Law Council
OF AUSTRALIA

Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012

Senate Standing Committee on Legal and Constitutional Affairs

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Introduction

1. The Law Council of Australia is pleased to provide the following submission in response to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* (the Bill).

2. The Bill repeals section 236B of the *Migration Act 1958* (Cth) (the Migration Act) which requires courts to impose mandatory minimum terms of imprisonment of between five and eight years for certain people smuggling and related offences. The Bill also makes a number of amendments to related provisions.

3. The Law Council strongly supports the enactment of this Bill.

4. The Council opposes mandatory sentencing regimes on the basis that they impose unacceptable restrictions on judicial discretion and are contrary to rule of law and human rights principles. The Law Council is also of the view that mandatory minimum sentences can result in disproportionate and unfair outcomes and may exacerbate costs and delays associated with the criminal justice system.

5. The Law Council has previously opposed the use of mandatory minimum sentences for people smuggling offences, and notes that the potential for disproportionate and unfair outcomes has been recently commented upon by a number of senior judges.[1]

6. The Law Council urges this Committee to recommend the swift passage of this Bill to restore appropriate judicial discretion to the sentencing process.

Relevant Provisions of the Migration Act

7. Australia's domestic legislative framework criminalising people smuggling is set out in the Migration Act for ventures entering Australia and in the *Criminal Code Act 1995* (Cth) (the Criminal Code) for ventures entering foreign countries whether or not via Australia.[2] The people smuggling offence provisions are currently contained in Division 12, Subdivision A of the Migration Act and in Division 73 of the Criminal Code.

8. Amendments enacted in May 2010 by the *Anti-People Smuggling and Other Measures Act 2010* (Cth) harmonised the Criminal Code offences and the Migration Act offences, created new people smuggling offences, broadened investigation mechanisms and extended mandatory minimum penalties for aggravated people smuggling offences. The Law Council made a submission to an inquiry by this Committee into the 2010 amendments, raising a range of concerns with the new and consolidated offence provisions and the extension of the mandatory minimum sentence provisions in the Migration Act. [3]

[1] See the Hon Wayne Martin, Chief Justice of Western Australia and Chair - National Judicial College of Australia, 'Sentencing Issues in People Smuggling Cases' Address to Federal Crime and Sentencing Conference, 11 February 2012, ANU, Canberra at http://www.supremecourt.wa.gov.au/publications/pdf/Federal_Crime_and_Sentencing_Conference_Martin_CJ_11_Feb_2012.pdf; see also Mark Dodd, 'Chief judge slams people-smuggling sentences for boat crew', *The Australian* 15 February 2012 at http://www.theaustralian.com.au/national-affairs/chief-judge-slams-people-smuggling-sentences-for-boat-crew/story-fn59niix-1226271200966

[2] See Explanatory Memorandum, *Anti -People Smuggling and Other Measures Bill 2010* at p 2

[3] Law Council of Australia submission to the Senate Committee on Legal and Constitutional Affairs on the *Anti-People Smuggling and Other Measures Bill 2010* (April 2012) . This submission is available at

9. The standard people smuggling offence in the *Migration Act* is contained in section 233A, which makes it an offence to organise or facilitate the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person who is a non-citizen and who has no lawful right to come to Australia. The maximum penalty for this offence is 10 years imprisonment.

10. The current Bill seeks to repeal the requirement in section 236B of the Migration Act to impose mandatory minimum sentences in respect of the following 'aggravated' people smuggling and related offences in the Migration Act:

- Section 233B - organising or facilitating the bringing or coming to Australia of a non-citizen with no lawful right to come, where the offender intends that the victim will be exploited after entry into Australia; or subjects the victim to cruel, inhuman or degrading treatment; or engages in conduct giving rise to a danger of death or serious harm or is reckless as to the danger of death or serious harm to the victim. The maximum penalty is 20 years imprisonment.

- Section 233C – organising or facilitating the bringing or coming to Australia of a group of at least five non-citizens who have no lawful right to come. The maximum penalty is 20 years imprisonment.

- Section 234 –presenting, making, delivering, transferring or parting with possession of documents or false or misleading information in connection with activities relating to entry into Australia of non-citizens or applications for visas. The maximum penalty is 20 years imprisonment.

