Deterring People Smuggling Bill 2011

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Deterring People Smuggling Bill 2011

Date introduced: 1 November 2011
House: House of Representatives
Portfolio: Home Affairs

Commencement: Sections 1 to 3 commence upon Royal Assent. Schedule 1 commences retrospectively on 16 December 1999.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Deterring People Smuggling Bill 2011 (the Bill) is to amend the Migration Act 1958 (the Migration Act) to clarify the meaning of the phrase ‘no lawful right to come to Australia’. This phrase is currently the subject of a legal challenge in the Victorian Court of Criminal Appeal.

Both the primary and aggravated people smuggling offences contained in the Migration Act require the prosecution to establish (amongst other things) that where another person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry to Australia, of a non-citizen, the non-citizen has ‘no lawful right to come to Australia’.

The Bill inserts a provision with retrospective application that sets out the circumstances in which an unlawful non-citizen has no lawful right to come to Australia for the purposes of Subdivision A (people smuggling and related offences). Essentially, these circumstances are if the person does not hold a visa that is in effect or does not fall within any of the existing exceptions contained in section 42 of the Migration Act. The provision also clarifies that reference to a non-citizen includes a non-citizen that is seeking protection or asylum whether or not Australia has, or may owe them, protection obligations.  

Background

This Bill was introduced in the House of Representatives at approximately 6:15pm on Tuesday 1 November 2011. Debate ensued immediately following its introduction and the Bill was subsequently passed in the House of Representatives shortly after 7pm the same day. The following

1. Australia’s protection obligations towards such persons arise from its ratification of various international human rights treaties, including the 1951 Convention Relating to the Status of Refugees (and accompanying 1967 Protocol).

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day, the Bill was introduced but not debated in the Senate. On 3 November 2011 the Bill was referred to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 21 November 2011.

There is evidence that the basis for the urgency was a people smuggling matter scheduled for hearing before the Victorian Court of Criminal Appeal on Thursday 3 November 2011 involving a 20 year old Indonesian national, Jeky Payara. This was a test case that was being run by Victoria Legal Aid in which they were going to argue that there was a real question as to whether asylum seekers can truly be said to have ‘no lawful right to come to Australia’ given Australia’s obligations under the 1951 Refugees Convention and the extent to which those obligations have been incorporated into Australian domestic law and practice. According to Victoria Legal Aid, on this question of law:

The President of the Court of Appeal commented that this was an entirely appropriate issue to have brought to the Court given the fact that it impacts on a large number of cases and resolving it early would provide legal certainty, which the efficient administration of justice requires.

This matter was adjourned until 30 November 2011 to allow the parliamentary process to run its course. It is clear that the hearing in the Court of Appeal will most likely be rendered moot if the Bill is passed.

Neither the Minister’s second reading speech or the Explanatory Memorandum make any reference to the matter before the Victorian Court of Criminal Appeal. Rather, the Minister said that the amendments are ‘critical to ensure Australia’s laws criminalising people smuggling are clear and effective and reflect the Parliament’s intention when the laws were put in place’.

Committee consideration

On 3 November 2011, the Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 21 November 2011. Details of the inquiry are at the inquiry

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   Non-Government MPs explicitly referred to the case during the second reading debate in the House of Representatives, however the Law Council of Australia in their Submission to the Senate inquiry note that the Minister did not ‘consider it proper to refer to relevant court matters’: Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Deterring People Smuggling Bill 2011*, 9 November 2011.
4. Ibid.
5. Ibid.

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webpage. The Senate Selection of Bills Committee identified the following reasons for referral/principle issues for consideration:

- whether the Bill contains provisions that are in breach of Australia’s obligations under international conventions and treaties
- whether the Bill requires amendment in relation to the effectiveness of the mandatory sentencing provisions and
- whether the retrospectivity of the bill is an appropriate and fair action under the rule of law.

The Committee held one public hearing on 11 November 2011 and received only 22 submissions. Interest groups emphasised that the time allocated for submissions to be received was extremely short. The views of submitters on the issues raised by the Bill are broadly canvassed below under the heading ‘position of major interest groups’.

Due to time constraints, this Digest will not incorporate the final views of the Committee expressed in its report (yet to be tabled).

