



DPP

Commonwealth Director of Public Prosecutions

Your reference:

Our reference:

16 April 2010

Mr Peter Hallahan
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

INQUIRY INTO THE *ANTI-PEOPLE SMUGGLING AND OTHER MEASURES BILL 2010*

I refer to your letter to the Commonwealth Director of Public Prosecutions, inviting a submission to the Committee's Inquiry into the *Anti-People Smuggling and Other Measures Bill 2010*.

Please find enclosed the submission of the Commonwealth Director of Public Prosecutions regarding the review. I am the author of the submission and my contact details are:

Ms Jaala Corinne Hinchcliffe
Senior Assistant Director

Thank you for inviting the Commonwealth DPP to make a submission.

Yours sincerely

Jaala Hinchcliffe
Senior Assistant Director

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Commonwealth Director of Public Prosecutions

SUBMISSION BY THE COMMONWEALTH DPP

THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE *ANTI-PEOPLE SMUGGLING AND OTHER MEASURES BILL 2010*

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*.

Amendments to the people smuggling offences in the Criminal Code

The *Anti-People Smuggling and Other Measures Bill 2010* (the Bill) amends the offences in sections 73.1(1) and 73.3(1) by removing the requirement that the person organised or facilitated the entry of the other person having obtained or intending to obtain a benefit, the aggravated offence in section 73.2(1) has been redrafted and a new offence of supporting people smuggling has been drafted in section 73.3A.

The Committee may be assisted in their consideration of the amendments to the people smuggling offences in the Criminal Code by the following breakdowns of the proposed and amended offences into their physical and fault elements, as provided for in Part 2.2 of Chapter 2 of the Criminal Code.

Section 73.1(1) - Offence of people smuggling

- (a) D organises or facilitates the entry of another person into a foreign country (whether or not via Australia) (conduct)

Fault: intention (s 5.6 of the Code)

- (b) The entry of the other person into the foreign country does not comply with the requirements under that country's law for entry into the country (circumstance)

Fault: recklessness (s5.6 of the Code)

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- (c) The other person is not a citizen or permanent resident of the foreign country
(circumstance)

Fault: absolute liability (s73.1(2) of the Code)

Section 73.2(1) - Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc)

Section 73.2(1)(a)

- (a) D commits the offence of people smuggling (underlying offence) in relation to another person (the victim) (conduct)

Fault: fault elements for the underlying offence (s 73.2(2) of the Code)

AND

intending the victim will be exploited after entry to the foreign country (s 73.2(1)(a) of the Code)

Section 73.2(1)(b)

- (a) D commits the offence of people smuggling (underlying offence) in relation to another person (the victim) (conduct);

Fault: the fault elements for the underlying offence (s 73.2(2) of the Code)

- (b) in committing the underlying offence, D subjected the victim to cruel, inhuman or degrading treatment (circumstance);

Fault: recklessness (s 5.6 of the Code)

Section 73.2(1)(c)

- (a) D commits the offence of people smuggling (underlying offence) in relation to another person (the victim) (conduct);

Fault: the fault elements for the underlying offence (s 73.2(2) of the Code)

- (b) D's conduct, in committing the underlying offence, gives rise to a danger of death or serious harm to the victim (circumstance);

Fault: Recklessness (s 73.2(1)(c)(ii) of the Code)

Section 73.3(1) – Aggravated offence of people smuggling (at least 5 people)

- (a) D organises or facilitates the entry of a group of at least 5 persons into a foreign country (whether or not via Australia) (conduct)

Fault: intention (s 5.6 of the Code)

- (b) The entry of at least 5 of the other persons into the foreign country does not comply with the requirements under that country's law for entry into the country (circumstance)

Fault: recklessness (s5.6 of the Code)

- (c) At least 5 of the other persons are not citizens or permanent residents of the foreign country (circumstance)

Fault: absolute liability (s73.3(2) of the Code)

Section 73.3A - Supporting the offence of people smuggling

- (a) D provides material support or resources to another person or organisation (conduct);

Fault: Intention (s 5.6(1) of the Code)

- (b) The support or resources aids the receiver, another person or organisation to engage in conduct constituting the offence people smuggling (circumstance);

Fault: Recklessness (s 5.6(2) of the Code)

Amendments to the people smuggling offences in the Migration Act 1958

The Bill amends a number of the offences in Sub-Division A of Division 12 of Part 2 of the *Migration Act 1958* (the Migration Act) and also creates some new offences in connection with people smuggling.

