
COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

# SENATE

## LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

**Deterring People Smuggling Bill 2011**

FRIDAY, 11 NOVEMBER 2011

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**SENATE**

**LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

**Friday, 11 November 2011**

**Senators in attendance:** Senators Cash, Crossin, Hanson-Young, Humphries and Pratt

**Terms of reference for the inquiry:**

To inquire into and report on:
Detering People Smuggling Bill 2011

## WITNESSES

**BALL, Ms Rachel, Senior Lawyer, Human Rights Law Centre**

**FARBENBLUM, Ms Bassina, Director, Migrant and Refugee Rights Project, Australian Human Rights Centre, Law Faculty, University of New South Wales**

*Evidence was taken via teleconference—*

**Committee met at 09:32**

**CHAIR (Senator Crossin):** I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Deterring People Smuggling Bill 2011. The inquiry was referred to the committee by the Senate on 3 November 2011 for report by 21 November 2011. The bill seeks to amend the Migration Act 1958 to retrospectively clarify the meaning of the words 'no lawful right to come to Australia' contained in the people-smuggling offence in the act.

We have received 21 submissions for this inquiry. Public submissions have been authorised for publication and are available on the committee's website.

I remind all witnesses that in giving evidence to the committee you are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and any such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We prefer all evidence to be given in public but, under the Senate resolutions, witnesses have the right to be heard in private session or in camera. You would need to signal to the committee if that is what you intend to do.

If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request of course may be made at any other time.

The committee notes that this inquiry is taking place in the context of legal proceedings which have been suspended pending the parliament's consideration of the bill. I remind witnesses and senators of the Senate's sub judice convention in relation to discussing the specific details of ongoing legal proceedings. I start this morning by welcoming our first witnesses, with their submission, from the Human Rights Law Centre and the Migrant and Refugee Rights Project, both via teleconference. We have submissions from both of your organisations, which are numbered 7 and 15 for our purposes. Before I ask you to make an opening statement, do you have any amendments to those?

**Ms Ball:** No.

**Ms Farbenblum:** No.

**CHAIR:** All right. I invite you to make an opening statement and speak to your submissions. Ms Ball, are you going to provide us with some comments first?

**Ms Ball:** Yes, I will start, thank you. First of all, thank you for the opportunity to address the committee. I would like to begin by highlighting two of our major concerns in relation to the bill. First, the bill contravenes the prohibition on retrospective criminal laws contained in article 15 of the International Covenant on Civil and Political Rights. This prohibition is reflected in domestic and regional laws around the world and in Australian common law and government guidelines. The prohibition on retrospective criminal laws is central to the rule of law and respect for the separation of powers. People must be capable of knowing what the law is so that they can abide by it. In cases of uncertainty, it is the courts' role to interpret and apply the law. Of course, parliament can amend the law if it disagrees with judicial interpretations, but it must do so prospectively. Exceptions to this rule are permitted only in exceptional circumstances. To give you a sense of what is meant by 'exceptional', the application of arguably retrospective criminal laws was controversial even in the Nuremberg trials. The justifications that have been offered for the retrospective application of this bill set a dangerous precedent for the Australian system of government.

The second issue I would like to address is the mandatory sentence of five years with a three-year non-parole period that flows from the offence of aggravated people smuggling. This sentence contravenes the prohibition on arbitrary detention and the right to a fair trial, also contained in the International Covenant on Civil and Political Rights. These principles require that the punishment fit the crime, but mandatory sentencing prevents the court from differentiating between serious and minor offending and from considering the particular circumstances of the individual. This legal regime threatens to see impoverished Indonesian fishermen and boys jailed for a minimum of three years. It violates human rights, costs taxpayers tens of millions of dollars and is likely to have no impact on people smuggling. I will now pass to Bassina to address two further concerns.

**Ms Farbenblum:** Thank you for the invitation to address the committee. Our written submission addresses several concerns with the bill, but my testimony today will focus on two erroneous assumptions in the explanatory memorandum regarding Australia's obligations under international law: first, that the offences in the bill 'are consistent with Australia's obligations to criminalise people smuggling and aggravated people smuggling' under the smuggling protocol; and, second, that the bill's provisions 'do not affect the rights of individuals seeking protection or asylum, or Australia's obligations in respect of those persons'. On the first point, it is our legal opinion that the offences in the bill are neither consistent with nor required by Australia's obligations under the smuggling protocol. The smuggling protocol is directed against the smuggling of migrants and is intended to address the problem of irregular labour migration. It is not intended to address refugee flows and does not require states to punish the individuals and refugees engaged to transport them to safety, even when the refugees enter the protection state without a visa. Article 19 of the smuggling protocol places critical limits on state permissible responses to smuggling. It explicitly states that when states criminalise smuggling to comply with the protocol they must do so consistent with each state's existing obligations under international human rights law, including, in Australia's case, obligations under the International Covenant on Civil and Political Rights. This means that the assumption in the explanatory memorandum of compliance with the protocol is legally incorrect.

Even leaving aside Australia's obligations to refugees, in its current form the bill directly conflicts with the limits in article 19 of the protocol because it violates Australia's obligations under the ICCPR in at least two respects. First, the retention of mandatory sentencing provisions violates the right to a fair trial, judicial review and freedom from arbitrary detention under articles 9 and 14 of the ICCPR. Second, the retrospective application of the bill directly contravenes the prohibition against retrospective criminal laws under article 15 of the ICCPR. It is impossible as a matter of a law to reconcile these two aspects of the smuggling offences with Australia's obligations under article 19 of the smuggling protocol.

In relation to the second assumption regarding Australia's protection obligations, Australia is obliged under the refugees convention, the torture convention and other human rights treaties to protect individuals who have fled torture or persecution in their own country. Those individuals have a right to seek asylum and Australia has an obligation to not frustrate their ability to engage Australia's protection responsibilities in a way that leaves them at risk of persecution. Australia also has a duty under international law to implement its treaty obligations in good faith. In our view and the view of other leading international refugee law scholars, criminalising the only means by which some refugees may reach Australia may directly breach Australia's non-refoulement obligation and, at the very least, is inconsistent with Australia's duty to implement its treaty obligations in good faith.

For these and the other reasons contained in our written submission, we recommend that the committee call for the bill to be rejected. In the alternative, we recommend that the committee call for the deletion of the retrospective application of the bill as well as the mandatory sentencing provisions under section 236B of the Migration Act that are associated with the offences to which the bill relates. Without these modifications the bill is irreconcilable with Australia's obligations under the smuggling protocol. I welcome questions on both these matters. Thank you.

**CHAIR:** You made reference to the explanatory memorandum being in breach of one of our international protocols. It is a very brief explanatory memorandum. Is there a particular section of that that is in breach or is it the total document?

**Ms Farbenblum:** There are two assumptions that the explanatory memorandum makes. The first is that the provisions of the bill are consistent with Australia's obligations to criminalise smuggling under the smuggling protocol. The second is the assumption that the bill does not affect the rights of individuals seeking protection or Australia's obligation in respect of those persons.

**CHAIR:** Going to the second one, why do you say that that assumption is incorrect?

**Ms Farbenblum:** Australia has obligations under the refugees convention and the torture convention—and indeed under the ICCPR—to not return individuals to persecution, torture or arbitrary deprivation of life in relation to each of those conventions. Flowing from that non-refoulement obligation is an obligation to not frustrate the ability of those individuals to seek asylum and to access procedures for seeking asylum and protection. By criminalising these actions and deliberately frustrating the ability of some individuals to access procedures and protection, Australia may be breaching its non-refoulement obligation. Even if that is not the case, Australia also has an obligation to implement its treaty obligations in good faith. That comes from the Vienna Convention on the Law of Treaties. By directly frustrating the ability of asylum seekers and refugees to engage Australia's protection obligations Australia is not implementing those obligations in good faith.

**CHAIR:** Is that based on either an assumption or facts that people who are actually either the crew on these ships or people smugglers themselves end up seeking asylum?

**Ms Farbenblum:** No, it relates to the passengers on the boats, although I do note that often people involved in smuggling at various levels indeed have protection claims themselves. It relates to the individuals who engage the services of smugglers for whom there is no other route to protection at any other point along their route from the country that they have fled.

**CHAIR:** One of the suggestions that you put forward was that this committee should look at not agreeing to the retrospectivity of it back to 1999 or we should make a decision that the changes occur from the date of assent. What impact would it have if we did the former rather than the later?

**Ms Farbenblum:** Deletion of the retrospective application of the bill?

**CHAIR:** Yes.

**Ms Farbenblum:** It would certainly remove the inconsistency between the bill and Australia's obligations under the ICCPR and compliance with the protocol, which requires compliance with the ICCPR. In order to fully comply with Australia's obligations under the ICCPR, the mandatory sentencing provisions under section 236B would also need to be removed. The bill in its current form retains those sentencing provisions.

**CHAIR:** Which ones would need to be removed in the bill then?

**Ms Farbenblum:** The bill would need to include language that removed the mandatory sentencing provisions under section 236B of the Migration Act. The bill does not actually refer to those provisions but incorporates them by not removing them.

**Senator HANSON-YOUNG:** You both spoke about the issues to do with the retrospectivity. The Legal Aid submission points out that retrospective legislation has only been passed four times in this parliament's history. It would be the fifth time if this bill were to pass. Could you reflect on the serious nature of governments making that decision from a legal point of view.

**Ms Ball:** As I said in my opening statement, there are only exceptions to be made to the prohibition on retrospective criminal laws in extreme cases. One of those cases in Australia previously was when the parliament wanted to retrospectively criminalise war crimes in World War II Europe. That legislation was the subject of the leading case on retrospective criminal laws in Australia. I think that is a good example of the type of case where it might be permissible to pass retrospective criminal laws. There are a number of factors that were at play there that are vastly different to the circumstances that are at hand when we are looking at this bill, for example, the seriousness of the offences and the status of the offence under domestic and international law at the time of its commission. Obviously when you are talking about a war crime, the physical element of murder was already a crime at the time of its commission. The moral culpability of purported offenders is relevant. I think there are aspects of the Legal Aid submission in particular that make the point that moral culpability is virtually absent in the vast majority of the cases that we are dealing with here. Also, I think the question of whether the issue subject to the legislative change is currently under consideration by the courts is also relevant.

**Senator HANSON-YOUNG:** In relation to the connection between this piece of legislation and the legislation that was passed in 2010 with the mandatory sentencing, I think both of your organisations submitted to the inquiry that we ran on that bill 18 months ago, back in March 2010. Could you foresee this happening in terms of the fact that the mandatory sentencing legislation meant that we were going to be caught in a situation where people who were not the organisers but were simply, in a lot of cases, poor fishermen from Indonesia, a lot of them young, were being caught up in the system? Of course, that is what these legal cases around the country are all about. This legislation—let us be upfront and honest about it—is all about scuttling the court case that is before the Court of Appeal in Victoria. Is that your view?

**Ms Farbenblum:** The Court of Appeal's case is actually directly considering this question of whether in fact the legislation does apply to asylum seekers and refugees. The Commonwealth argues that it does, and the defendant argues that it does not. The court has not had an opportunity to determine whether, between 1999 and the present, or at the very least since the 2010 changes, that is what the legislation has meant. This effectively creates a new offence. Were the court to find that the legislation in its current form does not include refugees and asylum seekers, the present legislation is going to create a retrospective offence that may not have existed at all.

**Ms Ball:** I might just add that this problem that you identify is precisely the issue with mandatory sentencing. It does not allow for the circumstances of the case to be considered by the court. When the mandatory sentencing laws were enacted, it was impossible to foresee precisely what cases would come before the court and impossible for parliament to determine what appropriate punishments would be in those cases.

**Senator HANSON-YOUNG:** If the government seriously wanted to deal with this issue of distinguishing between those that are organisers and those that are crew, in terms of dealing with the mandatory sentencing elements and building in some type of hierarchy, would that satisfy you, or is your point primarily that, at the end

of the day, the protocol on anti-people-smuggling actually says that, if somebody is being smuggled for humanitarian reasons, then they are not actually breaking the law?

**Ms Farbenblum:** I think there are two issues there. In relation to the first, under international law it is inappropriate to criminalise the smuggling of refugees but, even if parliament does include that, there is absolutely no need for mandatory sentencing provisions. Our judiciary are capable of imposing sentences that are commensurate with the person's moral culpability and with their personal circumstances. They are able to distinguish individuals who are organisers and really are people who are taking advantage of disadvantaged individuals, and that includes the low-level individuals involved in smuggling as well, who are often taken advantage of by the organisers of people smuggling. The court is able to impose much harsher penalties on those individuals and to impose appropriate penalties on individuals who may not have understood what they were doing and may not have had any involvement in the organisation of people smuggling at all. I would draw the committee's attention to some of the quotes made recently by judges who have had to impose these sentences in the Northern Territory, who have said that they would have imposed far lower sentences and believe the sentences that they have been forced to impose are not proportionate to the level of involvement and the personal circumstances of the defendants.

**Senator HANSON-YOUNG:** Can I just clarify something—Bassina, you may be able to speak to this more than Rachel but maybe not—about the issues in relation to the people-smuggling protocol? It is clear that that protocol was written and signed by signatory countries to deal with people trafficking in relation to labour and sex work and child slavery. It was never intended to be written to deal with the issues of humanitarian asylum seeker and refugee movement, surely.

