THE UNIVERSITY OF
NEW SOUTH WALES

FACULTY OF LAW

16 April 2010

Senate Legal and Constitutional Affairs Committee
Via online submission

Dear Committee Secretary,

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

Please find attached a submission in relation to the above Bill on behalf of the Migrant and Refugee Rights Project and the International Refugee and Migration Law Project, both housed within the Faculty of Law at the University of NSW (UNSW).

The Migrant and Refugee Rights Project (MRRP) is a project of the Australian Human Rights Centre at UNSW. It engages in research, advocacy, litigation and law reform to advance the human rights of refugees and migrants in Australia and Asia. MRRP runs a clinical program in which UNSW Law students gain practical experience in multifaceted approaches to human rights litigation and advocacy in both domestic and international settings, in collaboration with regional partner organizations.

The International Refugee and Migration Law Project is a research program of the Gilbert + Tobin Centre of Public Law at UNSW. It encompasses a broad range of international refugee and migration law issues, including four specific projects on complementary protection in international refugee law, climate-induced displacement and international law, immigration restriction law and policy from the 19th century to the present day, and the application of international humanitarian law and international criminal law to the adjudication of refugee status in Canada, the US, the UK, Australia and New Zealand. These projects are funded by two Australian Research Council Discovery Grants and a

grant from the Canadian Social Sciences and Humanities Research Council International Opportunities Fund.

Thank you for your time in considering our submission.

Yours sincerely,

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Anti-People Smuggling and Other Measures Bill 2010

Submission to the Senate Legal and Constitutional Affairs Committee

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I. INTRODUCTION

In opening his Second Reading Speech on the *Anti-People Smuggling and Other Measures Bill 2010 (Cth)* ("the Bill"), the Attorney-General described how a "global surge" in asylum seekers was being driven by "insecurity, persecution and conflict", especially in Afghanistan, the Middle East and Sri Lanka.[1] He observed that the numbers of people seeking asylum in Australia reflected "a worldwide trend", but that in searching for protection, "asylum seekers often fall prey to people smugglers". According to the Attorney-General, people smuggling is "a pernicious trade" that is "exploitative and dangerous", and people smugglers are "motivated by greed", operate in "sophisticated cross-border crime networks", and have little regard for lives or safety of those being smuggled.

The stated purpose of the Bill is to "strengthen the Commonwealth' anti-people smuggling legislative framework" by ensuring "that people smuggling is comprehensively criminalised in Australian law". In his Second Reading Speech, the Attorney-General stated that "[o]rganised criminal syndicates depend on enablers and facilitators who play a vital role in supporting the criminal economy", and that "[t]argeting those who organise, finance and provide other material support to people smuggling operations is an important element of a strong anti-people smuggling framework."

Yet, the Bill has been drafted so broadly that its provisions encompass not only organized criminal people smuggling networks – the purported focus of the Bill – but also individual asylum seekers and their families. We argue that this is not only bad policy, but also risks violating Australia's obligations under international refugee and human rights law. Furthermore, 'people smuggling' is defined in such wide terms that it encompasses cases of rescue-at-sea (which ship captains have an obligation to effect, in certain circumstances) and airlines that inadvertently transport undocumented passengers to Australia. The Bill also fails to appreciate why people may engage the services of people smugglers.

Furthermore, the Bill and its Explanatory Memorandum ignore the fact that the majority of those smuggled into Australia are, in nine out of ten cases, Convention refugees – people to whom Australia has protection obligations under international law, and who have a right to seek asylum and not be penalized if they enter Australia without a visa.[2] The nature of the offences – and the severity of their penalties – bear no relationship to the problem that the Bill purports to address.

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[1] Robert McClelland, "Anti-People Smuggling and Other Measures Bill 2010: Second Reading Speech", House of Representatives (24 February 2010), *Parliamentary Debates*, 1645.

[2] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 31; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III), art 14.

Nor do they bear a relationship to the UN Smuggling Protocol on which the Bill is supposedly based, and which Australia ratified in 2004.[3] This is because the Smuggling Protocol is intended to address the problem of irregular labour migration, not refugee flows. Article 19 of the Protocol expressly provides that States' responsibilities under international law – in particular, their obligations under the Refugee Convention – must continue to be respected, and that any anti-smuggling initiatives must be consistent with those obligations.

This submission proposes a series of recommendations that would enable the Bill to effectively serve its purposes of: (1) addressing the exploitative and dangerous aspects of people smuggling, (2) undermining and toughening sanctions against those who run and substantially profit from lucrative cross-border people smuggling networks, and (3) reconciling discrepancies between people smuggling provisions in the *Migration Act* and the *Criminal Code.* In contrast to the Bill's current provisions, our proposed recommendations fulfill these purposes while taking into account Australia's international obligations and the rights and well-being of asylum seekers and their families, as well as others unfairly affected by the Bill's reach.

Like this Bill, our recommendations will not stop people smuggling, and they will not stop unauthorized boat arrivals. This will only be achieved by addressing the root causes of asylum – such as conflict, persecution and severe human rights violations. People embark on the perilous boat voyage to Australia because it is often their *only* avenue to safety and protection from persecution. Asylum seekers cannot go to a consulate abroad and apply for a protection visa. In many parts of the world, there are no refugee camps they can flee to, and even if there are, people may wait for decades without a durable solution. People smuggling responds to a gap in lawful migration pathways for those whose lives are at risk. The only way to stop the boats, and to stop smuggling, is to expand authorized avenues through which those refugees may obtain Australia's protection. If Australia expands the number of available protection places and improves its authorized channels for refugee family reunion, it will curtail the people smuggling business.

II. SUMMARY OF CONCERNS

This submission outlines legal concerns with several key aspects of the Bill. It primarily focuses on amendments to the *Migration Act* and the *Criminal Code*, but also touches briefly on amendments to the *ASIO Act* and related legislation. These concerns include:

- Implications of **new material support provisions**, which criminalize the provision of support by individuals in Australia to relatives and friends who

[3] Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime (2000).

pay smugglers to bring them to Australia. We oppose these amendments because:

- Individuals who charitably support refugees' basic survival needs or flight from persecution will be unable to prove that those funds (potentially over a period of years) were not used to pay a smuggler. This will: act as a powerful deterrent against the provision of humanitarian assistance; provide incentives for money to be remitted through unofficial channels, fuelling a different set of exploitative organized crime networks; divert significant law enforcement resources to police small financial transactions that in no way threaten the security or well-being of any Australian; and unfairly subject refugee communities to financial scrutiny and surveillance.

