BOAT PEOPLE AS VICTIMS OF THE SYSTEM

MANDATORY SENTENCING
OF
"PEOPLE SMUGGLERS"
POLITICS OR JUSTICE?

CLANT CONFERENCE 2013

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HISTORY AND BACKGROUND:

Prosecutions for allegations of people smuggling conducted by the Commonwealth commenced in NSW sometime late in 2010. Prosecutions in other Australian states and territories commenced well before NSW prosecutions.

Between 2008 and 2012 the AFP arrested 544 alleged crew members of which 228 have been convicted. Over the same period, 14 alleged organisers were arrested and only 5 convicted.[1] Legal Aid NSW has granted aid for approximately 116 Indonesian crew members charged with aggravated people smuggling.
The people accused of people smuggling generally fell into one of two categories:

1. An *organiser* who is allegedly involved in the operations and organisation of people smuggling; or

2. An *Indonesian crew member*who was on-board the vessel during the voyage from Indonesian to Australian territorial waters. The role fulfilled by the crewmembersvaried from steering the vessel ultimately into Australian water to simply distributing food and water and generally assisting with the comfort of the "passengers" on the boat.

The large majority of prosecutions (with very few exceptions) were people who fell into the second category mentioned above. There have been very few prosecutions of actual "people smugglers".

Of the trials in NSWthat were the subject of a grant of Legal Aid:

- 38 accused persons were found not guilty by a jury;
- 43 accused persons entered a plea of guilty or were convicted after trial;
- 34 accused persons were either no billed or had the charges withdrawn;

[1] The statistics obtained from the Attorney General's Department and reports by the ABC, see "Migrant Smugglers: Profiles and Prosecutions", TC Beirne School of Law The University of Queensland http://www.law.uq.edu.au/ms-organisers

- The matters that were no billed/ withdrawn were matters where either:
  - age was in issue (as young as 12 years old); or
  - the offender was extended the benefit of a Direction of the Attorney-General.

The cost per trial has been estimated at between $450,000 and $750,000.[2] While in the year 2010-2011 the cost of people smuggling prosecutions was $6.2 million, the amount spent in the seven month period from July 2011 to January 2012 was $7.6 million. These figures do not include the cost of incarcerating those convicted. For the year 2012-2013 the Government will provide $8.8 million to the CDPP to prosecute crew and organisers.[3]

Since 27 August 2012, as a result of a Direction to the Commonwealth DPP from the Attorney-General Nicola Roxon, the number of people smuggling prosecutionsfor offences contrary to s 233C have significantly declined.

ATTORNEY-GENERAL'S DIRECTION:

On 27 August 2012, and pursuant to s 8(1) of the *Director of Public Prosecutions Act* 1983, the Attorney-General gave the Commonwealth DPP a Direction as to the institution and continuation of prosecutions contrary to s 233C *Migration Act* 1958.

The Direction is to the effect that:

- The CDPP **must not** institute, carry on, or continue prosecutions for an offence under s 233C;

- Against a "*member of the crew*";

- Unless satisfied that:
  - The person has committed a "repeat offence"; or

[2] "Prosecution and Punishment of People Smugglers in Australia 2008-2011", A. Schloenhardt and Charles Martin, *Federal Law Review* 2012 Volume 40, page 111 at p 113.

[3] Australian Government, Budget Measures: budget paper no. 2: 2012-2013, op.cit., p83

- The person's role extended beyond that of a crew member; or
- A death occurred in relation to the people smuggling venture.

- In matters to which the above applies, the CDPP must consider instituting proceedings contrary to s 233A.

The definition of "*member of the crew*" includes the captain or master of a vessel.

Unfortunately, the Direction does **not** apply to any proceedings, including appeals, for a person sentenced prior to 27 August 2012.

The Direction applies to a person who has been convicted or pleaded guilty to an offence, but who has not yet been sentenced, prior to 27 August 2012.

The obvious benefit of the above Direction is the avoidance of the application of the mandatory minimum sentencing provisions that attach to an offence contrary to s 233C.

LEGISLATIVE PROVISIONS:

Offences:

The*Migration Act* 1958 presently provides for four different people smuggling offences:

- Section 233A - people smuggling;
- Section 233B - aggravated people smuggling by virtue of exploitation/ danger/ death/ serious harm;
- Section 233C -aggravated people smuggling by virtue of there being at least 5 people;
- Section 233D – supporting the offence of people smuggling.

Mandatory minimum penalty:

The maximum penalties for each of the above people smuggling offences are as follows:

- Section 233A – imprisonment for 10 years or 1000 penalty units[4].
- Section 233B – imprisonment for 20 years or 2000 penalty units.
- Section 233C – imprisonment for 20 years or 2000 penalty units.
- Section 233D – imprisonment for 10 years or 1000 penalty units.

In addition to the maximum penalty prescribed by the legislation, s 236B of the *Migration Act* 1958 prescribes a **mandatory minimum** sentence for persons convicted of an offence against s 233B or s233C.

The mandatory minimum sentence for a conviction in respect to s 233B is 8 years imprisonment with a non-parole period of 5 years.

The mandatory minimum sentence for a conviction in respect to s 233C is:

- First offence - 5 years imprisonment with a non-parole period of 3 years.
- Repeat offence[5] – 8 years imprisonment with a non-parole period of 5 years.

The mandatory minimum sentencing regime does not apply if an offender, establishes on the balance of probabilities that he/she is under the age of 18 years: s 236(2) *Migration Act* 1958.

