Law Council
OF AUSTRALIA

Anti-People Smuggling and Other Measures Bill 2010

Senate Legal and Constitutional Affairs Committee

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GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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Acknowledgement

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Introduction

The Law Council of Australia is pleased to provide the following submission in response to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Anti-People Smuggling and Other Measures Bill 2010* ('the Bill').

Commonwealth people-smuggling offences are currently located in the *Criminal Code Act 1995* (Criminal Code) and the *Migration Act 1958* (Migration Act).

The Bill proposes to consolidate and strengthen Australia's anti-people smuggling legislative framework by harmonising existing offences between the Criminal Code and the Migration Act, creating new people smuggling offences, broadening investigation mechanisms and extending mandatory minimum penalties for aggravated people smuggling offences.[1]

Amendments are proposed to the following six Acts:

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

The Bill has been introduced against a backdrop of renewed discussion and debate about the effectiveness and appropriateness of Australia's border protection and immigration policies. In the course of that debate, there has been ongoing speculation, assertion and counter-assertion about the causes of a recent marked increase in irregular maritime entrants to Australia and about whether this increase is a product of changes to Australia's migration policy, particularly as it relates to the treatment of asylum seekers and the processing of their applications.

The Law Council has well-established views on Australia's duty to respect and fulfil its obligations under international law to those who seek asylum in Australia and, for example, has been and remains strongly opposed to mandatory, indefinite and non-reviewable immigration detention.

Nonetheless, this submission does not address these broader policy issues. Rather, the submission is focussed on the specific provisions of the Bill and the changes it seeks to introduce.

In particular, the Law Council's submission addresses the following issues:

- The introduction of a new offence of providing material support to people smuggling into both the Criminal Code and the Migration Act;

[1] See Second Reading Speech to the Bill, 24 February 2010

- The removal of the requirement from the Criminal Code people smuggling offence that the defendant must have obtained or intended to obtain a benefit from facilitating or organising the unlawful entry of another;

- The expansion and continuation of a mandatory sentencing regime for people smuggling offences;

- Amendment to the ASIO Act to expand the definition of '*security*' and thereby expand the reach of ASIO's intelligence gathering function;

- Amendment to the *Telecommunications (Interception and Access) Act 1979* to simplify the procedure for obtaining an interception warrant in relation to the Investigation of an offence under the Migration Act;

- Amendment to the *Telecommunications (Interception and Access) Act 1979* to broaden the definition of 'foreign intelligence"; and

- Amendment to the *Surveillance Devices Act 2004* to allow for increased access to emergency authorisations.

New Offence of Providing Material Support to People Smuggling

The Bill seeks to introduce a new offence of providing material support to people smuggling into both the Criminal Code and the Migration Act as follows:

> *73.3A Criminal Code*
>
> *Supporting the offence of people smuggling*
>
> *1. A person (the first person) commits an offence if:*
>
> *a) the first person provides material support or resources to another person or an organisation (the receiver); and*
> *b) the support or resources aids the receiver, or a person or organisation other than the receiver, to engage in conduct constituting the offence of people smuggling.*
>
> *Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.*
>
> *2. Subsection (1) does not apply if the conduct constituting the offence of people smuggling relates, or would relate, to:*
>
> *a) the first person; or*
> *b) a group of persons that includes the first person.*
>
> *3. To avoid doubt, the first person commits an offence against subsection (1) even if the offence of people smuggling is not committed.*

The new offence to be inserted into the Migration Act (proposed section 233D) is in the same terms.

Law Council Concerns

These new offences are based on section 102.7 of the Criminal Code which was enacted in 2002 and which creates the offence of 'providing support to a terrorist organisation'.

This is at least the second time in twelve months that a new offence, based on s102.7 of the Criminal Code, has been introduced into Commonwealth legislation.[2]

The Law Council does not support the introduction of these new offence provisions into the Criminal Code and Migration Act and is concerned about the replication of section 102.7 in new and different contexts.

In particular, the Law Council submits as follows:

- These proposed "providing support" offences are essentially designed to extend criminal liability beyond the direct perpetrator of the primary people smuggling offence to others who enable the commission of the offence.

