

CHAPTER 2

OVERVIEW OF THE BILL

2.1 The Bill contains provisions:

- (a) to create new people smuggling offences and amend existing offences;
- (b) to broaden the role of ASIO; and
- (c) related to the investigative powers of law enforcement agencies and ASIO.

People smuggling offences¹

2.2 The existing people smuggling offences are set out in sections 232A to 233C of the Migration Act and Division 73 of the Criminal Code. The Migration Act offences apply to people smuggling ventures entering Australia, while the Criminal Code offences apply to ventures entering foreign countries.²

New offence of supporting people smuggling

2.3 The Bill would insert a new offence of supporting the offence of people smuggling in both the Migration Act and the Criminal Code.³ The Explanatory Memorandum states that the new offences are targeted at:

...those involved in supporting and facilitating people smuggling. This is an important strategy in tackling serious and organised crime. Organised criminal syndicates depend on 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.⁴

2.4 The elements of the offence under both proposed section 73.3A of the Criminal Code and proposed section 233D of the Migration Act are that:

- (a) the person intentionally provided material support or resources to another person or an organisation; and
- (b) the provision of the support or resources aids the commission of a people smuggling offence.⁵

2.5 The fault element applicable to the second element of the new offences would be recklessness. This means that the prosecution would have to prove that the accused was aware of a substantial risk that the support or resources would aid the commission

1 *Submission 14* from the DPP provides a very helpful breakdown of the elements of the people smuggling offences proposed by the Bill.

2 Explanatory Memorandum, p. 1; section 73.4 of the Criminal Code.

3 Items 6 and 8 of Schedule 1; Explanatory Memorandum, p. 1.

4 Explanatory Memorandum, pp 8 and 15.

5 Explanatory Memorandum, pp 7 and 14; DPP, *Submission 14*, pp 3 and 4-5.

of a people smuggling offence and, having regard to the circumstances known to the accused, it was unjustifiable to take that risk.⁶

2.6 The maximum penalty for both offences would be ten years imprisonment, a fine of \$110,000 or both.⁷

2.7 These proposed offences would not apply to a person who provides support or resources for the smuggling of him- or herself or a group of which he or she is a part.⁸ However, the Explanatory Memorandum notes that the offences ‘will apply to persons in Australia who pay smugglers to bring their family or friends to Australia on a smuggling venture.’⁹ In his second reading speech, the Attorney-General explained the rationale for this approach:

The government is determined to reinforce the message that people should use authorised migration processes in seeking asylum and migrating to Australia, and in supporting others to come here. People in Australia should not support the life-threatening business of people smuggling by providing finance or other assistance.¹⁰

Consistency between people smuggling offences

2.8 A number of the proposed amendments in the Bill aim to harmonise the people smuggling offences under the Criminal Code and the Migration Act. At present, the people smuggling offences under the Criminal Code require the prosecution to prove that a person who organises or facilitates the unlawful entry of another person or persons into a foreign country did so having obtained, or intending to obtain, a benefit.¹¹ This is not an element of the people smuggling offences under the Migration Act.¹² The Bill would remove this requirement from the Criminal Code offences.¹³ The Explanatory Memorandum states that:

This amendment corrects a discrepancy between the Criminal Code and Migration Act in that the prosecution under the Criminal Code has to prove an additional element when prosecuting people smugglers for ventures transiting or departing Australia.¹⁴

2.9 The Bills Digest notes that the People Smuggling Protocol only requires states to criminalise people smuggling when it is committed in order to obtain a financial or

6 Sections 5.4 and 5.6 of the Criminal Code; Explanatory Memorandum, pp 7 and 14; Attorney-General’s Department, *Submission 8*, p. 2; Dr Dianne Heriot, Attorney-General’s Department, *Committee Hansard*, 16 April 2010, p. 35.

7 Explanatory Memorandum, pp 8 and 14.

8 Proposed subsections 73.3A(2) of the Criminal Code and 233D(2) of the Migration Act; Explanatory Memorandum, pp 7 and 14; Attorney-General’s Department, *Submission 8*, p. 2.

