






Refugee Council
of Australia

SUBMISSION TO THE INQUIRY INTO THE ANTI-PEOPLE SMUGGLING AND OTHER MEASURES BILL 2010

The Refugee Council of Australia (RCOA) is the national umbrella body for organisations involved in supporting and representing refugees and asylum seekers, with a membership of more than 300 organisations and individuals. RCOA promotes the adoption of flexible, humane and constructive policies by government and communities in Australia and internationally towards refugees, asylum seekers and other displaced persons. RCOA consults regularly with its members and refugee community leaders and our submission is informed by their views.

RCOA welcomes the opportunity to comment on the *Anti-People smuggling and Other Measures Bill 2010* (the Bill). RCOA has strong reservations about the Bill, shared by a number of other community, human rights and legal organisations which are also making representations to this inquiry. In particular, RCOA has had the benefit of viewing a draft of the Law Council of Australia's submission to the inquiry and wishes to endorse the key principles outlined in this submission. However, RCOA also wishes to highlight a number of concerns in relation to sections of the Bill which have specific implications for asylum seekers, refugee and humanitarian entrants, prospective entrants, and their family members.

Specifically, RCOA has concerns in relation to the following areas:

-  The lack of clarity in some sections of the Bill and the consequent broad scope and reach of its provisions.
-  Insufficient consideration in the Bill of international law, leading to inconsistencies between Australian domestic law and Australia's international legal obligations.
-  Insufficient consideration in the Bill of the circumstances of people escaping persecution and dangerous situations, with the result that the amendments may increase the risk of harm to vulnerable groups.

The Refugee Council urges the Committee to recommend that the Bill is not passed without significant amendment, as outlined in our recommendations.

Amendments to Sections 233A & 233C of the *Migration Act 1958*: Definition of the offence of people smuggling

233A Offence of people smuggling

(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 another person (the **second person**); and
- (b) the second person is a non-citizen; and
- (c) the second person had, or has, no lawful right to come to Australia.

233C Aggravated offence of people smuggling (at least 5 people)

(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 persons (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.

There is a need for clarification as to whether the above definitions include ventures in which the second person or other persons are asylum seekers. If so, the amendments are inconsistent with the United Nations *Convention Relating to the Status of Refugees*, which clearly states that non-citizens have a lawful right to enter a country for the purposes of seeking asylum, regardless of whether they have lawful status. As stated in Article 31(1) of the Convention, “*The Contracting States shall not impose penalties, on account of illegal entry or presence, on refugees...provided they present themselves without delay.*” It is thus both inaccurate and inappropriate to describe asylum seekers as persons who have “*no lawful right to come to Australia.*”

Recommendation 1:

RCOA recommends that the proposed definitions of the offence of people smuggling to be included under Sections 233A and 233C of the Migration Act 1958:




- a) be amended to clarify whether the offence encompasses people smuggling ventures which involve asylum seekers.
- b) if the offence of people smuggling as defined in the Bill is intended to encompass people smuggling ventures which involve asylum seekers, be amended to achieve consistency with the United Nations Convention Relating to the Status of Refugees.

Amendments to Section 233D of the Migration Act 1958 and Section 73.3A of the Criminal Code Act 1995: Supporting the offence of people smuggling

(1) A person (the **first person**) commits an offence if:

- (a) the first person provides material support or resources to another person or an organisation (the **receiver**); and
- (b) the support or resources aids the receiver, or a person or organisation other than the receiver, to engage in conduct constituting the offence of people smuggling.

RCOA is concerned that the precise nature and scope of “*material support and resources*” in the above provisions is not defined and therefore could potentially apply to any person who sends financial or in-kind assistance (such as medical goods or clothing) to asylum seekers in either their home country or a state of first asylum. Furthermore, it is not made clear whether these provisions apply to persons in current situations of persecution, or in transit. The “*receiver*” could thus be a person in a persecutory situation who uses the services of an agent to obtain a passport in a false name in order to leave the home state, or to obtain false documents to support an application for a visa to a safe state such as Australia. Such forms of support have historically been associated with refugee movement, for example:

-  Many Eastern Europeans sent support for relatives to cross into Western Europe in the 1950s and 1960s.
-  In years immediately following the Santa Cruz massacre in 1991, Eastern Timorese families and support groups sent funds to East Timor to assist many young East Timorese to obtain the assistance of agents in securing business visas to Australia.
-  Currently, many Burmese families are sending resources to relatives who are at risk due to their political associations or ethnicity. These funds are used to obtain passports through bribery.

