



Australian
Human Rights
Commission

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

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEES**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Committees in the Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012.

2 Summary

2. The Commission supports the repeal from the *Migration Act 1958* (Cth) (Migration Act) of the mandatory minimum penalties currently applicable to the aggravated offence of people smuggling.
3. Laws that impose mandatory minimum terms of imprisonment are inconsistent with Australia's international human rights obligations, including obligations under the *International Covenant on Civil and Political Rights* (ICCPR).
4. Moreover, a number of individuals charged with people smuggling offences that carry mandatory minimum terms of imprisonment say that they are children. As a consequence, mandatory detention raises concerns in relation to the human rights of children arising from Australia's obligations under the United Nations *Convention on the Rights of the Child* (CRC).

3 Recommendations

5. The Australian Human Rights Commission recommends that the Bill be passed.

4 Mandatory minimum penalties under the Migration Act

6. Section 236B of the Migration Act provides a mandatory minimum penalty for a person convicted of the aggravated offence of people smuggling.¹ Where a person is convicted of the aggravated offence of people smuggling, the court must impose a sentence of imprisonment of at least five years and set a non-parole period of at least three years. If the conviction is for a repeat offence, the mandatory minimum penalty is eight years imprisonment with a non-parole period of five years.
7. Mandatory minimum penalties for the aggravated offence of people smuggling apply where a person is aged over 18 years at the time the offence was committed.² The Migration Act requires that it be shown on the balance of probabilities that a person was 18 years or over at the time the alleged offence was committed.³ The 'balance of probabilities' test is lower than the criminal standard of 'beyond reasonable doubt'. As a consequence, a person may be held to be an adult and subject to the mandatory minimum term of imprisonment even where doubt exists as to whether that person is an adult.
8. The Commission has serious concerns that age assessment procedures permitted by Australian law and frequently used in investigations of individuals for people smuggling offences may have led to errors in age assessment. The President of the Commission is currently conducting an Inquiry into the treatment of individuals suspected of people smuggling offences who say that

they are children (Age Assessment Inquiry). Information about this Inquiry may be found at the following website:
www.humanrights.gov.au/ageassessment/index/html.

5 Mandatory minimum penalties and human rights

9. Laws that impose a mandatory minimum penalty raise a number of concerns in relation to Australia's international human rights obligations. They include obligations under the ICCPR. Australia ratified the ICCPR in 1980.⁴
10. The ICCPR prohibits arbitrary detention (article 9(1)) and provides that sentences must be reviewable by a higher tribunal (article 14(5)).

5.1 Prohibition against arbitrary detention

11. Under article 9(1) of the ICCPR, Australia must guarantee the liberty and security of the person. Article 9(1) of the ICCPR provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

12. A sentence may still be arbitrary notwithstanding that it is authorised by law. Under the ICCPR, 'lawful detentions may be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality'.⁵ Further, detention must be necessary in all the circumstances and must not continue beyond the period for which a State party can provide appropriate justification.⁶
13. Sentencing should enable a judge to take account of the personal circumstances of an individual offender. By exercising judicial discretion, a judge can ensure that the sentence imposed on an offender reflects the offender's individual circumstances and level of culpability. In this way, the sentence is less likely to be characterised as arbitrary or disproportionate. The High Court of Australia has stressed the importance of judicial discretion:

It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.⁷
14. The Commission submits that the current mandatory minimum term of imprisonment imposed on offenders convicted of the aggravated offence of people smuggling can be disproportionate to their level of culpability. Generally, people who work as crew on boats that bring asylum seekers to Australia are recruited from poor fishing communities on the Indonesian coast. The Commission believes that the majority of those who face people smuggling charges are low-level crew, who often have little prior knowledge of the nature or purpose of their role before departing Indonesia.

15. As a consequence, the Commission considers that the mandatory minimum sentences currently applicable under s 236B of the Migration Act are not proportionate and may violate the protection against arbitrary detention in article 9(1) of the ICCPR.

5.2 Review by higher court

16. Article 14 of the ICCPR establishes certain procedural guarantees in civil and criminal trials. Article 14 operates to ensure that no individual is deprived, in procedural terms, of his or her right to claim justice.
17. Relevantly, article 14(5) of the ICCPR requires Australia to ensure that:

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
18. Article 14(5) of the ICCPR provides for review of conviction and sentence by an appellate court. This means that Australia must ensure that the law allows for a right of appeal in order that a higher court may substantially review a sentence.⁸
19. Where a court imposes the mandatory minimum penalty provided by law for the aggravated offence of people smuggling there is no right of appeal against the sentence. The Commission submits that this is in breach of Australia's obligations under article 14(5) of the ICCPR.

6 Principles applicable to children

20. The Commission holds serious concerns that a number of individuals convicted of the aggravated offence of people smuggling and subject to the mandatory minimum term of imprisonment may be children.
21. Australia also has particular human rights obligations to children. Australia ratified the CRC in 1990.⁹ Australia's obligations under the CRC apply to all children in Australia, regardless of citizenship or immigration status. For the purposes of the CRC, children are defined as individuals who are under 18 years of age.¹⁰
22. The CRC is the key human rights treaty regarding children's rights. The CRC recognises that children are entitled to protection of their basic human rights and require special protection because of their vulnerability to exploitation and abuse.
23. Article 3(1) of the CRC requires State parties to ensure that the best interests of the child are a primary consideration in all actions concerning children, including actions undertaken by a court of law.
24. Article 37(c) requires that a child deprived of his or her liberty be treated in a manner which takes into account the needs of a person of his or her age.¹¹ Article 37(c) of the CRC states relevantly:

States Parties shall ensure that: ...

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. ...

25. Moreover, under the CRC all children in Australia have the right to be treated in a manner which takes into account the child's age¹² and to be arrested detained or imprisonment only as a measure of last resort and for the shortest appropriate period of time.¹³
26. The Commission holds serious concerns that the age assessment procedures employed by the Commonwealth in people smuggling matters have led to some children being charged, convicted and sentenced as adults.¹⁴ Should this have occurred, the imposition of a mandatory sentence on someone who is in fact a child is inconsistent with Australia's obligations under the CRC.

¹ The aggravated offence of people smuggling is established in s 233C of the Migration Act.

² *Migration Act 1956* (Cth), s 236B

³ *Migration Act 1956* (Cth), s 236A

⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), at <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 30 August 2011).

⁵ *Manga v Attorney-General* [2000] 2 NZLR 65, [40]–[42], (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands*, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/39/D/305/1988; *Spakmo v Norway*, Communication No 631/1995, UN Doc CCPR/C/67/D/631/1995.

⁶ *C v Australia* Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999 [8.2].

⁷ Barwick CJ in *Palling v Corfield* (1970) 123 CLR 52 at 58.

⁸ *Reid v Jamaica* Communication No. 355/1989, U.N. Doc. CCPR/C/51/D/355/1989 (1994).

⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), at <http://www2.ohchr.org/english/law/crc.htm> (viewed 27 January 2012).

¹⁰ *Convention on the Rights of the Child*, above, article 1.

¹¹ While Australia has made a reservation to article 37(c) of the CRC, that reservation applies to limit the obligation to separate children from adults in prison only to the extent that a child's contact with their families may be compromised taking into account the geography and demography of Australia.

¹² *Convention on the Rights of the Child*, above, article 40(1).

¹³ *Convention on the Rights of the Child*, above, article 37(b).

¹⁴ The Commission is currently conducting an *Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children* (information about the Inquiry can be found at: www.humanrights.gov.au/ageassessment/index.html).