

**AMNESTY
INTERNATIONAL**



Submission to the
Senate Legal and Constitutional Affairs Committee
Inquiry into Anti-People Smuggling and Other Measures Bill 2010

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Submitted by

Amnesty International Australia



Executive summary

Amnesty International understands that population flows across the Asia Pacific region must be addressed through international cooperation and encourages the Australian Government to work with its neighbours on this issue. However, the organisation maintains that human rights concerns must be acknowledged and prioritised in any regional cooperation. Currently the protection measures provided to asylum seekers outside of Australia are negligible and asylum seekers often have no other choice than to entrust their lives to people smugglers when seeking a durable solution. Investigating organised people smuggler syndicates must not undermine people's fundamental right to seek asylum.

Amnesty International acknowledges that people smuggling is a crime and accepts that governments must take measures to reduce incidents of unauthorised immigration. However, the organisation firmly believes that to effectively reduce incidents of people smuggling, in a manner both durable and humane, Australia must address the reasons that force asylum seekers onto boats. As a signatory to the 1951 *Refugee Convention*, Australia must encourage its regional neighbours to provide adequate care to asylum seekers and durable solutions for refugees, including those who are waiting for third country resettlement. Australia must also work with the UNHCR, the IMO and neighbouring governments to improve registration, protection and resettlement processes and ensure asylum seekers and refugees in the region are not waiting in limbo for years.

The organisation strongly believes that people smuggling should be dealt with solely as a criminal activity and not as a national security issue. There is little evidence to suggest that the activities of people smugglers, which namely facilitate the movements of asylum seekers, constitutes a national security risk. The organisation is concerned that legislatively linking people smuggling to national security will make it even more difficult to assert the humanitarian aspects of asylum seeking.

About Amnesty International

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights. Amnesty International is the world's largest independent human rights organisation, comprising more than 2.8 million supporters in more than 150 countries and has over 100,000 supporters in Australia. Amnesty International is impartial and independent of any government, political persuasion or religious belief. It does not receive funding from governments or political parties.

Protecting the rights of refugees is an essential component of Amnesty International's global work. We aim to contribute to the worldwide observance of human rights set out in the Universal Declaration of Human Rights, the United Nations (UN) Convention on the Status of Refugees and other internationally recognised standards. Amnesty International works to prevent human rights violations that cause refugees to flee their homes. At the same time, we oppose the forcible return of any individual to a country where he or she faces serious human rights violations.



Introduction

Amnesty International recognises that people smuggling is a significant issue on the rise both within the Asia-Pacific region and globally. The organisation also acknowledges that the Australian Government is responsible for preserving the integrity of Australia's borders and in doing so must collaborate with its neighbours to identify regional solutions to curb people smuggling. Amnesty International however categorically maintains that the plight of asylum seekers must not be ignored in regional law enforcement operations. It is well documented that asylum seekers in the region do not have access to effective protection measures and therefore often risk their lives in unseaworthy boats to seek asylum in Australia. The Australian Government's need to combat people smuggling should not in any way compromise or undermine its international human rights obligations as a signatory to the 1951 *UN Refugee Convention* which outlines the fundamental right to seek asylum for people fleeing torture and persecution.

Border protection and the processing of irregular maritime arrivals has been a contentious issue in Australia for many decades. The rhetoric of successive governments, has usually been predominantly one sided - to appear tough on border protection issues and implement a range of deterrence measures.

