The Senate

# Standing Committee on Legal and Constitutional Affairs

## Migration Amendment (Visa Integrity) Bill 2006

September 2006

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# ABBREVIATIONS

| | |
|---|---|
| 2002 Report | Senate Legal and Constitutional Legislation Committee, *Provisions of the Migration Legislation Amendment Bill (No. 1) 2002*, June 2002. |
| ALHR | Australian Lawyers for Human Rights |
| Amnesty | Amnesty International Australia |
| Bill | Migration Amendment (Visa Integrity) Bill 2006 |
| Bills Digest | S Harris Rimmer, 'Migration Amendment (Visa Integrity) Bill 2006', Parliamentary Library Bills Digest No. 2, 26 July 2006 |
| Department | Department of Immigration and Multicultural Affairs |
| EM | Explanatory Memorandum |
| Migration Act | *Migration Act 1958* |

# RECOMMENDATIONS

**Recommendation 1**

**3.21 The committee recommends that subsection 48(3) of the Bill be amended to include a statement that section 48 applies only to onshore visa applications.**

**Recommendation 2**

**3.23 Subject to the above recommendation, the committee recommends that the Senate pass the Bill.**

# CHAPTER 1

# INTRODUCTION

## Background

1.1 On 9 August 2006, the Senate referred the provisions of the Migration Amendment (Visa Integrity) Bill 2006 to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 11 September 2006.

1.2 The Migration Amendment (Visa Integrity) Bill 2006 proposes to amend the *Migration Act 1958* to:

- provide certainty in relation to the immigration clearance and immigration status of non-citizen children born in Australia;
- harmonise certain offence provisions with the Criminal Code;
- amend section 269 to ensure that a security may be imposed for compliance with visa conditions before grant; and
- clarify certain provisions in relation to Bridging Visas to:
    - ensure that a person who leaves and re-enters Australia on a Bridging Visa B cannot avoid the provisions of section 48; and
    - ensure that a Bridging Visa which ceases when an event occurs will cease the moment the event occurs rather than at the end of that day.[1]

1.3 The Bill revives some of the provisions of the Migration Legislation Amendment Bill (No. 1) 2002 (see Schedules 1, 2, 5 and 6 of that Bill), on which the committee has previously reported.[2]

## Conduct of the inquiry

1.4 The committee advertised the inquiry in *The Australian* newspaper on 16 and 30 August 2006, and invited submissions by 21 August 2006. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to 10 organisations and individuals.

1.5 The committee received 4 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

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1 Explanatory memorandum, p. 2.

2 Senate Legal and Constitutional Legislation Committee, *Provisions of the Migration Legislation Amendment Bill (No. 1) 2002*, June 2002 (2002 Report). Available at: http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/migration_no1/report/report.pdf.

## Acknowledgement

1.6 The committee thanks those organisations and individuals who made submissions.

## Note on references

1.7 References in this report are to individual submissions as received by the committee, not to a bound volume.

# CHAPTER 2

# OVERVIEW OF THE BILL

## Main Provisions

### *Schedule 1 - Immigration clearance of child born in Australia to non-citizen parents*

2.1 Section 172 of the *Migration Act 1958* (Migration Act) indicates several ways in which a non-citizen can be immigration cleared and be lawfully free to move about in the Australian community. First, he or she enters Australia with a visa at a port, provides any required information to the clearance officer and, not being in immigration detention, leaves with the permission of that officer. Secondly, he or she enters Australia otherwise than at a port but with a visa, provides any required information to the clearance officer at a prescribed place and, not being in immigration detention, leaves with the permission of that officer. Thirdly, he or she is refused, or bypasses, immigration clearance and is subsequently granted a substantive visa.[1]

2.2 Section 10 of the Migration Act provides that a non-citizen child born in the migration zone is taken to have entered Australia when he or she was born. Theoretically, this means that the child should have been immigration cleared at birth if he or she is to be left free in the community. The amendment in item 1 of Schedule 1 inserts a new provision, paragraph 172(1)(ba), which provides that such a child is immigration cleared if a parent was immigration cleared on last entry into Australia.[2]

2.3 Section 173 of the Migration Act provides that if the holder of a visa enters Australia in a way that contravenes section 43 of the Migration Act, the visa ceases to be in effect. Section 43 provides that visa holders must enter at a port or on a pre-cleared flight.[3]

2.4 Under section 78 of the Migration Act, a non-citizen child born in Australia is taken to have been granted a visa if, at the time of his or her birth, at least one of the child's parents holds a visa. This non-citizen child is taken to have been granted the same visa as his or her parents. On a literal interpretation of section 173, a non-citizen child's visa taken to have been granted under section 78 would *appear* to cease when the child enters Australia under section 10 in a way that 'contravenes' section 43 (i.e. by birth).[4]

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1 2002 Report, p. 2.

