



Detering People Smuggling Bill 2011

**Senate Legal and Constitutional Affairs
Committee**

9 November 2011

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Acknowledgment

1. The Law Council acknowledges the assistance of the Law Institute of Victoria, the Law Society of the Northern Territory, the Queensland Law Society and the NSW Bar Association in the preparation of this submission.

Introduction

2. The Law Council welcomes the opportunity to participate in the inquiry into the *Deterring People Smuggling Bill 2011* (the Bill) although the Law Council notes the extremely short time frame for submissions with the Bill being referred for inquiry on 3 November 2011 and submissions being due on 9 November 2011.
3. The Law Council's submission will focus on:
 - (a) The inadequacies of the process by which the Bill has been expedited;
 - (b) The appropriateness of introducing the Bill prior to the outcome of relevant court proceedings; and
 - (c) The retrospective nature of the amendment contained in the Bill.

The Progress of the Bill

4. On 1 November 2011, the Minister for Home Affairs introduced the Bill into the House of Representatives. The Minister referred to the need to deal with the Bill urgently in order to clarify the law relating to people smuggling. The Minister stated that he did not consider it proper to refer to relevant court matters. However in the short debate on the Bill, Mr Bandt, the member for Melbourne and Mr Oakeshott, the member for Lyne referred to a case in the Victorian Court of Appeal, which appears to have prompted the amendment proposed in the Bill.¹
5. The Opposition supported the passage of the Bill. The Government and the Opposition claim that the Bill is necessary to clarify an expression in the existing people smuggling offences in the *Migration Act 1958* (the Act) relating to a defendant committing an offence if the person he or she brings into Australia 'had or has no lawful right to come to Australia'. They claim that this expression was always intended only to refer to the person not having a visa to enter Australia and that it does not refer to the right to seek asylum if protection obligations are owed.²
6. The meaning of this expression is currently being considered by the Victorian Court of Appeal in a case involving the prosecution of Jeky Pakara, a 20 year old Indonesian fisherman who was a crew member on a boat carrying asylum seekers to Australia. The case was referred by the County Court to the Court of Appeal to determine whether the expression includes the right of a person to seek asylum under Australian and international law, which may mean that the offence may not be

¹ See *House of Representatives Hansard*, 1 December 2011 at pp 37-38; 41-44

² *Ibid*, pp 37-39; 40-41

established where a defendant is bringing in a person who has a lawful right to enter to seek asylum.³

7. The Bill's 'clarification' would mean that the second person had no lawful right to enter Australia only if they did not have a visa or fall within a relevant exception (and it would be irrelevant if they were an asylum seeker and whether they were owed protection obligations by Australia).
8. The Court of Appeal decision was expected on 3 November 2011 but has been adjourned to the end of November 2011 in view of the possible passage of the Bill. The Victorian public defender acting in the proceedings has stated that the Bill targets the proceedings specifically and that if it is passed it will mean the end of the case.⁴
9. The Bill seeks to make the amendments clarifying the expression retrospective to 1999 when the expression was first introduced. The Minister claims that ensuring the validity of previous convictions and maintaining current prosecutions constitutes 'exceptional circumstances' that justify retrospectivity.⁵
10. The Minister claims that there have been 'extensive consultations' on the Bill because the Government had discussed the Bill with the Greens and the Opposition the week before its introduction.⁶
11. The Bill was passed with Opposition support and transmitted to the Senate for concurrence the following day. Debate on the concurrence motion was adjourned.⁷
12. On 3 November 2011, the Senate Selection of Bills Committee decided to refer the Bill to the Legal and Constitutional Affairs Committee (the committee) for inquiry and report by 21 November 2011. The date for submissions is **9 November 2011**.⁸
13. The Law Council has raised the issue of legislative standards and inadequate time frames for consideration of draft legislation over many years.⁹ The Law Council considers that 6 to 12 weeks is a preferable time frame for consultation on draft legislation although it accepts that matters of urgency may require a shorter time frame. The Law Council does not consider that any claim of urgency justifies the introduction of legislation with retrospective effect without proper consultation. Four business days for making submissions to the committee is clearly inadequate. This time frame and the attempt to expedite the Bill are also of particular concern to one of the Law Council's constituent bodies, the Queensland Law Society, which has raised these issues in a separate submission to the committee.

