SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

DETERRING PEOPLE SMUGGLING BILL 2011

1. INTRODUCTION

Victoria Legal Aid (VLA) submits the following in response to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Deterring People Smuggling Bill 2011* (the Bill).

VLA's interest stems from the fact that, by virtue of our obligations under clauses 28 and 29 of the National Partnership Agreement on Legal Assistance Services[1] (NPA), we are arranging legal representation for the accused charged in all but two of the 55 cases of alleged people smuggling currently before the courts in Victoria[2]. VLA's staff practice also acts for the majority of the Indonesian men charged with those offences. More specifically we act for Mr Jeky Payara, whose case was due to be heard in the Victorian Court of Appeal last Thursday. Given the purported effect and the timing of the Bill it appears to be in response to Mr Payara's case.

This submission is primarily directed to the questions of retrospectivity and the effectiveness of mandatory sentencing as a deterrent, as these questions fit with our role remit. We have not addressed other matters that are the subject of this inquiry, such as the policy underlying the declaration that those who seek asylum from persecution have no lawful right come to Australia, or whether the Bill breaches international obligations.

2. THE ROLE OF VICTORIA LEGAL AID

Background

VLA is an independent statutory authority established under the Victorian *Legal Aid Act 1978* to provide legal aid and improved community access to justice and legal remedies[3], and empowered to provide legal assistance notwithstanding that the interests of the assisted person are or may be adverse to the State or Commonwealth[4]. This includes legal assistance to accused defending criminal prosecutions, to applicants in some judicial review proceedings and in various actions designed to quality assure the actions of government agencies, in their exercise of power over citizens' lives.

The provision of legal aid makes possible access to justice, which is central to the rule of law and a critical element of a well-functioning democracy. Our democratic society is based on the premise that all Australians are equal before the law. Legal aid commissions play a defining role in achieving that equality. They strive to ensure that all persons, including those who cannot afford to pay, have access to legal services and to the law. This includes taking actions against government, contemplated in section 5 of the *Legal Aid Act* which states that VLA does not represent the Crown.

As with all state and territory legal aid commissions, we are funded by both State and Federal Governments. In the 2011 – 2012 Budget, the Commonwealth Government allocated $194.8 million in funding for legal aid commissions under the NPA[5]. In addition, the Commonwealth

[1] http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/other.aspx.
[2] Victoria Legal Aid has arranged legal representation in a total of 61 alleged people smuggling cases.
[3] *Legal Aid Act 1978* (Vic) s4.
[4] *Legal Aid Act 1978* (Vic) s25.
[5] Australian Government, *Australia's Federal Financial Measures: Budget Paper No. 3: 2011–12*, Commonwealth of Australia, 2011, p 96.

Government provides additional funding to reimburse costs incurred by state and territory legal aid commissions in providing legal assistance in expensive Commonwealth criminal matters, including people smuggling cases, through the Expensive Commonwealth Criminal Cases Fund (ECCCF). Funding allocated through a specific fund ensures that legal aid commissions are not impacted in their ability to provide assistance for other Commonwealth legal aid priorities[6]. The 2011–12 Budget papers show that the Government has allocated $28.9 million over three years to the ECCCF[7].

In the context of the cases to which the Bill relates we have a dual role. First, we are an arranger of legal representation for the accused in these cases and, secondly, through our staff practice, we act as the lawyers for a large number of the men who have been prosecuted.

People smuggling prosecutions arrive in Victoria

In February 2011 we received advice from the Commonwealth Director of Public Prosecutions (CDPP) that Victoria could expect to receive a significant number of people smuggling prosecutions as a result of the Northern Territory courts being unable to deal with the numbers of cases. The next day eight accused were brought to Victoria. Over the following months many more followed. In total 61 people charged with people smuggling offences have been legally aided in Victoria. The majority are being represented by lawyers from VLA's staff practice with the rest represented on grants of legal aid by private law firms.

