



**Understanding the complexities:
People smuggling, deterrence and intersection
with Australia's maritime regulation**

Submission to the Senate Legal and Constitutional Affairs
Committee
on the
Deterring People Smuggling Bill 2011 (Cth)

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Contact:

Emily Price, Legal and Policy Officer

Phone: [REDACTED]

Email: [REDACTED]

Mandy Wyer, Public Affairs Manager

Phone: [REDACTED]

Email: [REDACTED]

Suite 5, Level 7, 189 Kent Street, Sydney NSW 2000 GPO Box 7052 Sydney NSW 2001
DX 10126 Sydney Stock Exchange ABN 96 086 880 499

T + 61 2 9258 7700 **F** + 61 2 9258 7777 **E** enquiries@lawyersalliance.com.au

www.lawyersalliance.com.au

Contents

Who We Are

Introduction

Executive Summary

A. Purported intention of the Bill

- a. Mandatory minimum sentencing
- b. Age determination

B. Purported justifications for the Bill

- a. 'Effective prosecution'
- b. 'Retrospective application is necessary'
- c. 'Urgency'
- d. 'A clear message'

C. Illegal fishing and its connection to people smuggling

- a. Deterrence of illegal fishing
- b. history of *mare nullius*
- c. Impact of Australia's aggressive maritime territorial regime

D. No lawful right to come to Australia

- a. Limited exceptions

Conclusion

Summary of Recommendations

Reference List



Who we are

Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

APLA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee with branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-

bearers are supported by ten paid staff that are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development. We also host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as human rights, workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine, Precedent, is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

Understanding the complexities: People smuggling, deterrence and intersection with Australia's maritime regulation

Let us not misunderstand one thing about who the criminals are: they are the people smugglers.

- Mr Scott Morrison MP¹

Jail nearly killed me, that was the first and last time for me.

- An Indonesian youth aged under 18, a fisherman.²

We had no idea, we had been tricked.

An Indonesian youth aged under 18, a fisherman, held in an adult Australian prison for 18 months and later deported back to Indonesia.³

Introduction

The Australian Lawyers Alliance welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee on the *Deterring People Smuggling Bill 2011* ('the Bill').

Principally, we are opposed to the current proposed legislative change formulated within the Bill, and at the circumstances in which it was introduced into Parliament.

The Australian Lawyers Alliance ('ALA') submits that the current approach of the Australian government in relation to border protection is exacerbating poverty; destroying economic livelihoods; imprisoning children, and inadvertently enhancing the recruitment of the poor into being involved in people smuggling.

Ultimately, the issue of people smuggling is one that intersects across a wide range of Australian laws. If the Parliament is genuinely committed to addressing the issue of people smuggling, a more in-depth, rigorous and consultative assessment of legislative change is required, combined with a greater focus on Australia's poverty reduction programs in Indonesia.

Executive summary

In summary, the Australian Lawyers Alliance ('ALA') submits in relation to the text of this Bill that:

- The purported intent of this Bill cannot be fulfilled.
- The purported justifications of this Bill are political and not grounded in a commitment to upholding the rule of law.

¹ Parliament of Australia, Hansard, House of Representatives, Tuesday 1 November 2011 <<http://www.aph.gov.au/hansard/reps/dailys/dr011111.pdf> >

² ABC Radio National, Background Briefing, 'Casualties in the war on people smuggling', 30 October 2011. Accessed

<<http://www.abc.net.au/rn/backgroundbriefing/stories/2011/3347689.htm>>

³ Ibid.

- The tightening of Australian fisheries laws are directly connected to the growth in participation of Indonesian communities in crewing boats travelling to Australia.
- To define 'no lawful right to come to Australia' will consolidate current miscarriages of justice.
- People caught up in these offences in the Australian prison system are subjected to shocking breaches of Australia's obligations under international law.

It is the recommendation of ALA that this legislation should be rejected.

A. Purported Intention of the Bill

Since the Christmas Island boat tragedy in December 2010, Australia's border protection policy has shifted linguistically from 'stop the boats' to 'breaking the people smuggler's model'. The Christmas Island tragedy was also mentioned in the second reading speech presenting this Bill.

In his second reading speech, Minister Brendan O'Connor, Minister for Home Affairs stated:

*The purpose of this bill is to give clarity to the laws that have criminalised people smuggling and aggravated people-smuggling offences for more than a decade. This bill does not affect the rights of people seeking protection or asylum in Australia.*⁴

The ALA submits that this Bill cannot give clarity to the laws criminalising people smuggling. It cannot deliver on its intended purpose and therefore should not be passed.