In relation to ss 233B, 233C offences, the legislation specifically prohibits the court from discharging the offender without proceeding to a conviction unless it is established on the balance of probabilities that the person charged is under 18 years at the time of the alleged offence. The effect of this section is that the Commonwealth equivalent of a "section 10" is not available.

[4]This offence can be dealt with summarily with the consent of the prosecution and defence.
[5] Repeat offence is defined in section 236B(5) *Migration Act* 1958.

Generally in sentence proceedings for all people smuggling offences, the sentence of imprisonmentthat is imposed commences on the date that the boat was intercepted by the Royal Australia Navy or the Australia Customs and Border Protection Service. There is no specific legislative provision that requires this commencement date, but this date is usually conceded by the Commonwealth – possibly because of the very arbitrary nature of the date of charge (persons are frequently detained in Immigration Centre(s) for months before charge).

In these sentence proceedings, the Commonwealth DPP in NSW have generally conceded that time in Immigration custody (both before and after charge) is time in custody for the purpose of backdating the sentence. There has been no distinction drawn between time in Immigration custody verses time in Corrective Services custody.

It is noteworthy to reflect upon the sentences imposed prior to the introduction of the mandatory sentencing regime. In respect of offences committed before the regime was introduced in September 2001, only 39 of 515 people convicted of people smuggling offences were given sentences at or above the current minimum statutory sentences.[6] Of these, only one was given a sentence of eight years, the current statutory minimum for repeat offenders. By contrast, 47 were released immediately and 97 received terms of less than one year.[7]

ISSUE OF PAROLE:[8]

Prior to 4 October 2012, a Federal offender would be granted automatic parole at the expiration of the non-parole period if the term of imprisonment was 10 years or less.

On 4 October 2012, section 19AL *Crimes Act* 1914, commenced. Section 19AL *Crimes Act* 1914 provides:

[6] Attorney General's Department, Submission number 17, cited in article by A Trotter and M Garozzo, "Mandatory Sentencing For People Smuggling: Issues of Law and Policy, *Melbourne University Law Review* 2012, Volume 36:553 at 564

[7] Ibid

[8] Special thanks to Juliana Crofts from the Commonwealth Crime Unit, Legal Aid NSW for sharing her insight on this topic.

Release on parole--making of parole order

*(1) The Attorney-General must, before the end of a non-parole period fixed for one or more federal sentences imposed on a person, either make, or refuse to make, an order directing that the person be released from prison on parole (a **parole order**).*

Note 1: For when a person is released on parole in accordance with a parole order, see section 19AM.

Note 2: A person released on parole must comply with any conditions of the parole order during the parole period (see sections 19AMA, 19AN and 19AU).

Note 3: Subsection (4) of this section affects the operation of subsection (1) if the person will be serving a State or Territory sentence at the end of the non-parole period.

(2) If the Attorney-General refuses to make a parole order for a person under subsection (1) or paragraph (b) of this subsection, the Attorney-General must:

(a) give the person a written notice, within 14 days after the refusal, that:
(i) informs the person of the refusal; and
(ii) includes a statement of reasons for the refusal; and
(iii) sets out the effect of paragraph (b) of this subsection; and

(b) reconsider the making of a paroleorder for the person and either make, or refuse to make, such an order, within 12 months after the refusal.

(3) A parole order must:

(a) be in writing; and
(b) specify whether or not the person is to be released subject to supervision; and
(c) if it is proposed that the supervision period for a person released on parole subject to supervision should end before the end of the person's parole period--specify the day on which the supervision period ends.

(4) Despite subsection (1), if the person will be serving a State or Territory sentence on the day after the end of the non-parole period, the requirement under that subsection to make, or refuse to make, a parole order does not apply:

(a) for a federal sentence, or federalsentences, that do not include a life sentence--if the parole period would end while the person would still be imprisoned for the State or Territory offence; and

(b) for a federal sentence, or federalsentences, that include a life sentence--until the release of the person from prison for the State or Territory offence (but a decision may be made under that subsection at any time during the 3 month period before the person's expected release); and

(c) in any case--if the State or Territory sentence is a life sentence for which a non-parole period has not been fixed.

Note: The effect of this subsection and subsection 19AM(2) is that a parole order may sometimes still be made for a person while the person is serving a State or Territory sentence, but the person will not be released in accordance with the parole order until the person is released from prison for the State or Territory sentence.

This provision effectively says that in the case of a federal offender, who has a sentence specifying a non-parole period and parole period, the Attorney-General **must** make or refuse an order directing that the person should be released from prison to parole.

This provision appears to only apply to sentences of 3 years or more because s 19AC *Crimes Act* 1914 says that if a person receives a sentence of less than three years the court must fix a recognisance release order and must not fix a non-parole period.

Section 19AL *Crimes Act* 1914, applies to all persons presently serving a federal sentence. The effect of this provision is that all persons presently serving a sentence for a s 233C people smuggling offence will be required to appear before the Commonwealth equivalent of the Parole Authority (which is understood to be the Federal Offenders Unit).

APPLICATION FOR "RELEASE ON LICENCE":

Section 19AP(1) *Crimes Act* 1914, permits the Attorney-General to grant a licence releasing a person from prison who is serving a federal sentence.

Section 19AP(4) provides that the Attorney-General may only grant such a licence if satisfied that "exceptional circumstances" exist to justify the grant of the licence.

Such an application must be made in writing and specify the exceptional circumstances relied on to justify the grant of the licence.