These accused men are all eligible for legal aid because they face serious charges and have no assets or income. Under Clause 28(b) of the NPA the Commonwealth maintains separate funding for legal aid commissions for expensive Commonwealth criminal cases accessible on a reimbursement basis (the ECCCF noted above). By agreement, the people smuggling cases are funded on that basis and the Commonwealth bears all the costs, without detriment to other worthy cases that might be funded.

The cases are at various stages. Some have been through committal in the Magistrates' Court of Victoria and are awaiting trial in the County Court of Victoria. Others will follow. We have worked closely with the CDPP and the County Court to schedule the trials in as efficient way as possible and they will be heard in blocks of three over the course of 2012.

There are two kinds of people smuggling offences. The simple version of the offence carries no mandatory term of imprisonment. On the other hand, Aggravated People Smuggling carries a mandatory term of five years with a minimum non-parole period of three years. The offence is aggravated if five or more people are brought to Australia. The practical reality is that all boats intercepted have significantly more than five people. Everyone we fund and act for is therefore charged with Aggravated People Smuggling and faces, on conviction, mandatory imprisonment.

Once a staff lawyer is assigned to a client they have, under section 16 of the *Legal Aid Act*, the same professional obligations and duties as any other legal practitioner acting for a client, including

[6] H Spinks, J Phillips, E Karlsen and N Brew, *Budget Review 2011 – 2012: Responding to boat arrivals*, Parliament of Australia, 2001. Retrieved from http://www.aph.gov.au/library/pubs/RP/BudgetReview2011-12/Boat.htm.

[7] Australian Government, *Budget Measures: Budget Paper No. 2: 2011–12*, Commonwealth of Australia, 2011, p 103.

the obligation to properly represent the interests of the accused person. As noted above, this means that, uniquely to legal aid commissions, staff employed by a public sector agency must at times act against the interests of the State. It is one of the hallmarks of a civilised society that the state helps people who the state itself charges with criminal offences.

Jeky Payara's case

In people smuggling cases one of the things that the prosecution has to prove is that the people brought to Australia had 'no lawful right to come'[8]. It became clear to our legal staff relatively early that there was a real question over the interpretation of this phrase. In particular, there was a question as to whether a person who seeks asylum from persecution in Australia can truly be said to have 'no lawful right to come' given Australia's obligations under the Refugees Convention and the extent to which those obligations have been incorporated into Australian domestic law and practice. Having identified the question, our professional obligation was to raise it on behalf of our clients and have it determined.

In order to ensure that the large number of pending trials proceeded efficiently and on a clear legal footing, we gave notice to the CDPP of this issue and chose a test case to take to the Victorian Court of Appeal before any of the trials started. The case chosen was Mr Payara's and, on 12 September 2011, the Chief Judge of the County Court reserved questions of law to the Court of Appeal. The hearing was set down for 3 November 2011 in the Court of Appeal. The Bill was introduced in the House of Representatives on 1 November 2011 and passed the same day. The hearing was adjourned until 30 November 2011 to allow the Senate process to take its course. The President of the Court of Appeal commented that this was an entirely appropriate issue to have brought to the Court given the fact that it impacts on a large number of cases and resolving it early would provide legal certainty, which the efficient administration of justice requires.

The Bill's effect

The Bill does three things. It:

- defines the phrase 'no lawful right to come' as being satisfied if a person does not hold a visa that is in effect or does not fall within the visa exceptions in section 42 of the *Migration Act 1958*,
- declares that an asylum seeker is not a person who has a 'lawful right to come to Australia', and
- provides for the Bill to come into effect 12 years ago in 1999.

The hearing in the Court of Appeal in Mr Payara's case will be rendered moot if the Bill passes into law. That is presumably why it was introduced.

As is discussed in more detail below, retrospective criminal legislation has only been passed on four previous occasions in the Australian Parliament. It has never previously been passed to prevent a case from being argued, although was recently passed after a case had been argued in the High Court of Australia but before judgment was delivered.

[8] *Migration Act 1958* (Cth) s233C(c).