9 Explanatory Memorandum, pp 8 and 15.

10 The Hon Robert McClelland MP, Attorney-General, *House Hansard (Proof)*, 24 February 2010, p. 3.

11 Paragraphs 73.1(1)(d) and 73.3(1)(d) of the Criminal Code.

12 Sections 232A, 233 and 233A of the Migration Act.

13 Items 1, 2, 4 and 5 of Schedule 1.

14 Explanatory Memorandum, p. 6.

material benefit and is thus not intended to apply to family members or charitable organisations who arrange the illegal entry of migrants for other reasons.¹⁵

2.10 The Explanatory Memorandum does not clarify why this discrepancy between the people smuggling offences under the Criminal Code and the Migration Act will be resolved by removing the requirement (that the person obtained or intended to obtain a benefit) from the Criminal Code offences rather than inserting this requirement into the Migration Act offences.

2.11 There is a further significant inconsistency between the people smuggling offences under the Criminal Code and the Migration Act. Section 73.2 of the Criminal Code provides for an aggravated offence where the people smuggler:

- (a) intends that the smuggled person will be exploited after he or she enters the foreign country;
- (b) subjects the person to cruel, inhuman or degrading treatment; or
- (c) exposes the person to a danger of death or serious harm.

2.12 The Migration Act does not set out an equivalent aggravated people smuggling offence. Proposed section 233B of the Migration Act would create an aggravated offence in relation to people smuggling ventures entering Australia which involve exploitation; cruel, inhuman or degrading treatment; or a danger of death or serious harm.¹⁶ The penalty for this offence would be a maximum of 20 years imprisonment, a fine of \$220,000 or both. This is the same as the penalty provided for under section 73.2 of the Criminal Code.

Mandatory minimum penalties

2.13 Section 233C of the Migration Act currently requires the courts to impose a minimum sentence of at least five years imprisonment (with a non-parole period of at least three years) where:

- (a) a person is convicted of an aggravated people smuggling offence; and
- (b) the offender was at least 18 years of age when the offence was committed.¹⁷

2.14 If the offence is a repeat offence section 233C requires a minimum penalty of at least eight years imprisonment (with a non-parole period of at least five years).

2.15 The Bill would extend the mandatory minimum penalties which apply to existing aggravated people smuggling offences to the new aggravated offence of people smuggling involving exploitation; cruel, inhuman or degrading treatment; or a danger of death or serious harm under proposed section 233B of the Migration Act.

15 Elibritt Karlsen, *Anti-People Smuggling and Other Measures Bill 2010*, Bills Digest No. 131, 11 March 2010, p. 6.

16 Item 8 of Schedule 1; Explanatory Memorandum, pp 11-12.

17 The existing aggravated people smuggling offences are offences relating to groups of five or more people and are set out in sections 232A and 233A of the Migration Act. These offences would be retained by the Bill as proposed sections 233C and 234A of the Migration Act.

The new offence would receive the higher mandatory minimum penalty of eight years imprisonment with a non-parole period of five years. The Explanatory Memorandum states that: ‘This is to reflect the serious nature of this offence.’¹⁸

2.16 In addition, proposed subsection 236B(5) of the Migration Act would extend the higher mandatory minimum penalty provisions so that they apply where a person is convicted of multiple aggravated people smuggling offences in the same proceeding. At present, the higher mandatory minimum penalties for repeat offenders only apply where a person has been convicted of aggravated people smuggling offences in a previous proceeding.¹⁹

Expanded role for ASIO

2.17 Schedule 2 of the Bill would amend the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to empower ASIO to play a greater role in combating people smuggling. The Explanatory Memorandum states that:

ASIO’s functions are set out in section 17 of the ASIO Act. These functions include obtaining, correlating and evaluating intelligence relevant to security, and communicating any such intelligence for purposes relevant to security. The existing definition of ‘security’ in section 4 does not specifically encompass border security issues. This means that ASIO currently has limited capacity to carry out its intelligence functions under section 17 in relation to threats to Australia’s territorial and border integrity such as people smuggling.²⁰

2.18 Schedule 2 would amend the definition of ‘security’ in section 4 to include ‘the protection of Australia’s territorial and border integrity from serious threats’.²¹ The Explanatory Memorandum notes that this would enable ASIO:

...to communicate intelligence relating to serious threats to Australia’s territorial and border integrity to the relevant authorities. For example, ASIO would be able to communicate intelligence relating to people smuggling endeavours to agencies such as Australian Customs and Border Protection Service or law enforcement agencies.²²

Investigative powers

2.19 The Explanatory Memorandum states that the Bill would amend the *Surveillance Devices Act 2004* (SD Act) and the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to enable law enforcement agencies to have consistent access under both Acts to the appropriate investigative tools in relation to

18 Proposed paragraphs 236B(3)(a) and (4)(a) of the Migration Act; Explanatory Memorandum, p. 16.

19 Explanatory Memorandum, pp 16-17.

20 Explanatory Memorandum, p. 3. See also Attorney-General’s Department, *Submission 8*, p. 3.

21 Item 1 of Schedule 2; Explanatory Memorandum, p. 20.

22 Explanatory Memorandum, p. 20.

the existing and proposed people smuggling offences.²³ The Bill would also expand ASIO's powers to use telecommunications interception to collect foreign intelligence.

Surveillance devices

2.20 The SD Act sets out the procedures law enforcement officers must follow in order to obtain surveillance device warrants as well as allowing for the use of surveillance devices without a warrant in certain urgent circumstances. In particular, section 30 of the SD Act permits an emergency authorisation where specific offences are being investigated and use of the surveillance device is necessary to prevent the loss of evidence relevant to the investigation.

2.21 The Bill would amend section 30 of the SD Act to allow the emergency use of surveillance devices, without a warrant, in relation to all aggravated people smuggling offences.²⁴ At present, an emergency authorisation is only available in connection with the investigation of the aggravated people smuggling offence under section 73.2 of the Criminal Code. The amendments to section 30 of the SD Act would extend this to cover the existing and proposed aggravated people smuggling offences under both the Criminal Code and the Migration Act.²⁵ However, the emergency authorisation of surveillance devices would not be available to investigate the aggravated offence of supplying false information or forged documents in relation to groups of non-citizens seeking visas or entry to Australia.²⁶

Telecommunications interception

Warrants to investigate people smuggling

2.22 Under the TIA Act, interception agencies may only be granted a telecommunications interception warrant in relation to the investigation of a 'serious offence'.²⁷ The Bill would amend the definition of 'serious offence' in section 5D of the TIA Act:

- (a) to include the new people smuggling offences within the definition so that telecommunication interception can be used to investigate those offences; and
- (b) to make the tests for obtaining a telecommunications interception warrant to investigate people smuggling offences under the Migration Act and the Criminal Code consistent.²⁸

23 Explanatory Memorandum, p. 2.

24 Items 14 and 15 of Schedule 1; Explanatory Memorandum, p. 2. Surveillance devices include data surveillance, listening, optical surveillance and tracking devices.

25 Explanatory Memorandum, p. 2. Specifically, emergency authorisations could be obtained to investigate offences under proposed sections 233B and 233C of the Migration Act and sections 73.2 and 73.3 of the Criminal Code.

