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RECOMMENDATIONS

Recommendation 1
2.50 The committee recommends that the Explanatory Memorandum to the Bill be revised and reissued to explicitly articulate the exceptional circumstances necessary for the introduction of Bill, its retrospective application and its application to current legal proceedings.

Recommendation 2
2.51 The committee recommends that the Australian Government, through the Attorney-General's Department, review the operation of the people smuggling offences in the *Migration Act 1958* to ensure these offences continue to effectively deter people smuggling.

Recommendation 3
2.52 The committee recommends that the Australian Government examine the Department of Prime Minister and Cabinet's *Legislation Handbook* and the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* to ensure that the articulation of policy is clear in relation to the introduction of retrospective legislation and legislation relevant to ongoing legal proceedings, with an emphasis on ensuring that the principles of the rule of law and the separation of powers within Australia's system of government are respected.

Recommendation 4
2.53 Subject to recommendation 1, the committee recommends that the Senate pass the Bill.
CHAPTER 1

INTRODUCTION

1.1 The Deterring People Smuggling Bill 2011 (Bill) was introduced into the House of Representatives by the Minister for Home Affairs and Minister for Justice, the Hon Brendan O'Connor MP (Minister), on 1 November 2011, and passed on the same day. The Bill was introduced into the Senate on 2 November 2011, and was subsequently referred to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 21 November 2011.¹

Background

1.2 The Migration Act 1958 (Migration Act) currently includes several offences relating to people smuggling. Existing section 233A establishes the primary people smuggling offence. Under this section, it is an offence for a person to organise or facilitate the bringing or coming to Australia, or entry or proposed entry into Australia, of another person, if that other person is a non-citizen and had or has no lawful right to come to Australia. Existing section 233C establishes an aggravated people smuggling offence where a person, in committing a primary offence of people smuggling, organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least five persons who had or have no lawful right to come to Australia. The words 'no lawful right to come to Australia' are utilised in both offences, but are currently undefined in the Migration Act.²

Purpose of the Bill

1.3 In his Second Reading Speech, the Minister outlined that the purpose of the Bill is 'to give clarity to the laws that have criminalised people smuggling and aggravated people smuggling offences for more than a decade'.³ In particular, the Bill will 'make it clear that the phrase "no lawful right to come to Australia" refers to requirements under Australia's domestic law that people must have a visa that is in effect to lawfully come to Australia, or fall within one of the limited exceptions to that rule outlined by the Migration Act'.⁴ This change would apply retrospectively to when these words were inserted into the people smuggling offences in the Migration Act in December 1999.⁵

¹ Journals of the Senate, 3 November 2011, p. 1735.
² Explanatory Memorandum (EM), p. 4.
³ House of Representatives Hansard, 1 November 2011, p. 37.
⁴ House of Representatives Hansard, 1 November 2011, p. 37.
⁵ House of Representatives Hansard, 1 November 2011, pp 37-38.
Key provisions of the Bill

1.4 The key provisions of the Bill amend the Migration Act.

Commencement

1.5 Subclause 2(1) of the Bill includes a table outlining when each part of the Bill will commence. In particular, Schedule 1 of the Bill commences 'Immediately after the commencement of item 51 of Schedule 1 to the Border Protection Legislation Amendment Act 1999' (Border Protection Amendment Act). Column 3 of the table (labelled 'Dates/Details') lists this as 16 December 1999.6

1.6 The Explanatory Memorandum (EM) notes that the words 'lawful right to come to Australia' were originally inserted into the Migration Act in December 1999 by the Border Protection Amendment Act.7

Clarification

1.7 Item 1 of Schedule 1 inserts proposed new section 228B after existing section 228A in the Migration Act. The new section is titled 'Circumstances in which a non-citizen has no lawful right to come to Australia'.

1.8 The EM outlines that:

This item is an amendment which clarifies the operation of the people smuggling and aggravated people smuggling provisions in Subdivision A of Division 12 in Part 2 of the Migration Act.

New section 228B will make it clear that...a non-citizen has, at a particular time, no lawful right to come to Australia if at that time the person does not meet requirements for lawfully coming to Australia under domestic law.8

1.9 Proposed new subsection 228B(1) provides that a non-citizen has, at a particular time, no lawful right to come to Australia if, at that time, the non-citizen does not hold a visa that is in effect, and is not covered by an exception referred to in existing subsections 42(2), 42(2A), or 42(3) of the Migration Act. These exceptions allow non-citizens to come to Australia without a visa in some circumstances.9

1.10 Proposed new subsection 228B(2) is an avoidance of doubt provision which clarifies that references to 'non-citizens' in proposed new subsection 228B(1) include those individuals seeking protection or asylum (however described) and whether or

6 However subclause 2(2) provides that 'Any information in column 3 of the table is not part of this Act'.
7 EM, p. 4.
8 EM, p. 4.
9 EM, p. 5.
not Australia has, or may have, protection obligations in respect of the non-citizen under:

- the *Convention Relating to the Status of Refugees 1951* (Refugee Convention), as amended by the *Protocol Relating to the Status of Refugees 1967*; or
- for any other reason.

**Application**

1.11 Item 2(1) of Schedule 1 provides that proposed new section 228B applies in relation to an offence committed, or alleged to have been committed, 'on or after commencement of this Schedule'. Item 2(2) provides that proposed new section 228B applies to proceedings (whether original or appellate) commenced on or after the day the Bill receives Royal Assent, and before the day on which the Bill receives Royal Assent.

**Conduct of the inquiry**

1.12 The committee advertised the inquiry in *The Australian* newspaper on 9 November 2011. Details of the inquiry, the Bill and other associated documents were placed on the committee's website. The committee also wrote to a number of organisations and individuals, inviting submissions by 9 November 2011.

1.13 The committee received 23 submissions, which are listed at Appendix 1. All public submissions are available on the committee's website at [http://www.aph.gov.au/Senate/committee/legcon_ctte/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/index.htm).


**Acknowledgement**

1.15 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

**Structure of the report**

1.16 Chapter 1 introduces the Bill and provides a brief outline of the key provisions the Bill. Chapter 2 discusses the key issues raised in evidence and includes the committee's view and recommendations.

**Note on references**

1.17 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.
CHAPTER 2
KEY ISSUES

2.1 A number of issues were raised by submitters and witnesses in relation to the Bill. These issues focused on:

- the reason for the Bill's introduction;
- people smuggling offences and mandatory sentencing;
- the appropriateness of legislative amendment during legal proceedings;
- the retrospective application of the Bill;
- Australia international obligations; and
- parliamentary scrutiny and consultation issues.

