

# Dissenting Report by Senator Sarah Hanson-Young

## Introduction

1.1 The majority report makes a mockery of the senate committee's ability to scrutinise legislation. Despite the issues and concerns raised throughout the inquiry process and the recommended amendments put forward, the majority report fails to appropriately address any of them in their response to the inquiry.

1.2 The Anti-People Smuggling and Other Measures Bill 2010 seeks to strengthen the Government's anti-people smuggling legislative framework, as well as ensuring that people smuggling is "comprehensively criminalised in Australian law." Yet, despite the Attorney-General stating in his second reading speech that the United Nations Global Trends Report "indicates that people seeking asylum in Australia reflects a worldwide trend driven by insecurity, persecution and conflict"<sup>1</sup>, no where in this Bill are Australia's obligations to those seeking our protection under international law recognised.

1.3 Like many in the legal profession, the Greens share serious concerns that this Bill, in its current form, not only breaches our obligations under international law, but also our obligations under domestic law. We remain very concerned that this Bill is a direct attack on the refugee communities in Australia, and those that support them. Despite assurances from the Attorney-General's Department that innocent individuals will not be caught under this poorly drafted legislation, the definition of "providing material support", is such that anyone who is seen to send money over to a friend or relative in a refugee camp, who may subsequently use that money to pay a people smuggler, could be charged under this broad definition.

1.4 As outlined by Professor Crock, from the Sydney Centre for International Law:

"This legislation targets refugee communities in Australia who are sending remittances to their families overseas. Every time they send money across to a relative, if there is a chance that that relative is going to get on a boat at some stage, they are at risk of being put in jail for 10 years. This legislation will only be seen by the very vulnerable emergent communities in this country as a direct assault on them—a frontal attack."<sup>2</sup>

1.5 While all sides of politics can agree that the people smuggling trade is an appalling way to exploit of innocent individuals who are in a desperate situation, the Greens do not believe that this Bill will act as a deterrent to people smugglers as the Bill suggests it will do. Rather, we have a situation where providing humanitarian

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<sup>1</sup> Anti-People Smuggling and Other Measures Bill 2010, second reading speech p.1

<sup>2</sup> <http://www.aph.gov.au/hansard/senate/commttee/S12939.pdf> Committee Hansard p.3

assistance to asylum seekers could be criminalised under this Bill, particularly as this Bill fails to reflect our obligations under the Anti-People Smuggling Protocol, which specifically states that it does not aim to punish individuals who assist smuggled persons for purely humanitarian reasons.

## Concerns with the Bill

### *Supporting the offence of people smuggling*

1.6 It is clear from the various submissions provided to the committee, that this new offence that amends both the *Criminal Code Act 1995* and the *Migration Act 1958*, is too broad and ineffective, particularly the ambiguous reference to ‘material support’. In its submission to the Inquiry, the Faculty of Law at the University of NSW stated that not only is the term “material support” vague and indeterminate with concerns around fairness and due process concerns, it also presents problems with our obligations under international law including:

“Australia’s international obligation to act in “good faith”, which requires that Australia not seek to avoid triggering its obligations under the Refugee Convention by preventing those entitled to protection from reaching Australia;

The Smuggling Protocol, which does not aim to punish individuals who assist smuggled persons for purely humanitarian reasons;

Article 23 of the International Covenant on Civil and Political Rights (ICCPR), which requires the protection of family unity by the State; and

The Convention on the Rights of the Child (if the smuggled relative is a child), including article 22(1) which requires that States ensure that refugee children receive appropriate protection. Incarcerating a parent for providing material support in order to protect her child from persecution may also violate articles 2(2) (non-discrimination based on status of parent), 3(1) (legislative bodies must take into account the best interests of the child), and 3(2) (State must ensure child’s protection and care).”<sup>3</sup>

1.7 This new provision is a clear step away from the accepted definitions in international law concerning supporting people smuggling.

