



ASYLUM SEEKER RESOURCE CENTRE

**SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL
REFERENCES COMMITTEE ON:**

Anti-People Smuggling and Other Measures Bill 2010

16 April 2010

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

Wednesday, 14 April 2010

Dear Secretary,

Re: Anti-People Smuggling and Other Measures Bill 2010

Thank you for the opportunity to provide a submission on this Bill. Due to time constraints the attached submission is brief, however we stress that the brevity of this submission does not in any way reflect a lack of concern with the proposed legislation and its possible deleterious affect on the Australian community.

Our principal concerns in relation to the legislation are the potential criminalisation of humanitarian responses to assist people in need and the punishment and mandatory sentences to be imposed on the impoverished Indonesian fishermen who sail the boats to Australia.

It is our belief that the conflating of these actions into criminal offences is a dangerous step.

Yours sincerely,
Pamela Curr
ASRC Campaign Coordinator

BACKGROUND TO THE ASYLUM SEEKER RESOURCE CENTRE.

1. The Asylum Seeker Resource Centre (ASRC) is an independent non-government, welfare organisation that was established after identifying a desperate need to fill gaps in the limited services provided by existing organisations working in the area of asylum seeker services and care.
2. The first ASRC centre was established at Footscray (now located in West Melbourne) in June 2001, and a second centre located at Thornbury, opened one year later. Since opening on the 8th of June 2001 we have gone on to become one of Australia's largest asylum seeker aid, advocacy and health organisation, having assisted over 2000 asylum seekers since opening through the more than 25 different services our centre offers. In 2003 the ASRC was awarded the Human Rights Award for the Community by the Human Rights and Equal Opportunities Commission. (HREOC).
3. The ASRC seeks to promote and protect the human rights of asylum seekers living in the community, and in detention, through working at a grassroots level to meet their daily living needs and simultaneously advocating and lobbying at a structural level to create genuine social change. Services offered by the ASRC include: material aid, legal advice, health, employment, counselling, casework, advocacy, recreation, community & detention-outreach, English language tutoring and financial aid.
4. The ASRC has played an important role in supporting and advocating for asylum seekers in immigration detention, in particular asylum seekers in the Maribyrnong Immigration Detention Centre (MIDC). Until they were closed

the Legal Program also represented asylum seekers from Baxter detention centre. The ASRC friendship program for asylum seekers in the MIDC continues today.

5. It is the interface of the ASRC's work with asylum seekers and refugees in the legal, medical and welfare spheres that qualifies the ASRC to make a valuable contribution to the current Senate inquiry. It is through the organisation's connections with refugees who have been assisted by the centre in the past that ASRC is linked with asylum seekers and refugees off shore. The ASRC's legal program in many cases continues to assist former asylum seekers with their family reunification applications. The pain and trauma of separation is ongoing for many families as the available places under both refugee and humanitarian programs continue to vanish.

Criminalisation of Humanitarian Acts

6. Many Australians contribute financial as well as moral support to off shore refugees. Some of these Australians are former refugees themselves, assisting family members who have fled violence and trauma in their home countries. Others are refugee advocates and human rights activists who feel concern and responsibility towards refugees and asylum seekers.
7. The ASRC holds grave concerns that this Bill encompasses provisions which would criminalise those who transfer funds to support vulnerable people outside Australia. Refugees in Indonesia who are awaiting resettlement are provided with food and shelter by the International Organisation of Migration (IOM). IOM is funded by the Australian Government to warehouse these people until resettlement places are found. In 2009 there were 34 people resettled in Australia who had waited in Indonesia since 2001, being fed and housed by IOM. In the 8 years they

spent waiting, they had no rights to work and their children were denied the basic right to go to school. Currently UNHCR recommendations for resettlement from Indonesia are at 2007 level. This means that anyone arriving in Indonesia after 2007 is not even in the queue for a place to call home. The effect of this is that with the upsurge of arrivals in 2008, 2009 and 2010, the queue for resettlement is now 40-50 years long. This figure is based on Australia's refugee intake which on average allowed 50 people to resettle each year from 2001-2009. Recent UNHCR reports from Indonesia state that there are 2,500 people registered by UNHCR who are either determined to be refugees or who are currently waiting for refugee determinations. These people are well aware of the current position and are anxious about their chances for resettlement.