Reason for legislative amendment

2.2 During the inquiry, it was highlighted that the introduction of the Bill was linked to a pending Victorian Court of Appeal decision in relation to the case of an Indonesian man accused of aggravated people smuggling.¹ These legal proceedings are a 'test case' undertaken by Victoria Legal Aid on behalf of one of its clients.² In its submission, Victoria Legal Aid commented:

In people smuggling cases one of the things that the prosecution has to prove is that the people brought to Australia had 'no lawful right to come'. It became clear to our legal staff relatively early that there was a real question over the interpretation of this phrase. In particular, there was a question as to whether a person who seeks asylum from persecution in Australia can truly be said to have 'no lawful right to come' given Australia's obligations under the Refugees Convention and the extent to which those obligations have been incorporated into Australian domestic law and practice. Having identified the question, our professional obligation was to raise it on behalf of our clients and have it determined.³

2.3 The Commonwealth Director of Public Prosecutions (DPP) also provided details about this 'test case'. It noted 'the Victorian County Court has stated a case to the Victorian Court of Criminal Appeal, reserving for determination by the Court of Appeal, questions of law which involve consideration of whether non-citizens...had a lawful right to come to Australia'.⁴ The Victorian Court of Criminal Appeal 'has

¹ For example, Farah Farouque and Andrea Petrie, 'Lawyers condemn migration law amendment', The Age, 3 November 2011, p. 12.
² Victoria Legal Aid, Submission 16, pp 3-4.
³ Submission 16, p. 4.
⁴ Submission 4, p. 1.
adjourned this matter until 30 November 2011 pending the consideration of this legislation by Parliament'.

2.4 The Attorney-General's Department informed the committee that, in its view, 'under the common law, there is no right for an individual to enter Australia to seek protection or asylum', and that the High Court of Australia 'has expressed the view that refugees do not have a right of entry under either customary international law or the [Refugees Convention]'. The Attorney-General's Department highlighted that the Bill's proposed amendments reaffirm 'the way the provisions have been consistently interpreted since their introduction in 1999':

The Bill makes it clear that references to a 'non-citizen' in Subdivision A of Division 12 in Part 2 of the Migration Act includes a reference to a non-citizen who is seeking protection or asylum (however that may be described). However, the people smuggling offences apply where a person smuggles any person that has no lawful right to come to Australia (that is, any non-citizen that does not hold a visa that is in effect, and is not covered by an exception referred to in existing subsections 42(2), 42(2A), or 42(3) of the Migration Act). The class of persons with no lawful right to come to Australia includes persons who are seeking protection or asylum.

2.5 An officer from the Attorney-General's Department noted:

[S]ince 1999 there has been an offence in the Migration Act criminalising the smuggling of five or more people to Australia. There have been over 900 cases since 1999 proceeding on the basis that smuggling five or more persons to Australia when they do not have a visa is an offence. The Commonwealth [DPP] has run the cases on that basis and the courts have approached the offences on that basis. The bill does not change that position; it simply makes express the understanding that we say always underpinned the people smuggling offences—that smuggling people to Australia when they do not have a visa is unlawful, and that is the essence of people smuggling.

2.6 Similarly, the Commonwealth DPP commented:

Section 228B accords with what has been this Office's understanding of the term 'no lawful right to come to Australia'. In this regard, we note that in a number of people smuggling prosecutions in different jurisdictions, defendants have raised arguments that the people smuggling offences in the Migration Act were inapplicable to the defendant because the non-citizens had a lawful right of entry, said to arise because they had come to Australia

5 Submission 4, p. 1.
7 Submission 14, p. 1 (emphasis in original).
8 Mr Iain Anderson, Attorney-General's Department, Committee Hansard, 11 November 2011, p. 23.
to seek asylum. Those arguments have been dismissed by trial courts in Western Australia, the Northern Territory, New South Wales and Queensland.9

2.7 In contrast, Victoria Legal Aid considered there is 'clearly an argument' about how the words 'no lawful right to come to Australia' should be interpreted. Mr Saul Holt from Victoria Legal Aid argued that the substantial legal resources utilised by the Commonwealth in contesting the 'test case' in the Victorian Court of Appeal suggested that 'there is something in [the] argument'.10 Mr Holt also stated:

From day one, it has been clear to us that the question of the content of the phrase 'no lawful right to come to Australia' is one that needed to be determined finally, legally and early, and we were following in good faith through the ordinary process of taking this to the Court of Appeal to do that.11

2.8 Others considered the characterisation of the Bill as merely a 'clarification' of the people smuggling offences of the Migration Act was problematic.12 In particular, it was noted that, if the case law regarding the interpretation of the people smuggling offences was clear and consistent, there would be no need for the proposed amendments. For example, Professor Sarah Joseph from the Castan Centre for Human Rights Law (Castan Centre) asserted:

I would say there is no such thing as retrospective clarification because either this law does absolutely nothing—that is, it clarifies something that does not need to be clarified—or it removes arguments that would perhaps exonerate the people charged. If it does that latter thing, it enlarges the offence.13

People smuggling offences and mandatory sentencing

2.9 A number of submitters questioned the policy of criminalising people smuggling where the people being 'smuggled' are usually those seeking to claim asylum in Australia as refugees. The Castan Centre noted that the vast majority of people brought to Australia by people smugglers are subsequently found to be genuine refugees, arguing that 'deterrence of people smugglers clearly has the knock-on effect of deterring asylum seekers, who presently have a right under both international and Australian law to seek asylum here'.14 Similarly, Professor Ben Saul contended:

The effect of criminalising those who smuggle refugees is to prevent the refugees themselves them from reaching safety, unless some effective,

9 Submission 4, p. 1.
10 Committee Hansard, 11 November 2011, p. 13.
12 For example, ChilOut – Children Out of Immigration Detention, Submission 19, p. 5.
13 Committee Hansard, 11 November 2011, p. 7.
14 Submission 6, p. 2.
alternative or substitute protection is provided for them elsewhere. It is therefore disingenuous to suggest, as the [EM] does, that criminalising people smuggling does not prejudice the position of refugees.\textsuperscript{15}

2.10 The morality of people smugglers was also frequently questioned during the inquiry.\textsuperscript{16} For example, Professor Ben Saul argued that '[i]f Anne Frank had paid someone to help her flee from genocide, it is hardly morally appropriate to criminalise the smuggler, in circumstances where...the international community had failed to protect her.'\textsuperscript{17} Similarly, the New South Wales Council for Civil Liberties stated:

\begin{quote}
[R]efugees, having fled persecution, find themselves in unsafe camps with polluted water supply, at risk of cholera, dysentery, rape and murder, they will, properly, seek to move on. Those who assist them should not be demonised on that account.\textsuperscript{18}
\end{quote}

2.11 Others noted that the majority of those who are subject to people smuggling prosecutions are often victims themselves. For example, Victoria Legal Aid informed the committee that '[a]s of 15 March 2011 of 353 people arrested and charged for people smuggling offences 347 were crew...[O]nly six were organisers.'\textsuperscript{19} The Australian Lawyers Alliance argued that many of those prosecuted for people smuggling offences 'were not aware of what they were implicated in' and '[m]any have been tricked'.\textsuperscript{20}

