Australian Government

Attorney-General's Department

SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE MIGRATION AMENDMENT (REMOVAL OF MANDATORY MINIMUM PENALTIES) BILL 2012

1. EXECUTIVE SUMMARY

The Attorney-General's Department has prepared this submission to the Senate Standing Committee on Legal and Constitutional Affairs as part of its inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012. The submission briefly outlines the legislative history of mandatory minimum penalties for people smuggling offences under the *Migration Act 1958* (Cth), provides information about sentencing, and addresses issues raised in the Bill's Statement of Compatibility on Human Rights.

Under Australian federal criminal law, mandatory minimum penalties apply to a very limited number of serious, aggravated people smuggling offences in the Migration Act. These include offences where the people smuggling venture involves a risk of death or serious harm, the smuggling of five or more non-citizens to Australia without visas in effect, or the provision of false documents or misleading information for five or more non-citizens. Mandatory minimum penalties do not apply where the defendant is under the age of 18 years when the offence was committed.

The majority of people smugglers are charged with the aggravated offence of people smuggling involving at least five people, under section 233C of the Migration Act (formerly section 232A). This offence attracts a mandatory minimum penalty of five years' imprisonment with a three year non-parole period. The offence applies to people smuggling organisers, facilitators and crew. The majority of convicted people smugglers have been sentenced to the mandatory minimum penalty.

2. LEGISLATION AND POLICY

2.1 People smuggling offences and mandatory minimum penalties

Australia's domestic legislative framework criminalising people smuggling is set out in the Migration Act for ventures entering Australia, and the *Criminal Code* (Cth) for ventures entering foreign countries, whether or not via Australia. Mandatory minimum penalties are only applicable to aggravated offences under the Migration Act, and do not apply to offenders under the age of 18 years.

Prior to 1999, the Migration Act contained the offence of bringing non-citizens into Australia in contravention of the Migration Act (former section 233(1)(a)). This offence had a penalty of two years' imprisonment.

In July 1999, the *Migration Legislation Amendment Act (No 1) 1999* (Cth), which created the offence of smuggling five or more non-citizens into Australia under former section 232A, came into force. The amending legislation also inserted offences (under former section 233A) for providing false documents and misleading information, in connection with smuggling five or more non-citizens into Australia. These offences carried a maximum penalty of 20 years' imprisonment, 2,000 penalty units, or both.

The former Government introduced mandatory minimum penalties in 2001, as part of the *Border Protection (Validation and Enforcement) Act 2001*. These penalties applied to those offences under former sections 232A and 233A. Mandatory minimum penalties were not applicable to minors.

In 2002 the former Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Philip Ruddock MP, stated that mandatory minimum penalties were introduced following indications that the sentences being imposed by the courts for people smuggling offences were not adequately reflecting the seriousness of the offences. Further, the maximum penalties were not proving to be an effective deterrent, with a number of individuals committing repeat offences after being released from prison.[1]

The *Anti-People Smuggling and Other Measures Act 2010* (Cth) came into force on 1 June 2010. The amending legislation reorganised and retitled the people smuggling offences in the Migration Act, including by repealing former sections 232A to 233C. The Anti-People Smuggling and Other Measures Act also inserted a new aggravated offence and an offence of supporting people smuggling. Since that time, the Migration Act has contained four aggravated offences involving mandatory minimum penalties, as follows:

- Section 233B is an aggravated offence of people smuggling where the person intends to exploit the people smuggling victim, or subjects the victim to danger of death or serious harm. This provision was inserted into the Migration Act to reflect the equivalent offence under the Criminal Code.

- Section 233C is an aggravated offence where a person organises or facilities the entry to Australia of at least five non-citizens who have no lawful right to come to Australia. Most persons are prosecuted for people smuggling offences under section 233C.

- Section 234A contains two aggravated offences for providing false documents or misleading information in connection with the entry to Australia of five or more non-citizens, with no lawful right to come to Australia.

