



Anti-People Smuggling and Other Measures Bill 2010

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Law and Bills Digest Section

Contents

| | |
|--------------------------------------------------------------------------------------------------------|----|
| Purpose..... | 3 |
| Background..... | 3 |
| Basis of policy commitment | 3 |
| Obligations arising under the Protocol against the Smuggling of Migrants by Land, Sea and Air | 5 |
| Committee consideration | 7 |
| Coalition policy position..... | 7 |
| Financial implications | 8 |
| Key issues | 8 |
| Main provisions | 10 |
| Schedule 1—Amendments relating to People Smuggling | 10 |
| Part 1—Main amendments | 10 |
| <i>Criminal Code Act 1995</i> | 10 |
| <i>Migration Act 1958</i> | 12 |
| Part 2—Consequential amendments | 15 |
| <i>Proceeds of Crime Act 2002</i> | 15 |
| <i>Surveillance Devices Act 2004</i> | 16 |
| <i>Telecommunications (Interception and Access) Act 1979</i> | 17 |
| Schedule 2—Amendment to the <i>Australian Security Intelligence Organisation Act</i> 1979 | 18 |

| | |
|-------------------------------------------------------------------------------------------------|----|
| Schedule 3— <i>Amendment of the Telecommunications (Interception and Access) Act 1979</i> | 19 |
| Concluding comments | 20 |

Anti-People Smuggling and Other Measures Bill 2010

Date introduced: 24 February 2010

House: House of Representatives

Portfolio: Attorney-General

Commencement: On the day after the Act receives Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of this Bill is to amend Australia's anti-people smuggling legislative framework. In particular, this Bill proposes to harmonise existing offences between Acts, create new people smuggling offences, enhance investigative tools, and extend the application of mandatory minimum penalties for aggravated people smuggling offences. Amendments are to be made to the following six Acts:

- the *Australian Security Intelligence Organisation Act 1979* (ASIO Act)
- the *Criminal Code Act 1995* (Criminal Code)
- the *Migration Act 1958* (Migration Act)
- the *Proceeds of Crime Act 2002* (Proceeds of Crime Act)
- the *Surveillance Devices Act 2004* (Surveillance Devices Act), and
- the *Telecommunications (Interception and Access) Act 1979* (Telecommunications Interception and Access Act).

Background

Basis of policy commitment

On 4 December 2008, Prime Minister Kevin Rudd MP delivered the government's first national security statement to Parliament in which the government set out its national security reform agenda for the future. In relation to the threat posed by transnational crime, including people smuggling activities, the Prime Minister emphasised the role of non-state actors and the need to strengthen border control by improving coordination among government agencies:

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The government is committed to deploying all necessary resources to prosecute those criminals who seek to undermine Australia's border security. We will work with our partners in the region to shut down the illegal operations of people smugglers and see them put in jail where they belong. The government has recently agreed to a series of new measures at a cost of \$44.1 million to further combat people-smuggling in cooperation with regional partners.

Organised crime more broadly is a growing concern for Australia, one the government is determined to combat. The Australian Crime Commission has estimated that organised crime costs for Australia each year run at some \$10 billion. The government will develop two initiatives in the related areas of border management and serious and organised crime. We will strengthen border management by simplifying arrangements and improving coordination across all agencies. Second, we will clearly define the role of the Commonwealth in combating serious and organised crime and enhance coordination among Commonwealth agencies.¹

In the 2009–10 Federal Budget the government announced that it would allocate \$654 million over six years to several portfolios to combat people smuggling and strengthen border security (including addressing the problem of unauthorised boat arrivals).² The media release accompanying the announcement notes:

...A further \$55 million will be provided to the Australian Federal Police, the Attorney-General's Department and the Commonwealth Director of Public Prosecutions to support the Government's fight against people smuggling.

“\$42 million will be provided to better equip AFP to stop people smuggling ventures before they launch for Australia, by ramping up the crucial partnership between the AFP and the Indonesian police, and to investigate and dismantle people smuggling syndicates.

“The funding will also include additional investigators and intelligence officers to be assigned to the AFP's People Smuggling Strike Team...³

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1. K Rudd, 'Ministerial statement: national security', House of Representatives, *Debates*, 4 December 2008, p. 12555, viewed 5 March 2010, <http://www.aph.gov.au/hansard/reps/dailys/dr041208.pdf>
 2. Prime Minister, Minister for Immigration and Citizenship, Minister for Foreign Affairs, Attorney-General and Minister for Home Affairs, *\$1.3 Billion to Combat People Smuggling and Strengthen Australia's National Security*, media release, 12 May 2009, viewed 5 March 2010, [http://www.ema.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_MediaReleases_\\$1.3BilliontoCombatPeopleSmugglingandStrengthenAustraliasNationalSecurity](http://www.ema.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_MediaReleases_$1.3BilliontoCombatPeopleSmugglingandStrengthenAustraliasNationalSecurity)
 3. See also: B Debus (Minister for Home Affairs), *New Measures to Enhance Australia's Border Protection*, media release, 12 May 2009, viewed 5 March 2010, http://www.ema.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_MediaReleases_NewMeasurestoEnhanceAustraliasBorderProtection. See also: J Philips, Budget

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The People Smuggling Strike Team is a task force that was established in May 2000. It comprises officers from the Australian Federal Police, from the Department of Immigration and Citizenship and from the Australian Customs and Border Protection Service. The team consists of investigators as well as intelligence and financial analysts that collect, evaluate, analyse and disseminate intelligence relating to people smuggling.