In its submission to this inquiry, Amnesty International wishes to:

- Emphasise the need for a multi-pronged approach to addressing the regional movements of asylum seekers;
- Address specific concerns with the draft Anti-People Smuggling and Other Measures Bill; and
- Reiterate the need for Australian law enforcement agencies to conduct their operations abroad within the confines of Australia's international obligations

Lack of regional protection space

At the launch of the United Nations High Commissioner for Refugees (UNHCR) report into 2009 asylum levels and trends UNHCR Regional Representative Rick Towle said, "*Conflict and human insecurity in places of origin are the key reasons why people flee their homes to seek protection further afield.*"¹

The majority of recent unauthorised boat arrivals are from Afghanistan and Sri Lanka,² countries currently facing severe human rights abuses and which do not have a UNHCR presence or an Australian embassy. Neighbouring countries including Pakistan, Malaysia and Indonesia, are not signatories to the UN Refugee Convention and as such claim that they have no obligations to offer protection to refugees. Amnesty International has repeatedly expressed concerns about the plight of asylum seekers in the region.³ **In developing anti-people smuggling strategies it is paramount that the Australian Government recognise the reasons men, women and children seek out people smugglers and risk their lives undertaking dangerous journeys to countries like Australia. Malaysia and Indonesia, the two primary countries from which asylum seekers board boats, do not offer effective protection.**

¹ UNHCR Media Release "*New Asylum Report: 377,200 people seek refuge in industrialized countries in 2009, mainly in Europe and North America*" 23 March 2010 available at - http://www.unhcr.org.au/pdfs/100323_stats_release_aul.pdf (accessed 7.4.10)

² UNHCR "*Asylum levels and trends in industrialized countries 2009*" 23 March 2010 available at http://www.unhcr.org.au/pdfs/AsylumReport2009_000.pdf (accessed 7.4.10)

³ Amnesty International's recent comments on the treatment of asylum seekers in Indonesia and Malaysia include: media release "*Situation dire in Malaysia*" issued 4 September 2009 available at <http://www.amnesty.org.au/refugees/comments/21648/> (accessed 7.4.10); and media release "*regional approach to refugees carries responsibilities*" issued 15 October 2009 available at <http://www.amnesty.org.au/news/comments/21866/> (accessed 7.4.10)



The UNHCR has outlined that at a minimum, “effective protection” must guarantee:⁴

- there is no likelihood of persecution, or refoulement or of torture or other cruel and degrading treatment;
- there is no other real risk to the life of the person[s];
- there is a genuine prospect of an accessible durable solution in or from the asylum country, within a reasonable timeframe;
- pending durable solution, stay is permitted under conditions which protect against arbitrary expulsions and deprivation of liberty and which provide for adequate and dignified means of subsistence;
- the unity and integrity of the family is ensured; and
- the specific protection needs of the affected persons, including those deriving from age and gender, are able to be identified and respected.

Malaysia

UNHCR estimates that there are approximately 90,000 refugees and asylum seekers in Malaysia.⁵ Despite this, there is no legislative framework for dealing with refugees. They are often forced to join the 1 million undocumented migrant workers in the country working in dangerous and dirty jobs, subject to exploitation, and risking arrest by police and immigration officials. Malaysian law does not distinguish refugees and asylum seekers from undocumented migrants.

People in breach of Malaysia’s immigration laws are detained in overcrowded centres then sentenced to jail and often caned. They are then returned to detention and - if they can afford to pay various fines - returned home.

Amnesty International conducted two fact-finding missions to Malaysia in July last year and in March this year to examine first hand the detention conditions endured by illegal migrants including asylum seekers and refugees. The organisation saw the extremely over-crowded conditions (in one instance 120 men were detained in a building no larger than a tennis court for 24 hours a day) and heard stories of malnutrition, disease, violence and suicide attempts. Those that were unable to pay various fines were detained for months on end.

Indonesia

Asylum seekers in Indonesia are not able to seek protection from the Indonesian Government and are not granted the rights that asylum seekers are entitled to under international law. They face arbitrary and indefinite detention until the UNHCR is able to process their claims. In February 2009 an Indonesian Foreign Ministry spokesperson, Teuku Faizasyah, was quoted saying “*[Indonesia’s] policy remains the same, we are not a country for refugees, nor are we a place for refugees to live temporarily*”.⁶

