

29 February 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

**Submission to Senate Inquiry:
Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012**

For your interest, on 3 February 2012, I made a Submission (No.24) to the Australian Human Rights Commission's (AHRC) Inquiry into Age Assessment of Indonesian crew of Suspected Irregular Entry Vessels. Please refer to the next link:

<http://www.hreoc.gov.au/ageassessment/index.html>

My Submission to the AHRC contains useful information about the people-smugglers' *modus operandi* and a background introduction to the 'causality' of Indonesian crew becoming involved in people-smuggling offences. At page 35 – 36 of my Submission, I touched on mandatory sentencing *vis-a-vis* the restoration of judicial discretion in sentencing. The Senate may find these aspects of my Submission to the AHRC of interest in its present Inquiry. My Submission is accessible at the next link:

[http://www.hreoc.gov.au/ageassessment/submissions/Greg%20Hogan%20\(Submission%2024\).pdf](http://www.hreoc.gov.au/ageassessment/submissions/Greg%20Hogan%20(Submission%2024).pdf)

There are four published papers which I should like to bring to the attention of the Senate Inquiry. These papers are as follows:

**Cranny, G. (2006) Mandatory Sentencing – Where From, Where To and Why?
Gilshenan & Luton Lawyers, ISRCL Conference, Brisbane, 2 - 6 July 2006**

<http://www.isrcl.org/Papers/2006/Cranny-Paper.pdf>

Cranny (2006) notes that mandatory minimum sentencing for people-smuggling offences was enacted "*in the context of a federal election campaign where... suggestions of 'children overboard' were then at the forefront of public debate*". [pg.4]
Cranny (2006) contrasts the case law which concedes that the Parliament can prescribe penalties as it sees fit, yet on the other hand, it is "*impermissible to require judicial officers to engage in inherently non-judicial processes*". [pg.5]

Debelle, Justice B. (2008) Sentencing: Legislation or Judicial Discretion?

<http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2008/Sentencing%20Conference%202008/papers/Debelle.pdf>

Debelle (2008) acknowledges that "*sentencing of offenders is a task in which the three arms of government have a role*". However the "*over-riding principle when determining penalty is proportionality....[even in the face of] perceived dimensions of lenience...influenced, if not shaped, by the media's reporting...*". [pg.1 - 6]
Debelle (2006) notes the criticisms of mandatory penalties as being: no deterrent effect, the potential for injustice, the shifting of discretion, and fewer guilty pleas.

Morgan, N. (2002) Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities, 23 Adelaide Law Review 141-154

<http://www.austlii.edu.au/au/journals/AdelLawRw/2002/6.pdf>

Morgan (2002) reminds the reader that mandatory sentencing can be traced back to “*moral panics [which] can develop around certain forms of behaviour; the dynamics of societal reactions to [those] who are held to be responsible...and legislatures [that] have become...interventionist ...[reacting] to public pressure.*” [pg.153]

Morgan (2002) also notes that mandatory sentencings for people-smuggling offences were introduced in November 2001. It was then the run-up to the Federal election. In reaction to the arrival of ‘boat people’ from Afghanistan, the Federal Parliament got “*tough [with] new border control laws*”.

Eleven years later, the same debate is being had in 2012. Mandatory sentencing has not stopped the boats. Whilst the “*realpolitik cannot be ignored or underestimated...[as it] represents the most overt attempt to impose political control over sentencers....[the] advocates of mandatory sentencing must explain how [it] will avoid the abject failures of recent history*”. [pg.154]

Petroboni, C (2006) The Impact of Media on the Choice of Sentence
ISRCL Conference, Brisbane, 2 - 6 July 2006

<http://www.isrcl.org/Papers/2006/Petroboni.pdf>

Petroboni (2006) states “*mandatory sentencing has little to do with the administration of justice and everything to do with politics. It is ... media pressure to turn political promises into a reality...media (which) not only informs the public, but also conditions mainstream community attitudes*”. [pg.19]

Petroboni (2006) cites the then Commonwealth Attorney General, who in June 2004 linked mandatory non-parole periods for people-smuggling offences with creating non-parole periods for terrorism offences, and so “*political promises turned into reality*”. [pg.31]

Given that mandatory sentencing for people-smuggling offences is now associated with ‘almost stupefying’ increase in the detention & incarceration rate of Indonesian nationals, one has to ask: Has ‘aggravated people smuggling’ become the ‘Indonesian offence’? If this is so, might one be more inclined to deport the accused crew after the remand period, than to jail these Indonesians at taxpayers’ expense for three years. In my experience observing people-smuggling trials in 2011, the accused Indonesian crewmen are held for 20 months *on average* simply awaiting trial (& retrial). Refer to **Hogan (2012)** Table 7 at page 30, accessible at the above link. One should recall the words of the court in *U.S. v Carrion* 488 F.2d 12, 14 1st Cir 1973,

*“no defendant should face the Kafkaesque spectre
of an incomprehensible ritual which may terminate in punishment”*

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

Yours sincerely
Greg Hogan