

Australian Lawyers Alliance

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

5 March 2012

Dear Committee Secretary,

Migration Amendment (Removal of Mandatory Minimum Penalties)

Bill 2012 (Cth)

The Australian Lawyers Alliance welcomes the opportunity to provide a Submission to the Senate Legal and Constitutional Affairs Committee regarding the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012 (Cth)*.

We welcome the introduction of this Bill and commend it to the Committee.

However, we also submit that the passing of this Bill alone will not be sufficient to rectify current inadequacies in the administration of justice for persons charged with 'people smuggling' offences. We also submit that legislative change is required that will provide further protections on persons claiming to be minors.

A. Our support for this Bill

We support this Bill for a number of reasons.

Firstly, mandatory sentencing in and of itself, discriminates against the vulnerable in society – especially the poor, mentally ill and those with an indigenous background, as these groups are more likely to include contextual factors that a judge will look at in exercising their discretion.

This is demonstrated clearly in the cases of persons charged with people smuggling.

Poverty

The vast majority of individuals charged are poor Indonesian fishermen, some of whom have no knowledge of the fact that the boat they are crewing will be travelling to Australia. These

individuals are crew. Many have themselves been subject to undue influence to become involved in people smuggling due to poverty.

In some communities, Australia's aggressive border protection laws targeting unlawful fishermen have contributed to this poverty cycle.¹

We have elaborated further upon the interconnected nature of these factors in our previous submission to the Committee on the *Deterring People Smuggling Bill 2011* (Cth).²

Judicial discretion

A number of judges have openly expressed disapproval of the minimum mandatory penalties currently in place under section 236B of the *Migration Act 1958* (Cth).³

We believe that removing mandatory minimum penalties will provide judges with the necessary discretion required to ensure that justice is done through appropriate sentencing.

International approaches to mandatory minimum sentences

In Canada, there have been distinct challenges to mandatory minimum sentences.

On February 15 of this year, the Ontario Superior Court issued an opinion refusing to impose a mandatory minimum sentence established by the Canadian federal government for firearm possession, declaring the guideline unconstitutional.⁴ In the case of Leroy Smickle, who was convicted of possessing a loaded handgun, usually a mandatory minimum sentence of three years was to be applied.

Jurist Legal News and Research reported that:

‘Smickle's defense counsel argued that the mandatory sentence amounted to cruel and unusual punishment prohibited by Canada's constitution, and Justice Molloy agreed...

The results of this case, and recent case *Regina v. Nur*, where a similar sentence was upheld, have combined to present a significant challenge to Canada's current mandatory minimum sentence requirements. The issue may warrant an appeal to the Supreme Court of Canada.

¹ See for example, the case of *Muslimin v The Queen*, [2010] HCA 7 (10 March 2010)

² See Australian Lawyers Alliance, ‘Understanding the complexities: People smuggling, deterrence and intersection with Australia’s maritime regulation’ (2011). Accessible at <http://www.lawyersalliance.com.au/public.php?id=115>

³ See, for example, The Australian, ‘Chief Judge slams people smuggling sentences for boat crew’, February 15 2012. Accessed at <http://www.theaustralian.com.au/national-affairs/chief-judge-slams-people-smuggling-sentences-for-boat-crew/story-fn59niix-1226271200966?sv=ad16c5c3f42b7478e3ef6664f429f5>

⁴ Jurist Legal News and Research, ‘Canada judge rules mandatory minimum sentence for firearm possession unconstitutional’ February 15 2012 <http://jurist.org/paperchase/2012/02/canada-judge-refuses-to-impose-mandatory-minimum-sentence-in-handgun-case.php>

Mandatory minimum sentences have also been an issue in the United States....Some commentators have suggested that mandatory minimum sentences should also be disfavored because of their tendency to increase the load of prisons on governmental budgets and unnecessarily increase the non-violent prisoner population.⁵

While Australia does not have a Charter of Rights and Freedoms as does Canada, this should further encourage the Parliament to pass laws that will ensure the protection on the rights of vulnerable people, such as those charged with people smuggling.

B. Additional recommendations

Treatment of minors

The Australian Lawyers Alliance are also concerned at the large number of minors that are currently being caught up in people smuggling offences, due to faulty age determination procedure. The presence of s236B(2) within the *Migration Act 1958* (Cth) indicates that the legislature intended that minors would not be charged with these offences.