2.12 Victoria Legal Aid, and other submitters, questioned the deterrence value of the people smuggling offences, which were characterised as frequently applying to impoverished, Indonesian fishermen with little education.\textsuperscript{21} As Victoria Legal Aid advised:

\begin{quote}
Almost all of the men who are currently being prosecuted in Australia for Aggravated People Smuggling are themselves victims of the trade. They are put on the same boats and exposed to the same risk as the asylum seekers. They are either misled into working on the boats, or offered what seems to them to be a small fortune.\textsuperscript{22}
\end{quote}

2.13 The appropriateness of the mandatory sentencing penalties of the aggravated people smuggling offences in the Migration Act was also raised by submitters and

\begin{itemize}
\item\textsuperscript{15} Professor Ben Saul, \textit{Submission 1}, p. 2.
\item\textsuperscript{16} For example, Centre for Policy Development, \textit{Submission 3}, p. 1; Ms Marilyn Shepherd, \textit{Submission 2}, p. 1; ChilOut – Children Out of Immigration Detention, \textit{Submission 19}, p. 3.
\item\textsuperscript{17} \textit{Submission 1}, p. 2.
\item\textsuperscript{18} \textit{Submission 5}, p. 2.
\item\textsuperscript{19} \textit{Submission 16}, p. 7.
\item\textsuperscript{20} \textit{Submission 18}, p. 8.
\item\textsuperscript{21} For example, Asylum Seeker Resource Centre, \textit{Submission 17}, p. 2.
\item\textsuperscript{22} \textit{Submission 16}, p. 11.
\end{itemize}
witnesses. The Migrant and Refugee Rights Project at the University of New South Wales noted that, under the Migration Act, 'a court must sentence a person convicted under s233C and other "aggravated" smuggling offences to at least five years imprisonment with a minimum three year non-parole period'. Ms Rachel Ball from the Human Rights Law Centre argued:

This [mandatory] sentence contravenes the prohibition on arbitrary detention and the right to a fair trial, also contained in the International Covenant on Civil and Political Rights. These principles require that the punishment fit the crime, but mandatory sentencing prevents the court from differentiating between serious and minor offending and from considering the particular circumstances of the individual.

2.14 Mr Saul Holt from Victoria Legal Aid highlighted the impact of mandatory sentencing on the crews of people smuggling vessels who usually come from 'extremely poor circumstances in Indonesia'. He emphasised that these men are often the 'breadwinners' for their families and that their imprisonment for 'three to five years' has broader impacts in their communities.

2.15 However, an officer from the Attorney-General's Department noted that the Bill 'does not purport to do anything about mandatory minimums' for people smuggling offences. The officer stated:

Regarding the offences, while a crew might receive a mandatory minimum sentence of five years with a three-year non-parole period, the maximum sentence that could be applied is far greater under these provisions, so the court is able to take culpability into consideration when deciding the sentence to apply to an organiser as opposed to a member of crew.

Appropriateness of legislative amendment during legal proceedings

2.16 Several submitters and witnesses suggested that the passage of the Bill is inappropriate given that a court is currently considering the relevant issue to be 'clarified' by the Bill. For example, Professor Ben Saul drew the committee's attention to 'questions of the propriety of Parliament legislating on this issue...'

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23 For example, Migrant and Refugee Rights Project, Submission 15, pp 13-16; Australian Lawyers Alliance, Submission 18, pp 5-6.
24 Submission 15, p. 13 (emphasis in original).
26 Committee Hansard, 11 November 2011, pp 15-17.
27 Mr Iain Anderson, Attorney-General's Department, Committee Hansard, 11 November 2011, p. 27.
28 Mr Iain Anderson, Attorney-General's Department, Committee Hansard, 11 November 2011, p. 24.
29 For example, Mr Jonathan Davies, Australian Lawyers Alliance, Committee Hansard, 11 November 2011, p. 21.
retrospectively, and while judicial proceedings are pending’. Similarly, Legal Aid NSW submitted that 'interpreting the law is the role of the judiciary, and as there is currently a stated case in Victoria on this very issue...the Parliament could let the Courts perform their constitutional function and await this case before deciding whether to take the unusual step of passing retrospective legislation'.

2.17 The Human Rights Law Centre was more explicit, asserting that the 'Bill arguably usurps judicial power, which is inconsistent with the separation of powers under the Australian Constitution and the powers vested in the court by Chapter III'. Ms Rachel Ball from the Human Rights Law Centre considered that the Bill was intended to 'circumvent current legal proceedings' and this is 'enormously problematic in terms of the maintenance of the rule of law in Australia and the maintenance of the separation of powers'. Similarly, Ms Bassina Farbenblum from the Migrant and Refugee Rights Project considered that a 'very dangerous precedent' is being set:

[I]t is especially problematic for parliament to intervene in a case in which the government is actually a party. The reason we have a judiciary and separation of powers is so that, generally, governments cannot just intervene by passing legislation when they think the court might reach a conclusion that they do not like when they are a party to litigation.

2.18 Victoria Legal Aid noted that there is no precedent for the government of the day to bring forward legislation while they are also a party to the relevant legal proceedings:

[H]ad we waited to know what the Court of Appeal had said about this so we truly knew what the law was, this committee could be proceeding on these important issues as a matter of certainty. We would not be having this odd argument about whether this bill does something or does not do it. If we actually knew, it would not prevent you from still passing the law in both houses, but we would truly know if this was retrospective legislation.

2.19 In contrast, an officer from the Attorney-General's Department noted that the Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2011 is a recent example where 'legislation was passed while a matter was before the High Court'.

30 Professor Ben Saul, Submission 1, p. 2.
31 Submission 22, p. 1.
32 Submission 7, p. 3.
33 Committee Hansard, 11 November 2011, p. 5.
34 Committee Hansard, 11 November 2011, p. 5.
35 Mr Saul Holt, Victoria Legal Aid, Committee Hansard, 11 November 2011, p. 16.
36 Mr Iain Anderson, Attorney-General's Department, Committee Hansard, 11 November 2011, p. 25.
2.20 The Castan Centre highlighted judicial comments made in a High Court of Australia case, *Nicholas v The Queen*,\(^{37}\) regarding the constitutional validity of laws which direct 'the manner in which judicial power should be exercised'.\(^{38}\) The Castan Centre commented that the 'courts are presently engaged in the process of interpreting the phrase "lawful right to come to Australia", and the Bill arguably purports to direct the manner in which they should go about this'.\(^{39}\) In the Castan Centre's view, the intention to intervene in the judicial process is apparent in the provisions of the Bill which provide that the amendments 'apply to proceedings in train (including appeals)'.\(^{40}\) Further:

In the relevant cases/appeals, the issue of refugees' and asylum-seekers' 'lawful right to come to Australia' has been raised in defence of accused people smugglers. Under ss 233A, B or C of the Migration Act, these accused persons face penalties of up to 10 or 20 years' imprisonment. Since the Bill would effectively decide the issue raised by the defence in these cases, it clearly has the potential to affect the defendants' liberty seriously. In the context of both the presumption against retrospectivity and the doctrine of separation of powers, these amendments constitute dubious law which may well be constitutionally invalid.\(^{41}\)

**Retrospective amendment to criminal law**

2.21 The Attorney-General's Department acknowledged that the Commonwealth's general approach has been that 'an offence should only be given retrospective effect in rare circumstances where there is a very strong justification', and that '[e]xceptions have normally been made only where there has been a strong need to address a gap in existing offences, and moral culpability of those involved means there is no substantive injustice in retrospectivity'.\(^{42}\) In the case of the Bill:

Retrospective application is necessary to ensure the original intent of the Parliament is affirmed, to avoid uncertainty about the validity of previous convictions, and to maintain current prosecutions...