³ See 'Boat Crew to Fight Smuggling Charges', The Age, 31 August 2011 at <http://www.theage.com.au/national/boat-crew-to-fight-smuggling-charges-20110830-1jk5f.html>; "Victorian Court of Appeal to hear Refugee Test Case", Herald Sun, 13 September 2011 at <http://www.heraldsun.com.au/news/more-news/appeals-court-to-hear-refugee-test-case/story-fn7x8me2-1226135202025>; 'Lawyers Condemn Migration Law Amendment', The Age 3 November 2011 at <http://www.theage.com.au/national/lawyers-condemn-migration-law-amendments-20111102-1mvpr.html>; 'People Smuggling Case Appears Doomed', ABC Radio PM, 2 November 2011 at <http://www.abc.net.au/pm/content/2011/s3354540.htm>

⁴ See 'People Smuggling Case Appears Doomed', ABC Radio PM, 2 November 2011 at <http://www.abc.net.au/pm/content/2011/s3354540.htm>

⁵ See note 1 at p 38

⁶ See note 1 at p 44

⁷ See *Journals of the Senate*, 2 November 2011, p 1723-1724 at http://www.aph.gov.au/Senate/work/journals/jnlp_062.pdf

⁸ See *Senate Hansard*, 3 November 2011, p 25 at <http://www.aph.gov.au/hansard/senate/dailys/ds031111.pdf> <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/legislative-standards.cfm>

⁹ See <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/legislative-standards.cfm>

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14. The Law Council's concerns about the lack of consultation on the Bill are magnified by the attempt to expedite the Bill through the Parliamentary process.
 15. The Law Council also considers that consultation with stakeholders such as the Law Council is vitally important to the legislative process. In relation to this Bill, the Law Council notes that there was no consultation with stakeholders or the public prior to its introduction. The Law Council also notes the extremely short time frames for submissions to and reporting by the committee.
 16. The Law Council considers that the work of Parliamentary committees is critical to the development of good legislation and the value of this work is being eroded by short timeframes for consultation.
 17. It is important to remember what the benefits of consultation are:
 - (a) well drafted laws which are clear,
 - (b) greater compliance with the law, because citizens can understand what they have to comply with; and
 - (c) easier enforcement, minimising costs of the justice system and higher success rates for regulators and prosecutors, supporting confidence in the justice system.
 18. Where appropriate consideration of draft legislation does not occur, difficulties with interpretation and enforcement may arise.
 19. The Law Council considers that insufficient time has been allowed for consideration of this Bill. The Law Council notes that issues in relation to the expression 'had or has no lawful right to come to Australia' were previously raised in the context of the committee's May 2010 inquiry into the *Anti-People Smuggling and Other Measures Bill 2011*.¹⁰
 20. In its submission to that inquiry, the Refugee Council of Australia stated in relation to the definition of the offences of people smuggling in the Act, which include the expression referred to above that :

*There is a need for clarification as to whether the above definitions include ventures in which the second person or other persons are asylum seekers. If so, the amendments are inconsistent with the United Nations Convention Relating to the Status of Refugees, which clearly states that non-citizens have a lawful right to enter a country for the purposes of seeking asylum, regardless of whether they have lawful status.*¹¹

21. In its submission to that inquiry, the University of NSW examined the basic offence of people smuggling in s 233A of the Act and stated that:

In light of Australia's international law obligations under the Refugee Convention and the Universal Declaration of Human Rights, by which Australia recognizes the right to seek asylum and its duty to protect people

¹⁰ See submissions by Bassina Fassenbaum and Jane McAdam; the Refugee Council of Australia at http://www.aph.gov.au/senate/committee/legcon_ctte/antipeoplesmuggling/submissions.htm

¹¹ See submission by Refugee Council of Australia at p 2

*with a well-founded fear of persecution on particular grounds, this offence should not apply to the movement of Convention refugees.*¹²