**Ms Farbenblum:** There are actually two protocols to the Convention on Transnational Organised Crime. One directly targets the issue of trafficking, which is where people are transported against their will. The other addresses smuggling, which is the current protocol that we are looking at. That protocol addresses the smuggling of individuals for labour migration: it looks at irregular flows of people who are economic migrants. You are absolutely correct—it was never intended to deal with people with protection needs. The word refugee does not appear in any of the definitions of migrant or in the obligation to criminalise the smuggling of migrants, and that is because the states which drafted the protocol simply did not have individuals with protection needs in mind; they were dealing with irregular labour migration flows. The term migrant is generally understood in international law to be used for individuals who do not have protection needs and are not refugees, and that is certainly how it is defined by the UNHCR in its handbook.

**Senator HANSON-YOUNG:** I understand that you have both called in your submissions for this bill to be rejected. Do you think there is any way that it could be amended that would be acceptable to the various different protocols which we are a signatory to under international law and in a way that would add to being productive in deterring people from taking that pathway through a people smuggler rather than some other option that may or may not be available to them?

**Ms Farbenblum:** I think it would be difficult to consider an amendment to the bill in relation to the issue of refugees and asylum seekers that would be consistent with Australia's obligations to implement the refugees convention in good faith. However, if that element was retained in the bill, removing mandatory sentencing and the retrospectivity aspect would certainly bring it closer to complying at least with Australia's obligations under the ICCPR and, as a result of that, it would come closer to complying with the smuggling protocol.

**Senator HANSON-YOUNG:** Just to clarify, your point is that, regardless, even that current section that was put in both in 2010 and the wording from 1999 about 'no unlawful entry' are in direct conflict with our obligations under the refugee convention.

**Ms Farbenblum:** The 2010 provision would be fine if it did not include asylum seekers, refugees and others to whom we have protection obligations; it is actually the current amendment, which states that that now includes asylum seekers and refugees, which is the problem. Criminalising people smuggling in itself is a good thing, provided that judges are able to impose sentences which are proportionate to the culpability in individual circumstances of the defendant; it is once we include the smuggling of asylum seekers and refugees and take away the capacity of judges to impose proportionate sentences that this bill falls foul of our international obligations.

**Senator HANSON-YOUNG:** In a more general sense, in terms of the process that is being used by the government in relation to this bill, this bill was introduced on 1 November; today is only 11 November; the committee here has to report back by 21 November. The government wants to get this bill through before parliament breaks at the end of the year precisely because they would prefer to get the bill through before there is

any type of resolution from the current court case in Victoria. What is your legal opinion on governments acting in such haste at a time when these issues are currently before a court?

**Ms Ball:** I think that the points you make illustrate that the purpose of this bill is to circumvent current legal proceedings, and that is enormously problematic in terms of the maintenance of the rule of law in Australia and the maintenance of the separation of powers. The timing of the bill is also difficult in terms of the capacity for parliament and the public to engage in proper and informed debate about a law that, as we have discussed, threatens a number of important fundamental rights in Australia.

**Ms Farbenblum:** I will just add to Rachel's point that it is especially problematic for parliament to intervene in a case in which the government is actually a party. The reason we have a judiciary and separation of powers is so that, generally, governments cannot just intervene by passing legislation when they think the court might reach a conclusion that they do not like when they are a party to litigation. This sets a very dangerous precedent for other areas where the court may be determining the government's legal obligations under legislation in other cases.

**Senator HUMPHRIES:** I have, I suppose, a procedural concern about the arguments that you have both put forward in your submissions and evidence today. It seems to me from looking at this legislation that, despite its rather grandiose title and slightly Orwellian overtones, really it is doing nothing more than plugging a hole that has appeared in the legislation that was passed by the parliament in 2010—or arguably the legislation that was passed in 2010 and 1999, taken together—and that everything that is being affirmed here was affirmed by parliament in the debate that it had, at the latest, in 2010. The assumptions that you are attacking in the bill are the same assumptions that were made in the legislation in 2010. I am looking at the moment at the submission that the Australian Human Rights Centre made to the 2010 inquiry, and you argued there against minimum mandatory sentences. You specifically referred to the problems with section 233C of the Migration Act with respect to the treatment of unlawful noncitizens. Isn't what you are doing inviting us to reopen a debate which, for better or worse, the parliament settled in 2010—I think on a bipartisan basis? We are really returning to those issues that were determined by the parliament in 2010, when arguably the job before us at the moment is simply to decide whether we should clarify and affirm what we decided in 2010 by passing the bill then.

**Ms Farbenblum:** In relation to the first point, it does go beyond mere clarification. The court right now is determining whether refugees and asylum seekers were in fact included in the 2010 amendments, and it is not clear that they were. So it is not merely clarifying something that everyone knows to be true; this is an open question, and we argue that it was and should have been left open because of Australia's obligations under the refugee convention and other treaties. So it is actually creating a new level of offence, not just clarifying what already exists.

I take your point that we raised the issue of mandatory sentencing in relation to the 2010 legislation as well, but there is a lot of information now on how that law has operated since it was passed in 2010, and all of the concerns that we raised there about what might happen with the mandatory sentencing provisions have been borne out over the last 18 months of cases where people have been prosecuted under that act. So this is really an opportunity to look at those concerns again in light of how that legislation has operated. Given that now parliament is looking at how and whether it should amend that legislation, it really is an opportunity to look at the mandatory sentencing provisions as they are operating and for parliament to decide whether they are appropriate in light of what has happened over the past 18 months.

**Senator HUMPHRIES:** Could I take you up on that point. Isn't the way the law has been operating since 2010 the same way it has been operating at least since 1999 and arguably for a long time before that, which is on the assumption that a person who assists or accepts money to facilitate a person's entry into Australia when that person does not have a visa, notwithstanding that they may qualify as a refugee, is committing an offence? Hasn't that always been the assumption underpinning Australian law? Whether we agree with it or not, it has always been the assumption underpinning our law with respect to entry of people courtesy of people smugglers. The operation of the law since 2010 has not really affected that basic assumption. Are you really saying that there was some doubt about whether there was an intention by the last parliament and by previous parliaments to say that any actions by people smugglers to assist people to come to this country, irrespective of whether they are or are not found to be refugees, was to be criminalised?

**Ms Farbenblum:** The 2010 legislation basically looked at the issue of smuggling afresh and decided to impose particularly harsh new penalties, to attach mandatory sentences to those penalties and to redefine the offence of people smuggling. If parliament is redefining an offence that has meaning—looking at Australia's obligations under international law and the way in which that language has changed, the language now states no lawful right to come to Australia—I think it is fair to assume that that language may have reflected something

beyond what was in the legislation before, meaning that there may be a source of a right to come to Australia under international law that was not necessarily contained in the legislation before it. The issue here is that the courts have not had an opportunity to consider parliament's intent in relation to these provisions until the current cases before the courts.

**Ms Ball:** Can I reiterate one of those points because I think it is an important one. There is an assumption in the explanatory memorandum, which is directly stated in the Attorney-General's Department submission: 'The bill does not alter any of the elements of the existing people-smuggling offences in the Migration Act'. That is a quote from that submission. If that were in fact the case then this bill would be redundant. So, if the bill does anything at all, it must expand the people-smuggling offence.

**Senator HUMPHRIES:** I have to be frank with you: I find that unconvincing. Are you really saying to us that, up until 2010 or between 2010 and now, there has been doubt about whether parliament intended that the crime of people smuggling should apply variously, depending on whether the person who was being smuggled was or was not a genuine refugee?

**Ms Ball:** That is the question which is in essence before the court at the moment, and the court is the appropriate body to determine the answer to that question.

**Senator HUMPHRIES:** I would argue differently. I would argue that it has always been the underpinning intention of the Australian law that people smuggling should be deterred, irrespective of what motives people might have. The crime of people smuggling has been on our statute books for decades—well, maybe not. It has been on the statute books since at least 1999. It was always the intention that it be criminalised. If someone is attempting to exploit what could be called a 'loophole' in the drafting of the 2010 legislation, it is open to the parliament to affirm what it intended in 2010 or intended in 1999 and what has always been the basis for the application of migration policy in this country, which is that people smuggling, whatever the motivation for it, should be deterred.

**Ms Farbenblum:** With respect, if that is parliament's intent, the appropriate response would be to prospectively define the legislation in that way. The way that our system of separation of powers works is that parliament cannot in hindsight redefine legislation that it passed previously. It is the province of the courts to determine what parliament intended at a previous date; it is not for parliament to retrospectively redefine legislation based on the way that it currently wants the legislation to read. In my view, that would set a very dangerous precedent in a whole lot of other areas where parliament could come back and say, 'Actually, legislation from 1960 was intended to mean something different from what you have thought it to mean for the last 50 years.'

**Senator HUMPHRIES:** I would agree with that argument if parliament were attempting to change what it actually said or meant on a previous occasion. I do not think either of you have asserted that parliament actually meant to say what you are now saying it could be interpreted to say, which is that people smuggling is excusable or not to be criminalised in the event that the people being smuggled are found to be refugees. Are you seriously telling us that that is what parliament intended on either of the previous occasions when it considered legislation in this area?

**Ms Farbenblum:** That is the precise question that is before the Victorian Court of Appeal at the moment: did the parliament intend—

**Senator HUMPHRIES:** It is also before us in this committee. I am asking you that question: do you think parliament really intended that people be excused from people smuggling in the event that they were smuggling people found to be genuine refugees?

**Ms Farbenblum:** I think it is certainly arguable that the legislation could be read in that way and that that intent could be applied to parliament, given the change in the language and the fact that it refers to a lawful right to enter.

**Senator HUMPHRIES:** That was not my question to you, but I will pass.

**CHAIR:** Thank you both for the submissions you have provided at such short notice and for your time this morning.

**FLETCHER, Mr Adam, Manager, Accountability Project, Castan Centre for Human Rights Law**

**JOSEPH, Professor Sarah, Director, Castan Centre for Human Rights Law**

*Evidence was taken via teleconference—*

[10:11]

**CHAIR:** I welcome representatives from the Castan Centre for Human Rights Law. We have received your submission, which is No. 6 for our purposes. I invite you both to make a short opening statement and then we will go to questions.

**Prof. Joseph:** This is the Deterring People Smuggling Bill. If one assumes that deterring people smugglers is an important thing to do, we would submit that this bill and the act to which it attaches are very unlikely to do so. It is most likely to catch the pawns of people smugglers, many of whom will be completely unaware of the laws. It is very unlikely to catch the big fish—that is, the people-smuggling organisers, who are extremely unlikely to ever set foot in this country. An article written on The Drum on 9 November quoted figures from the Australian Federal Police and said that, of the people charged already, 483 have been crew and a mere 10 have been actual organisers. I would query how many of those crew were in any way aware of Australian laws before they came here. If they are unaware of the law, they cannot be deterred.

The main thing I would like to note about this bill is that it is retrospective. I have heard it described on the news as being a retrospective clarification of the law. With due respect, I would say there is no such thing as retrospective clarification because either this law does absolutely nothing—that is, it clarifies something that does not need to be clarified—or it removes arguments that would perhaps exonerate the people charged. If it does that latter thing, it enlarges the offence. It removes defences and it retrospectively enlarges the criminal law. Retrospective criminal law is a breach of international human rights law. It is always a breach of the rule of law, and this new amendment might be contrary to our constitution. Furthermore, it is difficult to conceive of why a retrospective law is necessary. A retrospective law cannot deter anybody, and it seems to me that the government might be trying to avoid another embarrassment in the courts over refugees and the opposition is complicit in this. It is probably also trying to avoid embarrassment because it drafted the original laws in 1999. Adam and I both agree with that statement.

**Senator HANSON-YOUNG:** I want to pick up on the point that you were making around the issue of deterring and deterrence. The government seems pretty keen to get this legislation through very quickly. They only introduced it a week ago. We have been given a whole three hours for our Senate inquiry. We have to report back in a week's time. The government wants the legislation passed in the next sitting week. It is fairly clear that the government wants to do this because they are determined to scuttle the current legal proceedings that are happening around the country, particularly in Victoria. Would you argue that this is all just a bit of a smokescreen for the government to show that they are doing something on people smuggling even if it is not going to catch the big fish as you put it?

**Mr Fletcher:** As Professor Joseph said, if the bill only affects clarification then it is an unnecessary law in which case I suppose a smokescreen is an apt description.

**Prof. Joseph:** I do not think it is a smokescreen; I think that, as I said in my opening statement, it either achieves nothing in which case, as Adam said, it can be a smokescreen. In fact, I must confess: as much as you guys have not been given much time to deal with this month, neither we were. I am not sure of the status of the intended litigation in Victoria. I do not know if that litigation is going ahead, but it seems to me that this bill is clearly designed to scuttle one of the defences which the lawyers were going to raise. In that case, it is much more than a smokescreen; it is arguably a usurpation of judicial power which would be contrary to our constitution. As I said in the opening statement, I think that the only feasible reason for that is the government, along with the opposition this time, is wanting to avoid another embarrassment in our courts on the general issue of asylum seekers and refugees.

**Senator HANSON-YOUNG:** On the issue of retrospectivity, we just heard from some other witnesses in relation to the impact that retrospective law, particularly in criminal proceedings, has on our obligations to the ICCPR. Are they the same concerns that you have in relation to international law or is it the broader principle of how we draft our domestic laws?

