



Australian Government
Attorney-General's Department

Deputy Secretary
National Security and Criminal Justice

09/26321-04, 09/29994

23 April 2010

Ms Julie Dennett
Committee Secretary
Senate Standing Committee
on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

Inquiry into the Anti-People Smuggling and Other Measures Bill 2010

I write in response to questions taken on notice during the Committee hearing into this Bill on 16 April 2010. I would also like to take the opportunity to provide further information on some issues that were raised in evidence given to the Committee by other witnesses and in a number of submissions lodged on that day.

The Attorney-General's Department has distilled four questions from the extracts from the Hansard transcript which you provided. The answers are **Attachment A**. In preparing the answers, we were mindful of the Committee's tight timeframe and so had to limit our inquiries about questions three and four in order to provide a timely response.

A number of concerns were raised at the hearing, and in submissions, about the scope and application of the proposed offence of providing material support or resources to a people smuggling venture. While officers addressed this issue in their evidence, we thought it might be of assistance to the Committee to clarify further the scope of the proposed offence and to set out the general principles of criminal law responsibility (including the fault elements) which would apply. We have also provided examples of where the offence would not apply. This information is at **Attachment B**.

A number of witnesses suggested the proposed offence would unintentionally capture such things as humanitarian assistance or rescue at sea. However, it is important to note that existing defences contained in the *Criminal Code Act 1995*, including sudden or extraordinary emergency, would apply to the proposed offence of providing material support or resources to a people smuggling venture. Further, the proposed provision is drafted narrowly so that the offence would only apply in limited circumstances. Additional information on these issues is also included at Attachment B.

There was also some apparent confusion in submissions and at the hearing about effect of the Bill on the operation of the mandatory minimum penalty provisions in the *Migration Act 1958*. Currently under the Migration Act, a mandatory minimum penalty of five years imprisonment applies to anyone convicted of the aggravated offence of people smuggling involving five or more persons. Although the Bill amends the structure and titles of these sections, it does not alter the operation of the mandatory minimum sentencing provision as it currently applies to this offence.

However, the Bill does extend the mandatory minimum penalty provisions in the Migration Act to apply the higher minimum sentence and non-parole period for the new aggravated offence of people smuggling involving exploitation or danger of death or serious harm, and where a person is convicted of multiple offences in a proceeding. The Court maintains a judicial discretion to apply a sentence between the minimum and maximum sentence.

Finally, a number of witnesses and submissions have suggested that an effective response to people smuggling should include work with regional partners and local communities to prevent and disrupt people smuggling activities.

The Committee may wish to note that the Government has implemented a comprehensive strategy to prevent, deter and disrupt maritime ventures. This includes developing information campaigns aimed at deterring potential irregular immigrants and people smugglers from participating in ventures, including collaborative activity with partner governments in Sri Lanka, Indonesia and Malaysia. Australian law enforcement agencies work closely with their counterparts to disrupt irregular maritime arrivals: since September 2008, there have been 177 disruptions involving some 4600 persons. The Australian Government also provides funding for the United Nations High Commissioner for Refugees to support the system of international protection and conduct more refugee status determinations in the region. Funding is also provided to the International Organisation for Migration to provide humanitarian care and support in regional countries for irregular migrants intercepted en route while their claims for asylum are considered, and to help host and transit countries to develop and implement effective protection regimes.

We did not address these matters in our submission as they lay outside the substance of the Bill; however, we would be happy to provide further information on these initiatives if it would assist the Committee.

Should you require any further information the relevant Departmental contact is who can be contacted on

Yours sincerely

Milęs Jordana
Deputy Secretary

Questions on Notice

Senate Legal and Constitutional Affairs Committee Hearing into the People Smuggling and Other Measures Bill 2010

16 April 2010

(1) Was the Attorney-General's Department consulted with respect to the Government's announcement of 9 April regarding the suspension of the processing of new asylum applications for Sri Lanka and Afghanistan?

Yes.

(2) Which government departments and agencies were consulted by AGD in preparing the Bill?

Australian Federal Police, Australian Customs and Border Protection Service, Australian Secret Intelligence Service, Australian Security and Intelligence Organisation, Commonwealth Director of Public Prosecutions, Defence Signals Directorate, Department of Defence, Department of Foreign Affairs and Trade, Department of Immigration and Citizenship, Office of Parliamentary Counsel.

(3) Can the Department advise which countries have criminalised people smuggling activities, which countries have expressed an interest in doing so and the timing of the legislative proposal in those countries?

The Attorney-General's Department (AGD) does not maintain a comprehensive list of countries which have criminalised people smuggling activities. Nor have we been able to locate this information on the web site of the relevant United Nation's office.

AGD understands that few regional countries have enacted specific people smuggling offences. However, most regional countries do have existing immigration or other offences that criminalise elements of people smuggling activity.

The *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* (Protocol) provides that States Parties shall adopt legislation criminalising the smuggling of migrants. A list of the Parties to the Protocol as at 21 April 2010 is attached.