The effect of the retrospective application is to clarify an existing understanding of the laws, and to ensure convictions for people smuggling offences already made, as well as prosecutions underway, would not be invalidated should a court find that the absence of a specific reference to persons seeking protection or asylum means they are not intended to be the subject of the people smuggling offences...


\(^{38}\) *Submission 6*, p. 3.

\(^{39}\) *Submission 6*, p. 3.

\(^{40}\) *Submission 6*, p. 4.

\(^{41}\) *Submission 6*, p. 4.

\(^{42}\) *Submission 14*, p. 8.
There are exceptional circumstances that justify retrospectivity for this Bill. Those circumstances are that it would not be appropriate to risk a significant number of prosecutions being overturned as a result of a previously unidentified argument in relation to the words 'no lawful right to come to Australia'.

2.22 The Department of Immigration and Citizenship also explained that 'the effect of retrospective application is to clarify an existing understanding of the laws, and to ensure that convictions for people smuggling offences already made as well as prosecutions underway are not invalidated'. It referenced the Commonwealth DPP's 2010-11 Annual Report as stating that, as at 30 June 2011, there were 304 people smuggling prosecutions involving organisers, captain and crew before the courts.

2.23 The EM also suggests the amendments in the Bill are intended 'to avoid doubt and to ensure the original intent of Parliament is affirmed'.

2.24 A number of submitters and witnesses viewed the retrospective application of the Bill as problematic and urged the committee to recommend the Bill be withdrawn, or that the Bill be amended so that it does not apply retrospectively. For example, the Human Rights Law Centre argued:

In accordance with principles of statutory interpretation, an Act is to be interpreted according to the words of a section interpreted in the context of the Act as a whole. In other words, the Commonwealth is bound by the laws Parliament enacted; not what it would have liked Parliament to enact. If Parliament wishes to avoid doubt and either "clarify" or amend the original intent of the Parliament, it should do so prospectively.

2.25 Several submissions observed that the Australian Government's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers outlines that [a]n offence should be given retrospective effect only in rare circumstances and with strong justification. The Human Rights Law Centre argued that the EM 'does not contain sufficient justification for the retrospective application of the Bill'. Similarly, Victoria Legal Aid argued that 'there has to be something extremely rare and serious and a moral culpability of proportion that it would not
render the use of retrospective legislation unjust...It is not enough to say that you are merely clarifying the intent'.

2.26 However, an officer from the Attorney-General's Department commented:

In a situation where parliament has said that these offences should be penalised by a 20-year maximum sentence and a five-year mandatory minimum sentence, we say that is a serious situation and that people who are convicted of those offences are morally culpable. So we say the retrospectivity is justified...[P]eople smuggling is viewed as definitely a very serious activity. It puts lives at risk, bringing people to Australia, and, yes, it is a morally culpable activity for people to be engaged in.

2.27 The committee notes that Australia does not have an explicit constitutional prohibition against the enactment of retrospective legislation. However, several submissions highlighted that a number of jurisdictions and international agreements prohibit retrospective legislation with criminal sanctions. These include the United States of America and Article 15 of the International Covenant of Civil and Political Rights (ICCPR).

2.28 Article 15(1) of the ICCPR states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed...

2.29 Victoria Legal Aid argued that concern about retrospective criminal laws 'crosses cultural and political boundaries' and, while it is permitted under Australia's law, 'it nonetheless represents a breach of Australia's obligations under the ICCPR'. The Human Rights Law Centre also noted that Australia is a party to the ICCPR, and that Article 15 is 'non-derogable right which means that States are not permitted to suspend this right'. Ms Rachel Ball from the Human Rights Law Centre commented:

The prohibition on retrospective criminal laws is central to the rule of law and respect for the separation of powers. People must be capable of knowing what the law is so that they can abide by it. In cases of uncertainty, it is the courts' role to interpret and apply the law. Of course, parliament can amend the law if it disagrees with judicial interpretations, but it must do so prospectively. Exceptions to this rule are permitted only in exceptional circumstances...The justifications that have been offered for the

51 Mr Bevan Warner, Victoria Legal Aid, Committee Hansard, 11 November 2011, p. 13.
52 Mr Iain Anderson, Attorney-General's Department, Committee Hansard, 11 November 2011, p. 24.
53 For example, New South Wales Council for Civil Liberties, Submission 5, p. 1.
54 Submission 16, p. 5.
55 Submission 7, p. 2.
retrospective application of this bill set a dangerous precedent for the Australian system of government.56

2.30 Many contributors to the inquiry considered that legislation with retrospective application, particularly where it involves criminal sanctions, is contrary to the rule of law. For example, the New South Wales Council for Civil Liberties objected to the retrospective nature of the Bill:

People are entitled to certainty about what the law requires of them; but retrospective laws are arbitrary, and deny them that certainty. Imposing criminal sanctions on people for doing what was legal when they did it is necessarily unjust.57

2.31 Similarly, the Castan Centre commented:

Retrospective laws are prima facie contrary to the doctrine of the rule of law because they prevent people from ascertaining their rights and duties at law at a particular time. The Commonwealth's own Legislation Handbook makes it clear that "[p]rovisions that have a retrospective operation adversely affecting rights or imposing liabilities are to be included only in exceptional circumstances".58

2.32 The Castan Centre also highlighted the High Court of Australia's decision in Polyukhovich v The Commonwealth59 which considered 'retrospectively criminalised war crimes...under Australian law'. In that case, the High Court effectively split on the issue of whether the Commonwealth has the power to enact retrospective criminal laws, with some judges considering this was a breach of Chapter III of the Constitution. Professor Sarah Joseph from the Castan Centre described the precedent as 'unclear'.60 In relation to the Bill, she commented:

It does seem that it arguably could be a retrospective attempt to tell the judges how they are to interpret those words. That could be a breach of chapter III. If you are asking me about the morality of that, I would still maintain that, if parliament made a mistake, parliament can prospectively fix that but to retrospectively fix that is a breach of the rule of law.61