Policy position of non-government parties

The Coalition is supportive of this Bill. As Shadow Minister for Immigration and Citizenship, Scott Morrison, MP stated in Parliament:

The Deterring People Smuggling Bill 2011 is a matter of agreement between the government and the opposition. It is also a matter of urgency. No-one in this place wants to see those who have been involved in these criminal acts being allowed to slip through the net, because, where they have been detained and prosecuted, we wish to see a conviction. The bill seeks to provide clarity, retrospectively, that a person has no lawful right to come to Australia if, at the relevant time, the non-citizen does not hold a visa—that is, in effect, whether or not Australia may have protection obligations under the refugee convention or for any other reason. [Emphasis added].

It is likely that the Australian Greens will oppose this Bill in the Senate. In the House of Representatives, the party’s sole MP, Adam Bandt stated ‘this Bill ought to be of great concern to anyone who values the basic principles of the rule of law’. He further stated:

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10. A Bandt, ‘Second reading speech: Deterring People Smuggling Bill 2011’ House of Representatives, Debates, 1 November 2011, p. 41, viewed 9 November 2011,

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This bill is a knee-jerk reaction to an upcoming court case because the government are terrified that the court may in fact say, 'Yes, some people do have a legitimate right to come to Australia, and, no, if you find yourself as a 17- or a 20-year-old Indonesian fishermen caught up within it we are not going to mandatorily sentence you to five years.'

### Position of major interest groups

Broadly speaking, major interest groups such as the Law Council of Australia and Victoria Legal Aid oppose this Bill for a variety of reasons. These include:

- the retrospective nature of the amendments contained in the Bill
- the inappropriateness of introducing amendments prior to the outcome of Court proceedings, and
- the inadequacies of the process by which the Bill has been expedited.

International law expert, Professor Ben Saul from the University of Sydney expresses the view that, contrary to suggestions made in the Explanatory Memorandum, the Bill cannot purport to validly implement Australia’s obligations under the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention on Transnational Organised Crime if the scope of the Protocol (which focuses on ‘migrants’) in fact excludes refugees, as he asserts it does. He also makes the point that it is disingenuous to suggest, as the Explanatory Memorandum does, that criminalising people smuggling does not prejudice the position of refugees:

> The effect of criminalising those who smuggle refugees is to prevent the refugees themselves from reaching safety, unless some effective, alternative or substitute protection is provided for them elsewhere.

Immigration legal centres, such as the Immigration Advice and Rights Centre (IARC) also raise this point. They believe the Bill may negatively affect asylum seekers because it will potentially prevent them from coming to Australia to seek refuge and in doing so will unfairly punish those who seek protection—which is not consistent with Australia’s obligations under the 1951 Convention relating to the Status of Refugees (and accompanying 1967 Protocol).

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11. Ibid.  
14. Ibid.  
15. Immigration Advice and Rights Centre (IARC), Submissions to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Deterring People Smuggling Bill 2011, 10 November 2011.
John Menadue from the Centre for Policy Development is of the view that ‘in terms of good public policy, this Bill is a tenth-order issue’. He suggests that Parliament should consider an alternative amendment that clearly articulates the values, principles and obligations of Australia towards asylum seekers and refugees.

Financial implications

The Explanatory Memorandum states that the Bill has no financial impact on government revenue.

Main issues and key provisions

There are two ways of looking at this Bill. The first is to conclude that it does no more than make a technical amendment to the Migration Act to clarify the meaning of a phrase used in existing people smuggling offences. Another way of looking at this Bill is to consider whether it goes beyond mere clarification. This approach raises a number of ancillary questions, such as:

- was the original intention of Parliament that it would be a crime to bring refugees (or anyone else owed protection obligations) without a valid visa to Australia (noting that ‘refugees’ rarely possess a visa)?
- have the Courts consistently interpreted the people smuggling offence provisions in the Migration Act as applying when a person brings to Australia a refugee (or anyone else owed protection obligations) without a valid visa?
- is the criminalisation of the smuggling of refugees contrary to Australia’s international obligations?
- is the retrospective application of the Bill necessary and justified?
- is Parliament exercising a judicial function? and
- is Parliament usurping the role of the judiciary in defining words within a statute, especially at a time when to do so will potentially thwart the outcome of a criminal trial in which the Government is a party to proceedings?

The following section will consider some of these questions under the heading of two key issues that arise from this Bill, namely whether this Bill declares that asylum seekers do not have a lawful right to come to Australia and whether the retrospective application of this Bill is necessary and justified.

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17. Ibid.

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Does this Bill declare that asylum seekers do not have a lawful right to come to Australia?