Australian refugee rights lawyer Jessie Taylor undertook a research trip to Indonesia in July last year to inspect 11 places of detention. She reported that women, families with children and unaccompanied minors are detained in unhygienic and overcrowded prisons for months on end before being released into lower grade detention centres.⁷ “*One nine year-old girl explained to us the moment of her arrest along with her family, and she said that a policeman was shouting and holding a gun to her head for a while, until another*

⁴ UNCHR International Protection – effective protection newsletter, 2 December 2004 available at <http://www.unhcr.org.au/pdfs/EFFECT.pdf> (accessed 6.4.10)

⁵ UNHCR Global Appeal 2010-2011 – Malaysia, 1 December 2009 p1 available at “<http://www.unhcr.org/4b0514119.pdf>” (accessed 7.4.10)

⁶ The New York Times: Indonesia to allow UN access to Rohingya. 6 February 2009

⁷ Jessie Taylor “*asylum seekers in Indonesia: project, initial recommendations, findings & a case study*” September 2009



woman told him to lower his weapon... The effects of this imprisonment plays heavily on parents, especially, who rue the day that they came to see their children and babies behind bars. Many parents wept when they recalled the image of their children in the prisons".⁸

Amnesty International has expressed concern that the UNHCR has limited capacity in Indonesia and asylum seekers may end up spending extended periods of time in detention while waiting to apply for refugee status.

In her report Ms Taylor also noted that UNCHR is hugely under-resourced and overworked. "A UNHCR representative in Jakarta stated that she had conducted 20 interviews in one day. Based on an 8-hour day, this allows 24 minutes per interview. The interview is the only opportunity asylum seekers have to present their full claims to the UNHCR. 24 minutes is a hopelessly short time for such an interview, but half of that time is taken up by the process of interpreting, and half of the remaining time is taken up by the UNHCR representative explaining the process and asking questions. That leaves the applicant just six minutes to explain the circumstances which forced them to flee".⁹

Asylum seekers whose claims are ultimately rejected by the UNHCR are returned to their country of origin, while successful applicants are registered as refugees and released into the Indonesian community. Refugees in Indonesia do not have the right to work, send their children to school and have no recourse to a more permanent status. Their only hope of a durable solution is to be selected for resettlement to a third country through the UNHCR, a process that can take more than six years.

Anti people smuggling measures

As previously stated, Amnesty International acknowledges the rights of nations to protect their borders and recognises that organised people smuggling undermines the policing of who may or may not enter Australia. People smuggling is a crime that the international community needs to address, however this must be done in a manner which respects people's fundamental right to seek asylum.

The UNCHR's Executive Committee on the International Protection of Refugees states that interception is one of the measures employed by States to:¹⁰

- prevent embarkation of persons on an international journey
- prevent further onward international travel by persons who have commenced their journey; or
- assert control of vessels where there are reasonable ground to believe the vessel is transporting persons contrary to international or national maritime law.

The document also recommends that interception measures be guided by a number of considerations in order to ensure the adequate treatment of asylum seekers and refugees. Recommendations include that:

- interception measures should not result in asylum seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened, or where the person has other grounds for protection under international law. Intercepted persons found to be in need of international protection should have access to durable solutions;
- the special needs of women and children and those who are otherwise vulnerable should be considered as a matter of priority;
- intercepted asylum seekers and refugees should not become liable to criminal prosecution under the *Protocol Against the Smuggling of Migrant by Land, Sea or Air* for the fact of having been the object

⁸ Ibid., p 34

⁹ Ibid, p 5

¹⁰ UNCR Protection and Human Trafficking: Selected Reference Materials, First Edition, 1 December 2008 p142-144 available at <http://www.unhcr.org/4986fd6b2.pdf> (accessed 6.4.10)



of conduct set forth in article 6 of the Protocol; nor should any intercepted person incur any penalty for illegal entry or presence in a State in cases where the terms of Article 31 of the 1951 Convention are met.