The scope of these provisions is thus unacceptably broad, as they could effectively criminalise the act of supporting relatives in need, whether or not the act of people smuggling actually occurs. The amendment creates a chain of supposedly criminal activity in which the intention to flee from the home state and enter Australia without a valid visa is sufficient to criminalise the whole process and all the participants. However the “*first person*” and the “*receiver*” are most likely to be the family member in Australia and the potential refugee respectively –

neither of these persons are seeking material gain through the process, rather they are motivated by humanitarian concerns. The provisions therefore have the capacity to criminalise what are essentially humanitarian actions and are thus likely to place vulnerable groups and their families at an increased risk of harm.

RCOA also shares the Law Council's view that, in the very least, these sections should include a provision that "a person charged with this offence must **intend** that the provision of material support or resources will aid the receiver to engage in people smuggling." As the proposed amendments do not refer to the "intention" or "sole purpose" of sending material support, a family member who sends funds to an asylum seeker in a state of first asylum for upkeep, education or medical costs over a long period may be penalised under the provisions. As long as some of the resources are intended by the receiver, not the sender, to be used to attempt to travel to Australia, the act of sending assistance will be criminalised. There is a need to introduce a provision on intention so as to protect those who may unwittingly provide "support" to a people smuggling venture through supporting their relatives in need.

Recommendation 2:

RCOA recommends that the proposed amendments to Section 233D of the Migration Act 1958 and Section 73.3A of the Criminal Code Act 1995 include:

- a) a clearer definition of "material support and resources", so as to impose reasonable limits on the application of this provision.
- b) an exemption for humanitarian actions, that is, actions undertaken without criminal intent and with the aim of assisting people in need.
- c) a requirement that a person charged with this offence must intend that the provision of material support or resources will aid the receiver to engage in people smuggling

Section 73.1 of the Criminal Code Act 1995: Removal of the requirement that people smugglers must have gained or intended to gain benefit from the venture

Paragraph 73.1(1)(c) of the Criminal Code

Omit "and".

Paragraph 73.1(1)(d) of the Criminal Code

Repeal the paragraph.

RCOA is concerned that As pointed out by the Law Council, given that "the offences in the Criminal Code are concerned with those who organise or facilitate illegal entry into foreign countries, whether that be from or via Australia or not", the removal of the provision that a people smuggler must have obtained or intended to obtain a benefit from the offence significantly broadens the scope and reach of the Criminal Code Act's provisions. In a similar manner to the proposed provision on the offence of supporting the act of people smuggling (Section 73.3A), this amendment could criminalise humanitarian actions and place vulnerable groups at an increased risk of harm.

For instance, the removal of this provision could criminalise the actions of family and community members who assist asylum seekers to escape from their country of origin. The amendment suggests that it will become a criminal offence to assist people to escape dangerous situations, even if a person's motive is altruistic and the action carried out with the intention of saving lives. For instance, a person who seeks to assist their partner and children to escape from danger could face criminal charges under the proposed amendment. This amendment is thus highly problematic, as it has the capacity to criminalise humanitarian and non-criminal actions and fails to take into account the vulnerability of people fleeing life-threatening situations and the family members who assist them to flee. Again, therefore, the amendments are likely to increase the risk of harm to already vulnerable groups – particularly

if there is a mandatory minimum penalty for the offence (the issue of mandatory minimum penalties is further addressed in the following section).

Recommendation 3:

RCOA recommends that the extant wording of Section 73.1 of the Criminal Code Act 1995 be retained.