Item 1 inserts new section 228B which is titled ‘circumstances in which a non-citizen has no lawful right to come to Australia’. This section sets out the circumstances in which an unlawful non-citizen has no lawful right to come to Australia. Essentially, these circumstances are if the person does not hold a visa that is in effect or does not fall within any of the existing exceptions contained in section 42. New subsection 228B(2) clarifies that reference to a non-citizen includes a non-citizen that is seeking protection or asylum and whether or not Australia has, or may owe them protection obligations.

Under these amendments, the circumstances in which an unlawful non-citizen has no lawful right to come to Australia are only expressed to apply for the purposes of people smuggling and related offences (contained in Subdivision A of Division 12 of Part 2 of the Migration Act). Victoria Legal Aid argues that this amendment nonetheless has broader significance. They are of the view that this Bill effectively declares that an asylum seeker is not a person who has a lawful right to come to Australia.19

Under the Migration Act, it is not an offence to enter Australia without a valid visa.20 However, this has not always been the case. From 1901 to 1994, federal law contained offence provisions respecting unlawful entry and presence in Australia, which was punishable by imprisonment as well as by liability to deportation.21

For instance, when the Migration Act was enacted in 1958 it contained a provision that expressly made it an offence punishable by imprisonment for a maximum of six months for a ‘prohibited immigrant’, that is, an immigrant that did not hold a valid entry permit, to enter Australia.22 However, this section was eventually repealed by the Migration Reform Act 1992 without explanation and has since never been replaced.23


‘illegal entrant’ is a term derived from British common law...The term ‘illegal entrant’ is defined in section 14 of the Act. An illegal entrant is a non-citizen who has entered Australia illegally or

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20. It is an offence under the Migration Act to enter Australia using forged or false documents or to present a document to an official containing information that is false or misleading in a material particular. The maximum penalty for contravening this provision is imprisonment for 10 years or 1000 penalty units ($110,000), or both.

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who entered legally but no longer has authority to remain. Illegal entry status can only be acquired by non-citizens at or after entry to Australia.24

Significantly, the inquiry report notes that ‘frontier asylum claimants, for example, who are permitted to be physically present in Australia while their claims are assessed, are taken not to have entered and are not illegal entrants’.25 [Emphasis added].

Existing section 42 of the Migration Act states that a non-citizen must not travel to Australia without a visa that is in effect. However, there are a few exceptions to this requirement. Most relevantly, an exception applies to those who are brought to the migration zone under subsection 245F(9) of the Act.26 This subsection was introduced by the Border Protection Legislation Amendment Act 1999, being legislation expressly designed to ‘strengthen legislative provisions relating to people smuggling in order to maintain the integrity of Australia’s borders’.27

This provision enables people on ships outside the territorial sea of another country to be detained and brought to Australia or taken to a place outside Australia. The rationale for this exception was to ensure that ‘where the Commonwealth arranges for or requires a person without a visa to be brought into Australia, those involved in doing so are not exposed to offences under the Migration Act’.28 It seems that the effect of section 42, with its exception created in subsection 245F(9), is that people, perhaps including asylum seekers, are not required under section 42 of the Migration Act to have a visa. Such persons are nevertheless deemed to be ‘unlawful non-citizens’ because they are in the migration zone without a visa. This status is explicitly retained by subsection 42(4). The Bill retains the existing exceptions contained in section 42 of the Migration Act. The Explanatory Memorandum does not discuss the exception created in subsection 42(2A) which refers to subsection 245F(9).

An ‘unlawful non-citizen’ is simply a ‘status’ designated to persons in the migration zone without a valid visa.29 For onshore ‘unlawful non-citizens’ administrative detention is the consequence that flows from acquiring such a status. For ‘unlawful non-citizens’ taken to an ‘excised offshore place’

25. Ibid.
26. Under section 5 of the Migration Act, ‘enter Australia’ means entering the migration zone. Relevantly, the ‘migration zone’ is the land that is part of a state or territory. This includes an excised offshore place, such as Christmas Island. See also: DIAC, ‘Fact sheet 81 - Australia’s excised offshore places’, DIAC website, viewed 17 November 2011, http://www.immi.gov.au/media/fact-sheets/81excised-offshore.htm#b
27. Paragraph 42(2A)(c)(ii) of the Migration Act 1958. This subsection was inserted with effect from 16 December 1999, by Part 4, Schedule 1 to the Border Protection Legislation Amendment Act 1999.
29. Ibid., p. 3.
30. Section 13 of the Migration Act 1958 contains the definition of ‘lawful non-citizen’ while section 14 contains the definition of ‘unlawful non-citizen’.