The lawyers in the Commonwealth Crimes Unit, Legal Aid NSW[9] diligently submitted applications for "Release on Licence" on behalf of many offenders who are presently serving the mandatory minimum sentence for offences contrary to s 233C. It is understood that every application has unfortunately been unsuccessful. The options as to an administrative law challenge to the licence refusal are presently being considered. Further administrative challenge will be pursued if it is available.

ELEMENTS OF THE OFFENCE:

(i) "Unlawful Entry":

"*233C (1). A person (the **first person**) commits an offence if:*

*(a) The first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least 5 person (the **other persons**); and*

(b) At least 5 of the other persons are non-citizens; and

(c) The persons referred to in paragraph (b) who are non-citizens had, or have, no lawful right to come to Australia.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

In 2011 three cases before the courts in NSW, the Northern Territory and Victoria attempted to challenge the common perception that asylum seekers smuggled into Australia had no lawful right to come Australia. Essentially, it was argued that those arriving in Australia have an entitlement to seek protection under the Refugee Convention. In ***R v Ambo*** (2011) DCLR (NSW) 299, Knox J rejected this argument. Blockland J of the Supreme Court of the Northern Territory also rejected the argument in ***R v Ahmed*** (2011) 254 FLR 361.

The argument was also raised in the Victorian case of ***CDPP v JekyPayara*** (2011) Vict CA. Whilst that case was reserved before the Victorian Court of Appeal, the point was superseded by the introduction of the *Deterring People Smuggling*

[9] Led by Ms Frith Way, Solicitor in charge

*Act*2011 (Cth) in November 2011 through which the Government removed any residual doubt that persons arriving in Australia without a valid visa have a lawful right to enter.[10]

(ii) **"Knowledge of Destination":**

There have been two recent NSW authorities that considered the elements of the offence, and in particular, that the Crown must prove beyond a reasonable doubt that the accused person knew that they were taking people to a destination that was part of Australia, and, that the *accused knew* was part of Australia. The NSW authorities relied upon the Victorian decision of ***PJ v The Queen*** [2012] VSCA 146.

A common feature in the evidence in these trials is the alleged use of the words "Christmas", "Ashmore", "Ashmore Reef" or "Palau Pasir" (Ashmore Reef in the Bahasa Indonesian language) by the Indonesian crew. The issue in a number of trials has been whether the use of those words may be sufficient to establish that the accused person knew that they were facilitating the bringing or coming of people to Australia. A jury direction was frequently sought by those representing the accused, to the effect that the jury had to be satisfied that the accused knew that they were taking people to Ashmore **and** that the accused knew that Ashmore was a part of Australia. As a matter of law, various places - such as Ashmore Island, Christmas Island, Browse Island – are part of Australia but the issue was whether the Crown had to prove that the *accused knew* that those places were part of Australia.

In ***Sunada v R; Jaru v R*** [2012] NSWCCA 187 the Court (Macfarlan JA, Price, McCallum JJ) said (at [5]):

> *"In their grounds of appeal against conviction filed on 3 May 2012, the appellants contended that the trial judge's direction was erroneous. On 29 June 2012 the Victorian Supreme Court delivered judgment in PJ v R [2012] VSCA 146, holding that proof of an offence under s 233C of the Migration Act requires proof that the accused intended that relevant persons be brought to a destination that was a part of Australia* ***and that the accused knew was a part of Australia*** *([5] and [44])." (emphasis added)*

[10] Supra n 2 at p 137

In ***PJ v The Queen*** [2012] VSCA 146 the Court (Maxwell P, Redlich and Hansen JJA) said (at [5]):

> *"5 For reasons which follow, we would grant leave to appeal and allow the appeal. For the applicant to be found guilty of the offence under s 233C, he must be shown to have intended that the relevant persons be brought to Australia. That is, he must have been aware that Australia was the intended destination."*

And later (at [44]:

> *"44 Unsurprisingly, this definition of 'no lawful right to come to Australia' is concerned with – and only with – rights of entry into Australia. It follows, in our view, that by requiring proof of the defendant's recklessness as to the absence of that lawful right, Parliament intended to require proof that the accused was 'aware of a substantial risk' that none of the relevant persons had a lawful right to come to Australia. That is, the defendant must have turned his mind to the existence of that risk, in relation to that particular country, and decided, unjustifiably, to take the risk. On this view, the word 'Australia' when used in paragraph (c) does not mean 'the intended destination of the voyage, provided that it is in fact part of Australia'. **It means a place known to the accused as Australia**". (emphasis added)*

In ***Amomalu v R***[2012] NSWCCA 255 the jury were told that the relevant intention would be proved if "the accused knew that he was helping to take people to Australia". The court (MClellan CJ at CL, Rothman and Adamson JJ) said (at [82]):

> *82. To my mind his Honour's direction was not sufficient to effectively isolate the issue the jury had to determine …… Although it was correct to instruct the jury that they must be satisfied that the appellant knew that he was helping take people to Australia, **the issue in this case was whether, although he knew the boat was going to a place called Ashmore Reef, he knew that Ashmore Reef was a part of Australia.** The emphasis in both Sunada and PJ was on the accused knowing that the intended destination of the voyage was **a place known to the accused as Australia.** His Honour's direction did not achieve that objective". (emphasis added)*

<u>DIRECTED VERDICTS:</u>

The Full Court of the Supreme Court of South Australia in ***R v Zainudin*** [2012] SASCF 133 (14 December 2012) considered as a ground of appeal the refusal by the trial judge to give a directed verdict. The ground of appeal was essentially that there was no basis on which an inference was capable of being drawn or a finding was capable of being made that Mr Zainudin knew the intended destination of the passengers was Australia.