9. Until recently Indonesia was a fairly benign place for refugees. However changes have now been implemented. People are no longer being released from Indonesian Detention Centres upon official confirmation of their refugee status from the United Nations High Commission for Refugees (UNHCR). The people detained are becoming increasingly distressed at their indefinite detention and are seeking help from Australian advocates to affect their release. The appalling conditions in Indonesian detention centres make a tent on Christmas Island look like Buckingham Palace.
10. The refugees in Indonesian detention are provided with food by IOM to the cost of \$2.92 Australian. This is not enough to sustain health even in Indonesia where the cost of living is markedly lower than in Australia. Australians send money to buy extra food and other essentials to these people who are enduring great hardship. Pamela Curr, a refugee advocate working with the ASRC, visited people in this position in an Indonesian Detention Centre in Jakarta in January this year. The ASRC found 9 men living in a cell only 5 metres by 3 metres who were given two plastic bags of rice impregnated with chilli oil and curry slops twice a day. Some weeks

they are given tea bags and sugar as well. During the week the ASRC visited these were not given. They had no utensils or plates, no reading matter and few clothes. They have no access to fresh air or any exercise and had been there for two months.

11. It is to people in this position that money is sent to supplement their meagre diet. There is no provision in this Bill to discriminate between money sent for relief of dire poverty and money sent for transportation.
12. The inclusion of legislation expanding the provisions of security, surveillance and telephone interception with ASIO involvement could precipitate a witch-hunt mentality in the Australian community creating division and fear in our multicultural nation. Already people in detention are being questioned by the Australian Federal police about people who have been granted visas and released from Detention. This causes fear in communities that they are always under investigation and suspicion.
13. The fact that refugees are forced to remain in Indonesia for years waiting to find out whether they will be one of the 50 people accepted to go to Australia, coupled with the appalling conditions in which they live and the fact that their basic human rights are violated on a daily basis, makes it inevitable that given the opportunity they will turn to family members, other loved ones and supporters for help. When given the opportunity to help, it is impossible for these same family members, loved ones and supporters upon hearing of the plight of these refugees to refuse assistance.
14. It is the ASRC's submission that criminalising this type of compassionate humanitarian assistance does nothing to further the safety and security in Australia and represents an inappropriate use of criminal sanctions towards political ends.

15. Of further concern is the fact that subsection 3 of the proposed s73.3A of the *Criminal Code 1995* and subsection 3 of the proposed 233D of the *Migration Act 1958* under this Bill, makes clear that an offence is committed even in circumstances in which the actual people smuggling is never carried out. The ASRC is concerned that the breadth of this type of provision leaves open the possibility of families and other concerned individuals who are sending money to those in need overseas, being investigated and even charged for what are actually innocent contributions.
16. The ASRC notes that this Bill ignores the reality of survival for refugees in camps and on the fringes of the societies they have fled to. The provision of aid through remittances is an age old practice to assist the survival of impoverished family members by those who have reached safety and security. This Bill has the potential to frighten people and deter them from providing material aid to their families overseas by potentially criminalising this generosity.
17. The ASRC notes in the Bills Digest¹ the deviations from the existing Protocol against Smuggling of Migrants by Land, Sea and Air (the Protocol)² which very clearly did not include material assistance offered by families and charities. The drafters of the original UN Smuggling Protocol also expressed this concern and intended to limit the Protocol but this distinction is not maintained in the proposed legislation. The Bills Digest states:

“It is significant to note that the legislative guide to the protocol states that the primary focus of the Protocol is to target organised criminal groups who receive a financial or other material benefit. The drafters did not intend that the Protocol apply to others, such as family members or charitable

¹ 11 March 2010, no. 131, 2009–10, ISSN 1328-8091

² Available at: <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>

organisations, who procure the illegal entry of migrants for reasons other than gain. This distinction is not maintained in this Bill.”

