

Project SafeCom Inc.



Website: <http://www.safecom.org.au/>

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

Friday, 16 April 2010

Dear Secretary,

**Re: Anti-People Smuggling and Other Measures Bill 2010**

Thank you for the opportunity to send a public submission relating to the Anti-People Smuggling and Other Measures Bill 2010. Below is our contribution to your committee considerations of the Bill.

For this submission, our interest is defined by Project SafeCom's long-standing concern for just, decent and fair refugee policies and treatment.

In addition to Project SafeCom's usual interests, my personal interests in this issue are reinforced as a result of my work since June 2009 as a post-graduate university research student at a West Australian university, where I undertake research into the Political Development and Implementation of Australia's People Smuggling Legislation.

Yours sincerely,

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## 1. Underlying principles

This submission formulates its claims while assuming a number of underlying principles, norms and values. These are all linked to the United Nations Convention for the Status of Refugees (UNHCR, 2006) and other Conventions Australia has signed and acceded to.

- 1.1. Since 2001 Project SafeCom has expressed a concern for just, decent and fair refugee policies and treatment. This has caused us to be “fierce and vocal” on many occasions (for example in Smit, 2009) where Australia is clearly in breach of the UN Refugee Convention (UNHCR, 2006).
- 1.2. We acknowledge that – following a number of years where Australia’s treatment of refugees and asylum seekers was cruel, harsh, unnecessary and inhumane (for example see SafeCom, 2004) – the Rudd government through its Immigration minister Senator Chris Evans has been pro-active in creating a more humane treatment environment for refugees and asylum seekers (e.g. see SafeCom, 2008d, 2008e), bringing Australia more in compliance with the Refugee Convention.
- 1.3. While we note the good changes brought about under the Rudd government, we are still concerned that in relation to “boat arrivals” the Australian State remains gravely in breach of Article 31 of the Convention, which states – without any ambiguity – that a “member state” shall not discriminate against asylum seekers and refugees for having arrived “illegally” or treat them punitively based on this way of arriving. In international law this is generally referred to as discrimination based on an asylum seeker’s “mode of arrival” (UNHCR, 1979, 2001). It is not acceptable that any Australian politician or public servant tries to portray boat-faring refugees and asylum seekers as doing or having done anything “illegal” – they are simply using their international legal right to seek asylum in a country that gives them nothing less than UN Refugee protection.
- 1.4. Stating the point made in (3) in more detail, Australia’s discrimination of boat arrivals is implemented by jailing them. While many people understand and even support the initial control of those who arrived in unannounced and unexpected ways by boat, fact is that this initial control is not the purpose of this jailing. In addition, there is no law that limits the time for this jailing. The term “jailing” is deliberately used because boat-faring asylum seekers find themselves locked up in a maximum security facility, equal to a prison, built for this purpose. To make matters worse, the Australian state chose to locate this facility more than 2,500 km from the nearest major capital city in Australia. Given this extreme and remote location, it can be argued that Christmas Island *harbours more secrets* than the facilities of the now closed Woomera and Baxter Immigration Detention Centres: unless citizens are financially extremely well-off, they can not visit the island to check whether or not the Australian State treats asylum seekers there with respect or with extreme cruelties or harassment, telling them they are “*illegals who never will come into Australian society*” as has happened in the period between 2001 and 2005 in immigration detention centres: we have to take the word of the Immigration Minister for this, a Minister who supports several policies that are in breach of international law and of the UN Refugee Convention.

We should warmly applaud the commitments made by Minister Chris Evans in his 2008 lecture at Australian National University (SafeCom, 2008e), and we do indeed. Regrettably though, we have as yet to see legislation which completes this *journey from cruelty to refugee justice*. In the absence of changes in law, presented and passed by the Australian Parliament, we must remain sceptical about the Rudd government’s rhetoric around the treatment of refugees arriving by boat and the Minister’s promises of the *seven new principles of detention* as announced in that lecture.

- 1.5. Article 31 of the Refugee Convention is further – and bizarrely – undermined through the excision of more than 4,600 islands from the Australian territories ‘for migration purposes’ (SafeCom, 2008a). This excision zone may at times be ridiculed in international law circles, but it works: while Australia has a substantial body of refugee law, fully tested in the courts, the Australian State, also under the current government and its Minister Senator Chris Evans, blocks any access to

this refugee law in any courts for those who arrive by boat to seek asylum. Any assessment of refugee claims, even though the percentage of approval for boat arrivals is very high, should be treated by observers with suspicion: it's all handled by an officer of the Immigration Department, while his or her colleagues and superiors in the same Department scrutinise his or her decision making. This seems bizarre: the Australian Human Rights Commission (AHRC), established through an Act of Parliament under the Fraser government, remains out of earshot in refugee status determinations. Project SafeCom, as well as others (e.g. Neumann, 2004, p. 110) have been critical of this. We have argued that Immigration officers are *skilled and trained to keep people out of the country* rather than *letting them into the country*, and that an organisation such as AHRC (as we understand, the organisation counts amongst its staff more than one hundred trained human rights lawyers) should be participating in, if not be the final arbiters of the refugee determination process – if that process is indeed a *humanitarian* rather than a *border-protection* issue. It seems that the Australian State, if not the Department of Immigration and Citizenship, has been successful in wresting this process out of the sphere of human rights law, and Australia treats refugees who arrive by boat as a border protection issue. This remains deeply disturbing for us.

- 1.6. We congratulate the Rudd government for issuing a directive to the Immigration Department during July 2009 that confirmed the end to usage of the term “unauthorised arrivals” when the term is used to denote refugee boats (DIAC, 2010b). This change was unique and it challenged, for the first time in the history of the Immigration department, the universal usage of the term for all who enter Australian territory without prior approval – and it is wholly in line with the commitments Australia gave under Article 31 of the UN Refugee Convention. We note however, that the change is merely tokenistic, and it can be argued that it only came after the completion of a progressive process of punishment, by law, of boat-faring asylum seekers through mandatory immigration detention, and the criminalisation of *those who bring them* in the People Smuggling legislation, first in 1999<sup>1</sup> and then in 2001<sup>2</sup>.
- 1.7. There is a growing body of peer-reviewed evidence based on previously classified cabinet documentation and policy documents, showing that senior Australian immigration officials have run a long-standing campaign from the 1950s onwards of hardline resistance against Article 31 of the UN Refugee Convention (Neumann, 2004; Palmer, 2009) and its demands for the Australian situation, that maritime asylum seekers are not discriminated against or treated punitively. It is disappointing that these hardline officials have been able to set a self-serving agenda of control (Jupp, 2002, pp. 66-67) and persuasion, a campaign that proved too strong for the governments that should have led, instructed and directed them (Fraser & Simons, 2010, p. 419), rather than follow them. During the Fraser years this campaign resulted in an openly acknowledged agenda inside the Immigration Department, where officer Greg Humphries publicly states how he was sent to Malaysia with a brief of “*stopping the boats from arriving in Australia*” (Martin, 1989, p. 107). This seems to have not just been an acknowledged agenda for senior Immigration officers stationed in other countries, but this also resulted in Mr Humphries boasting about *interfering with and sinking refugee boats* (Martin, 1989, p. 107) in Malaysia. He boasts about this not just to his colleagues, but broadcasts this and identifies himself in a book, published by the Department of Immigration through the Australian Government Publishing Service.
- 1.8. While public opinion about refugee boat arrivals has always been an element *deeply feared* by Australian politicians (or opportunistically used to justify harsh deterrence, punitive laws or deportations), no Australian government administration, nor any Prime Ministers, from Menzies to Rudd, have shown enough courage to *fully* inform the Australian people about the fact that asylum arrivals by boat should be accepted and welcomed, because they do so under their universal right to seek asylum and because Australia has an international legal obligation to hear and assess their

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<sup>1</sup> Border Protection Legislation Amendment Bill 1999; Migration Legislation Amendment Act (No. 1) 1999

<sup>2</sup> Border Protection (Validation and Enforcement Powers) Act 2001

claims. This is by far the most disastrous failure on the part of Australian governments since Australia acceded to the UN Refugee Convention, and more so since 1973 under the Whitlam government, when the Convention became part of Australian law. Nobody, not even former Prime Minister Malcolm Fraser, under whose government around 220,000 Indo-Chinese refugees were resettled in Australia, showed sufficient *'gumption'* to tell the Australian people (see e.g. York, 2003b) about the legal status of refugees arriving uninvited on our shores for example in his *'information and education campaign'*. This failure to educate the public about the status and rights of boat arrivals is most likely to be the single largest contributing factor to the fact that a vast majority of Australians erroneously think it's illegal to arrive by boat to seek asylum.

In this context, it borders on the ridiculous that around one of the most stirring issues in Australian politics and society, the Australian government is unwilling to fully inform its citizens about the real legal and convention status and rights of asylum seekers attempting to reach Australia by boat and put the population at ease around this issue.

## 2. Summary of Recommendations

1. Throughout the legislation dealing with people smuggling, clear provisions should be made so that the legislation does not adversely catch out the crew and skippers if it cannot be shown that they are also the smugglers and organisers of the venture, and the mandatory sentencing provisions should not apply to crew and skippers.
2. The legislation should make Australians feel absolutely confident that they can provide financial support to their friends, their relatives and their associates in Indonesia. They should also feel supremely confident about providing financial support to these parties in Indonesia, even if these parties are also intending to use the travel services of a people smuggler to reach their destination country Australia.
3. Using the services of smugglers is not a crime and never has been a crime; therefore there should be no ambiguity in any part of the legislation that may imply that using the travel services of a people smuggler is a crime.
4. Any people smuggling legislation, including the present Bill, needs to ensure, in line with the express intent of the UN People Smuggling Protocol, inclusion of an ‘innocence clause’ for charitable organisations and church groups, international aid groups and other initiatives that would reasonably fall within this category.
5. Any people smuggling legislation, including the present Bill, needs to ensure that groups of refugees who organised their own passage by boat with or through one of their leaders or one of their organisers, cannot be said to have used people smugglers, and the legislation needs to ensure that no prosecution is “fitted” to such person or persons to fill whatever agenda prosecutors have.
6. The two amendments to sections 233A and 233C of the Migration Act as proposed in the legislation need to be adjusted to include an innocent passage clause for asylum seekers in line with the express intent of the United Nations People Smuggling Protocol, which specifically calls for states to not undermine the rights of those smuggled into their countries.
7. ASIO’s role as proposed in the people smuggling legislation needs to be viewed with deep suspicion, and only if tasking is sharply defined and boundaries strictly imposed on the agency’s role and involvement, in a context where the agency’s national accountability role and process is being made clear, open and responsive to Australia’s legal and democratic structures, where we do not unduly accuse our fellow citizens without evidence, can ASIO’s role be restored to what it should be.
8. The stacking of multiple offences in first-time court appearances, the shifting of the burden of proof from prosecution to the defendant, and the notion of mandatory sentencing, since they are all expressions of immature bullying of the courts by politicians, should be removed from the legislation.
9. Australia’s People Smuggling legislation should not be setting itself up as being *wiser* than the United Nations People Smuggling Protocol, where it intends to remove one of the central definition clauses of that Protocol, which requires people smuggling to be defined as including ‘obtaining a material benefit’.

### 3. Australia's People Smuggling laws: general comments and observations

#### 3.1. THE PEOPLE SMUGGLING LAWS AS FIRST PASSED BY PARLIAMENT DURING 1999 ARE THE HARSHTEST PEOPLE SMUGGLING LAWS IN THE WORLD.