**Prof. Joseph:** We are concerned that it appears to be a breach of article 15 of the ICCPR which very clearly prohibits retrospective criminal law. More broadly and more in tune with our constitutional heritage, which for better or worse is not so much based on international law, retrospective law is felt to be generally contrary to the rule of law because the rule of law requires the law to be predictable. It requires people to know what the law is at

the time that they perpetrate a particular act and retrospective law completely undoes that. Retrospective criminal law does that in a way which obviously affects people's liberty, so it has always been felt to be a much bigger no-go zone than, say, retrospective civil law. Furthermore, there are not only problems regarding international human rights law and the general principle of the rule of law but, as Adam put in the submission, there is a possibility, because the High Court has been unclear on this, that this amendment is a breach of chapter III of the Constitution—and that would surely be a concern to everybody.

**Senator HANSON-YOUNG:** Can you just expand on that for us, please.

**Prof. Joseph:** On the constitutional aspect?

**Senator HANSON-YOUNG:** Yes.

**Prof. Joseph:** Around 1990 there was a case called Polyukhovich v The Commonwealth. It concerned the validity of legislation which was retrospective. The legislation in that case was the War Crimes Amendment Act, which retrospectively made war crimes in Europe in World War II—so, obviously, acts committed in Europe from 1939-1945—criminal in Australia. Up to that point in time, it may be surprising, but such acts were not in fact a crime in Australia. So that was clearly a substantive retrospective criminal law.

In the end, by a 4-3 judgment, the High Court found that the law was valid. Justice Brennan in fact found it invalid, but he did not comment on the retrospectivity bit—he made his decision on a completely different basis—which leaves us with six judges. Three judges—I believe they were Mason, Dawson and McHugh—found that the law was fine, and that retrospective criminal law is permissible under our Constitution. But Gaudron and Deane, who were both in the minority, found otherwise; they felt that that was a breach of chapter III of the Constitution, and therefore they found the law invalid.

The swing vote here was Justice Toohey, who tended to agree with Gaudron and Deane that these laws could breach chapter III, but he found an exception in this particular case because he said there could be an exception for extremely grave transgressions—international crimes like war crimes. So it is arguable that, on the point we are talking about—the constitutionality of retrospective criminal law—we actually have a 3-3 split, because you could put Toohey in the camp with Gaudron and Deane with Toohey applying an exception which we do not believe applies in this case. I do not think you can compare people-smuggling, bringing asylum seekers to Australia, with war crimes and what they were talking about in Polyukhovich.

**Senator HANSON-YOUNG:** So, if this bill were to pass, what do you see as the practical impact? Do you think that there is a case to argue the retrospective nature of it in the courts? In which case the government is going to have to deal with that anyway.

**Prof. Joseph:** It is hard to say. We are not judges. And, as I have said, we have all had very little time to deal with this particular law. I have not had an enormously long look at the old law. But there is a good chance that this amendment we are talking about will achieve absolutely nothing, that it tries to give some sort of meaning to the words 'lawful right to come to Australia'—it retrospectively gives a meaning to those words which the court would have come up with anyway. If that is what happens—and I am not a judge; I am not going to presume how the judges will actually interpret that law—then it is not unconstitutional; it just basically achieves nothing at all. But if it in fact operates to retrospectively change, or retrospectively tell judges what those provisions mean, at that point in time in a case—I presume; you cannot challenge legislation in the abstract—it could be possible for a lawyer to say, 'If this in fact changes the meaning of the law, we argue that is a breach of chapter III'. The first step would be: how would a judge interpret this anyway?

I was talking to a colleague last night, Patrick Emerton, about this matter. We may remember that a few years ago the Australian terrorism laws were retrospectively changed, to change the wording of one provision which said 'the terrorist act' to 'a terrorist act'—again, with the purpose of facilitating a particular ongoing proceedings. I gather that in that particular case the New South Wales judge interpreted the amendment as having pretty much no effect—pretty much the same meaning as the original act. If that happened here, then no harm done, but in fact nothing is actually achieved. Our argument would be that, if this act actually achieved something, there is a possibility it is unconstitutional.

**Senator HANSON-YOUNG:** A number of the other submissions have raised concerns with the current situation in the legislation that was introduced in 2010, which introduced mandatory sentencing. Of course, that is one of the reasons why there are appeals in the courts around the country, because of the issue of magistrates and judges not being able to use discretion between 'Who are the small fish and who are the big fish?'—those that are caught up in the system themselves, even if they were crew on boats; young Indonesian boys from fishing villages, for example.

**Prof. Joseph:** Who are very unlikely to know what the laws are.

**Senator HANSON-YOUNG:** Right. And that is your point about the ability of deterrence: how can it be a deterrent if they do not even know what the law is?

**Prof. Joseph:** I am not trying to belittle these people at all, but we do not know the terms under which they are hired. It may be: 'Can you sail this boat to Christmas Island and then come back?' It is plausible that they are not particularly aware of any unlawfulness in what they are doing, particularly lawfulness under Australian law.

**Senator HANSON-YOUNG:** Do you have concerns with the mandatory sentencing that is in the current law?

**Prof. Joseph:** Yes. I must confess: we restricted our submission to the amendment, which does not really talk about mandatory sentencing. Mandatory sentencing itself almost always—I will say 'almost' because I cannot conceive of 100 per cent of possibilities just sitting here—raises issues regarding human rights. You can end up with a grossly disproportionate sentence because judges cannot take into account personal circumstances and cannot necessarily take into account the gravity of the crime, the person's knowledge of the crime, and so on—or maybe they can; I am not a criminal lawyer. I would share those concerns. Those concerns I think arise with mandatory sentencing generally.

**Senator PRATT:** This is in relation to the constitutional question that we have been discussing. Do you think it would be true to say that Australia does not actually have a strong constitutional prohibition on retrospectivity and that the issue with it would be a challenge in relation to the separation of powers? Clearly, some other constitutions internationally do cover that, but ours does not to any significant degree.

**Prof. Joseph:** Other constitutions have bills of rights and sometimes therefore have explicit prohibitions on retrospective criminal law. The fact is that our Constitution may contain such a prohibition within chapter III. Chapter III has had a real renaissance recently, which you may or may not be aware of. It is not really a question of strength; it either prohibits it or it does not. The main case we have had on this is the Polyukhovich case, where I think there was a three-to-three split. It is also a split of judges, none of whom are sitting on the High Court now. So we do not know what the present High Court would say about that, but the precedent is not weak; it is just unclear. The fact is that it may prohibit it, in which case it is strong, or it does not, in which case it is weak.

There is another case that dealt with retrospectivity—a case called Nicholas v The Queen—dealing with retrospective changes to evidence, and that was found not to be a breach. But, if this law achieves anything, I think it will achieve a substantive, retrospective change to the substance of the crime. That takes it out of the boat of Nicholas, because Nicholas was about admissibility of particular evidence, and this, I think, goes to what is or is not a crime. I am not sure it is proper for me to ask, but I would just ask the committee to consider: why does it have to be retrospective at all?

**Senator PRATT:** Is there a difference between retrospectivity in cases that might have human rights implications versus retrospectivity on things like tax law and tax avoidance, which we have previously considered in Australia?

**Prof. Joseph:** Retrospective civil law is not a breach of the Constitution and law is not felt to be a breach of human rights. It can be in some circumstances and in others it is not. Retrospective criminal law is a whole different boat. Generally, the notion of retrospective law itself is arguably against the rule of law, but again there is a distinction. In civil law it is sometimes okay, sometimes not; in criminal law it is very, very rarely okay. This is reflected in the ICCPR. It is also reflected in Justice Toohey's judgment in Polyukhovich. It may only be okay in circumstances where you are talking about grave international crimes like war crimes, in any war but in that case in World War II. You cannot equate people smuggling with war crimes.

**Senator PRATT:** I understand that. We as a nation have discussed whether we are prepared to create retrospective criminal law many times previously. I think the 2004 debate about terrorism laws would be one of those.

**Prof. Joseph:** Yes. I am not aware that anybody argued that was unconstitutional, but I gather the way the judge in the relevant New South Wales case dealt with it—I cannot name the case—was to indicate that the retrospective amendment achieved nothing, that the original meaning when it referred to 'the terrorist act' was pretty much the same as 'a terrorist act'. If the judge was to interpret this law as having no effect, it is clearly not unconstitutional; it just has no point.

**Senator HUMPHRIES:** Can I ask you whether you would regard there being any circumstances where retrospective criminal laws would be acceptable, putting aside this argument about whether they are permitted under chapter III of the Constitution?

**Prof. Joseph:** Yes. I have just said that I believe that the exception could be made in relation to grave international crimes—things like genocide, things which were covered by the 1988 retrospective war crimes amendment. Under international human rights law, under article 15(2) of the ICCPR, it is recognised that those

crimes are of such a grave nature that the person doing them should really know that what they are doing is wrong—crimes against humanity, war crimes et cetera. So I would draw a line there. But sitting here right now I cannot really think of any other circumstance where it would be justified, bearing in mind there is always the option—and the option would remain available with this particular amendment—of the fairly orthodox process of prospective criminal law.

**Senator HUMPHRIES:** Are you saying that retrospectivity is potentially permissible where the crime is very serious or where the crime is obviously one that the perpetrator would have known was a serious crime and therefore retrospectivity should not make a difference to their position?

**Prof. Joseph:** Probably the second, but I would be even more strict than the second. I am really talking about grave international crimes, and by that I mean crimes recognised in international law as crimes. There are very few of those. They are things which the International Criminal Court has jurisdiction over—crimes against humanity, genocide, grave war crimes and so on. That is a smaller thing than, 'You should have known what you were doing was wrong.' That is my opinion, but when you say 'permissible' it is not really clear to me if you are talking about what might be morally permissible or constitutionally permissible.

**Senator HUMPHRIES:** No, I made it clear I am talking about moral permissibility—putting to one side chapter III of the Constitution.

**Prof. Joseph:** Okay, so we are leaving aside the Constitution. Well that would be my personal opinion. I think it should be stricter than simply being serious. Serious itself is quite a subjective notion. Obviously there are some things that are very serious and some things that are not, but then there is a grey area in the middle. I do not think that is acceptable for retrospective criminal law and I do not think I would go so far as to say, 'Well, they should know what they were doing was wrong.' I think that might encompass more things than I would like. At this point in time I am going to restrict it simply to international crimes. I do not know what you think, Adam?

**Mr Fletcher:** There was a whole debate around the Nuremberg tribunal and the principle that they talked about was nulla crimen sine lege, which is no crime without law. They had long and detailed debates about how someone could possibly be tried for something which was not a crime in law at the time and they realised that—

**Senator HUMPHRIES:** I am familiar with the arguments, but I am trying to apply it in a contemporary setting. Are you saying, for example, that if we were to discover that there was a flaw in state laws that criminalise speeding on roads such that everybody who had been convicted of a speeding offence in the last decade everywhere in Australia should have their fines refunded, you would say that is not a legitimate basis for retrospective criminalisation?

**Prof. Joseph:** That is a different question. What we are talking about here in this amendment, as I have said, is either achieving nothing—in which case, what are we all doing here—or it is in fact retrospectively enlarging the offence. Your analogy with speeding I think is probably close to what happened in Nicholas. In the Nicholas case that was retrospectively changing the laws of evidence. I have got to admit that deep down I am not entirely comfortable with that, but that cleared chapter III and it also cleared article 15 of the ICCPR. Nicholas went to both forums. I do not mean to get all lawyerly on you, but at the end of the day we are lawyers in the law faculty. It would depend on what was happening. Speeding at 120 kilometres per hour is an offence. If you are saying it really should have been 100 and we want to retrospectively change that, I would be against that.

**Senator HUMPHRIES:** No-one is talking about that.

**Prof. Joseph:** If you are saying there is technicality, I do not believe what the legislation is retrospectively trying to change is in the category of a technicality.

**Senator HUMPHRIES:** I would submit to you that what the government is doing with this legislation is not changing what the law either was or was intended to be; it is affirming both what the law was intended to be and has been commonly understood to be for at least a decade. It was always intended that people smuggling would be a crime irrespective of the ultimate status of the person being smuggled. That was clearly always the intention of parliament. I have got no doubt that, if we go back and examine, for example, the *Hansard,* we will find plenty of evidence of senators in 2010 who would have argued against the legislation on the very basis that it did criminalise people for smuggling people who ultimately turn out to be refugees. The law was nonetheless passed by the parliament. Do you think there is actually any genuine doubt about what the parliament actually intended to do when it passed the 2010 legislation that made the reference to unlawful noncitizens entering Australia?

**Prof. Joseph:** The 2010 legislation or the 1999 legislation? This is being dated back to 1999.

**Senator HUMPHRIES:** Yes, I know, but let us start with 2010. Do you think there was any doubt in 2010 that the parliament did intend that people smuggling should be criminalised irrespective of the ultimate status of the people being smuggled?

**Prof. Joseph:** I am not looking at that legislation right now.

**Senator HUMPHRIES:** I am and I want to know what you think about it because that was the most—

**Prof. Joseph:** That is unfair question. I am not looking at the legislation right now. For argument's sake, I will accept everything you have just said. If that is in fact the case, and it well might be—deep down I think that is probably true—what is this law for? This law achieves nothing.

**Senator HUMPHRIES:** With respect, no, that is not the case. You cited two cases. Either it was redundant or it was not. There is a third situation, which is where parliament had a clear intention to do a certain thing or, I would argue, actually to affirm the existing state of the law with respect to the treatment of people smuggling, but it made an error in the way in which it cast the law to do that, or for the law to affirm that, and the parliament is going back now to correct the error so that the intention aligns with the letter of the law. If that is the case, and we know that sometimes courts will attempt to make policy which is at variance to what appears to be the intention of the parliament—that does happen from time to time—where there is a doubt about whether the law can be interpreted as intended, it is open, I would argue, to the parliament to clarify and affirm its intention on that earlier occasion.