Of significant concern to Amnesty International are the ramifications of Australia's anti-people smuggling deterrence measures. Collaboration with regional law enforcement agencies which aims to stop boats and leads to the inhumane treatment and arbitrary detention of asylum seekers in no way constitutes effective protection measures or humane durable solutions.

Amnesty International has not seen any evidence that the Australian Government plans on increasing the availability of protection measures within the region. In the second reading speech of the Anti-People Smuggling and Other Measures Bill, the Attorney General stated *"The government is devoting unprecedented resources to protecting Australia's borders and developing intelligence on people-smuggling syndicates. We are working cooperatively with Australia's regional partners to disrupt people smuggling where those ventures originate overseas. And we are subjecting people smugglers to the full force of Australian law."*¹¹

The 2009-2010 Federal Budget allocated \$302.4 million over the next few years to specifically target people smuggling. Some of the more substantial provisions include:

- \$14.3 million over the next two years to engage with Indonesia. This will provide additional funding to the International Organisation for Migration (IOM) to support the Indonesian Government in managing detention facilities in Tanjung Pinang and Jakarta¹²
- \$16.4 million over two years to enhance whole-of-government capabilities to respond to increasing irregular migration through the Asian region¹³
- \$30.5 million over four years to enhance the intelligence-related capabilities of the Australian Secret Intelligence Service, as part of the government's layered response to the maritime people smuggling threat¹⁴
- \$ 41.6 million over four years to fund additional AFP officers for the people smuggling strike team, establishing a technical investigation unit in Indonesia, and deploying AFP liaison officers to Sri Lanka, Pakistan, Indonesia, Malaysia and Thailand¹⁵
- \$62.9 million over four years for aerial surveillance over Australia's northern waters to assist in detecting illegal foreign fishing and people smuggling¹⁶
- \$54.3 million over two years to extend the lease of the Australian Customs and Border Protection Vessel ACV *Triton* to 30 June 2011. This supports surveillance and enforcement activities against illegal foreign fishing and maritime people smuggling¹⁷

¹¹ Second reading of speech, Attorney General Robert McClelland, Second Reading Speech Anti-People Smuggling and other Measures Bill 2010, 24 February 2010 - [\(accessed 6.4.10\)](http://parlinfo.aph.gov.au/parlInfo/search/display/display_w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=:query=BillId_Phrase%3Ar4295%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards):querytype=:rec=0:resCounit=)

¹² Australian Budget 2009 – 10, Part 2: Expense Measures; Immigration and Citizenship: Border Protection – Combating People Smuggling – Engagement with Indonesia; http://www.budget.gov.au/2009-10/content/bp2/html/bp2_expense-18.htm

¹³ Australian Budget 2009 – 10, Part 2: Expense Measures; Immigration and Citizenship: Border Protection – Combating People Smuggling – Initiative to address irregular population flows; http://www.budget.gov.au/2009-10/content/bp2/html/bp2_expense-18.htm

¹⁴ Australian Budget 2009 – 10, Part 2: Expense Measures; Foreign Affairs and Trade: Border Protection – combating people smuggling – enhanced intelligence capacity; http://www.budget.gov.au/2009-10/content/bp2/html/bp2_expense-18.htm

¹⁵ Australian Budget 2009 – 10, Part 2: Expense Measures; Attorney General's: Border Protection – combating people smuggling – enhancing federal police and regional capability; http://www.budget.gov.au/2009-10/content/bp2/html/bp2_expense-06.htm

¹⁶ Australian Budget 2009 – 10, Part 2: Expense Measures; Attorney General's: Border Protection – combating people smuggling – increased maritime response capability; http://www.budget.gov.au/2009-10/content/bp2/html/bp2_expense-06.htm

¹⁷ Australian Budget 2009 – 10, Part 2: Expense Measures; Attorney General's: Border Protection – combating people smuggling – maritime surveillance — extension of contract for ACV Triton; http://www.budget.gov.au/2009-10/content/bp2/html/bp2_expense-06.htm