11. Subsection 236B (3) of the Migration Act currently provides that where a person is convicted of an offence contained in sections 233B, 233C or 234A, the court *must* impose a sentence of imprisonment of at least eight years for a 'repeat offence' or for the aggravated offence of people smuggling involving exploitation; cruel, inhuman or degrading treatment; or danger of death or serious harm in section 233B. In the case of other offences under those sections, the court must impose a sentence of imprisonment of at least five years.

12. A 'repeat offence' is defined under subsection 236B (5) as another prescribed offence which the person is found to have committed or which the person has been convicted of either in *the same proceeding or* previous proceedings.

13. Subsection 236B(4) also requires the court to set a minimum non-parole period of five years for 'repeat offences' and the aggravated offence of people smuggling involving exploitation; cruel, inhuman or degrading treatment; or danger of death or serious harm. In the case of other offence under sections 233B, 233C or 234A, the court must set a minimum non-parole period of three years.

14. Section 236B does not apply if it is proved on the balance of probabilities that the person was aged under 18 years when the offence was committed. Section 236A also allows the court to dismiss the charge or discharge the offender without proceeding to conviction[4] in respect of an offence against sections 233B, 233C or 234A if it is proved on the balance of probabilities that the person was aged under 18 years when the offence was committed.

15. As noted above, the Bill repeals section 236B and by doing so removes the requirement to impose mandatory minimum sentences for the three offences

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=14D46415-1E4F-17FA-D281-F903F5FB4A3C&siteName=lca

[4] See section 19B of the *Crimes Act 1914* (Cth).

described above. The Bill also makes a number of amendments related to this repeal.[5] For the following reasons, the Law Council supports the passage of this Bill.

General Opposition to Mandatory Sentencing

16. The Law Council opposes the use of mandatory sentencing regimes on the basis that they impose unacceptable restrictions on judicial discretion and undermine rule of law and human rights principles. [6]

17. By effectively removing sentencing discretion from the courts which hear and examine all of the relevant circumstances of a particular case, mandatory sentencing provisions undermine the independence of the judiciary and threaten an essential component of the rule of law. As stated in the Law Council's recent *Policy Statement on Rule of Law Principles*:

> *In criminal matters, judges should not be required to impose mandatory minimum sentences. Such a requirement interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime.*[7]

18. 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.

19. Mandatory sentencing regimes also violate the right to a fair hearing because the sentence is effectively imposed by the legislature, and is not subject to judicial control.[8]

20. Mandatory sentencing regimes also effectively require increased use of discretion by police to decide whether to refer matters for prosecution and of prosecutors to decide whether to prosecute, knowing that if they do and a conviction is obtained, at least the minimum sentence will be imposed, regardless of the circumstances.[9]

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5 The substantive amendment contained in this Bill is to repeal s236B. The Bill also amends the notes contained in the offence provisions in s233A,233C and 234A which refer to section 233B as limiting conviction options for offences against these sections. The reference to section 236A in these notes would remain intact under this Bill.

6 For further details on the development of the Law Council's policy in this area see Law Council of Australia, The Mandatory Sentencing Debate, (September 2001) available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=91B75434-1E4F-17FA-D2BA-B6D5A60592A7&siteName=lca

7 In March 2011, the Law Council issued a *Policy Statement on Rule of Law Principles* which articuolates the framework employed by the Law Council in evaluating the merits of legislation, policies and practices, see Law Council of Australia, *Policy Statement on Rule of Law Principles*. (March 2011) available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=4858D679-AA9B-27F0-219A-40A47E586C70&siteName=lca

8 For further discussion of this issue see Sarah Pritchard, 'International Perspectives on Mandatory Sentencing' [2001] Australian Journal of Human Rights 17 at http://www.austlii.edu.au/au/journals/AJHR/2001/17.html.

