

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

Friday 16 April 2010

Dear Secretary

Submission to the Senate Inquiry into the proposed Anti-People Smuggling and Other Measures Bill 2010

Thank you for the opportunity to make a submission to this inquiry.

I have a particular interest in people smuggling which has arisen from my PhD research concerning the journeys of Iraqi asylum seekers in the period 1999 to 2001. As part of this research I am familiar with academic literature on people smuggling as a global phenomenon and have also conducted interviews and had conversations with many refugees in Indonesia and Australia, including people smugglers, about their journeys and the role played by smugglers.

My view is that the response to people smuggling as contained in the Bill is ill-informed; it punishes the wrong people and will not address the problem it purports to address. In this submission, I hope to provide a different perspective on some of the issues.

The main thrust of my submission is to challenge the overall approach being taken with regard to this issue. In particular I have concerns that the weight and might of the law is to be brought upon the marginalised and vulnerable with no regard to finding solutions to their predicament. Finding such solutions (discussed later) is more likely to resolve the issues which the legislation seeks to address.

What the literature and history tells us

What drives people smuggling

First and foremost, people smuggling is driven by demand from the customer base, which as far as Australia is concerned, are the asylum seekers. The most effective way of stopping people smuggling is to have satisfactory alternatives for asylum seekers; they only turn to smugglers in the absence of viable options. When these are available, the customer base then falls away and the trade stops.

The research suggests that if there were more legal options available to asylum seekers, they would choose these in preference to using people smugglers. But as countries close their doors and tend more and more to imprison asylum seekers, people smugglers present as at least an opportunity to find stability and a long term solution.

Different profiles

People smugglers have been branded as the scum of the earth, or described as merely travel agents. Neither is an accurate characterisation, and in fact it is unreasonable to characterise all people smugglers in the same way.

Globally, there are broadly three types of smuggling operations:

1. Individuals involved in transporting people as an occasional and secondary occupation to their main income earning activity.
2. Loose, fluid networks of locally based smugglers, probably with transnational contacts through shared ethnicity or kinship.
3. Hierarchical Mafia or Triad-like gangs, highly organised, highly sophisticated, well-resourced and involved in other criminal activities such as narcotics, prostitution and gun-running, where the top echelons have little involvement in day to day operations.

The people smuggling operations in Indonesia are usually grass roots affairs, originating from within the stranded refugee communities and/or local Indonesian communities. This is typical of many smuggling operations elsewhere¹. Indonesia-based smuggling operations fit either the first or second of the three types just described. There is no evidence that the third operates from Indonesia.

Smuggling operations are best considered as businesses², some big and some small. Some operate more ethically than others. From a business perspective, it is in smugglers' interests that boats arrive safely and passengers trust them or else they can't get further business.

They should be distinguished from trafficking operations. The main difference between people smuggling and people trafficking relates to coercion and exploitation. Trafficked persons are transported to another country either by force or on a false pretext, such as good employment prospects, and are exploited after the journey ends. An estimated 80% are coerced into prostitution and the remainder into slave or forced labour, with women and children particularly vulnerable to being trafficked. By way of contrast, the people who travel with people smugglers generally do so by choice, pay for a service and their association with the smuggler ends when the journey ends. However the desperation of refugees fleeing conflict zones and persecution in search of safety does make them vulnerable to exploitation and the distinction between people smuggling and people trafficking can become blurred.

There is plenty of anecdotal evidence to suggest that the smuggling syndicates in Indonesia operate with the support of individual local police, immigration and visa officials. They make

¹ Marfleet, P. (2006) *Refugees in a Global Era*, Hampshire, UK: Palgrave Macmillan Page 255

² Koser, Khalid (2009) *Why People Smuggling Pays* Recording accessible from <http://www.abc.net.au/tv/fora/stories/2009/07/29/2640772.htm>

money from these operations but are effectively untouchable, unlike the boat crews who of course, by the nature of what they do, make their way into Australian waters and can be caught by Australian authorities.