**Prof. Joseph:** Under the Constitution, it may well be. We have not argued that this is definitely a breach of the Constitution, because the Polyukhovich case, for example, was three to three, and a majority on the court may even agree that you can actually pass any retrospective criminal law. On the case of the Constitution, we have just pointed that out. On the issue of retrospective clarification—again I apologise in advance for some lawyer technicalities—

**Senator HUMPHRIES:** I am also a lawyer myself, so I understand.

**Prof. Joseph:** Good. Okay. I think there could be the argument that statutory interpretation is the job of judges: it is up to the judges to divine the meaning of the words before them. When they do that, I gather it is actually reasonably rare for them to go to extraneous material such as the explanatory memorandum and so on. I must confess that I have not tracked all of the migration laws in advance of this discussion, but the 2010 law, if it was passed before June, was passed by a completely different parliament. The 1999 law was of course clearly passed by a very, very different parliament. On the intention of parliament—and this has been said in many cases; it has been said in, for example, some cases concerning territorial senators and whatever in 1975, and cases like that—ultimately the judges are trying to work out the meaning of the words on the statute before them, taking into account what appears to be the intention of parliament. They do not go back through all the *Hansard*s thinking, 'Exactly what is it that parliament intended?' That is not what they do.

We are happy to be corrected on this, but I am not aware of this device of a retrospective clarification—which is how it was described, I think, by Minister O'Connor the other day in a press conference—having happened in the past. I am not saying it never has, but it seems quite strange. It does seem that it arguably could be a retrospective attempt to tell the judges how they are to interpret those words. That could be a breach of chapter III. If you are asking me about the morality of that, I would still maintain that, if parliament made a mistake, parliament can prospectively fix that but to retrospectively fix that is a breach of the rule of law.

I concede that the case may well be that this law in fact retrospectively confirms a clarification that the judges would have come up with anyway. If that is the case, it does not achieve anything and it is not a breach of the Constitution, but it does not have any effect. That would be my argument. On the argument that parliament inadvertently mucked up—whether it did or not is open to debate—and inadvertently was not clear on what it said, I think the parliament has to wear that, especially when you are talking about very serious consequences for people: loss of liberty, mandatory sentences and so on.

**Senator HUMPHRIES:** I put to you that Polyukhovich's case is irrelevant to this situation because that was dealing with a situation where the parliament was clearly trying to create a new criminal offence that had never been part of Australian law before. Understandably the judges were divided about whether that was constitutionally possible. With respect, that is nothing like the situation today, where we are arguably simply affirming what has been well understood to be the existing state of Australian law.

**Prof. Joseph:** When you say 'well understood' are you saying that it is well understood by the courts or well understood by politicians and the people?

**Senator HUMPHRIES:** Well understood by those who have read and understood the law. Ignorance of the law, as we know, is no excuse. But the fact of the matter is that everybody who would have addressed this issue in 1999 or 2010 would have said without hesitation—I would argue and I think the *Hansard* will demonstrate this—that we the parliament were clearly saying that any form of people smuggling was to be criminalised, irrespective of the ultimate status of the person being smuggled. That was clearly what everybody participating in the debate

understood. In fact, some were arguing against the law on the very basis that it did that. In terms of those who knew what was going on and who were observing the status of the law, there was no doubt about that question. What the parliament is now doing is affirming what was always understood to be the intention of the law.

**Prof. Joseph:** I agree that that can be seen as a fairly significant difference in degree between what happened in the Polyukhovich case—disregarding the different subject matters. I would argue that Polyukhovich is still relevant and that it would be a starting point for a court if a court was ever called upon to discuss the constitutionality of this act. I would be surprised if the High Court sat there and said that Polyukhovich was completely irrelevant. It is different and it may be so different that they say that the problems that arose for the three judges in the Polyukhovich case were of a different degree and that degree makes all the difference. That is possible—I do not deny that. But I would not agree that it is completely irrelevant. To be frank, it is very difficult—especially with a three-three precedent and with none of the judges who presided during the Polyukhovich case any longer on the court—to see how the court these days would deal with it. I will say that chapter III has had a bit of renaissance in recent times in the High Court. The High Court has been much more—for want of a better word—aggressive in its use of chapter III, striking down more laws with it, particularly state laws. It has probably always been quite aggressive in striking down Commonwealth laws. It is a feasible risk, so I would not accept that Polyukhovich is irrelevant.

**CHAIR:** This legislation is meant to clarify a section of the Migration Act. I suppose that I am asking for your view here. Will this remove a potential defence that can be used by lawyers or will it simply reaffirm what the courts have already been interpreting as the intent of the original legislation?

**Prof. Joseph:** I would like to clarify something. Has the court interpreted that section up until this point in time? They have interpreted as encompassing—

**Mr Fletcher:** My understanding from the explanatory memorandum was that the court has previously interpreted this law in regards to coming to Australia in the manner suggested in the bill.

**Prof. Joseph:** So that is what courts have been doing. I am not sure that I want to offer an opinion on that, partly because to be honest we have not had a lot of time to consider this. My main areas of expertise are constitutional law and human rights law. I am not an expert in the interpretation of migration law. Given that that is how the courts have interpreted it in the past, then there is probably—for what it is worth—a more than 50 per cent chance that that is how they will do it in the future. But I really do not know. I am not sure that it is hugely relevant what I think about how the courts would interpret that section in the absence of this amendment act. As I have said, there is a very good chance that this amendment act will not achieve anything and will just clarify something retrospectively that the courts would have come up with anyway. That is quite possible. But I am not going to engage in predictions about how courts would handle that argument. I am not an expert in statutory interpretation in the migration area—or, frankly, in any area beyond the Constitution.

**CHAIR:** I thank you both for the submission you have provided us and for making yourselves available this morning.

**Prof. Joseph:** Thank you.

**Mr Fletcher:** Thank you.

**Proceedings suspended from 10:51 to 11:07**

**HOLT, Mr Saul Conrad, Director, Criminal Law Services, Victoria Legal Aid**

**WARNER, Mr Bevan, Managing Director, Victoria Legal Aid**

**CHAIR:** We will reconvene our public hearing of the Senate Legal and Constitutional Affairs Committee and our inquiry into the Deterring People Smuggling Bill 2011. Welcome. Do you have any comments to make on the capacity in which you appear?

**Mr Holt:** I am also counsel for Mr Jeky Payara and his case.

**CHAIR:** Thank you. We have got a submission from you which we have numbered 16 for our purposes. I invite you to make an opening statement and remind you that we are inquiring into the bill and, as difficult as it is, we would ask you perhaps not stray into the specific details of your case for obvious reasons that I stated at the start of our hearing today.

**Mr Warner:** Thank you for hearing from us and for reading our submission. Our submission describes our dual role: first, as the arranger of legal representation on behalf of the Commonwealth for these men caught by these laws; and, second, as the provider of legal representation for Indonesian boat crew, a role that is undertaken with equivalent obligations of any private lawyer. By virtue of these roles, we have a unique perspective to offer this committee and Mr Holt, as you have heard, has of course acted for some of these men and knows their stories as well as the law.

We are of course aware of the sub judice convention and have no intention or desire to compromise any court case or our clients' interests and will not do so. However, as our submission indicates, it is important to understand the circumstances of these boat crew. Their circumstances are important because the relevant test we say the parliament is poised to fail, should this bill pass into law, is its own test in relation to the appropriateness of retrospective legislation.

As a number of submissions conclude—and indeed the Commonwealth Attorney General's Department submission refers to—there has to be something extremely rare and serious and a moral culpability of such a proportion that it would not render the use of retrospective legislation unjust. Put simply, the moral culpability of boat crew must be so great as to warrant retrospectivity. It is not enough to say that you are merely clarifying the intent. To be clear, assessing this bill requires an assessment of the moral culpability of these boat crew and its deterrent effect. This is not to confuse policy with the law. Our involvement with these cases has not been about politics or policy but about the efficient administration of justice and the law. It is the absolute right of parliament to change the law, but it is choosing to do so in the midst of court action in which the Commonwealth is involved. It is seeking to change the law in its favour—or why do it?

The vehicle chosen is this retrospective bill, which we say must be assessed against parliament's own standards. It necessitates consideration of moral culpability, which Mr Holt will talk about. We say this bill fails parliament's own test of moral culpability for the use of retrospective legislation because of the circumstances of the boat crew. Indonesian boat crew cannot be evil people smugglers, because they themselves are expendable. They risk their lives on the high seas just as asylum seekers do. Changing the law in its favour in the middle of a court case in which it is involved has no precedent. Governments do not do that. To do so in a rush is very concerning and highly undesirable. We set out the circumstances in our submission. We are happy to take questions.

**CHAIR:** Thank you very much. We will go to questions. Senator Humphries, I will start with you this time.

**Senator HUMPHRIES:** Gentlemen, you have had the advantage of sitting through the hearing already this morning, so you know what my questions are going to be, basically, and I am sure you will have excellent responses to my questions as a result.

Do you maintain that the bill has the effect of actually changing what the law was understood to be, at the latest in 2010 when the anti-people-smuggling bill was passed, and, in that case, can you point to any evidence to suggest either that the law was to that effect and understood to be to that effect, or the reverse of that situation?

**Mr Holt:** Parliament makes laws and it declares its intentions through the words of statutes. As you well know, the role of the court in our constitutional democracy is to interpret those laws. It does so using a whole lot of techniques, but it does so authoritatively. So the question really is: what do the words 'no lawful right to come to Australia' actually mean? There is clearly an argument about that. It was identified by us in this case, and it has been taken so seriously by the Commonwealth that they put 30 pages of submissions in response to ours and enlisted a team of five barristers, including the Solicitor-General personally, another silk, two doctorates and so on. And now, three days before that case was due to be heard in the Victorian Court of Appeal, the legislation is introduced into the House. Those circumstances tend to suggest that there was something in our argument.

To deal directly with your question: does the phrase 'no lawful right to come to Australia' include or not include asylum seekers? The short answer from me is: I do not know. It is regrettable that we did not have the opportunity to have that out in the Court of Appeal, because then we would not have had this odd situation this committee is in—of wondering, on the one hand, whether this bill does anything at all or, on the other hand, whether it does something quite radical: essentially, to make criminal what the court would have declared not to have been criminal over many years. We would simply have known that. That is really our position.

**Senator HUMPHRIES:** Can I clarify with you, though: you characterise my question as, 'Does the law make clear what the term "an unlawful noncitizen" means?', and, with respect, that is not the question that I was posing to you. The question I am posing to you is: what did the parliament intend in 2010 when it passed the original anti-people-smuggling legislation? Did it intend that anybody, more or less—I am summarising here—without a visa whose facilitation to enter Australia occurred through a people smuggler—did that situation give rise to an offence on the part of that people smuggler? Was it the intention of parliament that that should be an offence? That is the question, not whether in fact that is what the letter of the law says. The question I am asking you is: do you think that was the intention of parliament at the time?

**Mr Warner:** I might respond by saying: irrespective of the intent, if you choose a retrospective fix to clarify the intent, the relevant test that the parliament set for itself is to consider the moral culpability of the criminality that would be caught by the offence, which requires consideration of the circumstances of the boat crew. What we say is that the relevant test is whether the moral culpability of the boat crew is so significant and severe as to warrant such a retrospective fix. We think that is the question.

**Senator HUMPHRIES:** Sorry; I do not quite understand that argument. Could you clarify that? Are you saying that the question of retrospectivity depends on the culpability of the parties committing the offence?

**Mr Warner:** Professor Sarah Joseph talked in terms of crimes of international proportion—that the use of retrospective legislation in criminal proceedings should be limited to matters where the moral culpability of persons caught would not be unjust to be caught by a retrospective criminal sanction. We say that that requires consideration of the circumstances of boat crew.

**Senator HUMPHRIES:** Can I clarify again—I am not talking about international obligations; there is a whole different argument about whether or not international obligations preclude us from legislating retrospectively. As people who work in this area, presumably you have dealt in the courts with these sorts of matters to do with migration law for some time. Would you agree that it was the intention of parliament, at least as late as 2010 with the anti-people-smuggling bill, if not earlier, that people-smuggling should be an offence irrespective of whether the person being smuggled ultimately turned out to be a refugee or not?

**Mr Holt:** I can say that I have looked back through all of the *Hansard* in relation to this, and the history of this phrase is regrettably unclear. It has been changed over the course of about 15 years from referring to an unlawful noncitizen to specifically referring to a person who has no visa under section 42 until finally the words 'no lawful right to come' were settled upon. The answer to your question is that there are indications in the *Hansard* of a subjective intention by some members of both the House of Representatives and the Senate that this legislation would cover those people and assumption that it would. So I accept that those indications exist. The *Hansard* is by no means clear about that.

To answer the second part of your question, we have been involved in these cases, as we indicated in our submission, since they arrived on Victoria's doorstep in February of this year, so we have essentially had to look at this question afresh. From day one, it has been clear to us that the question of the content of the phrase 'no lawful right to come to Australia' is one that needed to be determined finally, legally and early, and we were following in good faith through the ordinary process of taking this to the Court of Appeal to do that. There are indications of subjective intention. That is, of course, only one of the things—as you well know; I am not attempting to be patronising—that a court will take into account when deciding what these words actually meant and what criminal offence they actually created.

**Senator HUMPHRIES:** I agree with you. I think it is important to settle what the words actually mean, which is arguably what the parliament is doing with this bill.