9 Law Institute of Victoria, *Mandatory Minimum Sentencing*, Submission to Victorian Attorney General, 30 June 2011, p. 5. available at http://www.liv.asn.au/getattachment/22c3c2c9-45a5-45c4-96e6-f0affdfe2ff8/Mandatory-Minimum-Sentencing.aspx

21. Commenting on the use of mandatory minimum sentences in a recent address to the National Judicial College, the Hon Wayne Martin Chief Justice of Western Australia emphasised that "[w]here an offence is created by the legislature, it is for the legislature to prescribe the range of sentences that may be imposed".[10] The Chief Justice observed, however, that when setting a minimum bound for the exercise of the sentencing discretion, the legislature:

> *creates the risk that a court may be required to impose a sentence which is disproportionate to the culpability of the offender, or the seriousness of the offence, or which may prejudice the prospects of rehabilitation and which is to that extent unjust, and [should] evaluate those risks against the perceived advantages of a mandatory minimum sentence. [11]*

22. The existence of mandatory sentencing provisions in the laws of the Commonwealth and some of its States and Territories[12] have also been subject to strong criticism by domestic and international human rights bodies on the grounds that they are inconsistent with fundamental human rights principles.[13]

23. Although the *International Covenant on Civil and Political Rights* (ICCPR) does not specifically address mandatory sentencing, the scope of many of its Articles suggest that removing judicial discretion in sentencing of criminal matters may place a country in breach of its obligations.[14]

24. For example, Article 9 of the ICCPR) prohibits arbitrary detention, and requires consideration of principles of justice and proportionality when a penalty is imposed under law.[15]

25. Imposing mandatory minimum sentences that cannot be subject to appeal is also in breach of Article 14(5) of the ICCPR which provides that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".[16]

26. The United Nations Human Rights Committee has also commented that a sentence of imprisonment which is grossly disproportionate to the gravity of the offence is

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[10] Wayne Martin, Chief Justice of Western Australia and Chair - National Judicial College of Australia, 'Sentencing Issues in People Smuggling Cases' Address to Federal Crime and Sentencing Conference, 11 February 2012, ANU, Canberra, p. 11, see note 1.

[11] Ibid.

[12] For example, see s297 (5) *Criminal Code Compilation Act 1913* (WA). For further discussion of these regimes see Law Institute of Victoria, Mandatory Minimum Sentencing, Submission to Victorian Attorney General, 30 June 2011, p.6, note 9

[13] For example, the report of the National Inquiry into Children in the Legal Process, jointly published by the then Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission in 1997, criticised relevant NT and WA laws because they violated the principle of proportionality in sentencing, did not represent a sentence of "last resort" and the sentences imposed were not reviewable by a higher court, see http://www.hreoc.gov.au/human_rights/children/seen_and_heard.html. In 2008, the UN Committee Against Torture in its Concluding Observations on Australia's 3rd Periodic Report recommended that mandatory sentencing should be abolished, see http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/421/66/PDF/G0842166.pdf?OpenElement at p 7

[14] The Law Council notes that this issue is addressed in further in detail in the submission prepared for this Inquiry by Professor Ben Saul.

[15] See *A v Australia*, HRC, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) [9.2] See also *Van Alphen v The Netherlands*, HRC, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988 (15 August 1990) [5.8]. See also Australian Human Rights Commission -Human Rights Brief No. 2 at www.hreoc.gov.au/human_rights/brief/h_9_2.html

[16] For further discussion see Sarah Pritchard, 'International Perspectives on Mandatory Sentencing' [2001] Australian Journal of Human Rights 17, note 8

likely to amount to a clear violation of Article 7 which prohibits torture or cruel, inhuman or degrading treatment or punishment.[17]

27. There is also judicial support for the contention that Australia is in breach of its international obligations. For example, in *Ferguson v Setter and Gokel* (1997) 7 NTLR 118, Kearney J of the Northern Territory Supreme Court expressed the opinion that the mandatory sentencing provisions introduced into the then *Juvenile Justice Act 1993* (NT) were "directly contrary to article 37(b) of the ICCPR".

28. Mandatory sentencing regimes may also infringe upon rights to equality and freedom from discrimination, such as those contained in Article 26 of the ICCPR, if they operate so as to have a particular impact on a group of persons from a specific racial and national group. Concerns have been raised in relation to past mandatory sentencing regimes in Western Australia and the Northern Territory that have been found to be having a disproportionate impact on Indigenous Australians.[18] Similar concerns can be raised in the context of people smuggling offences, where mandatory minimum sentences are being imposed on a very specific group – mainly young Indonesian fishermen – rather than the broader community.[19.]

