Victoria Legal Aid

Lawyers And Legal Services

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

MIGRATION AMENDMENT (REMOVAL OF MANDATORY MINIMUM PENALTIES) BILL 2012

1. INTRODUCTION

Victoria Legal Aid (VLA) submits the following in response to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* (the Bill).

VLA's interest stems from the fact that, by virtue of our obligations under clauses 28 and 29 of the National Partnership Agreement on Legal Assistance Services[1] (NPA), we are arranging legal representation for the accused charged in all but two of the 55 cases of alleged people smuggling currently before the courts in Victoria[2]. VLA's staff practice also acts for the majority of the Indonesian men charged with those offences.

This submission is primarily directed to the questions of the experience so far in cases of aggravated people smuggling where mandatory minimum terms have been imposed and the effectiveness of mandatory sentencing as a deterrent, as these questions fit with our role remit.

2. THE ROLE OF VICTORIA LEGAL AID

Background

VLA is an independent statutory authority established under the Victorian *Legal Aid Act 1978* to provide legal aid and improved community access to justice and legal remedies[3], and empowered to provide legal assistance notwithstanding that the interests of the assisted person are or may be adverse to the State or Commonwealth[4]. This includes legal assistance to accused defending criminal prosecutions, to applicants in some judicial review proceedings and in various actions designed to quality assure the actions of government agencies, in their exercise of power over citizens' lives.

The provision of legal aid makes possible access to justice, which is central to the rule of law and a critical element of a well-functioning democracy. Our democratic society is based on the premise that all Australians are equal before the law. Legal aid commissions play a defining role in achieving that equality. They strive to ensure that all persons, including those who cannot afford to pay, have access to legal services and to the law. This includes taking actions against government, contemplated in section 5 of the *Legal Aid Act* which states that VLA does not represent the Crown.

As with all state and territory legal aid commissions, we are funded by both State and Federal Governments. In the 2011 – 2012 Budget, the Commonwealth Government allocated $194.8 million in funding for legal aid commissions under the NPA[5]. In addition, the Commonwealth Government provides additional funding to reimburse costs incurred by state and territory legal aid commissions in providing legal assistance in expensive Commonwealth criminal matters, including

[1] http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/other.aspx.
[2] Victoria Legal Aid has arranged legal representation in a total of 61 alleged people smuggling cases.
[3] *Legal Aid Act 1978* (Vic) s4.
[4] *Legal Aid Act 1978* (Vic) s25.
[5] Australian Government, *Australia's Federal Financial Measures: Budget Paper No. 3: 2011–12*, Commonwealth of Australia, 2011, p 96.

people smuggling cases, through the Expensive Commonwealth Criminal Cases Fund (ECCCF). Funding allocated through a specific fund ensures that legal aid commissions are not impacted in their ability to provide assistance for other Commonwealth legal aid priorities[6]. The 2011–12 Budget papers show that the Government has allocated $28.9 million over three years to the ECCCF[7].

In the context of the cases to which the Bill relates we have a dual role. First, we are an arranger of legal representation for the accused in these cases and, secondly, through our staff practice, we act as the lawyers for a large number of the men who have been prosecuted.

People smuggling prosecutions arrive in Victoria

In February 2011 we received advice from the Commonwealth Director of Public Prosecutions (CDPP) that Victoria could expect to receive a significant number of people smuggling prosecutions as a result of the Northern Territory courts being unable to deal with the numbers of cases. The next day eight accused were brought to Victoria. Over the following months many more followed. In total 61people charged with people smuggling offences have been legally aided in Victoria. The majority are being represented by lawyers from VLA's staff practice with the rest represented on grants of legal aid by private law firms.

These accused men are all eligible for legal aid because they face serious charges and have no assets or income. Under Clause 28(b) of the NPA the Commonwealth maintains separate funding for legal aid commissions for expensive Commonwealth criminal cases accessible on a reimbursement basis (the ECCCF noted above). By agreement, the people smuggling cases are funded on that basis and the Commonwealth bears all the costs, without detriment to other worthy cases that might be funded.

The cases are at various stages. Some have been through committal in the Magistrates' Court of Victoria and are awaiting trial in the County Court of Victoria. Others will follow. We have worked closely with the CDPP and the County Court to schedule the trials in as efficient way as possible and they will be heard in blocks of three over the course of 2012 and 2013.