2.33 Another view on this case was provided by the Human Rights Law Centre, which stated that a majority of the High Court found it is within Parliament's power to enact retrospective criminal laws, 'but the bench differed in the circumscription of that power'.62 It argued that the Polyukhovich case could be distinguished because of the

56 Committee Hansard, 11 November 2011, p. 1.
57 Submission 5, p. 1.
58 Submission 6, p. 3.
60 Committee Hansard, 11 November 2011, p. 9.
61 Committee Hansard, 11 November 2011, p. 11.
62 Submission 7, p. 3.
'seriousness of the offence, its status under law at the time of its commission and the
moral culpability of [the] purported offenders'.63

**International obligations**

2.34 The EM states that the people smuggling offences in the Migration Act 'are
consistent with Australia's obligations to criminalise people smuggling and aggravated
people smuggling under the Protocol against the Smuggling of Migrants by Land, Sea
and Air supplementing the United Nations Convention on Transnational Organised
Crime (Protocol).64 Further, it explains that 'the [Bill's] amendments are consistent
with Australia's obligations under international law and do not affect the rights of
individuals seeking protection or asylum, or Australia's obligations in respect of those
persons'.65

2.35 Similarly, the Attorney-General's Department advised that the people
smuggling offences in the Migration Act contribute to Australia's implementation of
its obligations to criminalise people smuggling under the Protocol. It explained that
the purpose of the Protocol is to 'prevent and combat the smuggling of migrants, as
well as to promote cooperation among States Parties to that end, while protecting the
rights of smuggled migrants'.66 Further:

   Consistent with Australia's obligations under Article 5 of the Protocol,
   individuals who have been smuggled to Australia will not be subject to
criminal charges merely because they were the object of a people
smuggling venture. In respect of persons making claims for refugee status,
this is also consistent with Australia's obligations under Article 31 of the
[Refugees Convention] which provides that contracting States shall not
impose penalties on refugees on account of their illegal entry or presence,
provided those persons present themselves without delay to the authorities
and show good cause for their illegal entry or presence.67

2.36 However, this position was disputed by several submitters and witnesses.68
For example, the Castan Centre argued that the Bill may 'also have the effect of
deterring asylum-seeking, which is specifically excluded from the operation of this
Protocol under article 19(1)'.69 Article 19(1) of the Protocol states:

   Nothing in this Protocol shall affect the other rights, obligations and
responsibilities of States and individuals under international law, including

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63 Submission 7, p. 3.
64 EM, p. 4.
65 EM, p. 6.
66 Submission 14, p. 6.
67 Submission 14, pp 6-7.
68 For example, Dr Ben Saul, Submission 1, pp 1-2; Immigration Advice and Rights Centre,
Submission 21, p. 3.
69 Submission 6, p. 2.
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 nonrefoulement as contained therein.

2.37 Professor Ben Saul emphasised that the focus of the Protocol was on migrants rather than refugees. He argued that '[i]f the Protocol is intended to exclude refugees, it must be doubted whether there exists any offence under international treaty law of "smuggling" a refugee or asylum seeker.'\(^70\) The Immigration Advice and Rights Centre also contended that '[i]t is clear the [Protocol] should not compromise our obligations under international law and in particular the Refugee Convention'. It stated that the amendments in the Bill would 'significantly affect the rights of those who come here to seek asylum in breach of Australia's obligations under both the [Protocol] and the Refugee Convention'.\(^71\)

2.38 The Human Rights Law Centre considered that the Bill affects the rights of individuals seeking protection 'albeit indirectly, by imposing harsh mandatory penalties for people smuggling in cases where those entering Australia have a lawful right to do so under the Refugee Convention'.\(^72\) It noted that Article 31 of the Refugee Convention provides that contracting states shall not imposes penalties, on account of their illegal entry or presence, on refugees coming directly from a territory where their life or freedom is threatened, as long as they present themselves without delay to the authorities and show good cause for their illegal entry or presence. In the Human Rights Law Centre's view, the Bill 'clearly seeks to undermine Australia's good faith obligation under the Refugee Convention to allow asylum seekers to seek protection in Australia'.\(^73\)

2.39 Ms Bassina Farbenblum from the Migrant and Refugee Rights Project concurred:

> Australia also has an obligation to implement its treaty obligations in good faith. That comes from the Vienna Convention on the Law of Treaties. By directly frustrating the ability of asylum seekers and refugees to engage Australia's protection obligations Australia is not implementing those obligations in good faith.\(^74\)

**Parliamentary scrutiny and consultation issues**

2.40 A number of submitters highlighted their concerns with the pace of the passage of the Bill through the Parliament, the lack of opportunities for consultation

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70 Submission 1, p. 2.
71 Submission 21, p. 3.
72 Submission 7, p. 5.
73 Submission 7, p. 5.
74 Committee Hansard, 11 November 2011, p. 2.
and the timeframe allowed for the committee's inquiry.\textsuperscript{75} As the Law Council of Australia observed:

[C]oncerns about the lack of consultation on the Bill are magnified by the attempt to expedite the Bill through the Parliamentary process...

In relation to this Bill, the Law Council notes that there was no consultation with stakeholders or the public prior to its introduction. The Law Council also notes the extremely short time frames for submissions to and reporting by the committee.

The Law Council considers that the work of Parliamentary committees is critical to the development of good legislation and the value of this work is being eroded by short timeframes for consultation.\textsuperscript{76}

2.41 Similarly, the Queensland Law Society commented:

Section 17 of the \textit{Legislative Instruments Act 2003} (Cth) is entitled 'Rule-makers should consult before making legislative instruments'. In our view, this section indicates that it is considered best practice for the government to consult with organisation or bodies that are likely to be affected by the legislation. The [Queensland Law] Society considers that, as it appears that outside stakeholders were not invited to comment on this Bill prior to this consultation by the Senate Committee, the consultation undertaken with only political parties does not represent extensive consultation.\textsuperscript{77}

Committee view

2.42 While the committee acknowledges the concerns of submitters and witnesses raised during the course of the inquiry, the committee considers that the increasing seriousness of people smuggling to Australia justifies the need for the Bill, its retrospective application and its application to current legal proceedings. The committee considers that it has always been the intention of the Parliament that the words 'no lawful right to come to Australia' mean that the people smuggling offences in the Migration Act also apply to those smuggling individuals who intend to seek asylum in Australia. As recently as last year, this committee, in its report regarding the Anti-People Smuggling and Other Measures Bill 2010, reflected Parliament's clear intention that the people smuggling offences in the Migration Act apply even if those being smuggled are seeking asylum in Australia:


\textsuperscript{76} \textit{Submission 11}, p. 5.