The laws (*Border Protection Legislation Amendment Bill 1999; Migration Legislation Amendment Act (No. 1) 1999*) include a maximum prison sentence provision of 20 years. Legislation dealing with the much more violent (and non-consensual, as opposed to smuggling) transnational crime of human trafficking (e.g. for trafficking women to Australia for the purpose of 'sexual servitude') includes a maximum sentence of 15 years. The anti-smuggling laws of 2001 (further developing the 1999 laws) and the human trafficking laws were part of Australia's response to the United Nations 'Palermo Convention'<sup>3</sup> (UN, 2001a). However, unlike the people smuggling laws of 1999 and 2001, the human trafficking laws were codified at a much later date – in October 2005.

The comparison between these two sets of laws gives the impression that the Australian government was in a great hurry to pass the people smuggling laws, while not showing much haste to pass the human trafficking laws. This disparity has also given rise to critical comments suggesting that the Australian State is more interested in protecting its borders than in protecting women from being used in the sex slave trade (Taylor, 2002, p. 32, 2009a).

#### 3.2. THE 1999 PEOPLE SMUGGLING LAWS ARE MOSTLY BASED ON THE FEAR THAT TRANSNATIONAL CRIMINAL NETWORKS SUCH AS THE CHINESE SNAKEHEADS ARE BEHIND A VIGOROUS PEOPLE SMUGGLING TRADE IN AUSTRALIA.

The laws are formulated for a great deal as a response to nasty aspects (as known at the time) from the European people smuggling experience. During 1999, there were a number of occasions where people smuggling rackets tried to bring Chinese illegal immigrants to Australia prior to the Sydney Olympic Games, presumably to find jobs during the Games. For example, (Dr Barry York, 2003a):

- On 12 March 1999, 26 people arrive at Cairns, Qld
- On 10 April 1999, a 40 metre vessel runs aground off Macksville, south of Coffs Harbour, NSW
- On 17 May 1999, a group of 83 arrive near Port Kembla, NSW
- On 28 May 1999, 78 arrive at Cape York Peninsula

These arrivals were undoubtedly examples of an involvement of the hardened criminal networks of the Chinese Snakeheads practicing a lucrative trade, also in Australia. However, the 1999 arrivals proved to be extreme events, and they have not recurred since that time. An Indonesian migration expert, speaking from Jakarta during October 2009 to Paul Toohey of *The Australian* (Toohey, 2009), openly ridiculed the suggestion there is a presence of any Snakehead gang involvement in people movements to Indonesia and to Australia. Contrary to assertions that centrally organised transnational crime gangs are the facilitators, there is growing evidence based on academic research that small networks of refugees, linking together using family and ethnic networks, more comparable to '*mum and pop operations*' (Hoffman, 2007, 2009; Hoffman, 2010; Koser, 2009a)<sup>4</sup> are organising the attempts for other refugees to reach the safety of Australia as a Convention country.

#### 3.3. THE EUROPEAN PEOPLE SMUGGLING TRADE TRIES TO BRING A MIX OF ECONOMIC MIGRANTS, JOB-SEEKING TRAVELLERS, ENVIRONMENTAL REFUGEES AND ASYLUM

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<sup>3</sup> In this submission the colloquial term '*Palermo Convention*' is used to denote the United Nations Convention against Transnational Organised Crime

<sup>4</sup> A transcript of Khalid Koser's presentation "*Why migrant smuggling pays*" at the 2009 Adelaide Festival of Ideas is included in this submission as Attachment 1

SEEKERS TO EUROPEAN COUNTRIES; HOWEVER, THE AUSTRALIAN PEOPLE SMUGGLING NETWORKS MERELY “BRING UN CONVENTION REFUGEES HOME”.

Every time a boat arrives, the empirical evidence is further confirmed that for Australia, smugglers are only bringing refugees to Australia. Percentages of refugee claims approval for boat arrivals were higher than 90% in the last ten years. By way of example, of the 900 people brought to Australia on four vessels, with the alleged assistance of the ‘people smuggler’ Hadi Ahmadi, whose prosecution will be before the Australian courts in May 2010, 866 (or 97%) of the passengers were found to be refugees after their claims assessment was completed.

The fact that the United Nations People Smuggling Protocol has been unable to guarantee safe passage for Convention refugees regardless of the means of travel employed, has received critical comment, and it has been suggested, both from a criminal law perspective and from an international law perspective that a people smugglers’ journey to bring refugees to safety “*may not be so illegal at all*” (Brolan, 2003; Hathaway, 2008; Hunyor, 2001).

### 3.4. AUSTRALIA’S PEOPLE SMUGGLING LAWS DO NOT CATCH THE SMUGGLERS; INSTEAD THEY HARSHLY JAIL THE INDONESIAN CREW.

A quick glimpse at the data for boat arrivals between June 2009 and April 8, 2010<sup>5</sup> shows that they brought 3,884 passengers to Australia on 80 boats. In addition, these 80 boats brought 198 crew members to Australia. All of these 198 crew members are potentially liable for prosecution under Australia’s people smuggling laws. Yet on evidence from most of the vessels that arrived since the beginning of this century, most of the crew are likely to be poor, unemployed, probably illiterate or mostly illiterate, and members of the Indonesian fishing communities around the island of Roti. For the favour of having sailed a boat to the vicinity of Ashmore Reef and being paid as little as AUS\$120, they face extreme laws that demand years of imprisonment in Australian jails, and we call them people smugglers.

Project SafeCom has personal contact with officials in the Indonesian government. Indonesians, Indonesian human rights organisations and Indonesian government officials are increasingly expressing grave concern and are increasingly angry about what Australia is doing to their citizens. In the words of one such official: “...*all the crews are Indonesians [and these issues] are a matter of great concern to me personally and my government...*”

Serious concerns have also been raised for many years by social scientists, criminal lawyers and legal academics about the fact that we catch Indonesian sailors, jail them harshly and call them ‘people smugglers’ (Balint, 1999, 2005, 2007; Hunyor, 2001, p. 224; Taylor, 2009a). These concerns have also been raised in the context of Australia’s “*secret deal*” with the Sukarno government in 1975 by Prime Minister Gough Whitlam. Ruth Balint’s article *The Last Frontier* (1999) describes how Australia in 1974 claimed a zone of 200kms of the seabed between the North-West coast of Western Australia and Indonesia, leaving just a small area (the ‘Timor Box’) to the fishing communities as fishing grounds under an Memorandum of Understanding with Indonesia. The deal was “*a hastily prepared agreement*” (Balint, 2005, p. 71) and has been named as “*Australia’s Last Colonial Act*” (Campbell, 1995).

The MOU was a disaster for the islanders such as those from West Timor’s Roti Island. Australia now claimed as its territory an area that had been the fishing grounds for Indonesians for centuries. The Timor box includes Pulau Pasir, 80kms from Roti, known to Australians as Ashmore Reef, but by declaring it in 1983 a ‘national nature reserve’, Australia ended its age-old significance for Indonesian fishers. Balint describes the traumatic experiences in apprehension, prosecution, harsh sentencing and imprisonment by Australia when they kept fishing in this area. Their imprisonment

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<sup>5</sup> Publicly available record based on media releases issued by the Hon Brendan O’Connor, Minister for Home Affairs

in Australian jails was more often than not in breach of the human rights provisions legislated in Australia's Maritime Legislation Amendment Act 1994. Balint shows how the lives, pride, income, possessions and livelihood of countless Indonesians have been destroyed to marginalise them in devastating ways.

The Senate Legal and Constitutional Affairs Committee, when scrutinising the legislation before it, needs to consider, that by being the primary causation of the marginalisation of the fishing communities that used to fish around Ashmore Reef for centuries, the Australian State has contributed to their availability to smuggling networks as sailors. It is Australia that supplied and "*trained the bus drivers for the bus company*" – the sailors we jail as people smugglers. I ask that all Committee members take note of a report about the court conviction of two of such Indonesian young men by Bob Gosford (Gosford, 2009). The article is included as part of this submission: see Attachment 2.

### **3.5. AUSTRALIA CANNOT DESTROY THE PEOPLE SMUGGLING NETWORKS OPERATING IN INDONESIA BY CREATING EVER HARSHER AND INCREASINGLY PUNITIVE LEGISLATION. INSTEAD IT CAN TAKE OVER ITS BUSINESS.**

Convincing – and recent – arguments exist that link three facts. First, so the argument goes (Taylor, 2009), Australia sinks inordinate amounts of money into 'softening' the fate of asylum seekers who land in Indonesia, through financial disbursements to the International Organisation for Migration (IOM), who accommodate and 'shelter' many asylum seekers. The argument suggests that Australia is making this investment to stop asylum seekers from arriving in Australia. Second, in terms of assisting asylum seekers to reach the safety of Convention countries, Australia, as well as UNHCR in Indonesia, has displayed mostly inaction in relation to registering and processing of asylum seekers' claims prior to resettling them in Convention countries – not necessarily and exclusively Australia. For example, the report claims (from DIAC statistics) that Australia resettled a mere 32 refugees during 2006-07, 89 people during 2007-08 and just 35 refugees during 2008-09 (Taylor, 2009, p. 5). Based on this waiting game for those who are not amongst the chosen few, a 'queue' has been created with its own momentum. Based on the resettlement figures above, the report *claims that the queue is as long as forty years*. Third, so the report claims, as a result of this stalemate, the asylum seekers – including some who have waited for up to nine years for action from UNHCR – choose people smugglers to bring them to the safety of Australia as a country that has signed and acceded to the United Nations Refugee Convention.

Instead of fighting a "bad cause" with increasing layers of punitive and criminalising legislation, there are other models of dealing with illicit issues such as people smuggling. Some of these creative approaches have been thoroughly tested in western countries. During the early 1970s, the Dutch capital city government of Amsterdam and the city police realised they had a serious problem on their hands with illicit marihuana use – often imported through the Amsterdam harbour, one of the world's major international importation and exportation hubs, also for illicit goods and products. The Amsterdam authorities were losing millions of dollars of police resources that could not be deployed where they were most needed: to fight the significant crime gangs, including the large drug import and export networks. Most of Amsterdam's police resources were wasted because they were spending all their time 'catching' small dealers – and even 'ordinary' drug users. As is now well known around the world, the Amsterdam authorities destroyed the marihuana trade in Holland almost overnight when they decided to grow their own marihuana, controlling who grew the crop on behalf of the authorities, controlling the THC levels (the active drug in marihuana), and then sell this product through a limited number of café's in the inner city with little profit, far below the established market price.

Australia on its own, or even in conjunction with other countries in the region, may not be successful in alleviating the causes in source countries for the exodus of refugees looking for a new home. It can however contribute a great deal to a regional process of human rights justice by

“stealing” the travellers in Indonesia away from the smuggling networks and transporting them out to safe UN resettlement countries. The use of people smugglers to find a way out of Indonesia (and also Malaysia) is directly related to the time refugees are stuck in a country that will not be a safe home for them as refugees in good faith, waiting for registration, assessment, refugee status confirmation, and transport out of the country. *The Australian government can beat the smugglers to it.*

### 3.6. PAWNBROKERS AND SMUGGLERS: THOUGHTS ABOUT REGULATING A BUSINESS MODEL THROUGH COLLABORATION WITH THE OWNERS.

We want to offer a second ‘operational model’ to the Committee for consideration, even if it’s clear that *‘the people movers’ collective* is a large and worldwide movement that offers travel opportunities where regular travel and official entry into safety is not available to its customers for a variety of reasons – and at this stage too large for a single government to start collaborating with. First I want to point you, for an exciting and more detailed journey through the world of people smuggling, to Attachment 1 in this submission. In the attachment you’ll find a presentation (*“Why People Smuggling Pays”*) by one of the world’s leading authorities on people smuggling, Dr Khalid Koser, delivered at the 2009 Adelaide Festival of Ideas. I also offer some additional references to the exquisite work of Dr Khalid Koser (Koser, 2007; 2008; 2009a; 2009b). As a final offering, please allow me to point to the business of *pawnbrokers* in Australia and the success story of our police force and legislators.