Defining 'no lawful right to come to Australia' does not solve the current inadequacies in legislation regarding people smuggling offences. There are faults in the law that are much more central in inhibiting clarity and are leading to massive miscarriages of justice. These include mandatory sentencing, and the age determination of minors. Neither of these issues have been addressed by the proposed Bill.

a. Mandatory minimum sentencing

One of the core problems with current laws surrounding people smuggling is the mandatory sentences imposed on courts. Judges have no discretion to sentence lower than the legislative minimum, regardless of culpability of an individual.

Section 236B of the *Migration Act 1958* (Cth) provides that where a person is convicted of an offence against section 233B (aggravated people smuggling – exploitation, danger of death or serious harm); 233C (aggravated offence of people

⁴ Mr Brendan O Connor, cited in Parliament of Australia, above n 1.

smuggling – at least 5 people); 234A (aggravated offence of false documents and false or misleading information etc – at least 5 people):

- (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.*

Frustration has been expressed by the judiciary at the requirement that they must sentence the minimum 5 year period, with a non-parole period of 3 years. There is no opportunity to deviate from these sentencing prescriptions, with no availability to consider extenuating circumstances that may implicate lower culpability than implied in the offence. In short, judges are being asked to sentence in a way that is manifestly unjust.

There are no non-custodial alternatives to sentencing. This is inappropriate given the differing levels of culpability of individuals found guilty of these offences.

The ALA submits that there should be a review of the offences with lower culpability elements to be established.

The ALA submits that this review should include a review of mandatory sentencing, and the insertion of a phrase allowing ability to abolish the requirement to mandatorily sentence to a term of imprisonment’.

b. Age determination

The inadequacy of wrist X-ray age determination tests is well recorded and well known.⁵

It is common for young people to languish in adult prisons while they wait more than 18 months for their true age to be determined.⁶ At least 56 young people under 18 are currently held in adult prisons nationwide.⁷

This is unacceptable.

Under section 236B(2) of the *Migration Act 1958* (Cth), mandatory minimum penalties are not to be applied to persons aged under 18 years when the offence was committed. S236A provides that an order can be made under s19B of the *Crimes Act 1914* (Cth)⁸ only if it is established **on the balance of probabilities** that the person charged was aged under 18 years when the offence was alleged to have been committed.

⁵ See for example, Jill Benson, ‘Age determination in refugee children’ (2008) 37(10) *Australian Family Physician*. Accessible at <www.racgp.org.au/afp/200810/200810benson.pdf>

⁶ See for example, Ross Taylor, ‘Indonesian kids sleep in a prison near you’; Mike Carlton, ‘The shame we keeo locked away’ *Sydney Morning Herald* October 22- 23 2011; Natalie O’Brien & Cosima Marriner, ‘50 pawns of people smugglers in our cells’, *The Sun-Herald*, November 6 2011;

⁷ Natalie O Brien & Cosima Marriner, ‘Plucked from poor villages, boys land in jail’ *The Sun-Herald*, November 6, at 8.

⁸ Which provides for the discharge of offenders without proceeding to conviction.

The use of wrist X ray tests to determine age has been widely criticised, including by Sir Al Aynsley-Green, Britain's founding Children's Commissioner, who stated that the practice is:

*'Unethical, inaccurate, not fit for [the] purpose proposed and potentially unlawful... Injustice is likely when a decision on age is driven by using a method involving wrist X-ray which has been rejected elsewhere.'*⁹

Catherine Branson QC, President of the Australian Human Rights Commission, also was opposed to the practice:

*'The use of wrist X-rays for determining age may have led to errors in age determination, with the result that some children may have been incarcerated in adult prisons...The commission has recently received notifications from 11 Indonesian nationals detained in adult prisons who claim to be children.'*¹⁰

While young people languish in Australian jails, awaiting the results of tests based on poor methodology this could amount to unlawful detention.

Such treatment also hinders young people's education, therefore decreasing their opportunities for their future; and impacts on their families, including in some cases, their families' ability to make a livelihood.

The ALA submits that no person that may be reasonably suspected to potentially be under 18 should be kept in an adult prison.

The ALA submits that wrist X-ray forms of age determination should be abolished entirely. Specialists in the field should be consulted regarding best practice.