Section 236B of the Migration Act 1958: Mandatory minimum penalties for certain offences

- (1) *This section applies if a person is convicted of an offence against section 233B, 233C or 234A.*
- (2) *This section does not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.*
- (3) *The court must impose a sentence of imprisonment of at least:*
- (a) if the conviction is for an offence against section 233B—8 years; or*
 - (b) if the conviction is for a repeat offence—8 years; or*
 - (c) in any other case—5 years.*
- (4) *The court must also set a non-parole period of at least:*
- (a) if the conviction is for an offence to which paragraph (3)(a) or (b) applies—5 years; or*
 - (b) in any other case—3 years.*

While acknowledging that the Bill proposes to amend, rather than introduce, mandatory minimum penalty provisions to the *Migration Act 1958*, RCOA shares the concerns of the Law Council in relation to the removal of judicial discretion that results from mandatory sentencing. Specifically, mandatory sentencing prevents the courts from hearing and examining all details relevant to a particular case, including any mitigating circumstances, and as such can result in an inappropriate penalty being delivered.

If, for instance, individuals involved in “smuggling” are of refugee backgrounds and have vulnerabilities arising from those experiences (including torture and other traumatic events), these circumstances should be considered not only in the determining of their need for protection but also in determining the appropriateness of any penalty delivered. Failure to do so may result in the imposition of ineffective and/or disproportionate penalties and could also cause serious harm to vulnerable groups. For instance, the imposition of an inappropriate penalty on an individual who has experienced torture and trauma may compound the physical and mental health issues arising from these experiences. Such conditions should not be excluded from judicial consideration, particularly since the judiciary has the experience to duly consider these mitigating circumstances.

The forced imposition of a sentence of imprisonment of at least eight years (with a set non-parole period of at least five years) for an offence or of at least five years (with a set non-parole period of at least three years) is normally restricted to serious criminal offences, such as wounding or inflicting grievous bodily harm on a police officer (three to five year non-parole period). Even abhorrent crimes like sexual assault and dealing with obscene material depicting a child under 16 have maximum penalties of only seven years imprisonment. RCOA believes it is unacceptable to automatically impose such serious sentences without taking into account the circumstances of each unique case.

RCOA is also concerned that mandatory sentencing violates Articles 9(1) and 14(5) of the *International Covenant on Civil and Political Rights*, which respectively prohibit arbitrary detention and enshrine the right to have one’s conviction and sentence reviewed by a higher tribunal.

Recommendation 4:

RCOA recommends that:

- a) *the proposed amendments to 236B of the Migration Act not be enacted.*
- b) *the Committee consider recommending the removal existing provisions on mandatory minimum penalties from the Migration Act 1958, to bring the Act in line with Australia's human rights obligations under the International Covenant on Civil and Political Rights.*

Amendment to Section 4 of the Australian Security Intelligence Organisation Act 1979**Section 4 (after paragraph (a) of the definition of security)**

Insert:

(aa) the protection of Australia's territorial and border integrity from serious threats; and

There is a need for clarification in this amendment as to what constitutes a “*serious threat*” to Australia’s territorial and border integrity, specifically whether people smuggling measures which involve asylum seekers would be included within the mandate of the Australian Security Intelligence Organisation (ASIO). As noted by the Law Council, “*ASIO’s powers are quite distinct from those of ordinary law enforcement agencies and are subject to less transparent authorisation and review processes.*” Such processes are of particular importance when government agents are dealing with groups which are vulnerable to exploitation, such as asylum seekers (particularly those asylum seekers who have been smuggled to Australia). The potential involvement of ASIO in combating people smuggling operations could thus have significant implications for the welfare of vulnerable groups and may place them at increased risk of harm.

Given the potential impact of the amendments to the *Australian Security Intelligence Organisation Act 1979* on vulnerable groups, RCOA believes that there must be clearer justification provided for the need to expand ASIO’s mandate, that is, evidence which demonstrates that current processes are insufficient to combat “*serious threats*”. Furthermore, if ASIO’s mandate is to be expanded in this manner, it is crucial to ensure that the amendments include mechanisms to protect vulnerable groups such as asylum seekers from harm. These mechanisms should include training for ASIO officers working with potential asylum seekers on dealing with vulnerable people and on the refugee process.