The offence which is most commonly prosecuted by the CDPP in relation to people smuggling is section 232A of the Migration Act, which relates to organising or facilitating the bringing or coming to Australia of groups of 5 or more people. While this offence has been redrafted in the Bill (see clause 233C of the Bill), it is the CDPP's understanding that the amendments to the offence are not intended to change what the prosecution must prove to make out this offence.

The Committee may be assisted in their consideration of the amendments to the people smuggling offences in the Migration Act by the following breakdowns of the proposed and amended offences into their physical and fault elements, as provided for in Part 2.2 of Chapter 2 of the Criminal Code.

Section 233A - Offence of people smuggling

- (a) D organises or facilitates the bringing or coming to Australia or entry or proposed entry to Australia of another person (conduct);

Fault: Intention (s5.6(1) of the Code)

- (b) The other person is a non-citizen (circumstance);

Fault: Absolute liability (s 233(2) of the Migration Act)

- (c) The other person had, or has, no lawful right to come to Australia (circumstance);

Fault: Recklessness (5.6(2) of the Code)

Section 233B - Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc)

Section 233B(1)(a)

(a) D commits the offence of people smuggling (underlying offence) in relation to another person (the victim) (conduct)

Fault: fault elements for the underlying offence (s 233B(2) of the Migration Act)

AND

intending the victim will be exploited after entry to the foreign country (s 233B(1)(a) of the Migration Act)

Section 233B(1)(b)

(a) D commits the offence of people smuggling (underlying offence) in relation to another person (the victim) (conduct);

Fault: the fault elements for the underlying offence (s 233B(2) of the Migration Act)

(b) in committing the underlying offence, D subjected the victim to cruel, inhuman or degrading treatment (circumstance);

Fault: recklessness (s 5.6 of the Code)

Section 233B(1)(c)

(a) D commits the offence of people smuggling (underlying offence) in relation to another person (the victim) (conduct);

Fault: the fault elements for the underlying offence (s 233B(2) of the Migration Act)

(b) D's conduct, in committing the underlying offence, gives rise to a danger of death or serious harm to the victim (circumstance);

Fault: Recklessness (s 233B(1)(c)(ii) of the Code)

Section 233C - Aggravated offence of people smuggling (at least 5 people)

(a) D organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia of a group of at least 5 persons (conduct);

Fault: Intention (s5.6(1) of the Code)

(b) At least 5 of the other persons are non-citizens (circumstance);

Fault: Absolute liability (s 233C(2) of the Migration Act)

(c) The other persons who are non citizens had, or have, no lawful right to come to Australia (circumstance);

Fault: Recklessness (s5.6(2) of the Code)

Section 233D - Supporting the offence of people smuggling

(a) D provides material support or resources to another person or organisation (conduct);

Fault: Intention (s 5.6(1) of the Code)

(b) The support or resources aids the receiver, another person or organisation to engage in conduct constituting the offence people smuggling (circumstance);

Fault: Recklessness (s 5.6(2) of the Code)

Section 223E - Concealing and harbouring non-citizens etc

Section 223E(1)

(a) D conceals another person (conduct);

Fault: intending that the other person will enter Australia in contravention of this Act (s233E(1)(c) of the Migration Act)

(b) The other person is a non-citizen (circumstance);

Fault: Recklessness (s5.6(2) of the Code)

Section 223E(2)

(a) D conceals another person (conduct);

Fault: intending to prevent discovery by an officer (s233E(2)(c) of the Migration Act)