- The term "material support" is vague and indeterminate, raising fundamental fairness and due process concerns. For this reason, it is currently being challenged in the United States Supreme Court.

- The provisions are inconsistent with Australia's obligations under international law, including:

    - Australia's international obligation to act in "good faith", which requires that Australia not seek to avoid triggering its obligations under the Refugee Convention by preventing those entitled to protection from reaching Australia;

    - The Smuggling Protocol, which does not aim to punish individuals who assist smuggled persons for purely humanitarian reasons;

    - Article 23 of the International Covenant on Civil and Political Rights (ICCPR), which requires the protection of family unity by the State; and

    - The Convention on the Rights of the Child (if the smuggled relative is a child), including article 22(1) which requires that States ensure that refugee children receive appropriate protection. Incarcerating a parent for providing material support in order to protect her child from persecution may also violate articles 2(2) (non-discrimination based on status of parent), 3(1) (legislative bodies must take into account the best interests of the child), and 3(2) (State must ensure child's protection and care).

- Punishing refugee family members is inhumane and unfair in light of the absence of available family reunification alternatives in Australia.

- Concerns regarding "**aggravated offences**" carrying harsh penalties and mandatory minimum sentences. (Although a number of these provisions appear in current legislation, we articulate our concerns with the provisions so that the Committee may recommend their deletion or amendment as appropriate):

    - We object to the re-inclusion of the aggravated offence of **false documents** regarding five or more non-citizens which may include the accused (proposed section 234A of the *Migration Act*), because it violates article 31 of the Refugee Convention which prohibits a Contracting State from imposing penalties on a refugee on account of her illegal entry, and is therefore also inconsistent with article 19 of the Smuggling Protocol, which requires compliance with the Refugee Convention.

    - We object to the re-inclusion of the aggravated offence of **people smuggling (five or more non-citizens)** (proposed section 233C of the *Migration Act*), because this small number of non-citizens would render involvement in virtually every venture an aggravated offence – even the transporting of a single nuclear family.

    - We object to the **mandatory minimum sentences** in proposed s236B, and s236A's stripping of judicial discretion to consider mitigating factors in sentencing, because:

        - They will disproportionately impact vulnerable people, such as poor Indonesian fishermen who comprise the majority of individuals currently prosecuted for smuggling, whose personal involvement in a smuggling venture may be minimal, and whose family will likely be left destitute if their breadwinner is imprisoned for five years in Australia.

        - Mandatory sentencing regimes are inconsistent with Australia's international legal obligations under the ICCPR, including articles 9 (prohibiting arbitrary detention, which includes detention that is unjust or unreasonable even if sanctioned by law) and 14 (requiring judicial review of sentencing), as well as potentially articles 7 (prohibition of cruel, inhuman or degrading treatment or punishment) and 10 (treatment of people deprived of liberty). These provisions are also therefore inconsistent with article 19 of the Smuggling Protocol, which requires compliance with the Australia's human rights treaty obligations.

        - Mandatory sentencing regimes are inconsistent with the fundamental principle of Australian law that a criminal sentence must be proportionate to the offence committed.

The maximum sentences for the aggravated offences in the Bill are harsher than for crimes of mass destruction (which also have no minimum sentences), such as lighting a bushfire or burning down a house with a person inside.

- Concerns regarding the **removal of the requirement of an intention to obtain financial benefit** as an element of people smuggling offences in the *Criminal Code*, because:

    - The amendment would criminalize the activities of aid organizations, humanitarian workers, religious workers and others who assist people across borders in other countries for the purely humanitarian reason of saving their lives.

    - It is directly at odds with the Smuggling Protocol, which defines an act as people smuggling only if it is undertaken "in order to obtain, directly or indirectly, a financial or other material benefit".

    - The amendment is purportedly included for the purpose of harmonizing the *Criminal Code* with the *Migration Act* (which does not require such intention), and the better way to reconcile the two Acts is to include the requirement of an intent to obtain financial benefit as an element in the *Migration Act*'s smuggling provisions.

- Concerns regarding the treatment of unauthorized boat arrivals as a national security threat and the corresponding **expansion of ASIO's jurisdiction** to spy on refugee communities to identify threats to "border integrity". We oppose the expansion of ASIO's jurisdiction because:

    - Unauthorized boat arrivals do not present a threat to national security, and to enshrine a connection between unauthorized boat arrivals and national security in legislation is not only inaccurate and morally irresponsible, but it also establishes a flawed foundation for expenditure of important national security resources.

    - Authorizing ASIO to obtain warrants to listen to individuals' phones, read their emails, open their mail and monitor their financial transactions if ASIO suspects that they may be supporting refugee relatives or friends overseas who might engage people smugglers encroaches on the civil liberties and privacy of migrant and refugee communities, and potentially violates legal professional privilege between refugees and their lawyers.

III. SUMMARY OF RECOMMENDATIONS

Recommendation 1

We strongly oppose the amendments in Items 6 and 8 of Part 1 of Schedule 1 to the Bill.

If the offences remain in the Bill, we recommend that they be amended such that: (1) they are limited in application to individuals who provide core operational funding *directly* to a people-smuggling syndicate or who play a key organizational role in the operation of a people-smuggling syndicate, with each of those terms defined in a precise and circumscribed manner, and (2) they explicitly exclude individuals on a people smuggling venture (or who intend to be on a venture) from the definition of "persons" who may be the "receiver" of the relevant support or resources, mirroring the language of proposed subsections 73.3A(2) and 233D of the *Criminal Code* and *Migration Act* respectively.

Recommendation 2

In order to reconcile the Bill's people smuggling offences with Australia's obligations under international law, and with the definition of smuggling under the Smuggling Protocol, proposed subsection 233A(1)(c) should be amended to require that the person being brought to Australia is a non-citizen who "had, or has, no lawful right to come to Australia, including no right to protection as a refugee under the Convention relating to the Status of Refugees".

