Australian Government

Attorney-General's Department

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Deterring People Smuggling Bill 2011

The Deterring People Smuggling Bill 2011 (the Bill) was passed by the House of Representatives on 1 November 2011, and is now before the Senate for consideration.

Schedule 1 of the Bill will amend the *Migration Act 1958* (the Migration Act) to clarify the meaning of the words 'no lawful right to come to Australia' contained in the people smuggling offences in the Migration Act. The provisions will apply retrospectively from 16 December 1999, when the words 'lawful right to come to Australia' were first inserted into the people smuggling offences in the Migration Act.

The Bill clarifies the current operation of the people smuggling offences in the Migration Act to ensure they continue to apply as they were intended to and as they have been consistently interpreted by the courts since their introduction in 1999. The Bill does not alter any of the elements of the existing people smuggling offences in the Migration Act.

The amendments relate to the serious crimes of people smuggling and aggravated people smuggling, and do not affect the rights of individuals seeking protection or asylum in Australia. They also do not affect Australia's international obligations in respect of those persons.

This submission outlines the legislative history of the people smuggling offences since July 1999 and provides information on the relationship of the Bill with international law and relevant judicial authority. In addition, this submission provides information on retrospectivity.

Background

As outlined in the explanatory memorandum, the Bill provides that, for the purposes of Subdivision A of Division 12 in Part 2 of the Migration Act, a non-citizen has no lawful right to come to Australia if the non-citizen does not hold a visa that is in effect, and is not covered by an exception referred to in existing subsections 42(2), 42(2A), or 42(3) of the Migration Act. This is the way the provisions have been consistently interpreted since their introduction in 1999.

The Bill makes it clear that references to a 'non-citizen' in Subdivision A of Division 12 in Part 2 of the Migration Act includes a reference to a non-citizen who is seeking protection or asylum (however that may be described). However, the people smuggling offences apply where a person smuggles <u>any</u> person that has no lawful right to come to Australia (that is, any non-citizen that does not hold a visa that is in effect, and is not covered by an exception referred to in existing subsections 42(2), 42(2A), or 42(3) of the Migration Act). The class of persons with no lawful right to come to Australia includes persons who are seeking protection or asylum.

As well as applying to offences committed or suspected to have been committed on or after the date on which the Bill receives the Royal Assent, the amendments will apply to original and appellate proceedings that were commenced before the date on which the Bill receives the Royal Assent, if those proceedings have not been finally determined before the date of Royal Assent. In addition, the amendments will apply if a person convicted of a people smuggling or aggravated people smuggling offence appeals their conviction or sentence.

Legislative history since July 1999 - people smuggling offences

Before July 1999, the Migration Act contained an offence of people smuggling, which carried a maximum penalty of two years' imprisonment. The offence appeared in section 233 of the Migration Act as follows:

> 233 Persons concerned in bringing non-citizens into Australia in contravention of this Act or harbouring illegal entrants
>
> (1) A person shall not take any part in:
>
> (a) the bringing or coming to Australia of a non-citizen under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of this Act;
>
> (b) the concealing of a non-citizen with intent to enter Australia in contravention of this Act; or
>
> (c) the concealing of an unlawful non-citizen or a deportee with intent to prevent discovery by an officer.
>
> (2) A person must not knowingly or recklessly harbour an unlawful non-citizen, a removee or a deportee.
>
> Penalty: Imprisonment for 2 years.

This offence was amended in July 1999 by the *Migration Legislation Amendment Act (No. 1) 1999* (the Migration Legislation Amendment Act) to increase the maximum penalty for this offence from two years to 10 years' imprisonment. In addition to this amendment, the Migration Legislation Amendment Act also introduced an offence of smuggling five or more persons. The offence first appeared in section 232A of the Migration Act as follows:

> 232A Organising bringing groups of non-citizens into Australia
>
> A person who:
>
> (a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people; and
>
> (b) does so knowing the people would become, upon entry into Australia, unlawful non-citizens;
>
> is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both.

