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Submission to Senate Legal and Constitutional Affairs Committee: Inquiry into Deterring People Smuggling Bill 2011

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government.

Further information on our activities may be found at www.libertyvictoria.org.au

Liberty Victoria has been concerned with the welfare of asylum seekers for many years, and welcomes the opportunity to submit to the Senate Legal and Constitutional Affairs Committee Inquiry into the Deterring People Smuggling Bill.

The Deterring People Smuggling Bill 2011 ("the Bill") was introduced into Parliament on 1 November 2011 at 6.15pm. It was moved by the Minister for Home Affairs that the bill be debated immediately. This motion was opposed, and concern was expressed by various members of Parliament at the speed of the process. Regardless of serious concerns in the House, the bill was passed that evening, and transmitted to the Senate the following day. On 3 November 2011 the Senate referred the Bill to the Senate Legal and Constitutional Affairs Committee. Submissions were invited after close of business on 3 November, and were due 9 November 2011 (3 business days later).

As a preliminary matter, Liberty Victoria wishes to express its concern at the extremely limited timeline of the Inquiry. It is the submission of Liberty Victoria that 3 business days between invitation and closing date for submissions is not sufficient time to inquire adequately into the Bill, and to glean the views of interested parties. A similar timeframe applied to the recent 'Inquiry into the Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement'. Liberty Victoria wishes to express its concern at the emerging pattern of extremely tight timeframes applying to inquiries on matters affecting asylum seekers and related issues.

The purpose of the Bill is said to be clarification of the existing provisions dealing with people smuggling offences in the *Migration Act 1958* (Cth) ("Migration Act"). The current provisions state that a person will have committed an offence if the person or people he or she brings into Australia "had or has no lawful right to come to Australia". It is claimed by the government and opposition that this claim was only ever intended to refer to a person not holding a visa to enter Australia when s/he entered, and that the right to seek asylum is not a lawful right for the purposes of the Bill.

The Bill defines "no lawful right to come to Australia" as expressed in the people smuggling provisions to mean no lawful right *under domestic law* to come to Australia. This is to operate retrospectively to 16 December 1999.

There are numerous serious concerns relating to this Bill. They include, *inter alia,* the following:

1. The offensiveness of retrospective legislation at international & domestic law, and in government policy;
2. The disproportionate response to people smuggling, including mandatory sentences;
3. The punishment and further demonisation by proxy of asylum seekers.

The offensiveness of retrospective legislation at international & domestic law, and in government policy

On this matter, Liberty Victoria endorses the submission of the Human Rights Law Resource Centre (HRLRC):

1.1 International law

1. Article 15 of the ICCPR, to which Australia is a party, relevantly provides:

> (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed…

2. Article 15 is a non-derogable right which means that States are not permitted to suspend this right, even in exceptional circumstances (such as a state of emergency). The right flows from the basic principle that people must be able to know what the law is, so that they can abide by it.

3. The prohibition on retrospective criminal law is also recognised under Article 11(2) of the *Universal Declaration of Human Rights*, Article 7(2) of the *African Charter on Human and People Rights*, Article 9 of the *American Convention on Human Rights*, Article 7 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, sections 8 and 9 of the *United States Constitution* and Article 22 of the *Rome Statute of the*

International Criminal Court. The broad recognition of this right underscores it's centrality to the protection of human rights and respect for the rule of law.

1.2 Domestic law

4. Australian common law contains a presumption against retrospective criminal law.[1] In the *Polyukhovich* case, the majority of the High Court of Australia found that in that case it was within Parliament's power to enact retrospective criminal laws, but the bench differed in the circumscription of that power.[2]

5. The *Polyukhovich* case involved a suspected war criminal and the legislation in question dealt with conduct which, at the time of commission, constituted an international crime. The conduct in *Polyukhovich* is therefore distinguishable from that of people smuggling in respect of the seriousness of the offence, its status under law at the time of its commission and the "moral blameworthiness" of purported offenders. Further, the Bill arguably usurps judicial power, which is inconsistent with the separation of powers under the Australian Constitution and the powers vested in the court by Chapter III.

1.3 Government policy

6. The September 2011 edition of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that "offences should impose retrospective criminal liability only in exceptional circumstances".[3] The Guide goes on to state:

> An offence should be given retrospective effect only in rare circumstances and with strong justification. If legislation is amended with retrospective effect, this should generally be accompanied by a caveat that no retrospective criminal liability is thereby created.

7. Government policy also requires that:[4]

> Where a Bill has retrospective effect, the Scrutiny of Bills Committee requires the Explanatory Memorandum to contain sufficient justification. This must include an assessment of whether the retrospective provisions will adversely affect any person other than the Commonwealth. Justification in the Explanatory Memorandum is required even if retrospectivity is imposed only as a result of making a technical amendment or correcting a drafting error.