Recommendation 3

We support proposed section 233B of the *Migration Act* and section 73.2(1) of the *Criminal Code* provided that: (1) "danger of death or serious harm" is defined to involve a level of danger beyond that inherent in any sea voyage, (2) proposed 236A is amended to allow the consideration of mitigating factors as appropriate in relation to this offence [if section 236A is not deleted entirely; see Recommendation 6], and (3) proposed s236B is amended so as not to include mandatory minimum sentences for this offence [see Recommendation 6].

Recommendation 4

We object to the inclusion of proposed section 234A in the *Migration Act*. If the offence is to be included in the Act, we recommend the following amendments in order to reconcile the provision with the rest of the Act and with Australia's obligations under the Refugee Convention and article 19 of the Smuggling Protocol: (1) the provision should not apply if the accused or any of the other non-citizens are found to be refugees or otherwise entitled to protection under international law, (2) if that exception is not included, then, at a minimum: (a) the

phrase "(which may include that person)" should be replaced with the phrase "(excluding that person)", (b) the offence should include an exception for circumstances in which the five non-citizens are related to the person being charged with the offence, (c) proposed s236A should be amended to allow the consideration of mitigating factors as appropriate in relation to this offence [if section 236A is not deleted entirely; see Recommendation 6], and (d) proposed s236B should be amended so as not to include mandatory minimum sentences for this offence [see Recommendation 6].

Recommendation 5

We oppose the inclusion of section 233C in the *Migration Act*. If this section is included in the Act, we recommend that the following amendments be made: (1) the provision should not apply if the accused or any of the other non-citizens are found to be refugees or otherwise entitled to protection under international law, (2) if that exception is not included, then, at a minimum: (a) the provision should apply only if 200 of more non-citizens are involved, (b) proposed 236A should be amended to allow the consideration of mitigating factors as appropriate in relation to this offence [if section 236A is not deleted entirely; see Recommendation 6], and (c) proposed s236B should be amended so as not to include mandatory minimum sentences for this offence [see Recommendation 6].

Recommendation 6

We oppose the inclusion of proposed sections 236A (judicial discretion-stripping) and 236B (mandatory minimum sentences) in the *Migration Act* and recommend that both be deleted from the Bill.

Recommendation 7

We do not support the removal from the *Criminal Code*'s smuggling offences (subsections 73.1 and 73.3) the requirement of an intent to obtain a financial benefit from the smuggling activity. We recommend that in order to reconcile the discrepancy between the *Migration Act* and the *Criminal Code*, the Bill insert into the *Migration Act*'s smuggling provisions a requirement that the relevant conduct be undertaken with the intent "to obtain, directly or indirectly, a financial or other material benefit", adopting the definition of smuggling from the Smuggling Protocol.

Recommendation 8

We oppose the amendments to the *ASIO Act* in Schedule 2 to the Bill. If the amendments are included, we recommend that "serious threats" be defined to exclude irregular migration and unauthorized boat arrivals unless ASIO is aware of a specific security threat associated with a particular venture or vessel.

IV. ANALYSIS AND RECOMMENDATIONS

A. Amendments to the *Migration Act* 1958 and the *Criminal Code Act* 1995 (Schedule 1, Part 1)

Part 1 of Schedule 1 to the Bill contains a series of amendments to the *Criminal Code Act 1995* and the *Migration Act 1958.* The *Criminal Code* amendments address smuggling outside Australia; the *Migration Act* amendments concern smuggling into Australia.[4]

Items 6 and 8 create a new offence in the *Criminal Code* and the *Migration Act* [proposed section 73.3A and section 233D respectively] of providing "material support" or resources that aid the receiver or a third party to engage in people smuggling. For example, the provision applies to family and friends in Australia who send financial aid to relatives who at some point engage smugglers to reach Australia. It does not apply to those who personally engage people smugglers, either individually or as part of a group.

This Part also addresses three key "aggravated" people smuggling offences:

- It creates a new aggravated offence where a smuggling venture involves trafficking, exploitation or exposure to danger of death or serious harm [Items 3 and 8, creating new section 73.2(1) of the *Criminal Code* and section 233B or the *Migration Act* respectively];

- It replaces former sections 232A to 233C of the Migration and introduces new section 233B, retaining the same elements of the aggravated offence of smuggling where the venture involves five or more non-citizens [Item 8]; and

- It replaces former section 233A of the Migration with a new section 234A, retaining the same elements of the aggravated offence involving the entry to Australia of five or more non-citizens with false documents or information [Item 9].

Item 10 creates new mandatory minimum penalties under the *Migration Act* for these three aggravated offences [proposed section 236B], and retains the prohibition under current section 233B of the *Migration Act* against judicial consideration of mitigating factors in sentencing (unless the accused was under 18 when the offence was committed) [proposed section 236A].

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[4] *Anti-People Smuggling and Other Measures Bill 2010: Explanatory Memorandum*, 1.

Items 1, 2, 4 and 5 remove from the *Criminal Code*'s smuggling offences the requirement that the accused engaged in the relevant smuggling conduct with the intention of obtaining a financial benefit [amending sub-sections 73.1(1)(c) and 73.3(1)(c) and repealing sub-sections 73.1(1)(d) and 73.3(1)(d) of the *Criminal Code*]. The Explanatory Memorandum describes these amendments as "minor technical amendments" that serve the purpose of harmonizing the *Criminal Code* with the *Migration Act*, which does not require an intention of obtaining a financial benefit in its smuggling offences.

The following section addresses our concerns with each of these amendments in turn.

1. New Material Support Provisions (Schedule 1, Part 1 Items 6 and 8)

Recommendation 1: We strongly oppose the amendments in Items 6 and 8 of Part 1 of Schedule 1 to the Bill.

If the offences remain in the Bill, we recommend that they be amended such that: (1) they are limited in application to individuals who provide core operational funding *directly* to a people-smuggling syndicate or who play a key organizational role in the operation of a people-smuggling syndicate, with each of those terms defined in a precise and circumscribed manner, and (2) they explicitly exclude individuals on a people smuggling venture (or who intend to be on a venture) from the definition of "persons" who may be the "receiver" of the relevant support or resources, mirroring the language of proposed subsections 73.3A(2) and 233D of the *Criminal Code* and *Migration Act* respectively.