The explanatory memorandum to the Migration Legislation Amendment Act provides:

> In particular, the proposed amendments:
>
> ...
>
> - increase existing penalties for people trafficking offences (sic) in sections 233, 234 and 236 of the *Migration Act 1958* ('the Act') from imprisonment for 2 years to imprisonment for 10 years and / or 1,000 penalty units, in line with Commonwealth criminal law policy;
>
> - create new offences relating to people trafficking (sic). The new offences are aimed at people who intentionally organise, or participate in, the trafficking (sic) of groups of 5 or more people. The proposed penalty for each of these new offences is 20 years imprisonment and / or 2,000 penalty units;
>
> ...
>
> New section 232A Organising bringing groups of non-citizens into Australia
>
> Proposed clause 3A inserts new section 232A after section 232 of the Act. New section 232A provides a new offence in relation to the trafficking (sic) of groups of 5 people or more to Australia. The offence is aimed at organised operations and attracts a penalty of imprisonment for 20 years or 2,000 penalty units, or both.

In December 1999, the *Border Protection Legislation Amendment Act 1999* (the Border Protection Legislation Amendment Act) amended section 232A to insert the words 'is a person to whom subsection 42(1) applies' into the offence. The explanatory memorandum states:

> Paragraph 232A(a)
>
> This item adds a reference to subsection 42(1) in paragraph 232A(a) so that a person is not guilty of an offence under section 232A if subsection 42(1) does not apply to the group of 5 or more people referred to in paragraph 232A(a).

The Border Protection Legislation Amendment Act also removed the words 'does so knowing the people would become, upon entry into Australia, unlawful non-citizens' from former section 232A of the Migration Act as in force at the time, and replaced them with the words 'does so reckless as to whether the people had, or have, a lawful right to come to Australia'.

The explanatory memorandum to the Border Protection Legislation Amendment Act explains that this is to avoid a defence to the offence based on knowledge of what constitutes an 'unlawful non-citizen'. It is silent on why the language of 'entry into Australia' was replaced with language about a person's 'lawful right to come to Australia'. The explanatory memorandum states:

> Paragraph 232A(b)
>
> This item amends paragraph 232A(b) to replace the element of knowledge with the element of recklessness. Section 232A currently provides that a person who organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people and who does so knowing the people would become, upon entry into

> Australia, unlawful non-citizens. By replacing the knowledge element with an element of recklessness as to whether the people in question had, or have, a lawful right to come to Australia, this amendment will ensure that a person cannot avoid liability under section 232A on the basis that they did not have technical knowledge that the people being trafficked (sic) would become, in Australia, 'unlawful non-citizens'.

Following the commencement of the Border Protection Legislation Amendment Act, section 232A of the Migration Act provided as follows:

> 232A Organising bringing groups of non-citizens into Australia
>
> (1) A person who:
>
> (a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and
>
> (b) does so reckless as to whether the people had, or have, a lawful right to come to Australia;
>
> is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both.
>
> Note: Sections 233B and 233C limit conviction and sentencing options for offences under this section.

The *Migration Legislation Amendment Act (No.1) 2008* amended section 232A to insert a new subsection. Subsection 2 provided that the defendant bears the evidential burden to establish that exemptions to the visa requirements in the Migration Act apply to that person. Following the commencement of that Act, section 232A of the Migration Act appeared as follows:

> 232A Organising bringing groups of non-citizens into Australia
>
> (1) A person who:
>
> (a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and
>
> (b) does so reckless as to whether the people had, or have, a lawful right to come to Australia;
>
> is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both.
>
> Note: Sections 233B and 233C limit conviction and sentencing options for offences under this section.
>
> (2) For the purposes of subsection (1), the defendant bears an evidential burden in relation to establishing that subsection 42(1) does not apply to a person because of subsection 42(2) or (2A) or regulations made under subsection 42(3).
>
> Note: For evidential burden, see section 13.3 of the Criminal Code.

Following commencement of the *Anti-People Smuggling and Other Measures Act 2010* (the Anti-People Smuggling and Other Measures Act) on 1 June 2010, the former section 232A was replaced by existing section 233C of the Migration Act. The words 'lawful right to come to Australia' were retained in section 233C, but the reference to section 42 was removed. Existing section 233C of the Migration Act provides:

> 233C Aggravated offence of people smuggling (at least 5 people)
>
> (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 a group of at least 5 persons (the other persons); and
>
> (b) at least 5 of the other persons are non-citizens; and
>
> (c) the persons referred to in paragraph (b) who are non-citizens had, or have, no lawful right to come to Australia.
>
> Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.
>
> Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.
>
> (2) Absolute liability applies to paragraph (1)(b).
>
> Note: For absolute liability, see section 6.2 of the Criminal Code.
>
> (3) If, on a trial for an offence against subsection (1), the trier of fact:
>
> (a) is not satisfied that the defendant is guilty of that offence; and
>
> (b) is satisfied beyond reasonable doubt that the defendant is guilty of the offence of people smuggling;
>
> the trier of fact may find the defendant not guilty of an offence against subsection (1) but guilty of the offence of people smuggling, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