The maximum penalty for the primary people smuggling offence is 10 years' imprisonment, or 1,000 penalty units, or both. The maximum penalty for each aggravated offence is 20 years' imprisonment, 2,000 penalty units, or both.

The Anti-People Smuggling and Other Measures Act also re-modelled the mandatory minimum penalties provision under the Migration Act. Under current section 236B, if a person is convicted for a first offence of aggravated people smuggling contrary to section 233C, the court must sentence the offender to imprisonment for a term of at least five years, with a non-parole period of at least three years. In the case of an offence contrary to section 233B, or a repeat offence contrary to any of the aggravated people smuggling provisions, a minimum term of at least eight years' imprisonment with a non-parole period of at least five years applies.

The Anti-People Smuggling and Other Measures Act also changed the definition of 'repeat offence' under section 236B. Previously, a person would not have committed a 'repeat offence', unless a court had convicted the person of a people smuggling offence in a previous hearing, or found the person to have committed an offence without recording a conviction. This had the effect that a people smuggler convicted for conduct relating to two or more ventures during the same court hearing was subject to the same lower mandatory minimum penalties as a first-time offender.

[1] See Senate Standing Committee for the Scrutiny of Bills Report No. 1 of 2002, at p.17.

Under section 236B, the definition of 'repeat offence' now includes the circumstance of a person being convicted of multiple people smuggling offences, whether in the same proceedings or in previous proceedings. This means that a person who is convicted of multiple offences in the same proceeding will be subject to the higher mandatory minimum penalties of eight years' imprisonment with a non-parole period of five years.

Where it is established on the balance of probabilities that the offender was under the age of 18 years at the time the offence was committed, section 236B does not apply. Section 236A provides that a court may make an order under section 19B of the *Crimes Act 1914* (Cth) to dismiss the charge of aggravated people smuggling, or discharge the person without proceeding to conviction, if it is established that the offender was less than 18 years of age when the offence was committed.

Like all other federal offenders, people smugglers must agree to a parole condition to be of good behaviour and not violate any law before they are released on parole. However, as almost all people smugglers are unlawful non-citizens, they are removed to their country of origin when they are released on parole.

It is important to note that mandatory minimum penalties exist for a range of serious offences in Australia. For example, there are mandatory minimum penalties for repeat offences of burglary in Western Australia,[2] and the Northern Territory has mandatory minimum penalties for murder.[3]

2.2 Judicial approach to sentencing

The approach adopted by the courts to sentencing involving mandatory minimum penalties has varied between jurisdictions and is continuing to evolve.

For example, in the Northern Territory, the Supreme Court held in *The Queen v Pot, Wetangky & Lande*, (Unreported, NTSC, 18 January 2011), that the proper approach was to apply the sentencing principles set out in the Crimes Act and those applicable at common law and, taking into account all relevant factors, determine an appropriate sentence. Where that process results in a sentence less than the statutory minimum, the sentence should be rounded up so that the statutory minimum is imposed.

In the subsequent Western Australian Supreme Court case of *Bahar v The Queen* [2011] WASCA 249, the Court held that the sentencing principles in the Crimes Act should be applied at the court's discretion, within the boundaries of the minimum and maximum penalties set out in the Migration Act. In other words, the Court rejected the view that the sentence should be determined by identifying a 'starting point', with adjustment for aggravating and mitigating factors, as this effectively treats the absence of mitigating factors as having an aggravating effect.

[2] *Criminal Code Act 1913* (WA), subsection 401(4).
[3] *Criminal Code Act* (NT), subsection 157(2).