  Chapter 2 of the Criminal Code already provides for a range of ancillary offences, which extend criminal liability in relation to all Commonwealth criminal offences, regardless of how they were created or in which Act they are located. For example, by the operation of Chapter 2 of the Criminal Code, a person who aids, abets, counsels or procures the commission of any Commonwealth offence by another person is taken to have committed that offence and is punishable accordingly. [3] Likewise, a person who conspires with another person to commit a Commonwealth offence is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.[4] Further, a person who urges the commission of an offence is guilty of the offence of incitement.

  No explanation has been provided for why these ancillary offence provisions, which are based on established and sound principles of criminal law, are insufficient in the current circumstances. It is not clear, nor is it explained, what additional behaviour is sought to be targeted by the "providing support for people smuggling" offence provisions which would not already be captured by these existing provisions.

  The need for the "providing support" offence is even less apparent when it is considered that the primary people smuggling offence (even without the operation of Chapter 2 of the Code) already captures anyone who 'organises or facilitates' the bringing or coming to Australia, or the entry or proposed entry into Australia', of 'a noncitizen', 'who had or has no lawful right to come to Australia', according to the relevant provisions.

  The Explanatory Memorandum states that:

  "This offence [of providing support for people smuggling] targets those involved in supporting and facilitating people smuggling. This is an important strategy in tackling serious and organised crime. Organised criminal syndicates depend on

[2] For example, the *Crimes Legislation Amendment (Serious and Organised Crimes) Act (No.2) 2010* inserted section 390.4 (providing support to a criminal organisation) into the Criminal Code
[3] See section11.2 of the Criminal Code
[4] See section 11. 5 of the Criminal Code – note that the underlying offence must carry a penalty of at least 12 months imprisonment or a fine of 200 penalty units.

enablers and facilitators who play a vital role in supporting the criminal economy. Targeting those who organise, finance and provide other material support to people smuggling operations is an important element of a strong anti-people smuggling framework."

This justification for the new offence provisions takes no account of the wording and scope of the primary offence provision which is already cast broadly enough to capture those who organise or facilitate people smuggling – and, in fact, specifically uses those terms.

- If Parliament proceeds to enact these new offence provisions without addressing, except in the broadest rhetorical terms, what type of new or different conduct is specifically sought to be captured by the provisions, it creates the perception that these amendments are about legislative activity for its own sake. That is, it creates the perception that parliament is enacting new offences lest it been seen to be impotent or inactive in the face of the problem of people smuggling.

  Not only does such an approach potentially distract from exploring and implementing non-legislative responses to the problem, it also creates the risk that an ever wider range of people may be made vulnerable to criminal sanction in circumstances not properly considered or anticipated by the parliament.

- The effectiveness of Chapter 2 of the Criminal Code is currently under review by the Standing Committee of Attorneys-General and specifically by the Model Criminal Law Officers' Committee. Submissions on the operation of Chapter 2 were called for and made (including by the Law Council) in late 2008. For reasons not disclosed, this review has been delayed.

  Chapter 2 of the Criminal Code establishes the general principles of criminal responsibility under the laws of the Commonwealth. While this important Chapter remains under review, the Law Council submits that the Parliament should be very reluctant to continue with the ad hoc introduction, in quite disparate contexts, of an entirely new type of extended liability offence (i.e. the "providing support" offence). This is particularly so given that this new type of offence provision is largely untested and when it has been tested, such as in the context of the Haneef case, it has been found wanting. As the Committee would be aware, Dr Haneef is an Indian born doctor who was working in Australia on a temporary work visa. In July 2007 Dr Haneef was arrested and detained on suspicion of involvement in a series of failed terrorist attacks in London and Glasgow in 2007. Following 12 days in detention without charge, Dr Haneef was charged with providing support to a terrorist organisation. The charge was later withdrawn and an Inquiry into the handling of the case was conducted by the Hon John Clarke QC.[5] In the wake of Inquiry the Government is currently considering substantial amendments to section 102.7 of the Criminal Code in order to narrow and clarify the fault elements of the offence.[6]

- If these offence provisions are to be enacted despite the lack of evidence in support of their need or utility, the Law Council submits that at the very least they should be amended to require that a person charged with this offence must ***intend*** that the provision of material support or resources will aid the receiver to engage in

[5] http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Report

[6] See National Security Legislation – Discussion Paper on Proposed Amendments, Attorney-General's Department, July 2009 at page 62

people smuggling. It should not be sufficient that a person is merely reckless as to that outcome – as is currently proposed.