Once a staff lawyer is assigned to a client they have, under section 16 of the *Legal Aid Act*, the same professional obligations and duties as any other legal practitioner acting for a client, including the obligation to properly represent the interests of the accused person. As noted above, this means that, uniquely to legal aid commissions, staff employed by a public sector agency must at times act against the interests of the State. It is one of the hallmarks of a civilised society that the state helps people who the state itself charges with criminal offences.

[6] H Spinks, J Phillips, E Karlsen and N Brew, *Budget Review 2011 – 2012: Responding to boat arrivals*, Parliament of Australia, 2001. Retrieved from http://www.aph.gov.au/library/pubs/RP/BudgetReview2011-12/Boat.htm.

[7] Australian Government, *Budget Measures: Budget Paper No. 2: 2011–12*, Commonwealth of Australia, 2011, p 103.

3. MANDATORY MINIMUM PENALITIES

Boat recruits, not organisers, are being prosecuted

As of 18 October 2011 of 493 people arrested and charged for people smuggling offences 483 were crew. Only ten were organisers.[8]

This makes sense because the organisers would never allow themselves to be present on a boat in Australian Territorial waters.[9] They know what the consequences of that are, and they are measured by years in detention. By contrast, the men arrested on the boats are those who are considered by the people smugglers to be expendable.

The current regime provides for mandatory imprisonment for five years if the offence is committed in relation to five or more people. This aggravated form of the offence in reality captures all of these accused because each boat always has more than five people.

This test does not address the culpability upon which penalties should fairly be based. 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.

Policy

VLA does not support mandatory sentencing more broadly; not because no-one should ever be imprisoned, but because of (a) the overwhelming evidence that it does not reduce crime, (b) because justice is best done by tailored rather than pre-determined responses to individual offences and offenders and (c) because rigid rules create injustice in individual cases.

VLA supports judicial discretion in sentencing. Our experience is that every criminal case is different and requires a tailored response to carefully balance the competing interests. In some cases lengthy terms of imprisonment are plainly required to do justice, while in others the right outcome is a merciful one. Those who practice in criminal law both as prosecutors and defence lawyers learn quickly that it is very hard to put cases and offenders into strict categories and that attempts to do so lead to injustice. Further, our experience is that it is in the cases in which a prison term is plainly appropriate that a sentence does not need to be compelled. Thus, it is the offences at the lower end of the spectrum of seriousness that are punished disproportionately more severely than more serious cases where mandatory minimum sentences are required.

---

[8] Senate Legal and Constitutional Affairs Legislation Committee, Attorney-General's Portfolio, Supplementary Budget Estimates 2010–11, 18 October 2011, Hansard transcript.

[9] Commonwealth, *Estimates*, Senate Legal and Constitutional Affairs Legislation Committee, 18 October 2011, p 68 [evidence of Australian Federal Police]: In 2009, the AFP made 82 arrests for people-smuggling related matters, of which 76 were crew. In 2010, 203 arrests for people-smuggling related matters were made, of which 202 were crew. For 2011 to date, 208 arrests for people-smuggling related matters were made, of which 205 were crew. 'Most of those would have been arrested in Australia because they would have been the crews…All of those arrests have been made here in Australia. The remainder are for what we term as people-smuggling organisers, and there would be a mix with a majority of the arrests made overseas where we have then sought extradition.'

Notwithstanding media reports focused on specific cases, judges and magistrates get a hard job right most of the time. When they get it wrong, rights of appeal exist for both the accused and for the prosecution.

We acknowledge that government is entitled to legislate to alter sentencing levels. Traditionally that has been achieved by changing maximum penalties or altering the parole system. All of those measures influence sentencing without directly interfering with judicial discretion.

Judicial responses to mandatory sentencing of people smugglers

On conviction, the mandatory minimum sentence of imprisonment is eight years for a repeat offence and five years in any other case. A non-parole period must be set at a minimum five years for a repeat offence and three years in any other case[10].

Sentencing judges around the country have made strong statements about their inability to exercise discretion and distinguish between circumstances of offenders, or degrees of culpability, in sentencing. Judges have been reluctant to impose any more than the mandatory minimum even after trial.

Judges have consistently spoken out against of the injustice of the mandatory sentencing regime and, in a number of cases, called for the Federal Attorney General to release prisoners after the expiration of 12 months[11].

