



Refugee Council
of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

SUBMISSION ON THE CUSTOMS AND OTHER LEGISLATION AMENDMENT BILL 2016

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 200 organisations and around 1,000 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the Customs and Other Legislation Amendment Bill 2016 and its likely impact on refugees, asylum seekers and humanitarian entrants.

This Bill replicates Schedule 4 of the Migration and Maritime Powers Amendment Bill (No 1) 2015 (the earlier Bill). RCOA made a submission on this earlier Bill and this submission restates our opposition to these provisions. Our principal concern in relation this Bill is that it threatens to undermine our foreign relations by appearing to authorise the turnbacks of boats into another country's waters, if the Minister declares (even wrongly) that this is consistent with the law of the sea. We explain our concerns further below.

1. Maritime powers in breach of international law

1.1. Schedule 4 of this Bill appears to authorise the exercise of maritime powers in the territorial waters and archipelagic waters of another country. RCOA is concerned that this is intended to authorise the extension of Operation Sovereign Borders into Indonesian territorial waters, potentially in breach of Australia's obligations under international law.

1.2. RCOA notes that the stated intention is that this only authorises the exercise of powers permitted under the law of the sea, such as 'innocent passage' or 'transit passage'. We note that, while the law of the sea would not appear to permit any use of the detention or related interdiction powers in relation to Operation Sovereign Borders,¹ this is not made clear in the provision.

1.3. Further, the provision does not in fact require that the exercise of powers can be justified under the law of the sea. Instead, all that is required is that the officer or the Minister "considers" that it is permitted under the law of the sea, whether or not it is in fact permitted.

1.4. As was submitted by the Andrew and Renata Kaldor Centre for International Refugee Law to this Committee in relation to the earlier Bill, some activities under Operation Sovereign Borders such as turning back boats within territorial waters of another State would not appear to be consistent with the

¹ For a discussion of the application of the law of the sea to Operation Sovereign Borders, see Andrew and Renata Kaldor Centre for International Refugee Law, *Submission into the Inquiry into the Breach of Indonesian Territorial Waters*, Senate Legal and Constitutional Affairs Committee, 19 March 2014, http://www.kaldorcentre.unsw.edu.au/sites/default/files/kaldor_centre_submission_inquiry_into_breach_of_territorial_waters_final.pdf

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United Nations Convention of the Law of the Sea (UNCLOS). As a result, these provisions put Australia at risk of violating our obligations under international treaties as well as the fundamental principle that a State must interpret and perform treaty obligations in good faith.

1.5. We also endorse the submission by the Law Council of Australia into the earlier Bill. In particular, we endorse its concerns that the Bill removes the Court's power to determine if an act is consistent with UNCLOS, and increases Ministerial discretion to declare that turnbacks are consistent with the Convention. This raises real risks of *refoulement* which is inconsistent with Australia's international obligations.

Recommendation

RCOA recommends that this Bill be amended to ensure that it is consistent with international law.