**Mr Holt:** My respectful submission in that sense, without in any sense derogating from the notion of parliamentary sovereignty, is that our parliamentary arrangements, not even reliant on chapter III of the Constitution, give that role to the courts. If the parliament wants to take what I think is acknowledged by all parties, responsibly by the Attorney-General's Department, as the extreme step, through the guidelines of the Attorney-General's Department, of issuing on retrospective legislation in the drafting of it—as it is currently

entitled to under the Constitution—there should, as Mr Warner has indicated, be a moral culpability associated with the offending that underlies it.

That is the language that we have come up with from both from the words of the Attorney-General's Department's guidelines, which we have included in the submission, and the moral culpability of who is being prosecuted, acknowledging that there may be an entitlement to do it but you should really mean it if you want to. If the parliament is going to do this then it should really mean it. It is unprecedented to introduce legislation of this kind of clarifying type three days before a case is to be argued in the Court of Appeal. The parliament would have been in no worse position had it simply waited and heard what the court had said. This legislation would be no less or more permissible had that been done.

The moral culpability, of course, underlies these people as is well known. The AFP gave evidence to this committee in March of this year, where it pointed out that, of the 353 people prosecuted in Australia, at present 347 of them are crew and not organisers. Professor Joseph said that she did not know the terms of hire by which these young men come to be on these boats, and I can say that one of the things that we have tried to do in our submission is to provide what those terms of hire are. These young men are not wealthy. They are not organisers. They come from extremely poor circumstances in Indonesia and they are recruited onto boats, often being misled. The best example of this is: why would any people smuggler worth their salt with the characteristics that are attributed to them—as being evil, wealthy, organised and so on—ever end up on boats in the territorial waters of Australia when the risks of that are death, because they carry the risk of death just as much as asylum seekers do, or detention in Australia facilities for three to five years? There is simply no evil that in practice, from what we know from these numbers, is actually being addressed when you deal with who these young men are.

Some of the circumstances are quite extraordinary. We have set out in the submission—which I know is not currently public but is before the committee—a sort of 'team A, team B' scenario which we see in a very large proportion of our cases, where these young men are misled and told they are going on a fishing trip for a few weeks. They then travel on another boat, not even with the asylum seekers, to the edge of Australia's territorial waters or contiguous zone. Then the second boat comes alongside, they get transferred onto the asylum seeker boat, the real people smugglers get on the other boat and go away, and our clients, in the case of 347 of the 353, are left to be the patsies who risk either death or certain detention in Australian facilities. I can put it in this way: these are just heartbreaking cases.

This parliament has two extreme legislative steps that it can take in criminal cases. One is mandatory sentencing and the other is retrospective law, and it is entitled to do them both. I accept that without reservation: it is entitled to do them both. But it should only do them when it really, really means it and when the circumstances of the offending are such that it should really be done. The men that are targeted by these laws are not criminals. The men that are targeted by these laws who sit languishing in Australian detention centres and prisons are not the evil people smugglers to whom this stuff is addressed, and if they were then I am bound to say we probably would not be here arguing about these issues.

**Senator HUMPHRIES:** I would agree with you up to a point that this law, if it were to be passed, would be to confirm the criminality of people who are small wheels in a much bigger machine—at the very bottom of the culpability pyramid if they are culpable at all in terms of what they have done. But, if this law were not to proceed and the court were to find that in fact you do have to take into account whether an unlawful noncitizen had a right to claim to be a refugee in determining the culpability of those who assisted them to get here, by doing that you would also exonerate a few Mr Bigs, wouldn't you—a few people who clearly do not enjoy the ignorance or lack of moral turpitude that you assign to the majority of people you are talking about?

**Mr Holt:** That is a superb question, because you are utterly correct: the six people who are currently being prosecuted who are organisers would also gain the benefit of this argument. I acknowledge that immediately. What it highlights, in fact, is the problem of making everybody liable to the aggravated people-smuggling offence, because no matter what they do, as long as there are more than five people, they are subject to mandatory terms of imprisonment. It raises a more fundamental question about the way in which this regime is designed. I suppose it is partly why it is so regrettable that we have such a short time to deal with this, because the experience of what we have seen over the last 18 months with these laws and what we know about who is actually being prosecuted could and should allow a sensible debate about identifying how you apply harsh penalties to those who really deserve it. You could do that relatively easily in a legislative fix. I am bound to say that, if it were that sort of retrospective legislation—the sort of retrospective legislation where we were learning from the real problems that have been imposed—we would have substantially less problem with it, because you would truly be targeting those who should be targeted.

That leads back to the primary submission that I made, which is that, had we waited to know what the Court of Appeal had said about this so we truly knew what the law was, this committee could be proceeding on these important issues as a matter of certainty. We would not be having this odd argument about whether this bill does something or does not do it. If we actually knew, it would not prevent you from still passing the law in both houses, but we would truly know if this was retrospective legislation and we could truly ask questions about whether, for example, bringing more than five people is the right test for mandatory imprisonment or whether you might instead want to say mandatory imprisonment should flow from the status of being an organiser. It is clear from what the AFP said to this committee in March that they can differentiate. And, from my own experience, looking at many of these files and dealing with many of these clients, I know you can—it is overwhelmingly obvious who is in team A and team B, and if we had the time and energy to devote to this very important question of criminalising the right bits of people-smuggling and not criminalising the wrong bits, we would not be dealing in these terms. I would much rather be arguing about what sentence these guys should be getting in a particular trial court than worrying about an arguable point of law in a court of appeal; it is just a waste of everybody's time.

**Senator HUMPHRIES:** Okay, thanks.

**CHAIR:** Mr Warner, I have a couple of questions I want to ask you. You made a reference to the term 'no lawful right to come to Australia' and whether or not this bill is trying to reaffirm what the courts may or may not have done in terms of that definition. I put it to you: is it not the aim of this legislation to try and define it? Courts interpret what is in the law, but aren't we actually now retrospectively trying to define exactly what the meaning of those words are, rather than interpret them?

**Mr Holt:** Yes, that is precisely what you are doing—and doing that usurps the function of the court to exercise their own interpretive function, which is a different one. That is the small 'c' constitutional problem with the approach.

**CHAIR:** Could you just clarify that for me? What we are trying to do here is go back and actually not insert new words, nor insert a new assumption, but define what people believed was implied all this time. It is still up to the courts to interpret that definition, isn't it, however they see fit, or whatever circumstances apply?

**Mr Holt:** I suppose it is important to inject a dose of reality to what has occurred here. The legislation is targeted at the particular argument that we are making in the Victorian Court of Appeal. I do not think anyone could meaningfully deny that. And it has been beautifully drafted; it achieves its goal precisely. There is really no argument about it: it says 'these words', so, even if a court has said that those words meant something different for the last 10 years, they must assume, fictionally, that they meant something else, because they must assume that this new definition was put into the legislation at that time. As I say, there may not be a problem necessarily in doing that, but let us actually know what the law is first.

**CHAIR:** Flowing on from that, can I ask you: let's say this committee decides that this interpretation should apply from the day of assent of this legislation. Does that then leave open the possibility that those words could have been interpreted one way for the last 10 or so years and from the day of assent interpreted in the way that this legislation means for them to be interpreted? Could we have two different scenarios here? Is it not better to make it retrospective so we do not have that situation?

**Mr Warner:** I will ask Mr Holt to answer that question after I make the following observation: if that is what the committee does, our other argument is that it will be setting a very dangerous precedent because, if we can do it in these circumstances, where the degree of criminality is not severe, where the moral culpability test of those people caught by the retrospective laws does not equate with serious international crimes against humanity, then where will it stop? There are implications for the way this bill transacts the parliament, because the parliament has chosen to intervene in legal proceedings to invalidate a court case. There is that issue as well as the issue that you have asked Mr Holt to address, to which I will invite him to now respond.

**Mr Holt:** The short answer to your question is that of course there is a benefit in consistency in interpretation of legislation over time. That is a reasonable goal for anyone to have. But if we look back at the history of the people-smuggling offences over, for argument's sake, the last 15 years, and the words of the section and the way in which they are constructed, in fact brand new sections and so on have been introduced about every 18 months to two years through the course of this parliament. So there has been a tonne of changes over time. Believe me, it is a very hard job to work out precisely when one interpretation stops and another starts. This will not change that at all; this will not improve that situation. It is not like there was otherwise consistency, but for this particular piece of legislation.

**CHAIR:** But it would get over the hurdle, would it not, of retrospective interpretation or definition in relation to criminal matters?

**Mr Holt:** I am sorry, I do not understand the question.

**CHAIR:** Most of the submitters have put to us that this committee should look very seriously at whether or not we agree with the retrospective commencement date of this definition because it is uncommon in relation to criminal matters.

**Mr Holt:** I endorse those submissions on behalf of Victoria Legal Aid. Nothing in what I have said should be taken otherwise. Retrospective legislation, if I can put in blunt terms, should only be passed when you really, really mean it in criminal law and it should be associated with the criminality of the offending. It might be important for senators to understand that Indonesia has a population of 245 million. The villagers who live on the Indonesian archipelago, as we set out in the scenarios, are often recruited and told, 'Here is an island.' It is often an island called Pulau Pasir, or Sand Island. That is a traditional Indonesian fishing area. It 80 nautical miles from the island of Rote. So it is really close. You are not talking about massive trips. That is Ashmore Reef. It is part of Australia. It is in the contiguous zone. So when you are thinking about the criminality, the culpability and the moral conduct of these people and you hear them say all the time: 'We did not know that was Australia. No-one told us we were going to Australia. They said we were going to Pulau Pasir,' you understand they come from circumstances of poverty and underprivilege that we can only imagine, without access to computers or newspapers and so on. These are simply traditional fisherman and that is what they are told they are going to do. It is a very different proposition from the organiser of people smuggling who intentionally puts people on leaky boats, including our clients. Our clients are also the people who die when these boats sink. It is not a question of defending putting people onto boats who have to make tragic journeys; it is a question of defending people who are themselves as much at risk of drowning as anybody else.

**CHAIR:** I accept that and I sense your degree of passion here about the cases you have seen and are representing. We always have three options in this committee. One option is that we recommend that the Senate does not pass the bill at all. We can recommend that the Senate passes the bill that kicks in the retrospectivity back to 1999. The other option is that we can suggest some amendments. One of those amendments could be that this redefinition, or affirmation or however we want to describe the interpretation of those words, commence from the date of assent, which would be the end of November or early December. I am trying to get a sense from you because you are at the coalface of handling most of these cases, where you are really coming from in terms of what you think this committee might want to do.

**Mr Warner:** Prospective operation of the law would clearly be better, as would an enhancement to the sentencing regime that produced fairer outcomes that recognise the difference in degree of criminality between true organisers and boat crew. That would achieve what the parliament is intending to achieve.

**CHAIR:** Sure, but that is going to interpreted, is it not, amongst the general public as somehow the government or the parliament going a bit soft on people smuggling, going a bit soft on trying to deal with stopping this business and this activity?

**Senator HANSON-YOUNG:** We are making laws. It is not about perception.

**Mr Warner:** That was going to be my response. I think it is a question of what is effective and what is fair. What we say in relation to the relevant test that parliament has set itself for the use of retrospective laws in criminal cases, which is that it should be used very sparingly, is that the degree of moral culpability of these boat crews does not exist. Therefore, if this bill passes in the way it is intended, it would be failing parliament's own test.

**Mr Holt:** There is a risk in the desire to ensure that a perception of keeping a foot on the throat of true people smugglers, which is an utterly worthy perception in many ways. The risk is that, by using this mechanism, this act and this retrospective legislation in order to try and achieve that perception, the cost of that in real human terms are young men with no criminal culpability being held in Australian prisons for three to five years and their communities back home being deprived of breadwinners over that time. That is the true cost of the desire for that perception and I suppose, as we have seen as recently as last weekend in the *Sunday Age*, there is a growing understanding and awareness publicly within the Australian community of the fact that not everyone who might attract the label of people smuggler is truly evil. I think there is a sense of nuanced sophistication to the debate that is emerging, so, from my perspective, I would urge us not to pay the price of the detention of these young men for the need for perception.

**Senator HANSON-YOUNG:** I think you have covered most of the key issues in questions that I had and others that have been raised by other witnesses in other submissions. I want to go to the issue of deterrence and the last question from the chair in relation to perception. If indeed the aim, understanding and assumption of the parliament, whether it be in 1999 or 2010, was to act as a deterrent for people participating in people-smuggling

activities, make it very clear that this wasn't behaviour that Australia thought was appropriate and that it would attach such severe sentences, then surely that assumption has failed and not been met because of the nature of the people you have described who are being caught.

**Mr Holt:** If I can put it this way: if you are talking about deterrence, there are probably two populations that you are interested in deterring. The real point is that you have got to understand that they are different, so if you want to deter the organisers of people smugglers then locking up boat crews for three to five years does not do it.

**Senator HANSON-YOUNG:** Just like locking up asylum seekers in mandatory detention, I would argue.

**Mr Holt:** I will just focus on the boat crews—but I take your point—and the reason why is, for the true organisers of people smuggling, that the boat crews are as expendable as the boats. For them, the boat crews being locked up in Australian prisons for three to five years is part of the plan. It is part of the business—

**Senator PRATT:** I can just ask: is there any sense that those people would ever have an opportunity to return home? It sounds to me like 100 per cent of these people get detained when the boat arrives.

**Mr Holt:** I will put it this way: that is our very firm sense of it because, as soon as you are on the boat, you are deemed essentially to have facilitated the bringing so that is exactly what happens.

**Senator PRATT:** So, in a sense, 100 per cent of them have to have been mislead about the true circumstances; otherwise, I do not see why anyone would do it.

