

THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

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Senate Legal and Constitutional Affairs Committee
Via online submission

Dear Committee Secretary,

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

Thank you for the opportunity to make a submission to this Inquiry. We recommend that the Bill be passed.

Under section 236B of the *Migration Act 1958*, judges are required to sentence any person involved in bringing five or more asylum seekers to Australia to at least five years in prison, with a minimum three-year non-parole period - regardless of the individual's personal circumstances, level of involvement or moral culpability. These laws are overwhelmingly applied to unwitting Indonesian crewmembers from poor fishing villages, many of whom are themselves victims of unscrupulous organisers of human smuggling enterprises.¹

Mandatory sentencing offends basic notions of justice and the rule of law, and is not appropriate in an advanced democracy with an independent judiciary. As the Chief Justice of Western Australia recently explained, 'the prescription of a minimum sentence creates the risk that a court may be required to impose a sentence which is disproportionate to the culpability of the offender, or the seriousness of the offence, or which may prejudice the prospects of rehabilitation and which is to that extent unjust.'²

¹ See generally Victoria Legal Aid, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Deterring People Smuggling Bill 2011.

² The Hon Wayne Martin, Chief Justice of Western Australia and Chair of the National Judicial College of Australia, 'Sentencing Issues in People Smuggling Cases' (Paper

In the Australian domestic context, removal of judicial discretion in sentencing undermines the separation of powers between the judiciary and the legislature and executive, potentially in violation of Chapter III of the Australian Constitution. It creates a powerful disincentive for defendants to plead guilty, and the number of cases proceeding to trial is placing significant strain on the resources of the judiciary, the public prosecutor, and Commonwealth-funded legal aid providers – at considerable public expense.

Mandatory minimum sentences also violate Australia's obligations under international law. We have addressed in detail the application of international law to s236B in submissions to previous Senate Inquiries over the past 18 months,³ and we refer the Committee to those submissions.

In this submission, we wish to draw the Committee's attention to three key points:

1. Mandatory minimum sentences for people smuggling offences are inconsistent with Australia's obligations under the *UN Smuggling Protocol* – the key international treaty regulating the criminalisation of human smuggling.
2. Mandatory minimum sentences violate Australia's obligations under articles 9 and 14 of the *International Covenant on Civil and Political Rights* (ICCPR) because they may result in arbitrary periods of detention that are unjust in the circumstances (art. 14) and because sentences are not subject to judicial review (art. 9).
3. It is now clear that s236B has *in fact* resulted in the imposition of unjust, disproportionate sentences for people smuggling offences in multiple cases, and will likely continue to do so as many prosecutions against Indonesian boat crew proceed to trial in 2012.

Mandatory sentences breach the UN Smuggling Protocol because they are inconsistent with Australia's human rights responsibilities under the ICCPR

In 2004, Australia ratified the *Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention on Transnational Organised Crime* (2000) ('the Protocol'). The Protocol is the primary international agreement between states on the prevention and combating

presented at the Federal Crime and Sentencing Conference, ANU Canberra, 11 February, 2012) 11.

³ See UNSW Migrant and Refugee Rights Project submissions to the Senate Legal and Constitutional Affairs Legislation Committee Inquiries into the Anti-People Smuggling and Other Measures Bill 2010, the Deterring People Smuggling Bill 2011, and the Crimes Amendment (Fairness for Minors) Bill 2011.

of the smuggling of migrants.⁴ It has been widely ratified, and currently has 124 state parties.

Article 6 of the Protocol requires states to establish criminal offences for the smuggling of migrants. However article 19 of the Protocol places limitations on the definition and prosecution of those offences. It underscores that criminalisation of smuggling pursuant to the Protocol must not undermine “responsibilities of States and individuals under ... international human rights law.”

In February 2012 the UN Office on Drugs and Crime (UNODC) published its long-awaited International Framework for Action to Implement the Smuggling of Migrants Protocol (the ‘International Framework’).⁵ The International Framework ‘is anchored on the Smuggling of Migrants Protocol and aims to “unpack” the various obligations and standards set forth therein.’⁶

The International Framework makes the following two key points in relation to states’ obligations under the Protocol:

1. ‘Although the Smuggling of Migrants Protocol falls within the framework of combating transnational organized crime, by ratifying the Protocol, States parties agree to ensure that human rights ... are not compromised in any way by the implementation of anti-smuggling measures.’⁷
2. ‘A human rights-based approach to addressing migrant smuggling requires that the human rights of perpetrators of migrant smuggling and related crimes are also respected.’⁸

⁴ Protocol art. 2.

⁵ UN Office on Drugs and Crime (UNODC), *International Framework for Action to Implement the Smuggling of Migrants Protocol* (February 2012) <http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Framework_for_Action_Smuggling_of_Migrants.pdf> (‘International Framework’) (accessed 22 February, 2012).

⁶ UNODC Press Release, ‘International Framework for Action to Implement the Smuggling of Migrants Protocol available online’, February 13, 2012, <<http://www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/international-framework-for-action-to-implement-the-smuggling-of-migrants-protocol.html>> (accessed 22 February, 2012).

⁷ *International Framework* [47].

⁸ *Ibid* [50].

