

## **Anti-People Smuggling and Other Measures Bill 2010**

### ***1.1 Overview***

People smuggling is a serious criminal activity that endangers lives and threatens Australia's territorial and border integrity.

The purpose of the Anti-People Smuggling and Other Measures Bill 2010 (the Bill) is to diminish this risk by more comprehensively and consistently criminalising people smuggling activity and enhancing the capability of law enforcement and intelligence agencies to investigate and disrupt people smuggling networks.

The Bill amends the *Migration Act 1958* (the Migration Act) and the *Criminal Code Act 1995* (the Criminal Code) to strengthen people smuggling offences and to ensure that such offences are consistently treated across legislation.

The Bill also amends the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act), the *Surveillance Devices Act 2004* (the SD Act) and the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) to ensure that law enforcement and intelligence agencies have the necessary tools to combat people smuggling.

### ***1.2 Consolidating and strengthening people smuggling offences***

Offences relevant to people smuggling are located in both the Criminal Code (for ventures departing or transiting Australia) and the Migration Act (for ventures entering Australia).

Currently, while most, but not all, offences are contained in each Act, different legal tests apply meaning that different outcomes can arise from the same facts depending on which Act is relevant. Prosecuting people smuggling offences is further complicated by the structure of the Migration Act which does not readily identify or co-locate people smuggling offences. In addition, neither Act addresses the full range of conduct typically associated with contemporary people smuggling operations.

The Bill amends these provisions by creating a new offence of providing support or resources for people smuggling in both Acts, harmonising offences and elements between the Acts and restructuring and retitling the Migration Act provisions to improve clarity.

The Bill strengthens the existing framework by harmonising people smuggling offences between the two Acts to ensure that offences for people smuggling ventures entering Australia or ventures departing or transiting Australia are consistently criminalised. In particular, the Bill amends the Migration Act to include a section equivalent to section 73.2 of the Criminal Code so that the aggravated offence of exploitation or danger of death or serious harm also applies to people smuggling ventures entering Australia. The Bill also removes discrepancies in the tests between the two Acts.

The Bill also amends both Acts to target people and organisations that organise, finance and provide other material support to people smuggling operations. The Bill inserts a new offence of providing



support or resources for people smuggling activities into each Act. The offence will apply if a person is reckless as to whether the material support or resources they provide will be used in or assist a people smuggling venture. Material support could include, but would not be limited to, currency, monetary instruments or financial services, false documentation, equipment, facilities or transportation. The offence will not apply to a person who pays smugglers to facilitate their own passage to Australia or who pays for a family member or other person on the same venture. The maximum penalty for this offence is ten years imprisonment, a fine of \$110,000, or both.

The Bill also modifies the existing mandatory minimum penalties applying to people smuggling offences in the Migration Act. The Bill will also ensure that where a person is convicted of multiple aggravated people smuggling offences in a single proceeding, mandatory minimum penalties set out in the Migration Act are applied as a 'repeat offence'. This involves a mandatory minimum penalty of at least eight years imprisonment with a five year non-parole period. The Bill also applies that level of mandatory minimum penalty to a conviction for the proposed aggravated people smuggling offence of exploitation, danger of death or serious harm under the Migration Act.

Harmonising and strengthening the current criminal law framework is central to dealing with people smugglers. Deterring the criminal groups who organise, participate in and benefit from people smuggling and their support networks requires effective information gathering to detect, disrupt and prosecute people smuggling activities. The Bill addresses this requirement by amending the TIA Act, the SD Act and the ASIO Act to ensure that law enforcement and intelligence agencies have the appropriate tools necessary to combat people smuggling.

### ***1.3 Investigative tools***

The Prime Minister's 2008 National Security Statement identified the need to protect Australia's territorial and border integrity from serious threats such as people smuggling as being critical to preserving Australia's national security.

Currently, law enforcement and security agencies have a range of investigative tools available to them but their capacity to access these tools to address people smuggling activities is constrained by inconsistencies and gaps throughout the relevant legislation that do not reflect the reality of the contemporary security environment.

