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Senate Legal and Constitutional Affairs References Committee
By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Re: Inquiry into the Anti-People Smuggling and Other Measures Bill 2010

Please accept this short submission to your inquiry in the above bill. The Sydney Centre for International Law is a leading centre of international law and policy research in the Asia-Pacific region.

First, the Bill's revision of people smuggling offences, and the proposed new offence of supporting people smuggling, depart from the accepted definitions of such offences under international law (in the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organised Crime*). In particular:

(a) *Article 6 of the Protocol requires States to criminalize specified conduct where committed 'in order to obtain, directly or indirectly, a financial or other material benefit'*. Such requirement is presently reflected in the people smuggling offences in the *Criminal Code Act 1995* (Cth) s73.1(d)(i)-(ii), which require an accused either obtain a benefit or intend to obtain a benefit. **In contrast, the Bill seeks to omit the requirement of a profit motive** by its proposed changes to s. 73 of the Criminal Code and ss. 232A-233C of the *Migration Act*.

The consequence of omitting a profit motive broadens the offence and transforms its character beyond what is envisaged in international law. Under the Protocol, the profit motive underlying people smuggling is essential in identifying what is regarded as harmful or wrongful about people smuggling: the commercial exploitation of often vulnerable people such as asylum seekers. In contrast, by dispending with the profit motive, the proposed offence transforms the offence into a more general prohibition on helping anyone (including refugees or persons rescued at sea) to find safety, even for altruistic or humanitarian reasons, in circumstances where 'queues' abroad do not exist or do not function. **In consequence, people such as Oskar Schindler in World War Two, or Arne Rinnan, Captain of the *Tampa* who rescued lives at sea, would be people smuggling criminals; so too any person who sought to rescue Anne Frank.**

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(b) *Article 6 of the Protocol requires States to criminalize specified conduct 'when committed intentionally'*. **The Bill seeks to remove the fault requirement such as it exists in the present domestic offences**:

(i) The amendments concerning the aggravated offences of people smuggling would provide that there will be no fault element and that a person can be convicted of an offence without the establishment of any intent on their behalf to commit the underlying offence (see the second paragraph of both s 73.2 of the *Criminal Code Act* and s 233B of the *Migration Act 1958*).

(ii) The proposed new offence of 'supporting' people smuggling (in s 73.3A) would also omit a fault element (whether of intention or recklessness). The *Protocol* does not require Australia to criminalize any offence of 'supporting' people smuggling. Article 6(2) does, however, permit Australia to criminalize complicity, but if Australia wishes to do so then the Protocol requires Australia to incorporate the key elements of the underlying offence (including the fault element of intention).

The consequence of omitting the fault requirement in some of the offences is to criminalize entirely innocent conduct and to over-reach the criminal law. For example, a person may 'support' the offence of people smuggling (under new s. 73.3A) simply by the fact of providing resources to another person or an organization, which aids the receiver. The person providing support need not *intend* to aid the receiver to commit people smuggling, nor even be *reckless* (in the sense of being aware of a substantial risk) as to whether smuggling is likely to occur or is even intended.

In practice, an innocent person can only avoid a risk of criminal liability under this provision where the person resolves never to provide money, resources or assistance to anyone or any organisation overseas (including charities and humanitarian relief groups), since a person can never know with any degree of certainty whether those resources may be used to aid people smuggling.

Likewise, imposing absolute liability for the primary offence of people smuggling would, for example, criminalize the following:

- masters of ships or pilots of aircraft who unknowingly bring stowaways into Australia;
- masters of ships or pilots of aircraft who bring non-citizens into Australia who have presented apparently valid travel documents which turn out to be fraudulent;
- ships which rescue life on the high seas and seek to land rescued persons at Australian ports. For example, the Norwegian captain of the vessel *Tampa*, who rescued asylum seekers at sea and brought them into Australian waters, would be liable to prosecution as a people smuggler.

In circumstances where a person cannot reasonably and prospectively know the scope of their liabilities, Australia places itself at risk of violating the prohibition on retrospective criminal punishment under article 15 of the *International Covenant on Civil and Political Rights*. Article 15(1) ICCPR provides:

> 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. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Freedom from retroactive punishment encompasses the principle of legality that requires that criminal offences must not be defined too broadly or vaguely. As the European Court of Human Rights stated in *Kokkinakis v Greece* (1993) 17 EHRR 397 at para. 52:

> ... [freedom from retroactive punishment] also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. *This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.* [Emphasis added]

The criminalization of entirely innocent conduct, which a person cannot reasonably know will attract criminal liability, is a likely consequence of removing the fault requirements in the definition of offences. In many countries, giving any support to a person abroad brings some risk of criminal liability.

ASIO's Role, Telecommunications Interception Powers and Privacy Rights

The changing nature of security threats is well recognised. There may be circumstances in which it is appropriate for ASIO to utilize its powers in relation non-State actors of various descriptions. It is also noted that ASIO is only permitted to communicate intelligence for security purposes.

However, 'securitizing' criminal activities which are most properly dealt with by law enforcement authorities – such as people smuggling – risks diverting ASIO from its core mission of national security. People smuggling is essentially organised crime and seldom involves, for instance, risks of terrorism or weapons smuggling, given that persons smuggled are almost always intercepted and detained and are therefore subject to acute State control and surveillance.

Further, to the extent that the proposed people smuggling offences partly criminalize entirely innocent conduct, the extension of ASIO intercept powers in such circumstances risks unjustifiably violating privacy rights under the ICCPR.

Such interference would only be justified where there is reasonable suspicion of criminal activity which is genuinely threatening, and would not be justified to support fishing expeditions into the affairs of many thousands of blameless Australians who routinely transmit money abroad for all kinds of innocent purposes yet who may be captured on the face of the new offences.

Broader Policy Considerations

The right of asylum has ancient roots in international law. Australia inherited the long-established British democratic tradition of providing freedom to any who had been denied it in their own countries, on account of persecution, torture, or fear of death. Historically that tradition of safeguarding freedom in the face of authoritarian governments was a considerable source of pride in those countries, despite pressure from some quarters to diminish the availability of that freedom.

People smuggling laws have much reduced that zone of freedom in contemporary international society. Such laws send a paradoxical and sometimes hypocritical message. On the one hand, the law makes refugee status available if a person succeeds in reaching Australia. On the other hand, it is a crime for anyone to help such a person to reach Australia, in circumstances where the person often cannot get protection elsewhere – either because there are no queues in many parts of the world, or because such queues as do exist require the person to waste decades of their life 'warehoused' in refugee camps until some solution is found.

We caution the Parliament against encroaching further on the deep tradition in democratic countries of safeguarding the freedom of foreigners who need it. We hope that the eager pursuit to ensure 'border protection' and orderly immigration controls will not come at the expense of the greater value of human freedom and the interest we all share in safeguarding others from persecution or harm.

Yours sincerely,

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