CHAPTER 3
KEY ISSUES

3.1 Most evidence to the committee supported the policy objective of the Bill to deter people smuggling on the basis that smuggling exploits asylum seekers and places them in danger.[1] However, several issues were raised in evidence to the committee in relation to:

- the breadth of the new people smuggling offences;
- the penalties for people smuggling offences, particularly the mandatory minimum penalties for aggravated offences;
- the removal of the requirement to prove that the accused obtained, or intended to obtain a benefit, from the people smuggling offences under the Criminal Code;
- the effectiveness of the Bill in achieving its policy aims;
- the expanded role of ASIO; and
- the changes to investigative powers proposed by the Bill.

People smuggling offences

Breadth of the new offences of supporting people smuggling

3.2 Much of the evidence to the committee raised concerns about the breadth of the new offences of supporting people smuggling under proposed section 73.3A of the Criminal Code and proposed section 233D of the Migration Act. For example, the Migrant and Refugee Rights Project and the International Refugee and Migration Law Project at the University of New South Wales (the UNSW submission) strongly opposed these amendments. The UNSW submission argued that:

> 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.[2]

Support provided to family members or for humanitarian reasons

3.3 Professor Mary Crock told the committee that the offences risked capturing innocent people as well as people smugglers:

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1 See, for example, Immigration Advice and Rights Centre Inc, *Submission 7*, p. 1; Ms Hannah Quadrio, *Submission 13*, p. 3; Dr Elizabeth Biok, Refugee Council of Australia, *Committee Hansard*, 16 April 2010, p. 22.

2 *Submission 23*, p. 13.

> This legislation targets refugee communities in Australia who are sending remittances to their families overseas. Every time they send money across to a relative, if there is a chance that that relative is going to get on a boat at some stage, they are at risk of being put in jail for 10 years. This legislation will only be seen by the very vulnerable emergent communities in this country as a direct assault on them—a frontal attack.[3]

3.4 The Vietnamese Community in Australia articulated similar concerns noting that, when there were Vietnamese asylum seekers in camps in South East Asian countries, many Vietnamese Australians sent money to the camps:

> It is usually not possible for senders to know whether some of the money will be used for the purpose of a boat trip to Australia. Yet, because this new offence applies whether or not they know, they are criminalised.
>
> One of the fundamental Australian values is family. Other peoples share this value, too. It ought not be a crime to help your family members.[4]

3.5 Dr Elizabeth Biok of the Refugee Council of Australia also expressed concern that under these amendments people in Australia who send money to support relatives who are displaced in another country may be charged with a criminal offence:

> ...there is no intent provision and no direct link between the sending of resources and the act of people smuggling. There is a receiver and then there is another person or organisation, and somewhere down a chain there is an act of people smuggling. This seems to me not to acknowledge the fact that people send money to their relatives, as they can, in countries where they are in great need and where the UNHCR does not provide any material support. ...The act of people smuggling may only come into the picture after somebody has been sending money for 10 years, so the chain seems to me to be very nebulous and very vague.[5]

3.6 Ms Pamela Curr of the Asylum Seeker Resource Centre emphasised that it would not only be family members of refugees who might potentially be captured by the offences:

> Not just Australians with refugee backgrounds but many Australian refugee advocates send money to Indonesia and to other offshore places... We send that money to ensure that people have food, tents and clothing and that their children get the medical help that they need.
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> My concern is that this bill will place the actions of humanitarian people in Australia at risk of incurring criminal penalties.[6]

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3 *Committee Hansard*, 16 April 2010, p. 4.

4 *Submission 18*, p. 1.

5 *Committee Hansard*, 16 April 2010, p. 22. See also *Submission 10*, pp 2-3 and 6-7; Ms Susan Longmore OAM and Mr Andrew Longmore, *Submission 3*; Amnesty International Australia, *Submission 16*, p. 8; Great Lakes Rural Australians for Refugees, *Submission 21*, p. 1.

6 *Committee Hansard*, 16 April 2010, p. 22. See also *Submission 12*, pp 4 and 5-6; Project Safecom Inc, *Submission 17*, pp 6 and 12.