According to the Minister for Home Affairs, Brendan O'Connor MP, there have been 88 arrests and 25 convictions since September 2008. Convicted people smugglers, that is, crew members on vessels have been receiving between five and six years imprisonment.⁴

Obligations arising under the Protocol against the Smuggling of Migrants by Land, Sea and Air

The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (the Protocol), to which Australia is a party aims 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.⁵ The Protocol defines 'smuggling of migrants' in Article 3(a) as:

the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.⁶

2009–10: *Immigration—Border protection and combating people smuggling*, Parliamentary Library, Canberra, 2009, viewed 5 March 2010, http://www.aph.gov.au/library/Pubs/RP/BudgetReview2009-10/Immigration_BorderProtect.htm.

4. 'The government's new anti-people smuggling measures', *Sky News*, 24 February 2010, viewed 1 March 2010, http://www.ema.gov.au/www/ministers/oconnor.nsf/Page/Transcripts_2010_24February2010-TheGovernmentsNewAnti-People-SmugglingMeasures. See also: Brendan O'Conner, *Australia jails 11 people smugglers*, media release, 1 July 2009, viewed 5 March 2010, <http://www.brendanoconnor.com.au/news-&-media-releases/media-releases-%11-home-affairs/australia-jails-11-people-smugglers/>
5. The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution A/RES/55/25, entered into force 28 January 2004. Full text of the Convention and accompanying Protocols available via the United Nations Office on Drugs and Crime (UNODC) website: <http://www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext>
6. 'Illegal entry' is defined in Article 3(b) of the Protocol as 'crossing borders without complying with the necessary requirements for legal entry into the receiving State'.

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Each State Party to the Protocol is required to criminalize the smuggling of migrants and other forms of activity that support such smuggling.⁷ The legislative guide for the implementation of the Protocol summarises the criminalization requirements:

Each State party is required to criminalize, when committed intentionally and in order to obtain a financial or other material benefit:

- Conduct constituting the smuggling of migrants (the procurement for material gain of the illegal entry of a person into a State party of which the person is not a national or permanent resident)
- Producing, procuring, providing or possessing fraudulent travel or identity documents when done for the purpose of enabling smuggling of migrants
- Enabling a person to remain in a country where the person is not a legal resident or citizen without complying with requirements for legally remaining by illegal means
- Organizing or directing any of the above crimes
- Attempting to commit any of the above offences, subject to the basic concepts of the State party's legal system, and
- Participating as an accomplice in any of the above offences, subject to the basic concepts of the State party's legal system.

Each State party is also required:

- To establish, as aggravating circumstances for the above offences, conduct that is likely to endanger or does endanger the migrants concerned or that subjects them to inhumane or degrading treatment ...⁸

It is significant to note that the legislative guide to the protocol states that the primary focus of the Protocol is to target organised criminal groups who receive a financial or other material benefit. The drafters did not intend that the Protocol apply to others, such as family members or charitable organisations, who procure the illegal entry of migrants for reasons other than gain.⁹ This distinction is not maintained in this Bill. Firstly, the acquisition of a financial or other material benefit is not an element to offences of people smuggling under the Migration Act or Criminal Code. Similarly, persons who provide material support or resources may be found guilty of supporting the offence of people smuggling irrespective of whether they received a financial or other material benefit.

7. Article 6, Protocol against the Smuggling of Migrants by Land, Sea and Air.

8. United Nations Office on Drugs and Crime (UNDOC), 'Legislative Guides: United Nations Convention against Transnational Organised Crime', UNDOC website, Part Three, p. 339, viewed 4 March 2010, http://www.unodc.org/pdf/crime/legislative_guides/04%20Legislative%20guide_Smuggling%20of%20Migrants%20Protocol.pdf

9. Ibid.

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In relation to penalties, the legislative guide to the Protocol states ‘the Protocol is silent as to the punishment or range of punishments that should be applied to the various offences’. However, it notes that ‘sanctions should be effective, proportionate and dissuasive’ and ‘in cases where legislatures decide to apply mandatory minimum punishments, the possibility of excuse or mitigation for cases where offenders have cooperated with or assisted competent authorities should also be considered’.¹⁰

In keeping with the broad purpose of the Protocol, this Bill ensures that people smuggling is comprehensively criminalised in Australian law with tougher penalties for the most serious forms of the crime (that is, those involving aggravating circumstances).¹¹

Committee consideration

The Senate Selection of Bills Committee recommended this Bill not be referred to a Committee for inquiry.¹²

