



MONASH University
Castan Centre for Human Rights Law



Castan Centre for Human Rights Law

Monash University

Melbourne

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

Submission to Senate Legal and Constitutional Affairs Committee

February 2012

Prepared by Adam Fletcher

The Castan Centre thanks the Committee for the opportunity to comment on the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012.

The Castan Centre strongly supports the Bill. It amends provisions which restrict the ability of courts to impose penalties which are appropriate to the circumstances surrounding the vast majority of people smuggling offences.

According to the jurisprudence of the UN Human Rights Committee, sentences which are disproportionate to the relevant offence may be arbitrary in breach of article 9(1) of the International Covenant on Civil and Political Rights (ICCPR).¹ It has been argued that other mandatory sentencing regimes in Australia and elsewhere, contravene article 9(1) as well as other international human rights relating to discrimination and child protection.²

Mandatory minimum sentences such as those in the *Migration Act 1958* (Cth) effectively constitute administrative punishments, since they remove the courts' sentencing discretion. This raises fair trial issues under article 14 of the ICCPR, which requires courts to be independent and sentences to be reviewable.

In Canada, mandatory minimum sentences have been found to amount to cruel and unusual punishment in contravention of the Constitution and the Canadian *Charter of Rights and Freedoms* of 1982.³ Although there is no specific equivalent protection in Commonwealth law, the constitutionality of mandatory minimum sentences in Australia has been called into question by Justices of the High Court. Sir Garfield Barwick suggested it was 'unusual and generally undesirable that the court should not have discretion in the imposition of penalties,'⁴ and Sir Gerard Brennan has called them 'uncivilised' and destructive of the interests of the minorities they target.⁵

The Law Council of Australia, the Law Society of the Northern Territory, the NSW Bar Association and the Victorian Bar Council have all stated that mandatory sentencing impinges unacceptably on the independence of the judiciary.⁶ The Law Institute of Victoria has argued that it is contrary to that state's *Charter of Human Rights and Responsibilities Act 2006*.⁷

¹ See *Dissanayake v Sri Lanka* (CCPR/C/93/D/1373/2005, 4 August 2008) or *Fernando v Sri Lanka* (CCPR/C/83/D/1189/2003, 10 May 2005).

² See eg Pritchard, 'International Perspectives on Mandatory Sentencing' (2001) 7(2) *Australian Journal of Human Rights* 51.

³ See eg *R v Smith* [1987] 1 SCR 1045, confirmed more recently in *R v Smickle* [2012] ONSC 602.

⁴ See Brennan, 'Mandatory Sentencing: Rights and Wrongs' [2001] *AUJHRights* 13.

⁵ *Ibid.*

⁶ See *The Mandatory Sentencing Debate*, Law Council of Australia, September 2001:

<http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=91B75434-1E4F-17FA-D2BA-B6D5A60592A7&siteName=lca> 14-15.

⁷ See Mandatory Minimum Sentencing: Submission to Attorney-General Robert Clark, 30 June 2011:

<<http://www.liv.asn.au/getattachment/22c3c2c9-45a5-45c4-96e6-f0affdfe2ff8/Mandatory-Minimum->

The present Bill would remove the Note under ss 233B(c) and 233C(c) of the Migration Act, which states candidly that s 236 B ‘limits sentencing options for people smuggling offences.’ The five year minimum penalty provided for a breach of s 233C applies *inter alia* to anyone who ‘facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least 5 persons....’ In practice, this tends overwhelmingly⁸ to catch impoverished Indonesian fishermen who are enticed to perform the task by promises of payments of around A\$300-1200. Though these amounts are small in comparison to the fortunes reaped by people smuggler organisers, they are huge for the individuals concerned and their families. Furthermore, there is little evidence that these people were aware of their liability under Australian law at the time they committed the offence. While ignorance of the law is no excuse, the courts are prohibited from taking that ignorance into account in passing sentence.

The five year minimum rises to eight years if the offence is classed as ‘aggravated,’ which applies if the offender is found to be ‘reckless as to the danger of death or serious harm to the victim that arises from the conduct’ (s 233B(1)(c)(ii)). The aggravated offence (in s 233B(1)) is intended to deter the exploitation of asylum-seekers and other smuggled persons. However, the legislation fails to acknowledge the possibility that crew members on asylum boats may also be victims of exploitation, rendering minimum sentences of eight years grossly disproportionate.