3.7 The proposed offences would not apply to a person paying smugglers to facilitate his or her own passage, or the passage of a family member or another person who is travelling in the same group.[7] However, the Immigration Advice and Rights Centre Inc provided a specific example of where the offences might nevertheless capture asylum seekers. The centre described a recent case where a wife and child came to Australia by boat. The husband remained in Malaysia working to pay off the debt he owed for money he had borrowed to pay the people smugglers who brought his wife and child to Australia. The centre argued that:

> If the Bill is passed in its current form that husband could be prevented on character grounds from being reunited with his wife and child after they are found to be refugees because of a potential criminal conviction for supporting the offence of people smuggling.[8]

Term 'material support' too vague

3.8 Both proposed section 73.3A of the Criminal Code and proposed section 233D of the Migration Act would make it an offence to provide 'material support or resources' that aids a people smuggling offence. Associate Professor Ben Saul argued the term 'material support' is so uncertain that it may make it impossible for people to know prospectively whether their conduct is lawful. He noted that a similarly worded United States offence of providing material support or resources to a terrorist organisation is being challenged before the United States Supreme Court on the basis that it is unconstitutionally vague.[9] The UNSW submission raised the same issue and noted that:

> 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. In addition to being fundamentally unfair, this raises serious due process concerns.[10]

Justification of the new offences given existing ancillary offences

3.9 Ms Helen Donovan of the Law Council of Australia (the Law Council) argued that it is unclear why supporting offences are required when the provisions in Chapter 2 of the Criminal Code already make various forms of ancillary conduct related to people smuggling unlawful:

> There has been no real discussion about why these new offences are necessary, particularly in view of the ancillary offences in chapter 2 of the

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7 Proposed subsection 233D(2) of the Migration Act; proposed subsection 73.3A(2) of the Criminal Code; Attorney-General's Department, *Submission 8*, p. 2.

8 *Submission 7*, p. 3.

9 *Committee Hansard*, 16 April 2010, pp 11-12. See also UNSW submission, *Submission 23*, pp 15-16; Australian Lawyers for Human Rights, *Submission 26*, p. 3.

10 *Submission 23*, p. 15. See also Ms Helen Donovan, Law Council, *Committee Hansard*, 16 April 2010, p. 15.

> Criminal Code such as aiding and abetting, conspiring, inciting et cetera. The primary people-smuggling offence provisions themselves already target conduct which can be described as organising or facilitating people smuggling. Therefore, these new offence provisions must be targeted at those who facilitate the facilitation of people smuggling. The Law Council would submit that it has become simply too easy to make broad reference to the involvement of organised crime in a particular type of criminal activity as a justification for the introduction of new broader offence provisions without any detailed discussion of the operation of the existing provisions and the likely impact of the new provisions.[11]

3.10 In response to questions from the committee regarding what type of conduct might be captured by the new people smuggling offences which is not already captured by the ancillary offences in Chapter 2 of the Criminal Code, Ms Donovan stated:

> ...the possible difference is that it is simply not as onerous. It is simply not as difficult for the prosecution to satisfy the provisions of this offence of providing support, because there is no need to necessarily point to the commission of a particular offence. ...You provide support which enables people-smuggling but not necessarily the commission of a particular offence of people-smuggling and you need only be reckless to that outcome rather than intend that outcome. That may be the extent of the difference.[12]

3.11 On the issue of whether it is desirable from a policy perspective for the offences of supporting people smuggling to be cast in broad terms, Ms Donovan added:

> ...that is simply not the way that the criminal law ought to operate, that you cast the offence provision as widely as possible so that police and the prosecution do not have their hands tied in any way, shape or form because we trust them to focus on the right baddies and we trust them not to misuse the provision, even though the potential is there for it to be misused.[13]

Proposals to limit the operation of the proposed offences

3.12 If the new offences are to be enacted the Law Council submitted 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 people smuggling. It should not be sufficient that a person is merely reckless as to that outcome – as is currently proposed.[14]

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11 *Committee Hansard*, 16 April 2010, p. 13.See also *Committee Hansard*, 16 April 2010, pp 14 and 16-17; *Submission 9*, p. 5; Mr Chris Connolly, Australian Privacy Foundation, *Committee Hansard*, 16 April 2010, pp 31 and 33; Australian Privacy Foundation, *Submission 15*, p. 2.