Comments from Judges around the country include:[12]

> *"Such a sentence is completely out of kilter with sentences handed down in this court for offences of the same for higher maximum sentences involving far greater moral culpability, including violence causing serious harm to victims"* NT Supreme Court Judge Judith Kelly, May 2011.
>
> *"I would consider that the justice of this case required a sentence of considerably less than five years imprisonment. However, given the minim fixed by the legislature, I haven no choice but to impose a sentence of at least five years."* NT Supreme Court Chief Justice Trevor Riley, December 2010.
>
> *"I would have considered imposing a sentence of three years' imprisonment, with the possibility of a suspended sentence, because of the time already spent in custody…(It may be) the mandatory sentence is too severe in all the circumstances of this case."* WA District Court Judge Mary Ann Yeats, May 2004.
>
> *"But for the mandatory minimum sentences which I am required to impose, I would have imposed a much lesser sentence than I am now required by law to do…(Under mandatory*

[10] *Migration Act 1958* s236B.

[11] See, eg, *The Queen v Tahir and Beny*, unreported, Supreme Court of the Northern Territory, Mildren J, as reported in *The Australian* newspaper 19 May 2011.

[12] Owens, J, "Harsh penalties for boat crew 'target wrong people', *Weekend Australian*, 31 December 2011.

sentencing) principles of parity between offenders has little or no role." NT Supreme Court Judge Dean Mildren, October 2009.

"It is clear that I am not here dealing with smugglers who are the principal protagonists in this lucrative and insidious trade...A sentence appropriate to the circumstances could have seen him being returned to his country in about October 2011 (rather than April 2012)…However, he will now be our guest for a lot longer." NSW District Court Judge Paul Conlon, July 2011.

"Were it not for the statutory minimum penalty, I have no doubt that a sentence less than five years' imprisonment would have been imposed in each of your cases…I will, of course, have no option." Brisbane District Court Acting Judge Brad Farr, June 2011

"Commonly savage penalties are being imposed upon the ignorant, who are simply being exploited by organisers - you are one such person…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." Brisbane District Court Judge Terry Martin, January 2012.[13]

The Honourable Wayne Martin, Chief Justice of Western Australia and Chair of the National Judicial College of Australia recently said that

> …the terms of imprisonment which the courts are required to impose are often considered to be disproportionate to the culpability of the low level offenders who come before the courts, and the circumstances of their offending, and do not seem to be having any significant effect in deterring others who might be offered a position as crew on a people smuggling vessel. It is also clear that the imposition of these penalties is having significant practical and cost implications for the administration of justice generally..[14]

4. DETERRENCE

Why mandatory minimum penalties are unjust and ineffective?

We have previously provided to the Committee a number of case studies based on real clients of VLA accused of people smuggling offences, which illustrate their impoverished backgrounds, the manner in which they are recruited by people smuggling organisers to crew boats and the impact that their prolonged detention in Australia has on their families back home in Indonesia[15].

[13] Flatley, C, "Judge slams mandatory sentence for people smugglers', *Sydney Morning Herald*, 11 January 2012.
[14] Martin, W, "Sentencing Issues in People Smuggling Cases", Federal Crime and Sentencing Conference, 11 February 2012.
[15] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/deterring_people_smuggling_bill_2011/submissions.htm

Once one understands who the accused men are and how they are recruited, it is very hard to continue to sustain a deterrence argument either in principle or on a cost benefit analysis.

This follows from the conclusion that these accused men are treated in the same way as the boats that they sail. They are expendable. The people smugglers are well aware that these men will be detained for years in Australia. That is why they themselves do not travel to Australia but arrange for others, often by deception, to take the trip.

We are not aware of any empirical data to support the proposition that mandatory detention serves as a deterrent to people smugglers. The effectiveness of harsh punishments as a means to reduce crime more broadly is questionable. A recent report of the Victorian Sentencing Advisory Council concludes from a review of research findings that:

> …increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence.[16]

The Sentencing Advisory Council also concludes that:

> …increases in the certainty of apprehension and punishment demonstrate a significant deterrent effect[17]

The Sentencing Advisory Council qualify their findings by stating that there is a "…need for further research that separates deterrable from non-deterrable populations".[18]

While the purported purpose of the aggravated people smuggling provision is to create certainty about the minimum length of sentence to maximise the deterrent effect as the Hon Justice Carmel McLure, President of the Court of Appeal of Western Australia has said, '[o]f course, its effectiveness as a deterrent depends on securing widespread knowledge of its existence, particularly outside Australia'[19].