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such as Christmas Island, the Act does not require that they be detained—an officer has discretion in this regard.\textsuperscript{31}

Justice Hayne of the High Court expressed the view in \textit{Al-Kateb v Godwin} that the term ‘unlawful non-citizen’ does not refer to any breach of a law which expressly prohibited the conduct of entering or remaining in Australia without permission:

\textit{The use of the terms "lawful" and "unlawful" in the description of immigration status must, therefore, be understood as no more than a reference to whether the non-citizen had that permission. The use of those terms (and in particular the epithet "unlawful") did not refer to any breach of a law which expressly prohibited the conduct of entering or remaining in Australia without permission.}\textsuperscript{32}

Justice Merkel of the Federal Court of Australia in \textit{Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs}\textsuperscript{33} is of the view that while it may be ‘literally correct’ to describe an asylum seeker as an ‘unlawful entrant’ and an ‘unlawful non-citizen’ such terms are not a complete description of their position and conceal, rather than reveal, their lawful entitlement under international and domestic law to claim refugee status:

\textit{The Refugees Convention is a part of conventional international law that has been given legislative effect in Australia: see ss 36 and 65 of the Act. It has always been fundamental to the operation of the Refugees Convention that many applicants for refugee status will, of necessity, have left their countries of nationality unlawfully and therefore, of necessity, will have entered the country in which they seek asylum unlawfully. Jews seeking refuge from war-torn Europe, Tutsis seeking refuge from Rwanda, Kurds seeking refuge from Iraq, Hazaras seeking refuge from the Taliban in Afghanistan and many others, may also be called "unlawful non-citizens" in the countries in which they seek asylum. Such a description, however, conceals, rather than reveals, their \textit{lawful} entitlement under conventional international law since the early 1950's (which has been enacted into Australian law) to claim refugee status as persons who are "unlawfully" in the country in which the asylum application is made.}\textsuperscript{34}

The Attorney-General’s Department is of the view that ‘under the common law, there is no right for an individual to enter Australia to seek protection or asylum’. In addition, they assert ‘the High Court has expressed the view that refugees do not have a right of entry under either customary international law or the United Nations Convention Relating to the Status of Refugees (the Refugees Convention)’.\textsuperscript{35}

\textsuperscript{31}. See subsections 189(3) and (4).
\textsuperscript{32}. \textit{Al-Kateb v Godwin} [2004] 219 CLR 562, per Hayne J at 207—208.
\textsuperscript{34}. Ibid., at [61].
\textsuperscript{35}. Attorney-General’s Department (AGD), Submission to the Senate Legal and Constitutional Affairs Legislation Committee, \textit{Inquiry into the Deterring People Smuggling Bill 2011}, November 2011.

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In the time available to prepare this Digest, it is not possible to refer to all the applicable domestic and international law or explore all the arguments that surround this issue. The Government asserts that the people smuggling offences have been consistently interpreted (presumably by the Courts) in a way that accords with the amendments proposed in this Bill. Moreover, the Government argues that this Bill is simply ensuring the original intent of the Parliament is affirmed. The existence of this Bill, coupled with the context in which it was introduced, does suggest that the interpretation of the phrase is not so clear. Saul Holt from Victoria Legal Aid, and counsel for the accused Jeky Payara, pointed out to the Senate Committee inquiry:

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...I can say that I have looked back through all of the Hansard in relation to this, and the history of this phrase is regrettable unclear...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.36

Is the retrospective application of the Bill necessary and justified?

Item 2 of the Bill provides that proposed new section 2288 will apply in relation to an offence committed, or alleged to have been committed, on or after 16 December 1999 which is the date item 51 of Schedule 1 to the Border Protection Legislation Amendment Act 1999 commenced.

According to two lawyers in the office of the Australian Government Solicitor (AGS) ‘there is generally no constitutional impediment to the Commonwealth Parliament legislating retrospectively to alter the law’.37 However, they acknowledge that there are constitutional principles that limit the circumstances in which remedial or validating legislation can be enacted such as where the legislation impermissibly interferes with judicial power contrary to Chapter III of the Constitution.38 As they explain:

The separation of powers doctrine embodied in Chapter III of the Constitution prevents the Commonwealth Parliament usurping or interfering with the exercise of judicial power. Remedial legislation often has some impact on either pending, or other, court decisions and questions have arisen in a number of cases as to whether such impacts impermissibly interfere with judicial

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38. Ibid.