The support offences are framed in a manner that is too broad and indeterminate. As a result, rather than targeting the masterminds of people smuggling networks, who profit financially from them, it criminalizes the actions of vulnerable and disadvantaged people who have no connection with their operation.

The Explanatory Memorandum explains that:

> The offence will not apply to a person who pays smugglers to facilitate their own passage or entry to Australia or who pays for a family member on the same venture. However, the offence will apply to persons in Australia who pay smugglers to bring their family or friends to Australia on a smuggling venture.[5]

The material support provisions criminalize the provision of support either directly or indirectly to smugglers. Thus, a refugee in Australia who sends money to his wife and children to assist them to flee to Australia is liable to a $110,000 fine or

[5] *Ibid*, 8.

10 years' imprisonment. Targeting such people does not assist in meeting the objectives of the Bill.

a) Collateral consequences of criminalizing the provision of assistance to individuals in refugee-sending countries.

Refugees (and concerned citizens) in Australia send money to friends and relatives left behind in their countries in order to buy food, clothing, medication and other necessities for survival or flight from persecution. If the friend or relative overseas eventually pays a smuggler to bring her to Australia, the family member in Australia has **no way of proving that the particular money that she sent (potentially over a period of years) was not among the funds used to pay the smuggler**. Indeed, the Bill does not even require that she intends the money to be used to pay smugglers: according to the Explanatory Memorandum, she can be convicted if she is merely "reckless" as to whether some portion of the financial support she gave her family would be used to pay smugglers.

Any humanitarian assistance that a person sends to her relatives could render her liable for up to ten years' imprisonment. Moreover, under subsection (3) of the material support provision, she may be convicted "even if the offence of people smuggling is not committed", ie even if the friend or relative never makes it to Australia. This has extremely serious and undesirable consequences:

- It exposes any individual who provides humanitarian assistance to individuals or groups fleeing persecution to imprisonment if any of those individuals eventually come to Australia – or attempt to come to Australia – using people smugglers. The provision will act as a powerful **deterrent against the provision of humanitarian assistance** to those people most in need in our region and elsewhere in the world.

- For relatives in Australia who remain committed to financially caring for their family members left behind, there will be an **incentive to send money through unofficial channels** in order to avoid prosecution under material support provisions. Rather than using transparent, regulated financial institutions and remittance providers, they will have an incentive to use exploitative and often corrupt providers in order to for conceal any money sent overseas, **fuelling a different set of exploitative organized crime networks**.

- The material support provisions unnecessarily turn morally blameless people into criminals, and authorize **diversion of significant law enforcement resources to police small financial transactions that in no way threaten the security or well-being of any Australian**. Those Australian taxpayer dollars would be far

better spent tracing the large sums of money that actually fuel serious organized crime.

- In combination with the Bill's expansion of law enforcement powers, the material support provisions **unfairly subject to financial scrutiny** individuals in Australia who have friends and relatives in refugee-sending countries to whom they may provide any form of financial assistance.

b) The Overreach of Material Support Provisions to Family and Friends in Australia and Other Vulnerable Groups is Unnecessary, Counterproductive and in Tension with Australia's International Obligations

According to the Explanatory Memorandum to the Bill, the material support provisions do not apply to asylum seekers who pay smugglers to facilitate their own passage or that of a family member on the same venture. However, the provisions do apply to family members already in Australia who "provide material support or resources" that aid people smugglers to bring a relative to Australia in such a venture. The Explanatory Memorandum explains that punishing refugee relatives in Australia serves the purpose of "reinforc[ing] the message that people should use the authorised migration processes for seeking asylum."[6] This raises a range of legal and policy concerns.

a) "Material support" is unacceptably vague and uncertain

The term "material support" is undefined in the Bill. Both the nature of "support" that will lead to criminal culpability, and the materiality of that support, are entirely subjective, leaving individuals liable for severe punishment for offences that were undefined in advance. This is contrary to the principle of legality, which requires offences to be sufficiently clear in advance and not retrospective.[7] In addition to being **fundamentally unfair**, this raises serious **due process concerns**.

These concerns have been borne out through **litigation in the United States in relation to the identical wording** in section 2339A of the US *Criminal Code*, from which the Bill's material support provisions are drawn.[8] That definition in that provision is currently under challenge in litigation before the United States Supreme Court, on the basis that is unconstitutionally vague. It is also being challenged on the grounds that it so broad it would prohibit conduct that would violate the constitutional right to free speech. The US Supreme Court heard argument in the case, *Holder v Humanitarian Law Project*, on 23 February 2010 and has yet to issue a decision. Even if the Supreme Court does not strike down

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[6] *Ibid*, 8, 15.
[7] See generally, International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171, art 15.
[8] *Explanatory Memorandum*, above n 4, 8.

the provision, it may remand the case back to the lower courts, and section 2339A's "material support" definition may be the subject of further years of litigation. For all of the reasons that s2339A has been challenged in US courts,[9] it would be imprudent for Australia to incorporate its vague and uncertain definition of material support into its domestic legislation.

b) Inconsistency with Australia's International Legal Obligations

Arguably, the material support provisions are an attempt to deter people from embarking on boat journeys to Australia. Article 31(1) of the **Refugee Convention** provides that:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

This is a fundamental aspect of the Refugee Convention because it underscores the right of people in distress to seek protection, even if their actions breach the domestic laws of a country of asylum. It recognizes that the circumstances that compel flight commonly force refugees to travel without the requisite documentation, and that restrictive immigration policies mean that most refugees are likely to be ineligible for visas sought through official migration channels.

Since proposed section 233D does not penalize a refugee who personally utilizes the services of people smugglers, article 31(1) is not directly breached. However, it could be argued that the section is an attempt to avoid the Refugee Convention from being engaged at all. This is because the section seeks to deter family members from fleeing because of the severe penalties that may be imposed on relatives already in Australia who provide them with material support. Trying to avoid triggering the Refugee Convention undermines Australia's **separate international law obligation to act in "good faith"**. A State lacks good faith "when it seeks to avoid or to 'divert' the obligation which it has accepted, or to do indirectly what it is not permitted to do directly."[10] Thus,

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[9] For links to briefs filed by the Humanitarian Law Project (a US-based Tamil support organization) and *amicus curiae* academics, think tanks and prominent national organizations outlining the problems with s2339A, *see* <http://www.scotuswiki.com/index.php?title=Holder%2C_Attorney_General_v._Humanitarian_Law_Project> (accessed 8 April 2010).