**Mr Holt:** I think that is probably right. It is important to understand the true nature of the level of poverty that these people come from, so the idea of being offered what to them seems like a fortune but to us would be almost no money—

**Senator PRATT:** What kind of money are we talking about?

**Mr Holt:** Anything from the equivalent of US$40 to US$200. The scenarios that we see are essentially misleading. That is not to say that absolutely everybody is in that category but the vast majority of people that we see are. In terms of actually deterring the real people, there isn't a chance. It does not deter the crew at all. I have said it before but there are 245 million people in Indonesia and along the Indonesian archipelago there are tons of villages and many, many people. We are already starting to see trends emerging in the cases coming through. They move from village to village from area to area recruiting new people when a village has been decimated of its boat-crewing-age men. A lot of these men are recruited when they go away. The way they earn money is to away on fishing trips for three days or they get recruited to do building work somewhere. It is the nature of the local economy, so often they just go away on an ordinary trip and get recruited from those points. When we talk to their families back at home, they say, 'We just don't know where they've gone.' Two years later we have got mothers, sisters and daughters saying, 'We don't know where our menfolk are.' We try and find them by working with the Indonesian authorities, but no-one is being deterred in terms of stopping these vulnerable young men from getting on boats. More importantly, the true people smugglers do not get deterred by this because, bluntly, they do not care.

**Senator HANSON-YOUNG:** My point then is that this argument--about the intent of the parliament and the assumptions that were made regardless in relation to the wording that this seeks to clarify—has not worked anyway. The assumption has been based on a false footing, because those are not the people that we have assumed the laws are catching.

**Mr Warner:** If you accept that the scenarios which we have presented are common then people are being misled. It is clearly not serving as a deterrent. In addition, the mandatory nature of the penalties means that the regime they face in Australia is not fair, because in ordinary criminal law a sentencing official would be able to distinguish between the culpability of people committing the offence. In this regime they are prevented from doing so.

**Senator HANSON-YOUNG:** I would argue that it is not just the poor Indonesian fishermen who are being recruited as crew who are being misled; I would also argue that it is the Australian people who are being misled. It is said by our government—and, arguably, by previous governments—that these laws are all about smashing the people-smuggling model. Clearly, they are not. Clearly, they are not targeting the right people. They are not smashing the people smugglers' model. They are locking up very poor fishermen for a minimum of five years.

**Mr Warner:** We would say that the people who are being charged with these crimes are meant to get caught.

**Senator HANSON-YOUNG:** Sorry, chair, I know that you want to move on. I just want to go to the issues in relation to the appropriateness of the government of the day bringing forward this legislation with such haste while they are a party to the legal proceedings. Is this something that is a regular occurrence, from a legal perspective?

**Mr Warner:** As far as I know, it is without precedent. So on that basis alone I think it is very concerning.

**Senator HANSON-YOUNG:** Do you think that that opens up any further opportunity for legal challenge?

**Mr Warner:** It is not something that I have applied myself to. I would prefer not to comment but I am happy to take that on notice.

**Senator HANSON-YOUNG:** Thank you. It would be good if you could. I would like to ask a question that pulls up some of the responses that you gave to the chair earlier in relation to the issue that neither the current law nor this legislation deals with the problem at hand in terms of the king pins, the big fish or however else you want to describe these people. Is it your view that this piece of legislation could not really be amended to deal with the issue of mandatory sentencing, and that if we could deal with that then we would be dealing with the problem at hand? Is it your view that this legislation would need to be withdrawn and new legislation that was actually targeted at this issue of mandatory sentencing would have to be introduced?

**Mr Holt:** I think it is probably fair to say that dealing with the question of mandatory sentencing goes significantly beyond anything that is currently comprehended in this bill. So, to that extent I do not want to presume to comment on how matters should be substantively dealt with in the parliament, but it would appear that this would be an unsuitable vehicle, both in terms of its current content and also in terms of the time frame that is available to deal with an important policy shift—one that would need to be debated very carefully.

**Senator HANSON-YOUNG:** So in terms of the committee writing any type of recommendation for amendment it would seem worthless in relation to the legislation that we have in front of us. Actually, the recommendation would have to be that the government come back with a revised bill.

**Mr Holt:** I think that is probably a matter for the committee. I am not sure that I can comment further on that.

**Mr Warner:** Could I just make one set of concluding remarks?

**CHAIR:** Sure.

**Mr Warner:** It is really about our role and statutory function. It is really important that people understand that Victoria Legal Aid can and must do things that governments do not like or wish to hear. That is our statutory role. Like this committee, we have a role in helping make governments accountable. Of course we do this through the conduct of individual cases and appeals, and through the provision of advice about the desirability of changes to the law. I simply wanted to make it clear that in this instance, in these cases involving accused boat crew, we are fulfilling our role in terms agreed with the Commonwealth of Australia and no Australian citizen is missing out on or being denied a legal aid service because of the assistance we are providing to these Indonesian boat crew.

**CHAIR:** Can I just say in response that I do not think this committee, under previous governments or under this government, would be as successful as it is in suggesting sound amendments to legislation if it were not for people like those in your organisation putting forward submissions and being prepared to answer our questions. So you do play a valuable role in our deliberations. Don't ever forget that.

**Mr Warner:** Thank you very much.

**DAVIES, Mr Jonathan Adam, Committee Member, Australian Lawyers Alliance**

[11:45]

**CHAIR:** Good morning and welcome to our public hearing. Do you have any comments to make on the capacity in which you appear?

**Mr Davies:** As well as being a committee member of the Australian Lawyers Alliance, I am also a barrister at Albert Wolff Chambers in Perth.

**CHAIR:** We have a submission from the Australian Lawyers Alliance, No. 18. Do you want to make some opening remarks to that submission?

**Mr Davies:** Yes, I will. I will necessarily truncate them because I believe I can be of more assistance by answering questions. Bearing in mind that time is short, let me say this. As the committee will be aware from our submission, the Australian Lawyers Alliance is a national association of practising lawyers committed to protecting and promoting justice, the rule of law and the fundamental human rights and freedoms of the individual. We are grateful for the opportunity to provide the written submission, as we have, and to express our profound philosophical objection to the bill that is presently under consideration.

In our respectful submission, the bill is terminally flawed. It is flawed because it is not capable of fulfilling the objects that it seeks to achieve. Indeed, further, to the extent that it may have the effect of retrospectively creating a criminal liability which has not previously been perfectly created by the text originally enacted, the bill becomes offensive to the core values to which our society notionally subscribes—in particular, the idea that a person should not be prosecuted for a criminal offence which was not in existence at the time of the relevant activity. It is offensive because it smacks of arbitrary government, the evils of which fill the pages of our history books and which the Westminster system of parliament, executive government, legislature and judiciary, as it has developed, has sought to ameliorate.

The legislation, it appears, has been introduced due to a case currently before the Victorian Court of Appeal of a particular Indonesian national charged with people-smuggling offences. At the heart of it is the question of whether or not in the text of the legislation as it was previously written it was the case that an asylum seeker, a person having a genuine fear of persecution, had no right to come to Australia and apply for protection. This question has always thought to have been resolved in the way that these trials have proceeded, but in a lengthy trial I did last year of people smuggling—in fact, it was the first case in which there had been an extradition to Australia from overseas—during the deliberations the jury stopped and raised this very question. It was answered by the judge that the immigration laws of Australia prevailed notwithstanding the evidence of the international private right of an asylum seeker to come to Australia.

However, it appears that there is now a strong argument that the text originally creating the 1999 offence was imperfectly created. In other words, notwithstanding the obvious intention of parliament, parliament failed—or arguably failed—to use words with sufficient efficacy that the offence was created. If that is the case, then at the relevant time there was no offence. If retrospective legislation is to be introduced, what then happens to the persons who have already been tried and convicted? Our view is that they, at the very least, once they have exhausted appeal rights within the Australian system, would have the right to apply under the International Covenant of Civil and Political Rights optional protocol—that is, ultimately to an international body which Australia would be bound to follow—complaining that their conviction under the legislation offends against article 15 of the ICCPR.

Essentially, in our respectful submission, by passing this bill the parliament of Australia creates more doubt than that which already exists. If the 1999 legislation was flawed and imperfect and if there was no offence created, then it retrospectively creates the offence. Therefore, persons caught and prosecuted for these offences in the period prior to the existence of this bill are placed in the position that they did not proceed to have a fair trial at the time that they were tried and convicted, and they notionally would be entitled to be retried. All of these difficulties stand in stark contrast to the core values which we say—purportedly—underpin our system.

We are concerned also, as we have expressed in our submission, about mandatory minimum sentencing. We are appalled at the nature of methods of age determination which have recently been the subject of a controversy. We are concerned at prosecutorial practice. In a recent appeal decision, prosecution practice in one particular context in a people smugglers trial was described by the appeal court as impertinent and disrespectful. We are concerned with the disruption practices of the Australian Federal Police and when and to what extent those disruption practices have prevented persons who are legitimately entitled to seek our protection from being able to seek our protection and the safety of our embrace and to what extent they may have resulted in individuals being

refouled or repatriated. These are matters, amongst many, that not only concern our association but also, in our respectful submission, trouble the conscience of many in the Australian community.

**Senator HUMPHRIES:** Can I just ask you to indicate what you think was understood generally within the legal profession to be the state of the law with respect to the criminality or otherwise of people smugglers? The government is arguing with this legislation that it was always understood that the person who facilitated another person's entry into Australia without a visa would be subject to criminal penalties irrespective of the ultimate status of that person—that is, whether they were ultimately found to be a refugee not. Would you accept that that was understood generally to be the state of the law at least until the point when this litigation was brought forward in Victoria to challenge the legislation on that ground?

**Mr Davies:** Sorry—understood by who?

**Senator HUMPHRIES:** Understood by legal practitioners and others working in the field; people like your members—members of the Australian Lawyers Alliance.

**Mr Davies:** I always questioned it, but the rulings that were made by the courts made it clear that the intention of parliament, as expressed in the debates and the explanatory memorandum for the original legislation, overrode any private right that the individual may have as an asylum seeker, and that is the way that it was applied, yes.

**Senator HUMPHRIES:** So that was clear in your view?

**Mr Davies:** No. The point of it is that it was not clear from the text of the legislation, and I gave you the example of the very question that the jury asked—they came back and asked it. That is, the Australian community came back and saw the dilemma, saw the hypocrisy, and said, 'How can this be?' That was the guts of the question that they asked, completely unprompted.

**Senator HUMPHRIES:** I take that point, but I am not really asking what that particular jury thought. I am asking what most people working in this field would have thought if asked, before this particular litigation, what they would have thought the law said. If you had said to a person working in this area, 'The criminality depends on whether the person smuggled is ultimately found to be a refugee or not,' would they have said, 'No, it does not depend on that; people smuggling is an offence irrespective of the ultimate status of the person smuggled,' or would they have said, 'Yes, it does depend on whether the person becomes a refugee or not'?

**Mr Davies:** No, they would have said, 'Take the point and argue it.' Because of the prevailing practice, many practitioners would simply—and the difficulties of proving the entitlement of the asylum seekers themselves; it becomes too difficult to prove. We looked at it in a case we did last year. But, whatever the tactical reasons, it was not the right case to take the point. In discussion amongst practitioners, it was an argument that was looking for the right case for the point to be taken, and indeed the point has now been taken on the textual interpretation.

You see, it comes down to this: if, at law, you are going to create a gift—as the lawyers amongst you will remember, from way back in law school in trusts and equities and so on—you have got to perfectly give the gift. In other words, if it requires a signed document to create the conveyance of a piece of property you are giving as a gift, the conveyance has got to be properly signed and properly created. If you are going to create a criminal offence, you have got to do it properly. And if you do not do it properly, the offence is not created. If you are going to say, 'There is no doubt about it; it was the way it was practised and everybody understood it to be the case at the time,' then there is no need for the bill. The court would interpret the text of the legislation, no doubt with the *Hansard* sitting on the judge's lap, and they would say, 'That is what the law meant at the time,' and that is that; there is no need for the bill.

What concerns us is: if a judge is unintimidated by this legislation and this interference in the judicial process, if the court were to say, 'No, now that we look at it, this text does not perfectly create the offence where the individuals concerned are exercising a private right,' what would then happen?

**CHAIR:** Senator Humphries having finished his questions we are going to go to Senator Hanson-Young, but maybe just for five minutes, because we are going to run short of time.

**Senator HANSON-YOUNG:** In that case, I have two areas that you have not covered yet. Firstly, I just want to get your opinion on the precedent that is being set by the government here, where they have introduced legislation that deals directly with legal proceedings which they are a party to.

**Mr Davies:** There are two things. There is the separation of powers question. Just briefly: effectively, what the Commonwealth parliament is doing is becoming a judge in its own courts. It is interfering with the judicial process by changing the rules of the game halfway through. That smacks, again, of arbitrary government, and, once again, it is something that we refer back to the core values that underpin our system, of the way we do business in a civilised society. In other words, there are limits on what a parliament can do, and they are discussed

and recognised at law. Certainly if we had proper human rights law, if we had proper basic law like most other countries in the Western world, then we would be coming up against the limitations of the powers of legislatures—if that assists?

**Senator HANSON-YOUNG:** Thank you. Do you see any potential for any type of legal challenge on that particular point? It seems as though the whole purpose of this legislation is so that the Gillard government can avoid the embarrassment of losing another court case. Are they in fact opening up a whole new can of worms?