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power. It is now well settled that remedial legislation will not interfere with judicial power contrary to Chapter III of the Constitution simply because it affects pending litigation. 39 [Emphasis added].

In the recent case of Commonwealth Director of Public Prosecutions v Poniatowska [2011] HCA 43 (26 October 2011) Heydon J (dissenting) of the High Court observed:

It is common for the decisions of courts to be reversed by the legislature after they have been delivered. It is less common for this to take place even before they have been delivered. Yet the legislature has got its retaliation in first in relation to this appeal. 40

Though in that case, legislation was enacted with retrospective application in anticipation of the High Court’s decision, the AGS lawyers note that ‘a prospective amendment alone would not operate to prevent past convictions from being called into question’. In relation to whether the remedial legislation (the Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011) sought to validate some 15,000 existing convictions they further note:

Significantly, the effect of this retrospective application of the duty to notify is not to ‘validate’ existing convictions by deeming them to be error-free. A provision that operated in this way would likely violate the separation of powers embodied in Chapter III of the Constitution. Rather, the provision ensures that an appellate court considering a challenge to an existing conviction would find, as a matter of law, that there was an obligation on the convicted person to have acted in a certain way at the relevant time. In each case, the obligation was to notify Centrelink of a change in circumstances relevant to the receipt of a social security payment at the time the change occurred.

Thus, the retrospective application of the amendment to the Administration Act has the effect that earlier convictions remain legally effective because, as a result of the subsequent alteration of the law, no consequences would flow from an appeal against the conviction on the same basis that Ms Poniatowska succeeded. 41

While the Parliament has powers to pass legislation retrospectively, it is usual practice for governments to justify the need for retrospective operation and to ensure that the legislation does not unduly impinge on a person’s rights or responsibilities. 42 The Attorney-General’s Departmental submission to the Senate inquiry into the Bill explains the basis for the retrospection of the amendment in the following terms:

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39. Ibid.
41. B Gilmour-Walsh and S Thornton, op. cit. [Footnotes omitted].
42. See D Pearce and R Geddes, Statutory interpretation in Australia, sixth edn., LexisNexis, 2006, Chapter 10 for a comprehensive discussion of the retrospective operation of legislation. Pearce notes that the constitutional validity of retrospective legislation has been affirmed in Polyukhovich v Commonwealth [1991] 172 CLR 501, amongst others.

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Retrospective application is necessary to ensure the original intent of the Parliament is affirmed, to avoid uncertainty about the validity of previous convictions, and to maintain current prosecutions.

The effect of the retrospective application is to clarify an existing understanding of the laws, and to ensure convictions for people smuggling offences already made, as well as prosecutions underway, would not be invalidated should a court find that the absence of a specific reference to persons seeking protection or asylum means they are not intended to be the subject of the people smuggling offences. The Bill does not alter any of the elements of the existing people smuggling offences in the Migration Act.

There are exceptional circumstances that justify retrospectivity for this Bill. Those circumstances are that it would not be appropriate to risk a significant number of prosecutions being overturned as a result of a previously unidentified argument in relation to the words ‘no lawful right to come to Australia’. [Emphasis added].

The Guide to framing Commonwealth offences, infringement notices and enforcement powers produced by the Attorney-General’s Department states ‘an offence should be given retrospective effect only in rare circumstances and with strong justification’.

It further states:

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. [Emphasis added].

At the public hearing before the Senate Inquiry, Senator Humphries queried whether a distinction can be drawn between the moral culpability of crew members and organisers, even though both are caught by the same people smuggling offences (and mandatory sentencing regime) to which this amendment relates:

They [Victoria Legal Aid] 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

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43. Attorney-General’s Department (AGD), Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Deterring People Smuggling Bill 2011, op. cit.

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significant number of people convicted under these offences did not have the kind of moral culpability referred to in those guidelines.45

This Bill introduces a definition of the expression ‘no lawful right to come to Australia’, making no distinction between those with a greater or lesser degree of moral culpability for committing such offences. There is also no distinction made in the application of the mandatory minimum sentencing regime.

Crew members—‘people smugglers’ or ‘people movers’?