AGD works with a range of countries to develop or strengthen people smuggling laws through the *Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime* and through bilateral engagement programs managed by AGD's International Crime Cooperation Division.

Malaysia and Indonesia have publicly announced their intention to introduce specific people smuggling offences. The exact timing of the introduction of legislation into foreign parliaments is a matter for the governments of those countries and it would be inappropriate for AGD to speculate on the timing of the introduction of legislation by those governments.

(4) Can the Department provide details of the benefits to people smugglers of people smuggling, for instance, how many dollars per person is made from a boatload of people?

People smugglers charge a variety of fees for their services. The total cost to an individual purchasing the services is dependent upon a number of factors, as is the profit made by people smugglers.

Some of the variables include:

- point of departure
- mode of transport
- ancillary services provided (accommodation and meals)
- brokerage fees
- negotiation skills
- availability of places on venture
- number of people per venture
- risks, and
- level of involvement in the facilitation of the venture.

The Australian Federal Police (AFP) advises that passengers typically pay between US\$7,000 and US\$16,000 for passage to Australia; the average is US\$10,000 to US\$12,000. Typically, organisers of people smuggling ventures only spend a fraction of this money on the venture itself. Boats are purchased by organisers for between US\$10,000 and US\$40,000 depending on size and condition.

Crew are generally promised payment of somewhere between US\$330 and US\$2,200. This may or may not be paid.

The AFP considers that a typical venture that arrives in Australia would consist of 50 passengers and three crew.

ATTACHMENT: Parties to the Protocol as at 21 April 2010

Albania	Germany
Algeria	Greece
Antigua and Barbuda	Grenada
Argentina	Guatemala
Armenia	Guinea
Australia	Guinea-Bissau
Austria	Guyana
Azerbaijan	Haiti
Bahamas	Honduras
Bahrain	Hungary
Barbados	Iceland
Belarus	India
Belgium	Indonesia
Belize	Iraq
Benin	Ireland
Bolivia	Italy
Bosnia and Herzegovina	Jamaica
Botswana	Japan
Brazil	Kazakhstan
Bulgaria	Kenya
Burkina Faso	Kiribati
Burundi	Kuwait
Cambodia	Kyrgyzstan
Cameroon	Lao People's Democratic Republic
Canada	Latvia
Cape Verde	Lebanon
Central African Republic	Lesotho
Chile	Liberia
Congo	Libyan Arab Jamahiriya
Costa Rica	Liechtenstein
Croatia	Lithuania
Cyprus	Luxembourg
Czech Republic	Madagascar
Democratic Republic of the Congo	Malawi
Denmark	Mali
Djibouti	Malta
Dominican Republic	Mauritania
Ecuador	Mauritius
Egypt	Mexico
El Salvador	Monaco
Equatorial Guinea	Mongolia
Estonia	Montenegro
European Union	Mozambique
Finland	Myanmar
France	Namibia
Gambia	Nauru
Georgia	Netherlands
	New Zealand
	Nicaragua

Niger	St. Kitts and Nevis
Nigeria	St. Vincent and the Grenadines
Norway	Suriname
Oman	Swaziland
Panama	Sweden
Paraguay	Switzerland
Peru	Syrian Arab Republic
Philippines	Tajikistan
Poland	Thailand
Portugal	The former Yugoslav Republic of Macedonia
Republic of Korea	Timor-Leste
Republic of Moldova	Togo
Romania	Trinidad and Tobago
Russian Federation	Tunisia
Rwanda	Turkey
San Marino	Turkmenistan
Sao Tome and Principe	Uganda
Saudi Arabia	Ukraine
Senegal	United Kingdom of Great Britain and Northern Ireland
Serbia	United Republic of Tanzania
Seychelles	United States of America
Sierra Leone	Uruguay
Slovakia	Uzbekistan
Slovenia	Venezuela (Bolivarian Republic of)
South Africa	Zambia
Spain	
Sri Lanka	

The list is also available at the following website:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en

**Anti-People Smuggling and Other Measures Bill 2010 –
Providing support for people smuggling offence**

- The proposed offence of providing support or resources for people smuggling is intended to target:
 - persons, including persons in Australia, who pay a people smuggler for another person to be smuggled, and
 - serious organised crime groups that finance or otherwise provide material support for people smuggling.
- The new offence is intended to apply in circumstances where money is provided to the person being smuggled to deter those people from using people smugglers.
- Key existing criminal law safeguards apply –
 - the relevant fault elements would have to be satisfied, and
 - general criminal defences under the *Criminal Code* are available.
- Under the *Prosecution Policy of the Commonwealth*, the CDPP independently assesses each matter and decides whether there is sufficient evidence and whether it is in the public interest to prosecute. A person will only be prosecuted if there are reasonable prospects of a conviction and the public interest requires the prosecution.

Fault elements of the current offence

- Proposed sections 73.3A of the Criminal Code and section 233D of the Migration Act require two key elements to be established during a prosecution:
 - The defendant provides support or resources to another person or organisation.