Pawnbrokers have much in common with people smugglers. Both offer an alternative way of accessing a product when the ‘official’ product is not available to the customer. For the smuggler it’s the “travel ticket”, and for the pawnbroker it’s the “small but immediate loan”. For people smugglers, their customer cannot access official travel. Many people cannot produce identity papers (for example, many people from poorer middle eastern countries do not have a birth certificate), or they will be treated as criminals for leaving their country without authority. For pawnbrokers, their customer cannot access a small bank loan. Many people cannot produce proof of income apart from their Centrelink benefits payment slips, and banks do not offer a loan to these clients (and they do not offer a ‘small’ loan: often the minimum on offer starts at \$2,000).

Pawnbrokers offer an inferior service at extraordinary cost. Often interest rates are equal or higher than 10-25% of the loan per month. In addition, there has been a traditional link with criminal elements in society, who can dump their stolen or illegally gained goods through these shops. But, their customers use the service keenly in the absence of options available to them from the banks; they use the service without coercion but as consenting clients. Similarly, people smugglers offer an inferior service at extraordinary cost. The cost is extraordinary: many people pay as much as \$10,000 – \$15,000 to travel across the globe to their destination country, while the quality, for example of the vessels bringing asylum seekers to Australia, leaves much to be desired. Yet, their customers use the service keenly, by agreement and without coercion, in the absence of other options available to them.

Over the last couple of decades, the Australian franchise pawnbrokers *The Cash Converters* has experienced massive growth, and can now well be classed as the single largest operator in Australia in the pawnbroking industry. This growth is for a great deal the result of a strong collaboration with Australia’s police force. The Cash Converters gives the police open access to its stock and all logged entries of sales and purchases, thus fully collaborating with the police to catch small-time burglars, thieves and underground laundering networks of goods and stolen items. Although we cannot offer a clinical breakdown of the business model of the franchise, this glimpse into the business may trigger some constructive thoughts for the members of the Committee. The model of the Cash Converters shows how a ‘shady operation’ can be transformed into an enterprise that still offers an ‘inferior’ product but does so with dignity.

## 4. The Anti-People Smuggling and Other Measures Bill 2010

### Introduction

This chapter needs to be read in conjunction with the sections in the previous chapters. Chapter Two outlines some principles underlying this submission and Chapter Three outlines some issues about the people smuggling legislation in more general terms. The current Chapter Four deals with specific elements of the *Anti-People Smuggling and Other Measures Bill 2010* currently before the Committee, and at times the points made will refer back to related sections in the previous chapters.

#### 4.1. We should catch smugglers, not fishermen

The Mandatory Sentencing provisions in the Bill should not be applied to the fishermen. As is becoming clearer with the arrival of every boat (see the remarks made in *Chapter 3, item 3.4*), the fishermen can hardly be called ‘the smugglers’ while Indonesian citizens and government delegates are expressing serious concerns about the fact that we lock up their poor citizens, and it seems we’re locking up the ferrymen in order to satisfy the electorate.

We are particularly pleased to note the comments around this issue by the Opposition spokesperson for Immigration, Mr Scott Morrison, as cited in the Bill’s Digest (CofA, 2010b):

*“The other thing to point out is the people who come on the boats, and I am talking about the crew, are abused by the people smugglers also. They have very little knowledge of what they are getting into particularly the younger crew members who effectively have become people smugglers mules. There will be no shortage, sadly, of poor fishers in Indonesia who will be available to be used by the people smuggling trade. They will arrive, as I saw some of them when I was on Christmas Island recently, and the people who looked most worried getting off that boat quite frankly were the young crew who had no idea what they were getting into.”*

The Bill’s Digest states (p. 6) that the Protocol’s legislative guide “notes that ‘sanctions should be effective, proportionate and dissuasive’ and ‘in cases where legislatures decide to apply mandatory minimum punishments, the possibility of excuse or mitigation for cases where offenders have cooperated with or assisted competent authorities should also be considered’.”

It seems clear that this section of the guide relates directly to the Indonesian fishermen, who are neither the smugglers nor the organisers of the venture. Once again we should perhaps point to the dilemma and frustration experienced by Justice Mildren in his sentencing remarks about these Indonesians (Gosford, 2009), also found in Attachment 2. Therefore our Recommendation should be that:

<p>1. Throughout the legislation dealing with people smuggling, clear provisions should be made so that the legislation does not adversely catch out the crew and skippers if it cannot be shown that they are also the smugglers and organisers of the venture, and the mandatory sentencing provisions should not apply to crew and skippers.</p>
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#### 4.2. Refugee advocates, NGOs, lawyers and refugee families: all ‘providing material support’ for people smuggling?

Since around 2003 a number of independent human rights advocates as well as others connected to small Australian NGOs have made visits to Indonesia to support asylum seekers.

Amongst these visitors are ‘ordinary Australians’, activists and lawyers and employees connected to Australian NGOs. Our estimate is that around 10-15 Australians have visited several IOM facilities, hostels or independently living individuals in the last seven years. The asylum seekers they visited were

either registered by UNHCR or supported by IOM or they were not. In addition, some Australian academics and one or more Australian churches have research relationships, supportive connections and relationships with individuals, churches or church groups or NGOs in Indonesia with a view to support asylum seekers who have landed in Indonesia. Perhaps even more significantly, there are now also many families in Australia from ‘refugee-producing countries’, who came as refugees themselves, who have relatives amongst the many asylum seekers who have transited into Indonesia with a view to apply for asylum in Australia as the only Refugee Convention in the region.

It is likely that privately provided support funds are regularly being sent to many refugees and asylum seekers in Indonesia. These monies may be sent while at the same time these family members, NGOs, lawyers, ‘ordinary Australians’, churches and academic researchers are also aware that their ‘friends’ in Indonesia also have plans to seek a travel opportunity to Australia – again, in accordance with their international legal right to seek asylum – with the help of a people smuggler.

Does this transfer of support funds, by family members, NGOs, lawyers, ‘ordinary Australians’, churches and researchers mean, that they are providing “*material support for people smuggling*”? How do the laws, at all times, safeguard Australian family members, researchers, friends and advocates from prosecution under the laws, and – given the expanding role of ASIO in fighting people smuggling as proposed in the legislation – safeguard them from being subject to ASIO’s vast powers of investigation, which may include the powers of phone tapping, raids of their family homes in conjunction with the AFP, including confiscation of home computers, arrest, and detention under these ASIO powers?

We are not alone in this concern. The drafters of the UN Smuggling Protocol also expressed this concern and intended to limit the Protocol. Again, the Bill’s Digest states (p. 6) (*accent added*):

*“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 organisations, who procure the illegal entry of migrants for reasons other than gain. 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 and the entirely innocent act of travelling using the services of a people smuggler. We feel that an extremely dangerous ‘*slippery slope*’ is created in the legislation. *It is not a crime to use a people smuggler*, and it never has been a crime to do so. This legislation seems to intend to blur this distinction, but it is entirely incongruent with the Ministerial directive issued in July 2009 by the Immigration Minister Senator Chris Evans (see also *Chapter 1, item 1.6*), which brought an end – for the first time in the history of the Immigration Department – to the use of the term “*unauthorised arrivals*” when it is used to denote refugees and asylum seekers arriving by boats, also those organised by smugglers. A telephone inquiry to the Department of Immigration in which we sought confirmation of the Ministerial directive, provided a more detailed response: “*It replaces the term ‘unauthorised arrivals’, because that sounded a bit as if there was something illegal about it*”, the information officer in the Immigration Department told us (DIAC, 2010a). Therefore our next two Recommendations are as follows:

2. The legislation should make Australians feel absolutely confident that they can provide financial support to their friends, their relatives and their associates in Indonesia. They should also feel supremely confident about providing financial support to these parties in Indonesia, even if these parties are also intending to use the travel services of a people smuggler to reach their destination country Australia.

3. Using the services of smugglers is not a crime and never has been a crime; therefore there should be no ambiguity in any part of the legislation that may imply that using the travel services of a people smuggler is a crime.

#### **4.3. The role of charitable organisations**

No ambiguity should be part of the legislation that jeopardises the role of charitable organisations. To clarify, the relevant section from page 6 of the Bill's Digest as cited above applies again. In addition, to directly quote the legislative guide (UNDOC, 2004, p. 333):

*“In developing the text, there was concern that the Protocol should not require States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum seekers.”*

Members of the Senate Legal and Constitutional Affairs Committee should not underestimate the importance of the intent of the Protocol, and the Australian government should not go over and above its intent. By way of example, take the following hypothetical scenario:

##### HYPOTHETICAL SCENARIO

It is 2012, and another violent civil war breaks out in Sri Lanka. Thousands of Tamils in the most dangerous regions of Sri Lanka find themselves wedged between government forces and raiding groups of oppositional army forces. Many are killed, rape and torture is taking place on a large scale, children disappear and when the situation escalates alarmingly, the chief of a subsection of the International Red Cross takes unilateral action and organises a large vessel with the help of a friend in a shipyard to extract more than 1,800 people from the dangerous situation. The Uniting Church of Australia has assisted this emergency extraction with a sizable donation. The first time we hear of this rapid action is when the boat arrives in the harbour of Cairns.

The example provided here is not a wildly exaggerated pipe-dream. Before, during and following WWII transport initiatives that brought refugees to safety, including unauthorised arrivals, were organised or sponsored by charities and charitable groups, and this took equally place during the Vietnam war. Why would the Australian State implement legislation that would make churches and international aid organisations liable for prosecution under one of the harshest laws in our nation?

4. Any people smuggling legislation, including the present Bill, needs to ensure, in line with the express intent of the UN People Smuggling Protocol, inclusion of an ‘innocence clause’ for charitable organisations and church groups, international aid groups and other initiatives that would reasonably fall within this category.

#### **4.4. Groups of refugees, organising themselves and taking travel action**

Does the legislation distinguish between refugees who have been ‘smuggled’ as opposed to groups of refugees who have organised their own voyage to seek safety in a country that has signed the UN Refugee Convention? In the context of the acknowledgment under the UN Refugee Convention as well as by the current government, that there is no illegality around the entry of groups of refugees by boat into Australian territory, how does the legislation provide for a situation where one of the refugees becomes the organiser of the voyage, or the boat builder, or the cashier who collects the money to make the unusual voyage possible?

Reporter Norm Aisbitt and Dave Tanner's story of the *Cap Anamur*, a vessel used to escape Vietnam in the late 1970s may be instructive. The story, ‘*Gold paves way for refugees' escape from Vietnam*’, which appeared in the *Canberra Times* (October 8, 1981, page 12) details how Vietnamese officials

were bribed with a total of 103 ounces of gold before the organisers and their passengers left the nation on the vessel. The story is included in the *Canberra Times* news clippings of the VT838 arrival and deportation (CanTimes, 1981, p. 8). Under current legislation, what would be the fate of *father of four* Mr Nguyen Van Minh, who organised the escape with and for the 98 refugees after the fall of Saigon?

