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Senate Legal and Constitutional Affairs Committee
Online submission

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Dear Committee,

Re: Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012

This opinion addresses some international law aspects of this Bill, particularly whether mandatory penalties are contrary to Australia's international human rights obligations.

The *International Covenant on Civil and Political Rights* 1966 (ICCPR) does not explicitly address the issue of mandatory sentencing. The UN human rights treaty bodies have addressed certain aspects of mandatory sentencing in various contexts. The UN Human Rights Committee has found that:

- A mandatory death sentence for aggravated murder, where there was no failure to take into account any mitigating circumstances, was not an arbitrary and disproportionate punishment in violation of article 6 of the ICCPR (the right to life): *Brown v Jamaica*, Communication No. 775/97, para. 6.14.
- A mandatory death sentence in all cases of murder violates the right to life because it fails to consider 'whether this exceptional form of punishment is appropriate in the circumstances of his or her case': *Thompson v St Vincent and The Grenadines*, Communication No. 806/98, para. 8.2; see also *Kennedy v Trinidad and Tobago*, para. 7.3.

These cases concern the right to life and are largely not relevant to the present Bill.

The UN Racial Discrimination Committee has found that mandatory sentences which targets offences committed disproportionately by indigenous people may have a racially discriminatory impact and violate the *International Covenant on the Elimination of Racial Discrimination*: Concluding Observations on Australia (2000), para. 16; see also UN Human Rights Committee, Concluding Observations on Australia (2000), para. 17.

There may be a question whether the current law has an indirectly racially discriminatory effect, if, for instance, it can shown that it operates to disproportionately affect a particular racial group compared to others. This would depend upon factual analysis of the nationalities of those to whom the law is applied.

In one of the above death sentence cases, *Thompson v St Vincent and The Grenadines*, four dissenting members of the UN Human Rights Committee¹ elaborated on mandatory sentencing generally, that is, not limited to the context of the death penalty:

8. The essential question in this case is whether the Covenant demands that courts be given discretion in deciding the appropriate sentence in each case. There is no provision in the Covenant that would suggest that the answer to this question is affirmative. Furthermore, an affirmative answer would seem to imply that minimum sentences for certain crimes, such as rape and drug-dealing (accepted in many jurisdictions) are incompatible with the Covenant. I find it difficult to accept this conclusion.

Mandatory sentences (or minimum sentences, which are in essence mandatory) may indeed raise serious issues under the Covenant. If such sentences are disproportionate to the crimes for which they are imposed, their imposition may involve a violation of article 7 of the Covenant. If a mandatory death sentence is imposed for crimes that are not the most serious crimes, article 6, paragraph 2 of the Covenant is violated. However, whether such sentences are advisable or not, if all provisions of the Covenant regarding punishment are respected, the fact that the minimum or exact punishment for the crime is set by the legislature, rather than the court, does not of itself involve a violation of the Covenant. Carrying out such a sentence that has been imposed by a competent, independent and impartial tribunal established under law after a trial that meets all the requirements of article 14 cannot be regarded as an arbitrary act. ...

In summary: there is no provision in the Covenant that requires that courts be given discretion to determine the exact sentence in a criminal case. If the sentence itself does not violate the Covenant, the fact that it was made mandatory under legislation, rather than determined by the court, does not change its nature. ... [underlining added]

This is a dissenting and in large part incidental opinion. But 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.**

The dissenting opinion also rightly draws attention to the possibility that **a mandatory sentence which is disproportionate to the crime committed may violate article 7 of the ICCPR, that is, freedom from inhuman or degrading punishment.**

There is no case to date where the UN Human Rights Committee has accepted that mandatory sentencing violates other ICCPR rights, such as article 9 (freedom from arbitrary or unlawful detention) or article 14 (right to a fair criminal trial).

Plausible arguments can be made in relation to both of those articles, depending on the facts of individual cases. **First, 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.**

¹ *Thompson v St Vincent and The Grenadines*, Communication No, 806/98, Individual opinion by Mr David Kretzmer, co-signed by Mr Abdelfattah Amor, Mr Maxwell Yalden and Mr Abdallah Zakhia (dissenting), para. 8.

Second, 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.

Both of those arguments have not been tested before the UN Human Rights Committee in an appropriate case. It cannot be determined in the abstract whether Australia’s existing mandatory sentencing law infringes articles 9 or 14 on the above analysis. It will depend upon the facts of an individual case whether a sentence was excessive or disproportionate in the circumstances.

It can be said, however, that the existence of mandatory sentencing laws renders an infringement of these provisions of the ICCPR more likely than if the court’s sentencing discretion were not so circumscribed.

In consequence, the Bill’s proposed elimination of mandatory sentencing will reduce the risk of Australia infringing its ICCPR obligations.

Finally I reiterate my earlier submissions that aspects of the underlying aggravated people smuggling offences may not be compatible with certain provisions of the ICCPR and international refugee law.²

Please be in touch if I can be of any further assistance.

Yours sincerely

Professor Ben Saul

² See Sydney Centre for International Law, Submission No. 11, Senate Legal and Constitutional Affairs References Committee, Inquiry into the Anti-People Smuggling and Other Measures Bill 2010, 15 April 2010, at: <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=331efa49-35b1-4ae0-8bcd-c95549d62fc2>; see also Ben Saul, Submission No. 1, Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Deterring People Smuggling Bill 2011, 4 November 2011, at: <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=38edbb43-cb95-4312-9503-1eed8330c50f>.