**Mr Davies:** I will guarantee that you this package is explosive in terms of the potential for litigation. The phrase 'a can of worms' does not accurately describe it. The very existence of the legislation raised the current doubts about the interpretation. Simply, everybody who is sitting in jail now who has been convicted under this section and who has exhausted their appeals should prepare an application the International Human Rights Committee under the ICCPR. Once one of those people succeed, Australia will be confronted with the hypocrisy that is at the heart of the legislation. It will become an international embarrassment if Australia then refuses to follow any motion or directive that is given by the international committee. There are a lot of possibilities. This is going to go on and on. Indeed, the whole exercise may well result in us having a very good look at the pitiful state of human rights protections and limitations on arbitrary government in Australia.

**Senator HANSON-YOUNG:** Thank you. One of the other issues that you have raised in your submission relates to the charging and imprisonment of crew who have a question mark over their ages and who indeed may be minors. You made a recommendation on this, saying: 'The ALA submits that no person that may be reasonably suspected to potentially be under 18 should be kept in an adult prison.' We know from media reports but questions to the minister—and I have put questions to the minister on this issue—that there are young Indonesian fishermen, boys, who are being held in adult prisons. What is the legal standing on that?

**Mr Davies:** They certainly put them in adult prisons. They put them in protective custody. In Western Australia, I heard that they put them in protective custody in the same facility with adult sex offenders. Would you believe that? I heard anecdotally from a doctor at Casuarina that one of the kids was prepubescent. Where there is any doubt at all, the Australian Federal Police should go to Indonesia, track down the family, see if there is a birth certificate and sort it out. We were supposed to be booked on a plane last month to go to Rote to find the parents of a person and get some kind of an affidavit as to his date of birth. But, having held them in prison for months, the prosecution and the police finally conceded the point and dropped the charges. It is just not on. If we are going to allege that somebody is an adult, the government need to bear the cost of the investigation. We need to make sure that we get the facts right and find out the date of birth if there is any question about it as part of the investigation.

**Senator HANSON-YOUNG:** Do you think that there is some irony in the government's current involvement in the case of the young Australian boy that has been detained in Bali?

**Mr Davies:** The hypocrisy of their position is amazing. What about all the kids in our jails? One thing that I can guarantee you is that many right-thinking lawyers are looking at this and saying, 'At the end of the day, putting aside the political cost, if you have harmed children charged with people-smuggling offences by detaining them in protective custody or you have harmed children by detaining them because they are asylum seekers ultimately the Commonwealth government will pay and pay in terms of compensation.' The cost of the stolen generations is going to pale into insignificance. What we are doing in this entire area is completely wrongheaded. It needs imagination and a larger perspective than that which is being shown at present. We are a better society than this.

**CHAIR:** Mr Davies, thank you for your submission on behalf of the Australian Lawyers Alliance and thank you for making yourself available this morning.

**ANDERSON, Mr Iain, First Assistant Secretary, Criminal Justice Division, Attorney-General's Department**

**PHILLIPSON, Mr Gregory Mark, Acting Assistant Secretary, Legal Framework Branch, Department of Immigration and Citizenship**

**REID, Mr John, Assistant Secretary, International Law, Trade and Security Branch, Attorney-General's Department**

**RUTHERFORD, Mr Douglas, Acting Assistant Secretary, Border Management and Crime Prevention Branch, Attorney-General's Department**

**YANCHENKO, Ms Danica, Acting Principal Legal Officer, People Smuggling and Trafficking Section, Attorney-General's Department**

[12:05]

**CHAIR:** I now welcome representatives from the Attorney-General's Department and the Department of Immigration and Citizenship. We have two submissions: the Attorney-General's Department submission is No. 14 and DIAC's submission is No. 8.

I remind senators that the Senate has resolved that an officer of a department of the Commonwealth shall not be asked to give opinion on matters of policy and shall be given reasonable opportunity to refer questions asked of that officer to a superior or to the minister. I think those with me today are pretty familiar with that resolution of the Senate, so I am going to move on because we are getting very short of time here. Do either of the departments have an opening statement?

**Mr Anderson:** In the interests of time we will say that, as you have our submission, we will leave it at that.

**Mr Phillipson:** That goes for DIAC as well.

**CHAIR:** Okay, sure. If there was something you particularly wanted to add, that would be useful, but we will go to questions—

**Mr Anderson:** Okay, I will say one thing. Just to note: since 1999 there has been an offence in the Migration Act criminalising the smuggling of five or more people to Australia. There have been over 900 cases since 1999 proceeding on the basis that smuggling five or more persons to Australia when they do not have a visa is an offence. The Commonwealth Director of Public Prosecutions has run the cases on that basis and the courts have approached the offences on that basis. The bill does not change that position; it simply makes express the understanding that we say always underpinned the people-smuggling offences—that smuggling people to Australia when they do not have a visa is unlawful, and that is the essence of people smuggling.

**CHAIR:** That goes to the very first question I was going to ask you. In the explanatory memorandum you say:

The people smuggling offences in the Migration Act have been consistently interpreted since 1999 as applying where a person does not meet the requirements for coming to Australia under domestic law.

I was going to ask you whether you had any examples of either court cases or rulings that backs up that claim that it has been 'consistently interpreted'.

**Mr Anderson:** I would point to the fact that the proceedings have been run and convictions have been entered for large numbers of people who have done exactly that—smuggled five or more persons to Australia when those people did not have a visa.

**CHAIR:** And are there any particular court cases or rulings from judges that have made particular mention of what 'no lawful right of entry' means?

**Mr Anderson:** None that I can point to; not in those cases.

**CHAIR:** Okay. So, are you saying that there has been an assumption by the courts?

**Mr Anderson:** It is one of the elements of the offence, so the court has to be satisfied of it in order to convict a person on that basis.

**CHAIR:** I see. So they have to be satisfied that they have brought people here who have no lawful right to come to Australia?

**Mr Anderson:** I can add that there have been a number of cases, very recently, around Australia, where this issue has been expressly raised. There is a case currently in Victoria, which has been mentioned. There have been other cases where that issue has been raised in Western Australia, in the Northern Territory, in New South Wales

and I think in Queensland. In those cases the courts have expressly ruled on this argument and ruled on the interpretation and said that it applies when you are bringing people to Australia when they do not have a visa.

**CHAIR:** Okay. We will go to questions then. Senator Humphries?

**Senator HUMPHRIES:** I will be brief. Victoria Legal Aid have drawn attention to the Attorney-General Department's guide for framing Commonwealth offences. They have pointed out that, from that document, circumstances where retrospective criminal legislation should be limited. They quote where the guide says:

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.

They have run an interesting argument, because there is a genuine question about the extent to which people convicted of people-smuggling offences carry moral turpitude for their crimes or whether they are effectively bit players who have been lured into these offences in a variety of circumstances—whether that kind of moral culpability that is referred to in the guidelines actually exists here. I accept that there would be some people for whom moral culpability would be quite clear, but let's assume for the moment that you could argue that a significant number of people convicted under these offences did not have the kind of moral culpability referred to in those guidelines. Would you say that, under your own guidelines, that should not warrant the application of retrospective criminal offences?

**Mr Anderson:** We have referred to that approach in our own submission, so we are certainly not hiding that away. We think that this legislation meets the test and that the retrospectivity is justified. Regarding the offences, while a crew might receive a mandatory minimum sentence of five years with a three-year non-parole period, the maximum sentence that could be applied is far greater under these provisions, so the court is able to take culpability into consideration when deciding the sentence to apply to an organiser as opposed to a member of crew. These offences apply to organisers as well as to crew. I think that is a very important point that needs to be borne in mind.

**Senator HUMPHRIES:** Are you saying that, because it captures the Mr Bigs, the people with clear moral culpability, it is okay that it also captures and imposes a mandatory sentence on much smaller players who do not have that moral culpability?

**Mr Anderson:** There is a difficulty here. I do not want to comment upon the merits of the policy, with respect to people smuggling—

**Senator HUMPHRIES:** That is exactly what we are looking at. We are looking at the policy and we are looking at your policy. Your policy is, according to those guidelines, that we should not retrospectively criminalise offences if there is some question about there not being a high level of moral culpability of those who would be caught by such retrospectivity. I do not think you can avoid the policy issue behind that.

**Mr Anderson:** No, Senator. In a situation where parliament has said that these offences should be penalised by a 20-year maximum sentence and a five-year mandatory minimum sentence, we say that is a serious situation and that people who are convicted of those offences are morally culpable. So we say the retrospectivity is justified.

**Senator HUMPHRIES:** Are you saying that the moral culpability is determined by the fact that the statute makes it wrong—that the mandatory sentence makes them morally culpable?

**Mr Anderson:** I am saying that people smuggling is viewed as definitely a very serious activity. It puts lives at risk, bringing people to Australia, and, yes, it is a morally culpable activity for people to be engaged in.

**Senator HUMPHRIES:** Even if people could be argued not to have formed an intent to break the laws of Australia or were unaware of what the laws of Australia said about this? We have not taken detailed evidence about the circumstances of the fisher people who become people smugglers, but let's assume for argument's sake that some of them have been entrapped into this arrangement without being aware of the consequences of what they were doing. Let's assume that is the case. If those sorts of people are caught by this law and retrospectivity is to be considered, don't your own guidelines suggest that these are very sorts of circumstances where such retrospectivity should not be applied? If not, what do those words mean? In what circumstances would moral culpability be relevant? What kind of offence would that be relevant in?

**Mr Anderson:** Again I will point to the fact that these offences apply both to organisers, at a very high level of culpability, and to the crew, who might have a lesser level of culpability. Yes, our view is that those involved in people smuggling have a high level of moral culpability. That is certainly the case for organisers. It is so to a lesser degree for crew. I understand it is relatively common in the prosecutions for those involved to say that they were not aware of the full extent of what they were doing or were not aware that it was necessarily against

Australian law. That is a matter that is put before courts, and courts can weigh that up. I cannot comment on the veracity or otherwise of those matters that are raised.

**Senator HUMPHRIES:** Can you give me an example of a case where those affected by retrospectivity would not have a high level of moral culpability such that it would not be appropriate to legislate retrospectively?

**Mr Anderson:** Certainly, looking across the spectrum of criminal law, parking offences would obviously have a low level of culpability. There are a wide range of offences that might be penalised in ways that do not necessarily bring a custodial sentence; it might be a fine or something like that. There could be failure to lodge certain types of documents or failure to retain documents for periods of time. Those are things that are offences under Commonwealth law, but they are not viewed as having a high level of moral culpability. Putting people's lives at risk is, I think, a very serious matter.

**Senator HUMPHRIES:** I am going to leave it there, but, with respect, I think you are confusing the seriousness of the offence with the moral culpability of those involved in it. You may have a person who has committed a serious offence but with a very low level of intention to commit that offence. I suggest to you that some clarification of those guidelines is necessary to make it clearer in the future what you mean by 'moral culpability' as described in those guidelines. I will leave it there.

**Senator HANSON-YOUNG:** I have a few questions in a few different areas. First, I wanted to know when the A-G's Department was given instructions to write this legislation—to draft it. When were the instructions given by the minister's office in the first place?

**Mr Anderson:** I cannot think of the specific date. It would have been, I believe, in October.

**Senator HANSON-YOUNG:** So last month.

**Mr Anderson:** Yes.

**Senator HANSON-YOUNG:** Could you take on notice the exact date that you were given instructions, please.

**Mr Anderson:** Yes.

**Senator HANSON-YOUNG:** Thank you. Was the legal counsel who is involved in the case before the Victorian courts involved in drafting the legislation?

**Mr Anderson:** The Office of the Commonwealth Director of Public Prosecutions has been involved in giving instructions on the drafting of the legislation.

**Senator HANSON-YOUNG:** Giving instructions?

**Mr Anderson:** The legislation itself is drafted by parliamentary counsel, and we refer the matter of formality to providing drafting instructions to the legislative counsel.

**Senator HANSON-YOUNG:** Can you give me an example where this has occurred before in terms of the Commonwealth government being a party to current legal proceedings and at the same time giving instructions to have laws drafted that change that legal standing?

**Mr Anderson:** I believe our submission points to the Poniatowska case, where this parliament recently passed legislation while a matter was before the High Court.

**Senator HANSON-YOUNG:** How often has this been successful?

**Mr Anderson:** I am not sure what you mean by 'successful'.

**Senator HANSON-YOUNG:** If, indeed, there already is a precedent for the government of the day changing laws to suit themselves because they are currently party to legal proceedings, have those legal proceedings been withdrawn—and therefore the government's position has stood—or have the cases continued?

**Mr Anderson:** In the matter of Poniatowska, there were believed to be a very large number of previous cases as well as future cases that would have been affected had that retrospective legislation not been passed in that case. In this case, again, there have been, as I said, over 900 proceedings with respect to these offences since 1999, so no doubt matters will continue to be defended whether this legislation is passed or not. That will continue to be the duty of Victorian Legal Aid and others. So the cases will still be run and defended.

**Senator HANSON-YOUNG:** How many hours have been spent by the Attorney-General's Department in drafting this legislation?

**Mr Anderson:** As I said, the Office of Parliamentary Counsel, which is separate to the department, drafts the legislation.

**Senator HANSON-YOUNG:** Okay. How many hours have been spent in the Attorney-General's department on this legislation?

**Mr Anderson:** I would have to take that on notice.

**Senator HANSON-YOUNG:** Could you take that on notice please. Why the urgency?

**Mr Anderson:** Ultimately it is a matter for the government as to bringing a bill on. It is not a decision for the department.

**Senator HANSON-YOUNG:** Did the Attorney-General's Department give any advice as to the time frame of this legislation and when it should be introduced to parliament?