Would we, under our current legislation, jail Mr Nguyen Van Minh (who may well have gone on to become a highly successful Australian citizen in our country) as a people smuggler?

During the last couple of years, and perhaps especially since the latter half of 2009, an increasing number of vessels have arrived in Australia organised by Sri Lankan refugees. Sri Lankans often sail themselves, own their own vessel, and cannot be said to *'have been smuggled'* or to *'have used smugglers'*. How have Australian border protection authorities and the Australian Federal Police dealt with these arrivals? Have they taken *'a convenient shortcut'* and charged the skippers and crew of these vessels with people smuggling anyway? If they have, isn't it true that they seek to criminalise refugees arriving by boat, rather than criminalise people smugglers? Has the Australian Parliament investigated how Border protection authorities stick to the spirit as well as to the letter of the true intent of the United Nations People Smuggling Protocol, or whether they are dealing as zealots with those who arrive by boat?

Perhaps this is a good place to cite Article 19(1), the *"saving clause"* of the People Smuggling Protocol (UNDOC, 2004, p. 361):

*1. 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.*

It should be evident to the Senate Legal and Constitutional Affairs Committee that Australia's achievement in having implemented laws that criminalise people smugglers is no licence to quietly undermine the UN Refugee Convention and its 1967 Protocol by criminalising any group of refugees that organise their own voyage. Therefore our next Recommendation is as follows:

5. Any people smuggling legislation, including the present Bill, needs to ensure that groups of refugees who organised their own passage by boat with or through one of their leaders or one of their organisers, cannot be said to have used people smugglers, and the legislation needs to ensure that no prosecution is "fitted" to such person or persons to fill whatever agenda prosecutors have.

#### **4.5. Refugees have 'no lawful right to come to Australia'?**

We are highly critical of the clauses introduced under amendments to sections 233A and 233C of the Migration Act that deal with the bringing of a 'second person' or 'at least five people' to Australia. The People Smuggling Protocol is unambiguous about preserving the rights of those smuggled into a country, but there is no clause in these amendments to provide for cases where the 'second person' or 'at least five people' are asylum seekers trying to reach safety. Australia should not be making people smuggling legislation that undermines the United Nations People Smuggling Protocol.

6. The two amendments to sections 233A and 233C of the Migration Act as proposed in the legislation need to be adjusted to include an innocent passage clause for asylum seekers in line with the express intent of the United Nations People Smuggling Protocol, which specifically calls for states to not undermine the rights of those smuggled into their countries.

#### 4.6. The role of ASIO

The role of ASIO has already been mentioned briefly, and concerns have been expressed under paragraph 4.2 of this Chapter, that dealt with providing an ‘innocence clause’ for offering financial support to asylum seekers in transit in Indonesia by their friends and associates living in Australia. We need to express these serious concerns again, this time around fears we have about the lack of limitations imposed on ASIO around the agency’s role definition and precise tasking. We see a possible lack of boundaries about where, how and in which case ASIO involvement is warranted. If the legislation is to be entirely unambiguous about the supporting role Australian relatives, friends and associates of asylum seekers may have towards those transiting in Indonesia, then ASIO’s role needs to be sharply defined and clear limitations to its powers should be crisply imposed.

During the last couple of years Australians have been able to witness some disturbing outcomes of adverse ASIO assessments. While detained on the island of Nauru in immigration detention, two Iraqi asylum seekers, Mr Faisal and Mr Sagar, received adverse assessments by ASIO (Gooley, 2007). Eventually they were joined in ‘their fate’ by Mr Scott Parkin, an American peace activist and trainer, who had come to Australia to assist activist groups, an entirely legal and bona fide activity in Australia as a democratic nation.

The further development of this story in the Australian courts was nothing less than stunning: ASIO was not required to clarify to the trio what the nature of their adverse assessment was; ASIO was not required to tell their lawyers what the nature of their adverse assessment was, and ASIO was not required to clarify the nature of the assessment in the courts. Mr Scott Parkin was detained for an entire month without being charged with any offence, while he was not told why he was detained, before being deported without being told why he was deported. It’s not without reason, that the principal lawyer of *Maurice Blackburn Cashman*, Ms Anne Gooley, accused ASIO of undermining the rule of law (Gooley, 2007). There is a deeply disturbing issue, which is still very much live, around the functioning and accountability procedures of Australia’s intelligence organisation which needs urgent and full parliamentary review. At the moment any discerning Australian who values the true and tested mechanisms of a fully developed and democratically accountable society, cannot trust the agency.

7. ASIO’s role as proposed in the people smuggling legislation needs to be viewed with deep suspicion, and only if tasking is sharply defined and boundaries strictly imposed on the agency’s role and involvement, in a context where the agency’s national accountability role and process is being made clear, open and responsive to Australia’s legal and democratic structures, where we do not unduly accuse our fellow citizens without evidence, can ASIO’s role be restored to what it should be.

#### 4.7. Manipulating principles of common law: mandatory sentencing, reversing the burden of proof and recidivism for first-time offenders

If the current legislation will be passed by both Houses of Parliament, the number of manipulative constructs where internationally accepted principles of common law are forced aside by the Executive will have increased from one (mandatory sentencing) to three: the legislation introduces the notion of “recidivism” for first-time offenders, and it reverses the burden of proof from prosecutor to offender. According to the Law Council of Australia, who also opposes the mandatory sentencing provisions in previous people smuggling legislation and its extension in the current Bill, it also breaches Australia’s obligations under the International Covenant on Civil and Political Rights (ICCPR). As the Law Council notes, the ICCPR “*prohibits arbitrary detention (Article 9) and provides that prison sentences must be subject to appeal (Article 14)*”.<sup>6</sup>

<sup>6</sup> Law Council Submission on the *Anti-People Smuggling and Other Measures Bill 2010*, page 12

We take issue with the notion of mandatory sentencing, which has widely shown to be a great burden to the Judiciary. We do not appreciate it when the Executive imposes frustrations on the Legislative, just because they want to be seen to be “tough on crime”. *Some may even construe this as a bullying of the Legislative by the Executive.* The example of Justice Mildren’s frustration below in Attachment 2 is provided to illustrate this first manipulation of common law.

The second, and new, manipulation of common law will occur around the notion of the burden of proof. The legislation proposes, according to the Bill’s Digest (p. 11) (accent added):

*“[For the] new offence of supporting the offence of people smuggling ... (Criminal Code, new section 73.3A) ... the **evidential burden in this respect lies with the defendant** and a person commits an offence even if the offence of people smuggling is not committed (paragraph 73.3A(3)). The Explanatory Memorandum notes that the offence will nonetheless apply to ‘persons in Australia who pay smugglers to bring their family or friends to Australia on a smuggling venture’.”*

Why should the Australian state, when it wants to impose one of the world’s harshest punishment for people smuggling, not be burdened to provide the evidence beyond reasonable doubt for those it wishes to charge and prosecute? Is this because too often the State cannot come up with evidence showing the crime beyond reasonable itself?

The third manipulation of common law occurs around the notion of trying to construe multiple offences brought to the same court as “repeat offences” As the Explanatory Memorandum states (CofA, 2010a):

*“This amendment extends the definition of ‘repeat offence’ in proposed subsection 236B(5) to include the circumstance that involves a person being convicted of another offence against proposed sections 233B, 233C or 234A of the Migration Act whether in the same proceedings as the proceedings relating to the offence or in previous proceedings. This means that a person who is convicted of multiple offences in the same proceeding will be subject to the higher mandatory minimum penalties of eight years imprisonment with a non-parole period of five years. This will capture people smuggling organisers who have been involved in multiple people smuggling ventures but are coming before the court for the first time in relation to multiple offences.”*

This seems a bizarre way of dealing with multiple offences. There is no need to introduce what is basically a crafty manipulation of the mechanism of the courts. There are appropriate and established ways available to the courts which increase penalties for those who are, even in their first court appearance, found guilty of more than one offence. Why would we introduce a bizarre new mechanism, which uses the notion of recidivism where it’s not really recidivism? We concur in this case with remarks made in the Submission for this legislation prepared by the Law Council of Australia<sup>7</sup>. The legislation undermines two more principles of common law and previous people smuggling legislation, which has already shown to frustrate and anger the judiciary in their work. Politicians in the executive should refrain from setting up potential conflicts with the second arm of government, the judiciary, and should not be tempted to resort to introduce levels of democratic immaturity into the Parliament, just because they want to win votes. Australians rightly expect more maturity from their government.

8. The stacking of multiple offences in first-time court appearances, the shifting of the burden of proof from prosecution to the defendant, and the notion of mandatory sentencing, since they are all expressions of immature bullying of the courts by politicians, should be removed from the legislation.

<sup>7</sup> Law Council Submission on the *Anti-People Smuggling and Other Measures Bill 2010*, page 12

#### 4.8. Charging Mr Nguyen Van Minh: Removing the clause ‘obtaining a benefit’

In section 4.4 of this Chapter we told the story of Mr Nguyen Van Minh, under whose inventive and persistent leadership 98 refugees managed to escape Vietnam following the fall of Saigon. Passengers and organisers, all family members, contributed to the cost of the journey by giving gold. A total of 103 gold ounces made the journey possible. Under the removal of the ‘obtaining a benefit’ clause he will have become guilty of people smuggling.

*(a hypothetical that could become a reality)*

**PRESS ALERT:** *Persistent media rumours have just been confirmed: Mr Nguyen Van Minh, who assisted in the passage from Vietnam and the entry into Australia together with 97 of his family members, has just been arrested by Australian Federal Police and the Immigration Investigations Branch. Media reports revealed that he was culpable of collecting up to 103 ounces of gold to bribe government officials and Vietnamese police before coming to Australia with his vessel. Mr Nguyen will face up to twenty years imprisonment under Australia’s People Smuggling legislation. He did not receive any material benefits from organising the journey, an aspect cited in the UN Smuggling Protocol as the central characteristic of people smuggling. This aspect was dropped from the Australian People Smuggling legislation in 2010.*

To clarify the issues raised in this paragraph, we refer to the Bill’s Digest (p. 10) once more (accent added):

*“Items 1 and 2 **repeal existing paragraph** 73.1(1) from the Criminal Code which required the prosecution to prove that the person who organises or facilitates the unlawful entry of another person into a foreign country **did so having obtained or intending to obtain a benefit** (whether directly or indirectly). There is no such equivalent requirement under existing section 232A (Organising bringing groups of non-citizens into Australia) or proposed section 233A (Offence of people smuggling) of the Migration Act.”*

... and a second paragraph:

*“Items 4 and 5 **repeal existing paragraphs** 73.3(1) from the Criminal Code which required the prosecution to prove that the person who organises or facilitates the unlawful entry of a group of five or more persons into a foreign country **did so having obtained or intending to obtain a benefit** (whether directly or indirectly). There is no such equivalent requirement under existing section 232A (Organising bringing groups of non-citizens into Australia) or proposed section 233C (Aggravated offence of people smuggling (at least 5 people)) of the Migration Act.”*

The removal of this *benefit requirement* seems bizarre. Why on earth would the drafters of the *Anti-People Smuggling and Other Measures Bill 2010* want to remove this clause of obtaining a benefit, when the UN Smuggling Protocol clearly stipulates this as the central definition of what constitutes people smuggling?

