



ChilOut - Children Out of Immigration Detention

Submission to the

Legal and Constitutional Affairs Committee
Inquiry into the Deterring People Smuggling Bill 2011

10 November 2011

Thank you for this opportunity to make a submission to the Legal and Constitutional Affairs Committee's Inquiry into the Deterring People Smuggling Bill 2011

ChilOut – Children Out of Immigration Detention ChilOut is a not-for-profit community group of Australians campaigning on behalf of children held in immigration detention, and the rights of children generally within Australia's refugee and asylum seeker related policy areas.

ChilOut is becoming increasingly concerned with the situation for many Indonesian children being held in Australia on people smuggling charges. We are particularly alarmed about the welfare of the "unacknowledged children" being held in adult prisons as their claims of being under 18 are disputed by the Australian authorities using dubious age determination methods.

While ChilOut has a special focus on the rights of children, because these children are, in practice, being treated the same as adults in the Deterring People Smuggling Bill, we will make comment on the Bill as a whole.

ChilOut strongly recommends that this Bill not be passed, for reasons outlined in our submission. We are available to provide further information at the committee's request.

Kate Gauthier
Chair

Sophie Peer
Campaign Manager

ChilOut supports the submission made to this Inquiry on 4 November 2011 by Professor Ben Saul of the University of Sydney and refers the committee to Professor Saul's legal opinion on the proposed legislation.

Respecting Professor Saul's articulate legal position on this proposed amendment, ChilOut's submission will detail our concerns particular to children. Our submission comes from the perspective of an organisation with ten years of advocacy and campaigning experience representing a very broad range of Australians concerned with the rights of children.

The reality of an asylum seeker journey to Australia from Afghanistan, Iran, Iraq, Burma and Sri Lanka among other countries will quite often involve travel by sea. It is commonly known that people will pay bribes or obtain false documents to enter Malaysia or Indonesia. Whereas entering Australian airports through such means is far less common. With no realistic options for gaining protection within our region, for many people getting on a boat is their last hope for finding safety. For Australia as a signatory country to be considering legislation that will end up further disadvantaging people seeking protection is abhorrent.

In our region, people smuggling is not unique to Australia, and people dying at sea seeking protection is unfortunately not unique to Australia. What is unique to Australia is our political response to the issue. Some try to justify 'stopping the boats' on the grounds of stopping people from risking their lives. This is a cynical manipulation of the real reason - to stop the political problem created by community concern over asylum seekers.

If there was real concern over asylum seekers risking their lives, or the criminalisation of the process by which they flee for safety, then creating credible and safe options for people to find safety is the only moral, justifiable or outcome-driven policy option. Refugees only use people smugglers because Governments have failed to create safe states in source locations, or access to safe havens in destination countries. Removing people smugglers does not remove the need for safety that refugees face.

Surely it is far more in the national interest that we work cooperatively with our neighbours, increase our humanitarian intake (to 20,000 people per year) and present the public with factual non-politicised information on the issues.

Against international legal norms

The explanatory memorandum to this bill states Australia has obligations to criminalise people smuggling under the *Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the UN Convention on Transnational Organised Crime* (p4). However, this protocol did not intend to include the smuggling of refugees and asylum seekers as a crime. We urge the committee to ascertain whether there is in fact any precedent in international law to suggest that assisting a refugee to flee persecution is a crime. ChilOut is not aware of any such international norm and believe that until the Committee can show otherwise, **this legislation should not be passed.**

For Australia to make such a definition out of step with international humanitarian norms would be extraordinary and completely disproportionate to the flow of asylum seekers to Australia. In 2010 Australia received less than 2% of the world's asylum claims.¹ In-fact the Parliament of Australia's own documents show just how few asylum applications Australia receives compared to many other nations.²

¹ UNHCR Asylum levels and trends report 2010, released 2011. Table 3, p9 <http://www.unhcr.org/4d8c5b109.html>

²Asylum Seekers and Refugees: What are the facts. Australian Parliamentary Library Updated 22 July 2011. Graph p.12 'Irregular arrivals by sea: selected countries' <http://www.apl.gov.au/library/pubs/bn/sp/AsylumFacts.pdf>

Conflict with Refugee Convention

The explanatory memorandum to this bill states the Bill is to make it clear that to come lawfully to Australia, non-citizens not covered by visa exemptions require a valid visa that is in effect. This categorically defines all boat arrival asylum seekers – most of whom are later declared refugees - as unlawful entrants.

There is a clear conflict with the United Nations Convention Relating to the Status of Refugees, which explicitly states that unlawful non-citizens have a lawful right to enter a signatory country for the purposes of seeking asylum.

Australia has obligations under the Refugee Convention to provide protection to those in our territory who require protection for Convention reasons, and to not discriminate against any refugee who entered that territory unlawfully. The possibility of prosecution for people smuggling, outlined below, is in conflict with that obligation.

Refugees engaged in people smuggling

Some of those involved in the people smuggling networks are refugees themselves. This Bill, in conjunction with the powers under sections 500A and 501 of the Migration Act 1958 will increase the chances that refugees will be refused protection in direct breach of Australia's Refugee Convention obligations.

The Bill's Digest³ for the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 outlines this issue:

According to Professor Jane McAdam from the University of New South Wales, the existing character test regime under sections 500A and 501 already breach Australia's obligations under international law because the scope and matters that may be considered in refusing to grant a visa exceed the exhaustive grounds permitted under article 1F of the 1951 Refugee Convention, which relevantly states:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Thus, McAdam asserts that:

Imposing additional criteria, as the character test in section 501 of the Migration Act permits, is fundamentally at odds with Australia's obligations under the Refugee Convention. The present Bill will create further grounds which will continue and extend this breach.