The Crown case against the appellant was not that he knew that the island, which the boat was approaching, was part of Australia, but rather that he knew in a more general sense that the destination of the passengers was Australia. The appellant was a member of the crew. The passengers knew the ultimate destination was Australia and spoke to each other about “Australia”. However, there was no evidence in the trial that the Indonesian crew used the word(s) “Australia” or “Christmas Island”, nor that these words were said in sufficient proximity to the Indonesian crew that they would hear. The Indonesian captain of the vessel jumped overboard and swam to another boat saying “you have now arrived in Australia” – there was no evidence that this was heard by the Indonesian crew.

At trial the Crown relied upon the following in submitting against a directed verdict:

1. The journey was a “purposeful journey” with a specific destination as opposed to an “aimless cruise”.
2. Christmas Island is 200 NM south of the Indonesian mainland and that south of Indonesia there were no other islands apart from Australia.
3. The conversation of the passengers where the word“Australia” was used.
4. The jumping overboard of the Captain.
5. The inherent likelihood, as a matter of human nature, that the Indonesian crew and Captain would discuss the destination and that the crew would have been informed by the Captain that the destination was Australia.

The Full Court of the Supreme Court of South Australia allowed the appeal. The jury’s verdict was set aside and substituted with a verdict of acquittal. In respect to the matters relied upon by the Crown in answer to the directed verdict submissions the Full Court noted the following:

1. Whilst the purposeful nature of a journey coupled with other circumstances may lead to an inference that the boat was involved in “people smuggling” there was no basis to infer merely from the “purposeful nature of the journey” that the appellant knew that the island was Christmas Island or that it as part of Australia.

2. Contrast was drawn to the distance of Christmas Island ("CI") from Australian mainland (700NM). It was noted:
    - One would not "naturally assume" that CI is an Australian territory rather than Indonesian or some other nation.
    - There is no basis to find that the general knowledge amongst Australians was that the island in the position of CI is named CI or is part of Australia.
    - There is no basis to attribute to an Indonesian crew the general knowledge of Australians.
    - It was an agreed fact in the trial that Indonesia comprises over 17,500 islands. There was discussion as to an Australian-centric view verses the Indonesian-centric view.

3. In response to the Crown submission that there is no other island/land mass south of Indonesia than Australia, the Full Court corrected and qualified the geographical facts noting:
    - If one proceeds due south from the western half of Java one would not reach land until Antarctica.
    - If one proceeds generally southerly from Java, New Zealand is also south of Java.
    - The boat was not proceeding south but rather south-west.

4. In relation to the conversations of the passengers and words/actions of the Captain – there was no evidence that the appellant heard or understood those words.

5. In relation to the submission that it was "human nature" to discuss the destination, the Full Court noted the absence of evidence as to the cultural position of the appellant and that there was no basis to draw such an inference.

MANDATORY SENTENCING REGIME:

There has been significant criticism of the mandatory sentencing regime, not least by judicial officers who have referred to the mandatory requirements as "completely out of kilter"[11], "savage",[12] and the "antithesis of sentencing".[13]

In light of the arguments put in support of the challenge to the constitutional validity of mandatory sentencing, it is apt to reproduce in more detail some of the sentencing remarks made by judges imposing mandatory sentences.[14]

> ***R v Joni Balu& Tobin Seukh,*** Transcript of Proceedings, SCC 21031840 and 21035881, on file with the UNSW Human Rights Clinic per Justice Barr.
>
> > *' .. ,in your case I take into account your plea of guilty and your cooperation with theauthorities mentioned earlier. I take into account, in particular, your youth and absence ofprior relevant offending. I note that in respect of the Migration Act offence you were barely18 years old at the time of offending. I also take into account the fact that your role was very low in, if not at the bottom of, the hierarchy of participants involved in the organisationmarketing and putting into effect the voyage you undertook as a crew member.*
> > *I have concluded that a sentence considerably less than the mandatory minimum would beappropriate. However, it is not relevant for present purposes that I indicate what that lessersentence might have been, since for reasons I indicated earlier, I am required to impose the mandatory minimum'.*
>
> ***R v Mahendra,*** NT Supreme Court, 1 September 2011, per Blockland 1.
>
> > *'In my view, a sentence proportionate to the criminality would have been, consistent withgeneral sentencing practice, approximately one year to 18 months imprisonment... Unfortunately, the five year sentence I am obliged to impose has an arbitrary element to it,as do most forms of mandatory imprisonment. Australia is a party to the international covenant on civil and political rights. Article 9.1, in part states that no-one shall be subjected to arbitrary arrest or detention. Assigning a five year sentence of imprisonment, withoutjudicial consideration of the gravity of the offence, in terms of the circumstances of theoffending and the offender may, in my view, amount to arbitrary detention ... because it isnot a sentence that is a proportional sentence ... In this particular case it is particularly sobecause there is a failure to differentiate people in the circumstances of Mr*

[11] Transcript of proceedings (Sentence), *R v Nafi Supreme Court of the Northern Territory*, Kelly J 19 May 2011 p6

[12] Transcript of proceedings (Sentence) *R v Hasim* (District Court of Queensland) 1196/2011, Martin DCJ 11 January 2012

[13] *Trenerry v Bradley* (1997) 6 NTLR 175, 187 per Mildren J

[14] Standing Senate Committee on Legal and Constitutional Affairs, Document tabled by the Commonwealth Director of Public Prosecutions at public hearing on 16 March 2012.