The United Nations People Smuggling Protocol (cited in UNDOC, 2004, p. 337) defines people smuggling as follows:

*“For the purposes of this Protocol:*

*(a) ‘Smuggling of migrants’ shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;”*

Rather than removing this clause of ‘*obtaining a benefit*’ from the Criminal Code, we think it more appropriate to instead include this clause to the Migration Act when it is argued that this is missing from the Act. If “*legislation harmonisation*” is to be one of the purposes of the current legislation, then dismissing one of the central definitions of the People Smuggling Protocol is putting the order of things upside-down. Our Recommendation therefore follows as:

9. Australia’s People Smuggling legislation should not be setting itself up as being *wiser* than the United Nations People Smuggling Protocol, where it intends to remove one of the central definition clauses of that Protocol, which requires people smuggling to be defined as including ‘obtaining a material benefit’.

#### **4.9. Stopping smugglers ... or stopping boats?**

The Immigration Department (and related agencies) has no mandate to “*stop the boats*” (see *Chapter 1, item 1.7*), and it never had that mandate – this legislation is not, or at least should not be, about stopping any refugee boats from reaching Australia. The amendments as proposed in this Bill are about stopping criminal people smuggling ventures, but the Bill conveys the impression that its true purpose is to stop any boats from reaching Australia without anyone on board being able to avoid harsh prosecution. In view of commitments given by Australia under the UN Refugee Convention, also to refugees arriving by boat, this gives the legislation the appearance of being highly manipulative in nature.

A glimpse down history lane may assist in sharpening the focus around this issue. Previously classified but now released (on January 1, 2010) 1979 Cabinet documents (CofA, 1979a) show Australia’s first draft legislation to harshly prosecute anyone organising unauthorised vessels trying to reach Australia (CofA, 1979b, 1979c).

The proposals were compiled by the Department of Immigration and Ethnic Affairs. There were no international criminal smuggling syndicates in sight in 1979, yet the documents presented to the Fraser Cabinet raise the spectre of ‘*four large vessels*’ that had departed Vietnam, and that these vessels ‘*may arrive in Australia*’ yet there was no evidence these vessels actually arrived, and there is no confirmation that they have ever arrived on our shores at any later date. There were indeed large vessels, and paid passages on boats of considerable size, but in the main these were organised by the Vietnamese government after the fall of Saigon, which organised paid departures for those who wanted to leave the communist regime. In this context Immigration Minister Michael McKellar presents the prepared proposals at a January Cabinet meeting, which liberally use the terms of “*profiteering*” and “*trafficking*”. In hindsight, it seems strange if not manipulative to propose to codify criminal charges (up to ten years imprisonment or a fine of \$100,000) when the prime example for legislation cited in proposals is created by the government of another nation. As shown above (see *Chapter 1, item 1.7*), there was a remarkable, seemingly self-appointed, Immigration department brief for officers posted in Malaysia to “stop the boats from arriving in Australia”, resulting in acts of sabotaging and sinking boats intending to depart for Australia. This is a government department about which former Prime Minister the Rt Hon Malcolm Fraser comments in his recently published Political Memoirs:

*“There was a hard core within the immigration department that opposed a genuine compassionate and humanitarian response. It was ultra-conservative and reactionary with a strong racist streak.”* (Fraser & Simons, 2010, p. 419)

Eventually, the Fraser government brought the legislation to Parliament (Hansard-House, 1980a) with a sunset clause of 12 months, only to be proclaimed “if needed”. Proclamation would not happen for another year around the arrival (Hansard-House, 1981) and subsequent deportation of crew and passengers of the VT838 (CanTimes, 1981), but the principal question of whether a policy of ‘*stopping*

*refugee boats from arriving on our shores*' can ethically be defended has never – in full, objective, unambiguous and conclusive terms – been addressed in the Australian Parliament.

The name of the 1979-80 legislation prepared by the Immigration Department (*Immigration (Unauthorised Arrivals) Bill 1980*), in a context where immigration officials claim and promote their own agenda of 'stopping boats from arriving in Australia', suggests that the laws were an attempt to declare the arrival of *any* unauthorised vessel as 'illegal', including vessels carrying refugees and asylum seekers, in an attempt by the '*border guards*' inside the immigration department to completely 'control' the border and close it to anyone wanting to breach it and enter.

There is however, good hope that Australia, led by its politicians, may one day come to terms with the fact that boats with asylum seekers will keep arriving and that we need to receive the passengers with decency, respect, and treat them in accordance with Australia's commitments given under Article 31 of the Refugee Convention. In this context the courageous July 2009 initiative by Immigration Minister Senator Chris Evans in his Ministerial directive to the Immigration department (see *Chapter 1, item 1.6*) is an enormous step, which sets in motion a process where the management of borders, rather than their control, is becoming a reality, a call which has already been issued by academics who are concerning themselves about this paradigm shift (Taylor, 2005). The condition of this shift is the requirement that no politician uses the arrival of maritime asylum seekers as a political, manipulative and xenophobic tool to whip his or her electorate into a frenzy in order to get re-elected, but that instead each and every elected member and senator starts the day by acknowledging the rights of asylum seekers under the Refugee Convention and the Universal Declaration of Human Rights, and does so in an open, flexible way, and that (*let us dare to dream!*) an Australian government implements a nationwide education campaign around Australia's obligations under the UN Refugee Convention, which succinctly explains why it is not illegal to seek protection in our country, also by boat.

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# Attachment 1 – Why People Smuggling Pays

# Khalid Koser: Why Migrant Smuggling Pays

Adelaide Festival of Ideas, Sunday 29 July 2009

Session host: Peter Mares, Presenter, *the National Interest*, ABC Radio National

Audio Recording courtesy ABC Fora, Transcript Project SafeCom (Jack H Smit)

Audio location: <http://www.abc.net.au/tv/fora/stories/2009/07/24/2640772.htm>

**PETER MARES:** Good morning. Welcome to this session of the Festival of Ideas on people smuggling, *Why Migrant Smuggling Pays*. I'm Peter Mares, presenter of *The National Interest* on ABC Radio National and a member of the advisory committee of the Festival and I'm glad to see we've got a serious audience here who are more interested in the big issues of migration than in whether or not chiropractics are quacks.

In recent times we've seen a shift in political rhetoric in Australia away from talk about queue jumpers and such like language, to the evil people smugglers, so a shift in where the focus of criticism goes when irregular migrants or asylum seekers come to our shores by boat. The target now is very much the people smugglers, so I think it's very appropriate that we have this topic at this festival, discussing why migrants smuggling pays.

I must say I have regular correspondence with someone, a listener, and someone has been a very active advocate for refugee rights in Australia who, whenever I use the term people smuggling, sends me emails of a very ferocious nature criticizing me for using this term, because as she points out, everyone has the right under international law to seek asylum, so if someone helps them to move across the border they're not a people smuggler, they're something else – that's a humanitarian act in a way, and certainly, she makes the point that the fishermen who end up in the courts being prosecuted in Australia for people smuggling are being incorrectly labelled.

I disagree with her though, I because I think people smuggling *is* an industry and very profitable industry and it deserves to be analyzed as such. There is a difference between the fact that someone has the right to cross a border to seek asylum, and someone running a business to make a profit from facilitating that process, I think.

Anyway, enough from me, because we have probably the world's leading authority on these types of issues to talk to you. Dr Khalid Koser is a geographer and an expert on forced migration. He is Co-director of the New Issues and Security course of the Geneva Centre for Security Policy and is a Fellow in Foreign Policy studies at the Brookings Institution in Washington, and he has a particular interest in asylum issues – forced migration, as I say: international migration generally. He's the author of this very good little book, *International Migration, a Very Short Introduction*, an Oxford University Press publication. I first came across his work several years ago, when he and I were both within the same publication. And what struck me about Khalid's work, is that while many of us make assumptions about why people move and the way in which they move, he looked for empirical evidence, evidence-based data on why these movements happen and how they happen, and his work is surprising and rigorous and refreshing in the debates we have, which are often very predictable about these sorts of issues. So, please welcome Dr Khalid Koser.

**KHALID KOSER:** Well, thank you very much Peter, for that incredibly kind introduction. It's a real pleasure for me to be in Adelaide despite the wind and the rain and despite the cricket - we won't talk about that much more, I hope. I'm delighted and very grateful to the organizers of the Adelaide Festival of Ideas for inviting me. I've been on three panels and this is my solo session, I've enjoyed it thoroughly and found the feedback from the audience particularly rewarding, so I'm going to try to make sure that we have enough time for at least 10-15 minutes of discussion at the end of my presentation. Thanks to you also for making the effort to come on a windy Sunday morning, I'm very grateful you've made the effort.

As Peter has indicated, the topic of my talk today – migrant smuggling – is a hugely topical hot button issue in Australia at the moment, especially there's a focus around so-called boat arrivals. We know that something like 28 boats carrying something like 944 people have either landed in Australia or being intercepted on their way to Australia in the last year or so. There are rumours in the press that there are 10,000 people waiting to get to Indonesia, many of them planning to come on to Australia. I read yesterday that a boat carrying 74 people apparently from Pakistan and Afghanistan has become lost someone in the sea between Indonesia and Australia, and think we can perhaps expect the worst there, which is rather sad. I know also that there is a very lively debate in this country around how to control and stop boat arrivals. I note that earlier this year in Bali, Foreign Minister Stephen Smith said that he thought the global financial crisis might lead to more people fleeing places like Indonesia and heading for Australia – that's something we might wish to come back to and discuss after my presentation.

I know there've also been debates about the Rudd government's changes in policy, abandoning the so-called Pacific Solution, abandoning Temporary Protection Visas and some debate about the extent to which these more lenient policies are perhaps encouraging people to come to this country in an illegal manner. Let me just say on that, as an outsider and as someone who does not live in Australia: make no mistake, the Pacific Solution so-called was a scar on Australia's otherwise excellent international reputation. And I have to say that even if the cost is – and this is by no means necessarily proven – but even if the cost is, that a further hundred asylum seekers or so arrive in this country each year, I think it's a cost worth paying, a price worth paying, to make sure that Australia reestablishes its otherwise excellent international reputation.

I'm perfectly happy to return to Australian policy during discussion, but for my presentation I want to take a slightly wider perspective if I can. I'd like to speak to you about some research I did, I've done over the last two or three years in both Pakistan and Afghanistan, speaking to migrants who are planning to move, speaking to migrants have been unsuccessful and who have been sent back, speaking to their families (and as you're going to see, their families play an important part in the story), and also speaking to smugglers: people who are surprisingly accessible in places like Pakistan and Afghanistan. These people were heading for various destinations in the world, not just Australia, also North America, also Europe; some were going, yes by boats, others overland, others also by plane, so a variety of different destinations and methods. I would just as an aside say, it's important to put Australia's debate about boats and boat arrivals in a larger context.

Firstly, boat arrivals in Australia comprise actually a small proportion of overall so-called irregular migration in this country. More people arrive by plane each year than boats, but the boats seem to attract the attention. And most irregular migrants so-called in this country are actually people who overstay their visas, who arrive legally and then overstay illegally. So there's a bit of an obsession with boat arrivals even though they're a rather small proportion of a much wider concept of irregular migration in Australia.