Coalition policy position

The Shadow Minister for Immigration and Citizenship, Scott Morrison MP reportedly stated that the Coalition is supportive of these measures. However, he emphasises that what he considered to be driving the people-smuggling trade is the pull-factors created by the magnetic impact of the government’s failed border protection policies.¹³ In this respect, the Coalition have reportedly labelled the government’s plan as ‘too little, too late’.¹⁴

10. UNDOC, Legislative Guides, op. cit., p. 351.

11. In this respect it is significant to note that on 10 March 2010, the Indonesian President, Dr Susilo Bambang Yudhoyono announced that ‘the Indonesian government will soon introduce to parliament a law that will criminalise those involved in people-smuggling - those found guilty will be sent to prison for five years’: M Dodd, ‘Susilo Bambang Yudhoyono to jail people-smugglers for five years’, *The Australian*, 11 March 2010, viewed 11 March 2010, <http://www.theaustralian.com.au/politics/susilo-bambang-yudhoyono-to-jail-people-smugglers-for-five-years/story-e6frgczf-1225839337902>

12. Senate Selection of Bills Committee, *Report No. 3 of 2010*, 25 February 2010, viewed 1 March 2010, http://www.aph.gov.au/senate/committee/selectionbills_ctte/reports/2010/rep0310.pdf

13. S Morrison, *Doorstop interview: People smuggling legislation*, media release, 24 February 2010, viewed 1 March 2010, <http://www.scottmorrison.com.au/info/pressrelease.aspx?id=311>

14. ‘Spooks plan too late: opposition’, *Australian Financial Review*, 25 February 2010, viewed 1 March 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FSMZV6%22>

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Though the Coalition is supportive of the measures, Scott Morrison MP has also pointed out that the crews of the boats may also be potential victims of the people smugglers:

The other thing to point out is the people who come on the boats, and I am talking about the crew, are abused by the people smugglers also. They have very little knowledge of what they are getting into particularly the younger crew members who effectively have become people smugglers mules. There will be no shortage, sadly, of poor fishers in Indonesia who will be available to be used by the people smuggling trade. They will arrive, as I saw some of them when I was on Christmas Island recently, and the people who looked most worried getting off that boat quite frankly were the young crew who had no idea what they were getting into.¹⁵

Financial implications

The Explanatory Memorandum states that ‘the amendments in this Bill have no financial impact on Government revenue’.¹⁶

However, Shadow Attorney General, Senator George Brandis has queried whether ASIO will be required to support its proposed additional responsibilities to combat people smuggling from existing funding (which might divert resources away from the agency’s other intelligence functions) or whether additional resources will be made available.¹⁷ The agency’s total appropriation revenue is shown in the table below:

| 2007-08 | 2008-09 | 2009-10 | 2010-11 | 2011-12 | 2012-13 |
|---------|---------|---------|---------|---------|---------|
| \$291m | \$353m | \$409m | \$413m* | \$417m* | \$419m* |

* = forward estimate

Key issues

Following is a brief overview of the most significant issues arising under the various Acts:

In relation to the **Criminal Code** this Bill creates a new offence of supporting the offence of people smuggling which targets people who organise, finance and provide other material support to people smuggling ventures entering foreign countries, whether or not via Australia. The penalty for this offence is imprisonment for a maximum 10 years or a fine of \$110,000 or both.

15. S Morrison, Doorstop interview: People smuggling legislation, op. cit.

16. Explanatory Memorandum, Anti-People Smuggling and Other Measures Bill 2010, p. 3.

17. G Brandis, ‘Question without notice: National security’, Senate, *Debates*, 24 February 2010, pp. 50–51, viewed 1 March 2010, <http://www.aph.gov.au/hansard/senate/dailys/ds240210.pdf>

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In relation to the **Migration Act**, this Bill creates two new people smuggling related offences in the Migration Act. Firstly, supporting the offence of people smuggling which targets people who organise, finance and provide other material support to people smuggling operations, such as people in Australia who pay people smugglers to bring their family or friends to Australia. Secondly, the aggravated offence of people smuggling involving such things as exploitation, or danger of death or serious harm which will carry a penalty of imprisonment for a maximum 20 years or a fine of \$220,000 or both whereas the primary offence of people smuggling carries a penalty of imprisonment for a maximum 10 years or a fine of \$110,000 or both. The aggravating circumstances in this latter offence are derived from the Protocol.

The mandatory minimum penalty provisions will be extended to the three aggravated people smuggling offences which means the court must impose a sentence of imprisonment of at least eight years (with a non-parole period of at least five years). In addition, the Migration Act will be amended so that persons convicted of multiple offences in the same proceeding will also be subject to the higher penalties. This latter amendment will apparently close a loophole which meant people smugglers who were convicted for their involvement in two or more ventures during the same court hearing were treated as first time offenders and thereby subject to the lower mandatory minimum sentencing requirements.

In relation to the **Surveillance Devices Act**, this Bill will extend emergency authorisation for the use of a surveillance device to investigations into the aggravated offence of people smuggling involving such things as exploitation, or danger of death or serious harm and the aggravated offence of people smuggling involving at least five people contained in the Migration Act. Currently, the ability to obtain emergency authorisation for a surveillance device does not extend to offences under the Migration Act.

