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Senate Standing Committee on Legal and Constitutional Affairs
Online submission

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Dear Committee,

Re: Inquiry into the Deterring People Smuggling Bill 2011

This legal opinion addresses international law aspects of this Bill. The Explanatory Memorandum suggests the Bill relates in part to implementation of Australia's obligations under the *Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention on Transnational Organised Crime*.

Article 6 of that Protocol requires Australia to criminalise, inter alia, the smuggling of migrants. The "smuggling of migrants" is defined in Article 3(a) as procuring, for benefit, the "illegal entry" of a non-national or non-permanent resident to a State Party. Article 3(b) in turn defines "illegal entry" to mean "crossing borders without complying with the necessary requirements for legal entry into the receiving State".

The above definitions from the Protocol are understood to refer to the domestic immigration law requirements of entry to a State Party. As such, the Bill's clarification that the phrase "no lawful right to come to Australia" is intended to refer to domestic, not international law, is supported by the Protocol, at least in respect of "migrants".

However, the effect of other provisions of the Protocol must also be considered. Article 19(1) of the Protocol is a savings clause in the following terms:

> Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

An authoritative 'interpretive note' recorded in the UN drafting records of the Protocol states that: 'The protocol does not cover the status of refugees'.[1]

If the Protocol is intended to exclude refugees, it must be doubted whether there exists any offence under international treaty law of "smuggling" a refugee or asylum seeker. As the title of the Protocol suggests, its focus is "migrants" not refugees.

The latter are a special case for obvious reasons. If Anne Frank had paid someone to help her flee from genocide, it is hardly morally appropriate to criminalise the smuggler, in circumstances where States and the international community had failed to protect her.

The effect of criminalising those who smuggle refugees is to prevent the refugees themselves them from reaching safety, unless some effective, alternative or substitute protection is provided for them elsewhere. It is therefore disingenuous to suggest, as the Explanatory Memorandum does, that criminalising people smuggling does not prejudice the position of refugees.

It is unnecessary for present purposes to deal with a further argument that international law confers a 'right of entry' on a refugee or asylum seeker to a safe country, even where such entry would violate domestic law. It is sufficient to observe that there is no authority under international law to criminalise those who "smuggle" refugees.

If the scope of the Protocol excludes refugees, then the Bill cannot purport to validly implement Australia's obligations under an international treaty. This in turn raises questions about federal constitutional power to legislate on this specific basis.[2]

Finally, I draw the Committee's attention to questions of the propriety of Parliament legislating on this issue retrospectively, and while judicial proceedings are pending.

Yours sincerely

Professor Ben Saul

Notes

[1] United Nations Office on Drugs and Crime, *Travaux Preparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, New York, 2006, UN Publication E.06.V.5, p. 555.

[2] Which are not addressed here. There may of course be other valid bases of legislative power.