Removal of the requirement that the defendant must have obtained or intended to obtain a benefit from the people smuggling activity

The Bill seeks to amend the people smuggling offence in s73.1 of the Criminal Code so that it will not longer be an element of the offence that the person who organises or facilitates the unlawful entry of another person into a foreign country did so having *obtained or intending to obtain a benefit (whether directly or indirectly).*

The Explanatory Memorandum explains that the purpose of this amendment is simply to align the primary people smuggling offence in section 73.1 of the Criminal Code with the primary people smuggling offence in the Migration Act (see proposed section 233A).

Law Council Concerns

There is an important difference between the people smuggling offences in the Criminal Code and the people smuggling offences in the Migration Act. Whereas the offences in the Migration Act are concerned with those who organise or facilitate irregular entry into Australia, the offences in the Criminal Code are concerned with those who organise or facilitate irregular entry into foreign countries, whether that be from or via Australia or not. For example, the Criminal Code offences could capture someone who organises for another person (including a family member) to enter Egypt in an irregular way from Sudan or Papua New Guinea from Indonesia – without ever entering or transiting Australia. The only limiting jurisdictional requirement is that the person who commits the offence must be an Australian citizen or resident and/or the conduct constituting the offence (that is, the organisation or facilitation of the irregular entry) must have occurred wholly or partly within Australia.[7]

The Criminal Code offences are therefore not concerned with how Australia opts to protect its own territorial integrity, but with how Australia fulfils its obligations to the international community to be a part of broader measures to prevent and deter people smuggling globally. On that basis, the scope and nature of the people smuggling offences in the Criminal Code should be determined by Australia's international obligations.

Australia is a party to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime[8] ('the Protocol'). The Protocol requires each State Party to criminalise the smuggling of migrants and other forms of activity that support such smuggling.[9] The Protocol is not intended to apply to individuals or groups other than organised criminal groups who receive a financial or other material benefit from their activities.

[7] See section 73.4

[8] The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution A/RES/55/25, entered into force 28 January 2004. Full text of the Convention and accompanying Protocols available via the United Nations Office on Drugs and Crime (UNODC) website: http://www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext

[9] Article 6, Protocol against the Smuggling of Migrants by Land, Sea and Air

On that basis, the Law Council submits that the people smuggling offences in the Criminal Code should be subject to the additional requirement that the defendant obtained or intended to obtain a benefit (whether directly or indirectly).

If this is not included as an element of the offence – the scope and reach of the Criminal Code provisions is very broad. A wide range of people may be captured, including, for example, family and community members and humanitarian organisations who seek to help friends, relatives and other vulnerable people escape, by whatever means are available, from a war or disaster zone or from some other form of persecution. Such people may ultimately be found to be refugees and therefore should not be stigmatized as a consequence of a broadening of the people smuggling offences in the Criminal Code.

Amendment to the ASIO Act to expand the definition of 'security' and thereby expand the reach of ASIO's intelligence gathering

The Bill seeks to amend the definition of 'security' in section 4 of the *Australian Security and Intelligence Organisation Act 1979* ("ASIO Act").

Currently, 'security' means the protection of, and of the people of, the Commonwealth and the several States and Territories from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system, or acts of foreign interference, whether directed from, or committed within, Australia or not.

Proposed paragraph 4(aa) will expand this definition to include '*the protection of Australia's territorial border integrity from serious threats'*.

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

Law Council Concerns

It appears from the Explanatory Memorandum that the primary purpose of this amendment is to formally give ASIO a role in the gathering and sharing of intelligence about migration offences – particularly people smuggling.

However, it is not explained why it is appropriate or necessary for ASIO's functions to be broadened in this way.