As explained above, this Bill will amend the offence provisions that capture people smugglers, whether they are crew members or organisers. This is an issue that has already been the subject of debate in the context of this Bill.

People smugglers have been depicted as ‘scum of the earth’ plying an ‘evil trade’ in human lives.46 During their terms as Prime Minister, both Kevin Rudd and Julia Gillard have employed similar language:

People smugglers are engaged in the world’s most evil trade and they should all rot in jail because they represent the absolute scum of the earth.47

and again:

We are also committed and will continue to be committed to working on law enforcement activities to apprehend and stop people smugglers and the evil trade that they ply.48

Others view people smugglers in a more positive light, describing them as ‘people movers’ providing a ‘humanitarian service’ to asylum seekers in circumstances where they are denied legal routes of entry.49


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A leading researcher on forced migration, Dr Khalid Koser (Lowy Institute for International Policy), asserts that in fact there is very little known about people smugglers and the people smuggling trade around the world. However, he asserts that it is typically an economic process whereby almost everybody profits, including the ‘societies and economies of the countries they go to’. Other researchers in the field are in agreement, arguing that all that is really known about people smuggling is that it is a highly profitable ‘business model’ and a central element in irregular migration globally.

Since the late 1990s, most of the asylum seekers arriving by boat in Australian waters have been brought here by people smugglers operating out of Indonesia. Over the years there have been claims that the people smuggling trade in our region is highly organised by criminal elements with links to international mafia syndicates. However, many dispute this, claiming that most of the people smuggling operations are better described as ‘fluid’ networks of entrepreneurial individuals and organisers whose connections usually include local fishers, Indonesian officials and individuals or groups in Australia.

Regardless of the truth of these claims, it is well established that the crew members arrested and charged with people smuggling offences in Australia are not typically the organisers or ‘king-pins’, but usually fishers from impoverished areas of Indonesia seeking additional income. Most are vulnerable to exploitation and many are young:

...the people most likely to be caught and prosecuted are the crew members of the unauthorised boats, not the leaders of the smuggling organisations. Those charged are generally poor, unemployed, illiterate and members of the Indonesian fishing communities around the island of

55. Ibid., pp. 119 and 125; and J Hunyor, op. cit., p. 224.

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Roti. Many are very young—chosen by the smuggler because they are likely to attract lesser penalties.56

According to defence lawyer, Mark Plunkett, only four out of about 400 people arrested over the last two years have been organisers, the rest have been ordinary crew members, many recruited from remote villages in Indonesia.57 Some are fishermen whose boats have been destroyed by Australian officials after being seized for illegally fishing in Australian waters and who no longer have a livelihood as a result.58

A number of crew members are well aware of the penalties, but are prepared to take the risk in order to provide for their families, considering the offer to be too profitable to turn down.59 Others are completely unaware of the penalties, persuaded into joining the crew as deck hands or cooks with very little notice, and either never paid or paid very little.60 It could be argued that the latter stand to profit the least from the people smuggling trade.

In an attempt to avoid incarceration, for many years escort vessels have sometimes removed most of the crew before entering Australian waters, leaving only one or two young boys on board for the remainder of the journey in the hope that they will be dealt with as juveniles and returned to Indonesia promptly.61 Occasionally all the crew are removed.62 Some argue that the adult crew members who do remain on board often claim to be less than 18 years old to avoid prosecution since those found to be minors are usually removed.63

58. Ibid. The number of foreign fishers apprehended in Australian waters has decreased markedly in the last few years due to increased enforcement and deterrence efforts by Australian officials. In 2010–11 there were 14 apprehensions, down from a peak of 367 in 2005–06. See Australian Customs and Border Protection Service, Annual report 2010–11, p. 48; and Annual report 2009–10, p. 75.
59. Ibid.
60. Ibid; and J Hunyor, op. cit., p. 224.
62. For example, on 7 November 2010 a boat was intercepted north-west of Christmas Island with 81 passengers on board, but no crew. See B O’Connor (Minister for Home Affairs and Justice), Border protection command intercepts vessel, media release, 8 November 2011, viewed 8 November 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1213703%22
63. For example see “Child” people smugglers are adults’, West Australian Online, thewest.com.au website, 30 May 2011, viewed 8 November 2011, http://au.news.yahoo.com/thewest/a/-/breaking/9539646/child-people-smugglers-are-adults/ Note: Between 2008 (when the number of irregular maritime arrivals began to increase) and mid 2010, 19 crew members deemed to be minors and 14 adult crew members were removed voluntarily; source: Department of Immigration and Citizenship (DIAC), Red Book, 2010 election, 2010, part A, item 19, attachment B, IMA key statistics.

