



10 November 2011

Ms Julie Dennett
Committee Secretary
Senate Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
By Email: legcon.sen@aph.gov.au

Dear Ms Dennett

Deterring People Smuggling Bill 2011

Please find attached a submission from the Immigration Advice & Rights Centre ("IARC") to the *Deterring People Smuggling Bill 2011*.

We thank you for the opportunity to provide a submission and welcome any further opportunity to provide consultation regarding the Senate Committee's findings.

Kind regards,

Andrea Christie-David
Principal Solicitor
Immigration Advice & Rights Centre

Gayatri Nair
Solicitor
Immigration Advice & Rights Centre

Immigration Advice & Rights Centre Inc.

Introduction

1. The Immigration Advice and Rights Centre ("IARC") was established in 1986 as a specialist immigration law community legal centre. Due to its extensive knowledge of Australia's immigration law and policy IARC has made contributions to law reform discussions with a view to enhancing the operation and efficacy of migration and refugee law.
2. Drawing upon our Centre's experiences in the provision of pro bono advice, case work, education and training we provide the below submission highlighting issues relevant to our clientele, some of whom have had dealings with people smugglers, in particular asylum seekers and refugees.
3. As an organisation that advocates on behalf of refugees and their families, we are supportive generally of the Government's attempts to deter people smuggling, which exploits asylum seekers and places them in danger. However, we also submit that the people smuggling industry exists because of a demand for humanitarian assistance that is not currently being met by other legitimate means. Thus although the proposed amendment may act as a deterrent to some people smugglers we do not believe it will effectively address the issues underlying people smuggling.
4. This submission is limited to a consideration of the Bill's impact on refugees and asylum seekers.
5. The main premise of this submission is that the proposed legislative amendment has the scope to negatively affect people that come to Australia seeking asylum and, in particular, is not consistent with our obligations under the *Convention Relating to the Status of Refugees* (Refugee Convention) and also the Protocol against the *Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention on Transnational Organised Crime* (Migrant Smuggling Protocol). This will be discussed in more detail below.

Submission

6. We submit that any retrospective laws, especially those that are introduced with little time for proper consultation and consideration, are contrary to Australian's international obligations in particular those under the *International Covenant on Civil and Political Rights* (ICCPR). Article 15 of the ICCPR states:

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. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

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.

Immigration Advice & Rights Centre Inc.

7. The rights above are non-derogable and as such cannot be avoided. It is submitted that the proposed amendment will be in breach of this right given its retrospective nature.
8. A number of IARC's clients who have sought asylum in Australia have at some point utilised the services of a people smuggler. These people are often found to be refugees under the Refugee Convention as such owed Australia's protection. It is also important to note that the Migrant Smuggling Protocol refers to *migrants* who have been smuggled and not *refugees*.
9. The basis for the amendment is to clarify the law relating to people smuggling. The Bill retrospectively defines "no lawful right to come to Australia" contained in sections 233A and 233C of the *Migration Act 1958* (Migration Act). The definition is contained in the proposed section 228B in the context of our domestic law.
10. The Explanatory Memorandum provides that the people smuggling offences meet our obligations under the Migrant Smuggling Protocol and that they "do not affect the rights of individual's seeking protection or asylum in Australia". They also "do not affect Australia's international obligations in respect of those persons." We submit that this is not the case and that this proposed amendment will indirectly adversely affect the ability of those that utilise people smugglers to seek asylum here particularly for those whom it is their only option.
11. Article 31 of the Refugee Convention holds that States shall not penalise refugees for entering a State illegally. This further supports our argument that those who come here to seek refuge will be unfairly penalised by this proposed amendment to the legislation. The impact of the Bill is that it will potentially prevent asylum seekers from coming to Australia by stopping people smugglers, a way in which many come to here to seek refuge and will unfairly punish those who seek protection. This is not consistent with our obligations under the Refugee Convention.
12. Although Australia's obligations under the Migrant Smuggling Protocol require Australia to criminalise the smuggling of migrants domestically, it is important to note the savings clause contained in the Protocol. Article 19(1) of the Protocol states:

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.
13. Thus it is clear that the Migrant Smuggling Protocol should not compromise our obligations under international law and in particular the Refugee Convention. As noted above this proposed amendment will significantly affect the rights of those who come here to seek asylum in breach of Australia's obligations under both the Migrant Smuggling Protocol and the Refugee Convention.
14. It is also important to highlight that the proposed amendment does not address the root causes of people smuggling in our region and will not prevent this from occurring. It may be more useful to consider

Immigration Advice & Rights Centre Inc.

support in the region through education and other initiatives generally. It would also be beneficial to provide more appropriate resourcing in the region for organisations which assist asylum seekers such as the International Organisation for Migration and the United Nations High Commissioner for Refugees.

Conclusion

15. IARC undertakes a great deal of casework for clients making claims for protection. Accordingly, the issues highlighted above focus on the significant problems our clientele may face due to the proposed amendment. The proposed changes do not align with the intention or purpose of the Migrant Smuggling Protocol and the Refugee Convention. Further they are not consistent with our international obligations and responsibilities to those people who are in an already vulnerable situation and to whom Australia owes protection.