The Australian Federal Police, Department of Immigration and Citizenship and the Australian Customs and Border Protection Service already have the capacity to, and are tasked with, collecting, evaluating, analysing and disseminating intelligence relating to people smuggling. It is not clear why ASIO's resources and powers should also be deployed for this purpose.

Under section 18 of the ASIO Act, if ASIO, in the course of carrying out its current intelligence gathering role, comes into the possession of information which relates, or appears to relate, to the commission, or intended commission, of an indictable offence against the law of the Commonwealth (such as people smuggling) the information may be communicated to the relevant agency such as the AFP or the Australian Crime Commission. Therefore, this amendment is not required to allow ASIO to share information relevant to people smuggling which comes into its possession in the course of

other investigations. This amendment serves to allow ASIO to proactively investigate people smuggling.

The Law Council is concerned about any amendment to the ASIO Act which would authorise greater involvement of ASIO in areas of criminal investigation which have traditionally been and ought to remain the domain of law enforcement agencies such as the AFP and Australian Customs. ASIO's powers are quite distinct from those of ordinary law enforcement agencies and are subject to less transparent authorisation and review processes. The Law Council submits that the Parliament should not lightly authorise the deployment of those powers for ever broader purposes.

In that regard, the Law Council submits that is not sufficient to simply assert, as a justification for this amendment, that people smuggling constitutes a threat to national security. In recent years, the concept of national security has been significantly expanded such that all manner of criminal activity may now qualify as a threat to our security, from money laundering, to lighting bushfires, to cyber crime and any other activity that falls under the equally broad banner of serious and organised crime.[10] It would be alarming, if ASIO's mandate was widened to encompass the gathering and dissemination of intelligence on anything related to this broader concept of national security. The distinction between the roles and functions of ASIO and other law enforcement agencies would cease to be meaningful.

Amendment to the Telecommunications (Interception and Access) Act 1979 to simplify the procedure for obtaining an Interception Warrant in relation to the Investigation of an Offence under the Migration Act

Currently, under the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) telecommunications interception warrants are available to aid in the investigation of people smuggling offences against the Migration Act.

To obtain a warrant, the investigating agency must demonstrate not only that the investigation relates to one of the listed offences under the Migration Act but must also demonstrate that the offence:

- involves two or more offenders
- involves substantial planning and organisation
- involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques, and
- is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind.

In contrast, when an investigating agency applies for a telecommunications interception warrant to aid in the investigation of a people smuggling offence set out in the Criminal Code, the agency does not need to demonstrate that these additional threshold criteria are met.

[10] See for example the address by the Attorney-General, the Hon. Robert McClelland MP to the 7th Annual National Security Conference, 23 March 2009, Darling Harbour, Sydney at: http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_FirstQuarter_23March2009-7thAnnualNationalSecurityAustraliaConference

The Bill seeks to amend the TIA Act (specifically sections 5(1) and 5D(3)) so that telecommunications interception warrants will be available for the investigation of people smuggling offences under the Migration Act without the investigating agency needing to satisfy the additional criteria about the organised and sophisticated nature of the offence.

The exception to this would be in relation to the investigation of offences against section 236 of the Migration Act which prohibits the use of a visa that was issued to another person to either travel to Australia, remain in Australia or to identify one's self.

It is acknowledged in the Explanatory Memorandum that "*as the offence against section 236 relates to an individual acting for their own benefit, rather than attempting to facilitate others coming to Australia, telecommunications interception should be reserved for when this activity is undertaken in the most serious of contexts ... therefore ... a telecommunications interception warrant will only be available when the additional tests are met."*

Law Council Concerns*:*

The Law Council does not object to these proposed amendments to the extent that they will mean that the Migration Act people smuggling offences will receive the same treatment under the TIA Act as the corresponding Criminal Code offences.

However, the offence contained in proposed section 233E of the Migration Act ('concealing/harbouring a non-citizen') is also covered by this amendment. This provision does not appear to have a corresponding offence provision in the Criminal Code and is therefore in a different category.

Given the nature of this offence and the type of people it might capture - (such as family members, friends etc – that is, not members of an organised crime syndicate engaged in a sophisticated criminal enterprise) – the Law Council submits that this offence provision should continue to be subject to the more stringent eligibility criteria under the TIA Act. The Law Council submits that it should be treated in the same way as the offence under section 236, which has already been excluded from the amendment for the reasons set out above.

