

Briefing Paper on the application of Australia's people smuggling laws on potential victims of trafficking in persons.



Overview

This briefing paper considers the application of Australia's people smuggling laws to potential victims of trafficking in persons.

The legal framework

Section 233C of the *Migration Act 1958* establishes the offence of aggravated people smuggling where the accused organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least 5 non-citizens who have no lawful right to come to Australia.¹

The offence of aggravated people smuggling attracts a mandatory minimum sentence of 5 years with 3 years non-parole.²

Characteristic of people charged with people smuggling

Several Australian non-government organisations have criticised Australia's people smuggling laws on the basis that they target crew on the boats bringing asylum seekers from Indonesia to Australia.³ As of 15 March 2011, only 6 of 353 people charged with people smuggling offences were organisers of people smuggling operations.⁴ The remaining men and boys are usually poor Indonesian fishermen who have minimal personal knowledge of or involvement in smuggling operations.

Victoria Legal Aid (VLA) is arranging legal representation for the accused in at least 53 cases of alleged people smuggling. VLA recently provided evidence to the Senate Committee on Legal and Constitutional Affairs identifying several common characteristics of crew-members charged with aggravated people smuggling.⁵

- the crew are told that they will be transporting cargo and asylum seekers are only brought onboard once at sea;
- the crew are only transferred onto the boat shortly before Australian waters and the organisers then depart on a second boat;
- the crew are only told that the people they are transporting are to be taken to Australia once they are on the High Seas and cannot return;
- the crew are told that once they transport people to Christmas Island, Ashmore Reef or Cartier Island that they will be paid and allowed to return home.

¹ The *Deterring People Smuggling Act 2011*, passed on 25 November 2011, retrospectively defines 'no lawful right to come to Australia' to mean no lawful right *under domestic law*, notwithstanding that a person may have a clear and lawful right under international law to come to Australia.

² *Migration Act, 1958* s.236B.

³ See, for example, submissions made to the Senate Legal and Constitutional Affairs Legislation Committee, available at:

http://www.aph.gov.au/senate/committee/legcon_cte/deterring_people_smuggling_bill_2011/submissions.htm

⁴ Commonwealth, *Estimates*, Senate Legal and Constitutional Affairs Legislation Committee, 18 October 2011, p 68.

⁵ Submission No. 16 to the Senate Legal and Constitutional Affairs Committee's inquiry into the *Deterring People Smuggling Bill 2011* available at:

http://www.aph.gov.au/senate/committee/legcon_cte/deterring_people_smuggling_bill_2011/submissions.htm.

The Human Rights Law Centre considers that in these circumstances a person – having been recruited by means of deception for the purpose of exploitation – meets the definition of a trafficked person under the Protocol to Prevent, Suppress and Punish Trafficking in Persons.

Particular concerns in relation to children

The Australian Human Rights Commission is currently holding an inquiry into the treatment of suspected people smugglers who say that they are children.⁶ The Commission has expressed concern that errors in the processes to used to determine the age of these individuals may have resulted in children being detained for long periods of time in immigration detention and in adult prisons.

Recommendation

We recommend that the Australian Government conduct investigations into whether those charged or convicted under people smuggling laws are in fact victims of trafficking in persons. Where victims of trafficking are identified, they should be provided with adequate assistance and protection, not criminalised and subjected to lengthy jail terms in Australian prisons.

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⁶ Information about the inquiry is available at http://www.hreoc.gov.au/about/media/news/2011/116_11.html