B. Purported Justifications for the Bill

The purported justifications for the Bill include the need to 'uphold effective prosecutions'; 'retrospective application is necessary'; and the matter is 'urgent' and needs to send a 'clear message'. These justifications are political and not grounded in a commitment to responsible legislative change.

a. 'Effective prosecutions'

*'The effective prosecution of people involved in organising and facilitating these inherently dangerous voyages sends a clear message that the Australian parliament does not tolerate people smuggling.'*¹¹

⁹ Lindsay Murdoch, 'Wrist X-ray won't prove child's age, says expert', *Sydney Morning Herald*, June 27 2011.

¹⁰ Natalie O'Brien & Cosima Marriner, 'Boys in an adult nightmare' *Sydney Morning Herald*, November 6, 2011.

¹¹ Mr Brendan O'Connor MP, cited in Parliament of Australia, Hansard, above n 1, 38.

*Retrospective application is necessary to... **maintain current prosecutions.***¹²

*'It is a matter of urgency. No one in this place wants to see those who have been involved in these criminal acts being allowed to slip through the net, because, where they have been detained and prosecuted, **we wish to see a conviction**'.*

- Mr Scott Morrison, MP¹³

The ALA submits that current prosecutions in Australia are not effective in capturing the people that are involved in organising and facilitating voyages.

Therefore, consolidating the strength of such laws, without a more comprehensive review of their efficacy or effect, would be prejudicial to the rights of individuals affected by such legislation.

The majority of those people that have been prosecuted under the relevant provisions of the *Migration Act 1958* (Cth) have not been the organisers of syndicates.

Academic Jeffrey Neilson highlighted this recently:

*'Under questioning, the Deputy Commissioner for Operations in the Australian Federal Police, Andrew Colvin, revealed that of the 493 individuals arrested in Australia on people smuggling charges during 2009 – 2011, 483 were simply working as crew on boats leaving from Indonesian ports. Only 10 individuals are organisers.'*¹⁴

The majority of people caught up in Australian laws have been impoverished Indonesian fishermen, who have worked as crew and cooks on the boats.¹⁵

Many of these individuals were not aware of what they were implicated in. Many have been tricked. In some cases, the organisers and facilitators of the people smuggling will go in the boats with the individuals, only to depart at a later stage of the journey before the boat arrives close to Australian waters.

The organisers of criminal syndicates, on the whole, have not been prosecuted in Australia. They have constituted 2% of all prosecutions.

For the Parliament to seek to uphold convictions that are punishing those who have been exploited in their poverty simply to be seen as 'doing something' about border protection, is inhumane.

The ALA submits that a comprehensive review of current people smuggling laws should be undertaken.

¹² Ibid.

¹³ Mr Scott Morrison MP, Parliament of Australia, above n 1, 40.

¹⁴ Jeffrey Neilson, 'Australian laws contributing to deaths at sea', *ABC The Drum Opinion*, 9 November 2011. Accessed 9 November <<http://www.abc.net.au/unleashed/3650824.html>>

¹⁵ ABC Radio National, above n 2.

b. 'Retrospective application is necessary'

*'Retrospective application is necessary to avoid uncertainty about the validity of previous convictions and to maintain current prosecutions.'*¹⁶

*'There are **exceptional circumstances that justify retrospectivity for this bill.** Those circumstances are that **it would not be appropriate to risk a significant number of prosecutions being overturned**, as a result of a previously unidentified argument in relation to the words 'no lawful right to come to Australia'.'*¹⁷

Retrospective legislation ushered in at high speed is not conducive to responsible legislative decisionmaking, and is usually indicative of an event the Parliament is seeking to avoid.

The manner in which the Bill was drafted, couched and addressed is hauntingly reminiscent of legislation which retrospectively authorised the acts of the Tampa affair. The *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) was passed on 26 September 2001 to retrospectively authorise the events associated with Tampa, to prevent an appeal in the High Court the next day.¹⁸

The ALA believe that the legislation was introduced due to a case currently before the Victorian Court of Appeal, of 20 years old Jeky Payara, an Indonesian man charged with people smuggling offences.

The ALA draws attention to comments made in the media by Saul Holt, senior public defender for Legal Aid (Victoria), who is involved in the Victorian case:

*'Retrospective criminal legislation is not allowed under Victoria's Bill of Rights, nor under America's constitution, nor in most other common law countries. You'll understand why; people should be able to be prosecuted for offences that actually existed at the time that they were said to have been committed. It's a matter of basic fairness.'*¹⁹

The ALA submits that the retrospective element in the proposed legislation is poor legislative practice. It is also reminiscent of the Tampa affair.

¹⁶ Mr Brendan O'Connor, Parliament of Australia, above n 1, 38.

