



**Australian
Privacy
Foundation**

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15 April 2010

Submission to: Senate Legal and Constitutional Affairs Committee

Anti-People Smuggling and Other Measures Bill 2010

Submission by the Australian Privacy Foundation

About the Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For information about the Foundation and the Charter, see www.privacy.org.au

General comments

This submission is very brief, as there has been limited time available for the Australian Privacy Foundation to consider the Bill.

The Australian Privacy Foundation supports some of the overall objectives of the *Anti-People Smuggling and Other Measures Bill 2010*, but we have serious concerns about the radical expansion of ASIO's powers, and some concerns about the surveillance provisions of the Bill.

Amendment of the ASIO Act 1979

ASIO enjoys significant privileges and exemptions in Australian privacy legislation and is not subject to the same privacy oversight as other Government agencies (ASIO, ASIS and the ONA are the only agencies completely exempt from the operation of the Privacy Act). Privacy and Civil Liberty organisations oppose these exemptions and believe that a more balanced approach could be adopted in privacy legislation, where ASIO is the subject of carefully sculpted provisions that implement all of the principles, rather than having a blanket exemption.

The Australian Privacy Foundation is therefore very concerned at any expansion of ASIO's powers or activities, as this increases the range of surveillance activity that can be undertaken by the organisation free from privacy rules and oversight.

This proposal represents one of the most significant expansions of ASIO powers in its history, yet there has been little debate and no justification has been presented in support of the proposal for expansion of ASIO jurisdiction to include border security. As far as the APF can see, if an individual represents a serious risk (such as terrorism) ASIO will already have jurisdiction under their existing powers. In any case, there are multiple existing agencies with responsibility for border security

We note with great concern that some of the People Smuggling offences are relatively minor (such as Section 233E – harbouring) and are likely to involve generally law-abiding Australian citizens attempting to protect loved ones in desperate circumstances. Giving ASIO a new power to collect intelligence relating to these minor offences seems a long way from their current jurisdiction over the serious matters of espionage and terrorism.

The APF therefore opposes the expansion of ASIO powers to cover border security.

Section 233D – Supporting the offence of people smuggling

The Australian Privacy Foundation shares the concerns of many other organisations regarding this type of “supporting” offence being introduced into Australian law. The criminal law already contains a variety of means to prosecute people who assist others engaged in criminal activity. We are aware of no evidence that demonstrates these new “supporting” offences to be necessary.

The proposed offence expands liability to a broader range of individuals, and does not require any test of ‘intent’. Similar supporting offences have failed in other contexts, such as anti-terrorism legislation. Notably, the failed prosecution in the Dr Haneef case rested on an offence of this type.

Further, we understand that the supporting offences in anti-terrorism legislation are currently under review.

For all of the above reasons, the APF opposes the creation of an offence of this nature.

Surveillance Devices Act 2004

The Bill proposes to amend the Surveillance Devices Act 2004 to expand the range of offences for which an emergency surveillance authorisation can be issued.

With Australia's modern communications technology and modern, accessible judiciary, there is no justification for authorising surveillance devices without a judicial warrant. Emergency authorisations essentially allow an agency to obtain an internal authorisation for 48 hours, leading to a complete lack of independent oversight.

In addition, one of the offences covered by the proposed expansion does not include any danger or risk to individuals that would justify the use of such emergency powers (proposed Section 233C).

The APF opposes the use of emergency authorisations in any circumstance whatsoever.

The APF also specifically opposes the use of emergency authorisations in these circumstances.

Telecommunications (Interception and Access) Act 1979

The Australian Privacy Foundation does not oppose the proposed harmonisation provisions relating to TIA warrants.

However, we are concerned that the proposal purports to extend TIA warrants to include Section 233E (harbouring). This is not a serious offence and it is inappropriate to expand TIA warrants to this type of low-level offence. We acknowledge that this may be an oversight or unintended consequence of the Draft.

If, however, the intention is to expand TIA warrants to harbouring, then the APF opposes the measure.

Foreign intelligence

The Australian Privacy Foundation has had insufficient time to consider all of the implications of the proposals relating to foreign intelligence. On a brief review, they appear acceptable.

We have accepted the invitation to appear before the Committee to provide verbal evidence.

For further information contact:

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