3. RETROSPECTIVE CRIMINAL LAWS

Introduction

In many countries retrospective criminal law is unconstitutional or otherwise prohibited[9]. This includes many jurisdictions that operate very differently from our own, including, for example, Iran and Indonesia. Concern about retrospective criminal laws thus crosses cultural and political boundaries as is reflected by its enshrinement as an absolute right, from which derogation is not permitted[10], in Article 15 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party.

In Australia, retrospective criminal legislation is considered to be constitutionally valid but highly undesirable. In 1991 the High Court held that the Parliament could constitutionally pass retrospective criminal legislation[11]. It did so by majority against two dissenting judgments by Justice Deane and Justice Gaudron which held that retrospective criminal legislation is beyond the power of the Parliament to make because it interferes, in a way barred by Chapter III of the Constitution, with the functioning of the judiciary. Even though retrospective criminal legislation is permitted in domestic law, it nonetheless represents a breach of Australia's international obligations under the ICCPR.

Policy

The policy reason why retrospective criminal legislation is treated in this way can be put simply: people should only be charged with criminal offences that existed at the time that the act constituting the offence took place – it is unfair to make people criminally liable for acts that were not offences at the time they were done. The principle applies equally in a situation like this. If Mr Payara's argument about the interpretation of the phrase 'no lawful right to come' was held to be correct then he did not commit an offence. The effect of the Bill will be to nonetheless deem him to have committed an offence. It does so by declaring the amendment to have come into force 12 years before being passed by the Parliament.

This sort of legislation offends two bedrocks of our parliamentary system of government - the rule of law and the separation of powers between the elected parliament and the independent judiciary. The rule of law ensures that laws apply equally and openly to all Australians, including the Government, while our independent courts ensure that the law is applied without political interference. Retrospective legislation undermines these fundamental protections because it allows a government to change the law in their favour during the course of a case, turning government by rule of law into government by decree.

[9] For example, Brazil, Canada, Finland, France, Indonesia, Iran, Ireland, Italy, Japan, Norway, New Zealand, Pakistan, the Philippines, Russia, Spain, South Africa, Sweden, Turkey and the United States.

[10] Article 4 of the ICCPR allows for derogation from some obligations under the Covenant, but the prohibition on retrospective criminal laws is specifically excluded, see 'Prohibition on Retrospective Criminal Laws', Attorney-General's Department: www.ag.gov.au (accessed November 2011).

[11] *Polyukhovic v Commonwealth* ("War Crimes Case") [1991] HCA 32.

The Australian experience

The Attorney General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* says that[12]:

> *[a]n offence should be given retrospective effect only in rare circumstances and with strong justification.*

It goes on to note that[13]:

> *The Federal Parliament and successive governments have only endorsed retrospective criminal offences in very limited circumstances. People are entitled to regulate their affairs on the assumption that something which is not currently a crime will not be made a crime retrospectively through backdating criminal offences.*
>
> *Exceptions have normally been made only where there has been a strong need to address a gap in existing offences, and moral culpability of those involved means there is no substantive injustice in retrospectivity.*

This caution has meant that, prior to the term of the current Parliament, retrospective criminal legislation had only been enacted in Australia on three occasions:

- The 'bottom of the harbour' tax evasion offences (*Crimes (Taxation Offences) Act 1980*),
- The war crimes offences inserted in the *War Crimes Act 1945* by the *War Crimes (Amendment) Act 1988*, and
- The anti-hoax offence inserted in the *Criminal Code Act 1995* by the *Criminal Code Amendment (Anti-Hoax and other Measures) Act 2002*.

In the term of the current Parliament legislation was passed to retrospectively impose disclosure obligations on Centrelink recipients when the courts had held that the particular obligations did not exist in law and could not found criminal liability[14]. Previously, people receiving government pensions or benefits were required to provide updated information on any matter requested by Centrelink in regular notices sent to recipients. As a result of the legislation, people can now be prosecuted for failing to comply with an additional, general obligation to notify Centrelink of any event or change, when that obligation did not exist at the time that they are said not to have complied with it.

