to the Legal and Constitutional Affairs Committee for inquiry and report by 22 March 2012. On 28 February 2012, the Senate agreed to extend the reporting date to 4 April 2012.

BACKGROUND

The Bill seeks to amend the *Migration Act 1958* to remove the mandatory sentences relating to aggravated people smuggling offences.

Under Australian federal criminal law, mandatory minimum penalties apply to a very limited number of serious, aggravated people smuggling offences in the *Migration Act 1958*. These penalties were first enacted in 2001, to deter repeat offenders and ensure courts consistently apply penalties commensurate with the seriousness of the crime.

The Migration Act contains four aggravated people smuggling offences which carry mandatory minimum penalties:

- Section 234A: Aggravated offences of providing false documents and false or misleading information etc relating to at least five non-citizens.
- Section 233B: An aggravated people smuggling offence involving exploitation or danger of death or serious harm.
- Section 233C: An aggravated offence involving smuggling five or more persons.

Sections 234A and 233C carry mandatory minimum penalties of five years imprisonment, with a non-parole period of three years. Offences under section 233B—and repeat offences under any of the provisions—carry a mandatory minimum penalty of eight years imprisonment, with a non-parole period of five years.

Minors are only prosecuted with people smuggling offences in exceptional circumstances on the basis of their significant involvement in a people smuggling venture, their involvement in multiple ventures or where a serious incident occurs on a venture. However, where the court determines on the balance of probabilities that the accused was a minor when the offence was committed, the mandatory minimum penalties under the Migration Act do not apply (section 236B(2)).

Until recently, the most commonly prosecuted people smuggling offence was the aggravated offence of people smuggling involving five or more persons (section 233C), which attracts a mandatory minimum penalty. However, on 27 August 2012, the Attorney-General gave a direction to the Commonwealth Director of Public Prosecutions (CDPP) not to prosecute first time offender, lower culpability crew under section 233C, but to consider prosecution with a lesser offence that does not attract a mandatory minimum penalty. This is consistent with the recommendation of the Expert Panel on Asylum Seekers that changes to Australian law in relation to Indonesian crew be pursued with options including discretion being restored to Australian courts in relation to sentencing.

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.

The Government supports this recommendation and has taken steps to implement it.

On 27 August 2012, the Attorney-General gave a direction to the CDPP not to prosecute first time offender, lower culpability crew under section 233C of the Migration Act, which involves mandatory minimum penalties and to consider prosecution under a lesser offence that does not attract a mandatory minimum penalty.

The direction applies from 27 August 2012, to prosecutions then on foot and to new prosecutions.

The direction does not apply to organisers of people smuggling ventures; to crew who repeatedly come to Australia on such ventures; or to crew involved in ventures where a death occurs.

The CDPP has now re-assessed the 101 people smuggling crew matters that were before the courts, excluding appeals to which the direction does not apply, on 27 August 2012. Of these, the CDPP discontinued 34 matters and 2 matters resulted in directed acquittals. A further 60 matters were recommenced under a lesser people smuggling charge that does not attract a mandatory minimum penalty (s233A or s233(1)(a)), while 5 cases continued under s233C.

The Australian Government is also considering further the effectiveness of the current structure of offences in the Migration Act in light of the recommendations made by the Expert Panel on Asylum Seekers in its report released on 13 August 2012.

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.

The Government supports this recommendation and has taken steps to implement it.

In addition to strong law enforcement cooperation with regional partners, the Government is delivering public information campaigns throughout the region to ensure potential irregular immigrants are aware of the perils of a boat journey to Australia. Customs and Border Protection is responsible for the offshore communications effort.

Campaigns are underway in key source and transit countries such as Afghanistan, Pakistan and Indonesia. These campaigns seek to raise awareness of the dangers and costs of seeking to migrate irregularly, as well as promote regular pathways to resettlement.

Australia and Indonesia are committed to working together to raise awareness in vulnerable communities of the dangers of people smuggling and to deter people from becoming involved in people smuggling ventures.

On 2 July 2012, the Prime Minister and the Indonesian President, Susilo Bambang Yudhoyono agreed that Australia and Indonesia will conduct a joint public information campaign in Indonesia to prevent potential crew from being used by international people smuggling networks by helping them to understand the consequences, both in Australian and Indonesian law.

This campaign has commenced with two information sessions held in Bali and Kupang from 17-19 September 2012 for local Indonesian stakeholders and representatives.

This agreement follows an Australian Government public information campaign 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. This campaign specifically targeted potential crew members, fishermen, boat owners, boat builders, and coastal industry workers.

The Australian Customs and Border Protection Service has also tasked its contracted communications providers to raise awareness of the new policy arising from the Expert Panel on Asylum Seekers' report.

Recommendation 3

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