

Submission

Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration and Maritime Powers Amendment Bill (No 1) 2015



6 October 2015

Dear Committee Secretary,

The Kaldor Centre for International Refugee Law welcomes the opportunity to provide a submission to the Committee's Inquiry into the Migration and Maritime Powers Amendment Bill (No 1) 2015 ('the Bill').

The Kaldor Centre is the world's first research centre dedicated to the study of international refugee law. Based in the Faculty of Law at the University of NSW, it was established in 2013 with the aim of bringing a principled, evidence-based approach to refugee law and policy in Australia.

Our submission focuses on Schedule 4 of the Bill, which proposes changes to section 40 of the Maritime Powers Act 2013 ('the Act'). Section 40 currently reads:

40 Exercising powers in other countries

This Act does not authorise the exercise of powers at a place in another country unless the powers are exercised:

- (a) at the request or with the agreement of the other country; or
- (b) to administer, ensure compliance with or investigate a contravention of an international agreement or international decision that applies in that place; or
- (c) to investigate a contravention of a law that:
 - (i) applies in that place; and
 - (ii) is prescribed by the regulations; or
- (d) to administer or ensure compliance with a monitoring law that:
 - (i) applies in that place; and
 - (ii) is prescribed by the regulations; or
- (e) in connection with the exercise of powers in accordance with this section, to ensure the safety of a maritime officer or any other person.

The amendments proposed in Schedule 4, section 2, of the Bill provide that the above limitations will not apply to an exercise of powers if:

(2) ...

- (a) the exercise of powers:
 - (i) is part of a continuous exercise of powers that commenced in accordance with any applicable requirements of this Part (disregarding this subsection); and
 - (ii) occurs in the course of passage of a vessel or aircraft through or above waters that are part of a country; and

(b) a relevant maritime officer, or the Minister, considers that the passage is in accordance with [the United Nations Convention on the Law of the Sea (the Convention)].

(3) An exercise of powers in reliance (or purported reliance) on subsection (2) is not invalid because of a defective consideration of the Convention.

The Explanatory Memorandum to the Bill states:

206. The intention behind section 40 is to ensure that powers are exercised under the Maritime Powers Act in a manner consistent with the principle of territorial sovereignty at international law. Thus the use of enforcement powers within another country normally would require some form of agreement by that country. However, the section did not explicitly allow for the exercise of powers in the course of passage through and over waters within another country already permitted under international law, as reflected in the Convention. Examples of such passage include a vessel in the course of innocent passage, transit passage or archipelagic sea lanes passage. In those circumstances, under international law, no further agreement or approval by the coastal state is required

207. The purpose of the amendment is to confirm the operation of the Maritime Powers Act in circumstances where vessels and aircraft are considered to be exercising passage rights consistent with the Convention.

While the Explanatory Memorandum states that the intention and purpose of the amendment is to enable the exercise of powers under the Act in a manner consistent with the Convention, proposed section 40(3) appears to authorise the exercise of powers even in circumstances where this is *contrary to* Australia's obligations under the Convention.

The fact that a relevant maritime officer or the Minister mistakenly considers that the exercise of powers is consistent with the Convention cannot render the exercise of powers lawful as a matter of international law.

In authorising its officers to act in contravention of international law, Australia not only risks violating substantive treaty provisions, but also breaches the fundamental principle that a State must interpret and perform its treaty obligations in good faith.¹

It is likely that these amendments are intended to justify activities taking place in the territorial waters of other countries, such as Indonesia, pursuant to Operation Sovereign Borders. It should be noted that a number of activities known to take place under Operation Sovereign Borders are not consistent with Australia's international obligations under the Convention. In particular, turning back boats and patrolling for this purpose within the territorial waters of another State do not constitute innocent passage under the Convention, for two reasons.

First, 'passage' is defined in article 18 of the Convention as 'continuous and expeditious' 'navigation through the territorial sea for the purpose of (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b)

¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 arts 26, 31; Guy S Goodwin-Gill, 'State Responsibility and the "Good Faith" Obligation in International Law' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing, Oxford, 2004).

proceeding to or from internal waters or a call at such roadstead or port facility'. Turning back boats does not fit within this definition of 'passage', as its purpose is not navigation through the territorial sea.

Secondly, activities connected with turning back boats cannot be considered 'innocent', as they constitute activities 'not having a direct bearing on passage', thus rendering the passage non-innocent under the Convention.²

Please do not hesitate to contact us if we can provide any further information or clarification.

Yours sincerely,

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² United Nations Convention on the Law of the Sea (opened for signature 10 December 1981, entered into force 16 November 1994) 1833 UNTS 396, art 19(2). For further discussion of the international legal issues raised by the interdiction and turning back of boats, see the Kaldor Centre [Submission No 1 to the Senate Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Breach of Indonesian Territorial Waters](#) (19 March 2014); Professor Donald Rothwell, [Submission No 2 to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the Breach of Indonesian Territorial Waters](#) (20 March 2014) 4: 'the entry into Indonesia's territorial sea by an Australian Navy or Customs ship that has control over an asylum seeker boat by way of a tow line, with the intention of returning that boat to Indonesia, would not be consistent with the right of innocent passage.'