[10] See generally, UNHCR's submissions in *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1, available as UNHCR, "Written Case" (2005) 17 *International Journal of Refugee Law* 427, para 32.

> measures which have the effect of blocking access to procedures or to territory may not only breach express obligations under international human rights and refugee law, but may also violate the principle of good faith. Although States do not have a duty to facilitate travel to their territories by asylum seekers, the options available to States wishing to frustrate the movement of asylum seekers are limited by specific rules of international law and by States' obligations to fulfil their international commitments in good faith. [11]

The material support provisions also violate Australia's obligations under the **Smuggling Protocol**. The UNHCR has observed in its Summary Position on the Protocol that:

> The Protocol is also clear in that it does not aim at punishing persons for the mere fact of having been smuggled or at penalizing organizations which assist such persons for purely humanitarian reasons.[12]

In addition, punishing the family of a refugee who arrives on the venture could be viewed as punishing the refugee herself. Given that the penalty for the provision of material support is imprisonment for up to 10 years, this would likely remove from the refugee a source of financial and other support on her arrival to Australia (as well as placing great financial strain on the person's family, which could place Australia in breach of its obligations under article 7 of the ICCPR).[13] It would also inflict cruel emotional punishment on the refugee who would live with the daily awareness of her relative's imprisonment for his efforts to help her.

Article 23 of the **ICCPR** provides that: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Australia must ensure that it has adequate, accessible and fast processes in place by which refugees in Australia may reunite with their families (see the following section). Criminalization of efforts by refugees in Australia to reunite with their family members is arguably inconsistent with Australia's obligations under this provision.

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[11] GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, Oxford, 2007) 387–88 (fn omitted).

[12] UNHCR, "UNHCR Summary Position on the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime" (11 December 2000) at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3428&page=search> (accessed 15 April 2010).

[13] See eg *R v Secretary of State for the Home Department, ex parte Adam* [2006] 1 AC 396 (HL).

Where the relative being smuggled is a child who is entitled to protection as a refugee, there are important protections under the **Convention on the Rights of the Child** that need to be considered.[14] Article 22(1) provides that:

> States Parties shall take appropriate measures to ensure that a child who is seeking refugee status … shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

At the very least, such "appropriate measures" would include refraining from criminalizing conduct that ensures that the child is able to enjoy the protection to which he or she is entitled under the Refugee Convention, especially in light of provisions relating to the importance of the family unit.[15] Incarcerating a parent who assists her child to come to Australia by utilizing the services of a people smuggler would also raise significant concerns under article 3 of the Convention on the Rights of the Child, which requires the best interests of the child to be a primary consideration in any action concerning a child. This which includes actions in which a child is affected by, rather than the direct subject of, a decision, such as a decision concerning a parent.[16]

c) Punishing refugee family members is inhumane in light of the absence of available reunification alternatives

The harsh and unfortunate reality is that for the vast majority of refugees who arrive in Australia by boat, paying people smugglers is their only available avenue to protection from persecution. This fact presumably underpins the government's decision to exclude from criminal liability under the Bill's material support provisions refugees who facilitate their own passage on a venture. It is also a requirement under the Smuggling Protocol. In addition to Australia's Refugee Convention obligations, this reasoning should apply equally as a matter of good policy to the refugee's family and friends who financially support her passage to safety in Australia.

The family reunion process is a lengthy one, and given the narrow definition of 'family', certain relatives are not eligible to be included in an application. Some refugees cannot afford to lodge an application or to obtain assistance to do so.

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[14] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[15] See eg arts 5, 8, 9, 10, 16, 20, 22, 37.
[16] See eg *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

Alternatively, if refugees apply to sponsor family members (including extended family) through the Special Humanitarian Program, which does not have an application fee, it is a lottery whether they will be accepted, given the quota for places and the many millions of refugees awaiting resettlement.

A person's concern for the life and safety of her mother, brother, wife, child or other family member is frequently more compelling than the person's concern for her own life. It is one thing to ask refugees in Australia to sit idly while their relatives wait years or decades before reaching safety through family reunification processes; it is another matter entirely to punish them with 10 years in prison for failing to do so. Criminalization of this conduct is intolerable in a fair, decent and compassionate society.

Moreover, many of the individuals who could be charged under the new material support provisions are refugees who themselves escaped persecution. They are vulnerable, sometimes traumatized people whom Australia should treat with particular care and sensitivity, and whose well-being should outweigh any token deterrence value that their punishment might carry.

d) Implications for Local Indonesians Unaffiliated with People-Smuggling Syndicates

Given the broad and vague nature of the material support provisions, they could potentially be applied to local Indonesian service providers, such as hotel and restaurant owners whose services are used by people smugglers in the course of a venture, but who have no involvement in any criminal enterprise. Although prosecution is unlikely as long as these individuals remain in Indonesia, the criminalization of their ordinary business activities (which many rely upon for basic survival) may unfairly prejudice their ability to enter Australia in the future.

2. Amendments to "Aggravated Offences"

a) Basic offence underlying aggravated offences (proposed section 233A of the *Migration Act*)

Recommendation 2: In order to reconcile the Bill's people smuggling offences with Australia's obligations under international law, and with the definition of smuggling under the Smuggling Protocol, proposed subsection 233A(1)(c) should be amended to require that the person being brought to Australia is a non-citizen who "had, or has, no lawful right to come to Australia, including no right to protection as a refugee under the Convention relating to the Status of Refugees".

The basic offence underlying the Bill's aggravated offences is facilitating the entry to Australia of a non-citizen who has "no lawful right to come to Australia". In light of Australia's international law obligations under the Refugee Convention and the Universal Declaration of Human Rights, by which Australia recognizes

the right to seek asylum and its duty to protect people with a well-founded fear of persecution on particular grounds, this offence should not apply to the movement of Convention refugees.[17]

According to the Explanatory Memorandum, in order to be convicted of people smuggling the accused must have known that the non-citizen had no lawful right to come to Australia, or must have been "reckless" as to that fact.[18] Applying section 5.4 of the *Criminal Code*, a person is reckless if he or she is aware of a substantial risk that the person has no lawful right to come to Australia and it is unjustifiable to take the risk.

