Immigration Advice and Rights Centre Inc.

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Set out below are our submissions to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the *Anti-People Smuggling and Other Measures Bill 2010* (**Bill**).

1. Overview

1.1 About the Immigration Advice and Rights Centre

IARC is a community legal centre in New South Wales specialising in the provision of advice, assistance, education, training, and law and policy reform in immigration law. IARC provides free and independent advice to approximately 3,000 people each year and many more attend our education seminars annually. IARC also produces *The Immigration Kit* (a practical guide for immigration advisers), the *Immigration News* (a quarterly publication), client information sheets and conducts education/information seminars for members of the public. Our clients are low or nil income earners, frequently with other disadvantages including disability, low level English language skills, past torture and trauma experiences and domestic violence victims.

IARC was established in 1986 and since that time has developed a high level of specialist expertise in the area of immigration law. We have also gained considerable experience of the administrative and review processes applicable to Australia's immigration law.

1.2 General overview

IARC is appreciative of the opportunity to make written submissions in relation to the Bill. Given IARC's expertise in immigration law we have focused our comments below in relation to the amendments to the *Migration Act 1958 (Cth)* (**Migration Act**) and do not seek to comment on amendments to any other legislation which is beyond our area of expertise.

As an organisation that advocates on behalf of refugees and their families, we are supportive of the Government's attempts to deter people smuggling which exploits asylum seekers and places them in danger. However, we also submit

that the people smuggling industry exists because of a demand for humanitarian assistance which is not being met by other legitimate means.

Accordingly, while the Bill may act as a deterrent to some people we believe that more effective means of addressing people smuggling include:

- appropriate resourcing of international organisations such as the United Nations High Commissioner for Refugees (**UNHCR**) and International Organisation for Migration (**IOM**) to deal with asylum seekers efficiently and effectively, thereby removing the need for them to be smuggled to Australia[1];
- improving processing times for Australian visa applications so that genuine refugees who are facing danger or destitution in the country in which they reside can have their cases determined more quickly, and
- permitting internally displaced persons to make applications for Subclass 201 In-country Special Humanitarian visas under the Humanitarian program.

2. IARC's concerns regarding the Bill

2.1 Supporting the offence of people smuggling

While IARC recognises the potential positive effect of the new s233D *Supporting the offence of people smuggling* we are disturbed by the prospect of family members of asylum seekers in Australia being prosecuted under this section.

The Explanatory Memorandum states in relation to s233D:

> "However, the offence will apply to persons in Australia who pay smugglers to bring their family or friends to Australia on a smuggling venture."

The Government has recognised that it is inappropriate to penalise asylum seekers under this section (s233D(2)), as indicated in the second reading speech which states:

[1] For example, we refer the Committee to *Behind Australian Doors: Examining the conditions of detention of asylum seekers in Indonesia* a report produced by Jessie Taylor, a lawyer and refugee advocate which paints a bleak and harrowing picture of the lives of asylum seekers in Indonesia and gives an insight into why asylum seekers pay people smugglers to take them to Australia. This report was released on 3 November 2009 and can be viewed at http://www.law.monash.edu.au/castancentre/news/behind-australian-doors-report.pdf

> "It will not apply to a person who pays smugglers to facilitate their own passage to Australia or who pays for a family member on that same venture that they are traveling on."

We respectfully submit that under the same principle it is inappropriate to prosecute family members of asylum seekers who assist those asylum seekers to come to Australia. We believe that any such prosecution would be contrary to the intent of the Refugee Convention as it would in effect be punishing asylum seekers by targeting their families.

In protection visa applications Australia clearly recognises that the perpetrators of human rights abuses will often target family members as a means of punishing or persecuting an individual. To prosecute family members of an asylum seeker is incongruous with excusing that asylum seeker from prosecution for their own facilitation of passage to Australia using people smugglers.

We submit that punishing asylum seekers through their families would be contrary to the views of the UNHCR in relation to punishment of persons who assist asylum seekers for humanitarian reasons (see 2.2 below). It is also contrary to the views of the High Commissioner for Human Rights which states in Guideline 1 of its *Recommended Principles and Guidelines on Human Rights and Human Trafficking*:

> "States and, where applicable, intergovernmental and non-governmental organizations, should consider:
>
> 1. Taking steps to ensure that measures adopted for the purposes of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including those who have been trafficked."

In addition, the criminalisation of support offered by family members overseas to refugees seeking protection in Australia may later constitute a character issue which could prevent family reunification where those family members themselves applied for a visa to come to Australia. For example, IARC is aware of a recent case on Christmas Island where wife and child came to Australia by boat while the husband remains in Malaysia working to pay off the debt to the person who lent him the money to pay the people smugglers who brought his wife and child to Australia. If the Bill is passed in its current form that husband could be prevented on character grounds from being reunited with his wife and child after they are found to be refugees because of a potential criminal conviction for supporting the offence of people smuggling. This would be contrary to Australia's international obligations in relation to protection of the family unit[2]. It also clearly demonstrates how such a provision punishes the asylum seeker directly although they themselves may not be the subject of the charges.

[2] Universal Declaration of Human Rights 1948 Article 16

IARC is strongly opposed to prosecution of family members who assist refugees to come to Australia and submits that the inclusion of the requirement of having obtained, or intending to obtain a benefit (as discussed in 2.2 below) would go some way to addressing these concerns and preventing such prosecutions.

2.2 Requirement of having obtained or intending to obtain a benefit

While IARC supports the harmonisation of people smuggling offences between the Criminal Code and the Migration Act, we do not support the removal of the requirement that a person must have obtained, or intended to obtain, a benefit from the Criminal Code. We would respectfully submit that the better way to harmonise the two laws would be to include that requirement in the relevant offences under the Migration Act.

We do not believe that it is appropriate for persons or organizations who are involved in transporting asylum seekers for purely humanitarian purposes to be prosecuted. This would be contrary to the spirit of the Refugee Convention – if all countries adopted these laws then this principle would prevent all refugees from getting protection in any country other than those adjoining their home country (where they are often not able to get protection).

We submit that the removal of this element to the offence is contrary to the *Protocol Against the Smuggling of Migrants by Land, Sea and Air* to which Australia is a signatory and upon which the Government relies to justify the introduction of the aggravated offence under s233B of the Migration Act. Article 6 of that Protocol states that (our emphasis):

> "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally **and in order to obtain, directly or indirectly, a financial or other material benefit**:
> (a) the smuggling of migrants…."

We also submit that the removal of this element to the offence is contrary to UNHCR principles. In the *UNHCR Summary Position on the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime* the UNHCR states (our emphasis):

> "The Protocol is also clear in that **it does not aim** at punishing persons for the mere fact of having been smuggled or **at penalizing organizations which assist such persons for purely humanitarian reasons**."[3]

[3] UNHCR (11 December 2000) *UNHCR Summary Position on the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons,*

3. Conclusions

We appreciate the opportunity being afforded to stakeholders to make submissions in relation to the Bill. As outlined above, there are two significant concerns that we have in relation to the Bill. Thank you for your consideration of our comments and we hope that the Committee understands these concerns. We look forward to the Committee's conclusions and recommendations in this complex and difficult area.

Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime available at www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3428&page=search