8. The Explanatory Memorandum does not contain sufficient justification for the retrospective application of the Bill, or an assessment of whether the Bill will adversely affect any person other than the Commonwealth.

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[1] *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553, 558.
[2] *Polyukovich v The Commonwealth* [1991] HCA 32; (1991) 172 CLR 501.
[3] Available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers
[4] Ibid (footnotes omitted).

The disproportionate response to people smuggling, including mandatory sentences

The offence of aggravated people smuggling attracts a mandatory minimum sentence of 5 years, with a non-parole period of 3 years. Liberty Victoria submits that the length of the mandatory sentence is excessive. This is particularly so due to the age, poverty, social context and relatively minor involvement in the planning of the voyage of most people charged with people smuggling offences. It is well known that it is rarely the kingpins or the masterminds who fall foul of the law; it is usually impoverished young people, many of whom are under 18 years old, who have been employed to pilot a vessel from one point to another.

The prospect of jailing a child for five years for an offence that did not exist when the act was performed is unconscionable.

Liberty Victoria submits that the imposition of a mandatory sentence flies in the face of the right to a fair trial, and the prohibition in international law against arbitrary detention. On those matters Liberty again endorses the submission of the HRLRC:

> **International law**
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> ***(a) Arbitrary detention***
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> Article 9(1) of the ICCPR provides:
>
> > Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> Detention may be considered "arbitrary" even when it is permitted under law – to avoid being characterised as arbitrary, detention must also be reasonable, necessary and proportionate in all the circumstances.[5] The mandatory minimum sentences set out in s.236B of the Migration Act are arbitrary because they do not allow for differentiation between serious and minor offending or for consideration of the particular circumstances of the individual. That is, they prevent the court from distinguishing between those who orchestrate people-smuggling operations and the crew on the boats who are generally young, uneducated fishermen from small villages in Indonesia.
>
> ***(b) Fair trial***
>
> Article 14 of the ICCPR sets out a series of fair trial rights aimed at ensuring the proper administration of justice and respect for the rule of law. Article 14(5) of the ICCPR provides:

[5] Nowak, *CCPR Commentary (2nd revised edition)* (2005), p.224.

> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Mandatory sentencing effectively precludes review of a sentence imposed in a criminal trial and is therefore contrary to the right to a fair trial.

The punishment and further demonisation by proxy of asylum seekers.

Liberty Victoria is of the view that demonisation and zealous prosecution of alleged people smugglers is yet another way in which the government and opposition seek to demonise and prosecute asylum seekers by proxy.

It cannot be denied that the fear and suspicion of asylum seekers in the broader Australian community is based on the mistaken belief that it is illegal to seek asylum by boat, and that people who do so are criminals. This misunderstanding is reinforced time and again not only by the use of words like "illegal immigrants" in media, but by the very fact of continuing mandatory indefinite detention in Australia.

The simple notion that crime ought to be punished by imprisonment is subverted in the context of immigration detention.

Australia is a signatory to the UN Convention relating to the status of refugees. It has voluntarily undertaken to uphold the rights of asylum seekers and afford protection where it is genuinely needed. As a signatory, Australia has agreed to abide by the articles of the Convention. Liberty endorses HRLRC's comments:

> Article 31 of the Refugee Convention provides that:
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> > The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> Australia is required under the *Vienna Convention on the Law of Treaties* to perform this obligation in good faith.[6] A State lacks good faith when it "seeks to avoid or 'divert' the obligation which it has accepted, or to do indirectly what it is not permitted to do directly."[7]

[6] *Vienna Convention on the Law of Treaties, 1969*, article 26.

[7] See submission by Bassina Farbenblum and Associate Professor Jane McAdam to the Senate Legal and Constitutional Affairs' inquiry on the *Anti-People Smuggling and Other Measures Bill 2010* (submission no. 23), p. 16, citing UNHCR's submissions in *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004]

> The Bill clearly seeks to undermine Australia's "good faith" obligation under the Refugee Convention to allow asylum seekers to seek protection in Australia.

Liberty Victoria objects in the strongest possible terms to this Bill and other continued attempts by government and opposition to exclude asylum seekers from Australia. The prosecution of accused people smugglers is occurring only because there is still a market for their services. The fact that there remains a market for smugglers is by fault of successive governments in failing to find alternative viable, durable resettlement solutions for asylum seekers in South East Asia.

Liberty Victoria asks the Committee to recommend that the Bill not pass, on the basis that it is unconstitutional, unnecessary and offensive to the rule of law.

For further information please contact

UKHL 55, [2005] 2 AC 1, available as UNHCR, "Written Case" (2005) 17 International Journal of Refugee Law 427, para 32.