Given that over 90 per cent of unauthorized boat arrivals in Australia are found to be refugees,[19] only in a very small number of cases could it be reasonably argued that there is a substantial risk that a person being brought to Australia on a perilous boat voyage is not a refugee.

Nevertheless, in order to avoid doubt, we recommend that the provision be amended to clarify that a refugee is not included as a person who has no legal right to come to Australia.

b) Trafficking, exploitation and endangering life and safety (proposed section 233B of the *Migration Act* and section 73.2(1) of the *Criminal Code*)

Recommendation 3: We support proposed section 233B of the *Migration Act* and section 73.2(1) of the *Criminal Code* provided that: (1) "danger of death or serious harm" is defined to involve a level of danger beyond that inherent in any sea voyage, (2) proposed 236A is amended to allow the consideration of mitigating factors as appropriate in relation to this offence [if section 236A is not deleted entirely; see Recommendation 6], and (3) proposed s236B is amended so as not to include mandatory minimum sentences for this offence [see Recommendation 6].

We support the criminalization of conduct that exploits or endangers the lives of asylum seekers and others transported by people smugglers for financial gain.

[17] Additionally, Australia has international protection obligations arising under the Convention against Torture and the ICCPR to people who are at risk of torture, cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life, although these have not yet been incorporated into domestic law: *see* Migration Amendment (Complementary Protection) Bill 2009; J McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford, 2007).

[18] *Explanatory Memorandum*, above n 4, 10.

[19] Senator Chris Evans, Minister for Immigration and Citizenship, "Liberals Bereft of Immigration Policy", Media Release <http://www.minister.immi.gov.au /media/media-releases/2009/ce09096.htm> (accessed 10 April 2010).

However, in order to distinguish this offence from the basic people smuggling offence, it must involve something more than the ordinary danger inherent in sea voyages. Without such a limitation, all people-smuggling ventures by boat to Australia would be inappropriately classified as aggravated offences, subject to severe minimum mandatory sentences and a prohibition on consideration of any mitigating factors.

In addition, the imposition of mandatory minimum penalties and removal of judicial sentencing discretion for this offence via proposed sections 233A and 233B violates Australia's obligations under article 9 of the ICCPR [see discussion in Section 2(e) below]. It is also inconsistent with the principle of proportionality between sentence and offence that is entrenched in Australian domestic law.[20]

c) Aggravated offence of false documents regarding five or more non-citizens which may include the accused (proposed section 234A of the *Migration Act*)

Recommendation 4: We object to the inclusion of proposed section 234A in the *Migration Act*. If the offence is to be included in the Act, we recommend the following amendments in order to reconcile the provision with the rest of the Act and with Australia's obligations under the Refugee Convention and article 19 of the Smuggling Protocol: (1) the provision should not apply if the accused or any of the other non-citizens are found to be refugees or otherwise entitled to protection under international law, (2) if that exception is not included, then, at a minimum: (a) the phrase "(which may include that person)" should be replaced with the phrase "(excluding that person)", (b) the offence should include an exception for circumstances in which the five non-citizens are related to the person being charged with the offence, (c) proposed s236A should be amended to allow the consideration of mitigating factors as appropriate in relation to this offence [if section 236A is not deleted entirely; see Recommendation 6], and (d) proposed s236B should be amended so as not to include mandatory minimum sentences for this offence [see Recommendation 6].

This offence currently appears in the *Migration Act* despite its inconsistency with Australia's international obligations, outlined below. Its inclusion in the current Bill raises additional concerns in light of its inconsistency with the Bill's new material support provisions.

i) Inconsistency with new material support provisions

Unlike the exception to the material support provision for asylum seekers who facilitate their own passage or that of their family members on the same people smuggling venture, this aggravated offence applies where the accused uses false documents for five or more non-citizens to enter Australia, *including herself.*

[20] See eg *Veen v The Queen (No 2)* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

It could easily apply to a refugee who uses false documents in order to obtain entry for herself, her husband and her children into Australia. Clearly, this is a far cry from the purported focus of the provision – namely organized operations that falsify documents for large groups of people.[21] It is irreconcilable with the new material support provisions that recognize that punishment of an asylum seeker for organizing her own passage and that of her family on the same venture is inappropriate.

ii) Inconsistency with Australia's international legal obligations

Article 31 of the **Refugee Convention** prohibits a Contracting State from imposing penalties on a refugee on account of her illegal entry if she comes directly from the country in which her life or freedom is threatened and shows good cause for her illegal entry. Having a well-founded fear of persecution is generally recognized as constituting 'good cause'.[22] Inherent in the idea of 'unlawful entry' is that refugees may not possess the requisite travel documents, or may have false documents. The removal of the courts' discretion to decide not to convict under such circumstances violates this obligation. Proposed section 234A should therefore be amended.

Moreover, article 19 of the **Smuggling Protocol** requires that anti-smuggling measures be adopted in a manner that upholds States responsibilities under international law, including *in particular*, the Refugee Convention. In imposing penalties on a refugee for using false documents to enter Australia, Australia not only violates its obligations under article 31 of the Refugee Convention but also breaches its obligations under the Smuggling Protocol.

The imposition of mandatory minimum penalties and removal of judicial sentencing discretion for this offence via proposed sections 233A and 233B violates Australia's obligations under article 9 of the ICCPR [see discussion in Section 2(e) below]. It is also inconsistent with the principle of proportionality between sentence and offence that is entrenched in Australian domestic law.[23]

d) Aggravated offence of people smuggling (five or more non-citizens) (proposed section 233C of the *Migration Act*)

Recommendation 5: We oppose the inclusion of section 233C in the *Migration Act*. If this section is included in the Act, we recommend that the following amendments be made: (1) the provision should not apply if the accused or any of the other non-citizens are found to be refugees or otherwise entitled to protection under international law, (2) if that exception is not included, then, at a minimum:

[21] See Second Reading Speech, above n 1, 1654.
[22] See Goodwin-Gill and McAdam, above n 11, 265; Expert Roundtable for UNHCR's Global Consultations on International Protection, "Summary Conclusions: Article 31 of the 1951 Convention", para 10(e), (2001).
[23] See eg *Veen v The Queen (No 2)*, above n 20.