In relation to the **Telecommunications Interception and Access Act**, this Bill will simplify the criteria to be satisfied by agencies when applying for telecommunications interception warrants for offences against people smuggling offences in the Migration Act. Under these amendments agencies will no longer have to establish that the offence involved two or more offenders and substantial planning and organisation as well as the use of sophisticated methods and techniques and so forth.

In addition, changing the definition of ‘foreign intelligence’ will mean that information about foreign individuals or groups (non-state actors) can be collected when a warrant for a telecommunications interception device is issued under the Act. Under the proposed amendments, the Attorney-General will be able to approve the issuing of a warrant if the collection of the information is in the interests of Australia’s national security, foreign relations or economic well-being, rather than the collection being important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth’s international affairs.

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In relation to the **ASIO Act**, this Bill will amend the definition of the term ‘security’ in the ASIO Act to officially give the agency the statutory power to obtain and evaluate intelligence relevant to the protection of Australia’s territorial border integrity from serious threats. Such intelligence can then be communicated to agencies such as the Australian Customs and Border Protection Service or law enforcement agencies.

Main provisions

Schedule 1—Amendments relating to People Smuggling

Part 1—Main amendments

Criminal Code Act 1995

Items 1 and 2 repeal existing paragraph 73.1(1) from the Criminal Code which required the prosecution to prove that the person who organises or facilitates the unlawful entry of another person into a foreign country did so having obtained or intending to obtain a benefit (whether directly or indirectly). There is no such equivalent requirement under existing section 232A (Organising bringing groups of non-citizens into Australia) or **proposed section 233A** (Offence of people smuggling) of the Migration Act.

Item 3 repeals existing subsection 73.2(1) of the Criminal Code and substitutes a new subsection (Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc.)). Though in essence this offence closely resembles its predecessor, it inserts **proposed subsection 73.2(2)** into the Code which provides that there is no fault element for the physical element of conduct described in subsection (1) other than the fault elements (however described), if any, for the offence of people smuggling.¹⁸ **Proposed subsection 73.2(2A)** will also be inserted which clarifies that a person can be convicted of an offence against this section even if they have not been convicted of the offence of people smuggling.

Items 4 and 5 repeal existing paragraphs 73.3(1) from the Criminal Code which required the prosecution to prove that the person who organises or facilitates the unlawful entry of a group of five or more persons into a foreign country did so having obtained or intending to obtain a benefit (whether directly or indirectly). There is no such equivalent requirement under existing section 232A (Organising bringing groups of non-citizens into Australia) or **proposed section 233C** (Aggravated offence of people smuggling (at least 5 people)) of the Migration Act.

18. A *physical element* of an offence may be conduct, or a result of conduct, or a circumstance in which conduct, or a result of conduct occurs. A *fault element* for a particular physical element may be intention, knowledge, recklessness or negligence: See Divisions 4 and 5 of the Criminal Code.

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Item 6 inserts **proposed new section 73.3A** into the Criminal Code which is a new offence of supporting the offence of people smuggling. Section 73.3A provides that a person commits an offence if they provide material support or resources to another person or organisation and in doing so, aids the commission of the offence of people smuggling.

This offence has two physical elements:¹⁹

- The person intentionally provided material support or resources to another person or an organisation (the receiver) (**paragraph 73.3A(1)(a)**), and
- The person was reckless as to the circumstance that the provision of the support or resources aided the receiver or another person or organisation to engage in conduct constituting a people smuggling offence (**paragraph 73.3A(1)(b)**).²⁰

The penalty for this offence is imprisonment for 10 years or 1,000 penalty units (\$110,000), or both.

This offence does not apply to a person who provides material support or resources to smugglers to facilitate their own entry or the entry of a group of people of which they are a part (**paragraph 73.3A(2)**). The evidential burden in this respect lies with the defendant and a person commits an offence even if the offence of people smuggling is not committed (**paragraph 73.3A(3)**). The Explanatory Memorandum notes that the offence will nonetheless apply to ‘persons in Australia who pay smugglers to bring their family or friends to Australia on a smuggling venture’.²¹

The term ‘material support’ is not defined, but the Explanatory Memorandum notes:

The term ‘material support or resources’ is not defined in Commonwealth legislation. However, drawing reference from section 2339A of the United States of America Criminal Code, ‘material support or resources’ may include, but is not limited to: property, tangible or intangible, or service, finances including currency or monetary instruments or financial securities, financial services, false documentation or identification, communications equipment, facilities and transportation.

The term ‘material support’ has been used in accordance with a recommendation by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) made in their *Review of Security and Counter-Terrorism Legislation* in December 2006. The PJCIS recommended that the terrorism offence in section 102.7 of the Criminal Code be

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19. Section 5.6 of the Criminal Code will apply the automatic fault elements to these physical elements.
 20. Section 5.4 of the Criminal Code provides that a person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
 21. Explanatory Memorandum, op. cit., p. 8.