12 *Committee Hansard*, 16 April 2010, p. 17.

13 *Committee Hansard*, 16 April 2010, p. 18.

14 *Submission 9*, pp 6-7. See also Dr Elizabeth Biok, Refugee Council of Australia, *Committee Hansard*, 16 April 2010, pp 22-23 and 28.

3.13 The Refugee Council of Australia supported this position and submitted, in addition, that the offences should include 'an exemption for humanitarian actions, that is, actions undertaken without criminal intent and with the aim of assisting people in need.'[15]

3.14 An alternative proposal to limit the operation of the offences was made by the UNSW submission which proposed that the offences be amended to exclude people who provide support to people smuggling indirectly and instead be:

> ...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...[16]

Department response

3.15 The Attorney-General's Department told the committee that the offences of providing material support to people smuggling would not capture people who innocently remit money to asylum seekers for humanitarian purposes:

> In regard to the proposed offence of material support ...recklessness applies automatically by operation of the Criminal Code so that the prosecution, to prove this offence, would need to prove that a person intentionally provided material support and also that the person was aware of a substantial risk that the result would occur and, having regard to the circumstances known to him or her, it was unjustifiable to take that risk. So that element again automatically applies so the offence would not capture those examples given today where—I think the word was 'innocently'—people innocently remitted money to pay for subsistence or medical expenses.[17]

3.16 In addition, the department noted that the defence of mistake or ignorance of fact, under section 9.1 of the Criminal Code, would be available in relation to the new offences. For the defence to apply, the mistaken belief or ignorance must be reasonable in the circumstances. The department provided the following example of how the defence would operate in practice:

> *Example* - support or resources are provided to a family member for legitimate transportation costs to leave the country and are instead paid to a people smuggler for the family member or another person to be smuggled out of the country. The person providing the money to the family member has not committed the offence of supporting the offence of people smuggling.[18]

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15 Refugee Council of Australia, *Submission 10*, p. 3. See also Project Safecom Inc, *Submission 17*, pp 6 and 13.

16 *Submission 23*, p. 13.

17 Dr Dianne Heriot, *Committee Hansard*, 16 April 2010, p. 35. See also Attorney-General's Department, *Answers to questions on notice*, 23 April 2010, Attachment B, pp 7-8.

18 Attorney-General's Department, *Answers to questions on notice*, 23 April 2010, Attachment B, p. 8.

3.17 An officer from the Attorney-General's Department also rejected the view that the term 'material support' is too vague or uncertain. He noted that it is proposed to insert the term 'material' into the equivalent offence of providing support to a terrorist organisation with the precise aim of narrowing the scope of that offence:

> The idea of something being material is pretty common…(T)he idea of materiality is that it has to be concrete and real. You will find that there are many offences using the concept of materiality. It is not an unusual piece of language. Because it is a criminal offence the courts will always take a strict interpretation. With that terrorism offence there was probably a little bit of reluctance to use the word 'material' in the first place, because it might have resulted in very tight interpretation.[19]

3.18 On the issue of whether there is a demonstrated need for the new support offences given the existing provisions for ancillary offences under Chapter 2 of the Criminal Code, the officer told the committee:

> Chapter 2 of the Criminal Code is designed to have general principles that apply to every offence. So for every offence you have fault elements, for every offence you have an aiding and abetting aspect but the Criminal Code itself envisages that, in relation to specific circumstances, parliament might want to take a different approach to that general principle. These supporting offences... are easy to establish and there is no question, clearly, in the mind of the government that the conduct that is described is conduct that should be criminalised.[20]

Mandatory minimum penalties for people smuggling offences

3.19 Some submissions were critical of the severity of the penalties applicable to people smuggling offences, while others expressed concern regarding the mandatory minimum penalty provisions.[21] For example, Ms Nathalie Haymann argued that people smuggling laws should draw a distinction between the members of crime syndicates which organise people smuggling and boat crew:

> ...under our punitive people smuggling laws, impoverished, uneducated Indonesian fishermen are often duped into bringing boats into Australian waters for minimum payment by profiteering members of criminal

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19 Mr Geoffrey McDonald, *Committee Hansard,* 16 April 2010, p. 38. Section 102.7 of the Criminal Code makes it an offence to provide support or resources to a terrorist organisation. See also Explanatory Memorandum, pp 8 and 15; Attorney-General's Department, *National Security Legislation: Discussion Paper on Proposed Amendments,* July 2009, at: http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(966BB47E522E848021A38A20280E2386)~SLB+-+National+Security+Discussion+Paper.pdf/$file/SLB+-+National+Security+Discussion+Paper.pdf (accessed 21 April 2010), pp 62-63.

20 Mr Geoffrey McDonald, *Committee Hansard,* 16 April 2010, pp 38-39.

21 See for example Ms Doreen Roache, *Submission 6;* Vietnamese Community in Australia, *Submission 18,* p. 2; Great Lakes Rural Australians for Refugees, *Submission 21,* p. 1.

> syndicates, unknowingly risking 20 years jail and a $220,000 fine or both if caught. ...Meanwhile the main profiteers are not being brought to justice.[22]

3.20 The UNSW submission raised particular concerns about the impact of the mandatory minimum sentencing provisions on Indonesian boat crew and their families:

> 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.[23]

3.21 Ms Curr of the Asylum Seeker Resource Centre expressed similar concerns:

> I have a great concern that this bill, by implementing these mandatory minimum sentences, is going to increase the difficulties for the Indonesian fishermen who, by any realistic assessment, are not people smugglers. They are facilitating the journey in their boats, mainly because they are impoverished and have no other means of income. Why should they be treated as people smugglers, as people who have resourced and organised the transfer of people? To me, it is conflating two groups of people.[24]

3.22 Ms Sue Hoffman, whose PhD research relates to the journeys of Iraqi asylum seekers, submitted that people smuggling operations cannot all be characterised in the same way. Rather she argued that these operations fit into three broad categories:

> 1. Individuals involved in transporting people as an occasional and secondary occupation to their main income earning activity.
>
> 2. Loose, fluid networks of locally based smugglers, probably with transnational contacts through shared ethnicity or kinship.
>
> 3. Hierarchical Mafia or Triad-like gangs, highly organised, highly sophisticated, well-resourced and involved in other criminal activities such as narcotics, prostitution and gun-running, where the top echelons have little involvement in day to day operations.[25]

3.23 Ms Hoffman submitted that the people smuggling operations in Indonesia are usually 'grass roots affairs, originating from within the stranded refugee communities and/or local Indonesian communities' which fit into either the first or second

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22 *Submission 4*, p. 2. See also Labor for Refugees Victoria, *Submission 5*, p. 1; Project Safecom Inc, *Submission 17*, p. 8; Ms Sue Hoffman, *Submission 25*, p. 3.

23 *Submission 23*, p. 24.

24 *Committee Hansard*, 16 April 2010, pp 28-29. See also *Submission 12*, pp 8 and 12-13; Project Safecom Inc, *Submission 17*, pp 6 and 11.

25 *Submission 25*, p. 2.

category.[26] In the context of the variable nature of people smuggling operations, she submitted that mandatory minimum penalties are inappropriate:

> Blanket people smuggling penalties have no regard to the variety of roles played in smuggling syndicates. Some people are key players whose sole occupation is people smuggling, through which they earn large amounts of money.
>
> At the other end of the scale are the fishermen who take the opportunity to boost their meagre incomes – many struggle to feed their families – by crewing a boat to Australia. They earn a few hundred dollars if that. It is inappropriate for them to receive the same level of punishment as a main organiser.[27]

3.24 The Law Council opposed both the existing provisions for mandatory minimum sentences under the Migration Act and the extension of this sentencing regime proposed by the Bill:

> 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.[28]

3.25 The Law Council specifically opposed proposed subsection 236B(5) of the Migration Act which would provide for a minimum penalty of 8 years imprisonment where a person is convicted of multiple aggravated people smuggling offences in the same proceeding. In essence, this provision would treat a person convicted of multiple offences in the one proceeding as a 'repeat offender'. The Law Council argued that:

> ...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

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26 *Submission 25*, p. 2.