(a) the provision should apply only if 200 of more non-citizens are involved, (b) proposed 236A should be amended to allow the consideration of mitigating factors as appropriate in relation to this offence [if section 236A is not deleted entirely; see Recommendation 6], and (c) proposed s236B should be amended so as not to include mandatory minimum sentences for this offence [see Recommendation 6].

We are concerned about the re-inclusion of this offence in the *Migration Act* on the basis that virtually all smuggling ventures involve at least five individuals and the use of this small number would render involvement in virtually every venture an aggravated offence.

This is of particular concern in light of the imposition of mandatory minimum penalties and removal of judicial sentencing discretion for this offence via proposed sections 233A and 233B, in violation of Australia's obligations under articles 9 of the ICCPR [see discussion in Section 2(e) below]. It is also inconsistent with the principle of proportionality between sentence and offence that is entrenched in Australian domestic law[24]

e) Inappropriate and Unfair Sentencing for Aggravated Offences in Violation of International Human Rights Obligations and the Smuggling Protocol, as well as Domestic Legal Principles (proposed sections 233A and 233B of the *Migration Act*)

Recommendation 6: We oppose the inclusion of proposed sections 236A (judicial discretion-stripping) and 236B (mandatory minimum sentences) in the *Migration Act* and recommend that both be deleted from the Bill.

Under proposed section 236B, a court *must* sentence a person to at least five years' imprisonment with a minimum three year non-parole period (or eight years minimum for trafficking/exploitation or for repeat offences of any aggravated offence) [Item 10]. The sentencing court is stripped of its discretion to consider mitigating factors, regardless of their compelling nature or the unfairness or disproportionality of the sentence in light of individual circumstances.

The maximum sentences for aggravated offences (20 years) are equally disproportionate to the nature of the crime, at least in relation to smuggling five or more people (s233C) or arranging false documents for five or more people (s234A). To put these penalties in perspective, these sentences are heavier than the maximum sentences for lighting a bushfire (14 years under s203E, *Crimes Act (NSW)*), or burning down a house with a person inside (16 years under s196, *Crimes Act (NSW)*) – actions that deliberately cause vast destruction of property and loss of life.

[24] See eg *Veen v The Queen (No 2)*, above n 20.

i) Disproportionate Impact on Vulnerable Groups

These provisions will most directly affect the rights and well-being of highly vulnerable people and the families that depend on them. The overwhelming majority of individuals prosecuted for people smuggling offences under the current legislation have been impoverished Indonesian fisherman, rather than key organizers of sophisticated people smuggling syndicates. The Indonesian Embassy in Canberra has confirmed that:

> Most of the Indonesians detained in Australia in connection with the arrival of boat people are poor traditional fishermen, lured by the promise of money (sometimes as little as $US150) from the organised people-smugglers to carry a boatload of passengers who originally come from as far away as Afghanistan. These fishermen are the boat crew and not the masterminds of people-smuggling.[25]

Imprisoning a poor Indonesian fisherman for five years is likely to render his family destitute, since they will be without their primary breadwinner. To do this without individually assessing the extent of the individual's involvement in the venture, or any mitigating factors, such as the individual's remorse or his/her cooperation with authorities to identify the true masterminds of the venture, is fundamentally unfair and achieves no identifiable benefit to Australia that could justify the level of harm and hardship that it is likely to cause.

ii) Inconsistency with Australia's International Legal Obligations

Mandatory sentencing regimes are contrary to Australia's obligations under the ICCPR. Because mandatory sentencing does not allow consideration of the proportionality of the sentence to the crime committed in light of individual circumstances, *by definition* it may result in penal sentences that constitute arbitrary detention. Article 9 of the ICCPR prohibits arbitrary detention. Detention is "arbitrary" if it is unjust or unreasonable, even if sanctioned by law.[26]

Mandatory sentencing arguably also violates article 14 of the ICCPR, because it does not permit the right to a hearing before an independent tribunal and to a review of sentence by a higher tribunal. This is because the sentence is imposed by the legislature, is not subject to judicial control, and there is no system for sentences to be reviewed.[27] Mandatory sentencing also raises issues under

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[25] P Mailey and P Taylor, "Asylum Spike Bucks World Trend: UN Report", *The Australian* (24 March 2010).
[26] See eg *A v Australia*, UN Human Rights Committee (1997); reports of the UN Working Group on Arbitrary Detention: <http://www2.ohchr.org/english/issues/detention/> (accessed 12 April 2010).
[27] See eg S Pritchard, 'International Perspectives on Mandatory Sentencing' [2001] *Australian Journal of Human Rights* 17.

articles 7 (prohibition of cruel, inhuman or degrading treatment or punishment) and 10 (treatment of people deprived of liberty) of the ICCPR.

In addition, the mandatory sentencing provisions are inconsistent with the Smuggling Protocol, which requires that people smuggling penalties are proportionate to the crime committed.[28] The provisions are also inconsistent with the Protocol's requirement that the judiciary be able to consider the possibility of excuse or mitigation in sentencing.[29]

In the past, the UN Human Rights Committee has found that mandatory sentencing laws in the Northern Territory and Western Australia raised "serious issues of compliance with various Articles" of the ICCPR.[30]

iii) Inconsistency with Fundamental Principles of Australian Law

Mandatory minimum sentences and the fettering of judicial discretion to apply standard sentencing principles in light of individual circumstances is inconsistent with the principle of proportionality between sentence and offence that is entrenched in Australian domestic law.[31]

3. Removal of requirement of intention to obtain financial gain (amending sub-sections 73.1(1)(c) and 73.3(1)(c) and repealing sub-sections 73.1(1)(d) and 73.3(1)(d) of the *Criminal Code*)

Recommendation 7: We do not support the removal from the *Criminal Code*'s smuggling offences (subsections 73.1 and 73.3) the requirement of an intent to obtain a financial benefit from the smuggling activity. We recommend that in order to reconcile the discrepancy between the *Migration Act* and the *Criminal Code*, the Bill insert into the *Migration Act*'s smuggling provisions a requirement that the relevant conduct be undertaken with the intent "to obtain, directly or indirectly, a financial or other material benefit", adopting the definition of smuggling from the Smuggling Protocol.

