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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT

Dear Secretary

Re: Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012

Australian Lawyers for Human Rights (ALHR) is a national network of Australian law students and lawyers active in practising and promoting awareness of human rights. Our organisation has a national membership of over 2,000 people, with active National, State and Territory committees.

Introduction

ALHR welcomes the opportunity to comment on the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012 ('the Bill').

The Bill removes the current s. 236B from the *Migration Act 1958* (Cth) ('Migration Act'). This provision mandates minimum penalties for persons found guilty of the following offences ('aggravated people smuggling offences'):

- People smuggling, with the circumstance/s of aggravation of exploitation, cruel treatment and/or danger of death of serious harm (s. 233B Migration Act);
- People smuggling, with the circumstance of aggravation of smuggling 5 or more people (s. 233C Migration Act);

- Presenting false documents or false information in relation to a person, with the circumstance of aggravation of doing so in relation to 5 or more people (s. 234A Migration Act).

The minimum penalties range from 5 years imprisonment with a non-parole period of 3 years, to 8 years imprisonment with a non-parole period of 5 years (for s. 233B offences and otherwise for relevant repeat offences).

Background

The policy of mandatory minimum penalties was introduced in 2001. Section 236B was inserted more recently by the *Anti-People Smuggling and Other Measures Act 2010* (Cth), to extend mandatory minimum penalties to the aggravated people smuggling offences introduced by the same Act. The Explanatory Memorandum to that Act states:

> *'Mandatory minimum penalties still provide a court with discretion when determining the appropriate sentence, providing that the court does not go below the mandatory minimum sentence and non-parole period. This allows the court to have regard to the circumstances of both the offence and the offender.'*

Despite this assertion, the minimum mandatory sentencing regime has been widely criticised for its inhumane and disproportionate punishment of vulnerable minor participants in the larger enterprise of people smuggling, with no real deterrent effect and at a large cost to the taxpayer in the form of trial costs and incarceration expenses.[1]

The regime has further been criticised as a significant incursion on judicial discretion, not only in the public domain, but in the rare form of judicial comment. The following passages set out some such comments.

On 19 May 2011, Justice Judith Kelly of the Northern Territory Supreme Court spoke of the disparity between the appropriate sentence in all the circumstances and the sentence she was mandated to impose. She said, in passing sentence for an offence against s. 233C Migration Act:[2]

> *'I am required by s. 16A(1) [of the Crimes Act] to impose a sentence which is 'of a severity appropriate in all the circumstances of the offence'. However, I am prevented from doing this by the mandatory sentencing regime in s 236B of the Migration Act... As I say, taking into account all of those matters which are set out in s 16A(2), I would not consider it appropriate to hand down a sentence anywhere near as severe as the mandatory minimum sentence of eight years imprisonment nor would I consider it appropriate to fix a non-parole period as long as five years. Such a sentence is completely out of kilter with sentences handed down in this Court for offences of the*

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[1] For a recent example of such criticism, see: Michael Duffy, 'Tough laws on people smuggling are a con', *Sydney Morning Herald* (Sydney), 13 February 2012: http://www.smh.com.au/opinion/politics/tough-laws-on-people-smuggling-are-a-con-20120212-1szkp.html#ixzz1nYOrXB2a (accessed 27 February 2012).

[2] *The Queen v Edward Nafi* (Northern Territory Supreme Court, SCC 21102367, Transcript of Proceedings, 19 May 2011, per Kelly J).

same or higher maximum sentences involving far greater moral culpability including violence causing serious harm to victims... I am compelled by the legislation to hand down a sentence which is harsher than a just sentence arrived at on the application of longstanding sentencing principles applied by the Courts and which have been applied by those Courts for the protection of society and of the individual. I have no choice.'

Her Honour referred to the dicta of her brother Justice Dean Mildren in *Trenerry v Bradley* (1997),[3] on the nature of minimum mandatory sentencing generally:

'Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.'

On 2 December 2011, Justice Roslyn Atkinson of the Queensland Supreme Court spoke, in sentencing two fisherman from backgrounds of extreme poverty, about the relatively lower culpability of the people often charged with people smuggling offences, in the broader context of the enterprise. She said, sentencing under pre-amendment provisions:[4]

'The serious offenders at whom section 232A of the Migration Act *must surely be aimed are those who profit from people smuggling and do it for the purpose of making money rather than people like yourselves who they must know are certain to be caught and who live in such impoverished circumstances that the small amount of money that you would make from a journey such as this makes it worth taking the risk.'*

With reference to these judicial comments, it is ALHR's view that mandatory minimum penalties contained in s. 236B:

1. are unnecessary, where sentencers are already required to consider such factors as denunciation, general and specific deterrence in calibrating a just sentence;
2. limit judicial discretion to such an extent so as to virtually remove it from the sentencing process; and
3. do so with the likely effect of imposing a sentence that offends the principle of proportionality.

Human Rights Implications

The proposed removal of s. 236B would restore to the judiciary the discretion to fashion sentences that are just in the circumstances of the case. Under a human rights analysis, this would enhance Australia's compliance with Articles 9, 12, 14 and 26 of the *International Covenant on Civil and Political Rights* ('ICCPR').[5]

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[3] 6 NTLR 175 at 187.

[4] *The Queen v Nasir & Jufri* (Queensland Supreme Court, 300/2011 and 419/2011, Transcript of Proceedings, 2 December 2011, per Atkinson J).

[5] opened for signature 16 Decenber 1966, 999 UNTS 171 (entered into force 23 March 1976).

The right to liberty, security of person and freedom from arbitrary detention is set out in Article 9(1) of the ICCPR. This is complemented by Article 12(4), which guarantees freedom from arbitrary deprivation of the right to enter one's own country. In ALHR's view, a sentencing regime that prohibits the sentencer from attributing the weight it deems appropriate to the seriousness of the offending and the circumstances of the offender is bound to result in terms of imprisonment that are arbitrary.

The right to a fair trial is captured in Article 14(1) of the ICCPR, which guarantees that everyone who faces trial shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal. The current regime represents a legislative incursion into an area traditionally reserved for judicial discretion, with – in ALHR's view – concerning implications for the independence of the judiciary and more broadly for the rule of law.

The right to equality before the law and freedom from discrimination is guaranteed in Article 26 of the ICCPR. By nature, people-smuggling offences are far more likely to be committed by non-citizens than by Australian citizens. The current legislation therefore has an indirect discriminatory effect on non-citizens, who are often required to serve longer sentences of imprisonment than those whose offending is objectively more serious.

Conclusion

ALHR considers that the removal of minimum mandatory penalties for aggravated people smuggling offences would advance Australia's compliance with the ICCPR, and accordingly welcomes the proposed amendments contained in the Bill.

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