27 *Submission 25*, p. 6.

28 *Submission 9*, p. 12. See also Refugee Council of Australia, *Submission 10*, pp 4-5; Queensland Law Society, *Submission 19*, p. 2; Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No.3 of 2010, p. 2.

> incident or a repeated pattern of behaviour. For that reason, proposed section 236B(5) is unnecessary and unfair.[29]

Department response

3.26 An officer from the Attorney-General's Department explained that the Bill only proposes to extend the mandatory minimum sentencing regime:

> ...in quite narrow circumstances, one of which is in relation to the aggravated offence of people smuggling involving death or danger of serious harm. The other is where a person would be convicted in the same proceedings of multiple acts, as many of the organisers have been prosecuted for multiple offences dating back over a period of time in a single proceeding.[30]

3.27 The officer informed the committee that the mandatory minimum sentencing regime:

> ...still leaves considerable scope for the courts both to find fact and also to find an appropriate range of penalties between the maximum penalty and the minimum mandatory sentence, so there is certainly scope for judicial discretion. The High Court has, for example, indicated that it is well within the power of a parliament to direct the judiciary to determine an appropriate mandatory minimum penalty, and it has also indicated that there are circumstances which might warrant this.[31]

Requirement to obtain a benefit from people smuggling offences

3.28 The people smuggling offences under the Criminal Code currently 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.[32] The Bill would remove this requirement.[33] This is not an element of the people smuggling offences under the Migration Act. Some submitters argued that consistency between the offences should be achieved by inserting this additional requirement into the people smuggling offences under the Migration Act. For example, the Immigration Advice and Rights Centre supported the harmonisation of people smuggling offences between the Criminal Code and the Migration Act but stated that:

> ...we do not support the removal of the requirement that a person must have obtained, or intended to obtain, a benefit from the Criminal Code. We would respectfully submit that the better way to harmonise the two laws would be to include that requirement in the relevant offences under the Migration Act. We do not believe that it is appropriate for persons or

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29 *Submission 9*, p. 12. See also Project Safecom Inc, *Submission 17*, pp 6, 15-16.

30 Dr Dianne Heriot, *Committee Hansard*, 16 April 2010, p. 43. See also Attorney-General's Department, *Answers to questions on notice*, 23 April 2010, p. 2.

31 Dr Dianne Heriot, *Committee Hansard*, 16 April 2010, pp 42-43.

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

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

> organizations who are involved in transporting asylum seekers for purely humanitarian purposes to be prosecuted. [34]

3.29 The UNSW submission supported this approach and noted that removing the requirement that the accused obtained, or intended to obtain, a benefit:

> ...would criminalize the activities of aid organizations, humanitarian workers, religious workers and others who assist people cross borders in order to save their lives.[35]

3.30 Similarly, Associate Professor Saul argued that:

> ...the profit orientation in the primary offence of people smuggling should be re-included so that you insist that the offence of people smuggling, as agreed internationally by the international community and by Australia in ratifying the [People Smuggling Protocol], is an offence of commercially exploiting people. It is not the person who rescued Anne Frank from the Nazis or Oskar Schindler, who rescued people not for money but because he wanted to help people. That kind of activity is criminalised under this bill.[36]

3.31 The Law Council took a different position arguing that there are reasons the distinction between the people smuggling offences under the Migration Act and the Criminal Code should be maintained. The Law Council noted that the Criminal Code offences are not concerned with how Australia protects its own border integrity, but with how Australia fulfils its international obligations under the People Smuggling Protocol. The Law Council therefore argued that the scope of the people smuggling offences in the Criminal Code should be determined by Australia's international obligations:

> The [People Smuggling] 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.
>
> 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).
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> 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

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34 *Submission 7*, p. 4. See also Ms Hannah Quadrio, *Submission 13*, p. 8; Project Safecom Inc, *Submission 17*, pp 6 and 17-18.