**Mr Anderson:** We did not give advice as to when it should be introduced. As I said, the issue of when to introduce it is a matter for government.

**Senator HANSON-YOUNG:** So there has been no advice given from the Attorney-General's Department as to when this legislation should have been introduced.

**Mr Anderson:** We have given advice as to when it could be introduced.

**Senator HANSON-YOUNG:** Was that before or after the drafting of the legislation was taking place?

**Mr Anderson:** It was as part of the discussions around the legislation.

**Senator HANSON-YOUNG:** Okay. If you have given advice as to when the legislation could have been introduced, what would that have been based on? You are telling me that the matter of urgency is a matter for government. You are giving advice to government. Why would you advise that the legislation would need to be passed this year?

**Mr Anderson:** Sorry; why would we advise that?

**Senator HANSON-YOUNG:** Yes. Why would you give advice that new legislation should be passed this year?

**Mr Anderson:** Senator, you are asking me to speculate on—

**Senator HANSON-YOUNG:** No, I am asking: why would you give advice that this legislation should be passed this year?

**CHAIR:** I think, Mr Anderson, there is an assumption there that you have actually provided that advice in the first place.

**Senator HANSON-YOUNG:** He said that he had advised that the legislation could be introduced. I am asking what the basis of that advice could be.

**Mr Anderson:** It is, with regard to the parliamentary schedule, in terms of when sitting weeks are and the processes that the government has to go through in order to introduce a bill. Of course, ultimately once the bill is introduced, it is a matter for parliament as to the speed or otherwise in which the legislation is actually passed.

**Senator HANSON-YOUNG:** Has the department considered the urgency of this bill?

**Mr Anderson:** We have certainly given advice on the situation that is before the government in terms of the fact that there are a large number of people-smuggling cases on foot currently and there are a large number of convictions that have previously been recorded, certainly since 1999, that could all be affected if a court were to depart from the current understanding of the interpretation of provisions that has been consistently applied and to find that in fact bringing people to Australia without a visa, if they were asylum seekers, is not unlawful.

**Senator HANSON-YOUNG:** Since the 2010 legislation, the Anti-People Smuggling and Other Measures Bill, was introduced, which of course has the mandatory minimum sentences, how many boats has that legislation deterred?

**Mr Anderson:** I am not able to tell you that.

**Senator HANSON-YOUNG:** Maybe DIAC could give information. Has there been a deterrent since that legislation was introduced?

**Mr Phillipson:** I am not able to tell you, I am afraid.

**Senator HANSON-YOUNG:** The whole purpose of this legislation is to send a clear message to people not to participate in this criminal activity. You and the government are saying that this needs to be shored up and confirmed. Surely that is because you think it must be working. So you must have the figures on how many boats have been deterred because of this legislation—the current situation since 2010.

**Mr Phillipson:** Speaking on behalf of the department, I very much doubt that we would have any figures on how many boats were actually deterred.

**Senator HANSON-YOUNG:** So you do not have any proof that it has deterred people.

**Mr Phillipson:** We do not have any figures on how many boats have been deterred.

**Senator HANSON-YOUNG:** You do not have any evidence that the current law deters people smugglers.

**Mr Phillipson:** No, we do not have any figures on the number of boats that may or may not have been deterred.

**Senator HANSON-YOUNG:** So there is no evidence to suggest that the current law as it is—and the argument from the explanatory memorandum of this current bill before us and the government is simply to bed down what we already know—actually acts as a deterrent, which is the whole purpose of this legislation.

**CHAIR:** Senator Hanson-Young, what the officials are actually saying is that there is no way of knowing.

**Senator HANSON-YOUNG:** Oh, 'no way of knowing'?

**CHAIR:** There is no way of knowing. There are no figures. This has been reiterated a number of times in estimates as well as to how many boats actually leave the shores of Indonesia.

**Senator HANSON-YOUNG:** How many people have been charged with people-smuggling offences since 2010?

**Mr Anderson:** It is 190 convictions since September 2008.

**Senator HANSON-YOUNG:** 190 convictions?

**Mr Anderson:** Since September 2008.

**Senator HANSON-YOUNG:** How many people have been charged since this recent legislation?

**Mr Anderson:** I would have to take that on notice.

**Senator HANSON-YOUNG:** I would also like you to take on notice what the numbers were prior to 2010—between 2008 and 2010—so that we can compare the difference.

**Mr Anderson:** Yes, Senator.

**Senator HANSON-YOUNG:** I would like to pick up on your comment to Senator Humphries in relation to the seriousness of these criminal activities in terms of people participating in people smuggling—the difference between people as crew on boats and organisers. This, of course, is the big problem. The 2010 legislation came in and all of a sudden there were minimum mandatory sentences for anyone who was on these boats as crew. We know organisers do not board these boats. Why would you? Why would you collect hundreds of dollars and then board a leaky boat that you do not even expect will ever return let alone perhaps get to its destination? I might need to go back and check the *Hansard*, but you referred to it as being a very serious offence. I would just like to know the Attorney-General's Department's view on the distinction between a poor Indonesian fishermen who has been misled, tricked and manipulated to drive and steer a boat and the organisers. Do you really believe that person is so evil that they should be in the same category as the people who have organised the people-smuggling rackets?

**Mr Anderson:** You are asking me to comment—

**Senator HANSON-YOUNG:** No, I am asking for clarification, because you already put them in this category. I am asking for clarification. Is that what you are saying?

**Mr Anderson:** What I said is that people smuggling is a very serious offence and it is a very morally culpable activity.

**Senator HANSON-YOUNG:** Including the poor Indonesian fisherman who is 19 years old and has been tricked to board a boat that he thought he was going on a fishing trip in?

**Mr Anderson:** Senator Humphries asked me to make some assumptions, and I can make assumptions about an Indonesian fisherman who is crew on a boat and I can assume that in fact they have been tricked and all of those things, and I will certainly see that their culpability is going to be less than that of an organiser. But I will also say that the Australian government does have an offshore information communication campaign running to seek to educate people in other countries about the dangers of people smuggling and about the risks to crew as well in terms of the penalties. It is a large assumption—

**Senator HANSON-YOUNG:** I remember seeing a photo a couple of weeks ago of some Hazaras being slaughtered in front of one of those posters in Afghanistan. I do not know if you have copped a copy of that article, but it showed how powerful that campaign is!

**CHAIR:** Senator Hanson-Young, we have limited time so let's just get back to the content of the bill.

**Senator HANSON-YOUNG:** My point being: you are not able to distinguish, are you, because you have the mandatory sentences in the current law? Nothing in this piece of legislation deals with the issue at hand. The whole purpose these legal proceedings in the Victorian courts is directly in relation to how poorly drafted and misleading the current law is. So surely, rather than introducing legislation that is retrospective, putting all of these little fish in with the big fish, which we know are the majority, you have actually taken the easy route. Rather than dealing with the problem at hand, you just expect the parliament to rubber-stamp a piece of legislation that is absolutely flawed. What kind of advice to government is that from a government department?

**Mr Anderson:** The bill does not purport to do anything about mandatory minimums.

**Senator HANSON-YOUNG:** No, so you are not dealing with the problem, are you?

**Mr Anderson:** I am saying that the bill does not purport to deal with mandatory minimums. As I have said, it is simply to remove any doubt about the intention when the provisions were actually introduced back in 1999.

**Senator HANSON-YOUNG:** Except you cannot tell me whether that has actually deterred anybody.

**Mr Anderson:** What we cannot say is numbers of boats or people who have been deterred by it.

**Senator HANSON-YOUNG:** Do you believe it has deterred anybody?

**CHAIR:** You are asking Mr Anderson for a personal opinion now, which you know a departmental official is not able to give you.

**Senator HANSON-YOUNG:** Has the Attorney-General's Department done any research as to whether the current law has actually deterred anybody?

**Mr Anderson:** We have not done that research, no, but we are not the only agency in this space.

**Senator HANSON-YOUNG:** We know DIAC have not. DIAC do not even use their own research department to look at deterrent issues. We know that.

**CHAIR:** Senator Hanson-Young, I am going to have to ask you to put other questions on notice.

**Senator HANSON-YOUNG:** I want one last question. This is in relation to the ages of some of the people who have been charged under the people-smuggling law. How many people currently held in Australian prisons have a question mark over their age?

**Mr Anderson:** There are 17 people currently before Australian courts who are raising a question of their age. Seventy-seven people whom the Australian Federal Police and the Director of Public Prosecutions believe to be minors have been returned to Indonesia or their home country without being prosecuted.

**Senator HANSON-YOUNG:** So out of the—17 did you say?

**Mr Anderson:** Seventeen are currently before the courts. I cannot say how many more there might be.

**Senator HANSON-YOUNG:** Where are they being held?

**Mr Anderson:** I cannot say. I would have to take that on notice.

**Senator HANSON-YOUNG:** Are they being held in Australian prisons?

**Mr Anderson:** Some of them might be being held in Australian prisons. Some of them might be being held in immigration detention centres. I would have to take that on notice.

**Senator HANSON-YOUNG:** At what stage does the department act to suggest that somebody who has a question mark over their age be removed from an adult prison?

**Mr Anderson:** The policy that is applied by the Federal Police and by the Director of Public Prosecutions is to ascertain the age of people if there is a question. If there is a doubt, the policy is to in fact give the person the benefit of the doubt. As you would understand, the mere fact that someone contests their age as one element of a defence does not in itself mean that it is going to create doubt in the minds of the AFP or the DPP.

**Senator HANSON-YOUNG:** So what is the threshold that the Australian government uses to suggest that there is enough doubt for somebody to be removed from an adult prison?

**Mr Anderson:** It is a policy that says if there is sufficient doubt then we will not actually prosecute. That is in the—

**Senator HANSON-YOUNG:** Where is the policy?

**Mr Anderson:** The *Prosecution Policy of the Commonwealth* points out that the Commonwealth will not prosecute minors except in egregious circumstances. There was a statement made by the Minister for Foreign

Affairs and the Attorney-General on 8 July. That was a public statement as to the approach that would be followed—the benefit of the doubt.

**Senator HANSON-YOUNG:** Is there any public document that sets out what that policy is?

**Mr Anderson:** There was certainly a media release that set out the approach on that.

**Senator HANSON-YOUNG:** A media release? So the threshold by which a young, possibly 17-year-old, poor Indonesian fisherman is being held in an adult prison is based on a media release?

**Mr Anderson:** Senator, you asked me what public statements there were of the policy. Certainly the policy is—

**Senator HANSON-YOUNG:** I asked you what the policy was and you referred to the comments made by the minister.

**Mr Anderson:** I am sorry—I believed that you asked me whether there was a public statement of that policy, and the public statement of that policy is in the press release. There is a further, more detailed set of documents held by the Australian Federal Police and the Commonwealth Director of Public Prosecutions about the approach that they apply.

**Senator HANSON-YOUNG:** Are they publicly available?

**Mr Anderson:** I do not believe they are.

**Senator HANSON-YOUNG:** Can I ask that you take on notice whether you can table them for the committee, please?

**Mr Anderson:** Yes, we will take that on notice, noting that these are documents of other agencies.

**Senator HANSON-YOUNG:** I am just concerned, as you could understand, that the only publicly available documentation on the threshold for whether we detain children in adult prisons is based on a press release. If there is another way of enabling the committee to see what that policy is, I suggest we find out.

**CHAIR:** Senator Hanson-Young, I think you misinterpreted what Mr Anderson said there. He did not say it was based on a press release; he said you can find the comments of the minister about that policy in a press release.

**Senator HANSON-YOUNG:** But my—

**CHAIR:** Just let me finish. There are certainly also comments in speeches to parliament and ministerial statements to parliament and no doubt in a platform that the minister is working from. So there would be adequate public documents.

**Senator HANSON-YOUNG:** Chair, I am concerned that we have heard from the department themselves that there is no hard and fast rule used to determine whether a child should continue to be locked up in an adult prison. There is no hard and fast rule, so there must be some guidelines, some policy, some procedure. What you are telling me is none of that is publicly available, from what you have said. Could we have an idea of where we could see a copy of that protocol, that policy or those instructions? All we have to go on, otherwise, is a press release and some statements from the minister.

**CHAIR:** Mr Anderson said he would take that on notice. Given that it is not this agency, it is a matter he will need to ask of other agencies.

**Mr Anderson:** And there is another complication, in a sense, in that the Commonwealth does not actually run prisons itself. They are state and territory prisons, and states and territories have their own rules about how they treat prisoners, particularly where there is a question about their age, the conditions in which they are held and things like that. We obviously give them all the information we have as to the age that we believe the person is. But I have taken that on notice.

**CHAIR:** Senator Hanson-Young, we do not have Senator Humphries with us now, so I am going to have to ask you to put other questions you may have for these departments on notice.

**Senator HANSON-YOUNG:** Sure. My final question, on notice, is whether the department has either started to review the policies on the use of wrist X-rays and/or whether there has been an instruction from the minister to investigate their appropriate usage.

**CHAIR:** Mr Anderson or people from DIAC will take that on notice, I am sure.

**Senator HANSON-YOUNG:** Including the time frames if any instructions have been given.

**CHAIR:** Thank you, officers, for your submissions this morning and for making yourselves available. The questions that have been taken on notice that specifically relate to this piece of legislation need to be answered by

Tuesday at the latest because we are reporting Monday week and we may need to incorporate your answers into the draft. Thank you. I declare this public hearing of the Senate Legal and Constitutional Affairs Committee adjourned.

**Committee adjourned at 12:38**