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amended to provide for ‘material support’ to remove any ambiguity. For consistency across Commonwealth legislation, the term ‘material support’ has been used to make clear that the level of support required to commit the offence goes beyond mere support and is support that is real and concrete.²²

Migration Act 1958

Item 7 repeals the existing subheading ‘General Offences’ in Subdivision A of Division 12 (Part 2 of the Migration Act) and replaces it with ‘People smuggling and related offences’.

Item 8 repeals existing sections 232A to 232C of the Migration Act and replaces them with slightly amended and new offences structured differently in the subdivision. These amendments are explained in further detail below.

Proposed new section 233A is to be the primary people smuggling offence and stems from existing paragraph 233(1)(a) of the Migration Act. In essence, the newly worded and structured offence closely resembles its predecessor but the Explanatory Memorandum does not say if the operation of the section has been changed by this amendment. Nonetheless, the amendment brings the offence of people smuggling into line with the equivalent offence in the Criminal Code. The primary people smuggling offence has three physical elements:

- organising or facilitating the bringing or coming to Australia, or the entry or proposed entry into Australia of another person (**paragraph 233A(1)(a)**)²³
- the second person is a non-citizen (**paragraph 233A(1)(b)**),²⁴ and
- the second person had, or has, no lawful right to come to Australia (**paragraph 233A(1)(c)**)²⁵

The penalty for this offence remains at 10 years imprisonment or 1,000 penalty units (\$110,000), or both.²⁶

22. Explanatory Memorandum, op. cit., p. 8.

23. The fault element of intention will attach to the element of conduct of organising or facilitating by operation of the default elements in section 5.6 of the Criminal Code: Explanatory Memorandum, op. cit., p.10.

24. Absolute liability applies pursuant to **proposed paragraph 233A(2)** which means that it will not be necessary for the prosecution to prove a fault element and that the defence of mistake of fact will not be available to the defence: Explanatory Memorandum, op. cit., p.10.

25. Recklessness will attach to this element by operation of section 5.6 of the Criminal Code: Explanatory Memorandum, op. cit., p.10.

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Proposed new section 233B is to be the aggravated offence of people smuggling (involving exploitation, or danger of death or serious harm etc). It is a new offence to be inserted into the Migration Act. The aggravating circumstances to the offence of people smuggling are:

- the perpetrator of the people smuggling offence commits the offence intending that the victim will be exploited after entry to Australia (whether by the perpetrator or another) (**paragraph 233B(1)(a)**)²⁷
- in committing the people smuggling offence, the perpetrator subjects the victim to cruel, inhuman or degrading treatment (**paragraph 233B(1)(b)**), or
- in committing the people smuggling offence, the perpetrator's conduct gives rise to a danger of death or serious harm to the victim *and* they are reckless as to the danger of death or serious harm that arises from the conduct (**paragraph 233B(1)(c)**).

Though a person may be convicted of this offence even if they have not been convicted of the underlying offence of people smuggling, the Explanatory Memorandum notes that the prosecution would nonetheless need to establish the elements of the offence of people smuggling (as discussed above).²⁸

The penalty for this offence is 20 years imprisonment or 2,000 penalty units (\$220,000), or both.²⁹

On a drafting note, it is worth noting that though the Criminal Code uses the term 'victim' the Migration Act currently does not. It is not entirely clear why the term 'non-citizen' has not been used in this respect.

Proposed new section 233C is to be the aggravated offence of people smuggling (involving at least five people) and stems from existing paragraph 232A of the Migration Act. In essence, the newly worded and structured offence closely resembles its predecessor but the Explanatory Memorandum does not say if the operation of the section has been changed by this amendment. Nonetheless, the amendment brings this offence into line with the equivalent offence in the Criminal Code. The elements of this offence mirror the physical and fault elements of the primary people smuggling offence, the only

26. This penalty is consistent with the maximum penalty for the equivalent offence in the Criminal Code and the current offence of people smuggling in the Migration Act.

27. The term 'exploit' in this section has the same meaning as in the Criminal Code which defines the exploitation of one person by another if (amongst other things) the conduct causes the victim to enter into slavery, forced labour or sexual servitude.

28. Explanatory Memorandum, op. cit., p. 12.

29. Pursuant to **proposed paragraphs 236B(3)(a)** and **(4)(a)**, a mandatory minimum sentence of eight years imprisonment with a non-parole period of five years is applicable.

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difference being that the smuggling involves at least five people. Subsection 233C(3) provides that in the alternative, a trier of fact may find the defendant guilty of the offence of people smuggling under section 233A. This situation may arise if, for example, the trier of fact is satisfied the defendant intended to smuggle fewer than five people.³⁰

The penalty for this offence remains 20 years imprisonment or 2,000 penalty units (\$220,000), or both.

Proposed section 233D is a new offence to be inserted into the Migration Act. It provides for the offence of supporting the offence of people smuggling. This amendment replicates proposed new section 73.3A of the Criminal Code (see analysis of **item 6** above).