The second point to make is: on a global scale, Australia's got it pretty good. I spoke about something like 944 boat arrivals over the last year, but there are millions of people, millions each year, moving around the world in an illegal fashion with smugglers paying between them billions and billions of dollars, so Australia hasn't got it bad compared to many other parts of the world, including I think Europe and North America too.

The final point in the introduction to make is that whereas most people who arrive in this country seek asylum – I understand a large proportion of them get asylum – most irregular migrants in the world today are moving for largely economic reasons. So it's a mixture of people moving for political reasons, to flee persecution and economic reasons to improve their lives – and by the way I think there's nothing wrong at all, I think it's quite a noble thing to do to try to improve your life, and if you have to move to do it, then so be it.

Of course, the answer to the question why smuggling pays differs if you're a refugee fleeing political persecution or an economic migrant seeking to improve your life. If you're a refugee, smuggling pays because it gets you to safety. That's the pay-off of smuggling. If you're an economic migrant largely, smuggling pays because as we're going to see it allows you to recoup your costs and start to expand your income pretty quickly – I think surprisingly quickly. Given how much migrant smuggling has become ingrained in the public conscience, it seems to me that we know surprisingly little about it. There's lots of assumptions, there's lots of generalizations, but actually most people don't know much at all about migrant smuggling – and I include policymakers. And I think policymakers around the world are really beginning to run out of innovative ideas in terms of how to

respond to this issue.

So what I'd like to do for the next 15 or 20 minutes or so, is to adopt a pretty different and radically alternative approach to that than is normally I think adopted, and look, as Peter has indicated, look at smuggling as a business, as an industry, and in particular what I'd like to do is follow the money through this business. I want to try to answer the following questions: how much do smugglers charge – and we're gonna see that the charges vary according to route and destination, and method. How do migrants and their families raise the money to pay those charges? How are smugglers paid by migrants and their families – and there are some interesting findings around that. What do smugglers do with the money? How do they disperse it to make sure that smuggling actually works? How much money do migrants send home once they've arrived in their destination countries, and what happens to the money that they send home? And the headline here, and we'll see it at the end, is that basically smuggling pays for everybody involved. And I think if we start to understand smuggling as an economic process where everybody, from the migrants to the families to the smugglers, arguably to the destination societies and the origin economies too, if you understand it as a process whereby everybody seems to profit, then I think we need to think about some quite radically different alternative policy approaches to making it stop, if that is what we think we should do.

My economic approach is by no means intended to underestimate the human costs of migrant smuggling. Something like 2000 people each year die trying to cross from North Africa to southern Europe across the Mediterranean in boats; 2000 a year dying, making that journey. Something like 600 a year die trying to cross from Mexico into the USA. So, significant deaths of people trying to move around the world. And also, I do not want to underestimate the exploitation that many people go through once they arrive at the detention facilities in which many people find themselves – which I think are a disgrace – the exploitation of those people who find themselves in work, and so on, and so forth – so I'm not underestimating the human costs, but I think it's useful to focus on the economics of this, to see if we can uncover some new realities and think differently about policies.

So let's try to follow the money through the smuggling industry. The first question to ask is how much do smugglers charge. Again, based on research in Afghanistan and Pakistan, costs vary significantly according to the destination to which you want to go, assuming you're leaving Afghanistan or Pakistan. In general, the USA and Canada – North America – are the most expensive, and Western Europe and Australia are roughly the same amount of costs: cheaper than going to North America. Costs also vary by mode of transport. Looking for example at Afghanistan to Australia at the moment, to fly, between Afghanistan, Pakistan and Australia, illegally, with a smuggler, will cost you something between US \$12,000 and \$15,000. These are not insignificant sums of money. To do it by a combination of flight, then boat, perhaps a boat from Indonesia, will cost you somewhere between US \$5,000 and \$8,000 according to going rates at the moment amongst migrant smugglers in Pakistan and Afghanistan. Let me just make two observations of those costs and that range of costs. Firstly, smuggling is a flexible business. Smugglers will deliver a service that suits the depth of your pocket. If you can't afford to go to the USA, I'll take you to Turkey. If you can't afford to get to the UK, I'll take you to Australia. If you can't afford a flight, which is probably the safest way to go, then I'll make it cheap and we'll do a combination of flight and boat. This is a business, you're a customer, and I'll find a way to get your business and to get your custom and get your money. If you're poor, don't worry, we'll find a way to make it work, if you're richer, let's do it by flight, go straight to the USA and things will be straightforward. It's a business and I think we need to think of it in those terms.

And the second observation I'd make is that I think almost by definition – given the amount of money we're talking about – smuggling does not involve the poorest of the poor. These are people who, as we'll see in a minute, at least have the wherewithal to raise loans, perhaps to sell property, they have the wherewithal to be able to raise the money that's needed to pay these rather large and exorbitant fees. Having said that, I had a very interesting debate yesterday with Julian Garside on another panel, and he made the point, and I think it's important to emphasize here, that we shouldn't underestimate, especially in the Australian context, that many people are still coming from very underprivileged and very poor backgrounds, and I take that point completely. My only argument is that the given the costs involved, these are not the desperately poor of the world, these are not peasants. And I think when we come back to perhaps discuss the global financial crisis, that's an important implication. There maybe more people who are desperate to leave poor parts of the world; where they can afford to, paying smugglers, I think is another matter.

So there's the first set of issues: how much families need to raise to pay smugglers in the first place. Let's look now at how migrants and families raised the money. The first thing to say is that in almost all the cases of people I spoke to both in Afghanistan and Pakistan it was families, not migrants themselves, who raise the money. Very few migrants have the money, either in savings or the wherewithal to raise the money themselves, and they rely on families and family networks. This is an investment by families in their children. Just as you might invest in sending your children to school or university, these are families investing in their children, either to get them out of harm's way, if they're fleeing persecution, or to help them perhaps to achieve a better life and a better

standard of living by getting them to another part of the world. Again, think of it as an investment, as a business.

How did families raise money to pay these large fees to move their children around the world? Some people drew on savings. Some people sold property, some people were selling jewelry; some people sold land. Many people took on debt and borrowed money from moneylenders. Let me just go back especially to the jewelry point. Anyone who knows the Islamic culture, who knows Pakistan and Afghanistan: selling your jewelry is a fairly significant thing to do in these parts of the world. This isn't something you do lightly; these are wedding betrothals and so on and so forth. These are significant investments: that's the point. You're selling land, you're selling property, and you're selling jewelry. You're taking on risky loans from unscrupulous moneylenders, this is a business and you expect a return on your investment. This isn't something you're take on lightly, I think, in any of these countries. On average across my sample of over a 100 people in Afghanistan and Pakistan, smugglers fees came to 367% of annual household income. So what I'm saying is that people somehow raised more than three times their annual income in order to pay for smuggling. So again, an investment, and an investment upon which people expect some sort of return. You don't just take on borrowing three times your household income for the sake of it, you do it because you expect some form of return upon that investment.

Next question. We've seen how much smuggling costs. We've seen how migrants and normally their families raise the money to pay those costs. How are smugglers paid – and I think this is among the most interesting of the findings. Anyone in this room who has used eBay will be aware of what an escrow service is. An escrow service is a company that holds a buyer's money until the buyer is satisfied with the goods that are being delivered, and then the escrow service releases the money to the seller. So you're not risking paying all the money to the seller who's going to sell you a dodgy Hi-Fi, which means you don't get the goods that you want. On eBay you deposit your money with a third-party escrow service. Once you're satisfied with what you've got, the money is then released to the person who's selling you the item. Exactly the same system exists today in smuggling in Pakistan and Afghanistan. Migrant families don't pay the money directly to smugglers; they pay their money to a third party, usually a money changer or money handler, normally in one of the big bazaars out in Peshawar or Kabul. The money is only released by that third party to the smuggler, once the migrant has arrived safely in his or her destination. Now just think about what I'm saying. What I'm talking about here is a money back guarantee on smuggling. If you don't make it to your destination safely, I as a smuggler get nothing at all – nothing. The money is taken from the third-party, from the money changer, often in the market, and goes back to the family, and let's just call the whole deal off: a money back guarantee on migrant smuggling today in Pakistan and Afghanistan. Now, this varies around the world, and you'd find slightly different responses in West Africa and South America and so on and so forth, but I think that's quite a striking and important finding that we might wish to come back to.

It's interesting – briefly – to look at how payments have evolved in this setting. About 5 to 10 years ago, the method was that all of the money was paid up front to the smuggler. So if you wanted to move to Australia, you would come to me – the smuggler – you'd give me the money up front, and you'd hope I was trustworthy; often I wasn't, I ran off with the money, you didn't move, you lost your \$10,000. Again – a business responding to criticism by the customers – that soon changed. For a couple of years the method was that you'd pay a proportion of the money up front. So you'd give the smugglers, say 50% of the money, and you'd pay the balance upon confirmation that your son – and it normally is your son – has arrived safely at the destination to which he's going. The problem with that is that it opens up the possibility for exploitation. You arrive in Australia as a migrant, you still owe \$2,500 – or whatever it is – to the migrant smuggler back at home, and that debt means that you can be exploited. You can be forced into prostitution; you can be forced into exploitative situations, and so on and so forth. And this is where the concept of migrant smuggling and human trafficking begin to blur into one another. Again in response to complaints from potential customers, that changed. We now have what is effectively an escrow system. A money back guarantee, a low-risk investment for families, the money is deposited with a third party, and then released once someone has arrived safely at the destination to which they are going. So we've seen how much it costs; we've looked at how families raise the money; we've looked at how the money is actually transacted and passed over to smugglers. Let's look briefly at how smugglers themselves spend the money.

I think is really important when talking about smuggling, to move away from a kind of generalization, which I think we all have, and that's understandable I think – especially given the press – a generalization that somehow smugglers are arch-criminals. They're some sort of *James Bondesque* baddies who are kind of in the middle of this cool and evil network of manipulation and evil. That may be the case in certain circumstances, and I think the so-called snakeheads in China probably do fit that James Bond sort of model, but in most places in the world they don't. Smugglers who bring people from Mexico to the USA are so-called *mom and pop industries*: there are a couple of people who move you across the border in a fairly low-tech and fairly straightforward way. In Pakistan and Afghanistan it's normally people who have completely legitimate jobs and are making a bit of money on the side. So the normal contact usually in Afghanistan and Pakistan is a travel agent: he'll close the door at five o'clock on his business, he'll take you downstairs and he'll start to discuss other issues, more illegal issues perhaps, over the table. He will then work through a network of people to make smuggling happen. And

again, this echoes something I think of an interesting discussion we had with Julian Garside yesterday. We need to get away from the idea that smugglers are always evil. In some cases, in some circumstances, smugglers are people who are helping people get out of harm's way. Oscar Schindler was a smuggler and so on and so forth: we know those kinds of ideas. So I think we need to have a bit more sophisticated idea of what smuggling is and who smugglers are.

