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

### 1. Introduction

1.1 This submission starts from the premise that Australia has a sovereign right to control who has access to its borders, and that efforts to address people smuggling are a legitimate part of managing the flow of illegal migrants. The aim of this submission is to stress that caught up in the criminal trade of people smuggling are those to whom Australia owes protection obligations under the 1951 *Convention relating to the Status of Refugees* and the 1967 *Protocol relating to the Status of Refugees*.<sup>1</sup> Australia must respond to people smuggling in a way that reflects this. As the UNHCR stated in its 2001 Note on International Protection:

‘the challenge is to find the means to control illegal migration in a manner which does not have the effect of enhancing opportunities for smugglers and traffickers, but which ensures that the needs of refugees and asylum seekers, including access to protection, are properly met’.<sup>2</sup>

1.2 Recent policy announcements suggest that public pressure is leading the Australian Government away from an approach that properly balances Australia’s rights as a sovereign state with its obligations under the Refugee Convention. Anti-people smuggling measures have been touted alongside new policies that blatantly discriminate against asylum-seekers on the basis of their country of origin, and subject those asylum seekers to arbitrary detention

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<sup>1</sup> *Convention relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (hereafter *Refugee Convention*); *Protocol relating to the Status of Refugees* (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (hereafter *Refugee Protocol*).

<sup>2</sup> UNHCR, ‘Note on International Protection’, UN doc. A/AC. 96/951 (13 Sept. 2001), para 11.

periods, in contravention of international law.<sup>3</sup> Taken together, the Government's policies suggest that the objective is to deter boat arrivals absolutely. Recognition of a person's right to seek asylum from persecution,<sup>4</sup> and their right to not be penalized because of their mode of arrival,<sup>5</sup> appear to be fading.

1.3 These recent developments make it all the more important that the Anti-People Smuggling and Other Measures Bill 2010 be properly scrutinized. This submission will assess the refugee protection and policy issues that arise from the Bill, and suggest how the Bill can be amended to ensure that those fleeing persecution are given access to the protection they are entitled to under international law. The focus will be on people smuggling by boat, because although only a minority of unlawful arrivals come by this method, it is in this context that clashes between Australia's sovereign rights and international obligations most commonly occur. However, the international law principles discussed in relation to boat arrivals apply equally to other forms of people smuggling.

## 2. The need to address people smuggling

2.1 The *Protocol against the Smuggling of Migrants by Land, Sea and Air*,<sup>6</sup> which Australia has signed and ratified, defines people smuggling as follows:

'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident'

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<sup>3</sup> Minister for Immigration and Citizenship, Minister for Foreign Affairs, Minister for Home Affairs, *Press Release: Changes to Australia's Immigration Processing System* (9 April 2010).

<sup>4</sup> Article 14 of the Universal Declaration of Human Rights (1948) provides that, 'Everyone has a right to seek and to enjoy in other countries asylum from persecution'.

<sup>5</sup> *Refugee Convention* 1951 art 31(1).

<sup>6</sup> *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* UNGA res 55/25. Annex III (adopted 15 November 2000; entered into force on 28 January 2004) (hereafter the *Protocol against the Smuggling of Migrants*).

In Australia, 'illegal entry' can be translated to mean entry without a valid visa,<sup>7</sup> which is the case when people come by boat with the aid of a people smuggler. The people smugglers themselves also enter illegally.

There is no disputing the need to address people smuggling because of its illegal character. There are also strong humanitarian reasons to address people smuggling, namely, that the journeys undertaken across the sea are treacherous and life threatening. Fishing boats are not designed for long journeys across the shallow, choppy waters to Australia's North. The danger is increased by the risk of exploitation and abuse at the hands of the people smugglers. As Claire Brolan writes:

'...people smuggling costs untold numbers of people their lives, while others are raped or suffer violence and traumatic experiences, some are routinely cheated of thousands of dollars, and for others, after a painful journey, they find themselves detained and deported back home'.<sup>8</sup>

It is a shame that the humanitarian case against people smuggling has not been given as much media attention as the law enforcement perspective.

### 3. The difficulty in 'cracking down' on people smugglers

3.1 The need to address people smuggling is complicated by two factors. The first difficulty stems from the intersection of domestic and international law. Whilst it is unlawful under Australian domestic law to enter Australian territory without a valid visa, it is *not* unlawful under international law to travel overseas without a valid visa and seek asylum in another country. Countries that penalize asylum seekers who come in good faith, without a valid visa, seeking refugee

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<sup>7</sup> *Migration Act 1958* (Cth) s13, 14.