¹⁷ Ibid.

¹⁸ The *MV Tampa* rescued 433 people from a wooden fishing boat at sea on 26 August 2001. On 29 August 2001, the *MV Tampa* entered Australian waters to seek medical treatment for those on board. The Howard government decided that the asylum seekers would not be allowed to step foot on Australian soil. After a writ of habeas corpus had been issued, the Federal Court found, on 11 September 2001, that there had been unlawful detention of those on board the ship. This decision was reversed in the Federal Court on 18 September 2001 in the case of *Ruddock v Vadarlis* (2001) 183 ALR 1. With the prospect of a High Court appeal, the Howard government passed the legislation on 26 September 2001, which retrospectively authorised the detention of the asylum seekers. On 27 November 2001, the High Court refused an application for appeal. Information sourced from Tony Blackshield & George Williams, *Australian Constitutional Law and Theory – Commentary and Materials* (2006) (4th edition; The Federation Press) at 532.

¹⁹ Saul Holt cited in , ABC Radio PM, 'People smuggling case appears doomed', 2 November 2011. Accessed 9 November at <<http://www.abc.net.au/pm/content/2011/s3354540.htm>>

c. 'Urgency'

*The bill before the parliament today ...which we are dealing with in some urgency....*²⁰

*'It might have been preferable if we had had a little more notice of this bill being bought on today...'*²¹

*Because this case is coming up, we now have this bill being rammed through without any proper scrutiny...*²²

The ALA is concerned at the speed at which the proposed reforms were rushed through Parliament. In the second reading speech and surrounding debate, the matter was pressed as an issue of urgency.

The framing of the passing of this legislation within an emergency response framework is unnecessary, and likely to lead to poor law making. There is no emergency here, and it is more important that legislative change on the issue of people smuggling is a considered, sustainable and non-political response to external events, involving a genuine review of the efficacy of current laws.

The Bill was not on the House of Representatives Daily Program. It was introduced after 6.15pm. Concerns were initially raised regarding the lack of opportunity for an inquiry. Responses to the current Inquiry were to be submitted in less than 7 days.

Such speed, and the hype surrounding the Bill as 'critical', 'urgent' and 'necessary' was absolutely not required and could potentially be an abuse of parliamentary process.

The ALA submits that the speed at which this Bill has progressed is entirely unnecessary, and there is no urgency.

d. A clear message

The people that this legislation catches are the kids cooking the rice on the boats and the poor fishermen who just sail the boats along.
- Pamela Curr, Asylum Seeker Resource Centre²³

The ALA contends that current prosecutions do not send a clear message that Australians will not tolerate people smuggling.

The majority of individuals who are captured by people smuggling laws are from impoverished backgrounds in East Java, and surrounding islands such as Roti Island. There is now also a transition to people being recruited from cities in Surabaya, Kalimantan and Sulawesi. No clear message is being conveyed to those communities about people

²⁰ Mr Kennan MP, Parliament of Australia, above n 1, 39.

²¹ Ibid.

²² Mr Adam Bandt MP, Parliament of Australia, above n 1, 41.

²³ ABC Radio, PM, above n 19.

smuggling. The family members of those who disappear are not informed and many believe their families are dead. Communities hear only about the extent of the potential punishments through being contacted by individuals who are in prison in Australia, or have returned after serving their sentence.

On a practical note, the ALA is not aware of any targeted community legal education programs using peer education to inform about the dangers of people smuggling and/or human trafficking. While the International Organisation of Migration is currently handing out stickers²⁴, this is not specific enough to adequately inform communities of the liabilities they will incur in transporting people.

Rural communities in Indonesia cannot be expected to hear the 'clear message' of the dangers of people smuggling through individuals disappearing through prosecution in Australia.

Extradition of individuals, rather than a focus on capturing crew deckhands, would be more likely to send a clear message to the correct people, those involved in syndicates and profiteering, that the Australian government is committed to a regional approach to people smuggling.

There is, sadly, a plentiful supply of urban and rural poor in Indonesia, with boat handling experience, and a need for an income and livelihood, who can continue to be preyed upon by syndicates to become unwilling participants in events beyond their control or knowledge.

Providing greater financial support to programs targeting poverty reduction, including training in vocational education and alternative income generation, would also assist in combatting the problem of recruitment to be involved in people smuggling. Funding these programs would assist to provide a greater range of opportunities for individuals, whose choices are limited by poverty.