Mahendra..."from those who actually orchestrate the offence on a grand scale ... It is of concern, the sentence that I am about to pass in this case may amount to a contravention of some of themost fundamental and widely accepted principles of international justice. In relation to this particular accused, because I am unable to pass a proportional sentence, but rather amforced to sentence on the arbitrary term of five years'.

R v Karim,NSW District Court, 27 July 2011, per Conlon J.

'In my view the present case provides a glaring example of how mandatory penalties can sometimes prohibit a court in delivering a fair and just result and a sentence that is of'severity appropriate in all the circumstances' of the case [as required by the Crimes Act1914 (Cth)]. If I was to apply the usual sentencing principles to the present balancing exercise, I would have imposed a non-parole period (minimum term) of about eighteen months. However, the provisions of s233C make it unnecessary to further consider thematter ... [have little doubt that had mandatory minimum sentence provisions not applied,the present matter would most likely to have resolved by way of a plea saving much time and expense'.

R v Ambo[2011] NSWDC 182 (25 November 2011), per Knox J.

'Iagree with respect with the comments of Mildren J of the Northern Territory SupremeCourt in Trenerry v Bradley referred to by Kelly J in R v Dokeng that ' ... prescribed minimummandatory sentencing provisions are the very antithesis of just sentencing'. Nevertheless, Iam obliged to follow the law as it is'.

R v Nafi,NT Supreme Court, 19 May 2011, per Kelly J (in relation to a separate offence carrying aneight year mandatory minimum sentence):

'I would not consider it appropriate to hand down a sentence anywhere near as severe asthe mandatory minimum sentence of eight years imprisonment nor would I consider itappropriate to fix a non-parole period as long as five years. Such a sentence is completelyout 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 seriousharm to victims ... Had it not been for the mandatory minimum sentencing regime, taking into account the maximum penalty prescribed for this offence and the factors I have already set out I would have considered an appropriate penalty to have been a term ofimprisonment for three years with a non-parole period of 18 months. I thereforerecommend that the Commonwealth Attorney-General exercise his prerogative to extendmercy to you, Mr Nafi, after you have served 18 months in prison'.

***R v Nasir&Jufri**, OLD Supreme Court, 2 December 2011, per Atkinson J.*

'The serious offenders at whom section 232A of the Migration Act must surely be aimed at those who profit from people smuggling and do it for the purpose of making money rather than people like yourselves who they must know are certain to be caught and who live insuch impoverishedcircumstances that the small amount of money that you would make from a journey such as this makes it worth taking the risk,.

THE CHALLENGE TO VALIDITY OF THE MANDATORY SENTENCING REGIME

Although judicial consideration of the constitutionality of mandatory sentencing is sparse, in the cases where it has been raised, no serious doubts have been cast on its validity.[15] In ***R v Ironside*** (2009) 195 A Crim R 483 (SA CCA), the Court was dealing with mandatory minimum non-parole period under ***The Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007 (SA***). The legislation provides that in the absence of "special reasons" the court is to fix a mandatory minimum non-parole period for manslaughter being four-fifths the length of the head sentence.

In***R v Ironside***(2009)195 A Crim R 483(SA CCA) per Doyle CJ (Gray J concurring in a separate opinion, Kourakis J concurring with additional observations):

> *24 The Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007 (SA) (the 2007 Act) amended the Act to prescribe a mandatory minimum non-parole period in respect of any offence that is "a serious offence against the person" as defined by s 32(10) of the Act. The offence of manslaughter is such an offence……..*
>
> *68 The provisions of s 32A (set out earlier in these reasons) govern the application or effect of the specification of a mandatory minimum non-parole period in s 32(5)(ab) and (5)(ba). Under s 32A it is for the sentencing court to decide whether the non-parole period will be shorter than, longer than, or equal to, the mandatory minimum non-parole period. It is the court that fixes the non-parole period, but under s 32A it does so by reference to the mandatory minimum non-parole period. The provisions in s 32A(2), supplemented by s 32A(3), regulate how the court makes that decision. I have explained earlier in my reasons how these provisions operate.*
>
> *69 When applying these provisions in a particular case, the court will make findings of fact in the usual way, will apply the statutory provisions to the facts as found, and then will make an evaluative judgment in the usual way, although now constrained by the provisions of s 32A.*
>
> *70 While the provisions referred to govern the approach to the fixing of a non-parole period, and the provisions of s 32A impose constraints on a court that do not exist when fixing a non-parole period not affected by s 32A, the provisions inserted by the 2007 Act do not dictate the outcome of the process, nor determine what the non-parole period will be in a particular case. That remains the responsibility of the court. As I have already said, in cases affected by s 32(5)(ab) and (5)(ba), the court fixes*

[15] "Mandatory Sentencing for People Smugglers", *Melbourne University Law Review* 2012 Volume 36:553 at 591.

the non-parole period, but does so using the mandatory minimum non-parole period as a benchmark, and within the constraints set by s 32A.