<sup>8</sup> Claire Brolan, 'An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective' (2003) 14 *IJRL* 4 at 578.

protection and with good cause for their illegal entry, are acting contrary to Article 31(1) of the Refugee Convention.<sup>9</sup>

3.2 The second difficulty in addressing people smuggling is that, in some cases, it may be the only option for those facing persecution. Article 31(1) is reflective of this. The difficulty is captured in a statement from the Canadian Refugee Council:

People smuggling, despite its evils, has also been life-giving. It has made it possible for significant numbers of people to flee persecution and reach a place of asylum when no government was willing or able to offer an escape route.<sup>10</sup>

This statement is equally applicable to those who reach Australia via people smuggler.

3.3 There are a range of structural features which contribute to the situation where many asylum seekers feel that illegal entry is their only option. To be issued a visa, asylum seekers need a valid passport. To be issued a valid passport, asylum seekers must approach the government authorities in their country of nationality. It is no wonder that those who fear persecution at the hands of authorities, or who lack the effective protection of their national government, are often unwilling or unable to do this. Even when asylum seekers do have passports, they may be unable to obtain a visa. Travel to the relevant embassy may be difficult; embassies are not always willing to provide visas for the purpose of seeking asylum;<sup>11</sup> and in some instances, asylum seekers may be fearful of national police watching embassy premises.<sup>12</sup>

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<sup>9</sup> *Refugee Convention* 1951 art 31(1).

<sup>10</sup> Canadian Refugee Council, *Migrant Smuggling and Trafficking in Persons*, 20 Feb 2000 <<http://222.net/~ccr/traffick.htm>>

<sup>11</sup> Andrew Brouwer and Judith Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide' (2003) 21 *Refuge* 4 at 8.

<sup>12</sup> V. Vevstad, *Refugee Protection: A European Challenge* (1998) at 142.

3.4 It is not reasonable to argue that the difficulties in obtaining a visa should be resolved by ‘waiting in line’ at a UNHCR refugee camp. There are 10.5 million refugees of concern to UNHCR and the estimate is that only 1% will be referred for resettlement.<sup>13</sup> As Afghan consul to Australia Maymoud Saikal stated, ‘getting a place through “formal channels” is like winning a lottery’.<sup>14</sup> As a result, many asylum seekers remain in camps for decades, in terrible conditions. This is largely due to the UNHCR’s severe resource shortages, which lead to there being only one UNHCR staff person for every 4500 persons of concern to the UNHCR office. It is also due to there being a limited number of resettlement partners. This situation demands that resettlement by UNHCR be seen as a complement to, and not a substitute for, the right to seek asylum by approaching countries like Australia directly.<sup>15</sup>

3.5 The constraints faced by asylum seekers underscore the importance of international law provisions that allow for unlawful migration when there is due cause. This does not take away from the need to address people smuggling because of its criminal dimension and dangerous nature. The purpose of the preceding discussion is to highlight that any legislative attempt to address the problem must be aimed at the people smugglers themselves, and not at those who require protection.

## 4. Australia’s protection obligations

4.1 Australia’s protection obligations stem from two key international law principles. The first is outlined in Article 14 of the Universal Declaration of Human Rights, which states that ‘everyone has a right to seek and to enjoy in other countries asylum from persecution’.<sup>16</sup> Significantly, this provision does not

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<sup>13</sup> UNHCR, *Resettlement: A New Beginning in a Third Country* <<http://www.unhcr.org/pages/4a16b1676.html>>(13 April 2010)

<sup>14</sup> A. Clenel, ‘Our Refugee “Crisis” is a Drop in the Ocean’ *Sydney Morning Herald* (30 Aug 2001).

<sup>15</sup> Gary Troeller, ‘UNHCR Resettlement: Evolution and Future Direction’ (2002) 14 *IJRL* 1 at 92.

<sup>16</sup> Universal Declaration of Human Rights UNGA Resolution 217A (III) of 10 December 1948.

provide a right of admission or asylum, only a right to *seek* asylum. Nor does it impose any commensurate obligations on states to grant asylum. What it does is validate the need for states to facilitate the movement of persecuted people across borders. In the present context it suggests that if movement to Australia via people smuggler is to be limited, there is a humanitarian incentive for Australia to facilitate the movement of desperate people through other lawful channels.

4.2 Article 33 of the *Refugee Convention*, now recognized as a principle of customary international law, provides the second key principle. It states that:

‘No contracting State [of which Australia is one] shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

Despite the difference in wording, the description of a refugee in Article 33 is recognized as having the same meaning as Article 1, which defines a refugee as someone who:

‘...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’<sup>17</sup>

As in the case of Article 14 of the UDHR, Article 33 does not grant asylum seekers a right to admission or asylum. But in practice, what it does provide is a right to non-rejection; at least until their refugee status has been assessed. Any other interpretation would undermine the purpose of the Convention, and thus be inconsistent with the obligation to interpret the Convention in good faith.<sup>18</sup> Once

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<sup>17</sup> *Refugee Convention* (1951).