Notwithstanding strong concerns expressed by the Senate Scrutiny of Bills Committee[15], that legislation passed and passed quickly. In that case, the Scrutiny of Bills Committee said that retrospective laws *"show a basic disrespect for citizens insofar as they undermine the idea that law is a system of rules designed to guide human conduct"*. As breaching criminal laws may lead to the deprivation of liberty, *"retrospective laws carry added opprobrium"*[16]. In addition, at the time

[12] *Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, Attorney-General's Department, September 2011, p 15.
[13] Ibid.
[14] *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011*.
[15] Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 7 of 2011, 6 July 2011, p 26.
[16] Ibid at p 24.

the legislation was passed, the existing law affected by the retrospective amendments was the subject of a case taken on appeal by the Commonwealth to the High Court, in which arguments had been heard and judgment was pending but not yet delivered.[17]

Why retrospective legislation in this case?

The current position as a matter of law and policy in Australia is therefore that retrospective criminal legislation is permitted but should only be used in rare circumstances, in particular where the moral culpability of the people involved means that there is no injustice. The Scrutiny of Bills Committee has previously said that even where laws are enacted to pursue worthy policy objectives, there is a moral cost when those laws apply retrospectively[18].

In relation to this Bill the question of moral culpability requires careful consideration. While there are people who organise and substantially profit from the trade, the overwhelming majority of the people charged with people smuggling in Australia are impoverished Indonesian fisherman, the totality of whose involvement is to be recruited on to the boats to steer, crew or cook. They are as dispensable to the organisers of people smuggling as the boats that get burnt off the coast of Christmas Island and Ashmore Reef. The second reason said to justify retrospective legislation is to ensure that people smugglers are deterred, or as it is sometimes put, to 'break the people smugglers' business model'.

The remainder of this submission addresses both the extent of criminality by describing who the people being prosecuted in Australia actually are and the deterrent effect of the current strategy of prosecuting boat recruits.

4. THE PEOPLE

Boat recruits, not organisers, are being prosecuted

As of 15 March 2011 of 353 people arrested and charged for people smuggling offences 347 were crew. Only six were organisers.[19] This makes sense because the organisers would never allow themselves to be present on a boat in Australian Territorial waters.[20] They know what the consequences of that are and they are measured by years in detention. By contrast, the men arrested on the boats are those who are considered by the people smugglers to be expendable.

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[17] *Commonwealth Director of Public Prosecutions v Poniatowska* [2011] HCA 43.

[18] Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 7 of 2011, 6 July 2011, p 24.

[19] Attachment A, Senate Question on Notice 25, Senate Standing Committee on Legal and Constitutional Affairs, Australian Federal Police, 22 February 2011.

[20] Commonwealth, *Estimates*, Senate Legal and Constitutional Affairs Legislation Committee, 18 October 2011, p 68 [evidence of Australian Federal Police]: In 2009, the AFP made 82 arrests for people-smuggling related matters, of which 76 were crew. In 2010, 203 arrests for people-smuggling related matters were made, of which 202 were crew. For 2011 to date, 208 arrests for people-smuggling related matters were made, of which 205 were crew. 'Most of those would have been arrested in Australia because they would have been the crews…All of those arrests have been made here in Australia. The remainder are for what we term as people-smuggling organisers, and there would be a mix with a majority of the arrests made overseas where we have then sought extradition.'

Our experience

By virtue of acting for the majority of people charged with these offences in Victoria we have come to learn a lot about the way in which people smuggling operates, the roles played by the Indonesian fisherman and how they are recruited. This knowledge comes both from reviewing multiple briefs from the CDPP and from obtaining instructions from a large number of clients. There are a small number of repeating scenarios that have emerged from that experience:

- The crew are told that they will be transporting cargo and the asylum seekers are only brought onboard once at sea.
- The crew are only transferred onto the boat shortly before Australian waters and the organisers then depart on a second boat.
- The crew are only told that that the people they are transporting are to be taken to Australia once they are on the High Seas and cannot return.
- The crew are told that once they transport people to Christmas Island, Ashmore Reef or Cartier Island that they will be paid and allowed to return home.