\textsuperscript{77} \textit{Submission 12}, pp 1-2.
Some evidence to the committee suggested that since it is not illegal for refugees to seek asylum in Australia it ought not to be illegal to assist a refugee to do so. The committee rejects this view.\footnote{Senate Legal and Constitutional Affairs Legislation Committee, Anti-People Smuggling and Other Measures Bill 2010 [Provisions], May 2010, p. 31.}

2.43 The committee is of the strong view that an oversight made in relation to the wording of the legislation, leading to a potentially adverse legal decision, should not weigh against the broadly supported policy of deterring people smuggling to Australia. As the Minister's Second Reading Speech notes, '[s]uccessive Australian governments have condemned people smuggling ventures whether organised by individuals or by transnational criminal networks'.\footnote{House of Representatives Hansard, 1 November 2011, pp 37-8.} The amendments made by the Bill will ensure that a large number of people smuggling convictions and current prosecutions are not called into question.

2.44 In relation to the Bill's retrospective application, the committee notes that the Attorney-General's Department's own guidelines provide that EMs must contain sufficient explanation and justification for any retrospective effect:

Where a Bill has retrospective effect, the Scrutiny of Bills Committee requires the Explanatory Memorandum to contain sufficient justification. This must include an assessment of whether the retrospective provisions will adversely affect any person other than the Commonwealth. Justification in the Explanatory Memorandum is required even if retrospectivity is imposed only as a result of making a technical amendment or correcting a drafting error.\footnote{Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, September 2011, p. 16, available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers (accessed 15 November 2011).}

2.45 While the committee does not wish to pre-empt the Senate Scrutiny of Bills Committee's consideration of the Bill, in the view of the committee this requirement is not currently satisfied in the current EM. The EM to the Bill should be revised and reissued to include sufficient justification for the retrospective application of the Bill's amendments, and its application to current legal proceedings. The revised EM should note the number of current prosecutions and previous convictions which may be affected, and the Bill's potential impact on the administration of justice.

2.46 While mandatory sentencing for aggravated people smuggling offences is not an element of the Migration Act that the Bill seeks to amend, a significant part of the evidence received during the inquiry focused on this issue. The committee is concerned by some of this evidence, particularly from Victoria Legal Aid, regarding the impacts of the application of mandatory sentencing on individuals hired as boat crew for people smuggling vessels and subsequently convicted of aggravated people
smuggling offences. Previously, in considering mandatory minimum penalties for people smuggling offences, the committee has stated:

It is clear that boat crew members are rarely the main organisers of people smuggling syndicates. However, the committee considers that it is critical to deter the practice of people smuggling especially where people are transported in ways that place their lives in jeopardy.81

2.47 In the view of the committee, given that the people smuggling offences in the Migration Act have now been in place for over ten years, it is now timely for the Australian Government, through the Attorney-General's Department, to review these offences to ensure that they continue to effectively deter people smuggling.

2.48 In conclusion, the committee considers that the Bill falls into the very limited circumstances where it is appropriate for the Parliament to consider passing legislation which would affect ongoing legal proceedings because the Bill implements the clear intention of the Parliament in relation to serious people smuggling offences. However, the committee shares the concerns raised by several submitters and witnesses that the Bill could be perceived as a precedent for future proposed legislation directed at ongoing legal proceedings which are relevant to the Australian Government.

2.49 Currently, there does not appear to be a sufficiently detailed policy to guide decisions regarding when it is appropriate for the government of the day to introduce retrospective legislation or legislation which may influence the outcome of ongoing legal proceedings. Accordingly, the committee believes that the guidelines in the Department of Prime Minister and Cabinet's Legislation Handbook and the Attorney-General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers should be examined by the Australian Government to ensure that the articulation of policy is as clear as possible in relation to the introduction of retrospective legislation and legislation relevant to ongoing legal proceedings, with an emphasis on ensuring that the rule of law and the separation of powers are respected.

Recommendation 1

2.50 The committee recommends that the Explanatory Memorandum to the Bill be revised and reissued to explicitly articulate the exceptional circumstances necessary for the introduction of Bill, its retrospective application and its application to current legal proceedings.

Recommendation 2

2.51 The committee recommends that the Australian Government, through the Attorney-General's Department, review the operation of the people smuggling offences in the Migration Act 1958 to ensure these offences continue to effectively deter people smuggling.

81 Senate Legal and Constitutional Affairs Legislation Committee, Anti-People Smuggling and Other Measures Bill 2010 [Provisions], May 2010, p. 32.
Recommendation 3

2.52 The committee recommends that the Australian Government examine the Department of Prime Minister and Cabinet's *Legislation Handbook* and the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* to ensure that the articulation of policy is clear in relation to the introduction of retrospective legislation and legislation relevant to ongoing legal proceedings, with an emphasis on ensuring that the principles of the rule of law and the separation of powers within Australia's system of government are respected.

Recommendation 4

2.53 Subject to recommendation 1, the committee recommends that the Senate pass the Bill.

Senator Trish Crossin
Chair
ADDITIONAL COMMENTS BY COALITION SENATORS

1.1 Coalition senators are committed to maintaining the integrity of the *Migration Act 1958*, and in particular of the provisions designed to deter people smuggling. Given the surge in the number of asylum seekers being delivered to Australian waters since the present government relaxed border protection policies in 2008, there is a need for strong policy signals to be sent to people smugglers by the Australian Parliament.

1.2 Coalition senators accept that this legislation is urgent – in that it impacts on matters currently before the courts – and that it requires an element of retrospectivity – in that it clarifies what, arguably, was not clear in legislation previously passed by the Parliament.

1.3 The Bill, properly characterised, does not introduce changes in the architecture of the law designed to discourage people smuggling, a law first introduced in 1999 and strengthened in 2010 with the passage of the *Anti-People Smuggling and Other Measures Act 2010*. Despite its grandiose title, the Bill merely affirms a regime initiated more than a decade ago.

1.4 In all the circumstances, Coalition senators believe that it is important to affirm the original intention of Parliament in passing the previous legislation that the phrase "no lawful right to come to Australia" refers to requirements under this legislation that people must have a visa that is in effect to lawfully come to Australia, or fall within one of the limited exemptions outlined in the *Migration Act*.

1.5 Witnesses to the inquiry were unable to point to any convincing evidence that there is any doubt about the Parliament's original intention with respect to the "lawful right to come to Australia" definition. On the contrary, a number of arguments were made in the course of debate in the Parliament by opponents of the 1999 and 2010 bills that their passage would confirm that it was illegal for people to smuggle asylum seekers to Australia even if they were subsequently found to be genuine refugees.

1.6 Coalition senators accept that clarifying this intention of the Parliament can be fairly described as retrospective legislation, since interpretation of the intention of Parliament is *prima facie* the prerogative of the courts. As such the passage of the Bill might be sent to extinguish the rights of current litigants before the courts.