ChilOut believes that an unintended consequence of the proposed Bill could be a sentence of life imprisonment for refugees: Refugees who are found to have breached the provisions of the People Smuggling Bill will be at risk of being denied a protection visa under s500a or s501 of the Migration and therefore face a choice of remaining in immigration indefinitely as an unlawful non-citizen, or 'voluntarily' returning home to a place where they face persecution, imprisonment, torture or cruel and inhuman treatment.

Criminalises parents

³ <http://www.aph.gov.au/library/pubs/bd/2010-11/11bd143.htm>

ChilOut is particularly concerned that no provision is made in this Bill for the action of parents or other family group leaders who finalise boat arrangements for members of their family as part of their own journey to Australia to seek protection from persecution.

ChilOut strongly recommends that before this Bill is even considered for passage an amendment is made to exclude refugees and asylum seekers themselves from being prosecuted for people smuggling charges.

ChilOut is further concerned that this Bill increases the charge from people smuggling to aggravated people smuggling where a person has organised or facilitated the unlawful entry of five or more persons. This means a father of four children who also brought his wife could be charged and found guilty of aggravated people smuggling.

There is no provision in this bill to ensure that refugees themselves are not charged with people smuggling. The Bill relies upon the discretion of the Commonwealth Director of Public Prosecutions not to prosecute refugees who organised their own family members journeys - that is simple not good enough. The intent not to prosecute refugees and asylum seekers must be explicit in the Bill.

Exploited children vulnerable to prosecution

We urge the Committee to recommend an insertion into this Bill that protects the children who may be caught up in alleged people smuggling operations. Australia's obligations under the Convention on the Rights of the Child along with our own Migration Act amendments in 1995 have not been enough to prevent the ongoing detention of minors who have been crew on-board boats transporting asylum seekers to Australia. Usually these are young boys from poor fishing communities and presently there are dozens detained, some for over 6 months. Punishing these boys and their families, breaching our human rights obligations and denying the basic tenet of protecting the best interests of a child, is hardly going to break any people smuggling model or protect Australia's 'national interests'.

We note that there are today an estimated 40 Indonesian children in Australia's adult prisons. The children and their lawyers claim they are under 18 years of age, the Australian Federal Police, using the controversial x-ray method, has deemed them to be adults.⁴ A Bill such as this one needs to be drafted in such a way that a series of (at best) questionable practices does not result in further abuse of these children.

ChilOut calls for all children to be held in facilities suitable for minors and for a legally defined, short period and to have access to all necessary services including independent legal advice. If no charges are being laid and it is safe to do so, appropriate arrangements should be made to have the children returned to their home.

⁴ABC's Lateline, 7 November 2011 <http://www.abc.net.au/lateline/content/2011/s3358566.htm>

Unnecessary amendment to existing laws

The submission by the Commonwealth Director of Public Prosecutions (CDPP) to this Committee states that defendants of people smuggling charges under existing laws have raised the defence that they brought people to Australia who had a lawful right to enter as they were asylum seekers. The CDPP states those arguments were dismissed by trial courts in Western Australia, the Northern Territory, New South Wales and Queensland.

The CDPP appears unaware the logical outcome of this argument is that case law is sufficiently dealing with this issue, and there is no need for legislative change.

This shows once again that what is being addressed by this amendment is a political problem of public perception, not a problem with existing laws.

Political Climate

Whilst it may not be specifically in the Committee's remit for this Inquiry, it seems implausible to address this proposed Bill without consideration of the present political environment in relation to asylum seekers. As Professor Saul points out in his submission, the international protocol that this legislation is designed to address is applicable to 'migrants' and not refugees. Yet, we know the reality is that if passed, this new legislation would indeed target those to whom Australia has humanitarian obligations. The conflation of people smuggling and protection issues in Australia over the past 13 years has been to the detriment of our international standing and has led to policies that devastate the lives of children, men and women. ChilOut hopes that we will not see the passage of legislation that could further compound these international breaches.

ChilOut understands the need to have anti-people smuggling measures in place. Yet we are very concerned that this Bill, and others like it (for example the now passed Combating the Financing of People Smuggling and Other Measures Bill 2011) are targeting vulnerable asylum seekers and not actually focused on deterring people smugglers. There is no crime in needing to escape persecution and in seeking safety. Without any commitment to comprehensive regional protection there will be no reduction in the incidents of people smuggling from Indonesia and Malaysia to Australia. People have no safety, children are being raped, exploited and left with no state and in many cases, no institutional protection – continuing to flee to a Refugee Convention country is hardly a 'choice'.

The Explanatory Memorandum for the Deterring People Smuggling Bill states that there is no financial impact to the proposed legislation. How can this be the case, if the Bill intends to define more persons as 'having no lawful right to enter Australia'? Under current practices, it seems highly likely that these people would be detained, at a very high financial cost; possibly charged; at a financial cost and some returned; at a financial cost. We note the Commonwealth Director of Public Prosecutions complaints at the release of the last Federal Budget that he did not actually have enough money to prosecute people smugglers.⁵

ChilOut believes this proposed legislation is unnecessary and is a political move rather than one genuinely aimed at saving lives or affecting large-scale people smuggling operations.

If this proposed legislation were subject to comparison with seven of Australia's key international obligations (as the new Human Rights Framework will require) ChilOut is confident we would see many potential inconsistencies. Of most concern to us are Australia's obligations to children, their safety, dignity, rights to education and freedom.

⁵ <http://www.theaustralian.com.au/national-affairs/dpp-funds-cut-for-people-smuggling-prosecutions/story-fn59niix-1226062976775>