

15 November 2011

Senator Trish Crossin
Chair
Senate Standing Committee on Legal and Constitutional Affairs
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Dear Senator Crossin

Deterring People Smuggling Bill 2011

Thank you for the opportunity to give evidence on the Deterring People Smuggling Bill 2011 (the Bill) at the public hearing on 11 November 2011. I understand the Committee is required to provide advice to the Senate on the merits of the Bill by 21 November 2011 and I offer the following in support of that exercise.

Moral culpability needed

Boat crew are expendable. They are meant to get caught for the 'people smugglers business model' depends on it and the consequences for Boat crew and their families are devastating. If you accept our submissions that the majority of Indonesian boat crew caught by these laws are misled into transporting asylum seekers to Australia, then it follows as a matter of logic, that the Bill fails the relevant test of 'moral culpability' needed to justify the operation of retrospective criminal laws.

Legislative interference with the rule of law

It wholly undesirable for the Parliament to pass legislation designed to avoid the Australian Government (and its agencies) having to appear in Court. In fact, this behaviour would be criticised, if it were to occur elsewhere. If it is acceptable practise for this Parliament where will it stop and what checks and balances will exist to prevent more serious abuse in the future. It is not enough to say that the Parliament is clarifying its original intent for that is unarguably a role for the Courts. The composition of the Parliament has also changed with 96 new members elected to the House of Representatives and 55 to the Senate since 1999; when the laws were said to first have their "intended effect", a change of 64% and 72% respectively.

The price of failure

It is economically irresponsible to prosecute all Boat crew with these offences regardless of their circumstances. It doesn't deter 'true organisers' and the detention costs alone of 300 Boat crew serving 3-year non parole jail terms, approximates \$100 million. If the laws are to remain then prosecuting only those crew who are known to be complicit and have transported asylum seekers more than once would better express what is to be achieved.

It would avoid the human suffering perpetuated on boat crew and their families; who offend the law as it is currently being applied, but who bear little or no moral culpability for the offence itself because of the way they are recruited. It would also enable savings on the cost of imprisonment to be reinvested in additional investigative capabilities to bring more 'true organisers' to justice.

The use of language

The use of blanket phrases to demonise all people smugglers along with the unsophisticated nature of the aggravated people smuggling offence, together with mandatory sentences; does little to distinguish between the various roles people play in facilitating the movement of asylum seekers, and the degree of criminality attached to each. This 'dumbing down' of criminal law and the failure to distinguish between components of the 'people smuggling trade' does not assist fair judicial processes, nor does it enhance community understanding or confidence in the policy and legislative responses being implemented to quell the people smuggling trade.

Question on notice

I took a question on notice from Senator Hanson-Young who asked whether the fact that the Bill was introduced in response to a Court case, in which the Commonwealth is a party, may open up further opportunities for legal challenge. The answer to that question is that is highly unlikely that the fact of the Commonwealth being a party to the proceedings would itself lead to a constitutional challenge to the Bill. Possible areas of constitutional challenge were referred to by Professor Joseph in evidence to the Committee. They were a challenge to retrospectivity on the basis that it is unconstitutional or a challenge on the basis that the Bill essentially directs a court how it must decide a specific case before it. I confirm that VLA has not determined whether either or both of those issues will be taken further.

Yours faithfully

BEVAN WARNER
Managing Director