THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: JD:HumanRights:VK:587306

23 February 2012

Ms Margery Nicoll
Acting Secretary-General
Law Council of Australia
DX 5719 CANBERRA

By Email: rosemary.budavari@lawcouncil.asn.au

Dear Ms Nicoll,

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

Thank you for your invitation to contribute to the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Senator Hanson-Young's *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* (the "Bill").

The Human Rights Committee of the Law Society of NSW ("Committee") has considered your memorandum dated 14 February 2012 as well as the Bill. The Committee requests that its comments be incorporated into the Law Council of Australia's submission to the Senate Committee.

The Committee strongly supports the Bill.

The Committee notes that the Statement of Compatibility accompanying this Bill provides that the repeal of mandatory sentencing provisions represents an enhancement of human rights by promoting the right to security of person and freedom from arbitrary detention. The Statement of Compatibility also notes that the Bill has the practical effect of promoting the right to equality and non-discrimination as it is a specific group of people that have been affected by the existing mandatory sentencing provisions.

The Committee agrees with the analysis in the Statement of Compatibility.

The Committee's view is that the existing mandatory sentencing provisions should be repealed for the following reasons:

1. They may amount to a contravention of Australia's international human rights obligations under the *International Covenant on Civil and Political Rights* (ICCPR) and *Convention on the Rights of the Child* (CRC). Specifically, and as noted above, they contravene the right to security of person and freedom from arbitrary detention (Article 9(1)). The ICCPR also provides that prison sentences must be subject to appeal (Article 14(5)).

2. They unacceptably restrict judicial discretion. This can lead to sentences that are disproportionate and inconsistent. Comments from the bench support this concern. For example, in a letter to the *Sydney Morning Herald* on the topic of mandatory sentencing in a different context, Justices Fitzgerald, Stein, Beazley and Wood wrote: "It is unjust to imprison offenders without regard to their personal circumstances, life experience, prospects of rehabilitation or other, more suitable, sentences."[1]

The Committee also wishes to express grave concerns that as a matter of practice and procedure, the mandatory sentencing provisions have led to the following outcomes:

1. The detention of minors in adult prisons.[2] The Committee notes that the Human Rights Law Centre states that those who had been detained included children as young as 12.[3] The Committee's view is that this may amount to a contravention of Australia's obligations under the CRC, in particular Articles 37(b), 37(c) and 37(d) which provide that:

> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> (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. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

In its General Comment No. 10 (2007) on children's rights in juvenile justice[4], the UN Committee on the Rights of the Child states that:

> Art 37(d) where the child deprived of liberty has the right to a prompt decision on his/her action to challenge the legality of the deprivation of his/her liberty. The term "prompt" is even stronger - and justifiably so given the seriousness of deprivation of liberty - than the term "without delay" (art. 40 (2) (b) (iii) of CRC), which is stronger than the term "without undue delay" of article 14 (3) (c) of ICCPR.

The UN Committee on the Rights of the Child go on to say:

> If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or

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[1] *Sydney Morning Herald,* 16 March 2000

[2] Lindsay Murdoch, "Australia imprisons Indonesian boys," *Sydney Morning Herald,* 14 June 2011, online at: http://www.smh.com.au/national/tricked-boys-languish-in-adult-prison-20110613-1g0k0.html (accessed 22 February 2012)

[3] Michael Gordon, "Boat crews facing legal 'black hole'", *The Age,* 21 February 2012, p8.

[4] United Nations Committee on the Rights of the Child, Forty-fourth session, Geneva, 15 January-2 February 2007CRC/C/GC/10 25 April 2007

inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt.

In relation to sentencing, the Committee notes also Rule 17 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (1985). This Rule provides, *inter alia,* that in sentencing juveniles, the reaction must be proportionate to the circumstances and to the gravity of the offence, and also take into account the needs and circumstances of the juvenile (Rule 17.1(a)). Further, juveniles should not be incarcerated unless "the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response." (Rule 17.1(c)). Finally, consistent with the CRC, Rule 17.1(d) provides that the well-being of the juvenile should be the guiding factor in the consideration of his/her case.

2. The Committee notes reports that people awaiting a charge for people smuggling offences are being detained for an average of 161 days before being charged.[5] This delay may amount to a contravention of Articles 9(2), 9(3) and 9(4) of the ICCPR which provide that:

> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
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> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Even under Australia's anti-terrorism laws, the maximum period allowed of holding a suspect without laying charges is 8 days.[6]

Thank you again for the opportunity to provide comments. Enclosed for your information is the letter that the Law Society's Criminal Law Committee wrote to the Attorney-General setting out the impact of the mandatory sentencing provisions that apply to people smuggling offences on the NSW court system.

Yours sincerely,

Justin Dowd
President

[5] Note 3.
[6] Part IC of the *Crimes Act 1914* (Cth)

THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: RBG583189

15 February 2012

The Hon Nicola Roxon MP
Attorney-General
M1.21
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,

The impact of mandatory sentencing provisions on the NSW court system

The Law Society's Criminal Law Committee (Committee) has asked that I write to you in relation to the mandatory sentencing provisions that apply to people smuggling offences and the impact on the New South Wales court system.

Under the *Migration Act 1958* a person who is convicted of one of four specified offences faces a mandatory minimum period of imprisonment of five years with a three year non-parole period.

The Committee is opposed to mandatory sentencing because it removes sentencing discretion from the courts that hear and examine all of the relevant circumstances of a particular case. Mandatory sentencing can produce disproportionately harsh sentences and result in inconsistent and disproportionate outcomes. Further, there is no evidence that the harsher penalties provided by mandatory sentencing have any deterrent value.

As you will be aware, trial judges have been speaking out about the injustice of the mandatory sentencing regime and the removal of judicial discretion to pass proportionate sentences.[1] The Chief Judge of the District Court of New South Wales commented that "[t]he people being tried are in fact farmers and fishermen. None of these people are organisers of people smuggling."[2]

The practical implications for the New South Wales court system are of great concern. The mandatory sentencing provisions remove any incentive for an accused to plead guilty, because the sentence upon a finding of guilt after trial would be no greater than the sentence on a plea of guilty, while a trial offers the chance of acquittal. This has resulted in a large number of matters before the District Court, which has placed a

[1] See for instance: *The Queen v Tahir and Beny*, unreported, Supreme Court of the Northern Territory, Mildren J; *The Queen v Mahendra*, Supreme Court of the Northern Territory, Transcript of sentencing proceedings, Blokland J, 1 September 2011.
[2] 'People smugglers swamping the courts', Sydney Morning Herald, 27 December 2011.

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considerable strain on the resources of the courts, Legal Aid NSW and the Office of the Commonwealth Director of Public Prosecutions. There are over 30 people smuggler cases listed from January to early July 2012, and the delay between committal and trial has increased from 13-14 weeks to 19 weeks. A shortage of interpreters and difficulties in obtaining evidence of proof of age for those claiming to be minors has also contributed to delays.

In addition to the issues for the courts and publicly funded agencies responsible for providing resources to these cases is the significant cost of incarcerating people in correctional centres for a minimum of three years.

The view that mandatory sentences for people smugglers should be abolished is one that is universally shared by the prosecution, defence and judiciary.

The Committee supports the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, which is currently before the Senate. The Committee urges you to support the Bill that seeks to remove the mandatory minimum sentencing provisions that apply to certain people smuggling offences.

I look forward to your response.

Yours sincerely,

Justin Dowd
President