Indonesian fishermen

By far the greatest majority of people convicted under Australia's current people smuggling legislation are Indonesian fishermen who are paid possibly a few hundred dollars, sometimes far less, by the main organisers. Any increase in penalty will likely hit this group the most, who are often impoverished and suffering from restrictions placed upon their traditional fishing grounds. There is something morally reprehensible about punishing those who make choices driven from desperation and poverty. Further, the impact upon relations with Indonesia has to be considered. The growing numbers of Indonesian nationals being held in Australian jails for the roles they play in the smuggling operations is understandably of concern to Indonesian authorities, especially noting the length of the sentences meted out to them and that consideration is being given to increase the penalties.

UNHCR-registered refugees

A second grouping of people convicted in Australia of people smuggling offences, much smaller in number, includes UNHCR-registered refugees who, while in Indonesia, became involved in people smuggling. Their roles, degree of involvement and motives were mixed. Some were key players, others played minor, peripheral roles in smuggling syndicates. Some (not all) made money from these ventures and/or were motivated to help fellow refugees and/or took the opportunity to assist their own family members and/or appreciated having something to do that occupied their time, given they were not permitted to work.

With regard to three UNHCR-registered refugees³ based in Indonesia who were convicted of people smuggling offences in Australia, they were in part motivated by helping their own relatives get to Australia. One was referred to as an Oscar Schindler figure by the sentencing judge. People who travelled on another man's boats testified at his trial that he was a good man who helped people. Other passengers have told me he allowed people with no money to travel for free.

Not all bad

In my study, consistent with international research⁴, attitudes of participants towards smugglers were mixed. Of those who commented on them, 1/3rd were highly appreciative using phrases like 'he saved my life' and 2/3rds were critical. The main reasons for criticism were that smugglers had overloaded boats, and lied about their condition. It should be noted here, participants were referring to the men who were the main organisers, not the Indonesian crews who constitute the majority of those charged under current smuggling legislation.

In summary it is incorrect to view all smugglers as people perpetrating an evil trade purely for monetary gain; it is far more nuanced than that.

Attempts to stop smuggling can backfire

³ I have chosen not to name them in this submission although details of all three are widely available and on the public record.

⁴ Marfleet, P. (2006) *Refugees in a Global Era*, Hampshire, UK: Palgrave Macmillan Page 255

Third, it is useful to be aware that attempts to stop people smuggling and/or deter asylum seekers can backfire, or have only short term benefits, unless the broader issues are considered. It is recognised within migration research that irregular people movements cannot be turned on and off like a tap, although an assumption that they can, appear to underpin some policy decisions⁵.

The policies enacted in Europe in the mid 1990s to stop smuggling appeared to be successful in the short term but within a few years, the smuggling syndicates were back having adapted their methods of operation to get around barriers erected to stop them⁶. In short, any attempts to stop people smuggling seem to have only temporary benefits; invariably the syndicates re-emerge more effective, prolific and sophisticated than before.

There are lessons to be learnt from the introduction of Temporary Protection Visas (TPVs) in 1999. These were introduced as a deterrent by, amongst other things, taking away the right to access family reunion programs for refugees in Australia. From my research, before TPVs families would wait in the Middle East until their menfolk arrived in Australia and could sponsor them to join them. When TPVs removed this option, two things happened. In relation to men already in Australia, their wives and children made their way from the Middle East to Indonesia, sometimes against the husbands' wishes, to get on smugglers' boats. If the men were not yet in Australia, they travelled with their families rather than going on ahead and applying for family reunion at a later date. Hence the women and children became a new market for people smugglers, contributing to the growth in syndicates in 2000 and 2001, and the growth in the number of people travelling by boat.

This is consistent with international research which indicates that as it gets harder for asylum seekers to navigate the legal and physical barriers erected by governments, and harder for them to make their own way to a safe country, there is more likelihood they will turn to people smugglers. In this way, restrictive practices can, over time, contribute to the growth of people smuggling⁷. Again the solution lies in resolving the problems faced by asylum seekers.

A different perspective

People smuggling versus people trafficking

The distinctions between people smuggling and trafficking, already noted, should be remembered and reflected in the severity of penalties; trafficking is clearly a more heinous crime.

Risk assessment

It is standard practice to develop policies based on risk assessment. The risk associated with people smuggling and asylum seekers has been constantly overstated. I quote below from a Liberal Party policy document issued in 2001 while hoping that different language would be used nine years later.