18. *“This distinction is not maintained in this Bill.”* The new offence of ‘providing material support for people smuggling’ blurs the distinction between the criminal act of operating as a people smuggler for financial gain and the innocent and humanitarian act of assisting a genuine refugee to escape persecution by supporting their escape and transit.
19. The ASRC is concerned about the deliberate decision to criminalise innocent family members, charitable organisations and others who out of desperation and compassion provide assistance to refugees. In the ASRC’s submission criminalising this type of innocent and well intentioned behaviour does nothing to address the problem of people smuggling and is an inappropriate use of sanctions under criminal law.

Proposal to increase penalties for so-called people smugglers

20. The ASRC is concerned about the imposition of lengthy mandatory prison sentences for people smuggling offences under the proposed s236B of the *Migration Act 1958*. In the ASRC’s submission mandatory sentencing provisions are never appropriate. Mandatory sentencing provisions conflict with basic democratic principles and encroach on the fundamental principle of independence of the judiciary. Mandatory sentencing in the context of people smuggling cases will inevitably lead to harsh and unjust sentences being imposed on poor Indonesian fisherman whose crime is being forced to risk their own lives on boats due to their financial hardship and poverty. In many cases the fisherman in the boat is a mere pawn in a much bigger operation and yet it is those people, who are often the victims of human rights abuses themselves, who will be subject to these severe mandatory sentences of imprisonment.

Background to Arrival by Boat to Australia

21. The 2001 Pacific Solution is the most recent government policy (prior to the amendments put forth by this current Bill) with the so-called aim of deterring boats carrying asylum seekers from attempting to reach Australian territory.
22. Whilst the 2001 Pacific Solution is cited as a 'success' in reducing boat arrivals, what it actually did was to excise islands that were previously part of Australian territory so that subsequent boats were not counted as reaching Australia. Thus, although the year 2002 is often cited as having a decrease in the number of boat arrivals, once we take into account the number of boats that attempted to make the voyage as well as those that ended up detained within the Pacific Solution system (using the numbers provided by the 2002 'Select Committee for an inquiry into a certain maritime incident') we reach a very different number. We need to add 1546 asylum seekers to the 2002 number by combining attempted applications (by would-be asylum seekers) and successful applications made by those who reached Australian territory. Then we see a significant increase in numbers. As well, this new number of asylum applications for 2002 correlates strongly with the number of people seeking asylum in other industrialised countries globally.³
23. The Pacific Solution 2001 did not stop boats from attempting the journey to Australia. In 2002 SIEV(s) 5, 7, 11 and 12 attempted to reach Australia and were returned to Indonesia, whilst SIEV(s) 4, 6 and 10 actually sank. In 2003 boats (such as SIEV 14) were still attempting to reach Australia but

³ See: UNHCR 'Asylum levels and trends in industrialised countries 2009: Statistical overview of asylum applications lodged in Europe and selected non-European countries' and UNHCR 'Asylum applications lodged in industrialised countries 2004'

were again towed back to where they came from. This has skewed the number of recorded boat arrivals significantly.⁴

24. Despite diverse border protection policies between Australia (with the 2001 Pacific Solution) and New Zealand, UNHCR statistics for 1999 – 2009 reveal a high correlation for asylum applications for the two countries. Unlike Australia, New Zealand's border protection policy has remained fairly consistent through the Immigration Act 1987. If Australian policy was to act as a deterrent, we may expect an increase in applications to our regional neighbour New Zealand and a decrease in application to Australia, but this was clearly not the case.⁵
25. Asylum applications to Australia and New Zealand during the period 1999 - 2009 are reflective of asylum application global trends for other industrialised countries.⁶
26. These facts confirm that it is push factors not pull factors that are causing people to seek asylum outside their home country. This sentiment has been expressed by Deputy Prime Minister Julia Gillard herself who has said that the conflict in Asia, particularly Sri Lanka is responsible for the growing number of asylum seekers. Kevin Rudd has also said that numbers of asylum seekers will vary according to global conditions. Following this, measures that aim to stop boats from arriving - by increasing penalties for Indonesians 'smuggling' people across - will do little to address the real issue that drives the movement of these people namely the humanitarian

⁴See: *Parliament of Australia* 'Select Committee for an inquiry into a certain maritime incident' 2002.