The ALA submits that more attention should be focused on strengthening the Bali Process, including increasing support to NGOs in Indonesia that provide peer education programs regarding people smuggling, as well as providing financial support to targeted programs of poverty reduction; vocational education and income generation.

C. Illegal fishing and its connection to people smuggling

a. Deterrence of illegal fishing

The use of the word 'detering' in a Bill before Parliament is not unusual. However the ALA is concerned as previous Bills using the word have also managed to consolidate miscarriages of justice in complex issues that are interconnected with the current issue of people smuggling.

²⁴ ABC Radio National, above n 2.

Of note is the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005* (Cth) ('the Deterrence of Illegal Foreign Fishing Bill') which was granted assent in August 2005.²⁵ The second reading speech itself echoes that of the current Bill being considered by this Inquiry:

*'It is vital that these new initiatives are underpinned by an effective and clear legislative framework. This will enable the Australian government to implement tougher measures and to send a strong message to illegal foreign fishers.'*²⁶

The Minister noted that 138 vessels fishing unlawfully in 2003; 161 vessels in 2004, and as at February 2005, 18 suspected illegal foreign fishing vessels had been apprehended and detained.²⁷ In November 2005, a \$200 million 'Securing Our Fishing Future' package was also announced²⁸.

The *Deterrence of Illegal Foreign Fishing Bill* included granting powers to restrain illegal fishermen – and this restraint is not unlawful²⁹; strip search foreign fishermen³⁰; to detain illegal fishermen without charge;³¹ to seize and destroy the boats of illegal fishermen;³² and place illegal fishermen in immigration detention.³³

Such amendments are not only an unnecessary and excessive grant of powers, but are in breach of Australia's obligations under international law.

The excessive powers granted under the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 2005* (Cth) have cemented strict offences against Indonesian fishermen. In some cases, Indonesian fishermen have been towed into the Australian Fishing Zone and then detained for a period exceeding 18 months, and their means of livelihood (fishing boats) destroyed.

However, these legislative changes to fisheries laws directly relate to the current inquiry as their impact is now connected with people smuggling.

²⁵ *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*. Accessed at <http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r2286_first/toc_pdf/05016b01.pdf;fileType=application%2Fpdf>

²⁶ Mr Truss, Minister for Agriculture and Fisheries, Parliament of Australia, House of Representatives, Hansard Second Reading Speech, Thursday 17 February 2005. Accessed at <http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2005-02-17/0017/hansard_frag.pdf;fileType=application%2Fpdf>

²⁷ Ibid.

²⁸ Australian Fisheries Management Authority, 'New measures a watershed for Commonwealth fisheries' (Media release) 14 Decemebr 2005. Accessed 9 November at <<http://www.afma.gov.au/2005/12/new-measures-a-watershed-for-commonwealth-fisheries/>>

²⁹ *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*, Schedule 1, Part 1 Item 1.

³⁰ *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*, Item 17.

³¹ *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*, Part 2, Division 1.

³² *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005* Part 4 - Forfeiture etc. of things involved in illegal fishing.

³³ *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*, Schedule 1A, Part 1.

The ALA submits that the powers granted under the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 2005 (Cth)* have directly contributed to unlawful detention of Indonesian citizens and has harmed the livelihoods of Indonesian communities.

b. History of *mare nullius*

In 1979, Australia and Indonesia held discussion regarding the mapping of exclusive economic zones. This led to Australia officially declaring a 200 nautical mile territorial limit, known as the Australian Fishing Zone.³⁴ This has been described as the 'modern maritime equivalent of *terra nullius*'³⁵, given that Indonesian communities conducted trade and relations with local Aboriginal people for centuries prior.³⁶

As Ruth Balint writes,

*'The creation of this territorial limit brought within Australian jurisdiction the traditional fishing grounds which had been integral to the survival of the fishing communities of eastern Indonesia. Bruce Campbell has called maritime expansion 'Australia's last colonial act'. It created massive displacement and impoverishment of the traditional seafaring communities of eastern Indonesia, and a new class of fringe-dwellers and dispossessed.'*³⁷

A Memorandum of Understanding (MOU) was drawn in 1974 between the Indonesian and Australian government, 'which outlined the division of seabed resources and maritime boundaries.'³⁸

It designated a 'box area within the Australian Fishing Zone where Indonesian fishermen could have limited rights of access'³⁹. 'The MOU area incorporates five reefs, the largest of which is Ashmore Reef, considered culturally and economically the most important to the fishermen. It is also the closest to Indonesia's Roti Island (80 kilometres away).'⁴⁰

