SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE INQUIRY INTO THE *MIGRATION AMENDMENT (REMOVAL OF MANDATORY MINIMUM PENALTIES) BILL 2012*

Introduction

This submission is made in response to a request in a letter dated 13 February 2012 from the Senate Legal and Constitutional Affairs Legislation Committee to the Secretary of the Judicial Conference of Australia (JCA). In that letter, the Secretary to the Committee stated that it "has invited written submissions to its inquiry ... and would be grateful for a submission from" the JCA. As the letter states, the inquiry is into the proposal to amend the *Migration Act 1958* by removing the mandatory minimum sentencing provisions which currently apply to aggravated people smuggling offences.

The judges and magistrates who constitute the membership of the JCA are drawn from every court in every Australian jurisdiction. This submission generally reflects the views of the members of the Governing Council of the JCA, but does not purport to represent the views of the entire membership of the JCA. Nor does it purport to speak for any individual court, or the courts in general.

Separate powers and responsibilities

All judicial officers are mindful of the fact that they must not improperly intrude upon the legislative or executive spheres of responsibility. For this reason, judges and magistrates generally speak to the public only through their judgments or through their chief justices and other heads of jurisdiction. This submission is therefore exceptional. It is made because the Committee has invited the JCA to respond in this way, and also because the issues with which this inquiry is concerned are of great importance to the administration of justice. Mandatory minimum sentences impact upon the separation of powers between the legislative and judicial arms of government, and upon the quality of justice dispensed by the courts. Moreover, sentencing is a core judicial function, and the judiciary can therefore speak about it with relevant expertise. This submission is made in the hope that it will assist the Committee in its deliberations.

Legislatures have a vital role in setting maximum sentences and prescribing sentencing principles. This is a role which the judiciary recognises and respects. Legislatures also have the power to set mandatory minimum sentences. These too bind the judiciary, and judges and magistrates must therefore sentence accordingly.

The point should be made, however, that it is the responsibility of the judiciary, and not the role of the legislative or executive branches of government, to pronounce individual sentences on individual offenders. Mandatory minimum sentences restrict judicial discretion when giving effect to this quintessentially judicial task. They also cut across basic principles of sentencing law. These are directed to the

highly desirable aim of ensuring that the penalty imposed upon an individual offender is commensurate with the objective gravity of the conduct. In the words of the Federal Parliament, embodied in s 16A(1) of the *Crimes Act* 1914 and reflected in corresponding legislation in other Australian jurisdictions: "In determining the sentence to be passed, or the order to be made, in respect of any person for [an] ... offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence."

The application of sentencing principles

Deciding upon the sentence which is "of a severity appropriate in all the circumstances of the offence" is one of the most difficult of judicial tasks. It requires the judge or magistrate to weigh conflicting considerations, an exercise to which judicial officers bring the most anxious thought and care. In almost every case, there will be some mitigating and some aggravating circumstances, all of which the judicial officer must by law take into account, despite the fact that they pull in different directions.

Mandatory minimum sentences, however, sometimes require the sentencing judge or magistrate to impose a sentence of a severity which, far from being appropriate, is disproportionate, to the circumstances of the offence. In such cases, the paramount sentencing principle embodied in s 16A(1) is put aside; and the result is injustice.

The judicial function of assessing the appropriate sentence involves, in particular, the application of established legal principles to the facts and circumstances of the individual case. The binding effect of this body of law prevents the judge or magistrate from acting arbitrarily; acting, in other words, according to an idiosyncratic personal view of what seems to that judicial officer to be appropriate. That would be to deny the judicial oath to do justice according to law.

The principles of sentencing law also promote another essential element in the administration of justice: consistency. To the maximum possible extent (the qualification is necessary because the facts and circumstances of criminal behaviour vary so widely) the application of established sentencing principles is calculated to ensure that comparable sentences are imposed for comparable offending. This always requires the court to consider the relative criminality and other relevant facts and circumstances of the particular case when set against sentences imposed upon others for an offence against the same or some relevantly corresponding law.

It is at that point that the administration of justice, through the application of established sentencing principles, can be compromised by a mandatory minimum term. Such a penalty must be pronounced regardless of the relative criminality and other relevant facts and circumstances of the particular case. In consequence, there is the practical inevitability of arbitrary punishment as offenders with quite different levels of culpability receive the same penalty. On occasion, the least serious of cases will require the imposition of a sentence, namely the prescribed minimum, which is so disproportionate to the criminality and circumstances of that case that injustice is

done. Such injustice is directly attributable to legislative involvement in the essentially judicial function of pronouncing individual sentences on individual offenders.

Conclusion

The JCA accepts that the legislature is entitled to take the view that some offences are so inherently serious that all who commit them must receive at least a fixed minimum sentence, no matter that an individual judicial officer might not share that view, and no matter that such an approach encroaches upon the essentially judicial responsibility to pronounce individual sentences on individual offenders. Recognising this, and the proper limitations upon judicial power, the JCA does not seek to participate in the debate about appropriate policy responses to the practice described as people smuggling. Its concern is with the due administration of the criminal law.

Mandatory minimum sentencing regimes impact upon that administration by making sentencing easier for the sentencing judge. They do so to the extent that the need to consider whether the sentence is of a severity appropriate in all the circumstances of the offence is in some circumstances removed. It is those very cases, however, which have caused a significant number of Australia's most experienced judicial officers to accurately describe the sentence which they have been obliged to impose in people smuggling cases as manifestly unjust. The question for the Parliament is whether those injustices are a price which must be paid if the desired policy is to be implemented.