Once the initial contact – the travel agent normally in Pakistan and Afghanistan – receives the money (of course the money is not received, it's with a third party, but once the pledge has been made and the money is deposited with the third party) he then has to spend a large proportion of that money to make smuggling work. He needs to find someone who perhaps can supply a stolen or forged passport, who can forge a visa. He needs to pay boat men, or truck drivers, immigration officials, customs officials and so on and so forth. Any of you who have flown internationally recently – I've done it very recently – you show your passport three times when you fly internationally. You show it when you check in to deposit your bag, you show it as you go through to the departure lounge, and then finally you show it just before you get on to the aeroplane: three people there who need bribing, to make sure that you get through that system on to the aeroplane. And so a lot of money, in my research around 50%, is spent by the initial contact in making this work and dispersing the money around the network of people who are involved in making smuggling work. I want to come back to this, because this is really interesting. What I'm saying here is that smugglers are dispersing money to their network before they've actually received the money. The greatest economic risk in this entire process is that of the smuggler. He needs to pay \$7000 up front to make the smuggling work, and only when it works does he get the \$14,000 paid and so he recoups his 50% – around \$7000. That's quite an interesting observation I think, and there are certainly policy implications around that.

Let's continue to follow the money – I'm going to skip the traumas of the journey, I can come back to you if you wish with many rather depressing stories about the journey and how it works. 85% of the families that I spoke to in both Afghanistan and Pakistan, who'd paid to have a son – it normally was the eldest son smuggled abroad – had received money in the form of remittances from people who'd moved abroad. Now I think there are some really important implications there, and one is of course, what this means is that these people are finding work. When we look at migrant smuggling, when we look at irregular migration, we tend to focus on the supply side. We tend to think of desperate people living in poor countries, perhaps fleeing conflict and persecution, who need to get out of harm's way, or who are trying to improve their lives and pay smugglers to do so. Irregular migration wouldn't exist if there wasn't also a demand for their labour. There are something like 40 million irregular migrants in the world today. A third of them, 12 million in the USA alone – and believe me, those 12 million Mexicans in the USA work hard, and prop up the US economy in certain sectors.

Our economies depend on the work of irregular migration. So it's one part of the equation to get rid of the supply, to make sure that people are safe or can earn money at home, but the other is to make sure that we don't have a demand for their particular work in destination countries, and I think we need to look at the two sides of it. Most people in my sample who are smuggled found work relatively easily and were sending home significant sums of money as a result of the work that they found. The annual remittances – money sent back by migrants who had been smuggled from these families or via these smugglers that I spoke to – the average was US\$3750 a year. These are irregular migrants, sending home, on average – and it ranged from in one case just \$100 to in another incredible case \$10,000, and I think I'm not sure I believe that sum – but on average, it was reported to me, something like US\$3750 sent home by people who have been smuggled abroad. Now we can discuss later, and it's very interesting research some of which I have done, we shouldn't underestimate the social consequences of sending home remittances. Migrants often find themselves under huge social pressure to send back money. It may well be that if you're sending back \$3750 that really is depriving you of any form of life in the country in which you're living. Migrants often deprive themselves very, very significantly in order to try to meet family obligations back at home, so there is a debate I think to be had around that. The point is, most of these migrants are finding work, and most of them are sending back money in significant sums.

What happens to the money that they send home? On average – again of course, over a hundred households and migrants and smugglers and putting the data together – on average the remittances were about 50% of the money paid to the smuggler to make the smuggling happen. What that means is that within two years, the smuggler's fee has been paid off. The debt that you incurred has been paid off; the land that you sold has been recouped, in terms of at least its value. So two years of sending home remittances – and there's assumptions here about the extend to which you can maintain your work, and the extend to which you are able to send home remittances, but most of these people seem to be able to – within two years the smuggler's fee, and the investment made by your parents has largely to be paid off as a result of your remittances. After that, on average, remittances from irregular migrants doubled household incomes in Pakistan and Afghanistan. And this is what I mean by a sensible investment: you sell your land, you sell your property, you sell your jewelry: within two years, the fee has been paid off and thereafter, you are doubling your household income as a result of this process. It makes sense financially, and I think we need to understand that when we begin to think about why smuggling is such a big industry.

I have interesting evidence – by no means conclusive – but interesting evidence that at least some of the money that's received by families once they've paid off the initial debt incurred by the smuggling, is then fed back into the system, so that their next eldest son can then be smuggled. So here we have it, a real cycle. We have money raised by a family; we have that money dispersed through a migrant smuggling network by the initial contact; we have the migrant finding work in the destination country and sending home remittances; we have the smuggler's fee paid off in about two years. Thereafter we have household incomes doubling as a result of remittances, and pretty quickly we have families feeding more money into the system by sending their next son into the smuggling industry. A real cycle I think that we need to think quite carefully about how to break.

So let me just conclude with two comments. The question (and I haven't got an overhead), the question I asked to begin this presentation (and the title in the program) is why migrant smuggling pays. If you're a refugee, migrant smuggling pays because it gets you out of harm's way. It gets you out of the way of conflict and persecution and the threat of death. And again, some smugglers, I would argue, are good people, serving a good purpose. If you're someone who is moving for largely economic benefits, and that's by far the majority of irregular migrants, illegal migrants around the world today, it appears to pay pretty substantially. Households pay off their debt within two years and then double their household incomes. Migrants, it appears, find jobs fairly easily in the countries to which they're going, and earn enough money to send home significant amounts of remittances.

You wouldn't have been too much of a conspiracy theorist to scale this up and argue that migrant smuggling also benefits origin and destination societies too. Origin countries relieve unemployment. They relieve pressure on the labor market; they receive significant remittances which of course often go through formal banking systems. Certainly, I haven't seen much evidence at all in Afghanistan or Pakistan that the governments are taking this issue seriously and particularly want to stop it. I think I would argue that it benefits many origin countries, and I think getting those countries engaged in trying to stop it is an important issue. It wouldn't be too much of a leap of the imagination – I think this is less so in Australia, but it is certainly true in the USA and Europe – that it also benefits destination countries by providing very cheap labor. I often make this point when I lecture students in the UK by saying,

The reason, last night, that your pizza cost 5 pounds is because in the kitchen there's an Afghan working for under the minimum wage cleaning the dishes. If he wasn't there, or if he was legal, or if he was earning the minimum wage, your pizza would cost seven pounds. It benefits you and your pocket and your paycheck the fact that we're bringing illegals in to do those sorts of jobs.

Two final points. There is a debate, looking again at this idea of why migrant smuggling pays, that migrant smuggling undermines low-income native workers, it puts low-income native workers out of work. Largely, the evidence is, that is not the case, and the reason is that even in times of recession, even in times of global financial crisis such as we find ourselves at the moment – not Australia but many other parts of the world – there are certain jobs that native workers will not do. These are the so-called 3-D jobs – dirty, dangerous and difficult. Whatever the state of recession in this country, it's unlikely that Australians will clean toilets. They would rather take unemployment benefit and stay at home than clean toilets. There are certain jobs, the dirty jobs, the dangerous jobs, that we increasingly rely on migrants to do, and we will just not do them whatever the situation, and even if we're unemployed. So migrant labour – and I really want to press home this point – migrant smuggling pays and works because we provide jobs for these people and we need their labour because of the segmented economies that have developed around the world.

The final point I want to make, and I think this is a striking conclusion: viewing this as an economic process – and again, I'm not underestimating the humanitarian cost and the social cost and the life-threatening cost that many people go through – viewed as an economic process, the most interesting conclusion here, is that the greatest risk is taken by the smuggler. The smuggler is spending \$7500 to facilitate your migration, before he even gets the \$14,000 your family has paid. And only when the smuggling has succeeded and you've got to your destination, does the smuggler then get his \$14,500. He is taking a risk. He's investing \$7000 of his own money before getting the money in from the third party. This is why smuggling works, because these people cannot afford for it not to work, and they have lots and lots of mechanisms, lots of methods to make sure they do get the money back, including choosing destinations – we may come back to the Pacific Solution debate here – including destinations where they are fairly sure that they can get you safely, including for example using multiple clients. For example if you have to bribe somebody who's on the nightshift at Heathrow airport to get somebody through the airport, it doesn't matter how many people go through. You just pay that person 1000 pounds and he'll do the job for you for his four-hour shift. So you might as well move 20 people rather than one person because you're saving money. So smugglers increasingly, for economic reasons, will move multiple people as opposed to single people to try to make sure that they recoup their costs.

I want to conclude. I am very pleased to come back to discussion either on Australia, and Australian policy, or on

the humanitarian consequences that I've deliberately underestimated, or I think interestingly too, on what the implications of this economic approach might be for policy making and how we might adapt our policies to try to respond to what I think is a very successful migrant business.

*(Applause)*

**PETER MARES:** Well, I think you can understand why I gave the introduction I did about Khalid opening up this issue in very new and interesting ways. And we already have someone waiting to ask a question. Go ahead.

**AUDIENCE MEMBER 1:** Thank you for that. That was really, really good. What does the Australian habit of burning the boats on the beaches add to the cost and the danger of the journey? Does it make the boats worse?

**KHALID KOSER:** It's interesting, I think you asked this yesterday of Julian Garside and he made the point that domestic law allows this to happen. I think he said that this is a fairly outrageous law but clearly he made the point that this is legally acceptable for the Australians to be doing what they're doing. Now, I mean, I haven't interviewed Indonesian boat men who have their boats burnt on Australian shores, but if you follow through my economic argument, then clearly this increases the costs for the boat people, and I suspect would increase costs for smuggling all around, so it may be that you used to pay the Indonesian fishermen \$500 to move the people from an Indonesian port to Australia. But now that he knows his risk includes his boat, he'll increase his cost to \$750, so you might argue, again, and this is the interesting thing about this economic perspective, because it makes us think about these things in different ways, you might argue it's a good policy because it is increasing cost of smuggling, and therefore meaning that fewer people can afford to be smuggled, you might argue.

**PETER MARES:** Can I just say though, Khalid that I think the implication of the question is that people will come in much less seaworthy boats; that the result will be that the boats that are sent are in fact much more decrepit and dispensable and the corollary to that, or the other side of that, I would argue that when we had a policy in the period after the Tampa, in the immediate months after the Tampa of forcing boats back to Indonesia, the Navy towing boats back to Indonesia, it was therefore in interests of the smugglers and the migrants to make sure that by the time the boat reached Australian waters, it was as unseaworthy as possible.

**KHALID KOSER:** Right. Your wisdom is greater than mine on these issues.

**AUDIENCE MEMBER 2:** Thank you for some really fascinating information, which I think will be new to many of us here, and are you able to tell us at all about how you're able to do your research in Pakistan and Afghanistan? Was it with the support of the authorities? How did you find these people? How could you believe what they said et cetera?

**KHALID KOSER:** Really good points. In countries such as ours, Australia, the UK, the USA, smuggling is seen as a sort of a nefarious crime, and it's very hard indeed to do research on smuggling in destination countries, especially in advanced economies. In sending countries in my experience, and this is including in the Balkans, in Pakistan, Afghanistan, in the Horn of Africa and the various other places I have worked, it's very easy indeed. I mean, smuggling is advertised in newspapers and on billboards in supermarkets. You know, you push your trolley through a supermarket in Nairobi and there'll be signs that basically say, 'Migrant agent can help your son to get to the UK' and so on and so forth, so it's not in any way hidden, and it's very easy to find these people, there was no difficulty at all. You spoke about the authorities. I mean one of the most striking things in Pakistan – the authorities helped me find the smugglers. So I would speak to policemen and they'd say, well you need to speak to the guy who works at that travel agent, and perhaps go at 6pm and have a chat with him. So it's an open business that people are almost proud of. It's a bit like the gap year. You have your year abroad, the Australians, and the UK have their gap year. For many people in Pakistan this is just seen as an adventure. You know, you pay this guy and he's gonna send my son to the UK, what's the worst thing that can happen: he'll get sent back. There's a very different perception I think of smuggling in those sorts of countries: I think it's a misperception, as compared to our countries.