2 2002 Report, p. 2.

3 EM, p. 5.

4 EM, p. 5.

2.5 Item 5 of Schedule 1 inserts a new subsection 173(2) that puts it beyond doubt that a non-citizen child born in Australia who, under section 78, is taken to have been granted a visa or visas at the time of his or her birth, is not to be taken to have entered Australia in a way that contravenes section 43 of the Migration Act such that the visa taken to have been granted at birth ceases to be in effect at the same time.[5]

2.6 Items 1 and 5 of Schedule 1 apply to non-citizen children born in Australia on or after 1 September 1994 (see items 2 and 6 of Schedule 1). This date corresponds with the amendments to the Migration Act by the *Migration Reform Act 1992*, which introduced:

- the concept of 'immigration clearance' into the Migration Act; and
- the provisions relating to the cessation of visas where the holder fails to enter Australia at a port or on a pre-cleared flight.

***Schedule 2 – Criminal Code harmonisation amendments***

*People smuggling offences in sections 229(1), 232(1B) and 232A(2): a reversed onus of proof*

2.7 The Migration Act contains various offences relating to the 'unlawful' entry of non-citizens into Australia. Whilst it is not an offence for a non-citizen to arrive in Australia without a visa, it is an offence for a person to be involved in bringing such non-citizens to Australia.[6] Sections 229, 232 and 232A create various offences in relation to people smuggling.

2.8 Currently, subsection 229(1) of the Migration Act makes it an offence for the master, owner, agent, charterer and operator of a vessel to bring a non-citizen into Australia unless the non-citizen, when entering Australia, satisfies paragraphs 229(1)(a), (b), (c), (d) or (e).[7] Defences to the offence are set out in subsection 229(5).

2.9 The current wording of the offence in section 229 makes it unclear as to whether the matters in paragraphs 229(1)(a) to (e) constitute issues of *exception* to the offence or are *elements* of the offence. The Explanatory Memorandum states that there are two reasons why paragraphs 229(1)(a)-(e) should be considered elements of the offence:

> The existence of the defences in subsection 229(5) implies that the matters in paragraphs 229(1)(a) to (e) are not intended to be exceptions to the offence in subsection 229(1). If those matters were exceptions, they would co-exist with the defences in subsection 229(5), for which the defendant would bear a legal burden. If that were the case, it would be unlikely that a

5 EM, p. 5.

6 S. Harris Rimmer, 'Migration Amendment (Visa Integrity) Bill 2006', Parliamentary Library, Bills Digest No. 2, 26 July 2006 (Bills Digest), p. 7.

7 EM, p. 6.

> defendant would raise the matters in subsection 229(5) because they impose a legal burden (rather than an evidential burden) on the defendant.
>
> If the matters in paragraphs 229(1)(a) to (e) were matters of exception, the subsection 229(1) absolute liability offence would be a very wide offence. This is not intended to be the case.[8]

2.10 For these reasons, items 1 and 2 of Schedule 2 amend subsection 229(1) to clarify that the matters in paragraphs 229(1)(a) to (e) are *elements* of the offence in subsection 229(1).[9]

2.11 An element of each of the offences set out in sections 229, 232 and 232A is that the non-citizen who is being brought into Australia must be a person to whom subsection 42(1) of the Migration Act applies. Subsection 42(1) provides that a person must not travel to Australia without a visa that is in effect. Exceptions to subsection 42(1) are set out in subsections 42(2), 42(2A) and regulations made under subsection 42(3).

2.12 Items 3, 4 and 6 of Schedule 2 make it clear that, in relation to the offences in sections 229(1), 232 and 232A, the defendant bears the evidential burden if establishing that subsection 42(1) does not apply by virtue of the exemptions in subsections 42(2), 42(2A) or regulations made under subsection 42(3).

