



Submission

Senate Legal and Constitutional Affairs Legislation Committee
Inquiry into the Customs and Other Legislation Amendment Bill 2016

Never Stand Still

Law

Andrew & Renata Kaldor Centre for International Refugee Law

8 April 2016

Dear Committee Secretary,

We welcome the opportunity to provide a submission to the Committee's Inquiry into the Customs and Other Legislation Amendment Bill 2016 ('the Bill').

Our submission focuses on Schedule 6 of the Bill, which proposes changes to section 40 of the Maritime Powers Act 2013 ('the Act'). These provisions replicate those contained in Schedule 4 of the Migration and Maritime Powers Amendment Bill (No. 1) 2015 ('Migration and Maritime Powers Bill'). That bill was referred to the Committee in September 2015 and the Andrew & Renata Kaldor Centre for International Refugee Law made a submission to that inquiry.¹ The present submission reiterates the concerns we expressed there about those provisions, and in addition rebuts comments made by the Department for Immigration and Border Protection during that inquiry.

Section 40 of the Act sets out certain limitations on the exercise of maritime powers. The amendments proposed in Schedule 6, section 2, of the Bill provide that limitations expressed in section 40 will not apply to an exercise of powers if:

- (2) ...
 - (a) the exercise of powers:
 - (i) is part of a continuous exercise of powers that commenced in accordance with any applicable requirements of this Part (disregarding this subsection); and
 - (ii) occurs in the course of passage of a vessel or aircraft through or above waters that are part of a country; and
 - (b) a relevant maritime officer, or the Minister, considers that the passage is in accordance with [the United Nations Convention on the Law of the Sea (the Convention)].
- (3) An exercise of powers in reliance (or purported reliance) on subsection (2) is not invalid because of a defective consideration of the Convention.

The Explanatory Memorandum to the Bill states that the purpose of the amendment is to confirm the operation of the Act in circumstances where vessels and aircraft are considered to be exercising passage rights consistent with the Convention. However, proposed subsections 40(2) and (3) appear to authorise the exercise of powers even in circumstances where this is *contrary* to Australia's obligations under the Convention.

By setting a subjective standard for determining whether passage is consistent with the Convention, and stating that defective consideration of the Convention does not render an exercise of powers invalid, the Bill may authorise actions that are in breach of Australia's international obligations. As noted by the Law Council of Australia in its submission on the Migration and Maritime Powers Bill, this removes the judiciary's power to determine whether an act is consistent with the Convention.² The Bill does not require the officer or Minister to provide reasons for their consideration that the exercise of powers is consistent with the Convention. While the Department of Immigration and Border Protection has suggested that decision makers would 'apply accepted principles of treaty interpretation, including the requirement to interpret those obligations in good faith', this is not reflected as a binding requirement in the proposed amendments.³

The fact that a relevant maritime officer or the Minister considers that the exercise of powers is consistent with the Convention cannot render the exercise of powers lawful as a matter of international law. In authorising its officers to act in contravention of international law, Australia not only risks violating substantive treaty provisions, but also breaches the fundamental principle that a State must interpret and perform its treaty obligations in good faith.⁴

Further, it should be noted that a number of activities already known to have taken place in the territorial waters of other countries pursuant to Operation Sovereign Borders are inconsistent with Australia's international obligations under the Convention. In particular, turning back boats and patrolling for this purpose within the territorial waters of another State do not constitute innocent passage under the Convention, for two reasons.

First, 'passage' is defined in article 18 of the Convention as 'continuous and expeditious' 'navigation through the territorial sea for the purpose of (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility'. Turning back boats does not fit within this definition of 'passage', as its purpose is not navigation through the territorial sea.

Secondly, activities connected with turning back boats cannot be considered 'innocent', as they constitute activities 'not having a direct bearing on passage', thus rendering the passage non-innocent under the Convention.⁵

The amendments proposed by the Bill are not fit to achieve the purpose stated in the Explanatory Memorandum, namely that the exercise of powers under the Act be consistent with Australia's international obligations under the Convention. In order to achieve this purpose, we **recommend** that:

- an objective standard of compliance with the Convention be reflected, by omitting the words 'a relevant maritime officer, or the Minister, considers' from proposed section 40(2), and
- section 40(3) be omitted.

Please do not hesitate to contact us if we can provide any further information or clarification.

Yours sincerely,

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Endnotes

¹ Andrew & Renata Kaldor Centre for International Refugee Law, [Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration and Maritime Powers Amendment Bill \(No 1\) 2015](#) (6 October 2015).

² Law Council of Australia, [Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration and Maritime Powers Amendment Bill \(No 1\) 2015](#) (16 October 2015) [87].

³ Department of Immigration and Border Protection, [Answers to written questions on notice 21 October 2015 to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Migration and Maritime Powers Amendment Bill \(No. 1\) 2015](#) (2 November 2015).

⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 arts 26, 31; Guy S Goodwin-Gill, 'State Responsibility and the "Good Faith" Obligation in International Law' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing, Oxford, 2004).

⁵ United Nations Convention on the Law of the Sea (opened for signature 10 December 1981, entered into force 16 November 1994) 1833 UNTS 396, art 19(2). For further discussion of the international legal issues raised by the interdiction and turning back of boats, see the Kaldor Centre's [Submission No 1 to the Senate Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Breach of Indonesian Territorial Waters](#) (19 March 2014); Professor Donald Rothwell, [Submission No 2 to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the Breach of Indonesian Territorial Waters](#) (20 March 2014) 4: 'the entry into Indonesia's territorial sea by an Australian Navy or Customs ship that has control over an asylum seeker boat by way of a tow line, with the intention of returning that boat to Indonesia, would not be consistent with the right of innocent passage.'