Indonesia has a population of 245 million people[20], many of whom live a coastal subsistence lifestyle without access to television or internet. Despite the best efforts of the relevant authorities to advertise the legal consequences of people smuggling, it will be impossible to reach all potential boat crew. Once there is sufficient knowledge of the tactics of the organisers in a particular location they can simply move to the next village or island. The people smugglers themselves are not deterred at all. In the case of the people who sail the boats the likelihood of apprehension and punishment is certain, indeed, it is the object of the exercise to be apprehended in Australian waters.

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.

---

[16] Ritchie, D., Does Imprisonment Deter? A Review of the Evidence, Sentencing Advisory Council (Vic), April 2011, p2.
[17] Ibid.
[18] Ibid.
[19] *Bahar v The Queen* [2011] WASCA 249 at [60].
[20] 245 613 043, Bureau of Census, Indonesia, July 2011

McLure P found in the matter of Bahar that:

> none of the appellants had any involvement in the organisation of the people smuggling enterprise. The roles they played put them at the very bottom level of the hierarchy of culpability. Although the tasks they performed may be regarded as necessary to the success of the particular voyage, they would appear to have been targeted by organisers because they were both financially vulnerable and dispensable. There is no finding that any of the appellants understood the serious consequences that awaited them on their arrival in Australia[21].

Not only is the mandatory minimum sentencing regime unjust and ineffective but it is also expensive. Budget papers and Senate Estimates hearings have revealed some of the extent of spending on the prosecutions and the defence in people smuggling matters.[22] For instance:

- Budget papers reveal that in 2009-10 $11.3 million was allocated to establish a specialist prosecution unit for people smuggling offences within the CDPP given increased prosecution activity[23]. This was a two-year budget measure that has now ended[24], but as a large number of prosecutions of boat crew accused continue, we assume that CDPP resources continue to be allocated to conduct people smuggling prosecutions;

- The Attorney-General's Department estimates, based on costing from Western Australia, that it costs the Commonwealth $20,000 to prosecute each of those people smuggling matters that goes to trial[25]; and

- $28.9 million over three years has been allocated for reimbursements through the Expensive Commonwealth Criminal Cases Fund (ECCCF) to state and territory legal aid commissions for Commonwealth criminal cases, including people smuggling[26].

The existence of mandatory minimum penalties removes the incentive for an accused person to plead guilty. The prospect of a mandatory term of imprisonment means that they may not receive a real and significant sentencing discount for pleading guilty. This has a flow on effect for the resourcing of the criminal justice system. The number of upcoming trials around the country is evidence that mandatory minimum penalties have acted as a disincentive to plead guilty.

[21] *Bahar v The Queen* [2011] WASCA 249 at [64].
[22] 'Australian Government spending on irregular maritime arrivals and counter-people smuggling activities', Parliamentary Library research brief, 6 December 2011.
[23] Australian Government, *Budget measures: budget paper no. 2: 2009–10*, Commonwealth of Australia, Canberra, 2009, p. 97.
[24] Australian Government, *Portfolio budget statements 2011–12: budget related paper no. 1.2: Attorney-General's portfolio*, Commonwealth of Australia, Canberra, 2011, p.411.
[25] Senate Legal and Constitutional Affairs Legislation Committee, Answers to Questions on notice, Attorney-General's Portfolio, Additional Estimates 2010–11, 22 February 2011, Question no. 71.
[26] Australian Government, *Budget measures: budget paper no. 2: 2011–12*, Commonwealth of Australia, 2011, p. 103.

5. CONCLUSION

The awfulness of the people smuggling trade cannot be doubted. In its worst form it creates victims of some of the most vulnerable people on earth. Almost all of the men who are currently being prosecuted in Australia for Aggravated People Smuggling are themselves victims of the trade. They are put on the same boats and exposed to the same risk as the asylum seekers. They are either misled into working on the boats, or offered what seems to them to be a small fortune. The organisers have no interest in seeing these men return to Indonesia and they do not return – at least for many years, with significant consequences for the survival of their families. The imposition of harsh mandatory sentences on this class of people smuggler is neither just nor effective in reducing the prevalence of asylum seeker boats making the perilous journey to Australia. It does nothing more than entrench poverty and disadvantage in the remote Indonesian communities from which these men originate.

The mandatory sentencing regime as it currently exists should be abolished in the interests of justice and fairness. If the government remains concerned about deterring the activities of organisers, it would be open to construct a sentencing regime that fairly differentiates between the criminality of the organiser and that of the men who are recruited by organisers to perform the low level roles of crewing boats.