

9 November 2011

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email. legcon.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the Deterring People Smuggling Bill 2011

The Rule of Law Institute of Australia (RoLIA) thanks the Senate Committee for the opportunity to make a submission in relation to this Bill. In this submission RoLIA's view that the Bill does not comply with the rule of law due to its retrospective nature will be explained.

About RoLIA

RoLIA is an independent non-profit entity formed to uphold the rule of law in Australia.

The Institute's objectives are:

- To foster the rule of law in Australia.
- To promote good governance in Australia by the rule of law.
- To encourage truth and transparency in Australian Federal and State governments, and government departments and agencies.
- To reduce the complexity, arbitrariness and uncertainty of Australian laws.
- To reduce the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

Retrospectivity and the rule of law

RoLIA has strong reservations about the creation of any retrospective offence. Under the proposed amendments to section 228B of the *Migration Act 1958* people smugglers will be liable for offences in relation to conduct that they had engaged in prior to

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the royal assent of the amendments. These are retrospective offences. This is against certainty which is fundamental to the rule of law.

The commentary on the rule of law identifies numerous criticisms to the lack of certainty which arises under retrospective law and retrospective offences. Generally it is accepted that a person should not suffer for conduct that at the time it was engaged in was not unlawful.

Dr Joseph Raz has identified the need for certainty:

“ (certainty) is the basic intuition from which the doctrine of the rule of law derives: the law must be capable of guiding the behaviour of its subjects”¹

Geofferey De Q. Walker has shown how retrospectivity affects certainty:

“ a state cannot be certain if it is retrospective. Such a law can never in any real sense be *promulgated*. It cannot guide a person’s conduct and therefore cannot be obeyed”²

Recommendation

RoLIA does not support the amendment creating retrospective offences and as such recommends that the Bill not be passed in its current form.

Should you need any further information please contact Ms Laura Hicks (RoLIA Research Officer) via email at _____

Yours Sincerely

Richard Gilbert
Chief Executive Officer

¹ J. Raz ‘The Rule of Law and it’s Virtue’ 1977 93 L.Q.R 195.

² G.D.Q Walker ‘The Rule of Law: Foundation of Constitutional Democracy’ 1988 (Melbourne University Press).