71 It is relevant to bear in mind, when considering these matters, that if Parliament had chosen to provide that in relation to offences of a certain kind, the non-parole period should be a specified proportion of the head sentence, the court having no power to change that specified proportion, there could be no complaint about the validity of Parliament doing so. One must be careful to avoid proceeding on the misconception that Parliament may not fix the non-parole period, or the proportion to be borne by the non-parole period to the head sentence, in relation to particular offences. In Palling v Corfield (1970) 123 CLR 52 at 58 Barwick CJ said:

"It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute. Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. 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. But whether or not such a discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament. It cannot be denied that there are circumstances which may warrant the imposition on the court of a duty to impose specific punishment. If Parliament chooses to deny the court such a discretion, and to impose such a duty, as I have mentioned the court must obey the statute in this respect assuming its validity in other respects. It is not, in my opinion, a breach of the Constitution not to confide any discretion to the court as to the penalty to be imposed."

Other members of the court agreed on this point: Menzies J (at 64-65); Windeyer J (at 65); Owen J (at 67); Walsh J (at 68); Gibbs J (at 70).

72 Whatever one might think about the complexity of the process required by the 2007 Act, and whatever one might think about the utility of constraining the ability of the court to fix what it considers to be an appropriate non-parole period in the light of all the circumstances (and this is a matter that has been resolved by Parliament by enacting the 2007 Act) there is nothing about the task of a sentencing court under these provisions that is foreign or inimical to the exercise of judicial power. Nor is there anything about the task of the court that could cause one to say that the task is not one appropriate for a court.

In ***Margaret NalyirriWynbyne v Marshall***(NT SC)(1997) 99 A Crim R 1

per Martin CJ observed:

> *Pp 3-4: " In its operation the law will be harsher on some offenders than the law prior to its enactment. In so far as the minimum term is required to be imposed, it does not discriminate in relation to many matters relevant to sentencing, such as the value of the goods stolen or damaged, the circumstances in which the offence is committed or the circumstances of the offender. The intention of the Parliament is clear. It imposes a duty on the courts, and, in my opinion, the duty here imposed is within the competence of Parliament. That proposition is firmly established in Australia by the decision of the High Court in Palling v Corfield(1970) 123 CLR 52. There is nothing in the reasons for the decision in that case that would indicate that they were in any way dependent upon the nature of the legislation there in question.*

The High Court refused leave to appeal the constitutionality of the Northern Territory's mandatory minimum sentencing regime in 1998.[16]

In ***Bahar v The Queen***(2011)214 A Crim R 417 (WA CA) it was statedper McLure P, Martin CJ and Mazza J concurring:

> *46 Taking into account the statutory maximum penalty is well accepted and uncontroversial. The nomination of a statutory maximum penalty for a statutory offence has never to my knowledge been regarded as an inappropriate incursion or limitation on the scope of the judicial sentencing discretion. It is and always has been properly regarded as being within the sole purview and responsibility of the legislative arm of government. Statutory minimum penalties are less common and are often accompanied by critical judicial comment, curial and extra-curial: see Trenerry v Bradley (1997) 6 NTLR 175 at 187, 93 A Crim R 433 at 445. However, a statutory minimum penalty, like a statutory maximum, is a legislative direction as to the seriousness of the offence. No-one has (yet) suggested that a minimum statutory penalty itself substantially impairs or is incompatible with the institutional integrity of the courts: see Palling v Corfield (1970) 123 CLR 52 at 58; R v Ironside (2009) 104 SASR 54, 195 A Crim R 483.*

KARIM v R; MAGAMING v R; BIN LAHAIYA v R; BAYI V R; ALOMALU v R

The NSW Court of Criminal Appeal in ***Karim v R; Magaming v R; Bin Lahaiya v R;Bayi v R; Alomalu v R*** [2013] NSWCCA 23 considered a challenge to the constitutional validity of the provisions of the *Migration Act*1958 that provide for the mandatory minimum sentencing scheme.

[16] Transcript of proceedings ,*Wynbyne v Marshall* (High Court of Australia, D 174/1997. Gaudron and Hayne JJ, 21 May 1998)

Four of the applicants appealed against sentences imposed upon them for offences pursuant to s 232A and the new s233C. They were sentenced to the mandatory term of 5 years with a non-parole period of 3 years. Mr Bayu, who had a prior matter on his record, was sentenced to 6 years with a non-parole period of 3 year and a half years.

The sentence appeals involved a challenge to the constitutional validity of the provisions of the *Migration Act*1958 and to the approach taken to the imposition of sentences, accepting the validity of the provisions.

The Arguments:

(i) Constitutional validity

The arguments relied upon to challenge the validity of the provisions overlapped to some degree. Essentially, they were threefold:

(a) Section 233C purports to confer non-judicial power to State courts, because the power in s 233C cannot be exercised in accordance with fundamental principles of equal justice and cannot be exercised other than arbitrarily or capriciously, or without giving reasons.

(b) Section 233C purports to confer judicial power to the Executive. This argument focused on the overlapping nature and terms of the offences in the old s 233 and s 232 A. In the circumstances where there were more than five people involved, the Executive, through the DPP or the Attorney General, if a power of direction was used, was given a choice as to which provision the person could be charged under. This illegitimately conferred an aspect of judicial power (the choice of sentence) upon the Executive.

(c) Section 233C is inconsistent with Chapter III of the *Constitution* in that it impermissibly directs State courts as to the manner and outcome of the exercise of their jurisdiction to sentence federal offenders, thereby impairing the character of those courts as independent and impartial tribunals. The

argument focused upon section 233C being a legislative direction to the court by reason of the mandatory character of the sentence to be imposed.

(ii) Challenge to the approach in sentencing assuming constitutional validity:

In the event that the provisions were constitutionally valid, it was put that the "***Bahar"*** approach adopted in the sentencing proceedings was wrong. Instead the "***Pot"*** approach should have been adopted.

