



## **Deterring People Smuggling Bill 2011**

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### **About the Human Rights Law Centre**

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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# 1. Introduction

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## 1.1 Background

1. The *Deterring People Smuggling Bill 2011* (the Bill) was introduced into Parliament on 1 November 2011. On 03 November 2011 the Senate referred the Bill for inquiry and report.
2. The Bill amends the people smuggling offences in the *Migration Act 1958* (Migration Act). Existing sections 233A and 233C of the Migration Act establish a primary people smuggling offence and an aggravated people smuggling offence. Both of these offences are established *inter alia* where another person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry to Australia, of another person that is a non-citizen, and that non-citizen had, or has, no lawful right to come to Australia.
3. The Bill retrospectively defines “no lawful right to come to Australia” contained in the people smuggling offences to mean no lawful right *under domestic law* to come to Australia.

## 1.2 Scope of this submission

4. This submission focuses on the human rights implications of the Bill. The Human Rights Law Centre (HRLC) has identified the following concerns:
  - (a) the Bill contravenes the prohibition on retrospective criminal laws contained in article 15 of the *International Covenant on Civil and Political and Political Rights* (ICCPR), Australian common law and Government guidelines;
  - (b) the mandatory sentence of 5 years with a 3 year non-parole period that flows from the offence of aggravated people smuggling contravenes the prohibition on arbitrary detention (article 9 of the ICCPR) and the right to a fair trial (article 14 of the ICCPR); and
  - (c) the Bill violates Australia’s obligation to act in “good faith” by seeking to indirectly avoid its obligations under the Convention Relating to the Status of Refugees (Refugee Convention).
5. The Bill toughens an already draconian regime which threatens to see hundreds of impoverished Indonesian fishermen and boys jailed for a minimum of 3 years. This regime violates human rights, threatens the rule of law, costs taxpayers tens of millions of dollars in legal fees and detention costs and is likely to have no impact on people smuggling. The HRLC recommends that the Committee call for the Bill to be rejected.

## 2. Retrospective criminal laws

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### 2.1 Retrospective application of the Bill

6. The Bill applies to offences committed or suspected to have been committed from 16 December 1999.
7. The Explanatory Memorandum describes the Bill's purpose as being "[t]o avoid doubt and ensure the original intent of the Parliament is affirmed."<sup>1</sup> In accordance with principles of statutory interpretation, an Act is to be interpreted according to the words of a section interpreted in the context of the Act as a whole.<sup>2</sup> In other words, the Commonwealth is bound by the laws Parliament enacted; not what it would have liked Parliament to enact. If Parliament wishes to avoid doubt and either "clarify" or amend the original intent of the Parliament, it should do so prospectively.

### 2.2 International law

8. 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) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.
9. 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.
10. 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 its centrality to the protection of human rights and respect for the rule of law.

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<sup>1</sup> *Deterring People Smuggling Bill 2011 Explanatory Memorandum*, p. 1.

<sup>2</sup> *Acts Interpretation Act 1901* (Cth).

### 2.3 Domestic law

11. Australian common law contains a presumption against retrospective criminal law.<sup>3</sup> 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.<sup>4</sup>
12. 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 culpability 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.

### 2.4 Government policy

13. 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".<sup>5</sup> 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.

14. Government policy also requires that:<sup>6</sup>

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.

15. 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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<sup>3</sup> *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553, 558.

<sup>4</sup> *Polyukovich v The Commonwealth* [1991] HCA 32; (1991) 172 CLR 501.

<sup>5</sup> Available at

[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_GuidetoFramingCommonwealthOffences.CivilPenaltiesandEnforcementPowers](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences.CivilPenaltiesandEnforcementPowers)

<sup>6</sup> *Ibid* (footnotes omitted).

### 3. Mandatory sentences

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#### 3.1 Mandatory sentencing for offences covered by the Bill

16. The offence of aggravated people smuggling, which the Bill seeks to redefine, attracts a mandatory minimum sentence of 5 years with 3 years non-parole.<sup>7</sup>

#### 3.2 International law

##### (a) *Arbitrary detention*

17. 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.

18. Detention may be considered “arbitrary” even when it is permitted under law.<sup>8</sup> To avoid being characterised as arbitrary, detention must also be reasonable, necessary and proportionate in all the circumstances.<sup>9</sup> 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.<sup>10</sup>

##### (b) *Fair trial*

19. 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:

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

20. In *Reid v Jamaica* the UN Human Rights Committee stated:<sup>11</sup>

The Committee considers that, while the modalities of an appeal may differ among the domestic legal systems of States parties, under article 14, paragraph 5, a State party is under an obligation to substantially review the conviction and sentence.

21. Mandatory sentencing effectively precludes review of a sentence by a higher tribunal and is therefore contrary to the right to a fair trial.

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<sup>7</sup> Migration Act, s.236B.

<sup>8</sup> See, for example, Human Rights Committee, *A v Australia* (560/93) para. 9.2.

<sup>9</sup> Nowak, *CCPR Commentary (2<sup>nd</sup> revised edition)* (2005), p.224.

<sup>10</sup> See P Mailey and P Taylor, “Asylum Spike Bucks World Trend”, *The Australian* (24 March 2010).

<sup>11</sup> Human Rights Committee, *Reid v Jamaica* (355/89), para. 14.3.

22. The UN Human Rights Committee has previously found that mandatory sentencing laws in Western Australia and the Northern Territory led “in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed” and raised issues of compliance with various articles of the ICCPR.<sup>12</sup>

## 4. Right to seek asylum under the Refugee Convention

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### 4.1 The impact of the Bill on the right to seek asylum

23. The Explanatory Memorandum that accompanied the Bill states that:<sup>13</sup>

The offences deal with the serious crimes of people smuggling and aggravated people smuggling, and do not affect the treatment of individuals seeking protection or asylum in Australia. As such, the amendments are consistent with Australia’s obligations under international law and do not affect the rights of individuals seeking protection or asylum, or Australia’s obligations in respect of those persons.

24. In fact, the Bill does affect the rights of individuals seeking protection, albeit indirectly, by imposing harsh mandatory penalties for people smuggling in cases where those entering Australia have a lawful right to do so under the Refugee Convention.

### 4.2 International law

25. Article 31 of the Refugee Convention provides that:

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.

26. Australia is required under the *Vienna Convention on the Law of Treaties* to perform this obligation in good faith.<sup>14</sup> 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.”<sup>15</sup>

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

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<sup>12</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, (24 July 2000) (section 3).

<sup>13</sup> *Detering People Smuggling Bill 2011 Explanatory Memorandum*, p. 6.

<sup>14</sup> *Vienna Convention on the Law of Treaties*, 1969, article 26.

<sup>15</sup> 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] UKHL 55, [2005] 2 AC 1, available as UNHCR, “Written Case” (2005) 17 *International Journal of Refugee Law* 427, para 32.