29. Mandatory sentencing may also be in breach of the *Convention on the Rights of the Child* (CROC). For example:

- Article 3 requires courts to consider the best interests of the child as a primary consideration;
- Article 37(b) provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- Article 40.2(b) provides that every child convicted of a criminal offence is entitled to have this decision and any measures imposed in consequence reviewed by a higher competent, independent and impartial authority or judicial body according to law; and
- Article 40.4 provides that children in the criminal justice system must be dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

30. As discussed below, although section 236A and sub-section 236B (2) of the Migration Act avoid the impact of mandatory minimum sentences on persons proved to be under 18, given the difficulties associated with proving age, these provisions may not be adequate to protect children as required by CROC.

31. In addition to these concerns, the Law Council queries whether mandatory minimum sentencing regimes provide an effective deterrent to criminal behaviour. The evidence available in Australia suggests that mandatory sentencing does not reduce crime and may in fact lead to increased crime rates over the longer term. For example, the experience in the Northern Territory during the mandatory sentencing

[17] UN Human Rights Committee's General Comment No 34 on Article 7 of the ICCPR, available at http://www2.ohchr.org/english/bodies/hrc/comments.htm

[18] For example, the 2008 Concluding Observations of the Committee against Torture on Australia's Third Periodic Report, see note 12.

[19] The potential for the right to equality and non-discrimination to be restored by the passage of the current Bill was identified in the Statement of Compatibility tabled with the Bill, available at http://www.comlaw.gov.au/Details/C2012B00003/Explanatory%20Memorandum/Text

regime for property offences showed that property crime *increased* during mandatory sentencing, and *decreased* after its repeal.[20]

32. As discussed below, mandatory minimum sentences do not appear to have had a deterrent effect on the countless desperate and impoverished people who become involved in people smuggling operations.

33. The Law Council is also of the view that mandatory sentencing regimes may exacerbate costs and delays associated with the criminal justice system, as incentives are removed for offenders to assist authorities with investigations in the expectation that such assistance will be taken into account in sentencing. More offenders contest charges in order to try and avoid the mandatory minimum sentence.

34. A number of the Law Council's constituent bodies, such as the Law Institute of Victoria[21] and the New South Wales Law Society,[22] have also recently voiced strong concerns regarding the use of mandatory sentencing regimes in their respective jurisdictions.

35. The Queensland Law Society has also long maintained a strong stance against mandatory sentencing and draws the Committee's attention to the cogent arguments of the Hon Cameron Dick MP, the former Queensland Attorney-General, when he spoke against mandatory sentencing proposed in the *Criminal Code (Serious Assaults on Police and Other Particular Persons) Bill 2010* (Qld), a private member's Bill.[23]

Mandatory Sentencing in People Smuggling Cases

36. People smuggling is an international problem, that has very serious and significant consequences for many countries, threatening the rights and lives of individuals and disrupting communities and governments across our region.[24]

37. The image of people smuggling familiar to the Australian community is one of exploitation of vulnerable people, significant loss of life and the disruption of the orderly processing of asylum seekers. This image has understandably given rise to a high level of public concern surrounding people smuggling and generated legislative action by successive governments to seek to deter and prevent persons from becoming involved in such activity. This legislative activity has resulted in the

[20] Office of Crime Prevention, Mandatory Sentencing for Adult Property Offenders – The Northern Territory Experience (2003) p 10. For further discussion of the deterrent impact of mandatory sentencing regimes see Law Institute of Victoria, Mandatory Minimum Sentencing, Submission to Victorian Attorney General, 30 June 2011, p.7, note 9.

[21] Law Institute of Victoria, Mandatory Minimum Sentencing, Submission to Victorian Attorney General, 30 June 2011, see note 9.

[22] On 15 February 2012 the President of the New South Wales Law Society, Mr Justin Dowd, wrote to the Commonwealth Attorney General, the Hon Nicola Roxon regarding the impact of mandatory sentencing provisions in people smuggling matters on the NSW court system.