- \$22.0 million over four years to tow and dispose of intercepted vessels that enter Australian waters illegally as part of people smuggling ventures¹⁸
- \$11.3 million to establish a specialist prosecution unit for people smuggling offences¹⁹

Within this substantial anti-people smuggling budget relatively negligible amounts are being allocated to provide better primary care to refugees and asylum seekers in these transit countries. Australia's funding of Indonesian detention centres is in fact facilitating Indonesian authorities to subject asylum seekers to arbitrary detention while they wait several months to be processed by UNHCR. On average asylum seekers must wait between 8-10 months from the time they register with UNHCR to the time they are interviewed and then must wait between 10 to 14 months from the time they are interviewed to when they receive a determination.²⁰

"More than 90% of people we met in Indonesia had not come with the intention of getting on a boat. The prospect of the long, dangerous journey is the last thing that most families want to face. Instead, we gleaned the impression that people came to Indonesia to be processed by UNHCR and resettled. They are willing to wait for this to happen. However, when weeks stretch to months and months stretch to years, with no apparent action from UNHCR or IOM, the boat option begins to look more attractive. It is because of delays in processing and failure to resettle genuine refugees that Australia has seen an increase in boat arrivals in recent times".²¹

If Australia is serious about putting an end to people smuggling, it needs to address the reasons why asylum seekers risk getting on a boat. Australia must work with transit countries to provide asylum seekers with adequate protection by ensuring that they have access to health care, legal frameworks, employment opportunities and schooling for their children. Drastic improvements must also be made to the registration and resettlement processes to give asylum seekers more hope that their claims are being considered in a transparent and timely manner.

Specific concerns relating to the Bill

Redefining of 'security' to allow ASIO investigations:

Amnesty International is concerned that the redefining of 'security' to include border protection issues marks a significant departure from the agency's traditional investigative parameters. The Attorney General's Guidelines in relation to ASIO's functions define 'security' as:²²

- a) The protection of, and of the people of, the Commonwealth and the several States and Territories from:
- (i) espionage;
 - (ii) sabotage;
 - (iii) politically motivated violence;
 - (iv) promotion of communal violence;
 - (v) attacks on Australia's defence system; or
 - (vi) acts of foreign interference; whether directed from, or committed within,

¹⁸ Australian Budget 2009 – 10, Part 2: Expense Measures; Attorney General's: Border Protection – combating people smuggling – post-interdiction management of illegal entry vessels; http://www.budget.gov.au/2009-10/content/bp2/html/bp2_expense-06.htm

¹⁹ Australian Budget 2009 – 10, Part 2: Expense Measures; Attorney General's: Border Protection – combating people smuggling – specialist prosecution unit; http://www.budget.gov.au/2009-10/content/bp2/html/bp2_expense-06.htm

²⁰ Jessie Taylor "asylum seekers in Indonesia: project, initial recommendations, findings & a case study" September 2009, p 25

²¹ Ibid., p39

²² Attorney General Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence) available at <http://www.asio.gov.au/img/files/AttorneyGeneralsGuidelines.pdf> (accessed 8.4.10)



Australia or not; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).

Amnesty International again reiterates its understanding for the need to investigate and prosecute organised people smuggling syndicates. **However, the organisation strongly believes that people smuggling should be dealt with solely as a criminal activity and not as a national security issue. There is little evidence to suggest that the activities of people smugglers, in facilitating the movements of asylum seekers, constitute a national security risk. Asylum seekers who resort to using people smugglers should not be perceived through a national security lens.** The organisation is concerned that legislatively linking people smuggling to national security will make it even more difficult to assert the humanitarian aspects of asylum seeking. The Bill, its explanatory memorandum or its second reading speech make no differentiation between asylum seekers pursuing desperate measures and the people smugglers who bring them to Australia. The broadening of the security definition solidifies the misunderstanding within sections of the general community that asylum seekers are not only committing an illegal act but pose a potential security threat. It must be emphasised that over 90 per cent of asylum seekers that arrive by boat are found to have genuine refugee claims.