26 Proposed section 234A of the Migration Act.

27 Paragraphs 46(1)(d) and 46A(1)(d) of the TIA Act.

28 Items 17 and 18 of Schedule 1; Explanatory Memorandum, pp 2 and 18-19.

2.23 At present, to obtain a telecommunications interception warrant in relation to people smuggling offences under the Migration Act, the interception agency must show that the offence:

- (a) involves two or more offenders;
- (b) involves substantial planning and organisation;
- (c) involves, or ordinarily involves, the use of sophisticated methods and techniques; and
- (d) is committed, or is ordinarily committed, in conjunction with other offences of that kind.²⁹

2.24 These additional tests do not apply to applications for telecommunications interception warrants for the investigation of people smuggling offences under the Criminal Code.³⁰ The Bill would remove the requirement for agencies to prove these additional elements and would thus make it easier for investigating agencies to obtain telecommunication interception warrants to investigate people smuggling offences under the Migration Act. However, the additional tests would continue to apply to applications for telecommunications interception warrants in relation to the offences under section 236 of the Migration Act. These offences relate to using or possessing a visa issued to another person.

Warrants to collect foreign intelligence

2.25 Schedule 3 of the Bill would broaden the definition of ‘foreign intelligence’ in subsection 5(1) of the TIA Act. Under Part 2-2 of the TIA Act, the Attorney-General can issue a warrant to allow ASIO to intercept telecommunications for the purpose of collecting foreign intelligence.³¹ ‘Foreign intelligence’ is currently defined to mean ‘intelligence relating to the capabilities, intentions or activities of a foreign power’.³² A ‘foreign power’ is defined as ‘a foreign government, an entity that is directed or controlled by a foreign government or governments, or a foreign political organisation’.³³

2.26 The Explanatory Memorandum states that:

The definition [of ‘foreign intelligence’] came into effect at a time when State actors posed the most significant security threat to Australia. This no longer adequately reflects the contemporary position - activities undertaken by non-State actors, whether individually or as a group, can also threaten Australia’s national interest.³⁴

29 Subsection 5D(3) of the TIA Act; Explanatory Memorandum, pp 18-19.

30 Subsection 5D(3A) of the TIA Act; Explanatory Memorandum, p. 19.

31 Definition of ‘the Organisation’ in subsection 5(1), and sections 11A, 11B and 11C of the TIA Act.

32 Definition of ‘foreign intelligence’ in subsection 5(1) of the TIA Act; definition of ‘foreign intelligence’ in section 4 of the ASIO Act.

33 Definition of ‘foreign power’ in section 4 of the ASIO Act.

34 Explanatory Memorandum, p. 21. See also Attorney-General’s Department, *Submission 8*, p. 5.

2.27 Item 1 of Schedule 3 would amend the definition of ‘foreign intelligence’ to remove the requirement for foreign government or foreign political organisation involvement before foreign intelligence can be collected. Instead, the definition of ‘foreign intelligence’ would be ‘intelligence about the capabilities, intentions or activities of people or organisations outside Australia.’

2.28 The Explanatory Memorandum states that this would enable information about foreign individuals or groups operating without government support to be collected under a warrant issued under Part 2-2 of the TIA Act.³⁵ However, the drafting of the new definition of ‘foreign intelligence’ appears to preclude a foreign intelligence warrant being issued in relation to the activities of a foreign national who is *in* Australia.³⁶

2.29 Finally, Schedule 3 would amend the conditions that the Attorney-General must be satisfied of before issuing a warrant for the collection of foreign intelligence.³⁷ At present, such a warrant can only be issued where the Attorney-General is satisfied that the collection of the intelligence on a matter is ‘important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth’s international affairs’.³⁸ The amendments in Schedule 3 would broaden this test to allow a warrant to be issued where it is in the interests of Australia’s national security, foreign relations or national economic well-being.³⁹

35 Explanatory Memorandum, p. 21. See also Attorney-General’s Department, *Submission 8*, p. 5.

36 Subsection 11D(5) of the TIA Act would prevent such warrants being issued for the purpose of collecting information concerning Australian citizens or permanent residents whether they are in Australia or overseas.

37 Explanatory Memorandum, p. 22.

38 Paragraph 11A(1)(b), and subparagraphs 11B(1)(b)(i) and 11C(1)(b)(i) of the TIA Act.

39 Items 5, 7 and 9 of Schedule 3; Explanatory Memorandum, p. 22.