The Australian Lawyers Alliance submit that the recently proposed *Crimes Amendment (Fairness for Minors) Bill 2011* (Cth) provides a good first step in addressing these issues. We draw attention to our previous submission to the Committee on this Bill.⁶

Our previous submission highlighted:

- The clear intention of the legislature to exclude minors from prosecution of an offence of people smuggling;
- The need to abolish the wrist X-ray test as a valid form of evidence ;
- Support for a presumption of age of being 18 where an individual claims they are a minor;
- Support for a time limit in which charges could be laid;
- Support for other forms of evidence to prove age, such as birth certificates and affidavits; and
- Support for the Bill's intention to ensure that no person presumed to be a child will be incarcerated in an Australian adult prison.

We also previously made additional recommendations, which we again commend to the Committee for consideration:

⁵ Jurist Legal News and Research, 'Canada judge rules mandatory minimum sentence for firearm possession unconstitutional' February 15 2012 <http://jurist.org/paperchase/2012/02/canada-judge-refuses-to-impose-mandatory-minimum-sentence-in-handgun-case.php>

⁶ See Australian Lawyers Alliance, 'Crimes Amendment (Fairness for Minors) Bill 2011 (Cth)' (2012) Submission No. 17, accessible at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/fairness_for_minors/submissions.htm

- That there be a retrospective abolition of the wrist X-ray test, with a review of all cases of persons who were charged on the basis of this evidence;
- That there be a minimum time period of 48 hours in which to notify families of individuals claiming that they are minors;
- That there be an Inquiry into the issue of garnishing wages of persons charged with people smuggling within Australian prisons; and
- The recommendation for compensation to be paid to individuals under 18 who were charged with people smuggling. Some minors have been sexually abused in prison, and are liable also to sue for unlawful imprisonment
- The recommendation for compensation to be paid to individuals whose wages have been garnished in prison. This has caused the death of family members in Indonesia, who were solely dependent on the person charged as a wage earner. It has also meant that individuals are essentially engaging in slave labour.

Persons being held without charge

The Australian Federal Police admitted recently that persons involved in people smuggling are being held without charge for an average of 161 days.⁷ This is more than ten times longer than a suspected terrorist can be held without charge.

The Australian Lawyers Alliance submit that a maximum time period that a person can be held without charge should be established in cases of people smuggling. This should be no longer than 7 days.

Persons' access to communication

In some cases, families of persons that have been involved in people smuggling do not hear what has happened to their family members, and assume that they are dead, while in reality, they are locked up in Australian prisons.

The Australian Lawyers Alliance submit that all persons should be provided with effective access to their Consulate, provision of translators, and the opportunity to contact their family members.

Conclusion

We are opposed to mandatory sentencing in principle as ultimately, the imposition of mandatory sentences discriminates against the vulnerable in society – especially the poor, mentally ill, and those with an indigenous background.

Our National President, Greg Barns has previously made comment on the nature of mandatory sentencing and our opposition to it:

This is because jail for the vulnerable increases the chances they will be further harmed and will be more likely to commit a crime on release. It is also because

⁷ ABC, Lateline, 'Alleged people smugglers held without charge' 20/02/2012
<http://www.abc.net.au/lateline/content/2012/s3435403.htm>

To truly accord justice, a judge or magistrate has to be able to balance deterrence with rehabilitation. Mandatory formulas eliminate this capacity.⁸

Allowing judicial discretion in sentencing is a crucial element of our criminal justice system.

Mandatory sentencing is currently causing great frustration for judges who are bound by mandatory sentencing provisions in relation to the *Migration Act 1958* (Cth). The frustration felt by the judiciary is likely to continue to be aired again in the practical implementation of these proposed provisions.

Ultimately, judges are best placed to determine the non-parole period for individuals on a person-by-person basis, rather than a standard piece of legislation that treats every individual as the same. Each individual comes into the criminal justice system with a different background and circumstances, and needs to be acknowledged as such, if there is any hope of fulfilling goals of deterrence and rehabilitation for that individual, and their meaningful participation in society in the future.

We would be happy to comment further on any issues we have raised within this Submission.

Yours sincerely,

Greg Barns

National President

Australian Lawyers Alliance

Emily Price

Legal and Policy Officer

⁸ Greg Barns, 'Jail formula locks in a big mistake', *The Courier-Mail*, 3 November 2011, <http://www.couriermail.com.au/ipad/jail-formula-locks-in-a-big-mistake/story-fn6ck620-1226183962250>