In ***R v Pot, Wetangky and Lande (***unreported, NT Supreme Court, Riley CJ, 18 January 2011), the offenders had pleaded guilty to offences under the old s 232A. The approach to sentencing was to apply Pt 1B of the *Crimes Act*1914 to come to a view about an appropriate sentence in all the circumstances of the offence. If the sentence considered thus was less than the mandatory minimum non-parole period and head sentence, it would be raised to meet the mandatory requirements of s 233C.

The Western Australian Court of Appeal disagreed with this approach ***in Bahar v R*** [2011] WASCA 249; 255 FLR 80. Mclure J concluded that the general sentencing principles in Pt 1B applied, but between the maximum and mandatory minimum sentences, being the ceiling and the floor of punishing.

In determining the appeal, the court considered the following:

- The court noted the increase in the maximum penalty and that the clear policy of Parliament was to increase penalties and express a view as to the seriousness of the offending [23] and [25].

- The court recognised the seriousness of the conduct in these offences [30] and that deterrence of the illicit trade in smuggling people was both a legitimate and important public policy of the Australian Parliament [31].

- The court rejected the argument challenging the constitutional validity of the mandatory minimum sentencing regime considering itself bound by the High

Court authorities of ***Fraser Henleins***[17](which involved thelegislative structure in s 4 of the *Black Marketing Act 1942*) and ***Palling v Corfield***. [18]

- The Court stated that the High Court authorities provided "unequivocal words supporting the legitimacy of mandatory sentences and the removal of discretionary sentencing authority from the court" [87].

Allsop P with Bathurst CJ agreeing said:

> ***[116] The mandatory minimum penalties are severe, indeed harsh. That is the will of Parliament: for other than a repeat offence, say a first offence, imprisonment for five years (with a three year non-parole period), which may be inflicted upon an illiterate and indigent deckhand, in circumstances where he or she or someone like him or her could have been prosecuted under a provision whereby the sentencing judge would have the duty to assess all the offender's circumstances, including the objective seriousness of his or her offending before deciding on an appropriate sentence****.*
>
> *[117] The offender (thus incarcerated for 3 to 5 years) could be **justified** in concluding, in a simple way, that, as a matter of substance, he or she had his or her **sentence in a significant respect dictated, in advance, by a decision of the Australian executive government by its choice of one of two alternative charges**, and that his or her stay in prison has been determined out of public view for reasons of administrative or **political choice, and not law**. The offender could think that he or she has been treated in a way that was unequal to either someone charged under the other provision or to his or her legal responsibilities to the Australian community under the other provision.*
>
> *[118]That simple approach attracted the support in 1944 of Sir Frederick Jordan. To use and paraphrase the words of Sir Frederick Jordan, **in a civilised community the exercise of such power to incarcerate should not be so transparently a choice for the Executive without the existence of any relevant differentiating factor between the two provisions, both dealing with substantially the same conduct.** As reasoning to a legal consequence, however, this approach is precluded by the authorities to which I have referred.*
>
> *[119] The norms and conceptions inhering in the exercise of judicial power incorporate from their roots in the common law the norms that now characterise international human rights - a rejection of inequality, arbitrariness, discrimination, unfairness, injustice and cruelty. That the common law and legal punishment in earlier eras exhibited a severity that might shock today, does not mean that by the values and political and legal structures of the time any severity could not be justified, nor does it mean that contemporary conceptions of punishment need embrace any such*

[17] [1945] 70 CLR 100
[18] [1970] 123 CLR 52

severity. Indeed, these considerations reveal the effect of changing circumstances on the content of law and its informing norms.

[120]For mandatory minimum sentences to be unconstitutional, a Constitutional constraint upon Parliament must be recognised that the assessment of a just and appropriate sentence is ultimately a judicial task, by the deployment of judicial method. The reconciliation of such a proposition with the authority of the Parliament to set societal norms involves deep questions of the relationship between Parliament's power and the inhering essence of law and judicial power. The source of an affirmative answer to the question of the existence of such constraint may lie in the rooted strength of the conception of equal justice and of the rejection of any power in Parliament to require courts to make orders that are arbitrary, grossly disproportionate or cruel by reference to inhering norms of fairness, justice and equality.

*[121]**Here, in relation to these offences, an illiterate and indigent deckhand having little or no knowledge of, or contact with, the organisers of the smuggling, and knowing little about the voyage in respect of which he or she was charged, pondering his or her incarceration for five years for a first offence, could legitimately conclude that, at a human level, he or she had been treated arbitrarily or grossly disproportionately or cruelly.***

*[122]**Once again, existing authority precludes such notions informing reasoning to a relevant legal consequence**.*

[123] If I may respectfully say, it may be that a view as to the potential injustice of the operation of mandatory minimum sentences led to the direction on 27 August 2012 by the Commonwealth Attorney-General to the Director of Public Prosecutions under the Director of Public Prosecutions Act 1983 (Cth), s 8(1) that prosecutions under new s 233C were not to be instituted, carried on or continued against a crew member, unless it was a repeat offence, or the person's role extended beyond being a crew member or a death had occurred on the voyage. If I may also respectfully say, the salutary amelioration of the potential arbitrary and harsh effect of s 233C on illiterate and indigent foreign seafarers by such direction rather makes Sir Frederick Jordan's point as to the central place of the Executive in the sentencing outcome under the section's operation with two overlapping provisions.

