

**Submission of the  
New South Wales Young Lawyers Human Rights Committee**

**To the Joint Standing Committee on Treaties:**

**Inquiry into the Protocol against the Smuggling of Migrants by  
Land, Sea and Air, Supplementing the United Nations  
Convention against Transnational Organised Crime**

20 February 2004

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The Secretariat  
 Joint Standing Committee on Treaties  
 Canberra ACT 2600  
 AUSTRALIA

20 February 2004

Dear Committee Members,

**Inquiry into the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime ('the Protocol').**

The Human Rights Committee of NSW Young Lawyers (**YLHRC**) is a group of young lawyers and law students who are concerned with a range of human rights issues in both Australia and abroad.

We are grateful for the opportunity to make submissions to the Committee. We have explored the aims and goals of the Protocol as well as steps already taken by the Australian government to incorporate the provisions of the Protocol into Australian law.

**1. Introduction**

The Australian government has made much of our perceived problem with people smuggling in the past, so it is pleasing to the YLHRC to see that we are moving closer to ratifying the only international instrument that attempts to comprehensively deal with the issue.

Since it was opened for signing in December 2000, more than 40 nations have ratified the Protocol. This means that the Protocol came into force on 28 January 2004 so it is imperative for Australia to ratify it and keep pace with other state parties.

This Protocol is not innovative in the sense that it provides a succinct encapsulation of policies enacted globally to fight people smuggling. Therefore, the incorporation of the Protocol into Australian law should not be an onerous undertaking. However, it completes one very important task - it seeks to reconcile key human rights norms with the criminalisation of the practice.

**2. Analysis of key provisions of the Protocol**

- 2.1 The preamble to the Protocol encompasses its mandate - transnational groups are smuggling migrants, people are being endangered by the practice, and thus we need an international instrument that "addresses all aspects of smuggling of migrants and other related instruments"<sup>1</sup>. It is interesting to note that a concern not raised here is the notion of border integrity and its compromise by people smuggling activities, an idea often raised by politicians. This Protocol seems to focus on the criminal nature of people smuggling activities and targets the organised crime groups that perpetuate the practice.

<sup>1</sup> Preamble to the Protocol against the smuggling of migrants by Land, Sea and Air

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In this respect the YLHRC sincerely hopes that in ratifying this Protocol, that the Australian government will seriously address all aspects of the Protocol

- 2.2 Article 6 concerns criminalisation of people smuggling and particularises the offence in a way that most countries have already done. By virtue of Article 1, this creates an offence under the UN Convention Against Transnational Organised Crime.

The YLHRC notes that Australia has already taken steps to satisfy this article by creating criminal offence under our laws. Indeed, the YLHRC understands that successful prosecutions have already occurred.

- 2.3 Article 8 is interesting in that it covers smuggling by sea and is therefore highly relevant to Australia. Article 8 provides, in general terms, that nothing shall be done without the authorisation of the flag state of a vessel in question. Once this is obtained then a State can board, search, and if necessary, deal with the people aboard the vessel under domestic laws.

The YLHRC hopes that this article will be upheld by Australia, noting, of course, that the flag state of a ship may not always reflect the nationality of its passengers. The YLHRC feels that this article is integral in fulfilling the other aspects of the Protocol regarding international co-operation, the discussion of which follows. If Australia consults and seeks authorisation from flag states, then arguably there will be better channels through which Australia can co-operate with transit states to end people smuggling.

The importance of this article extends further to ensuring that, together with article 16, there is a specific framework for dealing with suspected illegal entry vessels whose passengers may be in danger. It in fact clarifies the previously grey area covered by the UN Convention on the Law of the Sea.

- 2.4 Articles 10 and 14 outline co-operation between state parties through information exchange, both in terms of counter mechanisms and other technical co-operation and training. In one sense though, Article 14, which provides for training of smaller state parties by larger, is already being done, as we see Australia taking an active trainer role in the region.

Article 17, encourages further bilateral and regional arrangements to complement its provisions, in recognition of the need for a strong regional approach.

These articles are particularly relevant to recent initiatives of Australia in the region, where we have established taskforces with ASEAN nations to tackle people smuggling. These provisions will provide a framework for such initiatives to operate in.

- 2.5 Article 15 addresses the socio-economic aspects of people smuggling and asks state parties to strengthen information programmes to increase public awareness of the criminal nature of people smuggling and the impact upon its victims. It further obliges state parties to develop programmes to tackle the socio-economic causes of people smuggling.

Arguably this article asks the Australian government to better inform the Australian public about the victims of people smuggling, which runs contrary to past practices where victims of people smuggling have been demonised. The Australian government

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would therefore, if it were to uphold its obligations, need to increase its awareness campaigns into people smuggling to make them more balanced and cover the victim aspect of the practice.

2.6 Article 16 looks specifically at the rights of people who have been smuggled, and calls upon state parties to take measures to ensure such rights, including legislative safeguards. In doing so, the article imposes an obligation on state parties to afford assistance to migrants whose lives are in danger. This could therefore mean that should another Tampa or Siev X situation arise, then Australia would be obliged to offer them assistance rather than simply towing them outside our migration zone.

2.7 Article 19 states:

"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 YLHRC sees this as an important inclusion as it reminds state parties that whilst they must punish those who organise people smuggling, there are also victims who have often been forced to endure horrendous circumstances. Significantly, the article makes reference to obligations under the Refugee convention, and its principle of not sending people who fear persecution back to a dangerous situation.

### 3. Conclusions

The cumulative effect of the articles of this Protocol will be to provide a framework for our international initiatives. In addition given that very few of Australia's regional neighbours, that are the usual staging points for smuggling operations, have signed the Protocol, we would hope that Australia would advocate the signing and ratifying of this Protocol in the region.

Whilst noting that changes would need to be made to current government policy and practice, the YLHRC urges the Australian government to ratify the Protocol. Notwithstanding that we already comply with the more significant articles - namely article 6 - it is equally as important that we take active steps to address obligations contained in the other articles. IN this respect, we sincerely hope that Australia does not express any reservations to the Protocol, but rather adopts the entire instrument.

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