22. The University of NSW submission recommended that the section be amended to require that the person being brought to Australia is a non-citizen who 'had or has no lawful right to come to Australia including no right to protection as a refugee under the Convention relating to the Status of Refugees'.¹³ Associate Professor Reilly of the University of NSW specifically addressed the issue at the inquiry's public hearing.¹⁴
23. Therefore, these issues were brought to the attention of Senators participating in that inquiry. Government officers also appeared at that inquiry. Therefore, at least since May 2010, the Government has been on notice about the need for clarification in relation to the expression. Yet the Government only introduced the Bill on 1 November 2011 and sought to expedite its passage through Parliament.
24. The Law Council has previously raised the issue of Government acting promptly when ambiguities in the operation of a statute are drawn to its attention with the Parliamentary Joint Committee on the Australian Crime Commission (PJACC) in its inquiry into the *Australian Crime Commission Amendment Act 2007* (Cth). In that Act, the Government sought to retrospectively validate a number of summonses issued by the Australian Crime Commission without reasons being provided in writing prior to the issuing.
25. Mr Robert Richter QC on behalf of the Law Council gave the following evidence at the PJACC's inquiry hearing:

*It is in the ACC's interest to find out at the earliest opportunity whether or not it has acted validly. If there is a challenge to the validity of its actions, it is in its interests to find out whether or not it has acted validly rather than to wait for a possible denouement that occurs at trial when it is too late to fix it.*¹⁵

The Court Proceedings and the Urgency of the Bill

26. As noted above, proceedings in relation to the interpretation of the relevant expression are currently before the Victorian Court of Appeal. As also noted above, an issue before the court is whether the relevant expression includes the right of a person to seek asylum under Australian and international law. If the expression is interpreted in this way, the defendant may be able to argue that he is not guilty of the offence if the persons whose entry he or she facilitated had such a right.
27. As noted above, the Minister did not consider it proper to refer to the court proceedings in the debate on the Bill. However, the Minister did refer to the risk of 'prosecutions being overturned as a result of a previously unidentified argument' in relation to the expression.¹⁶

¹² See submission by Bassina Fassenbaum and Jane McAdam at pp 19-20

¹³ *ibid*

¹⁴ See Senate Legal and Constitutional Affairs Committee Report, Anti-People Smuggling and Other measures Bill 2010, May 2010, p 23 at

http://www.aph.gov.au/senate/committee/legcon_ctte/antipeoplesmuggling/report/index.htm

¹⁵ See Parliamentary Joint Committee on the Australia Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007* p 33 at

http://www.aph.gov.au/senate/committee/acc_ctte/acc_amend_act07/report/index.htm

¹⁶ See note 1 at p 38

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28. The Bill inserts a new section 228B into Subdivision A, Division 12 of Part 2 of the Act. This Subdivision deals with people smuggling offences, including the basic people smuggling offence in s 233A(1), which reads:
- (1) A person (the first person) commits an offence if:
 - (a) The first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person (the second person); and
 - (b) The second person is a non-citizen; and
 - (c) The second person had, or has, no lawful right to come to Australia.
29. Proposed section 228B reads:
- (1) For the purposes of this Subdivision, a non-citizen has, at a particular time, no lawful right to come to Australia if, at that time:
 - (a) The non-citizen does not hold a visa that is in effect; and
 - (b) The non-citizen is not covered by an exception referred to in subsection 42(2) or (2A); and
 - (c) The non-citizen is not permitted by regulations under subsection 42(3) to travel to Australia without a visa that is in effect.
 - (2) To avoid doubt, a reference in sub-section (1) to a non-citizen includes a reference to a non-citizen seeking protection or asylum (however described) whether or not Australia has or may have protection obligations in respect of the non-citizen:
 - (a) Under the Refugees Convention as amended by the Refugees Protocol; or
 - (b) For any other reason.
30. The Bill also provides for the above amendment to be made both prospectively and retrospectively to 1999 when the expression was first inserted in the Act.
31. The Law Council and a number of its constituent bodies, particularly the Law Institute of Victoria, the Law Society of the Northern Territory and the NSW Bar Association have serious concerns that the Government is undermining the court process by introducing the Bill before the outcome of the court proceedings. The right to a fair trial is undermined if laws are changed during the course of proceedings.
32. The Law Council notes that the Government recently introduced the *Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2011* (the Social Security Bill) prior to the outcome of proceedings before the High Court in the *Poniatowska* case.¹⁷ The Social Security Bill was introduced on 23 June 2011 and relevant parliamentary standing orders were suspended to allow it to be debated and passed in both houses on 6 July 2011 with Opposition support.