*People smuggling offence in s 233(1)(a) – strict liability*

2.13 Existing paragraph 233(1)(a) of the Migration Act establishes another people smuggling offence, making it an offence to 'take any part' in 'the bringing or coming to Australia of a non-citizen under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of this Act.' The penalty for contravening this provision is imprisonment for 10 years or 1000 penalty units, or both.[10]

2.14 Item 7 of Schedule 2 inserts proposed subsection 233(1A), to make it clear that *strict liability* applies to this offence. Strict liability under section 6.1 of the Criminal Code means that (a) there are no fault elements for any of the physical elements of the offence; but (b) the defence of mistake of fact under section 9.2 is available.[11] The Explanatory Memorandum states that this amendment is necessary to *restore* the application of strict liability to this offence:

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8 EM, p. 6. Absolute liability as set out by section 6.2 of the Criminal Code means that (a) there are no fault elements for any of the physical elements of the offence; and (b) the defence of mistake of fact under section 9.2 is unavailable.

9 EM, p. 6.

10 Bills Digest, p. 8.

11 Bills Digest, p. 9.

Prior to the application of the Criminal Code to all offences against the Act, strict liability applied to the physical element of circumstance of the offence.

The physical element (ie: the circumstance element) in this offence is:

- 'the bringing of the non-citizen to Australia *under circumstances* where it might reasonably be inferred that the non-citizen intended to enter in contravention of the Migration Act'.

At the time the Criminal Code was applied to the Act, no provision was made for strict liability to apply to the physical element of circumstance of the offence in paragraph 233(1)(a).

The Criminal Code requires that if an offence is intended to be one of strict liability, it must be expressly stated. This is because there is a strong presumption that proof of fault is required in relation to an offence. As there was no such express statement of strict liability in relation to this aspect of the offence in paragraph 233(1)(a), the default element provisions provided for in subsection 5.6(2) of the Criminal Code were applied. These default provisions applied the fault element of 'recklessness' to the circumstance of the offence. This changes the offence as it had been construed prior to the application of the Criminal Code to the Act.[12]

### *Schedule 3 – The taking of securities*

2.15 Section 269(1) of the Migration Act provides that an authorised officer may require and take security for compliance with the provisions of the Migration Act or the regulations, or any condition imposed in pursuance of, or for the purposes of, the Migration Act or regulations.

2.16 Item 2 of Schedule 3 inserts a new subsection 269(1A) provides that, in certain circumstances, an authorised officer may require and take security under subsection 269(1), in relation to an application for a visa *before* a visa is granted.[13]

2.17 Under new subsection 269(1A), an authorised officer may do this only if:

- the security is for compliance with conditions that will be imposed on the visa in pursuance of, or for the purposes of, this Act or the regulations, if the visa is granted; and
- the officer has indicated those conditions to the visa applicant.[14]

2.18 The purpose of the amendment is intended to clear the uncertainty raised in the Federal Court decision of *Tutugri v Minister for Immigration and Multicultural Affairs* [1999] FCA 1785. In that case, the Federal Court raised significant doubts about the power of an authorised officer to request and take security for compliance

12 EM, pp 9-10.

13 EM, p. 14.

14 EM, p. 14.

with conditions to be imposed on a visa at a time before the visa is actually granted. The court considered that a condition on a visa does not bind the applicant until after the visa is granted. As such, a condition cannot be said to have been 'imposed prior to grant'.[15]

2.19 The decision in *Tutugri* has presented difficulties from a practical point of view in the administration of security arrangements – the reason being, that a security must be able to be required before a visa is granted. Once the visa is granted, the holder can simply refuse to provide the security requested.[16]

***Schedule 4 - Restrictions on bridging visa holders***

2.20 Section 48 of the Migration Act currently limits the visas that a non-citizen in the migration zone who does not hold a substantive visa, and who was refused a visa after last entering Australia or held a visa that was cancelled, can apply for. The Bill proposes by item 1 of Schedule 4 (headed 'Minor amendments') an amendment to section 48 stating that, for the purposes of the section, a non-citizen who, while holding a bridging visa, leaves and re-enters the migration zone is taken to have been continuously in the migration zone despite that travel.[17]

15 EM, p. 14.

16 EM, p. 14.

17 2002 Report, p. 5.