(b) The other person is an unlawful non-citizen or deportee (circumstance);

Fault: Recklessness (s5.6(2) of the Code)

Section 223E(3)

(a) D harbours another person (conduct);

Fault: Intention (s5.6(1) of the Code)

(b) The other person is an unlawful non-citizen or deportee (circumstance);

Fault: Recklessness (s5.6(2) of the Code)

Section 234A (1) - Aggravated offence of false documents and false or misleading information etc. relating to non-citizens (at least 5 people)

Section 234A(1)(c)

(a) D presented or caused to be presented, to an officer or a person exercising powers or performing function under this Act a document (conduct);

Fault: intention (s 5.6 of the Code)

(b) The document was false or forged (circumstance)

Fault: Knowledge (s234A(1)(c) of the Migration Act)

- (c) The document was presented in connection with:
- (i) the entry or proposed entry into Australia, or the immigration clearance, of a group of 5 or more non-citizens (which may include D), or any member of the group

OR

- (ii) an application for a visa or a further visa permitting of a group of 5 or more non-citizens (which may include D), or any member of the group to remain in Australia (circumstance)

Fault: Recklessness (s5.6 of the Code)

Section 234A(1)(d)

- (a) D made or caused to be made, to an officer or a person exercising powers or performing function under this Act a statement(conduct);

Fault: intention (s 5.6 of the Code)

- (b) The statement was false or misleading in a material particular(circumstance)

Fault: Knowledge (s234A(1)(d) of the Migration Act)

- (c) The statement was made in connection with:
- (i) the entry or proposed entry into Australia, or the immigration clearance, of a group of 5 or more non-citizens (which may include D), or any member of the group

OR

- (ii) an application for a visa or a further visa permitting of a group of 5 or more non-citizens (which may include D), or any member of the group to remain in Australia (circumstance)

Fault: Recklessness (s5.6 of the Code)

Section 234A(1)(e)

- (a) D delivered or caused to be delivered, to an officer or a person exercising powers or performing function under this Act or otherwise gave or caused to be given for official purposes of the Commonwealth a document (conduct);

Fault: intention (s 5.6 of the Code)

- (b) The document contained a statement or information that was false or misleading in a material particular (circumstance)

Fault: Knowledge (s234A(1)(e) of the Migration Act)

- (c) The document was presented in connection with:

- (i) the entry or proposed entry into Australia, or the immigration clearance, of a group of 5 or more non-citizens (which may include D), or any member of the group

OR

- (ii) an application for a visa or a further visa permitting of a group of 5 or more non-citizens (which may include D), or any member of the group to remain in Australia (circumstance)

Fault: Recklessness (s5.6 of the Code)

Section 234A (2) - Aggravated offence of false documents and false or misleading information etc. relating to non-citizens (at least 5 people)

Section 234A(2)(a)

- (a) D transfers or parts with possession of a document/s (conduct);

Fault: intending that the document/s be used to help a group of 5 or more people, none of whom are entitled to use the document or documents or any member of such a group to gain entry into or remain in Australia or to be immigration cleared (s 234A(2)(a) of the Migration Act).

Section 234A(2)(b)

- (a) D transfers or parts with possession of a document/s (conduct);

Fault: reason to suspect that the document/s may be used to help a group of 5 or more people, none of whom are entitled to use the document or documents, or any member of such a group to gain entry into or remain in Australia or to be immigration cleared (s234A(2)(b) of the Migration Act).

The CDPP notes that a number of the amendments to the Migration Act offences are intended to align those offences to the offences in the Code. The CDPP sees benefit in there being commonality between the offences in the Migration Act and the Code and, in particular, supports that this has included a further harmonisation of the Migration Act offences to the principles of criminal responsibility in Chapter 2 of the Code.

The Bill also includes amendments to both the Migration Act and the Code which aim to ensure that the CDPP can frame charges and the Courts can impose sentences to reflect any particular aggravating features of people smuggling activities, including the exploitation or danger of death or serious harm that may be caused to the victim.