⁵See: UNHCR 'Asylum levels and trends in industrialised countries 2009: Statistical overview of asylum applications lodged in Europe and selected non-European countries' available at <http://www.unhcr.org/4ba7341a9.html>

And: UNHCR 'Asylum applications lodged in industrialised countries 2004; available at: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=422439144&query=asylum%20applications%202004>

⁶ *Ibid.*

crises taking place in the countries from which these people are fleeing and seeking asylum.⁷

Indonesia's position on people-smuggling and regional response

27. In meetings held between the ASRC representative and the Indonesia Department of Diplomatic Security (DEPLU), it was made clear that they held grave concerns for the numbers of Indonesian Fishermen currently held "in your West Australian prisons". They asked "what are Australian advocates doing about our fishermen in your prisons?"
28. Australia has said to Indonesia that it will display more understanding and provide a guarantee of better consular access for poor Indonesian fishermen who bring people to Australia. But the recent Bill suggests otherwise.⁸
29. Australia has a poor record of care for these fishermen who have been detained on tiny boats with no toilets and no running water on Darwin Harbour. Two men have died during their time on those boats. The first man died in 2003 after being detained on his boat in Darwin Harbour for one month. The second man died in 2005 after being detained on his boat for 9 days.
30. Indonesian Foreign Minister Dr. Natalagawa said he did not support any policy to turn boats back from Australian waters, saying that it is not

⁷ Lindsay Murdoch, 5th April 2010: 'Smugglers profit while poor pay the price' available at *The Age online edition*

⁸ 'SBY set to sign people-smuggling agreement' by Lindsay Murdoch, Tom Allard and Dan Oakes. *The Age online*. March 8th 2010. Available at :<http://www.theage.com.au/.../sby-set-to-sign-peoplesmuggling-agreement-20100307-pqqk.html>)

consistent with the cooperative approach of having origin, transit and destination countries working together.⁹

31. The Indonesian government has said it will soon introduce to parliament a law that will criminalise those involved in people-smuggling. Those found guilty will be sent to prison for up to five-years.¹⁰
32. Australian federal authorities are routinely charging impoverished Indonesian crewmen who steer boats to Australia for people-smugglers with offenses that carry mandatory jail terms of up to twenty-years – penalties as harsh as for murder.¹¹
33. These Indonesian fishermen receive the equivalent of a few hundred Australian dollars whilst the organisers who recruit this fisherman are making most of the money. Organisers often trail a smaller boat behind the boat carrying asylum seekers and transfer to this one before entering Australian waters so as to avoid arrest. None of the main organisers of the 102 boats that have arrived in Australia since 2008 has been brought to justice.¹²
34. There are seventy-seven Indonesian crewmen who were caught on illegal fishing boats or asylum-seeker vessels now in Darwin's Detention Centre (according to the Department of Immigration).¹³
35. Susan Cox, director of the Northern Territory Legal Aid Commission, told *The Age* that most of the people facing people-smuggling offences and

⁹ ABC News online 'Rudd, SBY sign people smuggling agreement'. March 10th 2010, at <http://www.abc.net.au/news/stories/2010/03/10/2841853.htm>

¹⁰ See extract from speech given by Yudhoyono on March 10th 2010, available at <http://www.safecom.org.au/yudhoyono-visit.htm>

¹¹ 'Smugglers profit while poor pay the price' by Lindsay Murdoch in *The Age* online April 5th 2010:

¹² *Ibid.*

¹³ ABC News online March 18th 2010: 'Asylum boat crew transferred to Darwin' by Phoebe Stewart

mandatory jail terms in Australia were not organising the boats. "That's what we see as the injustice," Ms Cox said. "They are poor fishermen with limited education who come from impoverished backgrounds." People-smuggling operations are extremely lucrative and poor Indonesian fishermen are easy prey. The 240 Sri Lankans now in Marek, West Java paid people-smuggler Abraham Lauhenaspessy a total of \$4.3 million. There is nothing in this new Bill to suggest that the organisers of people-smuggling will be apprehended. Thus it seems unlikely that proposed changes will have an effect on the number of boats arriving from Indonesia.¹⁴