Recommendation 5:

RCOA recommends that:

- a) *the proposed amendment to Australian Security Intelligence Organisation Act 1979 be revised to include a clearer definition of the scope and limitations of ASIO’s role in protecting Australia’s territorial and border integrity from serious threats.*
- b) *clearer justification be provided for the need to expand ASIO’s mandate, before the proposed amendments are approved.*
- c) *if ASIO’s mandate is to encompass people smuggling cases which involve asylum seekers, specific provisions for transparent authorisation and review processes for such cases should be included in Australian Security Intelligence Organisation Act 1979, so as to protect vulnerable groups from harm.*
- d) *if ASIO’s mandate is to extend to monitoring people sending material support to vulnerable people overseas and to frontline interaction with potential asylum seekers, all ASIO officers and related staff should have minimal standards of practice for working with vulnerable people (including survivors of torture and trauma), as well as training on working with vulnerable people and on the refugee process, including the Refugee Status Determination and Refugee Status Assessment processes.*

Conclusion

RCOA's core concern about the proposed legislation is that it will place vulnerable groups at further risk of harm and criminalise the actions of people in Australia who, out of concern for their relatives' wellbeing, provide support to family members facing hardship or persecutory situations overseas.

Given the risks associated with the Bill, RCOA is of the belief that Parliament must provide stronger justification for the need to introduce these new measures. Unless clear evidence can be presented of the failure of existing mechanisms to effectively combat people smuggling, there can be little justification for enacting legislation which will place already vulnerable people and their families at further risk of harm. Indeed, as pointed out by the Law Council, the failure to hitherto provide such evidence *"creates the perception that these amendments are about legislative activity for its own sake. That is, the perception that Parliament is enacting new offences lest it been seen to be impotent or inactive in the face of the problem of people smuggling."*

RCOA strongly urges the Committee to recommend that the Bill should not be passed unless significant evidence of its necessity can be provided and, if the Committee is convinced of the need for the proposed legislation, that it should not be passed without significant amendment to prevent harm to vulnerable groups and their families.

Summary of Recommendations

Recommendation 1:

RCOA recommends that the proposed definitions of the offence of people smuggling to be included under Sections 233A and 233C of the Migration Act 1958:

- a) be amended to clarify whether the offence encompasses people smuggling ventures which involve asylum seekers.*
- b) if the offence of people smuggling as defined in the Bill is intended to encompass people smuggling ventures which involve asylum seekers, be amended to achieve consistency with the United Nations Convention Relating to the Status of Refugees.*

Recommendation 2:

RCOA recommends that the proposed amendments to Section 233D of the Migration Act 1958 and Section 73.3A of the Criminal Code Act 1995 include:

- a) a clearer definition of "material support and resources", so as to impose reasonable limits on the application of this provision.*
- b) an exemption for humanitarian actions, that is, actions undertaken without criminal intent and with the aim of assisting people in need.*
- c) a requirement that a person charged with this offence must intend that the provision of material support or resources will aid the receiver to engage in people smuggling*

Recommendation 3:

RCOA recommends that the extant wording of Section 73.1 of the Criminal Code Act 1995 be retained.

Recommendation 4:

RCOA recommends that:

- a) the proposed amendments to 236B of the Migration Act not be enacted.*
- b) the Committee consider recommending the removal of existing provisions on mandatory minimum penalties from the Migration Act 1958, to bring the Act in line with Australia's human rights obligations under the International Covenant on Civil and Political Rights.*

Recommendation 5:

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- a) *the proposed amendment to Australian Security Intelligence Organisation Act 1979 be revised to include a clearer definition of the scope and limitations of ASIO's role in protecting Australia's territorial and border integrity from serious threats.*
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- c) *if ASIO's mandate is to encompass people smuggling cases which involve asylum seekers, specific provisions for transparent authorisation and review processes for such cases should be included in Australian Security Intelligence Organisation Act 1979, so as to protect vulnerable groups from harm.*
- d) *if ASIO's mandate is to extend to monitoring people sending material support to vulnerable people overseas and to frontline interaction with potential asylum seekers, all ASIO officers and related staff should have minimal standards of practice for working with vulnerable people (including survivors of torture and trauma), as well as training on working with vulnerable people and on the refugee process, including the Refugee Status Determination and Refugee Status Assessment processes.*