



Submission to the

Senate Legal and Constitutional Affairs
Committee

**Inquiry into the Migration Amendment
(Removal of Mandatory Minimum
Penalties) Bill 2012**

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Submitted by

Amnesty International Australia

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About Amnesty International

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the *Universal Declaration of Human Rights* (UDHR) and other international instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights. Amnesty International is the world's largest independent human rights organisation, comprising more than 3 million supporters in more than 160 countries and has over 140,000 supporters in Australia. Amnesty International is impartial and independent of any government, political persuasion or religious belief. It does not receive funding from governments or political parties.

Introduction

Amnesty International welcomes the introduction of the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* and supports the passage of the legislation through the Parliament.

Amnesty International recently made a submission to the Australian Human Rights Commission (AHRC) inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children.¹ In the submission, Amnesty International argued that mandatory minimum penalties are inconsistent with certain international human rights obligations and recommended that provisions establishing minimum penalties be removed from people smuggling offences.

The *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* achieves this recommendation.

Amnesty International believes removal of mandatory minimum penalties for people smuggling offences will allow the courts to impose more appropriate sentences for individuals charged with people smuggling, who often have little knowledge of the crimes they have been recruited to commit.

Mandatory minimum penalties

Amnesty International has previously expressed its opposition to mandatory minimum penalties, arguing that it contravenes Australia's international human rights obligations under article 9 of the International Covenant on Civil and Political Rights (ICCPR) which requires that:

"No one shall be subjected to arbitrary arrest or detention."

Setting mandatory minimum penalties does not allow for individually tailored sentences that take into account proportionality between the sentence and the offence. As such, the use of mandatory minimum penalties does not constitute just sentencing.

Mandatory minimum penalties are particularly severe for individuals charged with people smuggling offences, who are often poor Indonesian fishermen who have little understanding of

¹ Australian Human Rights Commission [website], Inquiry into the treatment of individuals suspected of people smuggling who say that they are children, Submissions, No. 23, <http://www.hreoc.gov.au/ageassessment/submissions.html>.

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the crimes they have committed. The United Nations Office on Drugs and Crime's *Issue Paper on the Smuggling of Migrants by Sea* explains that:

*"Sometimes the 'captain' is an experienced fisherman or seafarer who has been recruited by the smuggler specifically for his skills; the smugglers may even have tested his capabilities before the journey is undertaken. In regions where fishermen are recruited by smugglers for the seafaring skills and their knowledge of particular waters and land masses, the smuggler will sometimes offer the fisherman more money to transport a group of migrants than he could possibly make otherwise. Persons who are tempted into accepting such an offer may or may not know of the risk they incur and the illegality of what they are being asked to do, but it is clear that the smugglers pass the risk of prosecution on to those they recruit."*²

The five-year mandatory sentences imposed on these individuals do not take into account individual circumstances and fail to take into account the complexity of the people smuggling trade.

Mandatory minimum penalties have also been criticised on several occasions by judges themselves who have expressed frustration at having to impose harsh sentences;

*"It's obvious that the legislation imposing a minimum mandatory penalty deprives a court from exercising a full and proper sentencing discretion ..."*³

The *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* would restore such discretion to the courts.

Convention on the Rights of the Child

It is evident that children are often purposely used by people smugglers as crew on boats.

"The majority of people suspected of committing people smuggling offences [in Australia] are Indonesians who have worked as crew on such boats. In some cases, these individuals are children (under the age of 18 years) at the time of their arrest."

*"In many regions, there have been situations of minors being used to captain the boats so as to avoid prosecution upon interception, though this is not always the result. Often the boat will be piloted by an adult and a child only placed at the helm when rescue services are spotted or where the vessel is approaching its destination."*⁴

As discussed in the Australian Human Rights Commission (AHRC)'s recent Discussion Paper⁵, determining the age of an individual who is suspected of a people smuggling offence is particularly critical as mandatory five-year minimum sentences apply to adult individuals convicted of an aggravated offence.

² United Nations Office on Drugs and Crime, 2011, *Issue Paper on the Smuggling of Migrants by Sea*, http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf, p.30.

³ Brisbane District Court Judge Terry Martin, 11 January 2012 as reported by Flatley, Christine, 11 January 2012, *Sydney Morning Herald*, 'Judge slams mandatory sentence for people smugglers', <http://www.smh.com.au/national/judge-slams-mandatory-sentence-for-people-smugglers-20120111-1puvi.html>.

⁴ United Nations Office on Drugs and Crime, 2011, *Issue Paper on the Smuggling of Migrants by Sea*, http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf, p.30.

⁵ Australian Human Rights Commission, December 2011, *Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children Discussion Paper*, http://www.hreoc.gov.au/ageassessment/downloads/AgeAssessment_DP20111206.pdf.

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Incorrect age assessments for people suspected of people smuggling offences who say they are minors have significant implications in terms of Australia's compliance with international human rights obligations, in particular, the Convention on the Rights of the Child (CRC).

The detention of minors in adult correctional facilities seriously breaches international human rights law. In particular, articles 37 (b) and (c), article 40(1) and article 19 of the CRC are clearly in breach when children wrongly assessed as being adults are charged with adult people smuggling crimes and imprisoned in adult correctional facilities.

It should be noted that Australia maintains a reservation under article 37(c) of the CRC allowing the Government to detain children with adults. This is despite recommendations from the UN Committee on the Rights of the Child that the reservation is unnecessary and should be removed.⁶

Recommendations

Amnesty International recommends that the Bill be passed.

⁶UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: Australia*, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/443/74/PDF/G0544374.pdf?OpenElement>, pp.2-3.