Noting that the terms ‘material support or resources’ is not to be defined, it is not entirely clear how the new offence of supporting the offence of people smuggling differs in essence from the existing offence of facilitating the bringing of groups of non-citizens into Australia contained in existing section 232A. This provision was the basis upon which a Sydney man was recently charged for allegedly aiding persons arriving on a people smuggling venture that was intercepted on 28 June 2009.³¹

Proposed section 233E is to contain offences relating to concealing and harbouring non-citizens etc. These offences stem from existing paragraph 233(1)(b) and (c) and subsection 233(2) of the Migration Act. Though the structure of the offences has slightly changed, their operation has not changed.³²

Item 9 relocates existing section 233A after section 234 (False documents and false or misleading information etc. relating to non-citizens) by inserting **proposed section 234A** (Aggravated offence of false documents and false or misleading information etc. relating to non-citizens (at least 5 people)). The operation of existing section 233A has not been changed by this amendment.

Item 10 relocates existing section 233B by inserting **proposed section 236A** (No discharge of offenders without proceeding to conviction for certain offences). The operation of existing section 233A has not changed by this amendment.

This item also inserts existing section 233C by inserting **proposed section 236B** (Mandatory minimum penalties for certain offences). The Explanatory Memorandum notes that proposed section 236B amends existing section 233C to extend the provision to

30. Explanatory Memorandum, op. cit., p. 13.

31. Australian Associated Press, ‘Sydney man charged with people smuggling’, *Sydney Morning Herald*, 1 July 2009, viewed 5 March 2010, <http://news.smh.com.au/breaking-news-national/sydney-man-charged-with-people-smuggling-20090701-d4lg.html>

32. Explanatory Memorandum, op. cit., p. 15.

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a broader range of circumstances.³³ **Proposed section 236B** will apply to persons convicted of an offence against sections 233B, 233C or 234A (aggravated offences of people smuggling and false documents etc relating to at least 5 non-citizens) but not if the perpetrator was under 18 years of age when the offence was committed (subsection 236B(2)). Subsection (3) sets out the circumstances when the court must impose a minimum sentence of imprisonment and subsection (4) sets out when the court must impose a minimum non-parole period. The Explanatory Memorandum addresses the Court's residual discretion in sentencing which in practice may apply to crew members found guilty of an aggravated offence of people smuggling:

Mandatory minimum penalties still provide a court with discretion when determining the appropriate sentence, providing that the court does not go below the mandatory minimum sentence and non-parole period. This allows the court to have regard to the circumstances of both the offence and the offender. The court also has discretion to impose higher sentences on the offender depending on the person's culpability so long as they do not exceed the maximum penalty prescribed for the offence.³⁴

With respect to repeat offences, the Explanatory Memorandum also notes:

This amendment extends the definition of 'repeat offence' in proposed subsection 236B(5) to include the circumstance that involves a person being convicted of another offence against proposed sections 233B, 233C or 234A of the Migration Act whether in the same proceedings as the proceedings relating to the offence or in previous proceedings. This means that a person who is convicted of multiple offences in the same proceeding will be subject to the higher mandatory minimum penalties of eight years imprisonment with a non-parole period of five years. This will capture people smuggling organisers who have been involved in multiple people smuggling ventures but are coming before the court for the first time in relation to multiple offences.³⁵

Item 11 clarifies that **proposed section 236A** (No discharge of offenders without proceeding to conviction for certain offences) will only apply to offences committed on or after commencement of this item.

Part 2—Consequential amendments

Proceeds of Crime Act 2002

Item 13 extends the definition of 'serious offence' in section 338 of the Proceeds of Crime Act (an Act which establishes a scheme to confiscate the proceeds of crime) to the following new and existing offences under the Migration Act:

33. Explanatory Memorandum, op. cit., p. 16.

34. Explanatory Memorandum, op. cit., p. 17.

35. Explanatory Memorandum, op. cit., pp. 16–17.

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- section 233A (offence of people smuggling)
- section 233B (people smuggling involving exploitation or danger of death or serious harm etc)
- section 233C (people smuggling at least 5 people)
- section 233D (supporting the offence of people smuggling)
- section 233E(1) or (2) (concealing non-citizens etc), and
- section 234A (false documents etc relating to at least 5 non-citizens).

Surveillance Devices Act 2004

Items 14 and 15 amend section 30 of the Surveillance Devices Act. This section enables a law enforcement officer who is conducting an investigation into a specified offence to apply to an appropriate authorising officer for an emergency authorisation for the use of a surveillance device. The law enforcement officer must reasonably suspect that:

- the use of the surveillance device is immediately necessary to prevent the loss of any evidence relevant to that investigation
- the circumstances are so serious and the matter is of such urgency that the use of the surveillance device is warranted, and
- it is not practicable in the circumstances to apply for a surveillance device warrant.