Amendment to the Telecommunications (Interception and Access) Act 1979 to broaden the definition of 'foreign intelligence"

Sections 11A, 11B and 11C of the TIA Act currently allow the Attorney-General to issue an interception warrant to ASIO for the purposes of obtaining 'foreign intelligence' on a particular matter where he or she is satisfied that the collection of that foreign intelligence is important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs.

The current definition of 'foreign intelligence', which is made by reference to the ASIO Act, means "*intelligence relating to the capabilities, intentions or activities of a foreign power*". A 'foreign power' is '*a foreign government, an entity that is directed or controlled by a foreign government or governments, or a foreign political organisation'*.

It is proposed to replace this with the following definition:

"foreign intelligence means intelligence about the capabilities, intentions or activities of people or organisations outside Australia."

It is further proposed to amend sections 11A, 11B and 11C so that a warrant to obtain foreign intelligence is available where the Attorney General is satisfied that its collection is "*in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being*".

Law Council Concerns*:*

The Law Council does not support this amendment, the effect and import of which extends far beyond the investigation of people smuggling offences.

Telephone interception warrants are an exception to the general prohibition on intercepting telecommunications and, given the breach of privacy that they necessarily entail, should only be available when strictly required to achieve a clearly identified and legitimate aim. This is particularly so with ASIO warrants, which are issued by the Attorney-General and not subject to the supervision of a Court.

The proposed amendments to the definition of "foreign intelligence", coupled with the further proposed amendment to the test in sections 11A, 11B and 11C, will mean that telephone interception warrants are available to ASIO in a very broad range of circumstances. The Law Council submits that the proposed changes are such that they will almost render meaningless the threshold test that must be met by ASIO in order to obtain a warrant under the relevant sections. A telephone interception warrant will be able to be obtained to gather information about the activities of any person or group outside Australia whenever those activities are considered to be somehow relevant to Australia's national security, Australia's foreign relations or Australia's national economic well-being.

The justification for the amendment does not take any account of the fact that under sections 9 and 9A of the TIA Act, the Attorney-General already has the power to issue a telecommunication interception warrant to ASIO in order to allow for the interception of telecommunications to or from *a person* engaged in or likely to be engaged in activities prejudicial to national security.

Mandatory Sentencing

The Bill extends the existing mandatory minimum sentence regime in the Migration Act to the new aggravated offences of people smuggling involving exploitation or danger of death or serious harm; people smuggling involving 5 people or more; and false documents or information relating to 5 people or more.

Law Council Concerns

While the Explanatory Memorandum asserts that the Bill merely extends the existing mandatory sentencing regime to the new aggravated offence, the Law Council is concerned not only at this extension but also at the original inclusion of mandatory minimum sentence provisions in the Migration Act.

The Law Council is opposed to mandatory sentencing because it imposes unacceptable restrictions on judicial discretion and contravenes Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR).[11]

Mandatory sentencing effectively removes sentencing discretion from the courts which hear and examine all of the relevant circumstances of a particular case. In individual cases, there may well be mitigating circumstances that require consideration in determining sentencing, such as mental illness or other forms of hardship or duress.

Mandatory sentencing may render some sentences disproportionately harsh and mean that appropriate gradations for sentences are not possible thereby resulting in inconsistent and disproportionate outcomes.

Further, there is no evidence that the harsher penalties provided by mandatory sentencing have any deterrent value. However, it is clear that mandatory sentencing comes with significant economic costs associated with longer sentences.

When Parliament introduced and passed the people smuggling offences in the Migration Act via the *Border Protection (Validation and Enforcement Powers) Act 2001*, no specific justification for mandatory sentencing provisions was provided. Again, with the current Bill, no empirical evidence or other rationale is provided for the imposition of mandatory sentencing. While mandatory sentencing may provide the appearance of addressing the problem of people smuggling, there is no justification or merit for such sentencing in economic or legal terms or in terms of the deterrence value it provides.