#### ***ASIO powers to examine border security threats***

ASIO's functions are set out in section 17 of the ASIO Act. These functions include obtaining, correlating and evaluating intelligence relevant to security and communicating any such intelligence for purposes relevant to security. 'Security' is currently defined in section 4 of the ASIO Act as:

- (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
  - (i) espionage;
  - (ii) sabotage;
  - (iii) politically motivated violence;
  - (iv) promotion of communal violence;
  - (v) attacks on Australia's defence system; or
  - (vi) acts of foreign interference;whether directed from, or committed within, Australia or not; and



- (b) 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).

This definition does not specifically encompass border security issues. This means that ASIO currently has limited capacity to carry out its intelligence functions under section 17 in relation to protecting Australia's territorial and border integrity against threats such as people smuggling.

Currently, ASIO is only able to consider people smuggling and other border security issues where there is a link with a security matter within the definition of security in section 4. For example, if there is a link between people smuggling and terrorism, such as people smuggling ventures organised by a terrorist group or for terrorist purposes, ASIO could use its intelligence capabilities in relation to the matter. However, ASIO does not have a legislative mandate to use its intelligence capabilities in relation to people smuggling or border security threats more generally.

Schedule 2 of the Bill will amend the definition of 'security' in section 4 of the ASIO Act to include 'the protection of Australia's territorial and border integrity from serious threats'. This will enable ASIO to use its existing intelligence capabilities to respond to people smuggling and other serious threats to Australia's territorial and border integrity, such as unlawful armament dealings and serious transnational crime. Consistent with the Prime Minister's 2008 National Security Statement, this amendment will enable ASIO to cooperate with other agencies, including law enforcement agencies, and to share intelligence so as to assist the whole-of-government response to serious people smuggling and other serious threats to Australia's territorial and border integrity.

While the Bill will enable ASIO to use its existing intelligence collection and analysis capabilities in relation to whole-of-government efforts to combat people smuggling, it will not give ASIO any new powers. The Bill will extend the matters that come within the definition of security by adding a new limb to the definition of security that encompasses border security matters. This does not give ASIO new powers. Rather, it gives ASIO a new role within its existing security functions.

By amending the definition of 'security' to include 'the protection of Australia's territorial and border integrity from serious threats', ASIO's role will be subject to the same legislative requirements applicable to its current security functions. This includes requirements that certain intelligence collection must only be done under warrant and requirements relating to the communication of intelligence by ASIO. ASIO is also required to comply with the Attorney-General's Guidelines (issued under section 8A of the ASIO Act). The Attorney-General's Guidelines require, among other things, that any means used for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence.

ASIO's operational activities are subject to oversight by the Inspector-General of Intelligence and Security which operates independently of Government and has extensive investigatory powers. ASIO is also accountable to the Parliamentary Joint Committee on Intelligence and Security in relation to its administration and expenditure. In addition, ASIO reports annually to the Attorney-General on its activities. An unclassified version of its annual report is tabled in Parliament.

The amendments will not allow ASIO to undertake activities that are more appropriately undertaken by law enforcement agencies. ASIO is not a law enforcement or prosecution agency. It has no powers of arrest and is not tasked with investigating and collecting evidence for prosecutorial purposes. This is consistent with the traditional separation between law enforcement and intelligence agencies in Australia. The amendments contained in this Bill will not affect this functional divide.



During Parliamentary debate in the House of Representatives on this Bill, several speakers expressed concern as to whether ASIO's resources are adequate to enable ASIO to perform both its current responsibilities, as well as its new responsibilities in relation to protecting Australia's territorial and border integrity from serious threats. Counter-terrorism and counter-espionage will remain top priorities for ASIO. The proposed amendment to the ASIO Act will enable ASIO to use its capabilities in relation to people smuggling to enable ASIO to contribute to the whole-of-Government effort relating to people smuggling and other threats to Australia's territorial and border integrity.

