



MONASH University
Castan Centre for Human Rights Law



Castan Centre for Human Rights Law

Monash University

Melbourne

**Submission to Senate Legal and Constitutional Affairs
Committee**

Inquiry into Deterring People Smuggling Bill 2011

9 November 2011

Prepared by Adam Fletcher

The Castan Centre thanks the Committee for the opportunity to comment on the Detering People Smuggling Bill 2011 (the Bill).

In summary, the Centre believes the Bill is contrary to Australia's international obligations and its retrospective commencement represents an inappropriate interference with ongoing criminal law matters. It should not be passed.

International Law and People-Smuggling

The Bill may have the effect of deterring the smuggling of migrants, as prohibited by the *Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention on Transnational Organized Crime* (the Protocol), but it will also have the effect of deterring asylum-seeking, which is specifically excluded from the operation of this Protocol under article 19(1).¹

Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

The Explanatory Memorandum states that the existing offences are consistent with Australia's obligations under the Protocol, and claims that the offences as amended "do not affect the rights of individuals seeking protection or asylum in Australia. They also do not affect Australia's international obligations in respect of those persons."

Yet vessels operated by people smugglers have, over the past 13 years, transported thousands of people to Australia, the majority of whom have subsequently been found to be genuine refugees (up to 98% in the case of certain nationalities).² Therefore, deterrence of people smugglers clearly has the knock-on effect of deterring asylum seekers, who presently have a right under both international and Australian law to seek asylum here.

Retrospectivity

Item 2 of the Bill provides that the amendments, if passed, will have effect from 16 December 1999 (when the phrase 'lawful right to come to Australia' was inserted into the Migration Act). Section 228B(1) is said to constitute a mere 'clarification' of existing people smuggling offences. The Explanatory Memorandum states that "[t]he 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." This statement implies that the retrospective clarification is wholly unnecessary, in which case the Bill is redundant. Therefore, if they achieve anything, the amendments in the Bill are arguably more in the nature of an enlargement of the people smuggling offences than a clarification.

¹ In this respect, we refer the Committee's attention to the arguments in the submission of Professor Ben Saul.

² See: *Asylum seekers and refugees: what are the facts?* Parliamentary Library Background Note, updated 22 July 2011, available at: <<http://www.aph.gov.au/library/pubs/bn/sp/AsylumFacts.pdf>> 8-10.

Retrospective laws are *prima facie* contrary to the doctrine of the rule of law because they prevent people from ascertaining their rights and duties at law at a particular time.³ The Commonwealth's own Legislation Handbook makes it clear that "[p]rovisions that have a retrospective operation adversely affecting rights or imposing liabilities are to be included only in exceptional circumstances."⁴ This principle is also reflected in article 15 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, which requires that the criminal law be applied as it stood when the offence was committed with only the narrowest of exceptions.⁵

In *Polyukhovich v The Queen*,⁶ the High Court considered one of these exceptional cases (legislation introduced in 1988 which retrospectively criminalised war crimes in World War II in Europe under Australian law). Deane J considered that retrospective criminalisation was inconsistent with Chapter III of the Constitution, since it is the exclusive preserve of the judiciary to determine criminal guilt according to the law.⁷ Gaudron J concurred, finding the law to be a 'usurpation of judicial power.'⁸ Toohey J agreed in principle, but contended that there could be exceptions for 'extremely grave' transgressions (such as war crimes).⁹ It may be noted that three Judges (Mason CJ, Dawson and McHugh JJ) in *Polyukhovich* found that the Commonwealth does have the power to enact retrospective criminal laws, while Brennan J did not decide on the matter. Therefore, the court split 3:3 on the matter, with Toohey J applying an exception which is probably not relevant to the law under consideration here.¹⁰

Unlike the law in question in *Polyukhovich*, the present Bill does not create any new offence. However, it is arguable that it retrospectively enlarges an offence by removing a potential defence. The law may render an act – namely the unauthorised transportation of asylum-seekers (as opposed to other migrants) – criminal retrospectively and pre-empt findings of the courts in ongoing prosecutions.

The case of *Nicholas v The Queen*¹¹ is also relevant. In that case, Brennan CJ stated that "[a] law that purports to direct the manner in which the judicial power should be exercised is constitutionally invalid."¹² The courts are presently engaged in the process of interpreting the phrase 'lawful right to come to Australia,' and the Bill arguably purports to direct the manner in which they should go about this. Gaudron, McHugh and Kirby JJ, while reaching different conclusions on the facts in *Nicholas*, all agreed with Brennan CJ that such interference with the operation of the courts is impermissible.

³ See Joseph and Castan, *Federal Constitutional Law – A Contemporary View*, 3rd Ed, Thomson Reuters 2010, 231.

⁴ *Legislation Handbook*, Australian Government Department of Prime Minister and Cabinet, available at: <http://www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf> [6.18].

⁵ See eg Opsahl and de Zayas, 'The Uncertain Scope of Article 15(1) of the International Covenant on Civil and Political Rights' [1983] *Canadian Human Rights Yearbook* 237, 244-245.

⁶ [1991] HCA 32

⁷ *Ibid*, [59].

⁸ *Ibid*, [41].

⁹ *Ibid*, [108].

¹⁰ A majority of 4 judges (Mason CJ, Dawson, McHugh, Toohey JJ) to 3 (Brennan, Deane, Gaudron JJ) found the law to be valid.

¹¹ [1998] HCA 9.

¹² *Ibid*, [20].

If there were any doubt about the intention to intervene in the judicial process, the Bill provides specifically in item 2(2)(b) of Schedule 1 that the amendments are to apply to proceedings in train (including appeals). In the relevant cases/appeals, the issue of refugees' and asylum-seekers' 'lawful right to come to Australia' has been raised in defence of accused people smugglers.¹³ Under ss 233A, B or C of the Migration Act, these accused persons face penalties of up to 10 or 20 years' imprisonment. Since the Bill would effectively decide the issue raised by the defence in these cases, it clearly has the potential to affect the defendants' liberty seriously. In the context of both the presumption against retrospectivity and the doctrine of separation of powers, these amendments constitute dubious law which may well be constitutionally invalid.

The Law Council of Australia and Law Institute of Victoria have reached similar conclusions in relation to the Bill.¹⁴

Conclusion

The Centre urges the Committee to recommend the Bill be withdrawn, or at the very least that it be amended so that it does not apply retrospectively.

¹³ See eg: 'Lawyer throws down challenge in people smuggler case,' *Sydney Morning Herald*, 4 October 2011, available at: <<http://www.smh.com.au/national/lawyer-throws-down-challenge-in-people-smuggler-case-20111003-1I5e1.html>>.

¹⁴ See media release *Law Council and LIV Concerned at Legislative Rush on People Smuggler*, 3 November 2011, available at: <<http://www.lawcouncil.asn.au/media/news-article.cfm?article=66B771CE-09D6-DDB2-C839-65A0D1B84FE7>>.