Currently, the ability to obtain emergency authorisation for a surveillance device does not extend to offences under the Migration Act. Rather, it includes a short list of serious offences under various Acts³⁶ including the following offences under the Criminal Code:

- Part 9.1 of the Criminal Code (Serious drug offences) other than section 308.1 (Possessing controlled drugs) or 308.2 (Possessing controlled precursors)
- existing section 73.2 (Aggravated offence of people smuggling (exploitation etc))
- section 91.1 (Espionage and similar activities)
- Subdivision A of Division 72 (International terrorist activities using explosive or lethal devices)
- Division 80 (Treason and sedition)

36. Offences under other Acts include: an offence against section 233BAA of the *Customs Act 1901* (with respect to goods listed in Schedule 4 to the Customs (Prohibited Imports) Regulations 1956 or in Schedule 8 or 9 to the Customs (Prohibited Exports) Regulations 1958); or an offence against Part IIIA of the *Crimes Act 1914*; or an offence under the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*.

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- Divisions 101 (Terrorism), 102 (Terrorist organisations) 103 (Financing terrorism), and
- Division 270 (Slavery, sexual servitude and deceptive recruiting).

Item 14 extends the ability to obtain emergency authorisation for a surveillance device to an offence against section 73.3 of the Criminal Code (Aggravated offence of people smuggling (at least 5 people)). **Item 15** further extends the ability to obtain emergency authorisation for a surveillance device to an offence against proposed sections 233B (Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc.) and 233C (Aggravated offence of people smuggling (at least 5 people)) of the Migration Act.

Item 16 limits the application of this amendment to investigations that have begun on or after commencement of this Act.

Telecommunications (Interception and Access) Act 1979

Item 17 removes certain people smuggling related offences from the definition of ‘immigration offence’ in section 5 of the Telecommunications (Interception and Access) Act, an Act which enables warrants to be issued to intercept telecommunications. More explicitly, this amendment removes offences against sections 232A, 233, 233A, and 234 of the Migration Act for the purposes of the definition. Consequently, the definition of ‘immigration offence’ will simply be offences against section 236 (Offences relating to visas).

As the Explanatory Memorandum notes, applying for a telecommunications interception warrant to investigate offences listed in subsection 5D(3) is different and arguably more difficult than applying for a warrant under section 5D(3A) of the Act. This latter provision is currently used when applying for a warrant to investigate people smuggling offences under the Criminal Code. Under subsection 5D(3):

...the agency must not only show that the conduct constituting the offence is taking place, but must demonstrate that the offence:

- involves two or more offenders
- involves substantial planning and organisation
- involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques, and

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- is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind.³⁷

Item 18 therefore amends the definition of ‘serious offence’ in subsection 5D(3A) to incorporate offences against **proposed sections 233A, 233B, 233C, 233D, 233E, and 234** of the Migration Act. It also extends the definition to offences under **proposed 73.3A** of the Criminal Code. The practical effect of this will be that ‘a telecommunications interception warrant will be available for the investigation of the offence without needing to satisfy the additional criteria set out in subsection 5D(3). This will simplify the process and ensure consistency between the similar offences set out in the Migration Act and the Criminal Code’.³⁸

Schedule 2—Amendment to the *Australian Security Intelligence Organisation Act 1979*

Item 1 expands the definition of ‘security’ in section 4 of the ASIO Act. This definition is crucial to the functions of the Australian Security Intelligence Organisation (ASIO) which are set out in section 17 of the ASIO Act. They include to obtain, correlate and evaluate intelligence relevant to security and to only communicate such intelligence for purposes relevant to security.³⁹ Currently, ‘security’ means the protection of, and of the people of, the Commonwealth and the several States and Territories from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia’s defence system, or acts of foreign interference, whether directed from, or committed within, Australia or not.⁴⁰ **Proposed paragraph 4(aa)** will expand this definition to include ‘the protection of Australia’s territorial border integrity from serious threats’.

The practical effect of this amendment is that ‘ASIO would be able to communicate intelligence relating to people smuggling endeavours to agencies such as Australian Customs and Border Protection Service or law enforcement agencies’.⁴¹

On 24 February 2010 the *Sydney Morning Herald* reported that David McKnight, Associate Professor of Journalism at the University of New South Wales said that the shift in ASIO’s responsibilities was ‘quite a significant change. It highlights a trend that’s

37. Explanatory Memorandum, op. cit., pp. 18–19.

38. Explanatory Memorandum, op. cit., p. 19.

39. Existing paragraphs 17(1)(a) and (b) of the *Australian Security Intelligence Organisation Act 1979*.

40. Section 4 of the *Australian Security Intelligence Organisation Act 1979*. Note also existing paragraph (b) of the definition of ‘security’ which includes ‘the carrying out of Australia’s responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).

41. Explanatory Memorandum, op.cit., p. 20.

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pushing ASIO into the investigation of crimes rather than national security. The tendency is for ASIO to operate more like a police force'.⁴² However, as recently noted by the Director-General of Security, David Irvine, despite not having an express power under the ASIO Act to collect intelligence on people smuggling, the agency *does* already appear to have the ability to pass on information relating to people smuggling to other Commonwealth agencies:

ASIO's activities must be directed towards those items which are listed under section 4 of the act, which are called the heads of security. Border protection and people smuggling is not one of those, so we do not collect intelligence at home or overseas in operations specifically directed against people smuggling. From time to time, and as a result of our other inquiries on matters under our heads of security, we come across information that may be relevant to people smuggling, and under the act we are able to provide that to the relevant authorities.⁴³

Schedule 3—Amendment of the Telecommunications (Interception and Access) Act 1979

Item 1 amends the definition of the term 'foreign intelligence' in subsection 5(1) of the Telecommunications Interception and Access Act. The current definition is imported by virtue of the ASIO Act which defines it as intelligence relating to the capabilities, intentions or activities of a 'foreign power' which in turn is defined as 'a foreign government, an entity that is directed or controlled by a foreign government or governments, or a foreign political organisation'. The proposed new definition of 'foreign intelligence' will mean 'intelligence about the capabilities, intentions or activities of people or organisations outside Australia'.