¹⁷ See *Commonwealth Director of Public Prosecutions and Poniatowska* [2011] HCA 43

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33. The Social Security Bill was also claimed to be necessary and urgent because the defendant in a matter involving alleged social security fraud had raised an argument that an element of the offence had not been made out as a consequence of the drafting of the relevant legislation. It was claimed that if the defendant was successful before the High Court up to 15,000 similar cases would need to be re-examined, that convictions might be quashed and existing prosecutions put at risk.
34. The Social Security Bill also provided for retrospective operation of the relevant amendment to 2000. This aspect of the Bill drew the attention of the Senate Scrutiny of Bills Committee (the Scrutiny Committee) which expressed strong reservations about the use of retrospective legislation to impose or confirm criminal guilt and whether the justifications for its use in the Social Security Bill were adequate. The Scrutiny Committee acknowledged that the principle against retrospective legislation is not absolute and that there are circumstances in which such legislation is justified but nevertheless expressed its strong reservations about the Social Security Bill. Despite those reservations, the Bill was passed by both Houses.
35. The High Court handed down a majority decision in favour of the defendant on 26 October 2011. In his dissenting judgment, Heydon J made the following remarks:
- It is common for the decisions of courts to be reversed by the legislature after they have been delivered. It is less common for this to take place even before they have been delivered. Yet the legislature has got its retaliation in first in relation to this appeal.*¹⁸
36. The Government's actions in relation to the Bill and the Social Security Bill are of great concern to the Law Council in the context of the pending court decisions at the time of the introduction of the bills and the rush to have the bills passed. These actions impact on the rights of the accused and have the potential to impact on the work and the independence of the courts.

The Retrospective Nature of the Amendment

37. As noted above, the Bill provides for the relevant amendment to be made retrospective to 1999 when the expression was introduced into the Act. While the Minister claims that no new retrospective offence is created and that the Bill merely seeks to clarify the expression used in the relevant offence, the Law Council considers that the amendment 's retrospective operation does offend principles against retrospective legislation.
38. Australia is party to the Universal Declaration of Human Rights (the UNDHR) and the International Covenant on Civil and Political Rights (ICCPR).
39. Article 10 of the UNDHR provides that no one should be guilty of a penal offence on account of an act which did not constitute such an offence under national or international law at the time it was committed. Article 15 of the ICCPR contains a similar prohibition.¹⁹
40. It is possible that if the defendant's argument in the Victorian Court of Appeal succeeds and he adduces relevant evidence in the County Court, his conduct would not have constituted an offence at the time it was committed. Therefore making the

¹⁸ Ibid at para 45

¹⁹ See <http://www.un.org/en/documents/udhr/http://www2.ohchr.org/english/law/ccpr.htm>

amendment retrospective will result in him being found guilty in relation to an act which did not constitute an offence under national law at the time. While it may also be argued that people smuggling is prohibited at international law because of the operation of the UN Smuggling Protocol, the nature of this prohibition is highly contested with strong arguments that it is not intended to address situations involving asylum seeker flows.²⁰

41. In the Commonwealth Government's Guide to Framing Commonwealth Offences, the principle relating to retrospectivity is stated as:

*An offence should be given retrospective effect only in rare circumstances and with strong justification. If legislation is amended with retrospective effect, this should generally be accompanied by a caveat that no retrospective criminal liability is thereby created.*²¹

42. The Guide also states that justification in the Explanatory Memorandum is required even if retrospectivity is imposed only as a result of making a technical amendment or correcting a drafting error. The Law Council notes that no such justification is provided in the Explanatory Memorandum for the Bill, although the Minister subsequently sought to provide such justification in the Parliamentary debate.²²

43. The Law Council also notes that the High Court has dealt with the issue of retrospective criminal legislation in the *Polyukhovich* case.²³ While the majority found that the relevant provision in the *War Crimes Act 1945* (Cth) was not invalid on a number of grounds, including that it was permissible for it to operate retrospectively, Brennan J (as he then was) and Gaudron J in dissenting judgments discussed a number of common law principles relevant to consideration of retrospective operation of criminal laws.