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However, others claim that it is just as common for minors to be erroneously incarcerated in adult jails, with one media report claiming that there may be as many as forty Indonesian minors in Australian prisons, sixteen cases of which were under investigation by the Indonesian consulate. In one notorious case, two Indonesian minors aged fifteen and sixteen were released in June 2011 from a high security adult prison in Brisbane where they had been incarcerated for many months. The boys had been deemed to be adults by the Australian Federal Police (AFP) using wrist x-rays to determine age. This technique has been discredited by many experts and is not used by the Department of Immigration and Citizenship (DIAC) to determine the age of asylum seekers arriving by boat. Instead DIAC uses an interview technique to determine age. In July 2011, the Minister for Home Affairs and Justice announced that while wrist x-rays would continue to be used by the AFP, additional measures such as dental records, birth certificates and interviews would be employed to help determine the age of crew members.

On many occasions Indonesia has expressed its concern at the lengthy detention and subsequent incarceration of crew members (particularly minors) and in June 2011 the media reported that a high-level Indonesian Government delegation was due to meet with Australian Government officials to voice these and other growing concerns. As early as July 2009, the Indonesian Ambassador asserted that Australia’s treatment of Indonesian nationals apprehended in Australian waters was too harsh, stating that embassy staff had interviewed several crew members on Christmas Island and in the Perth immigration detention centre (presumably while they waited to be processed by the AFP) most of whom were fishermen who claimed to have no knowledge of the true purpose of their voyage.

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68. R McClelland (Attorney General) and B O'Connor (Minister for Home Affairs and Justice), Improved process for age determination in people smuggling matters, media release, 8 July 2011, viewed 8 November 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2F906838%22


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voyage.  

According to media reports the Indonesian Consulate continues to be very concerned and has appointed barrister Mark Plunkett to investigate the cases of about fifty Indonesian nationals being held in adult jails around Australia. It is alleged that most of these prisoners are minors and some may also have been subjected to sexual and other physical abuse.

Prosecution and sentencing of people smugglers

As at 23 February 2011, there were 161 crew members in immigration detention facilities under investigation for possible prosecution for people smuggling offences. Over the last three calendar years, 493 people have been arrested for people smuggling related offences (as at 18 October 2011). The vast majority of these arrests have related to ventures undertaken prior to the mandatory sentencing regime that came into operation in 2010 (discussed below). Also, of these arrests only ten have been what are termed people-smuggling organisers. As at 18 October 2011, the AFP had seven extraditions of suspected people smugglers on foot— that is people arrested overseas who the AFP are trying to extradite to Australia.

According to the Commonwealth Director of Public Prosecutions (DPP), there were 30 people smuggling prosecutions involving organisers, captain and crew before the courts as at 30 June 2009. A year later (as at 30 June 2010) there were 102 people smuggling prosecutions underway. By 30 June 2011 this figure had tripled to 304.

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72. Ibid.
75. Ibid.

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During the period 1 January 2009 to 18 October 2011, a total of 170 crew members and four organisers had been convicted of people smuggling related offences.\(^78\) While as at 25 February 2010, only one people smuggling organiser had been convicted, one year later (as at 23 February 2011) five had been convicted.\(^79\) As at 15 March 2011, no organisers had been charged under the new people smuggling offence provisions in the Migration Act requiring mandatory minimum sentencing.

On 31 May 2010, the *Anti–People Smuggling and Other Measures Act 2010* came into operation.\(^80\) Of most direct relevance, it introduced a new aggravated offence in the Migration Act for people smuggling involving exploitation or danger of death or serious harm (section 233B) and extended the application of higher mandatory minimum penalties to this new offence and to persons who were convicted of multiple aggravated people-smuggling offences in the same hearing. Prior to this amendment, the higher mandatory minimum penalty for repeat offenders only applied where a person had a previous people-smuggling *conviction*, not where a people smuggler had organised numerous ventures over a period of time.