ASIO has expanded significantly in recent years. Operational decisions about how ASIO will support whole-of-government efforts to address people smuggling will be determined by the Director-General of Security and such a role could be accommodated within existing resources. However, should ASIO's people smuggling role prove to be more resource intensive than initially anticipated, this will need to be monitored and considered through the normal budgetary processes.

### ***Interception and surveillance powers***

The Bill makes consequential amendments to the TIA Act and the SD Act to ensure that the investigative tools under both Acts are available in relation to both the new and amended people smuggling offences.

Currently, the TIA Act allows law enforcement agencies to apply for an interception warrant to investigate specific people smuggling offences. However, a different legislative test applies depending on whether the offence is located in the Migration Act rather than the Criminal Code. This limits the availability of information needed to combat people smuggling activities based purely on the location of an offence rather than the nature of the offence. The Bill will amend the TIA Act to ensure that all relevant people smuggling offences under either the Migration Act or the Criminal Code, including the new offences being inserted into those Acts under this Bill, are recognised as being serious offences for the purposes of the Interception Act and are subject to the same legislative test. The amendments will remove ambiguity about the application of the TIA Act for agencies applying under that Act for an interception warrant to investigate people smuggling offences and ensure the relevant provisions reflect the range of available offences, including the new aggravated people smuggling offences inserted by this Bill into the Criminal Code and the Migration Act.

Any information collected under the TIA Act will continue to be subject to the existing limitations on the secondary use and disclosure of lawfully intercepted information set out in Part 2-6 of the TIA Act.

The Bill also amends the SD Act to reflect other amendments being made by the Bill. Normally law enforcement agencies require a warrant to install, use and remove a surveillance device unless the circumstances support an emergency authorisation. Currently though, an emergency authorisation is only available in connection with the investigation of one offence relating to people smuggling: an aggravated offence of people smuggling with circumstances of exploitation or a danger of death or serious harm under section 73.2 of the Criminal Code.

The Bill will amend section 30 of the SD Act to extend the existing capability of law enforcement agencies to obtain an emergency authorisation to cover all the aggravated people smuggling offences in both the Criminal Code and the Migration Act, including the new aggravated people



smuggling offences included in the Bill. This amendment ensures that the same powers are available for circumstances of greater culpability irrespective of their location.

### ***Foreign intelligence collection***

The Bill amends the definition of foreign intelligence in the TIA Act to align it with the concept of foreign intelligence in the *Intelligence Services Act 2001* (the ISA).

Under the TIA Act, the Attorney-General can issue, on advice from the Minister of Defence or the Minister for Foreign Affairs, a telecommunications interception warrant to collect foreign intelligence information (pursuant to sections 11A, 11B or 11C of the TIA Act).

Currently the TIA Act limits the collection of foreign intelligence to information relating to foreign governments and foreign political organisations where that information is important to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs. This definition came into effect at a time when State actors posed the most significant security threat to Australia. It no longer adequately reflects the reality of Australia's contemporary threat environment where, in an increasingly interconnected global community, activities such as people smuggling are usually undertaken by non-State actors that are neither sponsored by nor associated with either a foreign government or a foreign political organisation. Nor does it accord with the concept of foreign intelligence in the ISA which includes information about foreign persons and foreign organisations.

Schedule 3 of the Bill amends the definition of foreign intelligence in the TIA Act to remove the requirement for involvement by a foreign government or foreign political organisation before foreign intelligence can be collected. Removing this requirement will enable information about foreign individuals or groups operating without government support to be collected in accordance with a warrant issued under Part 2-2 of the TIA Act.

The Bill also amends the TIA Act to recognise the broader nature of the contemporary threat environment by allowing the collection of foreign intelligence where it is in the interests of Australia's national security, foreign relations or economic well-being. This aligns the conditions for issuing warrants under the TIA Act with the scope of functions of intelligence agencies under the ISA.

These amendments will enhance the ability of intelligence agencies to collect intelligence about people smuggling networks and other non-State actors threatening national security and to share information critical to protecting Australia's national interests within the national security community.

The Bill does not affect existing protections on the collection, use and disclosure of foreign intelligence information as set out in the TIA Act and the ISA.