The explanatory memorandum to the Anti-People Smuggling and Other Measures Act provides:

> Paragraph 233C(1)(c) sets out the physical element of a circumstance that the persons referred to in paragraph (b) have or had no lawful right to come to Australia - that the bringing or coming, or entry or proposed entry does not or would not comply with the entry requirements under Australian law. (emphasis added)

In addition to amendments to the aggravated people smuggling offence involving five or more persons, the Anti-People Smuggling and Other Measures Act restructured and reordered Subdivision A of Division 12 in Part 2, to ensure the Migration Act was clear and appropriately structured. As part of these amendments, the offence of people smuggling was moved from former section 233 to existing section 233A of the Migration Act, and it was aligned with existing section 233C. Since 1 June 2010, the people smuggling offence has provided:

> 233A Offence of people smuggling
>
> (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.
>
> Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.
>
> (2) Absolute liability applies to paragraph (1)(b).
>
> Note: For absolute liability, see section 6.2 of the Criminal Code.
>
> (3) For the purposes of this Act, an offence against subsection (1) is to be known as the offence of people smuggling.

International law

The amendments are consistent with Australia's obligations under international law and do not affect the rights of individuals seeking protection or asylum, or Australia's obligations in respect of those persons.

The offences in Subdivision A of Division 12 in Part 2 of the Migration Act that use the words 'no lawful right to come to Australia' deal with the serious crimes of people smuggling and aggravated people smuggling, and do not affect the treatment of individuals seeking protection or asylum in Australia.

People smuggling offences contribute to Australia's implementation of its obligations to criminalise people smuggling under the *Protocol Against the Smuggling of Migrants by Land, Sea and Air* (the Protocol) supplementing the *United Nations Convention on Transnational Organised Crime* (UNTOC).

Australia's people smuggling offences are consistent with the Protocol and the UNTOC. As outlined in Article 2 of the Protocol, the Protocol's purpose is to 'prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.' Consistent with Australia's obligations under Article 5 of the Protocol, individuals who have been smuggled to Australia will not be subject to criminal charges merely because they were the object of a people smuggling venture. In respect of persons making claims for refugee status, this is also consistent with

Australia's obligations under Article 31 of the *United Nations Convention Relating to the Status of Refugees* (the Refugees Convention) as amended by the *1967 Protocol Relating to the Status of Refugees*, which provides that contracting States shall not impose penalties on refugees on account of their illegal entry or presence, provided those persons present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Rights of individuals seeking asylum or protection to enter Australia - position at common law, and the High Court's views on international law

In the view of the Department, under the common law, there is no right for an individual to enter Australia to seek protection or asylum. The authority for this proposition is *Ruddock v Vadarlis* (2001) 110 FCR 491. In that case, French J (with whom Beaumont J relevantly agreed), when speaking of non-citizens who had expressly sought not to be deprived of the 'rights of refugees according to International Convention', said at [197]:

> In my opinion, the executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion ... The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australia community, from entering.
>
> ... In my opinion, absent statutory authority, there is such a power at least to prevent entry to Australia. It is not necessary, for present purposes, to consider its full extent … Absent statutory abrogation it would be sufficient to authorise the barring of entry by preventing a vessel from docking at an Australian port and adopting the means necessary to achieve that result. Absent statutory authority, it would extend to a power to restrain a person or boat from proceeding into Australia or compelling it to leave.

The statement of principle in *Ruddock v Vadarlis* also reflects majority opinions expressed in the courts of other jurisdictions. In *T v Home Secretary* [1996] AC 742, Lord Mustill stated:

> … [A]lthough it is easy to assume that the appellant invokes a 'right of asylum' no such right exists. Neither under international or English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries.

The High Court has expressed the view that refugees do not have a right of entry under either customary international law or the *United Nations Convention Relating to the Status of Refugees* (the Refugees Convention). For example, in *NAGV v Minister for Immigration and Multicultural Affairs* (2005) 222 CLR 161, Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ stated at paragraphs [13] to [16] that:

> First, customary international law deals with the right of asylum as a right of states not of individuals; individuals, including those seeking asylum, may not assert a right under customary international law to enter the territory of a state of which that individual is not a national.
>
> ...

