



DPP

Commonwealth Director of Public Prosecutions

SUBMISSION BY THE COMMONWEALTH DPP

THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE DETERRING PEOPLE SMUGGLING BILL 2011

Introduction

The Office of the Commonwealth Director of Public Prosecutions (CDPP) is responsible for the prosecution of criminal offences against the laws of the Commonwealth and to confiscate the proceeds of Commonwealth crime. The CDPP can only prosecute or take confiscation action when there has been an investigation by an investigation agency. The CDPP does not have an investigative function. The Office prosecutes or takes confiscation action in matters investigated by the Australian Federal Police or other investigative agencies, such as the Australian Crime Commission.

The CDPP is responsible for the prosecution of people smuggling offences under the *Migration Act 1958* and the *Criminal Code* which are referred to the CDPP by investigation agencies, such as the AFP. The majority of people smuggling offences referred to the CDPP relate to offences under the *Migration Act 1958* (the Migration Act).

Insertion of section 228B into the Migration Act

The *Deterring People Smuggling Bill 2011* (the Bill) inserts section 228B into the Migration Act. Section 228B clarifies when a non-citizen has no lawful right to come to Australia for the purposes of Part 2, Division 12, Subdivision A of the Migration Act.

Section 228B accords with what has been this Office's understanding of the term "no lawful right to come to Australia". In this regard, we note that in a number of people smuggling prosecutions in different jurisdictions, defendants have raised arguments that the people smuggling offences in the Migration Act were inapplicable to the defendant because the non-citizens had a lawful right of entry, said to arise because they had come to Australia to seek asylum. Those arguments have been dismissed by trial courts in Western Australia, the Northern Territory, New South Wales and Queensland.

Stated case in Victorian Court of Criminal Appeal

The Victorian County Court has stated a case to the Victorian Court of Criminal Appeal reserving for determination by the Court of Appeal questions of law which involves consideration of whether the non-citizens, in relation to whom the defendant, Jeky Payara, was charged with an aggravated offence of people smuggling under section 223C of the Migration Act, had a lawful right to come to Australia. The Court of Criminal Appeal has adjourned this matter until 30 November 2011 pending the consideration of this legislation by Parliament. As this matter is currently before the court, this office has no further comments in relation to it.