# CHAPTER 3

# CONSIDERATION OF THE BILL

3.1 This chapter considers the main issues and concerns raised in the course of the committee's inquiry.

## Key Issues

### *Section 48(3) - Previous Recommendation*

3.2 In its 2002 Report on the Migration Legislation Amendment Bill (No. 1) 2002, the committee recommended that the bill be passed subject to two recommendations, only one of which is relevant to the current Bill. That recommendation related to the proposed amendment to section 48 of the Migration Act, which restricts the types of visas that a person can apply for once they have had a visa refused or cancelled (Schedule 4 of the Bill).

3.3 According to the 2002 Report, the proposed amendments to section 48 'caused more debate (and confusion) than any other in the Bill'. That is:

> Many of the persons and organisations which sent submissions or gave evidence believed that [the amendments to section 48] meant that persons who held a bridging visa but whose application for a substantive visa had been rejected could no longer travel overseas to lodge an 'offshore' application, then return to Australia. They referred to what they saw as the long-standing and necessary practice known as the 'Buffalo shuffle' in the United States of America and the 'Auckland shuffle' in Australia by which people travel to the nearest point outside the country to lodge 'offshore' applications.[1]

3.4 The committee noted that a careful reading of section 48 made it clear that the section only operated to restrict the visa applications that a person could make onshore. However, the committee recommended that the new subsection 48(3) be amended to include a form of words that clarified that the restriction in section 48 applied only to onshore applications.

3.5 This recommendation has not been taken up in the current Bill. The Department's submission outlines the reason for this:

> [In its previous report, the committee] noted that there was some confusion around the provision and recommended a clarifying amendment be made. However the Committee also noted that the legal position was in fact correct.
>
> The provision remains the same as originally drafted in the Migration Legislation Amendment Bill (No 1) 2002 as we consider that the legal

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1 2002 Report, pp. 12-13.

> effect of the provision is correct. The explanatory memorandum also makes it clear that the provision relates to [a] person seeking to apply for a visa when they are in Australia, not when they are offshore.[2]

### *Immigration status of the children of non-citizens*

3.6 Amnesty International Australia (Amnesty) suggested that there needs to be some form of immigration clearance for children born in Australia to non-citizens who are not immigration cleared. Amnesty argues that the fact that paragraph 172(1)(ba) does not provide for these children to be immigration cleared can be problematic because the child might have great difficulty obtaining a passport/travel documents from their parent's country of origin.

3.7 Amnesty cited the case of Naomi Leong as an example of this issue. Naomi was born while her mother, Virginia, was in immigration detention at Villawood. The Malaysian Government denied Naomi any lawful status to enter Malaysia.[3]

3.8 Australian Lawyers for Human Rights (ALHR) have also noted that the status of children is now also subject to the provisions of the *Migration Amendment (Detention Arrangements) Act 2005*.[4] No further information was provided by ALHR regarding its concern in relation to the interaction between the current Bill and the Migration Amendment (Detention Arrangements) Act.

3.9 In the course of the committee's previous inquiry, the International Commission of Jurists suggested that the Bill should address other situations where children should be immigration cleared:

> … just as the Bill proposes that children born in Australia to parents, at least one of whom is immigration cleared at the time of the child's birth, would be immigration cleared, so children born in Australia to parents who were subsequently given immigration clearance should also be immigration cleared.[5]

3.10 During the previous inquiry, in response to this proposal, the Department stated that where a child was born to a person who did not hold a substantive visa and who had not been immigration cleared, if the person applied for and was granted a substantive visa, the Department would also have to examine whether or not the child was entitled to a visa at that time. The committee agreed with the Department on this point.[6]

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2 *Submission 3*, p. 6.

3 *Submission 1*, pp 1-2.

4 *Submission 2*, p. 1.

5 2002 Report, p. 7.

6 2002 Report, p. 7.

### *Strict liability in relation to people smuggling offences*

3.11 In the course of the previous inquiry, witnesses expressed concern about strict liability being applied to the people smuggling offence in paragraph 233(1)(a). For example, the Law Institute of Victoria argued that it was inappropriate for strict liability to apply to an element of an offence which carried a penalty of 10 years in prison and/or a fine of 1000 penalty units.[7]

3.12 In its submission to the current inquiry, the Department noted this concern, however, the Department reiterated that the reason for the amendment is to restore the offence to one of strict liability, as had been the case before the introduction of the Criminal Code:

> We advised [the committee in 2002] that the effect of s233(1)(a) currently was to make it an offence for someone to participate in the bringing or coming of a non-citizen into Australia being reckless as to whether the non-citizen has a lawful right to come to Australia. Advice was given that [the] DPP had advised that because of the Criminal Code, the offence in section 233 had been altered.
>
> The courts had interpreted the offence as being a strict liability offence and this had not been picked up in the harmonisation exercise undertaken [in 2001]. The amendment would ensure that the provision operated in the way it always had. It was being made a strict liability offence again.
>
> [In its 2002 Report the committee] noted the concern in respect of strict liability but stated that the change from recklessness to strict liability was justified in the current context.[8]

3.13 During the current inquiry the committee raised with the Department the fact that paragraph 233(1)(a) did not distinguish between the crew of a vessel who are asylum seekers fleeing persecution, and cases where the crew of a boat is profiting for assisting people to illegally enter Australia (people smuggling). The committee queried whether asylum seekers would be much worse off under the strict liability provision than under the current provision which requires 'recklessness'.

3.14 The Department noted that strict liability would apply to the physical objective element of the offence in paragraph 233(1)(a): the bringing or coming to Australia of a non-citizen under circumstances where it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of the Migration Act. The Department stated that, as strict liability applies to the objective element of the offence, 'it is unlikely that an individual would be more liable to be prosecuted if section 233 is a strict liability offence than if the provision has a recklessness element.[9]

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7 2002 Report, p. 9.

8 *Submission 3*, p. 4.

9 Answers to Questions on Notice, 6 September 2006, *Submission 3A*, p. 1.

3.15 Further, the Department also stated that the provisions do not have a disproportionate impact on asylum seekers:

> The decision to prosecute an individual under these provisions is determined on a case-by-case basis. Depending on the circumstances of a case, a decision may be made that it may be inappropriate to prosecute an asylum seeker under these provisions. Ultimately, a decision on whether to prosecute rests with the Commonwealth Director of Public Prosecutions who will consider whether the public interest requires a prosecution to be pursued.[10]

3.16 The committee also asked the Department whether it was possible for paragraph 233(1)(a) to be amended in a way to maintain strict liability but to distinguish between a skipper of a boat who is an asylum seeker (and carrying other asylum seekers) and cases where there is a clear profit motive for the skipper involved in people smuggling.

3.17 The Department does not believe such an amendment should be made because it would lead to unjustified claims for asylum:

> The existing prosecution provisions form part of Australia's response to people smuggling by providing a mechanism to prosecute people smugglers and crew members who bring people unlawfully into Australia. A proposed exception to these provisions for any person who has made an asylum claim may encourage unmeritorious claims made solely for the purpose of avoiding potential prosecution.[11]

## Committee view

3.18 The committee has previously recommended that the provisions of this Bill be passed by the Senate, and will make the same recommendation in this report.

3.19 However, there are two issues that the committee will briefly address.

3.20 Firstly, the committee is disappointed that the Department does not appear to appreciate the need for clarity in legislative drafting. The committee accepts that the amendments proposed to subsection 48(3), as currently drafted, are legally correct. However, the committee does not understand the Department's reluctance to insert a simple clarifying statement into section 48(3) which would alleviate the confusion which seems to have surrounded this provision.

### Recommendation 1

**3.21 The committee recommends that subsection 48(3) of the Bill be amended to include a statement that section 48 applies only to onshore visa applications.**

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10 Answers to Questions on Notice, 6 September 2006, *Submission 3A*, p. 1.

11 Answers to Questions on Notice, 6 September 2006, *Submission 3A*, p. 3.

3.22 The committee has considered the issue of strict liability in the context of the offence in paragraph 233(1)(a). While the committee is still concerned about the impact of the amendments on boat skippers (and crew) who are themselves asylum seekers, the committee accepts the Department's explanation as to why this group cannot be excluded from the offence in paragraph 233(1)(a).

**Recommendation 2**

**3.23 Subject to the above recommendation, the committee recommends that the Senate pass the Bill.**

**Senator Marise Payne**

**Committee Chair**

# 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[1] 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 bought 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[2]:

> **"…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."**

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

**"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[3] 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**

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)

# APPENDIX 1

## SUBMISSIONS RECEIVED

| | |
|---|---|
| 1 | Amnesty International Australia |
| 2 | Australian Lawyers for Human Rights |
| 3 | Department of Immigration and Multicultural Affairs |
| 3A | Department of Immigration and Multicultural Affairs |
| 3B | Department of Immigration and Multicultural Affairs |
| 4 | Law Institute of Victoria |