In May 2011, the NT Supreme Court convicted Mr Edward Nafi of aggravated people smuggling. The court accepted that Mr Nafi’s motivation for captaining a vessel carrying asylum-seekers to Australia was extreme poverty and the need to provide for his family – the \$1200 fee paid to him by organisers in Indonesia had proved to be irresistible. The court assessed Mr Nafi’s level of moral culpability as low, and the effect of a custodial sentence on his family as devastating, yet was forced to impose the eight-year minimum anyway.⁹ Many comparable cases have resulted in similarly undesirable outcomes.¹⁰

The injustice of this approach is such that sentencing judges from courts in NSW,¹¹ Queensland,¹² the NT¹³ and WA¹⁴ have felt it necessary to break with convention and

[Sentencing.aspx](#)> 3. The LIV argued that the regime was contrary to ss 17(2) and 23 of the Charter as it applied to juvenile offenders, but a similar argument could be made in relation to s 21 (the right to liberty).

⁸ According to WA’s Chief Justice, only 10 of the 493 prosecutions to date have been of organisers, with the remaining 98% generally ‘impoverished and illiterate’ – see ‘Chief judge slams people-smuggling sentences for boat crew,’ *The Australian*, 15 February 2012: <<http://www.theaustralian.com.au/national-affairs/chief-judge-slams-people-smuggling-sentences-for-boat-crew/story-fn59niix-1226271200966>>.

⁹ See Sentencing remarks by Kelly J in *The Queen v Edward Nafi (Sentence)*, SCC 21102367 (NT SC) Transcript of Proceedings at Darwin on 19 May, 2011 (unreported).

¹⁰ See eg Sentencing remarks of Blokland J in *The Queen v Mahendra*, SCC 21041400 1 September, 2011 (unreported) and of Mildren J in *Trenerry v Bradley* (1997) 6 NTLR 175, 17.

¹¹ See ‘Fixed jail terms “unfair” for people smugglers: judge,’ *Sydney Morning Herald*, 28 July 2011: <<http://www.smh.com.au/nsw/fixe-jail-terms-unfair-for-people-smugglers-judge-20110728-1i0o6.html>>.

criticise it directly. According to the *Australian*, 12 judges including the Chief Justice of Western Australia have gone on record as opposing the provisions, which is an unusually strong indication that this is, quite simply, bad law. Its effect, which could have been predicted from studies of the 'three strikes' mandatory minimum sentences in the United States, NT and WA,¹⁵ is to contribute greatly to prison overcrowding and little to deterrence.

In South Africa, the *Criminal Law Amendment Act 1997* provided for some minimum sentences, but included a clause which allowed a court to impose a lesser sentence if it is "satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed."¹⁶ Similarly, in England and Wales, mandatory minimum sentences were amended by the *Powers of Criminal Courts (Sentencing) Act 2000* which specified a mandatory life sentence for anyone over the age of 18 years convicted of a second serious offence such as murder, attempted murder, or rape. However, there is still discretion to impose a lesser sentence "where the court is of the opinion that there are particular circumstances which (a) related to any of the offence or the offender; and (b) would make it unjust to do so in all the circumstances."

As stated above, the Centre supports the present Bill and urges the Committee to recommend to the Parliament that it be passed. However, if the Committee is inclined to propose amendments, we would recommend a compromise similar to that in the South African or UK legislation. Such a clause would demonstrate the Government's disapprobation of people smuggling without forcing the courts to ignore compelling aspects of certain defendants' cases.

¹² See 'Judge slams mandatory sentencing for people smugglers,' *Sydney Morning Herald*, 11 January 2011: <<http://www.smh.com.au/national/judge-slams-mandatory-sentence-for-people-smugglers-20120111-1puvi.html>>

¹³ See 'NT Supreme Court judge calls people smuggler law "dangerous,"' *Law Gate*, 15 October 2011: <<http://www.lawgate.com.au/article/nt-supreme-court-judge-calls-people-smuggler-law-dangerous>>.

¹⁴ See Chief judge slams people-smuggling sentences for boat crew,' *The Australian*, 15 February 2012 (above).

¹⁵ See eg Brown, 'Mandatory Sentencing: A Criminological Perspective' (2001) 7(2) *Australian Journal of Human Rights* 31.

¹⁶ Criminal Law Amendment Act 1997, s 51(3)(a), available at: <http://us-cdn.creamermedia.co.za/assets/articles/attachments/03135_crimlawaa105.pdf>