Items 1, 2, 4 and 5 remove from the *Criminal Code*'s smuggling offences the requirement that the accused engaged in the relevant smuggling conduct with the intention of obtaining a financial benefit. The Explanatory Memorandum describes these amendments as "minor technical amendments" that serve the

[28] Commonwealth Parliamentary Library, Bills Digest No 131 2009–10, last reviewed 12 March 2010, <http://www.aph.gov.au/library/Pubs/bd/2009-10/10bd131.htm#_ftn16> (accessed 7 April 2010) ('*Commonwealth Parliamentary Library*').
[29] *Ibid*.
[30] UN Human Rights Committee, "Concluding Observations of the Human Rights Committee: Australia" (24 July 2000) UN doc A/55/40.
[31] See eg *Veen v The Queen (No 2)*, above n 20.

purpose of harmonizing the *Criminal Code* with the *Migration Act*, which does not require an intention of obtaining a financial benefit in its smuggling offences.

They are plainly inconsistent with entire purpose of the Smuggling Protocol and this Bill: to address exploitative smugglers who (as the Attorney-General underscored in his Second Reading Speech) are "motivated by greed." The Smuggling Protocol makes this very clear.

Article 3 of the Protocol defines people smuggling 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 permanent resident.

As observed above, the UNHCR takes the view in its Summary Position on the Protocol that "[t]he Protocol is also clear in that it does not aim at ... penalizing organizations which assist [smuggled] persons for purely humanitarian reasons."[32]

Australia's criminalization of the humanitarian movement of people across borders for no financial gain would criminalize the activities of aid organizations, humanitarian workers, religious workers and others who assist people cross borders in order to save their lives.

Furthermore, the proposed "people smuggling" definition risks Australia breaching other international law obligations. For example, there is a well-established duty in both treaty law and general international law to rescue people in distress at sea.[33] The importance of this obligation is underscored by the fact that many States impose criminal liability on ship masters who fail to render such assistance.[34] However, the omission from the proposed "people smuggling" definition of a requirement to show intent to obtain a financial benefit, means that actions such as rescue at sea could be characterized as people smuggling.

The obvious way to remedy this situation and reconcile the *Criminal Code* and *Migration Act* provisions is to include the requirement of an intent to obtain financial benefit in the *Migration Act*, leaving it in its current form in the *Criminal Code*.

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[32] "UNHCR Summary Position on the Protocol", above n 12.
[33] See eg UN Convention on the Law of the Sea (1982), art 98; UN Convention on the Safety of Life at Sea (1960).
[34] See further Goodwin-Gill and McAdam, above n 11, 278–79.

B. Amendments to the *ASIO Act* 1979 (Schedule 2)

Recommendation 8: We oppose the amendments to the *ASIO Act* in Schedule 2 to the Bill. If the amendments are included, we recommend that "serious threats" be defined to exclude irregular migration and unauthorized boat arrivals unless ASIO is aware of a specific security threat associated with a particular venture or vessel.

Schedule 2 of the Bill proposes to expand ASIO's jurisdiction to include "the protection of Australia's territorial and border integrity from serious threats". Unless "serious threats" is defined to exclude irregular migration and unauthorized boat arrivals, we oppose the expansion of ASIO's jurisdiction and powers as proposed.

1. Unauthorized Boat Arrivals Do Not Present a Threat to National Security

As the Attorney-General correctly observed in his Second Reading Speech, the phenomenon of unauthorized boat arrivals stems from the global movement of asylum seekers fleeing conflict and persecution. There is no link between asylum seekers arriving in Australia by boat and a threat to Australia's national security; indeed the Prime Minister recently described the assertion of such a link as "divisive and disgusting".[35] Indeed, of the 1,039 irregular maritime arrivals in 2008–09, only 207 were referred to ASIO for security assessments, and not a single adverse assessment was made.[36] Similarly, in the last six months of 2009, the only adverse assessments made by ASIO were the five Oceanic Viking Tamils.[37]

To enshrine a connection between unauthorized boat arrivals and national security in legislation and to expand ASIO's powers accordingly is not only inaccurate and morally irresponsible, but it establishes a flawed foundation for expenditure of important national security resources. This means that money is potentially diverted from safeguarding Australia against credible security threats.

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[35] AAP, "Rudd Slams Tuckey's 'Terrorist' Asylum Seeker Comments", *Sydney Morning Herald* (22 October 2009), available at <http://www.smh.com.au/national/rudd-slams-tuckeys-terrorist-asylum-seeker-comments-20091022-hamt.html?autostart=1> (accessed 15 April 2010).

[36] From Senate Estimates (Additional Estimates) (8 February 2010) 55 (Mr Fricker representing ASIO).

[37] *Ibid*.

2. Encroachment on Civil Liberties, Privacy and Legal Professional Privilege Are Not Justified

The proposed amendments to the *ASIO Act* encroach on basic civil liberties and the privacy of Australian citizens and refugee communities by authorizing ASIO to obtain warrants to listen to their phones,[38] read their emails,[39] open their mail and monitor their financial transactions[40] if the organization suspects that they may be supporting refugee relatives or friends overseas who might engage the services of people smugglers. This may also extend to computers and any files on these computers that might contain incriminating evidence.[41] This aspect of the Bill will have a destructive impact on migrant and refugee communities, many of whom have escaped repressive regimes that conducted invasive intelligence-gathering activities. It will likely undermine relationships between these communities and law enforcement agencies in Australia, to the detriment of both.

Aside from privacy concerns, the amendments also raise concerns with respect to potential ASIO interception of communications between a lawyer and her refugee client which may be confidential and protected by legal professional privilege. This issue has been raised in previous parliamentary inquiries related to the scope of ASIO powers.[42]

The Australian Federal Police, the Australian Quarantine and Inspection Service, the Department of Defence, the Department of Immigration and Citizenship and the Australian Customs and Border Protection Services are all capable of addressing any threats presented by irregular migration, as they already do. The government has not suggested any deficiency in the operation of these agencies or other reason why ASIO's powers should be expanded in the manner proposed.

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[38] *Australian Security Intelligence Organisation Act* 1979, s 26.
[39] *Ibid*, s 25A.
[40] *Ibid*, ss 27, 27AA.
[41] *Ibid*, ss 25, 26B.
[42] Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005) <http://www.aph.gov.au/House/committee/pjcaad/asio_ques_detention/report.htm> (accessed 12 April 2010).