[23] See http://www.parliament.qld.gov.au/documents/hansard/2010/2010_08_04_WEEKLY.pdf at pp 2449-2453

[24] The international dimension of the problem was recognised by the adoption by the General Assembly of the United Nations on 15 November 2000 of the *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, which is a supplement to the *United Nations Convention Against Transnational Organised Crime*. Australia signed the protocol in December 2001.

drafting of broadly framed offences that go beyond the scope of the international instruments designed to deal with people smuggling to which Australia is a party.[25]

38. Governments have also legislated harsh penalties for people smuggling offences. For example, a sentence of ten years imprisonment can be imposed on a person convicted of the basic offence of assisting a person with a claim to asylum to come to Australia, regardless of the absence of a financial motive. The Migration Act also includes 'aggravated' offences that attract significantly higher penalties and minimum mandatory sentences, such as the offence in section 233B, which prohibits organising or facilitating the bringing or coming to Australia of a group of at *least five non-citizens* who have no lawful right to come. The aggravating feature of this offence is the number of non-citizens coming to Australia. This can be contrasted with many other 'aggravated' criminal offences where the element of aggravation is related to violence, the harm experienced by the victim or significant financial gain.[26] The aggravated offence in section 233B, with its relatively low threshold of five non-citizens, has effectively rendered the standard people 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.

39. 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.

40. Recent research has found that when jurors, who are fully informed of the facts of a case (rather than media reports), are asked to assess the appropriateness of a sentence imposed through the full exercise of a judge's discretion, 90% agreed that the sentence was very or fairly appropriate.[27]

41. According to official data, 493 people were arrested for people smuggling related offences between 2008 and 2011.[28] In a recent address to the National Judicial College the Hon Wayne Martin, Chief Justice of Western Australia summarised this data as follows:

> *Of those arrests, only ten could be termed organisers, and the remainder described as crew. Typically the people arrested as crew are those who are left on the boat at the time it is apprehended in Australian waters. Very commonly more senior personnel, including organisers, will have disembarked, perhaps at Rote*

[25] Australia is a party to the *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, which supplements the *United Nations Convention Against Transnational Organized Crime.* Article 6 of the Protocol—on which the offences in ss 233A and 233B are expressly based—specifically provides 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 nexus with a profit motive was removed from these offences in the 2010 amendments. For example, section 233A of the Migration Act, which provides the standard people smuggling offence in that Act provides: makes it an offence to organise or facilitate the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person who is a non-citizen and who has no lawful right to come to Australia. The maximum penalty for this offence is 10 years imprisonment.

[26] For example Crimes Act 1900 (NSW) s61J, the basic offence of sexual assault is aggravated when there is also the deliberate infliction of serious injury or a particularly vulnerable victim.

[27] See K Warner, *Public Judgment on Sentencing: Final Results from the Tasmanian Jury Sentencing Study* at http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi407.aspx

[28] See Australian Government Spending on Irregular Maritime Arrivals and People Smuggling Activity, (January 2012), available at http://www.aph.gov.au/library/pubs/bn/sp/PeopleSmuggling.pdf

Island or perhaps onto another vessel before there is any risk of apprehension. Those that remain and are arrested and brought before Australian courts are often impoverished and illiterate, and have been induced to work on the boat for a sum which they regard as very substantial, but which is the Indonesian equivalent of between $300 and $500.[29]

42. The circumstances of those persons most likely to be charged and prosecuted for people smuggling activities should not necessarily absolve them of criminal responsibility, but they do point to the need for sentencing courts to be able to take a range of matters into account when sentencing for these offences.

43. When Parliament introduced and passed the first people smuggling offences in the Migration Act via the *Border Protection (Validation and Enforcement Powers) Act 2001*, no specific justification for mandatory sentencing provisions was provided. Similarly, no empirical evidence or other rationale was provided for the imposition of mandatory sentencing under the 2010 amendments. As outlined in its submission on those amendments, the Law Council is of the view that while mandatory sentencing may provide the appearance of addressing the problem of people smuggling, there is no justification or merit for such sentencing in economic or legal terms or in terms of the deterrence value it provides.

44. As Chief Justice Martin explains, the deterrent effect of mandatory sentencing regimes in the context of irregular maritime migration may be questionable:

The growth in the numbers of such persons coming before our courts also suggests that the criticisms of the limited deterrent effect of mandatory minimum sentences in this area may have some substance. Although the figures vary, depending upon their source, all the data I have seen, and the experience of the courts is that the numbers of offenders brought before the courts for people smuggling has increased exponentially over recent years. Referring again to data tabled in the Parliament, as at 30 June 2009, there were 30 people smuggling prosecutions underway before the courts. A year later (as at 30 June 2010), there were 102 cases pending, and by 30 June 2011, 304 (that is, ten times as many as 2 years earlier).[30]

