

QUESTION TAKEN ON NOTICE

IMMIGRATION AND MULTICULTURAL AFFAIRS PORTFOLIO

The Senate Legal and Constitutional Committee asked:

1. It has been suggested that the use of 'strict liability' would not enable any differentiation between the situation where asylum seekers are directly fleeing persecution (including the skipper of the boat) and one in which the skipper is commercially profiting from the work (people smugglers).
 - a. Is there a risk the proposed 'strict liability' provisions may leave someone in the situation of the asylum seekers (and skipper) fleeing persecution much worse off than the existing 'reckless' provisions?
 - b. Is the only way those situations have been effectively distinguished so far is through non-prosecution? (For example no one was prosecuted under the existing provisions even though on the face of the law there was initially an argument that one of the 43 from West Papua may have committed an offence).

Answer:

These amendments are designed to rectify the unintended effect of the *Migration Legislation Amendment (Application of Criminal Code) Act 2001*. The 2001 Criminal Code amendment applied recklessness as the fault element for the physical element of all offences in the *Migration Act 1958* (the Act). Prior to the 2001 Criminal Code amendment commencing, the Courts considered that the fault element for an offence under section 233 of the Act was strict liability. The proposed new subsection 233(1A) applies strict liability to the offence under section 233. This amendment is designed to rectify this unintended effect of the Criminal Code amendment and restore strict liability.

There are two elements to this offence – the conduct element and the physical objective element. Strict liability under subsection 233(1A) will only apply to the physical element, namely '...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 Act'. As this is an objective element, 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.

These provisions do not distinguish between asylum seekers and those persons who do not seek asylum and 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.

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The Senate Legal and Constitutional Committee asked:

2. Is there a concern that in the sort of case which, in the general view, should be prosecuted, the evidence of intention or recklessness becomes almost impossible to gather owing to the covert and extra-territorial nature of people smuggling operation, and this may support the move to strict liability?

Answer:

These amendments have not been proposed to address any perceived issues regarding the nature of people smuggling. As stated in response to question 1, prior to the amendments to the Criminal Code commencing, the Courts considered that the fault element for an offence under section 233 was strict liability. After the introduction of the amendments to the Code, the fault element became recklessness. The amendment is designed to rectify this unintended amendment and restore strict liability.

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The Senate Legal and Constitutional Committee asked:

3. There should be a clear distinction in cases where the skipper of a boat is an asylum seeker and there is clearly no profit motive. Similarly, people who are directly fleeing persecution need to be considered differently and should not be caught by provisions about people smuggling. Could amendments on this issue address these concerns while maintaining strict liability in the bill?

Answer:

The response to question 1 provides information regarding the purpose of the proposed Criminal Code Harmonization amendments to the Migration Act.

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.

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.