We demonstrate each of these scenarios with case studies based on real but de-identified clients below. However, it is important to understand something of how the process of people smuggling works.

The process of people smuggling through Indonesia

Most of the asylum seekers who come to Australia by boat are from Iraq, Afghanistan and other parts of the Middle East. They are usually fleeing persecution. The asylum seekers are guided though a sophisticated network of 'true' people smugglers operating between the Middle East and Indonesia before being placed on a boat that ultimately brings them to within Australian territory.

Asylum seekers typically pay an agent in the Middle East a first instalment of up to $5000 to be issued a false passport and fly to Malaysia. They then pass through immigration officials in other countries by illegal means. A network of people smugglers then facilitates their transport by land and sea through a series of safe houses to Java or other islands further east along the Indonesian archipelago. Dozens of people will assist in managing the secret movement of asylum seekers to the point at which they board the boat to Australia. None of the 55 accused currently being assisted by VLA are alleged to have been involved in the movement of asylum seekers through Indonesia. Their involvement is limited to the final leg of the journey to Australia on the boats themselves.

Crew are recruited by organisers from the islands of the Indonesian archipelago. In the ways set out in the case studies below, the crew are often misled into going onto the boats. They have an expectation of returning; an expectation not shared by the organisers.

Arrival and treatment in Australia

Inevitably, the boats are apprehended in off-shore waters by Australian authorities and the crew and passengers are detained because they are *"reasonably suspected of being unlawful citizens"*[21]. They must then be kept in immigration detention until removed from Australia or

[21] *Migration Act 1958* s189.

provided with a visa[22]. In the case of suspected people smugglers, the Attorney General usually stays their removal or deportation for the purposes of 'the administration of criminal justice'[23].

Of the almost 60 people in Victoria currently charged with people smuggling, many were kept in immigration detention for ten months before being charged. Even since the people smuggling prosecutions have been distributed across various Australian jurisdictions to alleviate a backlog, the delay between apprehension and charge remains at about six months[24].

People smuggling accused in Victoria have a prima facie entitlement to bail[25]. Ordinary accused people in a like situation of no prior convictions, no history of bail breaches, low risk of re-offending and likely delay to trial of one to two years, would easily achieve bail. However, for people smuggling accused, there is no practical right to freedom from incarceration pre-trial. Bail would mean a return to immigration detention and in Victoria this means housing in the Maribyrnong Immigration Detention Centre, currently the most secure and prison-like immigration detention facility in Australia. When delays to trial are added in, there will be people ultimately acquitted at trial who will have spent close to three years in custody.

Mandatory Sentencing

On conviction, the mandatory minimum sentence of imprisonment is eight years for a repeat offence and five years in any other case. A non-parole period must be set at a minimum five years for a repeat offence and three years in any other case[26].

Sentencing judges around the country have been reluctant to date to impose any more than the mandatory minimum even after trial. Trial Judges have consistently spoken out against of the injustice of the mandatory sentencing regime and, in a number of cases, called for the Federal Attorney General to release prisoners after the expiration of 12 months[27].

5. RECURRING SCENARIOS

[22] *Migration Act 1958* s196.
[23] *Migration Act 1958* s147.
[24] The ICCPR entitles all accused to be 'tried without undue delay'. The *Universal Declaration of Human Rights* decrees that 'no one shall be subjected to arbitrary arrest, detention or exile'.
[25] *Bail Act 1977* (Vic), s4.
[26] *Migration Act 1958* s236B.
[27] See, eg, *The Queen v Tahir and Beny*, unreported, Supreme Court of the Northern Territory, Mildren J, as reported in *The Australian* newspaper 19 May 2011.