This in effect served as an 'eviction notice. Confinement to a tiny part of what was once their fishing grounds has resulted in the area being dramatically overfished in the past two decades. This has also led to more fishing expeditions as the competition intensifies for fewer and fewer resources'.⁴¹ It has also meant that for

³⁴ Ruth Balint, 'The Last Frontier: Australia's Maritime Territories and the Policing of Indonesian Fishermen' (1999) *Australian Public Intellectual Network*, 30. Originally published in Murphy and Warner (eds), *New Talents 21c Writing Australia: Journal of Australian Studies* no 63, St Lucia, UQP, 1999. Accessed < <http://www.api-network.com/main/index.php?apply=scholars&webpage=default&scholar=182>

³⁵ *Ibid* 32.

³⁶ *Ibid* 31.

³⁷ *Ibid* 30.

³⁸ *Ibid* 32.

³⁹ *Ibid* 32.

⁴⁰ *Ibid*.

⁴¹ *Ibid*.

fishermen to gain access to the MOU area, they need to be 'traditional fishermen', the lawful method by which individuals can catch fish is in 'outdated and fragile craft without auxiliary motors, radios or other forms of safety and navigational equipment'⁴². This also means that some fishermen are unlikely to know when they have inadvertently drifted over a maritime territorial limit.

Prior to 1974, there had been no monitoring of how many boats frequented the area that was then displaced by the MOU, and later, the expansion of the exclusive economic boundary. There is therefore no record

In her article, 'The Last Frontier: Australia's Maritime Territories and the Policing of Indonesian Fishermen' Ruth Balint describes the complexities associated with displacement of Indonesian fishermen, and their treatment by the Australian government.

In brief, the agreements made between Indonesia and Australia regarding access to oceans has compounded socio-economic issues of access to resources, employment, income and freedom of movement.

The interconnection surrounding the issue of people smuggling is thus extremely complex, and require careful and rigorous assessment.

c. Impact of Australia's aggressive maritime territorial regime

'They burned our boats... We're very confused about problems at the border, we don't know for sure, because we're in the middle of the sea. The Australians say we've entered the area. But if we check our GPS – we are still in Indonesia.'
- An Indonesian fisherman⁴³

The aggressive policies used by Australia in its fisheries legislation have also directly exacerbated poverty in communities. For example, in some communities, individuals obtain loans to purchase boats, which are traditionally decorated before setting out to sea. These boats are destroyed by Australian officials, and the fishermen, usually the main breadwinners of their families, are put in Australian prisons.

The destruction of these boats means that communities incur huge debts which they are unable to repay. Similarly, the imprisonment of the main breadwinners of families means that their families become more desperate.

This was highlighted by the High Court case of *Muslimin v The Queen*⁴⁴, where an Indonesian fisherman was imprisoned in April 2008, **despite his boat being outside the Australian Fishing Zone**. The High Court held that his conviction should be quashed, and a verdict of acquittal entered. This was two years after the offence.

When Muslimin returned to Indonesia, his boat had been burnt by the Australian government, and he therefore had no livelihood. He took to people smuggling as his family were so desperate, that they were starving⁴⁵.

⁴² Ibid.

⁴³ ABC Radio National, above n 2.

⁴⁴ [2010] HCA 7 (10 March 2010)

⁴⁵ ABC Radio National, above n 2.

Since then, cases have been lodged by Indonesian communities suing the Commonwealth for compensation.

This experience has been often replicated and is not an isolated experience.

The ALA submit that a comprehensive and human-rights based review of fisheries laws and people smuggling laws should be commissioned to an independent review body, such as the Australian Human Rights Commission.

D. No lawful right to come to Australia

*The purpose of this bill is to make clear that the phrase ‘no lawful right to come to Australia’ refers to requirements under Australia’s domestic law that **people must have a visa** that is in effect to lawfully come to Australia, or fall within one of the **limited exceptions** to that rule outlined by the Migration Act.*

- Minister Brendan O’Connor, Tuesday 1 November 2011

a. Limited exceptions

The Bill proposes to define ‘no lawful right to come to Australia’, with some exceptions.

Of note, **no exceptions are applicable to Indonesian citizens**. This is despite the fact that all our other closest neighbours are covered by exceptions.⁴⁶ **None of these exceptions** address the rights of Indonesian fishermen to fish in waters traditionally accessible for centuries.

