

Quote in reply: International Law and Relations Section:21000325/50

16 April 2010

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By Email: legcon.sen@aph.gov.au

Dear Secretary

SENATE INQUIRY INTO THE ANTI-PEOPLE SMUGGLING AND OTHER MEASURES BILL 2010

1. Thank you for the opportunity to contribute to the Law Council of Australia submission on the Senate Inquiry into the *Anti-People Smuggling and Other Measures Bill 2010* (the Bill). This response has been composed with the assistance of the International Law and Relations Section who have a keen awareness of the issues relating to this area of law.
2. We understand that the Bill introduces a range of offences to target and deter people smuggling activity and provides the Australian Security Intelligence Organisation with powers to investigate serious border security threats and amends a range of legislation, including the:
 - The *Australian Security Intelligence Organisation Act 1979*;
 - The *Criminal Code Act 1995*;
 - The *Migration Act 1958*;
 - The *Proceeds of Crime Act 2002*;
 - The *Surveillance Devices Act 2004*;
 - The *Telecommunications (Interception and Access) Act 1979*.

3. Clause 233A - offence of people smuggling

We understand that clause 233A of the Bill creates the offence of people smuggling. This clause 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 Australia.*

We consider that it would be more clear if the parties involved in trafficking were labelled with more descriptive titles as opposed to being referred to as "first person" and "second person". For example, the person responsible for obtaining or facilitating the bringing or coming to Australia of a person could be referred to as a people trafficker and the victim of the offence could be referred to as a trafficked person. This will provide a clearer understanding of the roles of the parties when reading the Bill.

We suggest that clause 233A subsections 1(b) and 1(c) be deleted and the following be inserted:

- (1) ...
b) *the second person is an unlawful non-citizen as described in section 14 of the Migration Act 1958.*

4. Clause 236B - mandatory minimum penalties for certain offences

The Society does not support a mandatory sentencing regime for any offence. We understand that mandatory sentencing may contribute to uniformity in sentencing. However, in our view, the imposition of a mandatory sentencing regime would have negative consequences, including:

- The limitation of judicial discretion; and
- Harmful effects on the rehabilitation of the prisoner.

A mandatory sentencing regime would remove the decision-making power of the judiciary. The removal of this power would eliminate the ability of the judiciary to exercise their discretion when handing down sentences. This discretion allows judges to take into account the particular facts of the case and the presence or absence of mitigating and/or aggravating circumstances when determining sentencing outcomes. The ability of the judge to exercise this discretion, allows the sentence to more closely fit the offence, thereby reinforcing concepts of procedural fairness and equity.

A minimum mandatory penalty would adversely impact on the rehabilitation of prisoners. Prisoners who attend programs which aid in their rehabilitation may, as an incentive, be granted early release. The imposition of a minimum mandatory penalty would remove this option and prisoners will no longer receive incentives to attend rehabilitation programs, thereby adversely impacting on the rehabilitation of prisoners. We consider that treatment and restorative justice is more cost effective and beneficial for prisoners than the imposition of minimum mandatory sentences.

If you have any questions regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Binny De Saram on _____ or _____.

Yours faithfully

Peter Eardley
President