<sup>18</sup> *Vienna Convention on the Law of Treaties* 8 I.L.M 679 (1969), art 31(1). The article states that ‘A treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of their treaty in their context and in the light of its object and purpose’.

refugee claims have been assessed, the intercepting or host State is prohibited under Article 33 from taking action that will result in the return of genuine refugees to territories where they may face persecution. The test is one of 'real chance'.<sup>19</sup>

4.3 The principle of non-refoulement has been extended through two other international treaties, both signed and ratified by Australia. Article 3 of the Convention Against Torture extends the principle to situations where there are substantial grounds for believing that a person would be in danger of being subjected to torture upon return.<sup>20</sup> Article 7 of the International Covenant on Civil and Political Rights, when taken together with Article 2(1), extends the principle even further.<sup>21</sup> The ICCPR provisions introduce an implied prohibition on the refoulement of people who would be subjected to 'torture or cruel, inhuman or degrading treatment or punishment' upon return.

4.4 There is recognition in customary international law that the principle of non-refoulement regulates State action *wherever* it may take place – whether internally, at the border or through agents acting outside Australia's territorial jurisdiction.<sup>22</sup> This has practical consequences for Australia's interception of people smugglers and their passengers, which are not reflected in the Anti-People Smuggling and Other Measures Bill 2010.

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<sup>19</sup> *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 168 CLR 37.

<sup>20</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

<sup>21</sup> *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>22</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> ed, 2007) at 248.

## 5. The Anti-People Smuggling and Other Measures Bill 2010<sup>23</sup>

The Anti-People Smuggling and Other Measures Bill 2010 (Cth) is part of a package of measures which the Government says will 'make it tougher for people smugglers to ply their trade'.<sup>24</sup>

### Amendments under Part 1

5.1 Under Part 1 of the Bill, the *Migration Act 1958* and the *Criminal Code Act 1995* have been restructured and reworded to provide greater clarity and to ensure that offences relating to people smuggling are consistently criminalized.<sup>25</sup> The significant changes under Part 1 are discussed below.

5.2 Paragraph 73.1(1)(d) of the *Criminal Code* – requiring the prosecution to prove that the people smugglers acted having obtained or intending to obtain a benefit (whether directly or indirectly) – has been removed because it is an element of proof not required under the *Migration Act*. There are three reasons why this is a problematic change. Firstly, it is inconsistent with the *Protocol against the Smuggling of Migrants*.<sup>26</sup> Secondly, it removes the need to prove the most objectionable element of smuggling – that is, the way smugglers seek to make a profit out of desperate people. Thirdly, it extends the definition of people smugglers so that those who rescue people at sea and those who unknowingly travel with stowaways on board, would all be liable. No justification has been given for the repeal of para 73.1(1)(d) which counterbalances these three negative results. It would be preferable for the *Criminal Code* to be brought into line with the *Migration Act* on the issue of proof, not vice versa.

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<sup>23</sup> Hereafter, this will be called the 'Anti-People Smuggling Bill'.

<sup>24</sup> Minister for Immigration and Citizenship, Minister for Foreign Affairs, Minister for Home Affairs, *Press Release: Changes to Australia's Immigration Processing System* (9 April 2010).

<sup>25</sup> Explanatory Memorandum accompanying the Anti-People Smuggling and Other Measures Bill 2009

<sup>26</sup> *Protocol against the Smuggling of Migrants* (2000) art 3.



5.3 The new section 233D of the *Migration Act*, and the equivalent para 73.3A of the *Criminal Code Act* also raise serious concerns. These provisions make it a criminal offence to support the offence of people smuggling by providing material support or resources in order to facilitate people smuggling. Subsection (2) of both new sections provides an important caveat: the offence does not apply to a person who pays smugglers to facilitate a people smuggling venture involving that person or a group of persons including that person. This subsection is a way of getting around the Article 31(1) prohibition in the *Refugee Convention*. What is concerning is that the new section still applies to people who pay smugglers *to bring their family or friends* to Australia.<sup>27</sup> It signals a broadening of focus – one that extends the punitive arm of the law beyond people smugglers themselves.