44. Brennan J stated:

*At least since the time of Bentham and Mill, however, ex post facto criminal legislation has been generally seen in common law countries as inconsistent with fundamental principle under our system of government.*²⁴

45. Gaudron J stated:

*Equally it would be a travesty of the judicial process if, in proceedings to determine whether a person had committed an act proscribed by and punishable by law, the law proscribing and providing for punishment of that act were a law invented to fit the facts after they had become known. In that situation, the proceedings would not be directed to ascertaining guilt or innocence (which is the function of criminal proceedings and the exclusive function of the courts), but to ascertaining whether the Parliament had perfected its intention of declaring the act in question an act against the criminal law. That is what is involved if a criminal law is allowed to take effect from some time prior to its enactment.*²⁵

²⁰ See Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the UN Convention against Transnational Organized Crime (2000); see also submission by Fassenbaum and McAdam, note 10

²¹ See *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers

²² See note 1 at p 38

²³ *Polyukhovich and the Commonwealth* [1991] HCA 32

²⁴ Ibid at para 28

²⁵ Ibid at para 36

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46. Dawson J in the majority also stated:

*The resistance of the law to retrospectivity in legislation is to be found in the rule that, save where the legislature makes its intention clear, a statute ought not to be given retrospective operation where to do so would be to attach new legal consequences to facts or events which occurred before its commencement.*²⁶

47. The Law Council has raised concerns with the retrospective operation of legislation over many years, including with the Joint Parliamentary Committee on the Australian Crime Commission as discussed above.

48. The Law Council has recently consolidated a set of Rule of Law Policy Principles, which include the following principle;

The law must be both readily known and available, and certain and clear.

In particular, people must be able to know in advance whether their conduct might attract criminal sanction or civil penalty. For that reason:

- (a) Legislative provisions which create criminal or civil penalties should not be retrospective in their operation;*
 - (b) The intended scope and operation of offence provisions should be unambiguous...*
 - (c) The fault element for each element of an offence should be clear.*²⁷
49. The Law Council considers that the general principle against the retrospective operation of criminal offences should be applied to the Bill. The Law Council does not consider that the justification provided by the Minister for the retrospective operation of the Bill is sufficient. It is not acceptable for the Government to simply resort to retrospectively amending legislation whenever a party to litigation or a stakeholder points to a different interpretation of the legislation to that which the Government considers appropriate.

Conclusion

50. The Law Council opposes the Bill for the reasons outlined above. The Law Council considers that there has been woefully inadequate consultation on the Bill and similarly inadequate Parliamentary consideration of the Bill to date. The Government has been aware of possible problems with the interpretation of the relevant expression at least since May 2010.
51. The Government has acted prior to the outcome of relevant court proceedings raising serious concerns about the fair trial rights of the defendant in those proceedings.
52. The Government has acted contrary to the general principles applying to the retrospective operation of criminal laws and has not provided adequate justification in the Explanatory Memorandum to the Bill or even subsequently for doing so. The

²⁶ Ibid at para 17

²⁷ See Law Council of Australia *Policy Statement: Rule of Law Principles*, March 2011 at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=4858D679-AA9B-27F0-219A-40A47E586C70&siteName=lca

Government should not simply resort to retrospectively amending legislation whenever a different interpretation of the legislation is raised. Both this Bill and the Social Security Bill point to a disturbing trend in this regard.

53. The Law Council considers that it is contrary to the rule of law to introduce amending legislation with retrospective effect resulting in criminal liability into Parliament without proper consultation and without providing adequate time for Parliamentary consideration. It is also contrary to the rule of law when this action occurs in the context of pending court decisions relating to the guilt or innocence of an accused person and may amount to abuse of process in relation to those proceedings.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.