Unclear definitions surrounding provision of material support

The Bill's Explanatory Memorandum mentions that a "person is guilty of an offence if that person provides material support or resources to another person or organisation and the provisions of the support or resources aids the commission of the offence of people smuggling".²³ Prosecution would need to prove:

- the person intentionally provided material support or resources to an another person or an organisation (the receiver), and
- the person was reckless as to the circumstance in that the provision of the support or resources aided the receiver or another person or organisation to engage in conduct constituting a people smuggling offence²⁴

The Explanatory Memorandum also states: "*The offence will not apply to a person who pays smugglers to facilitate their own passage or entry to Australia or who pays for a family member on the same venture. However, the offence will apply to persons in Australia who pay smugglers to bring their family or friends to Australia on a smuggling venture. The Government is determined to reinforce the message that people should use authorised migration processes for seeking asylum and migrating to Australia, and that people in Australia should not assist people smuggling by providing finance or other assistance*".²⁵

Amnesty International is concerned that this new offence has potentially huge ramifications for individuals in Australia sending financial assistance to relatives who are still in transit countries. Clarification is needed as to whether a person who sends money to family members to support them, could risk prosecution and a gaol sentencing for inadvertently supporting people smugglers.

Accountability of Australian agencies

²³ Anti- People Smuggling and Other Measures Bill 2010, Explanatory Memorandum p 8, available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4295_ems_3d8c8bea-c882-4abd-ad7d-632b05718ca1/upload_pdf/339885.pdf;fileType=application%2Fpdf (accessed 8.4.10)

²⁴ Ibid.

²⁵ Ibid.,p 9



*“The bill equips our law enforcement and national security agencies with effective investigative capabilities to detect and disrupt people smugglers”.*²⁶

Amnesty International stresses that all Australian agencies involved in the detection and disruption of people smugglers must conduct their operations in compliance with Australia’s international obligations. This includes having defined Standard Operation Procedures which set out clear accountability measures for information and intelligence sharing with law enforcement agencies from non-signatory countries which have no obligations to provide protection to asylum seekers and refugees. Amnesty International is extremely concerned that Australian investigations could result in asylum seekers being arbitrarily detained for extended periods of time.

Anecdotal reports indicate that Australian Federal Police interviews are not always conducted in a humane or sensitive manner - *“the AFP seem unconcerned with their plight and the difficult circumstances they find themselves in. They have never had an opportunity to discuss their protection concerns, the safety of their families or any other issues of importance to themselves or their families. After discussions of smugglers have concluded, the asylum seekers find themselves talking to the AFP officers’ retreating backs.”*²⁷

Amnesty International is also extremely alarmed at recent reports that the Australian Federal Police relied solely on information provided by the Sri Lankan Government to assess the security backgrounds of three Sri Lankan Tamil men.²⁸ In the concluding remarks at the trial of these three men, Victorian Supreme Court Justice Paul Coghlan described it as outrageous and a fundamental departure from the principles accepted as governing interrogations.

²⁶ Second reading of speech, Attorney General Robert McClelland, Second Reading Speech Anti-People Smuggling and other Measures Bill 2010, 24 February 2010 -

[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=:query=BillId_Phrase%3Ar4295%20Title%3A%22second%20reading%22%20Content%3A%21%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20\(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards\);querytype=:rec=0:resCount=](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=:query=BillId_Phrase%3Ar4295%20Title%3A%22second%20reading%22%20Content%3A%21%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards);querytype=:rec=0:resCount=) (accessed 6.4.10)

²⁷ Jessie Taylor *“asylum seekers in Indonesia: project, initial recommendations, findings & a case study”* September 2009, p 37

²⁸ Crikey *“AFP flying close to the wind – again- on Tamil case”*, 7 March 2010 available at - <http://www.crikey.com.au/2010/04/07/afp-flying-close-to-the-wind-again-on-tamil-case/> (accessed 7.4.10)