Thomas Bland

10 November 2011

Julie Dennett
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
Parliament House
Canberra ACT 2600

Dear Secretary

We attach a submission regarding the inquiry into the Deterring People Smuggling Bill 2011.

Yours sincerely

Thomas Bland	David Foster
Lyndal Ablett	Nick Laurie
Glyn Ayres	Dylan Maloney
Robyn Barnard	Clare Rawlinson
Heidi Edwards	Julia Wang

Dear Secretary

Inquiry into the Deterring People Smugglers Bill 2011

Thank you for the opportunity to make a submission with respect to the Deterring People Smuggling Bill 2011. We would like to express serious concerns about the retrospective operation of the Bill, which would undermine the role of the courts and is fundamentally contrary to both human rights and the rule of law.

We understand that the purpose of the Bill is to 'clarify the meaning of the words "no lawful right to come to Australia"'. As to the necessity or desirability of clarifying these words for the future, we express no view.

We have grave concerns, however, about the proposed retrospective application of the Bill. During the course of many trials for offences under sections 233A and 233C of the *Migration Act 1958* (Cth), 'no lawful right to come to Australia' has been judicially interpreted to refer to, in essence, rights under Australian domestic law. We understand that there is an appeal currently reserved in the Victorian Court of Appeal in which the appellant is challenging this interpretation on the footing that it pays insufficient regard to Australia's obligations at international law, particularly under the *Refugee Convention* of 1951.

Under the Constitution, the courts are entrusted with making binding and final determinations of the meaning of statute law. Insofar as the purpose of this Bill is to clarify the 'existing understanding' of the *Migration Act* held by the Parliament, the Government, the Department of Immigration or the Department of Public Prosecutions, that 'existing understanding' is irrelevant. The relevant and determinative understanding of legislation is the interpretation reached by the courts.

This is emphatically so with respect to legislation creating criminal offences. It is a fundamental tenet of the rule of law that criminal offences are not created or modified retrospectively. Furthermore, to do so would contravene Article 15(1) of the *International Covenant on Civil and Political Rights*. Whatever the 'existing understanding' of legislation held by Government organs, it is the interpretation of that legislation by the courts, and the courts only, that can be determinative of the guilt or innocence of accused persons.

The submission of the Deputy Secretary of the Department of Immigration and Citizenship notes that the effect of the retrospective application is to 'ensure convictions for people smuggling offences … are not invalidated'. If an appellate court's interpretation of legislation does not accord with the 'existing understanding' held by Government organs, then that understanding is incorrect, regardless of how widely held it is.

If dissatisfied with the finding of an appellate court, the Director of Public Prosecutions has the right to seek leave to appeal to the High Court of Australia. To retrospectively amend legislation so as to subvert this process not only undermines the constitutional functions of our courts, but is fundamentally unjust.

This Bill should not be passed in its current form. Its retrospective operation must be removed.

Yours sincerely,

Thomas Bland	David Foster
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