So finding them is very easy indeed. Of course there is a very important methodological question about trust. I hope I spoke to enough people, and I hope I did enough triangulation of the methodology to at least establish some sort of trust in the people I spoke to. I spent a long time with them, and most of my findings I think are supported in one way or another by research elsewhere, so I'm fairly confident. I mean, the figures may be wrong, and there may be some exaggeration: \$10,000 received in remittances I think is unlikely, but I think the general principle I'm fairly confident is correct. And I can tell you some interesting stories about smugglers. I mean, you know the other thing about smuggling that I learnt doing this work is that it's not just a bunch of Third World crooks who are involved. It's also people working in our societies and in our airports and so on and so forth. There was a wonderful moment, it was about midnight, in an attic in some Travel Agent's in Peshawar in northwest Pakistan, drinking nice mint tea, as you do, and the guy opened his safe and took out 50, a pile of 50 mint British passports, and he said, I got these by bribing your guy in the British Embassy. These are real British

passports, and now I only need to do is get a photo and it gets on to forgeries, and ... So, you know, let's not ... it is British Airways, it's Immigration, airline staff, as well as PIA [*Pakistan International Airlines*] staff, and so on and so forth, and it really is a global industry, I think, and that is how it works.

**PETER MARES:** I am just going to ask a question, because I think it needs to be asked, Khalid, and what are the policy implications of what you're saying, I mean Australia's response has been for example to beef up cooperation with Indonesia, to provide the Indonesian police with night goggles, with training to help them detect the migrants before they get on the boats – prevent them leaving. Other responses have been to post immigration officials in airports around the region that fly directly to Australia to prevent, to look at those passports before people get on, and to increase the level of security in the document itself, so it's actually now, the number of people who arrive in Australia with false papers is actually very, very small, because they just don't get on to the plane. If they do get on the plane Qantas gets a fine of \$5000 for bringing them here, and there are a whole lot of mechanisms – advanced passenger processing, things like this. So, I mean, I guess we have to ask two questions: what is the policy goal, is it to stop migrant smuggling? And if so, how do we do it? Or, is the answer to say, well, in fact, border controls don't work, we should have a system of open borders. That's the most radical policy response, one that is politically completely unlikely to ever move anywhere, so I want to ask you to ...

**KHALID KOSER:** OK, there's lots of interesting issues there, and we haven't got much time. On the open borders, I'm by no means a proponent of open borders; I think there has to be some sort of management of borders and management of migration. I would observe however that when the EU enlarged itself, firstly from, I think, 12 to 15 and then from 15 to 25, there were of course the doomsday people who said, this is going to result in huge floods of people from Romania and Poland and so on and so forth, and actually, it wasn't true at all. There were temporary inputs of people most of whom found work; some of them were going back as a result of the financial crisis, so the mini experiment in open borders that has taken place in the European Union seems to have worked. And, of course that's different on a global scale.

I don't know if Julian is here, but I think he made the point very strongly yesterday, that since in Australia many of the people who arrive illegally are genuine refugees, people fleeing persecution and people who are entitled to international protection and assistance – which isn't the case in the USA and Europe: most people who arrive there are clearly economic migrants – you could argue that these toughening policies are victimizing people who genuinely do need protection and assistance. And so there is a question about the validity of strengthening borders if all you're doing is keeping out people who are in desperate need of protection. If you're trying to keep out people who are not in need of protection and who are just economic migrants, and so on and so forth, as I said, you need to address demand; if they can come here and find work then there is something wrong with what's going on. You need to address the question of political will: Indonesian police may well have night goggles, but if frankly their government doesn't care about irregular migration and it benefits the economy and society then I don't think night goggles will serve much purpose at all. But what is clear is that international cooperation is essential, and unilateral policies just can't work.

**PETER MARES:** Well, I think, interestingly in the Indonesian case there is a very big established people-smuggling network between Malaysia and Indonesia. And in the Suharto era at least it was very much the national army, the TNI of Indonesia, which was also the police (they were part of the same organization in those days) that ran that network, so you know, to ask them to then crack down on it was kind of ridiculous, but a lot has changed in Indonesia, the police have been separated from the military and so on and so forth, so we have a rather different situation now. But if we were to say, to take Julian Burnside's argument, if we were to say, 'well, we're persecuting people who need protection – we should change these policies', then without doubt, the flow of people would change and we wouldn't just be having refugees arriving in Australia, we would be having people looking for economic opportunities as well.

**KHALID KOSER:** Of course, ideally, refugees should be able to get protection in places close to their homes. You know, there shouldn't be a need as a refugee to flee as far as Australia if we can get a rule of law and a genuine judicial system and we can trust the appeals process and so on and so forth in places like Pakistan and Iran, then maybe there wouldn't be a need, so there is a development issue there, I think as well.

**PETER MARES:** One final question. Was there someone waiting? Yes please – ask the question.

**AUDIENCE MEMBER 3:** It's just occurred to me that Malcolm Fraser found a solution to this problem in 1975, and I'm wondering a) why do you think, that neither the Rudd government nor the Howard government has thought of that? and b) what would be the economic implications of doing what Fraser did?

**PETER MARES:** And I mean, by what Fraser did, you're talking about the Comprehensive Plan of Action for refugees from Indo-China, which involved Australia and other developed nations saying to countries of first asylum – I'm just summarising for the rest of the audience – countries of first asylum, places of asylum like

Malaysia, Hong Kong, Thailand: let these people land, allow them into refugee camps – because this was at a time when boats were being pushed out back to sea and things like that, we had pirates and so on. Allow them to land, and we will ensure that everyone who is a refugee is resettled over time, so that you won't be, as developing nations, as countries of asylum, you won't be left carrying this burden.

**KHALID KOSER:** And this is the 1970's?

**PETER MARES:** This is the post-Vietnam War so, late 70s, early 80s.

**KHALID KOSER:** I mean, I can't speak for Australia specifically, but there was a global trend during the Cold War era, in the post-World War II era, probably up to about the oil crisis, kind of early seventies or so, where taking on refugees and resettling refugees was done fairly generously around the world. The numbers were relatively small, their labour was needed. If they came from the Communist Bloc, then there was a question of you know, 'the enemy of my enemy is my best friend' and so on and so forth. That's all gone now. Larger numbers, migration has become a huge security concern; we're going through recessions so we don't need their labour, so the kind of idea of interest conversions I think has gone, and I don't think it will come back, sadly so. What Fraser apparently did in the 70s might have worked then, but I don't think it would work today in terms of the numbers and security concerns and public reaction and keeping voters happy and so on and so forth.

**PETER MARES:** OK – look, I'd like you to help me thank Khalid Koser for an extremely impressive presentation. Thank you very much.

*(Applause)*

## Attachment 2 – Meet Kevin Rudd’s “scum of the earth”

# Meet Kevin Rudd's "scum of the earth"

Crikey

Friday, 30 October 2009

by Bob Gosford

In April this year, Prime Minister Kevin Rudd told the world:

*People smugglers are engaged in the world's most evil trade and they should all rot in jail because they represent the absolute scum of the earth. We see this lowest form of human life at work in what we saw on the high seas yesterday.*

Rudd was talking about the tragic events arising from an explosion on board a boat carrying a group of Afghani asylum seekers.

Last week Rudd's "scum of the earth" appeared before Justice Dean Mildren in the Supreme Court of the Northern Territory.

The two men charged with bringing the boat into Australian waters are Mohamed Tahir and a man known only as Beny. Beny is one of twelve children and attended school in South Sulawesi till he was about seven-years-old and has mostly worked as a subsistence fisherman and labourer.

As Justice Mildren told the court on his Sentencing Remarks:

*...Approximately 12-18 months ago, you left South Sulawesi to go to Java in order to find work. You obtained some employment but about a month before you became involved in this matter, you left Java to go to Lombok in order to find work there. You were approached in Lombok by an older man who offered you employment on this trip. You were to be paid five million rupiah (about \$560) which to you is a very large sum of money. You were lured into the task by the money. You expected to be caught. You were told that you would be returned home after a short time.*

Mohamed Tahir was one of seven children had a similar work history as Beny and was:

*...born in a village called Muncar near Banyuwangi in East Java... You were approached by two older men at the wharves near your village and were offered five million rupiah to undertake this job. You had not been in work for some months and to you this was a very substantial sum of money. You left your village with the men and you were taken to Lombok. There the vessel was loaded with the passengers.*

Beny and Mohamed were both severely injured in the explosion.

As Justice Mildren told them in Court:

*Beny ... received burns to your left leg, left arm, left foot and the left side of your back. You were also thrown into the water for about 25-30 minutes before you were rescued. You were hospitalised for about 20-30 days.*

*Tahir, also received burns to your right arm and left leg. You have permanent significant scarring. You are still wearing bandages and will need to wear the bandages for the next two years. You still have pain.*

Beny and Mohamed entered guilty pleas to section 232A of the Migration Act 1958 for which the maximum penalty is imprisonment for 20 years or a fine of \$220,000 or both.

The true evil for Beny, Mohamed and for Justice Dean Mildren, is the requirement that anyone found guilty under section 232A is liable to a mandatory minimum sentence of five years with a mandatory minimum non-parole period of at least three years contained in section 233C of the Migration Act.

These provisions were introduced in 1999.

Introducing the Bill to the House of Representatives, Peter Slipper said that:

*The bill ... introduces a more severe penalty of 20 years imprisonment or 2000 penalty units, or both, for the trafficking of groups of five or more people. This penalty recognises that organised crime groups are involved in people trafficking, and the penalty reflects the seriousness of the offence.*

Labor's Con Sciacca responded:

*Overall in 1997-98 some 157 illegal immigrants arrived by sea on our shores. In 1998-99 this figure increased eightfold to 859, and more are coming every day. This increase in people smuggling, in the operation of the so-called "snakeheads", signifies that Australia's penalties for these offences do not go far enough to deter those who assist these criminal warlords on our shores.*

But in Beny and Mahamed's case all in Justice Mildren's Court knew that they were not members of one of Slipper's "organised crime groups", nor were they Sciacca's "snakeheads" or Rudd's "scum of the earth" deserving of the condign punishment required by the Migration Act provisions.

Beny and Mohamed were prime candidates for the exercise of ordinary judicial discretion and the application of the usual judicial Sentencing Principles that provide clarity and transparency in sentencing.

But in Beny and Mohamed's case Justice Mildren's hands were tied.

In words that reveal his barely restrained judicial frustration, he told Beny and Mohamed that:

*But for the mandatory minimum sentences which I am required to impose, I would have imposed a much lesser sentence than I am now required by law to do. There are dangers when the Courts are required to impose mandatory minimum sentences. In cases such as this, the ordinary sentencing principles play no function.*

*The other dangers of mandatory minimum sentencing, apart from the fact that the Court is required to impose a sentence which is greater than the justice of the case would otherwise require include the fact that principles of parity between offenders has little or no role to play. All offenders that fall within the class will be treated equally no matter what their level of criminality may be.*

*However this is not the occasion to debate the merits of mandatory minimum sentencing.*

Beny and Mohamed were both sentenced to five years "on the top" and a non-parole period of three years. Justice Mildren recommended that Beny and Mohamed be released after twelve months.

Maybe now is the time to debate the merits of mandatory minimum sentencing?

<http://www.crikey.com.au/2009/10/30/meet-kevin-rudds-scum-of-the-earth/>