Disproportionate and Unfair Outcomes

45. The potential for disproportionate and unfair outcomes arising as a consequence of section 236B of the Migration Act has been noted by a number of judges, who have been required to utilise the section when sentencing offenders whose personal circumstances and level of involvement in people smuggling operations suggest a more lenient sentence would have been appropriate. The growing level of judicial concern about this provision was commented upon by Chief Justice Martin in his recent address to the National Judicial College:

On at least 11 occasions, at the time of writing, judges imposing the mandatory minimum sentence of 5 years imprisonment for people smuggling have made observations critical of the mandatory minimum with varying

[29] The Hon Wayne Martin, Chief Justice of Western Australia and Chair - National Judicial College of Australia, 'Sentencing Issues in People Smuggling Cases' Address to Federal Crime and Sentencing Conference, 11 February 2012, ANU, Canberra, p. 12, note 1.
[30] Ibid, p. 13

degrees of stridency.[31] *In addition, two judges have criticised the mandatory minimum extracurially.*[32]*. In a number of the cases, judges have observed that without the constraint imposed by the statutory minimum, they would have imposed a lower sentence which would, in their view, have been appropriate to the circumstances of the case and the culpability of the offender."* [33]

46. Some of the judicial observations referred to by Chief Justice Martin include the following:

- When Queensland District Court Judge Martin imposed five years imprisonment on a 29 year old fisherman from Indonesia, His Honour observed that the defendant was the only crew member on board a wooden vessel that was intercepted off the coast of Western Australia carrying 20 Afghani asylum seekers.[34] The defendant told the court the he had agreed to make the journey after being approached by organisers in Indonesia, so that he could provide for his mother and sister. In the course of sentencing, Justice Martin noted that the defendant's personal circumstances made him as desperate and as vulnerable to exploitation as the refugees on his boat. Judge Martin imposed the five-year term, but said the penalty did not reflect the facts of the case. In relation to the mandatory minimum provision, His Honour observed that: "Commonly savage penalties are being imposed upon the ignorant, who are simply being exploited by organisers. It's obvious that the legislation imposing a minimum mandatory penalty deprives a court from exercising a full and proper sentencing discretion in cases such as this." [35]

- When sentencing Asse Ambo for bringing SIEV 229 and its 53 passengers to Australian waters, NSW District Court Judge Knox described the nine stages in the human supply chain that brought the vessel from Tehran and Baghdad.[36] It was observed that Ambo, who was unemployed, illiterate and down the bottom of this supply chain, only received two hundred and seventeen dollars payment for his role. In sentencing, Judge Knox said the deterrence effects of Australia's anti-people smuggling policy needed to be considered "in the context of illiterate and poor fishermen from remote islands of the Indonesian archipelago where there is no electricity, no television and no radio".[37] Judge Knox further observed that mandatory sentencing does not "allow a distinction [between] sentencing offenders such as Mr Ambo and those involved in [more important roles, such as running] the overall scheme".[38] He compared the situation with drug smuggling trials, where

[31] Supreme Court of Northern Territory - Riley CJ, Kelly J, Barr J, Mildren J, Blokland J; Supreme Court of Queensland - Atkinson J; District Court of WA - Yeats DCJ; District Court of New South Wales - Conlan DCJ, Knox DCJ; District Court of Queensland - Martin DCJ, Farr ADCJ
[32] Chief Judge Blanch, Murray J (SCWA)
[33] The Hon Wayne Martin, Chief Justice of Western Australia and Chair - National Judicial College of Australia, 'Sentencing Issues in People Smuggling Cases' Address to Federal Crime and Sentencing Conference, 11 February 2012, ANU, Canberra, p. 11, note 1.
[34] Flatley, C, "Judge slams mandatory sentence for people smugglers', *Sydney Morning Herald*, 11 January 2012
[35] Flatley, C, "Judge slams mandatory sentence for people smugglers', *Sydney Morning Herald*, 11 January 2012
[36] [2011] NSWDC 182, see also Michael Duffy, "Tough laws on people smuggling are a con", Sydney Morning Herald, 13 February 2012 available at: http://www.smh.com.au/opinion/politics/tough-laws-on-people-smuggling-are-a-con-20120212-1szkp.html#ixzz1nG911yiu
[37] *R v Ambo* [2011] NSWDC 182 at [31]
[38] Ibid at [18]

judges have the discretion to give markedly different sentences to couriers and to principal organisers.[39]