Those who are left behind

One way of understanding how these men end up on the boats, and the true circumstances from which they come, is to speak with those that they have left behind. VLA staff have recently travelled to Rote Island to fulfil their professional obligations in acting for accused, including to establish the age of a number of our clients who claim to be under 18. The Commonwealth rely in age determination hearings on wrist X-ray analysis that has been internationally discredited. Obtaining direct evidence of age is almost impossible from a distance and the Commonwealth do not themselves travel to these communities to obtain first hand evidence. The relative cost of an investigative trip to Indonesia is much less than the cost of a committal hearing and trial which are avoided if a person is demonstrated to be under 18.

A number of claims were investigated on the most recent trip in order to maximise the benefit. The trip was supported and facilitated by the Indonesian government. What we confirmed was the extreme poverty from which these men come and why the villagers of Rote are such easy targets for people smuggling organisers. The experience also illustrated the generational poverty that is being created by the removal of 'bread winners' from the villages for three years or more. This is particularly so given that about 45% of these men are under 30 years old.

For example, in one village our staff spoke to twelve women who had male family members (husbands, brothers and sons) ranging in age from 14 to over 75 years old in detention in Australia on people smuggling charges. A number of the men had already been working in other provinces when they were recruited by 'organisers', while others were recruited from the village itself by outsiders who came to the village in search of fishing crews.

These families reported having received sums of around of 1-3 million rupiah ($100-330) from the 'organisers'. However, there was no evidence of enrichment to the families. Most of the women indicated that the money received had been used to pay off debts or to purchase food. These families were clearly suffering financially when compared to families who did not have relatives in Australian detention. Many of the women were in the practice of incurring debt at the local store to buy cooking ingredients, which they would then bake into cakes to be sold at the local market, so as to buy other foodstuffs and repay the store. All of the affected families with school aged children reported having been forced to remove one or more children from primary or junior secondary school so that the children could begin to work to support the family.

6. DETERRENCE

Once one understands who the accused men are and how they are recruited, it is very hard to continue to sustain a deterrence argument either in principle or on a cost benefit analysis. It is our view, therefore, that in this instance the rare step of retrospective legislation is not justified by any deterrence effect.

This follows from the conclusion that these accused men are treated in the same way as the boats that they sail. They are expendable. The people smugglers are well aware that these men will be detained for years in Australia. That is why they themselves do not travel to Australia but arrange for others, often by deception, to take the trip.

Indonesia has a population of 245 million people, many of whom live a coastal subsistence lifestyle without access to television or internet. Once there is sufficient knowledge of the tactics of the organisers in a particular location they can simply move to the next village or island. The people smugglers themselves are not deterred at all. In the case of the people who sail the boats the likelihood of apprehension and punishment is certain, indeed, it is the object of the exercise to be apprehended in Australian waters.

7. MANDATORY IMPRISONMENT

The current regime provides for mandatory imprisonment for five years if the offence is committed in relation to five or more people. This aggravated form of the offence in reality captures all of these accused because each boat always has more than five people. This test does not fairly address the culpability upon which penalties should fairly be based. A sounder and fairer model would differentiate between the criminality of those who crew these boats and the organisers of people smuggling. If mandatory imprisonment was linked to whether or not the person was an organiser rather than a boat recruit, many of the harsh effects of the regime would be removed and the concerns for the treatment of this population ameliorated.

8. CONCLUSION

The awfulness of the people smuggling trade cannot be doubted. In its worst form it creates victims of some of the most vulnerable people on earth. Almost all of the men who are currently being prosecuted in Australia for Aggravated People Smuggling are themselves victims of the trade. They are put on the same boats and exposed to the same risk as the asylum seekers. They are either misled into working on the boats, or offered what seems to them to be a small fortune. The organisers have no interest in seeing these men return to Indonesia and they do not return – at least for many years.

The public interest in securing the conviction and mandatory detention of these men is not sufficient to justify the rare step of imposing retrospective criminal liability – still less so before the Victorian Court of Appeal has decided whether the law as it currently stands creates the problems that the retrospective legislation is intended to solve.