The proposed section 228B provides that:

For the purposes of this Subdivision, a non-citizen has, at a particular time, no lawful right to come to Australia if, at that time:

- (a) The non-citizen does not hold a visa that is in effect; and*
- (b) The non-citizen is **not covered by an exception referred to in subsection 42(2) or (2A)**; and*
- (c) The non-citizen is **not permitted by regulations** under subsection 42(3) to travel to Australia without a visa that is in effect.*

The exceptions referred to in section 42(2) provide in essence that a visa is not required for ‘an allowed inhabitant [a person who is a citizen of Papua New Guinea and a traditional inhabitant⁴⁷] of the Protected Zone travelling to a protected area in connection with traditional activities’.⁴⁸ The Protected Zone means the area the boundaries of which are described in Annex 9 to the *Torres Strait Treaty*.⁴⁹

While the proposed section is stated to be ‘for the purposes of this Subdivision [People smuggling]’, the references to exceptions that would usually not apply in

⁴⁶ These include Torres Strait Islanders; some citizens of Papua New Guinea; and New Zealand. See s42, *Migration Act 1958* (Cth).

⁴⁷ *Torres Strait Treaty*, article 10 (3) and (4)

⁴⁸ *Migration Act 1958* (Cth) s42(2)

⁴⁹ *Torres Strait Fisheries Act 1984* (Cth) s3

people smuggling cases [e.g. New Zealand], draw questions as to whether this section will later be expanded to perpetuate a continuing consolidation of the lack of access rights of Indonesian citizens to access Australian waters.

There is also no exception granting access to Indonesian fishermen as a compassionate measure in relation to natural disasters. In the past 10 years, there have been a number of earthquakes. These include the Boxing Day Tsunami (2004) and an earthquake (July 2006)⁵⁰ that impacted upon fishing communities in various areas of Indonesia, in addition to depletion of fish stocks as a result of overfishing in restricted areas.

The ALA wishes to highlight that the strengthening of fisheries laws was implemented within 2 months of the Boxing Day Tsunami in Asia in 2004, an event that could have had a substantial impact on fish stocks due to migratory patterns.

The ALA submit that the recruitment of impoverished people in Indonesia to the people smuggling trade is potentially the overflow impact of Australia's territorial maritime expansion and aggressive regulation of fisheries.

This has exacerbated poverty, and reduced livelihood opportunities for Indonesians.

The ALA submit that defining of 'no lawful right to come to Australia' will further consolidate already existing laws that are causing gross miscarriages of justice, regarding access to waters near or in the Australian Fishing Zone.

Conclusion

Ultimately, the current proposed Bill cannot do what it proposes, and the commentary providing justification for departure from ordinary legislative process is not acceptable.

The Australian Lawyers Alliance contends that this Bill should not be passed.

While cited as an issue of urgency, the real issue of urgency is how Australian legislation is affecting the lives of Indonesian communities and individuals caught up in people smuggling offences who are not part of criminal syndicates.

A genuine commitment to addressing people smuggling does not involve knee-jerk reactions to court cases or retrospective legislative change that will sanction the imprisonment of potentially unlawfully detained people. A genuine commitment would involve a comprehensive, responsible and sustainable approach to legislative change, with consideration of the human rights issues we have raised within this submission.

⁵⁰ The Tsunami Page of Dr George P.C. *Indonesia, The Earthquake and Tsunami of 16 July 2006* <<http://www.drgeorgepc.com/Tsunami2006IndoJava.html>>

Summary of Recommendations

It is the recommendation of ALA that this legislation should be rejected.

The ALA submits that this Bill cannot give clarity to the laws criminalising people smuggling. It cannot deliver on its intended purpose and therefore should not be passed.

The ALA submits that there should be a review of the offences with lower culpability elements to be established.

The ALA submits that this review should include a review of mandatory sentencing, and the insertion of a phrase allowing ability to abolish the requirement to mandatorily sentence to a term of imprisonment'.

The ALA submits that no person that may be reasonably suspected to potentially be under 18 should be kept in an adult prison.

The ALA submits that wrist X-ray forms of age determination should be abolished entirely. Specialists in the field should be consulted regarding best practice.

The ALA submits that current prosecutions in Australia are not effective in capturing the people that are involved in organising and facilitating voyages.

Therefore, consolidating the strength of such laws, without a more comprehensive review of their efficacy or effect, would be prejudicial to the rights of individuals affected by such legislation.

The ALA submits that a comprehensive review of current people smuggling laws should be undertaken.

The ALA submits that the retrospective element in the proposed legislation is poor legislative practice. It is also reminiscent of the *Tampa* affair.

The ALA submits that the speed at which this Bill has progressed is entirely unnecessary, and there is no urgency.