Mandatory sentencing regimes violate Australia's obligations under the ICCPR, and possibly other human rights treaties. Because mandatory sentencing does not allow consideration of the proportionality of the sentence to the crime committed in light of individual circumstances, *by definition* it may result in penal sentences that constitute arbitrary detention. Article 9 of the ICCPR prohibits arbitrary detention. Detention is "arbitrary" if it is unjust or unreasonable, even if sanctioned by law.⁹

Mandatory sentencing arguably also violates article 14 of the ICCPR, because it does not permit the right to a hearing before an independent tribunal and to a review of the sentence by a higher tribunal. This is because the sentence is imposed by the legislature, is not subject to judicial control, and there is no system for sentences to be reviewed.¹⁰ Mandatory sentencing also raises issues under articles 7 (prohibition of cruel, inhuman or degrading treatment or punishment) and 10 (treatment of people deprived of liberty) of the ICCPR.

In the past, the UN Human Rights Committee has found that mandatory sentencing laws in the Northern Territory and Western Australia raised "serious issues of compliance with various Articles" of the ICCPR.¹¹

Mandatory sentencing for people smuggling offences is particularly problematic in the Australian context because smuggling offences are defined more broadly than under the Smuggling Protocol.¹² Under the Migration Act, an individual can be sentenced for the aggravated people smuggling offence (carrying the five-year mandatory minimum sentence) even if she was acting for purely humanitarian reasons and had no profit motive. In contrast, article 6 of the Protocol requires that smuggling only be criminalised if it is undertaken 'in order to obtain directly or indirectly, a financial or other material benefit.'¹³ Indeed 'the reference in the definition of migrant smuggling as being for the purpose of "financial or other material benefit" is intended to emphasize that the intention is to include the activities of organized criminal groups acting for profit but to

⁹ See eg *A v Australia*, UN Human Rights Committee (1997); reports of the UN Working Group on Arbitrary Detention.

¹⁰ See eg S Pritchard, 'International Perspectives on Mandatory Sentencing' [2001] *Australian Journal of Human Rights* 17.

¹¹ UN Human Rights Committee, "Concluding Observations of the Human Rights Committee: Australia" (24 July 2000) UN doc A/55/40.

¹² The inconsistency undermines the Protocol's intention to harmonise the definitions of the crime across state parties. *International Framework* [88].

¹³ Protocol, art. 6.

exclude the activities of those who support migrants for humanitarian or familial reasons.¹⁴

Section 236B has resulted in unjust, disproportionate sentences for people smuggling offences and will continue to do so

Mandatory sentencing has *in fact* resulted in the imposition of unfair and arbitrary sentences in Australia over the past two years.

Thirteen Australian judges have expressed criticism of the mandatory sentences for smuggling offences -- 11 in the course of imposing the five year jail term,¹⁵ and two extracurially.¹⁶ Several judges have explicitly observed that without the constraint imposed by s236B they would have handed down a sentence significantly lower than the mandatory minimum in light of the circumstances and the individual's culpability -- an outcome that directly contravenes Australia's obligations under articles 9 and 14 of the ICCPR, and is therefore inconsistent with article 19 of the Smuggling Protocol.

For example Justice Kelly in the Supreme Court of the Northern Territory made the following statements in the course of sentencing remarks:

[T]aking 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 ... Such a sentence is completely out of kilter with sentences handed down in this Court for offences of the 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.¹⁷

¹⁴ *International Framework* [87].

¹⁵ Supreme Court of Northern Territory - Riley CJ, Kelly J, Barr J, Mildren J, Blokland J; Supreme Court of Queensland - Atkinson J; District Court of Western Australia - Yeats DCJ; District Court of New South Wales - Conlan DCJ, Knox DCJ; District Court of Queensland - Martin DCJ, Farr ADCJ (as listed in Martin J, 'Sentencing Issues in People Smuggling Cases', above n.2, 11).

¹⁶ Chief Judge Blanch, Murray J (Supreme Court of Western Australia) (as listed in Martin J, 'Sentencing Issues in People Smuggling Cases', above n.2, 11).

¹⁷ Sentencing remarks by Kelly J in *The Queen v Edward Nafi (Sentence)*, SCC 21102367 (Supreme Court of the Northern Territory), Transcript of Proceedings at Darwin on 19 May, 2011.

Justice Blokland issued similar criticisms in the Northern Territory Supreme Court:

I fully acknowledge the need for general deterrence, however deterring of poor, uneducated fishermen in Indonesia has not been achieved by mandatory sentences, and at the same time has removed judicial discretion to pass proportionate sentences. Other members of this court have made similar observations. It is important people be deterred from committing this offence, particularly because of the safety issues to all persons, and the understandable concern in the community about that. Unfortunately, the five year sentence I am obliged to impose has an arbitrary element to it, as does most forms of mandatory imprisonment....

In this particular case it is particularly so because there is a failure to differentiate people in the circumstances of [the defendant] from those who actually orchestrate the offence on a grand scale.¹⁸

In January 2012, Justice Martin in the Brisbane District Court became the tenth judge across four states and territories to criticize what he described as the "savage" five-year mandatory sentences that must be imposed on Indonesian boat crew – in this case on an illiterate fisherman who was the sole breadwinner for his mother and sister.¹⁹ In reluctantly imposing the sentence Martin J observed that the defendant 'was as much a victim of people-smuggling as the 20 Afghan passengers he ferried from Indonesia.'²⁰

In order to bring Australian law into compliance with the nation's obligations under the ICCPR and the Smuggling Protocol we recommend that the Bill be passed.

Yours sincerely,

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¹⁸ Sentencing remarks of Blokland J in *The Queen v Mahendra*, SCC 21041400, Supreme Court of the Northern Territory, 1 Sept., 2011.

¹⁹ Jared Owens, 'Tenth judge decries 'savage' mandatory sentences against boat crewmen,' *The Australian*, 12 Jan., 2012.

²⁰ Ibid.