

## **Additional Comments by the Australian Democrats**

1.1 Whilst I am broadly supportive of the views expressed by the majority of the Committee, I am concerned about the fairness of applying strict liability in the circumstances proposed in this Bill. It is also an extremely broad provision without any safeguards or protection for people who may be asylum seekers. This issue was raised by a number of submitters in hearings under the predecessor Bill and I am concerned that these have again been ignored in the current Bill.

1.2 The broad nature of the provision is worrying because it does not distinguish between the operator of the boat including its crew and that of potential asylum seekers fleeing persecution. DIMA has specifically refused to address this issue citing that it will lead to unjustified claims for asylum. DIMA has also specifically stated that the provisions are not designed to have a disproportionate impact on asylum seekers citing that the decision to prosecute an individual under these provisions will be determined on a case by case basis. This may sound reasonable in theory. However, since the Committee first considered a similar provision four years ago, we have had the opportunity to see how fairly the government administers provisions relating to allegations of people smuggling, particularly when it involves asylum seekers.

1.3 The facts show that genuine refugees have been subjected to separation from families and jailing as a direct result of the approach of the Federal Government. Commitments given by the government in Parliament that people smuggling provisions would not affect genuine asylum seekers and refugees and would only target those who profiteer from people smuggling have been shown to be false.

1.4 An example of this<sup>1</sup> is the treatment involved in the arrival of 53 Vietnamese asylum seekers who arrived at Port Headland on 1 July 2003, aboard the vessel Hao Kiet. The man who owned and skippered the boat was Mr Van Tol Tran, a fisherman from southern Vietnam, who was accompanied by his wife and two teenage children and the 49 other asylum seekers. Also on board was Mr Hao Van Nguyen, an Australian citizen who was a relative of some of the asylum seekers.

1.5 Mr Nguyen was charged with people smuggling in a complaint sworn on the 3 July 2003, even though there was no evidence that he had financially benefited from assisting the asylum seekers to flee.

1.6 On the 25th August 2003 charges were brought against Mr Tran and his relative, Mr Lai and they were transferred from Christmas Island to Hakea prison in Western Australia as a remand prisoner. Mr Lai was separated from his young son and Mr Tran from his wife and children. On the 17 March 2004, Tol Van Tran was

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1 Excerpts taken from Ms Kaye Bernard's submission No 169, Senate Legal and Constitutional Committees Inquiry into the Operation and Administration of the Migration Act 1958.

convicted of one count of 'facilitating' the bringing to Australia of a group of persons pursuant to Section 232A of the Migration Act 1958 ('the Act'). Mr Tran was subsequently sentenced to the minimum mandatory term of 5 years imprisonment, eligible for parole after 3 years, pursuant to section 233C(2) and (3) of the Act.

1.7 The sentencing comments by the Judge said:

"This group are now caught in the mandatory sentencing regime put in place to protect Australia from organised gangs involved in people smuggling for base motives of greed. I raise these matters because of my belief that this case may be one where the Commonwealth Executive will need to intervene, relying on the prerogative of mercy, to alleviate the harshness of the mandatory sentencing regime that I am required to apply."

"I would have considered imposing a sentence of three years with the possibility of a suspended sentence because of the time already spent in custody. I now have to sentence you to five years with a minimum of three years. (It may be) the mandatory sentence is too severe in all the circumstances in this case."

1.8 Crown Prosecutor at the original trial: Mr Hilton Dembo said:

"The venture was not for profit ie contrary to the spirit of the second reading speech which indicated that the section was enacted inter alia to stop those involved in people smuggling for profit"

1.9 After serving part of that sentence at Acacia prison in Western Australia, Mr Tran's conviction was quashed on appeal in the Perth Supreme Court of Appeals on the 22 March 2005 and a retrial ordered for October 2005 in the Perth District Court.

1.10 Mr Tran had a successful bail hearing on the 17 June 2005 and was released into the detention supervision of the Immigration Department on the 18 June 2005 and reunited with his family. Mr Tran's application was subject to a favourable decision at the Refugee Review Tribunal in June 2005 and was considered a person to whom Australia has protection obligations under the Refugees Convention. Mr Tran and his family were all finally released from detention on Temporary Protection Visas.

1.11 It is appropriate to note that in the second reading speech to the Migration Legislation Bill (No.1) which created the penalty for the offence, commonly known as 'people smuggling', provided for in s 232A of the Migration Act, the then Parliamentary Secretary, Mr Slipper specifically stressed that<sup>2</sup>:

**"...Refugees are not at risk from these provisions. This is because the refugees Convention to which Australia is a party, provides that refugees are not to be subjected to penalties on account of their illegal entry of presence in the country of first refuge."**

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2 House of Representatives Hansard, 30 June, 1999 page 7992

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**"I want to make it clear that this legislation is primarily aimed at the profiteers from people trafficking who organise individuals or groups to enter Australia illegally or for a fee"**

1.12 There are other cases<sup>3</sup> where refugee men who arrived on boats seeking asylum were convicted of people smuggling, and despite being assessed as refugees by Australia, DIMIA put up the people smuggling convictions as 'character barriers' as an obstacle for the men being issued with protection visas. Appeals to the AAT (Administrative Appeals Tribunal) by the refugee men were successful and the Department's decisions overturned.

1.13 As mentioned above in the Judge's comments in sentencing Mr Tran, Section 233C of the Migration Act, now contains mandatory sentencing provisions which apply in relation to people smuggling offences under Sections 233A and 233B. The mandatory sentencing provisions were contained in amongst the seven pieces of legislation guillotined through the Senate on 26th September, 2001 in the wake of Tampa incident and on the eve of the 2001 federal election.

1.14 These provisions were not justified at the time, and became law only due to the heated political climate of the time. Since then, we have the example of Mr Tran and Mr Nguyen being charged for offences when neither were profiteering in any way, and Mr Tran was clearly a bona fide asylum seeker. This has shown that mandatory sentencing provisions can produce patently unjust outcomes.

1.15 The Senate should take the opportunity presented by this legislation to repeal the mandatory sentencing provisions contained in Section 233C. For similar reasons, the Senate should not agree to introducing strict liability

**Senator Andrew Bartlett**

**Australian Democrats**

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3 SRBBBB and Minister for Immigration and Multicultural and Indigenous Affairs [2003] AATA 1066 (24 October 2003) and SRCCCC and Minister for Immigration and Multicultural and Indigenous Affairs [2004] AATA 315 (26 March 2004)