The practical effect of this amendment is that it will enable information about foreign individuals or groups (non-state actors) to be collected when a warrant for a telecommunications interception device is issued under the Telecommunications Interception and Access Act.

Items 2 and 3 insert new definitions of the terms 'Minister for Defence' and 'Minister for Foreign Affairs' into subsection 5(1) of the Telecommunications Interception and Access Act. **Item 4** inserts a definition of the term 'Australia' to include the external territories into subsection 5(1) of the Telecommunications Interception and Access Act.

42. Y Narushima and J Pearlman, 'Asylum-seekers spark change to ASIO mandate', *Sydney Morning Herald*, 24 February 2010, p. 6, viewed 1 March 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F59ZV6%22>

43. D Irvine, Senate Legal and Constitutional Affairs Legislation Committee: Additional Estimates 2009–10, 8 February 2010, p. 47, viewed 5 March 2010, <http://www.aph.gov.au/hansard/senate/committee/S12747.pdf>

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Items 5, 7 and 9 make amendments to paragraphs 11A(1)(b) and subparagraphs 11B(1)(b)(i) and 11C(1)(b)(i) respectively. Currently, the Attorney-General will only approve the issuance of a warrant if satisfied that the collection of the intelligence is important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs. These amendments enable a warrant to be issued where it is in the interests of Australia's national security, foreign relations or economic well-being. According to the Explanatory Memorandum, this amendment 'recognises the broader nature of the contemporary threat environment' and aligns the conditions for issuing warrants under the Telecommunications Interception and Access Act with the scope and functions of intelligence agencies under the *Intelligence Services Act 2001*.⁴⁴

Items 5, 6, and 8 make minor amendments to paragraphs 11A(1)(b) 11B(1)(b) and 11C(1)(b) respectively to clarify that the Attorney-General will act on advice from the Minister for Defence and the Minister for Foreign Affairs on the need to issue a warrant for the collection of foreign intelligence.

Concluding comments

Since mid-2008 there has been a marked increase in the number of asylum seekers arriving by boat into Australian territory.⁴⁵ With the Christmas Island detention facilities nearing capacity and two tragic incidents in 2009, the government is under increasing pressure to adopt effective measures to address border security and combat people smuggling. Whether the increase in the number of boats arriving is due to a 'softening of border protection', as argued by the Coalition, or whether it has been caused by various 'push factors' caused by civil unrest in the region, both sides of politics appear to converge at the point that people smuggling is an unacceptable organised criminal activity that endangers people's lives.

The Minister's second reading speech emphasises that this Bill will 'bolster the government's hardline and comprehensive approach to combating people smuggling'. It also 'demonstrates the government's commitment to addressing the serious nature of people smuggling activities'.⁴⁶ However, considering that the Bill was not referred to a parliamentary committee for inquiry and arguably makes rather minor technical amendments, the Bill is not indicative of a significant policy change. That is not to say that the Bill does not contain important amendments—most notably, the creation of new

44. Explanatory Memorandum, *op. cit.*, p. 22.

45. 28 boats have arrived in Australia's territory between 20 November 2009 and 9 February 2010. The total number of 'irregular maritime arrivals' between 1 July 2008 and 9 February 2010 is 3494 and 176 crew members: Senate Legal and Constitutional Affairs Legislation Committee: Answers to questions on notice, Budget Supplementary 2009–10, 20 October 2009, viewed 10 March 2010, http://www.aph.gov.au/Senate/committee/legcon_ctte/estimates/add_0910/diac/DIAC5.pdf

46. R McClelland, 'Second reading speech', *op. cit.*, p. 5.

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offences as part of the implementation of the Protocol, the formal expansion of ASIO's heads of power and measures to facilitate the use of investigative tools such as telecommunication interception. However, as the Minister for Immigration and Citizenship, Senator Chris Evans recently emphasised, sophisticated policy responses are needed to effectively end people smuggling:

...it is not as simple as pretending that one simplistic notion of a change in domestic policy is going to end people smuggling in the world. It is just not going to happen and it has not happened in the past... I think all countries in the world now understand that international cooperation and quite sophisticated policy responses are necessary to try and deal with this problem.⁴⁷

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47. C Evans, Senate Legal and Constitutional Affairs Legislation Committee: Budget Supplementary 2009–10, 20 October 2009, p. 119, viewed 5 March 2010 <http://www.aph.gov.au/HANSARD/senate/commtee/S12494.pdf>

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