1.8 In particular, Article 6 of the Protocol Against the Smuggling of People requires States to criminalise specified conduct where committed ‘in order to obtain, directly or indirectly, a financial or other material benefit’.

1.9 This requirement already exists in the people smuggling offences outlined under the *Criminal Code Act 1975* that requires the accused to either benefit or intend to obtain a benefit from smuggling an individual into Australia. Yet, under this Bill the requirement of a profit motive to exist is omitted, thus broadening the offence

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<sup>3</sup> UNSW Submission No.23 p.7

beyond what is envisaged in international law. As identified by the Sydney Centre for International Law

“under the Protocol, the profit motive underlying people smuggling is essential in identifying what is regarded as harmful or wrongful about people smuggling: the commercial exploitation of often vulnerable people such as asylum seekers. In contrast, by dispensing with the profit motive, the proposed offence transforms the offence into a more general prohibition on helping anyone (including refugees or persons rescued at sea) to find safety, even for altruistic or humanitarian reasons, in circumstances where ‘queues’ abroad do not exist or do not function.”<sup>4</sup>

1.10 It is clear that if this legislation passed in its current form, the amendment would criminalise the activities of aid organisations, humanitarian workers, charity and church workers and other individuals who assist people across borders in other countries for humanitarian reasons. If this Bill is to proceed in its current form, this definition must be consistent with our commitments under the Protocol Against the Smuggling of People.

1.11 Given the level of concern expressed by legal professionals, refugee advocates, academics and individuals about the new material support provisions, with many identifying the Bill as one of the “worst pieces of legislation”<sup>5</sup> they have ever had to address before the committee, it is clear that the Government is just trying to ram through the Bill for their own political agenda.

### *Offence of people smuggling*

1.12 The Greens are concerned with the inclusion of the aggravated offences in this Bill which basically stipulates that it is an offence to facilitate the entry to Australia of a non-citizen who “had, or has, no lawful right to come to Australia.”<sup>6</sup> If the purpose of subsection 233A is to encompass the offence of people smuggling ventures that involve asylum seekers, then it must be amended to reflect Australia’s obligations under the refugee Convention.

1.13 The fact that more than 90% of unauthorised boat arrivals in Australia are found to be genuine refugees<sup>7</sup>, it is clear that if this legislation proceeds, the Government must clarify the provision to ensure that a refugee is not included as a person who has no legal right to come to this country.

1.14 The Convention Relating to the Status of Refugees clearly states that non-citizens have a lawful right to enter a country to seek asylum. Under Article 31(3) of

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<sup>4</sup> Sydney Centre for International Law Submission No.11p.1

<sup>5</sup> <http://www.aph.gov.au/hansard/senate/commtee/S12939.pdf> Committee Hansard p.9

<sup>6</sup> Anti People Smuggling and Other Measures Bill 2010 p.5

<sup>7</sup> Senator Chris Evans, Minister for Immigration and Citizenship, “Liberals Bereft of Immigration Policy”, Media Release <<http://www.minister.immi.gov.au/media/media-releases/2009/ce09096.htm>> (accessed 10 April 2010).

the Convention “contracting states shall not impose penalties, on account of illegal entry or presence, on refugees...provided they present themselves without delay.” Given the current provision infers that asylum seekers have no lawful right to come to Australia, it is clear that the Bill is contravening our commitments under international law.

### ***Expansion of ASIO’s jurisdiction***

1.15 According to the Explanatory Memorandum the main purpose of expanding ASIO’s jurisdiction is to formally give them a role in the gathering and sharing of intelligence about people smuggling. The Greens share the concerns of many of the submissions presented to this inquiry that there is need for clarification of what actually constitutes a “serious threat” to Australia’s territorial and border integrity.

1.16 Given the Australian Federal Police, Department of Immigration and Citizenship and the Australian Customs and Border Protection Service already collect, evaluate analyse intelligence relating to people smuggling, there seems to be no clear indication as to why the resources of ASIO should also be deployed for this purpose.

