

29 February 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100, Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012

The Human Rights Law Centre (HRLC) welcomes the introduction of the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, which seeks to amend the *Migration Act 1958* to remove mandatory minimum sentencing provisions which currently apply to aggravated people smuggling offences.

The offence of aggravated people smuggling currently attracts a mandatory minimum sentence of 5 years with 3 years non-parole.¹ The HRLC considers that the imposition of mandatory penalties for people smuggling offences contravenes Australia's international human rights law obligations, including the prohibition on arbitrary detention and the right to a fair trial.

The UN Human Rights Committee has previously found that mandatory sentencing laws in Western Australia and the Northern Territory led 'in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed' and raised issues of compliance with various articles of the ICCPR.²

The prohibition on arbitrary detention

Article 9(1) of the *International Covenant on Civil and Political Rights* provides:

¹ Migration Act, s.236B.

² Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, (24 July 2000) (section 3).

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Detention may be considered “arbitrary” even when it is permitted under law.³ To avoid being characterised as arbitrary, detention must be reasonable, necessary and proportionate in all the circumstances.⁴ The mandatory minimum sentences set out in s.236B of the Migration Act are arbitrary because they do not allow for differentiation between serious and minor offending or for consideration of the particular circumstances of the individual. That is, they prevent the court from distinguishing between those who orchestrate people-smuggling operations and the crew on the boats who are generally young, uneducated fishermen from small villages in Indonesia.⁵

The right to a fair trial

Article 14 of the ICCPR sets out a series of fair trial rights aimed at ensuring the proper administration of justice and respect for the rule of law. Article 14(5) of the ICCPR provides:

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

In *Reid v Jamaica* the UN Human Rights Committee stated:⁶

The Committee considers that, while the modalities of an appeal may differ among the domestic legal systems of States parties, under article 14, paragraph 5, a State party is under an obligation to substantially review the conviction and sentence.

Mandatory sentencing effectively precludes review of a sentence by a higher tribunal and is therefore contrary to the right to a fair trial.

The HRLC recommends that the Bill be passed.

Yours sincerely

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³ See, for example, Human Rights Committee, *A v Australia* (560/93) para. 9.2.

⁴ Nowak, *CCPR Commentary (2nd revised edition)* (2005), p.224.

⁵ See P Mailey and P Taylor, “Asylum Spike Bucks World Trend”, *The Australian* (24 March 2010).

⁶ Human Rights Committee, *Reid v Jamaica* (355/89), para. 14.3.