1.7 There is an important distinction between legislation which repairs a gap in existing law, and clarifies its meaning, in a manner which does not directly (although may incidentally) retrospectively alter the rights and liabilities of citizens, and legislation – notably tax legislation – whose main purpose is to retrospectively impose a liability or rescind or vary a right. It is legislation of the latter kind which is almost always invidious. This legislation falls into the former category, which is from a jurisprudential point of view more defensible.
1.8 However, Coalition senators were extremely disturbed by the lack of precision on the part of the relevant departments in evoking a clear case for retrospectivity. The Australian Government's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers sets out circumstances in which retrospective legislation can be considered. However, officers of the Attorney-General's Department and the Department of Immigration and Citizenship were unable to link any of the provisions of that guide to the particular legislation before the Committee.

1.9 The Guide refers to retrospective legislation addressing a "serious gap in the law", but it is unclear as to whether this refers to addressing a gap that, arguably, the Parliament has already "closed".

1.10 The Guide also refers to retrospectivity being justified where the "moral culpability of those involved means there is no substantive injustice in retrospectivity". The departments were unable to address the argument put to the committee that, for many people caught up in the people smuggling business, the level of "moral culpability" may actually be very low.

1.11 This lack of an ability to link the rare exercise of retrospective law-making with any clear guidelines operating within the Australian Government is disturbing. Although Coalition senators accept that retrospective legislation is sometimes appropriate – and indeed is appropriate here to clarify what the Parliament intended and what is commonly understood to be Parliament's intention – it should as a matter of principle occur pursuant to well-articulated and well-understood rules of which the community has notice. This is not the case here.

Recommendation

1.12 Coalition senators support Recommendations 1, 3 and 4 of the majority report, but do not support Recommendation 2. Coalition senators do not regard the evidence before this inquiry as justification for a review of the extent to which the provisions of the Migration Act 1958 effectively deter people smuggling.

Senator Gary Humphries
Deputy Chair

Senator Sue Boyce

Senator Michaelia Cash
DISSENTING REPORT BY
THE AUSTRALIAN GREENS

Introduction

1.1 The Senate inquiry into the *Deterring People Smuggling Bill 2011* ('the Bill') uncovered a great reservoir of concern and disapproval among the Australian community, human rights advocates and legal experts about the proposed amendment and the legislation it seeks to amend. The depth of concern expressed by submitters is downplayed by the majority report. While the majority report notes the significant criticisms that were raised through the inquiry process, it brushes them aside without due response and recommends passing the Bill through the Senate. The concerns raised should be taken seriously and the Bill should not pass the Senate.

1.2 The Bill ostensibly seeks to 'clarify' the phrase 'no lawful right to come to Australia' as it appears in the hierarchy of Commonwealth people smuggling charges. The Australian Greens opposed the legislation that gives rise to those charges when it was proposed in 2010 for the reasons that were detailed in a dissenting report on the inquiry into the *Anti-People Smuggling and Other Measures Bill 2010* ('the 2010 Bill'). The concerns raised by the Australian Greens in that dissenting report still stand.

1.3 In fact, those concerns have regretfully been borne out by the reality of the prosecutions. Since the 2010 Bill there have been numerous charges laid and prosecutions under Commonwealth people smuggling charges. As a result of the process we now have an improved understanding of the people smuggling industry, the relative roles of those involved and the backgrounds and motivations of crewmembers on board the vessels. We also know the success or otherwise of deterrence and punishment of our current system of prosecuting and convicting people smugglers.

1.4 The submissions and evidence to the inquiry into this Bill made it clear that the Commonwealth people smuggling charges do little to deter people smuggling; are in breach of various international protocols and treaties; and include mandatory sentencing which is unjust and in breach of the rule of law. These criticisms remain unchanged since the 2010 inquiry. However, the proposed amendment is additionally problematic under the rule of law in that it will be retrospective to 1999; is strategically intended to scuttle a court case to which the government is itself a party; and is arguably unconstitutional.

Breach of international law

1.5 The submissions and evidence provided by legal experts and human rights commentators raised significant concerns that the Bill breaches aspects of international law. Professor Ben Saul noted that, while Australia is obligated by the *Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the*
United Nations Convention on Transnational Organised Crime to criminal people smuggling, this is specifically intended to mean the criminalisation of migrants, not asylum seekers.

1.6 As in 2010, it remains of great concern to the Australian Greens that the effect of criminalising those who smuggle refugees is to prevent the refugees themselves from reaching safety. In seeking to make it so difficult to claim asylum in our migration zone, Australia acts in violation of Article 31 of the United Nations Convention for the Protection of Refugees (the Refugee Convention) and its Protocol.

Retrospectivity

1.7 The submissions and evidence were unequivocal in their condemnation of the retrospectivity proposed by the Bill. One by one the witnesses appearing in the hearing commented that it is against the grain of the rule of law, and against numerous international covenants, to make people criminally liable for acts that were not offences at the time they were done.

1.8 The Australian Greens concur with the evidence given by legal experts that the retrospective effect of the Bill goes beyond mere 'clarification'. In her evidence Professor Sarah Joseph of the Castan Centre for Human Rights said:

I would say there is no such thing as retrospective clarification because either this law does absolutely nothing—that is, it clarifies something that does not need to be clarified—or it removes arguments that would perhaps exonerate the people charged. If it does that latter thing, it enlarges the offence.

1.9 In its written submission the Law Council of Australia said that the retrospectivity offends principles against retrospective legislation which are set out in Article 10 of the Universal Declaration of Human Rights (the UNHDR) and the International Covenant on Civil and Political Rights (ICCPR).

1.10 Ms Rachel Ball of the Human Rights Centre noted:

First, the bill contravenes the prohibition on retrospective criminal laws contained in article 15 of the International Covenant on Civil and Political Rights. This prohibition is reflected in domestic and regional laws around the world and in Australian common law and government guidelines. The prohibition on retrospective criminal laws is central to the rule of law and respect for the separation of powers.

1.11 Victoria Legal Aid pointed out in its submission and evidence that retrospectivity should only be used in rare circumstances, in particular where the moral culpability of the offender is such that it justifies such a departure from law making in accordance with the rule of law. Victoria Legal Aid also commented that retrospective lawmaking is banned in many countries. In Australia, such caution is applied to retrospective criminal legislation that it has only been utilized on three occasions: tax evasion offences in 1980, war crimes offences in 1988 and anti-hoax offences in 2002.
1.12 The Australian Greens do not accept the finding of the majority report that the criminality of the people being charged under the people smuggling charges is serious enough to take the step of making the proposed retrospective legislation. In the 353 or more people smuggling prosecutions that have been started or completed around Australia thus far, only six were accused to be organisers of the industry. Victoria Legal Aid, which is acting for 53 accused people smugglers in Victoria, expressed it as follows:

While there are people who organise and substantially profit from the trade, the overwhelming majority of the people charged with people smuggling in Australia are impoverished Indonesian fishermen, the totality of whose involvement is to be recruited on to the boats to steer, crew or cook. They are as dispensable to the organisers of people smuggling as the boats that get burnt off the coast of Christmas Island and Ashmore Reef. (page 7)

1.13 The moral and criminal culpability of those being prosecuted under the Commonwealth charges is not adequate to make a departure from the rule of law and common fairness.