- Justice Blokland of the Northern Territory Supreme Court made similar observations when imposing the mandatory minimum sentence in respect of Mr Mahendra, an Indonesian crew member, who Justice Blokland found to have been misled about the nature and legal consequences of his participation in a people smuggling operation.[40]

- When sentencing Mr Nafi, another Indonesian fisherman involved in transporting irregular maritime arrivals to support his extended family, Justice Kelly of Northern Territory Supreme Court made similar observations:

  As I say, taking into account all of those matters which are set out in s 16A(2), I would not consider it appropriate to hand down a sentence anywhere near as severe as the mandatory minimum sentence ... Such a sentence is completely out of kilter with sentences handed down in this Court for offences of the same or higher maximum sentences involving far greater moral culpability including violence causing serious harm to victims.[41]

Potential Impact on Children

47. The Law Council also holds serious concerns about the plight of children who may be unintentionally captured by the mandatory sentencing provisions in the Migration Act.

48. Although section 236A and sub-section 236B (2) of the Migration Act avoid the impact of mandatory minimum sentences on persons proved to be under 18, the burden of proof is placed on the defendant. Experience suggests that many vulnerable, impoverished young people who have made the voyage to Australia by sea – either as paid members of a people smuggling operation or as passengers - are unable to obtain the requisite documentation or other proof needed to show that they were under 18 at the time.[42]

49. The Law Council has been deeply concerned by media reports suggesting that many people previously and currently in custody on suspicion of people smuggling offences are children. [43] Some of these children have been returned to Indonesia after obtaining pro bono legal assistance to obtain proof of their ages, and avoid criminal prosecution, but in many instances, these young people have been detained for many months with adult prisoners.[44]

50. The detention of minors with adult prisoners on suspicion of people smuggling offences[45] may constitute a contravention of Australia's obligations under the

[39] Ibid at [12]-[14]
[40] Sentencing remarks of Blokland J in *The Queen v Mahendra*, SCC 21041400, Supreme Court of the Northern Territory, 1 Sept., 2011.
[41] Sentencing remarks by Kelly J in The Queen v Edward Nafi (Sentence), SCC 21102367 (Supreme Court of the Northern Territory) Transcript of Proceedings at Darwin on 19 May, 2011.)
[42] For further discussion of this issue see Australian Human Rights Commission, Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children, Discussion Paper: December 2011, available at http://www.hreoc.gov.au/ageassessment/downloads/AgeAssessment_DP20111206.pdf.
[43] See Michael Gordon, 'Small fish in rough seas', Sydney Morning Herald, 8 February 2012; , Lindsay Murdoch, "Australia imprisons Indonesian boys," Sydney Morning Herald, 14 June 20 II ,
[44] See Michael Gordon, 'Small fish in rough seas', Sydney Morning Herald, 8 February 2012
[45] See for example, Lindsay Murdoch, "Australia imprisons Indonesian boys," Sydney Morning Herald, 14 June 20 II ,

CROC, in particular Article 37 (b), which prohibits the arbitrary detention of children and Article 37 (c) which requires the separation of children deprived of their liberty from adults unless it is not in their best interests.

51. The UN Committee on the Convention on the Rights of the Child has specifically commented that all children detained for criminal matters must be able to quickly and effectively challenge the legality of their detention.[46] The Committee has further observed that:

> *If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt.* [47]

52. Rule 17 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (1985) also provides that in sentencing juveniles, the reaction must be proportionate to the circumstances and to the gravity of the offence, and also take into account the needs and circumstances of the juvenile. Further requirements include that the juvenile only be incarcerated in serious cases or those involving violence, and that the wellbeing of the juvenile should be the guiding consideration.

Overly Broad Definition of 'Repeat Offence'

53. In its submission on the 2010 amendments to the people smuggling offence provisions, the Law Council raised specific concerns with the new section 236B(5) which provides that a 'repeat offence' is another prescribed offence which the person is found to have committed or which the person has been convicted of in the *same proceeding* as well as in previous proceedings.

