



Deterring People Smuggling Bill 2011

Asylum Seeker Resource Centre (ASRC) Submission 9 November 2011

About the ASRC

The Asylum Seeker Resource Centre (ASRC) protects and upholds the human rights, wellbeing and dignity of asylum seekers. We are the largest provider of aid, advocacy and health services for asylum seekers in Australia. Most importantly, at times of despair and hopelessness, we offer comfort, friendship, hope and respite.

We are an independent, registered non-governmental agency and we do not receive any direct program funding from the Australian Government. We rely on community donations and philanthropy for 95% of our funding. We employ 24 full time staff and rely on 600 dedicated volunteers. We deliver services to over 1,000 asylum seekers at any one time through programs such as material aid, health, legal, counseling, casework and foodbank.

ASRC's vision is that all those seeking asylum in Australia have their human rights upheld and that those seeking asylum in our community receive the support and opportunities they need to live independently.

www.asrc.org.au

The Asylum Seeker Resource Centre (ASRC) is concerned with the Deterring People Smuggling Bill 2011 as:

- The bill will **not reach the people** who equip and organise the people smuggling passage.
- **Retrospective legislation** is still something to be avoided or used only in the most exceptional of circumstances
- It is entirely inappropriate to state within the *Migration Act 1958* that a person seeking asylum has “**no lawful right** to come to Australia”.
- **Mandatory sentencing** does not make any allowance for the degree of a person's involvement. The federal government makes no distinction between crew and people smugglers.
- The current **political focus** on stopping the boats has prompted the Government to behave in a way which is fundamentally against the rule of law.
- The bill appears to be directed as a challenge to the **Payara Case** that is currently adjourned before the Victorian Court of Appeals.

WHO THE LAW TARGETS

We would like to express our concern at the Government's overzealous response in attempting to strengthen these laws which in reality target the “small fish”. It is the poor Indonesian fishermen (and their families) motivated to take an unsafe boat journey due to their own suffering and hardship who will suffer mandatory imprisonment as a result of the Government's attempt to “strengthen” this law. There is a very real question about what if any effect imprisoning these fishermen will actually have on deterring people smuggling given that many are motivated by their own desperation.

The Protocol against smuggling of migrants by land and sea is used as the justification for making it criminal to help someone to escape harm and seek asylum in Australia.

However it is worth noting that this protocol supplements the United Nations Convention on Transnational Organised Crime. There is a real question about what impact imprisoning fishermen who help people to escape harm in fact has on transnational organised crime and reaching the organizers of people smuggling.

RETROSPECTIVE LEGISLATION

This avoidance of retrospective legislation is recognized in the government's own legislation handbook (Department of Premier and Cabinet Legislation Handbook 1999) which states:

“6.18 Provisions that have a retrospective operation **adversely affecting rights or imposing liabilities** are to be included **only in exceptional circumstances** and on explicit policy authority (see sub-paragraphs 4.7(g) and 4.17(c), and paragraph 8.19).

See also paragraphs 4.24 to 4.27 concerning announcement of legislation to operate from the date of announcement.)”¹.

¹ http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4694_ems_b16e7931-0cc6-4e8f-b85e-2b36e632df06/upload_pdf/361932.pdf;fileType=application%2Fpdf [accessed 7/11/2011]

Additionally, Australia also has an international obligation under International Covenant and Civil and Political Rights (Article 15) not to enact retrospective legislation:

If Australia wishes to continue to hold itself out as a fair and just nation in which human rights are respected and the rule of law is respected – retrospectively legislating to ensure a conviction in a case in which the government is a party and in which the government has a significant political interest in the outcome is fundamentally inappropriate.

LAWFUL RIGHT TO COME TO AUSTRALIA

The proposed section 228B sets out circumstances in which a non citizen has no lawful right to come to Australia. It also specifies in 228B (1) that a non citizen seeking protection is included as a person with no lawful right to come to Australia – “*whether or not Australia has, or may have, protection obligations in respect of the non-citizen*”.

It is problematic to at once declare that a person has no lawful right to come to Australia despite the fact that Australia has an obligation to consider that person's claim for protection. Australia is under a very clear obligation – as is effectively acknowledged in the new s228B to receive those people who are seeking asylum and not to impose penalties on them if they arrive illegally.

As a signatory to various international conventions Australia does have an obligation to consider a person's claim for protection – regardless of how they arrived in Australia.

- We note that according to Article 14 of the Universal Declaration of Human Rights “*Everyone has the right to seek and to enjoy in other countries asylum from persecution.*”
- The Refugee Convention 1951 also prohibits states imposing penalties on those entering a country illegally who come from a territory where their life or freedom is threatened.

It flows from Australia's international obligations to asylum seekers then that it is also inappropriate to impose criminal penalties on people who are facilitating a person escaping a territory where their life or freedom is threatened. Those assisting persons at risk of harm for a refugee convention reason to escape that harm are arguably facilitating a person's ability to seek protection from harm.

It is also important to acknowledge that in most cases people have no other choice. It is not easy to walk into an Australian Embassy and get a visa to come to Australia for most people in the world and particularly for people from known refugee producing countries.

We also know that many people who have been found to be genuine refugees by UNHCR find themselves warehoused in detention centres in countries which do not offer them protection and some are forced to wait 10, 15 or 20 years in circumstances in which their fundamental human rights are not being met

The explanatory memorandum to the Deterring People Smuggling Bill 2011 states that the proposed amendments “do not affect the rights of individuals seeking protection or asylum Australia”. The proposed amendment clearly does affect the rights of individuals who are not able to gain authorised entry into Australia as it has the potential to significantly curtail their access to and therefore their right to seek asylum.

Further the proposed amendment inserts into the migration act a provision which has the effect of saying that an asylum seeker has no lawful right to come to Australia – despite the fact that they do.

We urge the senate to hesitate to insert a provision into the migration act which is at odds with both international law and the migration act itself.

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS

The explanatory memorandum to the Deterring People Smuggling Bill 2011 gives as a justification for the proposed amendments the protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations convention against transnational organised crime).

We refer to Professor Ben Saul's submission to the Senate Standing Committee on Legal and Constitutional Affairs with respect to this issue, highlighting the contradiction between Article 6 of the Protocol and article 19 of the Protocol. As noted by Professor Saul 'If the protocol is intended to exclude refugees, it must be doubted whether there exists any offence under international treaty law of 'smuggling' a refugee or asylum seeker. As the title of the protocol suggests, its focus is 'migrants' not refugees.