2.3 People smuggling prosecutions

Figure 1 below sets out the number of defendants convicted of people smuggling offences prior to the introduction of mandatory minimum penalties in September 2001.[4]

Figure 1- people smuggling prosecutions not involving mandatory minimum penalties[5]

Maximum Term of Imprisonment[6]	Number of defendants	Proportion of defendants
Released immediately	47	9.1%
Less than 1 year	97	18.8%
1 year	13	2.5%
2 years	98	19.0%
3 years	133	25.8%
4 years	88	17.1%
5 years	16	3.1%
6 years	16	3.1%
7 years	6	1.2%
8 years	1	0.2%
TOTAL	**515**	**100.0%**

From 1 September 2008 until 22 February 2012:

- 525 people had been charged with people smuggling offences, and
- there were 228 convictions of maritime people smuggling crew and five people smuggling organisers.

As at 22 February 2012, there were 196 people smuggling crew and three organisers before the courts in Australia.

Since the mandatory minimum penalties were introduced in 2001, the majority of sentences imposed on persons convicted of aggravated people smuggling offences have been the mandatory minimum period of five years with a non-parole period of three years. The longest sentence for people smuggling crew has involved four repeat offenders being imprisoned for eight years with a non-parole period of five years.

Sentences for people smuggling organisers and facilitators (i.e. offenders other than crew) have varied considerably. The range of sentences for offences against current section 233C and formerly section 232A of the Migration Act (the aggravated offence of people smuggling involving at least five people) from 1999 to 22 February 2012 has varied from imprisonment for two years to imprisonment for nine years.

[4] Data extracted from the CDPP prosecutions database on 27 February 2012.

[5] This table contains the number of defendants convicted of offences against:

- s233(1)(a) of the Migration Act regardless of when the matter was received or prosecuted, and
- s232A of the Migration Act where the matter was received by the CDPP between 22 July 1999 and 26 September 2001.

[6] The 'maximum term of imprisonment' was calculated by rounding the head sentence to the nearest whole year.

3. STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The Bill's Statement of Compatibility with Human Rights states that the proposed legislation 'advances the protection against arbitrary imprisonment and removes mandatory sentencing which, in practical operation, impacts on a specific group of people'.

3.1 Freedom from arbitrary detention

The Australian Government is aware of its obligations under international law with respect to arbitrary detention. Under Article 9 of the *International Covenant on Civil and Political Rights*, to which Australia is a party, persons must not be subject to arbitrary or unlawful detention. The test for whether detention is arbitrary is whether, in all the circumstances, the detention of the particular individual is appropriate and justifiable, and reasonable, necessary and proportionate to the end that is sought.

The Australian Government considers that one of the primary purposes of mandatory minimum penalties is to ensure that courts consistently apply penalties commensurate with the seriousness of the offence. Under the current mandatory minimum penalties regime, judges retain discretion to apply a penalty within the relevant minimum and maximum penalties for the offence. This enables the court to consider relevant factors present in a particular case. As stated above, mandatory minimum penalties are not applicable to persons under the age of 18 years.

3.2 Rights to equality and non-discrimination

Australia has international obligations under the *Convention on the Elimination of All Forms of Racial Discrimination* and other international human rights treaties to prohibit discrimination and to ensure equality before the law, without distinction as to race (or other attributes such as sex, religion, political opinion, national or social origin).

Mandatory minimum penalties under the Migration Act apply to all persons convicted of aggravated people smuggling offences, irrespective of race or nationality. While many persons convicted of people smuggling offences are Indonesian nationals, other foreign nationals are also charged with people smuggling offences, including offences involving smuggling persons by air.

The Australian Government undertakes a variety of activities to deter people smuggling. These include working with regional partners to target organisers and disrupt people smuggling ventures, a communications campaign in source and transit countries to discourage people smuggling, and efforts to build capacity in source countries to reduce the number of people attempting to travel to Australia to seek asylum. An Australian Government public information campaign was delivered by the International Organization for Migration in Indonesia in 2009-2010 to raise awareness among Indonesian communities of the dangers of people smuggling and the consequences of involvement in this activity, targeting potential crew members, fishermen, boat owners, boat builders, and coastal industry workers.