> Fourthly, the [Refugees] Convention has been construed by the House of Lords and the Supreme Court of the United States as not detracting from the right of a Contracting State to determine who should be allowed to enter its territory.

The cases referred to in *NAGV* include *T v Home Secretary*, as well as the majority opinion in *Sale v Haitian Centers Council* (1993) 509 US 155, 188 [9], a decision of the Supreme Court of the United States.

Retrospectivity

The Commonwealth's general approach to retrospective legislation

The approach taken by the Commonwealth with respect to retrospective offences has been that an offence should only be given retrospective effect in rare circumstances where there is a very 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.

The Commonwealth Parliament and successive Commonwealth Governments have only endorsed retrospective criminal offences in limited circumstances. People are entitled to regulate or conduct their affairs on the assumption that something which is not currently a crime will not be made a crime retrospectively through the backdating of criminal offences. Exceptions have normally been made only where there has been a strong need to address a gap in existing offences, and moral culpability of those involved means there is no substantive injustice in retrospectivity.

Retrospectivity – Deterring People Smuggling Bill

As the people smuggling offences in the Migration Act were intended to and have been consistently interpreted since 1999 as applying where a person who is brought into Australia does not meet the requirements for lawfully coming to Australia under domestic law, the amendments will apply retrospectively from 16 December 1999 when the words 'lawful right to come to Australia' were first inserted into the people smuggling offences in the Migration Act. Retrospective application is necessary to ensure the original intent of the Parliament is affirmed, to avoid uncertainty about the validity of previous convictions, and to maintain current prosecutions.

The effect of the retrospective application is to clarify an existing understanding of the laws, and to ensure convictions for people smuggling offences already made, as well as prosecutions underway, would not be invalidated should a court find that the absence of a specific reference to persons seeking protection or asylum means they are not intended to be the subject of the people smuggling offences. The Bill does not alter any of the elements of the existing people smuggling offences in the Migration Act.

There are exceptional circumstances that justify retrospectivity for this Bill. Those circumstances are that it would not be appropriate to risk a significant number of prosecutions being overturned as a result of a previously unidentified argument in relation to the words 'no lawful right to come to Australia'.

Other examples of retrospectivity

Social security amendments

Retrospective amendments to legislation have recently been made to clarify the operation of a social security offence. The Commonwealth amended the *Social Security (Administration) Act 1999* by inserting a duty to notify Centrelink of relevant information, to be applied retrospectively, triggering an offence under the *Criminal Code*.

In the Second Reading Speech for the Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2011, the Minister for Tertiary Education, Skills, Jobs and Workplace Relations indicated that exceptional circumstances existed in that case which justified retrospectivity.

The Minister for Tertiary Education, Skills, Jobs and Workplace Relations said it would not be appropriate for a significant number of prosecutions to be overturned on a previously unidentified legal technicality, and that the effect of the retrospective application of that provision was to confirm convictions already made.

On 26 October 2011, the High Court ruled against the Commonwealth in *Poniatowska v DPP*. If the amendments had not been made retrospectively, approximately 12,000 prosecutions for social security fraud may have been affected.

Anti-hoax amendments

The anti-hoax offences were inserted in the Criminal Code by the *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002*. New offences were added to Part 10.5 of the Criminal Code relating to the sending of dangerous, threatening or hoax material through the post or similar services. Retrospectivity was justified on the basis that the new offences commenced on the date that the then Prime Minister publicly announced that the Government was going to implement new offences for sending hoax material. In that announcement, the then Prime Minister stated that the new offence would commence from that date onwards, regardless of when the legislation would pass through the Parliament.

War crimes amendments

The *War Crimes (Amendment) Act 1988* amended the war crimes offences in the *War Crimes Act 1945* retrospectively to provide that those accused of committing war crimes in Europe during World War II, where those persons have since entered Australia or become citizens of Australia, could be brought to trial in Australia for the war crimes they have been accused of. Retrospectivity was justified on the basis that 'war crimes' are recognised as crimes at international law and the extension of the jurisdiction of Australian courts to remove certain limitations on prosecution and the punishment of war crimes in Australia was distinguished from a simple case of creating an offence retrospectively.