5.4 The application of s233D and the equivalent para 73.3A is legally defensible. Family and friends who pay people smugglers *are* funding unlawful activity. Their motives are irrelevant from a legal perspective, just as the motives of those who fund organizations deemed to be terrorist organizations are irrelevant. However, the provisions do not secure good public policy outcomes. In practice they would simply cause financiers of people smuggling to transfer funds in a more obscure way. A more productive way to discourage illegal and dangerous boat arrivals is to work *with* family and friends to promote other (lawful) alternatives. These include the family reunion arrangements that exist within Australia's Humanitarian Program and within the family stream of the general Migration Program. For family members who wish to bring relatives to Australia by these means, there is generally still a cost involved. However, under these systems the funds will not be used for illegal purposes.

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<sup>27</sup> Explanatory Memorandum accompanying the Anti-People Smuggling and Other Measures Bill 2009 at 15.

## Amendments under Part 2

5.5 Part 2 of the Bill involves changes that dramatically strengthen the capacity of the Australian Government to detect and monitor people smuggling ventures.

5.6 The amendments proposed under Part 2 would have three significant effects. Firstly, they would enable Commonwealth and State law enforcement agencies to use surveillance devices without a warrant in connection with aggravated offences of people smuggling.<sup>28</sup> Secondly, they would increase the availability to agencies of telecommunications interception warrants in relation to people smuggling offences, by removing the need for agencies to demonstrate that the offence taking place involves a particular degree of planning and organisation.<sup>29</sup> Thirdly, the amendments give ASIO the power to carry out intelligence functions which relate to 'the protection of Australia's territorial and border integrity from serious threats' - namely people smuggling - thus making it possible for ASIO to spy on individuals and groups not associated with foreign governments.<sup>30</sup>

5.7 Not only do these amendments trample civil liberties and raise significant accountability issues, they also give rise to serious questions about how increased surveillance and intelligence powers could affect the treatment of asylum seekers. We must assume that the detection of people smuggling activities will lead to the use of interception techniques. It is thus important to stress that whilst interception may be legal and even encouraged by the *Protocol against the Smuggling of Migrants* (2000),<sup>31</sup> there are limits to what states can and can't do when intercepting people smuggling activities. The principle of non-refoulement (discussed above) is the most significant limitation. It comes into play at the moment of interception, provided that a person is already outside the jurisdiction of their home state. To ensure the obligation of non-refoulement is

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<sup>28</sup> Anti-People Smuggling Bill 2010 (Cth) part 2, sched 1, cl15, 16.

<sup>29</sup> Anti-People Smuggling Bill 2010 (Cth) part 2, sched 1, cl17, 18.

<sup>30</sup> Anti-People Smuggling Bill 2010 (Cth) part 2, sched 2, 3.

<sup>31</sup> See for example art 9.

not breached, Australian authorities must put in place procedures to identify whether there are any genuine refugees among those intercepted. In most cases, the intercepting authorities will not have the necessary knowledge and experience to make refugee status determinations immediately. In most cases it will be preferable that the asylum seekers are escorted to Christmas Island or to a more convenient UNHCR processing site. Only action that has the effect of returning refugees (and asylum seekers not yet assessed as refugees) to territories where they would face persecution will constitute refoulement.

5.8 To ensure that the legislative provisions are interpreted in line with Australia's international obligations, including those just outlined, the Bill should be amended to include a 'saving clause' identical to that in the *Protocol against the Smuggling of Migrants* (2000). Article 19(1) of the Protocol states:

'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.'

The absence of this kind of provision in the *Anti-People Smuggling Bill* is the most serious shortcoming of the proposed amendments. Without such a provision, authorities will be tempted to view people smuggling solely through the lens of border protection, and Australia's protection obligations may be forgotten.

## 6. The way forward

Since the beginning of 2010, 1808 irregular immigrants and 96 crewmembers have made it to Australia by boat.<sup>32</sup> In addressing this issue, the Rudd Government must recognize its protection obligations to those in fear of persecution, and ensure that these are reflected in any legislative reform on the topic. Further, the Rudd Government must recognize that if its legislative

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<sup>32</sup> Tom Allard, 'Boat people trade "out of control"' *Sydney Morning Herald* (9 April 2010) at 1.

reforms *do* effectively deter asylum seekers and others from the use of people smugglers, then many people will be left without a reasonable prospect of escape, unable to exercise their right to seek asylum under Article 14 of the UDHR. This should prompt the Government to match its legislative efforts to curb people smuggling with new mechanisms designed to ensure that those in fear of persecution can seek asylum through legal and safe means. The use of extraterritorial processing schemes in 'push' countries like Sri Lanka and Afghanistan should be explored. Other policy measures, such as working together with refugees in Australia to raise awareness of legal avenues for seeking asylum should also be prioritized.