1.17 Is the Government suggesting that the existing agencies are failing to adequately manage their responsibilities?

1.18 Expanding the role of ASIO with no apparent justification is of serious concern, particularly when the organisation in question is not subjected to appropriate levels of transparency and public scrutiny. As noted by the Law Council of Australia

“ASIO’s powers are quite distinct from those of ordinary law enforcement agencies and are subject to less transparent authorisation and review processes... It would be alarming, if ASIO’s mandate was widened to encompass the gathering and dissemination of intelligence on anything related to this broader concept of national security.”<sup>8</sup>

1.19 The Greens remain concerned that expanding the role of ASIO beyond its traditional national security mandate, sends the message that asylum seekers are a threat to Australia’s national security, and subsequently (which may not be the intention) discriminates against those that arrive by boat versus those that arrive by plane.

1.20 The Attorney-General, in his second reading speech observed that

“conflicts and turmoil in Afghanistan, the Middle East and Sri Lanka are driving a global surge in asylum seekers, with large numbers of displaced persons seeking resettlement in foreign countries.”<sup>9</sup>

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<sup>8</sup> Law Council of Australia, Submission No.9 p.

<sup>9</sup> Anti-People Smuggling and Other Measures Bill 2010, second reading speech p.1

1.21 It is clear that there is no link between asylum seekers arriving in Australia by boat and a threat to Australia's national security.

1.22 The Government's position on the reason why people seeks asylum and the insistence to expand ASIO's role beyond national security, with a clear rational explanation is contradictory, and sets a dangerous precedent.

1.23 The Australian Privacy Foundation in their submission highlighted their concerns at expanding ASIO's powers and activities, particularly as this would increase "the range of surveillance activity that can be undertaken by the organisation free from privacy rules and oversight."<sup>10</sup>

1.24 The Greens, along with Amnesty International are also concerned that the Bill, its accompanying EM, and the Attorney-General's second reading speech fails to differentiate between those seeking Australia's protection and the people smugglers who actually exploit their desperation. In their submission, Amnesty state that

"the broadening of the security definition solidifies the misunderstanding within sections of the general community that asylum seekers are not only committing an illegal act but pose a potential security threat."<sup>11</sup>

## **Conclusion**

1.25 It is clear from all but the Government's own submissions, that there has not been adequate time to consider this Bill. The failure of the Government to articulate why it is necessary to introduce the new measures proposed by this Bill highlights that wider public consultation and debate is necessary before these measures can seriously be considered.

1.26 The Law Council of Australia articulates this concern in their submission, stating

"it creates the perception that these amendments are about legislative activity for its own sake. That is, it creates the perception that parliament is enacting new offences lest it been seen to be impotent or inactive in the face of the problem of people smuggling."<sup>12</sup>

1.27 Given the strong level of criticism that this Bill has generated, the Greens are seriously concerned at the lack of consultation with the legal profession about the impact that this legislation will have on civil liberties, as well as the failure of these proposed new measures to adhere to our commitments under international law.

1.28 The fact the Government has failed to commit to a Charter of Rights, which would enshrine our commitments under international law and provide an avenue to

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<sup>10</sup> Australian Privacy Foundation Submission no.15 p.2

<sup>11</sup> Amnesty International Submission No.16 p.8

<sup>12</sup> Law Council of Australia, Submission No.9 p.6

allow for human rights challenges in Australian courts, gives reason for concern, particularly when the legislation in question can unintentionally capture innocent individuals.

### **Recommendation**

**The Greens recommend that this Bill should not proceed:**

- **without significant amendments to prevent harm to vulnerable groups and their families, and**
- **until it has been subjected by the Federal Government's new parliamentary Joint Committee on Human Rights and a statement of compatibility with our international obligations is produced.**<sup>13</sup>

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<sup>13</sup> Attorney-General's Media Release 21 April 2010 "Australia's Human Rights Framework"