The illegal movement of people poses a serious security and law enforcement challenge for Australia. People smuggling provides opportunities for the extension of international

5 Castles, S. (2004) *Why Migration Policies Fail* Ethnic and Racial Studies Vol. 27 No. 2 Page 208.

6 Koser, K. (2001) *New Approaches to Asylum* International Migration, Vol. 39, No. 6 Page 90

7 Marfleet, P. (2006) *Refugees in a Global Era*, Hampshire, UK: Palgrave Macmillan Page 249

criminal activity, for the spread of terrorism, for the breakdown of law and order, and for the violation of laws which protect Australian health and security.

It is hard to see why the arrival of a few thousand asylum seekers would be linked to ‘the breakdown of law and order’. Is there seriously a belief that the activities of people smugglers will lead to anarchy on our streets? Such statements do not withstand scrutiny.

Any people movement, the arrival of any foreigners on Australian shores, provide opportunity for the extension of international criminal activity – we see it with gangs involved in ATM skimming machines (who for the sake of clarity, do not arrive as asylum seekers). The internet also ‘provides opportunities for the extension of international criminal activity’.

My point is that while there may be risk it should be assessed appropriately. There is risk in every activity, and boat arrivals do not necessarily pose greater or exceptional risks compared with other arrivals. Commonsense would suggest if people had bad intent, they would be less likely to arrive by boat, be subject to detention and possibly refused a visa. More likely they would obtain false documents, get a visa beforehand and fly in.

To suggest people smuggling and unauthorised boat arrivals ‘pose a serious security and law enforcement challenge’ overstates the case. Our borders and public safety are not in that much danger. When boats come, there is a system in place for dealing with them and their passengers.

Unsafe boats

Smugglers are criticised for putting the lives of their passengers at risk because of the conditions of the boats, and the argument is made by politicians and others that on humanitarian and safety grounds, people smuggling must be stopped.

From my research I would suggest that from the asylum seekers’ perspective, they see it differently. The vast majority of asylum seekers who attempted the journey in the 1999-2001 period made it safely to Australia (some via Nauru and PNG). They considered the risks were worth it especially when the alternatives were so grim. People were and are more than merely willing to take the risks; they are desperate to try.

With this in mind, I would like to address the double standard implicit in suggestions that Australia should intercept boats and return them to Indonesia.

As part of my research, I have asked asylum seekers and a people smuggler who were in Indonesia in 2001 what in their view stopped the boats at that time. No-one mentioned mandatory detention, the Pacific Solution or Temporary Protection Visas. Despite claims to the contrary, based on what I have been told, these policies did not stop the boats as the asylum seekers still had hope they would get to Australia even though it might take longer. It was only after boats were intercepted and returned to Indonesia that paying for a passage on a smuggler’s boat seemed to be a pointless exercise, which would affect the people smuggling businesses. However the practice of returning boats is not a viable, sustainable option.

It requires the cooperation of Indonesia which is unlikely to accept returned boats in the current climate. The legality of such actions is questionable, possibly in breach of international law⁸. Further it is extremely dangerous.

Four boats were turned back in 2001 (SIEVs 5, 7, 11, 12). I have first hand accounts from passengers on two of them. Based on these accounts, their boats were in no condition to do the return journey. Although some repairs were done at the time the boats were intercepted by the Australia navy, the boats broke down after the navy left and before the boats reached the Indonesian shoreline. Local fishermen rescued passengers on both boats. By this time they were physically and emotionally exhausted, having had little sleep or food in the ten or more days since they started their journey. One man I spoke with still has nightmares about it. Three men disappeared and are believed to have drowned trying to reach land after SIEV 7 ran aground about 300 metres from the Indonesia coast line.

Much is made by both sides of politics that people smugglers put vulnerable people's lives at risk by sending them to Australia in wooden fishing boats. **If politicians argue for returning these boats to Indonesia, then they should be aware they would be putting people's lives at risk in exactly the same way as people smugglers are accused of doing.** It is morally repugnant and dangerous.