35. Mandatory sentencing does not make any allowance for the degree of a person's involvement. The federal government makes no distinction between crew and people smugglers. Clearly there exists a hierarchy regarding knowledge, profiteering and direct responsibility regarding the people smuggling activities that are being conducted. Within this hierarchy people cannot all have the same capability.¹⁵
36. Even those working within the legal system are disillusioned by such harsh legislation. When he sentenced two Indonesian crewmen who were on SIEV 36, the boat on which five people died when it exploded near Ashmore Reef last year, Northern Territory Supreme Court Justice Dean Mildren said he believed they did not deserve five years' jail. "But for the mandatory minimum sentences I am required to impose, I would have imposed a much lesser sentence," Justice Mildren said.¹⁶

Conclusions and Recommendations

- 37 In the ASRC's submission, criminalising poor Indonesian fisherman, concerned loved ones and supporters of refugees, as this Bill seeks to do,

¹⁴ *Smugglers profit while poor pay the price' by Lindsay Murdoch in The Age online April 5th 2010*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

is not the answer to the problem of boat arrivals to Australia. There are other tangible alternatives available to reduce or stop the informal arrival of people seeking asylum by boat to Australia, which would not breach Australia's commitments under the International Human Rights Conventions nor jeopardize our relations with our regional neighbours.

38. The fact remains that arrival by boat is an expensive, unsafe option of last resort, but unfortunately remains the only real option for many people.
39. Providing alternatives to this, by ensuring robust mechanisms for refugees to apply formally for assessment of refugee claims and possible resettlement, would stop the boats and enable people to access a safer option, rather than put themselves in the hands of people smugglers and all the uncertainty this entails.

Recommendations:

40. Provisions included in this new bill which conflate the actions of people smugglers with those of refugees should be removed.
41. Harsh mandatory sentencing provisions which severely penalize the boat operators and essentially criminalize their poverty should be removed.
42. Efforts should be made to target the "big fish" in these people smuggling operations, rather than simply relying on catching the fishermen who are an easy target.
43. The Australian government should provide meaningful and genuine alternatives to improve refugee processing in order to ensure that the "push factor" is also addressed.

44. Australia should establish either temporary or permanent refugee processing centres in countries of first resort, in order to provide refugees with a real alternative to turning to people smugglers.
45. Implement measures to increase the faith of asylum seekers that industrialized countries such as Australia will process their applications and resettle them.
46. The ASRC accepts that there is a need a need to establish refugee and humanitarian visa quotas, however the current quota fails to meet Australia's share of the burden.
47. Refugee and humanitarian entrants currently make up just 6.6% of the total migration program in Australia, which is the lowest since 1975. This percentage should be increased.
48. The Australian government's foreign aid and investment policies should encourage positive human rights practices to ensure that Australia is not aiding governments which persecute their minorities and vulnerable groups, forcing them to flee and seek asylum elsewhere.
49. The ASRC recommends a cessation of aid to the Sri Lankan government until they demonstrate a clear commitment to end the persecution of the Tamil community
50. A mechanism to monitor and report to Parliament on the activities of IOM in providing Australian funded material assistance to refugees in Indonesia should be established, to ensure the Australian public is aware of the situation.

51. As a matter of urgency a public education program on our responsibilities to refugees should be implemented to counter the dangerous undermining of the fabric our multicultural society

52. Reception centres should be established in capital cities and major regional centres to deal with settlement issues, language development and job training. These centres would need to be closely linked with existing public welfare agencies. This is undoubtedly a more effective and more economical way of managing new arrivals than supporting a jail on Christmas Island.

These are the matters which we wish to put before the Senate Committee.

We thank the Committee for its consideration of the submission made by the ASRC and welcome the opportunity to elaborate on any of the matters raised in this submission.