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Committee Secretary
Senate Legal and Constitutional Committee
Parliament House
CANBERRA ACT 2600

Dear Secretary

Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012

Thank you for the opportunity to make a submission on this Bill.

We believe that the Bill ought to be passed. The *Migration Act 1958* (Cth) should be amended to remove mandatory minimum sentencing applying to aggravated people smuggling offences.

The *Migration Act* takes an exceptional approach to aggravated offences. Usually, an aggravated offence involves particularly egregious conduct that distinguishes it from the basic offence that is ordinarily charged. For example, under s 61J *Crimes Act 1900* (NSW), the basic offence of sexual assault is aggravated when there is also the deliberate infliction of serious injury or a particularly vulnerable victim. Under the *Migration Act*, to be aggravated, a people smuggling activity need only involve five or more passengers (s 233C). This has ensured that aggravated offences apply to every boat to be intercepted since these provisions were introduced, thus rendering redundant the basic offence.

The *Migration Act* already sets down harsh penalties for people smuggling offences. A person convicted of the basic offence of assisting an asylum seeker to come to Australia can be jailed for 10 years, regardless of whether there was any financial motive. However, for the aggravated offence under s 233C, the imprisonment doubles to 20 years, with a mandatory minimum sentence of five years and a non-parole period of at least three years (s 236B).

These sentences are already lengthy by Australian standards. The latter sentence in particular is already more severe than the sentence attached to some heinous crimes under State and

federal law. For example, s 61I of the *Crimes Act 1900* (NSW) imposes a maximum penalty of 14 years for sexual assault.

Contravention of an aggravated people smuggling offence in the *Migration Act* should not attract a mandatory minimum sentence in jail. Mandatory sentencing of this kind is extremely rare in Australian law, let alone in federal law, for good reason.

It is normally an accepted principle in Australia that the courts are given the power to tailor the sentence to fit the crime. Instead, a court must in this case impose a minimum sentence even where it is demonstrably unjust or mitigating factors suggest the need for a lesser penalty. The requirement to impose mandatory minimum sentences on those convicted of smuggling offences is generating increasing criticism from judges for good reason (see for example, the comments of Mildren J in *The Queen and Mohamid Tahir and Beny*, NTSC, SCC20918263 and 20918261, 28 October 2009).

One reason for the judicial disquiet is that the vast majority of those being brought before the courts on smuggling charges are crew members, often from impoverished fishing communities.[1] 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.

The disproportionate impact of the mandatory sentencing regime on the most vulnerable participants is consistent with the experience of the mandatory minimum sentence regime that operated in the Northern Territory for a range of property offences between 1997 and 2001. As with the smuggling offences, that regime required minimum terms of imprisonment for first offences and was extensively criticised for its excessively punitive and damaging impact on young Indigenous people.[2] It was partly with that experience in mind that the Australian Law Reform Commission recommended in 2005 that: 'The Australian Government should review federal criminal offence provisions and seek appropriate amendments to ensure that no mandatory minimum term of imprisonment is prescribed for any federal offence.'[3]

Furthermore, for smuggling offences to attract a mandatory minimum sentence it need only be shown 'on the balance of probabilities' that a person was aged 18 years or over when the offence was committed. This test is much easier to satisfy than that of 'beyond reasonable doubt'. It enables people to be subjected to very long, mandatory terms of imprisonment even where there is real doubt as to whether they are, in fact, an adult. This is especially significant given the widespread concerns regarding the methods used to ascertain the age of accused smugglers.[4]

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[1] Between 19 May 2009 and 2 April 2010, 6 alleged organisers were charged with offences in relation to 2 boats carrying 1209 passengers. Between 19 October 2008 and 10 March 2011, 347 crew members were charged in relation to 133 boats carrying 5805 passengers (Senate Standing Committee on Legal and Constitutional Affairs, Answer to Question on Notice No.25, 22 February 2011).

[2] See D Johnson and G Zdenkowski (2000), *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory.*

[3] Australian Law Reform Commission (2005) *Sentencing of Federal Offenders,* Discussion paper 70, at par.21.60.

[4] As the Committee will be aware, concerns over the use of wrist x-rays were one of the reasons cited by the President of the Australian Human Rights Commission for establishing an inquiry into treatment of suspected

Constitutional Law

The mandatory minimum sentences imposed under the *Migration Act* not only have the potential to lead to unjust outcomes, but also to undermine the separation of powers. It is the role of the courts, which have long expertise in sentencing and the specific facts of the case before them, to determine the appropriate sentence within the maximum penalty imposed by Parliament. This is a key power and discretion in the criminal justice process. Removing it amounts to an inappropriate interference in judicial discretion.

This raises constitutional issues. Chapter III of the Australian Constitution has been held by the High Court to require a strict separation between the federal judiciary and the executive and parliament. For example, in *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73 at 98, Dixon J found that, by virtue of the separation of judicial power, the federal Parliament is restrained 'both from reposing any power essentially judicial in any other organ or body, and from reposing any other than that judicial power in such tribunals'. This embodies two propositions:

1. That the judicial power of the Commonwealth cannot be vested in any tribunal other than a Chapter III court (that is, one established or authorised by Chapter III of the Constitution); and
2. That a Chapter III court cannot be invested with anything other than judicial power (except for those ancillary powers that are strictly incidental to its functioning as a court).