This Act also inserted into the Migration Act section 233C, which provides for the aggravated offence of people smuggling involving at least five people. This offence carries a penalty of imprisonment for a maximum of 20 years or a fine of $220,000 or both, though mandatory minimum penalty provisions explained above also apply. This offence was simply a remodel of previous section 232A which was titled ‘Organising bringing groups of non-citizens into Australia’. As at 15 March 2011, 44 crew members had been arrested and charged under new section 233C of the Migration Act.\(^81\) Those convicted, will face a mandatory *minimum* penalty of five years imprisonment with three years non-parole period.\(^82\)

**Sentencing concerns**

Once again, issues involving sentencing have arisen in the context of the Bill because the amendments affect the operation of offence provisions which are subject to the mandatory minimum sentencing regime in the Act. As noted by submitters to the Senate inquiry and the media more broadly, trial judges have been speaking out about the injustice of the mandatory sentencing

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82. Section 236B of the Migration Act. A person convicted of multiple offences in the same proceeding will be subject to the higher mandatory minimum penalties of eight years imprisonment with a non-parole period of five years.

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Deterring People Smuggling Bill 2011

To this end, it is perhaps relevant to note the recent sentencing remarks of Justice Blokland of the Supreme Court of the Northern Territory when sentencing 27 year old Mr Mahendra to five years imprisonment for people smuggling under section 233C of the Migration Act:

In my view, a sentence proportionate to the criminality would have been, consistent with general sentencing practice, approximately one year to 18 months imprisonment. I am unable to make such an order. Around one year to 18 months would be deserved, and necessary to meet the deterrent ends of sentencing. I acknowledge, also, that Mr Mahendra, although at a lower end offender, this last leg of any voyage between Indonesia and Australia is a vital part of the operation.

I fully acknowledge the need for general deterrence, however deterring of poor, uneducated fishermen in Indonesia has not been achieved by mandatory sentences, and at the same time has removed judicial discretion to pass proportionate sentences. Other members of this court have made similar observations. It is important people be deterred from committing this offence, particularly because of the safety issues to all persons, and the understandable concern in the community about that. Unfortunately, the five year sentence I am obliged to impose has an arbitrary element to it, as does most forms of mandatory imprisonment.

Australia is a party to the international covenant on civil and political rights. Article 9.1, in part states that no-one shall be subjected to arbitrary arrest or detention. Assigning a five year sentence of imprisonment, without judicial consideration of the gravity of the offence, in terms of the circumstances of the offending and the offender may, in my view, amount to arbitrary detention. In the usual sense it is understood, it must be arbitrary because it is not a sentence that is a proportional sentence. The court is deprived of the usual function to assess the gravity and, therefore, be able to pass a proportionate sentence...

It is of concern, the sentence that I am about to pass in this case may amount to a contravention of some of the most fundamental and widely accepted principles of international justice. In relation to this particular accused, because I am unable to pass a proportional sentence, but rather am forced to sentence on the arbitrary term of five years, I do request the Federal Minister for Justice and Home Affairs to review this sentence in the light of well accepted sentencing principles and international principles, and consider Mr Mahendra for release in exercise of the prerogative of mercy. I note her Honour Kelly J requested similar action in relation to another offender.84 [Emphasis added].

83. See for instance: The Queen v Tahir and Beny, unreported, Supreme Court of the Northern Territory, Milden J; M Dillon, ‘Warning on smuggler sentence’, NT News, 2 September 2011.

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Concluding comments

As this Bill has bi-partisan support, it is likely to be passed by the Senate without delay. Though this Bill simply makes a technical amendment—its impact will not be insignificant. Not only will it secure the people smuggling convictions that have been recorded since 1999 (precise number unknown), it will likely render moot the hearing in the Victorian Court of Appeal in the test case being run by Victoria Legal Aid, and potentially incorporate a declaratory statement in the Migration Act that asylum seekers and others seeking protection, have no lawful right to come to Australia irrespective of whether Australia owes them protection obligations or not.

It is perhaps understandable that the Government does not want to wait until the judiciary determines this question of law. Perhaps there is a real likelihood that a court will depart from the current understanding of the offence provisions—which the Government alleged the High Court recently did with respect to section 198A of the Migration Act (the basis upon which it was to transfer asylum seekers to Malaysia under the ‘Malaysia Arrangement’).

Perhaps the debate surrounding this Bill serves to highlight the need for an inquiry into the operation of the people smuggling offences and the effectiveness of the mandatory sentencing regime that is relied on to deter people smuggling in the region. A need which is arguably highlighted by the impassioned remarks of solicitors defending people smugglers and the trial judges tasked with sentencing them.

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