Intention applies to the conduct - the person must have meant to provide the support or resources.
 - The support or resources aids the receiver, or another person or organisation, to engage in conduct constituting the offence of people smuggling.

Recklessness applies to the circumstance –

 - the person was aware of a **substantial risk** that the circumstance existed or would exist, and
 - having regard to the circumstances known to him or her, it was **unjustifiable to take the risk**.
- These fault elements preclude the offence being used in the following examples:
 - *Example* - An aeroplane or ship transports persons to Australia and persons on board carry false documents as part of a people smuggling venture. The person in charge of the aeroplane/ship or the people in charge of the business conducted proper checks which did not show that the passengers carried false documents. There was nothing to put the person on notice that passengers might have had false documents. The person in charge of the aeroplane or ship was therefore unaware that passengers have false documents. The person in charge of the aeroplane/ship therefore did not intend to provide material support to the passenger. The person was not reckless as to whether the support or resources

aided in a person or organisation engaging in conduct constituting the offence of people smuggling. The person has not committed the offence under section 233D.

- *Example* - A person provides funding to a relative overseas. The person providing the funding is not aware of a substantial risk the funds were to be used for the persons to leave the foreign country by a people smuggling venture, nor was there anything to put the person on notice of such a risk. Therefore, the person has not intended to provide material support to the passenger and the person was not reckless as to whether the support or resources aided a person or organisation to engage in conduct constituting the offence of people smuggling. The person has not committed the offence under section 233D.

Criminal Code principles of criminal responsibility and defences

- General criminal principles and defences in the Criminal Code could apply.
- A person can be criminally responsible for an offence even if at the time of the conduct constituting the offence, the person is mistaken or ignorant of the existence or content of the offence.
- However, general Criminal Code provisions may apply to circumstances which would result in the person not being criminally responsible.
- **Mistake or ignorance of fact** (section 9.1) – a person is not criminally responsible for an offence where at the time of the conduct constituting offence the person is under a mistaken belief about, or is ignorant of facts, where that mistake or ignorance negates the relevant fault element. The belief or ignorance would need to be reasonable in the circumstances.

Example - support or resources are provided for a family member for legitimate transportation costs to leave the country and are instead paid to a people smuggler for the family member or another person to be smuggled out of the country. The person providing the money to the family member has not committed the offence of supporting the offence of people smuggling.

- **Sudden or extraordinary emergency** (section 10.3) – a person is not criminally responsible for conduct constituting an offence in response to circumstances of sudden or extraordinary emergency. The defence only applies if the person carrying out the conduct reasonably believes that:
 - circumstances of sudden or extraordinary emergency exist
 - committing the offence is the only reasonable way to deal with the emergency, and
 - the conduct is a reasonable response to the emergency.

Example – A captain of a ship comes upon a boat that is sinking in the sea and rescues the passengers and crew. The captain believes if he or she did not rescue the crew of the boat and passengers, they would drown. Some of the passengers are ill and require urgent medical attention and Australia is the closest port. The captain brings the crew and passengers to Australia, knowing the crew were engaged in people smuggling. The person has a defence to any charge of people smuggling or providing support to people smuggling because the captain carried out the conduct in response to a sudden or extraordinary emergency.

- **Duress** (section 10.2) - a person is not criminally responsible for an offence if a person carries out conduct under duress. The defence only applies if the person reasonably believes that:
 - a threat has been made that will be carried out unless an offence is committed
 - there is no reasonable way that the threat can be rendered ineffective, and
 - the conduct is a reasonable response to the threat.

This defence does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

Example - A person is threatened by other people that if he or she does not provide support to a people smuggler, he or she will be harmed, or his or her family will be harmed. He or she reasonably believes that:

- the threat will be carried out unless the offence of providing support to a people smuggling is committed;
- there is no reasonable way that the threat can be rendered ineffective; and
- the conduct is a reasonable response to the threat.

If the person provides the support, he or she has a defence of duress.

Prosecutorial discretion

- The CDPP is an independent prosecution agency and makes decisions in accordance with the *Prosecution Policy of the Commonwealth*.
- If as a result of an investigation an offence appears to have been committed, the established practice is for a brief of evidence to be forwarded to the Commonwealth Director of Public Prosecutions where it will be examined to determine whether a prosecution should be initiated.
- The factors considered by the CDPP in deciding whether to prosecute are set out in the Prosecution Policy. Under the Policy, there is a two stage test which must be considered before the CDPP institutes proceedings:
 - a. There must be sufficient evidence to prosecute the case, including evidence for each of the elements of the offence, and reasonable prospects of obtaining a conviction, and
 - b. It must also be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest. The CDPP can take into account a wide range of factors in deciding if the public interest requires a prosecution, including:
 - i. mitigating circumstances and the degree of culpability of the offender
 - ii. whether the prosecution would bring the law into disrepute, and
 - iii. whether the consequences of conviction would be unduly harsh and oppressive.