These principles have been reaffirmed in a number of cases, most notably in the *Boilermakers' Case* – reported in the High Court as *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, and in the Privy Council as *Attorney-General (Commonwealth) v The Queen* [1957] AC 288.

It is arguable that the mandatory minimum sentence set down by the *Migration Act* breaches the second limb above. 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 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.

International Law

Mandatory sentencing is inconsistent with a number of Australia's obligations under international law. At the outset, it is essential to appreciate that the Act defines 'smuggling' far more broadly than its accepted definition in international law.[5] In international law,

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people smugglers who claim they are children. See http://www.hreoc.gov.au/about/media/news/2011/116_11.html.

[5] The offence is defined in the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime ('Smuggling Protocol'), art 3(a), which Australia has ratified. By omitting a profit motive, the Australian legislation 'broadens the offence and transforms its character beyond what is envisaged in international law': Sydney Centre for

'smuggling' is an offence committed 'to obtain, directly or indirectly, a financial or other material benefit'.[6] However, Australian law omits this requirement. This means that the *Migration Act* criminalizes conduct which is *not* considered to be unlawful under the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime. Indeed, article 6 of that Protocol—on which ss 233A and 233B are expressly based—specifically reiterates that 'smuggling' is *only* a criminal offence 'when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit'. The disparity between international law and Australian law on this point makes mandatory sentencing for these offences particularly egregious.

The mandatory sentencing provisions violate the following provisions of the International Covenant on Civil and Political Rights (ICCPR):

- article 9 (the prohibition of arbitrary detention)

Detention is 'arbitrary' if it is unjust or unreasonable, even if it is sanctioned by law.[7] 'Arbitrariness' includes 'elements of inappropriateness, injustice and lack of predictability.'[8] Detention must 'not only be lawful but *reasonable* in all the circumstances ... [and] be *necessary* in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime'.[9] In this context, 'the element of proportionality becomes relevant'.[10] Since mandatory sentencing does not allow for consideration of the proportionality of the sentence to the crime committed in light of individual circumstances, by definition it may result in penal sentences that constitute arbitrary detention.

- article 14 (the right to review of sentencing)

Mandatory sentencing violates article 14 of the ICCPR because it does not permit the right to a review of the sentence by a higher tribunal according to law. This is because the sentence is imposed by the legislature, is not subject to judicial control, and there is no system for sentences to be reviewed.[11] The UN Human Rights Committee has interpreted the phrase 'according to law' as meaning 'not intended to leave the very existence of the right to review to the discretion of the States parties'.[12]

Mandatory sentencing may also raise issues under the following provisions of the ICCPR:

- article 7 (the prohibition of cruel, inhuman or degrading treatment or punishment)

International Law, Submission No 11 to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Anti-People Smuggling and Other Measures Bill 2010 (15 April 2010) 1.

[6] Smuggling Protocol, art 3(a).

[7] See eg *A v Australia*, Communication No 560/1993 (UN Human Rights Committee, 3 April 1997); reports of the UN Working Group on Arbitrary Detention: http://www2.ohchr.org/english/issues/detention.

[8] *Van Alphen v The Netherlands*, Communication No 305/88 (UN Human Rights Committee, 23 July 1990), para 5.8.

[9] Ibid, para 5.8 (emphasis added).

[10] *A v Australia*, *op cit*, para 9.2.

[11] See eg Sarah Pritchard, 'International Perspectives on Mandatory Sentencing' [2001] *Australian Journal of Human Rights* 17.

[12] *Salgar de Montejo v Colombia*, Communication No R.15/64 (UN Human Rights Committee, 24 March 1982), para10.4.

- 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)[13]
- article 15 (non-retrospective punishment).[14]

In the past, the UN Human Rights Committee has found that mandatory sentencing laws in the Northern Territory and Western Australia raised 'serious issues of compliance with various articles' of the ICCPR.[15]

In cases where children (those below the age of 18) are detained, the mandatory sentencing provisions may also violate the following provisions of the Convention on the Rights of the Child:

- article 3 (the best interests of the child)
- article 37(a) (the prohibition of cruel, inhuman or degrading treatment or punishment)
- article 37(b) (the prohibition of arbitrary detention)
- article 37(c) (the requirement that persons deprived of liberty be treated with humanity and respect)
- article 40 (treatment of children who have infringed penal law)

Yours sincerely

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[13] Incarceration is generally thought to be ineffective in this respect. For a discussion of the complexities of this issue, see David Garland (1990) *Punishment and Modern Society*, especially chapter 12; and in relation to the Northern Territory experience of mandatory sentencing, see D Johnson and G Zdenkowski (2000), *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory.*

[14] For analysis of this provision, see Sydney Centre for International Law submission, *op cit*, 3.

[15] UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Australia' (24 July 2000) UN Doc A/55/40.