Special Leave

An appeal has been lodged against the NSW Court of Criminal Appeal decision on two bases. The first relates to the issue of constitutional validity of the provisions. It is noteworthy that although the NSWCCA rejected this ground of appeal, it did so being constrained by the binding effect of ***Fraser Henleins*** and ***Palling***. However, Allsop P reiterated the fundamental principles characterising the operation of judicial function: at [111]

> "*The operation of norms of fairness, justice and equality before the law and their reflections in a lack of arbitrariness, and a lack of differential treatment or discrimination without a reasonable relation to a proper objective, characterise the judicial process and its expected outcomes".*

It is difficult to reconcile this statement of principle with the remarks on sentence made by a number of judicial officers when sentencing crew members to mandatory periods of imprisonment.

A separate but related appeal has been lodged on behalf of Mr Bayu. This appeal deals with the discrete issue of the proper approach to be taken assuming constitutional validity. While the NSWCC, in dismissing the applicant's appeal, held that ***Bahar*** was not 'plainly wrong' (at [44]), the Court accepted that the alternative view, expressed in ***Pot*** and relied upon by the applicant was open and arguable (at [44]).

It is anticipated that the applicant will argue that the ***Pot*** approach results in fewer unjust sentences being imposed. The approach taken in ***Pot*** compromises proportionality by increasing sentences of only those offenders who would have otherwise received sentences less than the statutory minima, whereas the approach taken in ***Bahar*** compromises proportionality by increasing the levels of sentences imposed on *all* offenders.

Politics or Justice?

Answering this question requires an assessment of whether mandatory sentences under the ***Migration Act*** 1958 can be said to fulfil the objectives of sentencing. It is argued that the mandatory provisions reflect the need to combat the seriousness and prevalence of this kind of offending. But the effectiveness of ***general deterrence*** has been questioned by a number of judges who have expressed misgivings in these cases.[19]

[19] Supra n 2 at p 127: *R v Dopong&Ors* (unreported Supreme Court of the Northern Territory, Barr J 25 January 2011; *R v Satoso&Ors* (unreported, Supreme Court of the Northern Territory, Riley CJ 18 January 2011; *R v Hasanusi* (unreported, District Court of Western Australia, Fenbury DCJ, 21 April 2010, *R v Pandu&Ors*(unreported, Distrct Court of Western Australia, Eaton DCJ, 21 May 2010

Given the profile of those offenders who are apprehended, convicted and sentenced in Australia, it is difficult to see how the imposition of mandatory sentences will deter similar individuals from undertaking the ventures. Furthermore, after more than a decade of mandatory minimum sentencing of people smugglers, the number of vessels entering Australian waters continues to rise.[20]

The principle of proportionality is compromised to a significant degree in these cases. Often the moral culpability, or lack thereof, cannot be appropriately reflected in the sentence imposed. In some cases the passengers have expressed gratitude to the crew who brought them to Australia. In ***R v Bumiamin***[21], for example, passengers gave money to the offender and his son, believing they deserved it for having taken them to Australia. In ***R v Nafi***, Kelly J questioned the moral culpability of the offenders in these cases:

> *"By committing the offence to which you have pleaded guilty, you have broken Australian law and must suffer the consequences. However, it cannot be said that, apart from the existence of that law, there is any moral culpability in helping to transport willing passengers to a place where they want to go."*[22]

Parity between offenders is compromised under this scheme of mandatory sentences. Because judges are reluctant to impose sentences that many view as disproportionate in the circumstances, they have tended to impose the mandatory minimum notwithstanding the different roles played by the different crew members. In ***R v Tahir&Anor,*** Mildren J noted:

> *The other danger of mandatory sentencing, apart from the fact that the Court is required to impose a sentence which is greater than the justice of the case would otherwise require include the fact that principles of parity between offenders has little or no role to play. All offenders that fall within the class will be treated equally no matter what their level of criminality will be.*[23]

The decision in ***Bahar v The Queen*** may have restored the parity principle somewhat in that the Court held that the mandatory minimum should be treated as

[20] Supra n 2 at p 128
[21] Unreported, Supreme Court of the Northern Territory, Southwood J 21 January 2011
[22] See supra n 2 at p 137
[23] Unreported, Supreme Court of the Northern Territory Mildren J 28 October 2009 p 4

the base penalty, reserved for those offences at the bottom of the range of objective seriousness.

Rehabilitation, as a sentencing objective, is not fulfilled under the mandatory sentencing regime. The offenders are incarcerated in institutions far from their families. The offenders, in the main, are not literate in English and cannot therefore take part in any education or work programs.

Several objectives of sentencing that are critical to other offences are simply inapplicable to those convicted of people smuggling offences.[24]

Conclusion

On 12 June 2013 special leave was refused in ***Bayu v The Queen***. The point taken was that there was an element of "double punishment' in requiring sentencing judges to take into account general deterrence as a purpose of sentencing, where general deterrence was already reflected in the policy underpinning the mandatory sentencing regime. The High Court held that The NSW CCA decision in Bayu is not "attended with sufficient doubt to warrant the grant of special leave".

Special leave was granted in ***Magaming v The Queen*** on a number of grounds. The appeal will involve the important question of whether there is a class of mandatory minimum penalty where the range of offending behaviour to which it applies means that its application will be "inescapably arbitrary or capricious in some way which is incompatible with the functions that can be conferred on a Chapter III court".

Dina Yehia

(Acknowledgment and special thanks to Angela Cook, Barrister, Forbes Chambers)

[24] Supra n 15 at p 557