1.14 The majority report seeks to suggest that the mere fact of the large volume of previous and current convictions is sufficient to establish the exceptional circumstances required for justifying retrospectivity. It recommends that the Explanatory Memorandum to the Bill be amended to clarify the great necessity for retrospectivity. The Australian Greens vehemently disagree with this conclusion and recommendation. The volume of past convictions and current prosecutions has no bearing on the criteria that should be applied to considering whether to make legislation retrospective, and it can only be seen as cynical and self-serving for the majority report to suggest otherwise.

**Lack of deterrence**

1.15 There was no evidence provided by the Commonwealth Director of Public Prosecutions or the Attorney-General that the current regime has any useful deterrence effect. The lawyers who are working at the coal face of these prosecutions expressed severe condemnation of the suggestion that the current regime of criminal charges will 'break the people smugglers' model' because the threat of imprisonment is not well known in the impoverished villages of Indonesia where the boat crew are sourced.

1.16 The submission of the Australian Lawyer's Alliance echoes the evidence that was given by a many witnesses at the hearing:

Many of these individuals were not aware of what they were implicated in. Many have been tricked. In some cases, the organisers and facilitators of the people smuggling will go in the boats with the individuals, only to depart at a later stage of the journey before the boat arrives close to Australian waters.

The organisers of criminal syndicates, on the whole, have not been prosecuted in Australia.
They have constituted 2% of all prosecutions. For the Parliament to seek to uphold convictions that are punishing those who have been exploited in their poverty simply to be seen as ‘doing something’ about border protection, is inhumane.

Mandatory sentencing

1.17 The mandatory sentences of 5 years imprisonment with 3 years non-parole set out in the Crimes Act do not allow for differentiation between serious and minor offending or for consideration of the particular circumstances of the individual. Liberty Victoria in its submission notes that under the ICCPR Article 9(1) this renders the sentence of imprisonment as arbitrary.

1.18 The University of New South Wales Migrant and Refugee Rights Project summarised mandatory sentencing as follows:

The sentencing court is stripped of its discretion to consider mitigating factors, regardless of their compelling nature or the unfairness or disproportionality of the sentence in light of individual circumstances.

1.19 The mandatory minimum sentence means that the heaviest individual burden lands on the very people who are least involved in the people smuggling industry. Victoria Legal Aid makes the following practical suggestion:

If mandatory imprisonment was linked to whether or not the person was an organiser rather than a boat recruit, many of the harsh effects of the regime would be removed and the concerns for the treatment of this population ameliorated.

1.20 It is imperative that the Australian government move to immediately review the mandatory sentencing provisions, to make way for a fairer model which would allow judicial discretion to take into account the facts and circumstances of each case.

Conclusion

1.21 Many of the submitters to the inquiry commented on the extremely tight timeframe around the legislation and inquiry. Liberty Victoria commented that it appears to be a pattern that such a tight timeframe is applied to matters affecting asylum seekers and related issues. The Uniting Church also commented that it has 'long been troubled by the manner in which successive Australia governments have amended (in great haste) the Migration Act'.

1.22 This Bill has been brought on with woefully inadequate consultation and was rushed through the House of Representatives in an attempt to beat a legal challenge. The Attorney-General's Department conceded in the public hearing that it had only been given drafting instructions for the Bill in October when the threat of the legal challenge became clear. Clearly, if the 'oversight' in the legislation were so desperately in need of remedy, this would have been a priority prior to the test case having reached the Victorian Court of Appeal.
1.23 It seems to be that successive Australian governments are so desperate to appear strong on border protection that they will make regular wild departures from due legal process. This amendment is a sorry example of such departure and should not, in good faith and legal propriety, pass the Senate.

**Recommendations**

The Australian Greens recommend:

- That this Bill should not proceed;
- That it should not proceed without thorough review of the current deterrence outcomes of the criminal charges of people smuggling as currently structured;
- That it should not proceed without review of the mandatory sentencing regime with reference to the rule of law and natural justice;
- That it should not proceed until it has been examined by the Federal Government's parliamentary joint committee on Human Rights and a statement of compatibility with our international obligations is produced.

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**Senator Sarah Hanson-Young**

Greens spokesperson for Immigration
## APPENDIX 1

### SUBMISSIONS RECEIVED

<table>
<thead>
<tr>
<th>Submission Number</th>
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<tr>
<td>1</td>
<td>Professor Ben Saul</td>
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<td>2</td>
<td>Ms Marilyn Shepherd</td>
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<td>Centre for Policy Development</td>
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<td>New South Wales Council for Civil Liberties</td>
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<td>Castan Centre for Human Rights Law</td>
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<td>Department of Immigration and Citizenship</td>
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<td>9</td>
<td>Rule of Law Institute of Australia</td>
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<td>UnitingJustice Australia</td>
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<td>Asylum Seeker Resource Centre</td>
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<td>Australian Lawyers Alliance</td>
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<td>ChilOut - Children Out of Immigration Detention</td>
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20 Thomas Bland, David Foster, Lyndal Ablett, Nick Laurie, Glyn Ayres, 
Dylan Maloney, Robyn Barnard, Clare Rawlinson, Heidi Edwards and 
Julia Wang

21 Immigration Advice and Rights Centre

22 Legal Aid New South Wales

23 South Australia Police

ADDITIONAL INFORMATION RECEIVED

1 Response to questions on notice provided by Victoria Legal Aid on 15 
November 2011

2 Response to questions on notice provided by the Attorney-General's 
Department on 16 November 2011
APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 11 November 2011

ANDERSON, Mr Iain, First Assistant Secretary, Criminal Justice Division, Attorney-General's Department

BALL, Ms Rachel, Senior Lawyer, Human Rights Law Centre

DAVIES, Mr Jonathan, Committee Member, Australian Lawyers Alliance

FARBENBLUM, Ms Bassina, Director, Migrant and Refugee Rights Project, Australian Human Rights Centre, Law Faculty, University of New South Wales

FLETCHER, Mr Adam, Manager, Accountability Project, Castan Centre for Human Rights Law

HOLT, Mr Saul, Director, Criminal Law Services, Victoria Legal Aid

JOSEPH, Professor Sarah, Director, Castan Centre for Human Rights Law

PHILLIPSON, Mr Gregory, Acting Assistant Secretary, Legal Framework Branch, Department of Immigration and Citizenship

REID, Mr John, Assistant Secretary, International Law, Trade and Security Branch, Attorney-General's Department

RUTHERFORD, Mr Douglas, Acting Assistant Secretary, Border Management and Crime Prevention Branch, Attorney-General's Department

WARNER, Mr Bevan, Managing Director, Victoria Legal Aid

YANCHENKO, Ms Danica, Acting Principal Legal Officer, People Smuggling and Trafficking Section, Attorney-General's Department