The Law Council also has specific concerns with proposed section 236B(5) which provides, for the purposes of the mandatory sentencing provisions, that a person who is convicted of multiple offences in the same proceeding is to be treated as a "repeat offender" and therefore subject to higher mandatory minimum penalties.

This distorts the notion of "repeat offender" which is generally used to refer to a person who, although having been prosecuted and punished for particular conduct, nonetheless engages in the same conduct again showing no evidence of remorse or rehabilitation.

It is not uncommon at criminal law for a person to be liable to an increased maximum penalty if he or she is a repeat offender. This is intended to deter recidivism.

However, the result of this amendment is that a person may be punished unduly harshly as a recidivist, that is, as someone who has demonstrated themselves as unwilling or unable to reform, when in fact they are appearing before the Court for the first time to face the consequences of their offending behaviour.

Where a person has been convicted and is being sentenced for multiple offences simultaneously, the court already has the discretion to ensure that the length of the sentence appropriately reflects the gravity of the offending behaviour, the extent of the defendant's involvement in the criminal enterprise and whether or not the offending behaviour represents an isolated incident or a repeated pattern of behaviour. For that reason, proposed section 236B(5) is unnecessary and unfair.

[11] The ICCPR prohibits arbitrary detention (Article 9) and provides that prison sentences must be subject to appeal (Article14).

Amendment to the Surveillance Devices Act 2004

In addition to the primary people smuggling offence in the Criminal Code and Migration Act, there are two aggravated people smuggling offences in each Act (see Criminal Code sections 73.2 and 73.3 and Migration Act proposed sections 233B and 233C).

The first is the aggravated offence of people smuggling involving exploitation, or danger of death or serious harm. The second is the aggravated offence of people smuggling involving at least five people.

Currently, under the *Surveillance Devices Act 2004*, an emergency authorisation for a surveillance device can be obtained where it relates to the investigation of the aggravated Criminal Code offence of people smuggling involving exploitation, or danger of death or serious harm. It is not available in the investigation of the aggravated Criminal Code offence of people smuggling involving at least five people. Likewise, it is not available in the investigation of either corresponding aggravated offence under the Migration Act.

It is proposed to amend section 30 of the *Surveillance Devices Act* so that a law enforcement officer who is conducting an investigation into any of the aggravated people smuggling offences, either under the Criminal Code or Migration Act, may apply to an appropriate authorising officer for an emergency authorisation for the use of a surveillance device.

An emergency authorisation is an internal agency authorisation which allows a surveillance device, such as a data surveillance device, a listening device, an optical surveillance device or a tracking device to be installed and used, without a warrant from a judge or member of the Administrative Appeals Tribunal (AAT). (Although within 48 hours of issuing an emergency authorisation the officer who gave the authorisation must apply to an eligible Judge or to a nominated AAT member for approval of the giving of the emergency authorisation.)

Law Council Concerns

The Law Council does not object to the extension of section 30 of the Surveillance Devices Act to cover the aggravated Migration Act offence which corresponds with the Criminal Code offence already covered (that is, the aggravated offence of people smuggling involving exploitation, or danger of death or serious harm).

This is consistent with the purported aim of harmonising the two sets of offence provisions and the tools available for their investigation and enforcement.

However, the Law Council submits that the extension of section 30 to cover the second aggravated people smuggling offence (people smuggling involving five or more people) in both the Criminal Code and Migration Act is somewhat different.

Although, this is presented in the Explanatory Memorandum essentially as a 'tidying up' amendment - (that is, an amendment simply to make sure that section 30 captures all the aggravated people smuggling offences) - the two aggravated offences are in fact very different in nature. One relates to the harm or risk of harm to the victims of the people smuggling venture, whereas the other relates to the size and scope of the people smuggling operation.

For that reason, it should not be taken for granted that just because the first aggravated offence is covered by the emergency authorisation procedures – that the second should also automatically be covered. Some justification, based, for example, on operational

requirements or hurdles encountered in the past, should at least be advanced for this amendment.

While the Law Council does not necessarily strenuously oppose the amendment –the Law Council submits that the Senate Committee should at least be aware that it is not just a 'tidying up' amendment, as suggested.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.