54. As explained in the submission, this definition 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. This approach is at odds with the accepted notion of a "repeat offender" as person who, although having been prosecuted and punished for particular conduct, nonetheless engages in the same conduct again showing no evidence of remorse or rehabilitation. The result of this amendment is 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 to face the consequences of their offending behaviour.

55. The Law Council explained that this provision was unnecessary and unfair, particularly given the court's existing discretion to ensure that the length of the sentence appropriately reflects the gravity of the offending behaviour, the extent of the defendant's involvement in the criminal enterprise and whether or not the offending behaviour represents an isolated incident or a repeated pattern of behaviour.

Impact on Administration of Justice

56. The pressure mandatory sentencing regimes place on the criminal justice system results in increased costs and delays. As noted above, this pressure occurs largely because the mandatory minimum sentence takes away any incentive for the

[46] UN Committee on the Convention on the Rights of the Child, General Comment No 10, (2007)
[47] UN Committee on the Convention on the Rights of the Child, General Comment No 10, (2007)

defendant to plead guilty, or to assist in the investigation of the offence.[48] This pressure can give rise to significant costs to the community. As Chief Justice Martin explains:

> *Because almost all the offenders coming before the court are first offenders, whose only role was to serve as crew and who had no organisational role or capacity, and whose only hope of profit was a very modest amount (which might alleviate their poverty), offenders are almost invariably sentenced to the statutory minimum, irrespective of whether or not they plead guilty. Because of the significance of the penalty which they face, legal aid is invariably granted. Because their defence is funded, and there is no advantage to be derived from a plea of guilty, pleas of not guilty and lengthy trials are very common. The exponential increase in the numbers involved is posing very significant issues for the publicly-funded agencies responsible for providing resources to these cases. Those agencies include the Federal Police, the Commonwealth Director of Public Prosecutions, the various State Legal Aid agencies and the state and territory courts. Because the accused seldom speak English, interpreters are necessary at every stage of the process, including throughout the trial, and this significantly adds to the expense involved. Further, when the offenders are found guilty and the mandatory minimum terms of imprisonment imposed, state and territory prison systems that are already over-crowded must find accommodation and provide interpretation facilities for these prisoners.*[49]

57. These particular concerns have also been raised by the Queensland Law Society and the Human Rights Committee of the New South Wales Law Society, who provided a particular perspective from New South Wales:

> *The practical implications for the New South Wales court system are of great concern. The mandatory sentencing provisions remove any incentive for an accused to plead guilty… while a trial offers the chance of acquittal. This has resulted in a large number of matters before the District Court, which has placed a considerable strain on the resources of the courts, Legal Aid NSW and the Office of the Commonwealth Director of Public Prosecutions. There are over 30 people smuggler cases listed from January to early July 2012, and the delay between committal and trial has increased from 13-14 weeks to 19 weeks. A shortage of interpreters and difficulties in obtaining evidence of proof of age for those claiming to be minors has also contributed to delays.*
>
> *In addition to the issues for the courts and publicly funded agencies responsible for providing resources to these cases is the significant cost of incarcerating people in correctional centres for a minimum of three years. The view that mandatory sentences for people smugglers should be abolished is one that is universally shared by the prosecution, defence and judiciary.*

[48] Media reports suggest that in Victoria, 56 Indonesians are being held at the Metropolitan Remand Centre and the Port Phillip Prison and 27 trials are scheduled in the County Court, taking the equivalent of two judges out of play for six months, see Michael Gordon, 'Small fish in rough seas', Sydney Morning Herald, 8 February 2012.

[49] The Hon Wayne Martin, Chief Justice of Western Australia and Chair - National Judicial College of Australia, 'Sentencing Issues in People Smuggling Cases' Address to Federal Crime and Sentencing Conference, 11 February 2012, ANU, Canberra, p. 14, note 1.

58. The Law Council is also troubled by reports that persons suspected of people smuggling offences are being detained for an average of 161 days before being charged. This serious delay may be in breach of Australia's obligations under Article 9 of the ICCPR. [50]

59. For the reasons outlined above, the Law Council strongly urges this Committee to recommend that the Bill be passed, which will have the effect of removing the mandatory minimum sentencing regime in section 236B and reintroducing judicial discretion into the sentencing processes for people smuggling offences under the Migration Act.

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[50] See for example, Lindsay Murdoch, "Australia imprisons Indonesian boys," Sydney Morning Herald, 14 June 20 II ,

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.