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Submission on the Anti-People Smuggling and Other Measures Bill 2010

Australia has a proud history of resettling refugees. It was an early signatory to the 1951 Refugee Convention and took a lead role in its drafting. Between 1945 and 1990, nearly 500,000 refugees arrived in Australia through its off shore resettlement program. It continues to provide for up to 13,000 places per year in its humanitarian visa stream. Australia is rightly considered a positive contributor in the resettlement of refugees.

The Refugee Convention draws no distinction between asylum seekers who seek protection from the UNHCR or directly to a Convention signatory such as Australia. The Convention assumes that in order to seek asylum, refugees will need to enter states without prior authorisation in order to seek protection.

Australia is also a signatory to the People Smuggling Protocol. The key element of the offence of people smuggling under Article 3 of the Protocol is the procurement of the illegal entry of a person into a State of which the person is not a national. 'Illegal entry' is defined broadly to include 'crossing borders without complying with the necessary requirements for legal entry into the receiving state'.

The Protocol has an express saving clause in Article 19 which states:

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951

Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

If Australia uses the offence of people smuggling to target the movement of asylum seekers, a tension is created between Australia's obligations under the Refugee Convention and under the People Smuggling Protocol. There is a legal dilemma created by the two sets of overlapping obligations under the Convention and the Protocol: the tougher the people smuggling offence, the more likely it is that it will be contrary to obligations under the Refugee Convention. There is a difficult balance to strike.

The Australian offence of people smuggling currently under ss 232A and 233(1)(a), and under proposed s233A, mirrors the elements in the Protocol closely. It states:

(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

The offence in s233A does not distinguish between cases in which the person is attempting to enter Australia in a clandestine fashion and remain in Australia illegally and undetected; and the case of the asylum seeker who wishes to seek the protection of the Australian government upon entering Australian territory. On the contrary, the Australian offence is aimed at punishing people who assist asylum seekers to reach Australia in order to deter asylum seekers themselves. This is evident from the explanation for the offence in the Explanatory memorandum: "The Government is determined to reinforce the message that people should use authorised migration processes for seeking asylum and migrating to Australia."

The Australian offences make no attempt to distinguish the level of criminality involved in assisting an asylum seeker to reach Australia, and assisting a person who desires to enter and remain in Australia illegally. There is no express mental element in the underlying people smuggling offence – the act of assistance is enough. Furthermore, a key element of the offence of people smuggling under the protocol – of engaging in smuggling 'for financial or other material benefit' - is not an element of the Australian offences.

Because the Australian offences are in some respects broader than the offence of people smuggling under the protocol, Australia risks non-compliance with both the Protocol and the Refugee Convention. Furthermore, and more fundamentally, the offences risk being disproportionate to the

criminality involved. In principle there is nothing wrong with assisting asylum seekers reaching Australia to make a claim under the Refugee Convention. Any element of wrongfulness is only introduced in the aggravated versions of the offence in the proposed laws, for which minimum sentences are mandated. This is an inappropriate use of the criminal law to achieve an ulterior end, and the end to be achieved, of preventing genuine asylum seekers from invoking Australia's obligations under the Refugee Convention, is itself dishonourable.