The ALA submits that more attention should be focused on strengthening the Bali Process, including increasing support to NGOs in Indonesia that provide peer education programs regarding people smuggling, as well as providing financial support to targeted programs of poverty reduction; vocational education and income generation.

The ALA submits that the powers granted under the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 2005* (Cth) have directly contributed to unlawful detention of Indonesian citizens and has harmed the livelihoods of Indonesian communities.

The ALA submit that a comprehensive and human-rights based review of fisheries laws and people smuggling laws should be commissioned to an independent review body, such as the Australian Human Rights Commission.

The ALA submit that the recruitment of impoverished people in Indonesia to the people smuggling trade is potentially the overflow impact of Australia's territorial maritime expansion and aggressive regulation of fisheries.

This has exacerbated poverty, and reduced livelihood opportunities for Indonesians.

The ALA submit that defining of 'no lawful right to come to Australia' will further consolidate already existing laws that are causing gross miscarriages of justice, regarding access to waters near or in the Australian Fishing Zone.

Reference List

Articles

Natalie O'Brien & Cosima Marriner, 'Boys in an adult nightmare' *Sydney Morning Herald*, November 6, 2011.

Jeffrey Neilson, 'Australian laws contributing to deaths at sea', *ABC The Drum Opinion*, 9 November 2011. Accessed 9 November <<http://www.abc.net.au/unleashed/3650824.html>>

Jill Benson, 'Age determination in refugee children' (2008) 37(10) *Australian Family Physician*. Accessible at <www.racgp.org.au/afp/200810/200810benson.pdf>

Ruth Balint, 'The Last Frontier: Australia's Maritime Territories and the Policing of Indonesian Fishermen' (1999) *Australian Public Intellectual Network*, 30. Originally published in Murphy and Warner (eds), *New Talents 21c Writing Australia: Journal of Australian Studies no 63*, St Lucia, UQP, 1999. Accessed < <http://www.api-network.com/main/index.php?apply=scholars&webpage=default&scholar=182>

The Tsunami Page of Dr George P.C. *Indonesia, The Earthquake and Tsunami of 16 July 2006* <<http://www.drgeorgepc.com/Tsunami2006IndoJava.html>>

Bills

Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005. Accessed at <http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r2286_first/toc_pdf/05016b01.pdf;fileType=application%2Fpdf>

Deterring People Smuggling Bill 2011 (Cth)

Books

Tony Blackshield & George Williams, *Australian Constitutional Law and Theory – Commentary and Materials* (2006) (4th edition; The Federation Press)

Cases

Ruddock v Vadarlis [2001] FCA 1329

Muslimin v The Queen [2010] HCA 7 (10 March 2010)

Government sources

Australian Fisheries Management Authority, 'New measures a watershed for Commonwealth fisheries' (Media release) 14 Decemebr 2005. Accessed 9 November at <<http://www.afma.gov.au/2005/12/new-measures-a-watershed-for-commonwealth-fisheries/>>

Hansard

Parliament of Australia, Hansard, House of Representatives, Tuesday 1 November 2011
<<http://www.aph.gov.au/hansard/reps/dailys/dr011111.pdf> >

Parliament of Australia, House of Representatives, Hansard Second Reading Speech, Thursday 17 February 2005. Accessed at
<http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2005-02-17/0017/hansard_frag.pdf;fileType=application%2Fpdf>

International agreements

Torres Strait Treaty

Legislation

Crimes Act 1914 (Cth)

Migration Act 1958 (Cth)

Torres Strait Fisheries Act 1984 (Cth)

Media

ABC Radio National, Background Briefing, 'Casualties in the war on people smuggling', 30 October 2011. Accessed
<http://www.abc.net.au/rn/backgroundbriefing/stories/2011/3347689.htm>

Ross Taylor, 'Indonesian kids sleep in a prison near you'

Lindsay Murdoch, 'Wrist X-ray won't prove child's age, says expert', *Sydney Morning Herald*, June 27 2011.

Mike Carlton, 'The shame we keeo locked away' *Sydney Morning Herald* October 22- 23 2011

Natalie O'Brien & Cosima Marriner, '50 pawns of people smugglers in our cells', *The Sun-Herald*, November 6 2011

Natalie O'Brien & Cosima Marriner, 'Plucked from poor villages, boys land in jail' *The Sun-Herald*, November 6

Saul Holt cited in , ABC Radio PM, 'People smuggling case appears doomed', 2 November 2011. Accessed 9 November at <<http://www.abc.net.au/pm/content/2011/s3354540.htm>>