Penalties for the Indonesian crews

Blanket people smuggling penalties have no regard to the variety of roles played in smuggling syndicates. Some people are key players whose sole occupation is people smuggling, through which they earn large amounts of money.

At the other end of the scale are the fishermen who take the opportunity to boost their meagre incomes – many struggle to feed their families – by crewing a boat to Australia. They earn a few hundred dollars if that. It is inappropriate for them to receive the same level of punishment as a main organiser.

Providing material support

I share the concerns expressed in other submissions that people sending money overseas to assist relatives in precarious situations could be caught by the proposed amendments. Again we see a situation where the world's vulnerable are targeted by ill-conceived legislation, which will do nothing to address the problems the legislation is supposed to address.

There seems to be little real grasp of the life and death situations, and desperation, faced by people in refugee-like situations. One cannot reasonably expect people not to send money or otherwise support relatives who are begging for help. The suggestion they might later be found to be guilty of a crime and punished for this is most disturbing.

There is potential here that if a person comes to Australia on a smugglers' boat, their Australia-based relatives will be investigated to check the destination of any monies they may have sent overseas. Anyone involved with refugees knows that it is common for them to

⁸ Mathew, P. (2002) *Australian Refugee Protection in the Wake of the Tampa* The American Journal of International Law Vol 96, No. 3 Page 666

remit money overseas to help vulnerable relatives. This would be highly damaging to refugee communities and the like who already feel that they undergo too much scrutiny by Australian authorities.

This to me seems to be moving in the direction of legislation found in authoritarian regimes where family members and associates can be placed under suspicion or punished when they have acted in ways that are natural to do; with barely a second thought, to help loved ones in need. It also brings to mind the situation of Mohammad Haneef, under suspicion merely because of his familial connections.

Alternative solutions

This is a significant global issue which the international community has struggled with for decades, with little success, perhaps because the focus has not been on resolving the problems faced by asylum seekers and refugees. Instead it has been on containing or rejecting them. This approach, as previously noted, has contributed to the growth in people smuggling.

The hopelessness felt by refugees/asylum seekers stranded in Indonesia is a push factor in itself. Those living in the community are not permitted to work and access to education for children is limited. They feel their lives are being wasted as the years slip by and nothing changes. Hundreds more are held in detention facilities, some in appalling conditions. New arrivals see the predicament of those who have been waiting for years, and the toll it has taken on their psychological health.

People smuggling continues to be an issue despite the vast amounts of money already spent on such things as:

- funding IOM and UNHCR in Indonesia;
- funding AFP to operate in Indonesia;
- costs associated with arrest and prosecution of people smugglers;
- refurbishment of Indonesian detention centres;
- operation of Christmas Island detention centre;
- costs of Pacific Solution, including payments to Nauru and PNG;
- double processing of protection claims by TPV holders
- border surveillance and so forth

Perhaps the hundreds of millions of dollars could be better spent, in consultation with Indonesian and other regional governments, and those of countries of first asylum, on providing better options for the asylum seekers, and modelling a different form of burden sharing in this region and beyond. This is not the forum in which to detail all possible alternatives but to give an idea:

- improving prospects for speedy resettlement and family reunion
- negotiating the possibility for integration with the communities where people have been living
- while people are waiting for a permanent and durable solution, provide opportunity for them to use their time productively
- instead of financing detention centres and prisons, provide educational facilities and skills training also available to local populations;

- negotiate for refugees/asylum seekers to be given work rights and for their children to attend schools

The development of schemes and programs which offer real benefits to asylum seekers/refugees will then reduce their feelings of despair and hopelessness, thereby reducing the appeal of the transport services offered by smugglers. As noted, asylum seekers generally prefer to operate in accordance with official programs; it is when these fail to provide solutions or are non-existent that they seek out other options.

Finally, if there was greater willingness on the part of the advanced economies to provide support to poor countries which inevitably carry the largest load of the world's refugees and asylum seekers, along with the adoption of more flexible approaches in responding to their needs, there is every possibility that demand for the services offered by people smugglers would reduce.

Concluding comments

I hope this submission will be useful in providing context to the proposed legislative changes from a different perspective and would welcome the opportunity to provide further comment.

Yours sincerely

Sue Hoffman
Murdoch University
Perth