35 *Submission 23*, p. 26. See also Ms Pamela Curr, Asylum Seeker Resource Centre, *Committee Hansard*, 16 April 2010, p. 28.

36 *Committee Hansard*, 16 April 2010, p. 5. See also Sydney Centre for International Law, *Submission 11*, p. 1; Liberty Victoria, *Submission 29*, p. 1.

> vulnerable people escape, by whatever means are available, from a war or disaster zone or from some other form of persecution.[37]

Department response

3.32 The Attorney-General's Department gave evidence that the amendments to remove the requirement to prove that the smuggler obtained, or intended to obtain, a benefit from the people smuggling offences under the Criminal Code are aimed at achieving consistency with the equivalent offences under the Migration Act. An officer from the department noted that the Migration Act is the act that is primarily used in prosecutions and that its provisions have proved to be effective.[38]

3.33 The department further explained that one concern about retaining this requirement is that profit is not the only illicit motive for smuggling people:

> ...people-smugglers can have lots of different motivations, and the motivation will often be profit but it could potentially be something else. It could be that they are interested in settling criminals here...[39]

Existing people smuggling offences

3.34 Some evidence to the committee argued that the existing people smuggling offences under the Migration Act are too broad. For example, the UNSW submission argued that the underlying people smuggling offence of facilitating the entry to Australia of a non-citizen who has no lawful right to come to Australia (proposed section 233A of the Migration Act) should not apply to the movement of refugees.[40] Similarly, Associate Professor Alexander Reilly argued that:

> The offence in s233A does not distinguish between cases in which the person is attempting to enter Australia in a clandestine fashion and remain in Australia illegally and undetected; and the case of the asylum seeker who wishes to seek the protection of the Australian government upon entering Australian territory. On the contrary, the Australian offence is aimed at punishing people who assist asylum seekers to reach Australia in order to deter asylum seekers themselves.[41]

3.35 Associate Professor Reilly further submitted that:

> This is an inappropriate use of the criminal law to achieve an ulterior end, and the end to be achieved, of preventing genuine asylum seekers from invoking Australia's obligations under the Refugee Convention, is itself dishonourable.[42]

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37 *Submission 9*, pp 7-8.See also Ms Helen Donovan, Law Council, *Committee Hansard*, 16 April 2010, pp 14-15 and 16; Refugee Council of Australia, *Submission 10*, pp 3-4.

38 Dr Dianne Heriot, *Committee Hansard*, 16 April 2010, p. 38.

39 Mr Geoffrey McDonald, *Committee Hansard*, 16 April 2010, p. 41.

40 *Submission 23*, pp 19-20. See also Refugee Council of Australia, *Submission 10*, p. 2.

41 *Submission 20*, p. 2. See also Ms Marilyn Shepherd, *Submissions 1;* Ms Erika Stahr, *Submission 2.*

42 *Submission 20*, p. 3.

Effectiveness

3.36 Several submitters and witnesses suggested that the Bill is unlikely to have a significant impact on people smuggling and that other measures should be adopted instead.[43] For example, the UNSW submission argued that:

> 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.[44]

3.37 Similarly, Labor for Refugees (Victoria) submitted that:

> The lack of real opportunity for family reunion under the current humanitarian intake causes immense suffering for refugees faced with lengthy separation, and as such continues to provide an incentive for the risky and costly alternative of reunion via people smugglers.[45]

3.38 Labor for Refugees (Victoria) suggested that the policy aims of the Bill would be more honourably and effectively achieved by alternative measures including establishing Australian refugee assessment centres in countries of first resort; and increasing the number of places for refugee family reunion in order to create an orderly process for application and sponsorship.[46] Professor Crock noted that similar approaches have been utilised in the past and have successfully reduced irregular migration:

> In the past, we have been very successful in stopping irregular migration from difficult spots by actually targeting the communities who have got connections with Australia, who want to come here, and giving them an alternative in the form of special humanitarian visas. We have had special visas for Cambodians, East Timorese, Ahmadis, Burmese. This is the way to do it, but nobody seems to be thinking: 'There is a population within the displaced Tamils who have got very strong connections with Australia. Let's go and talk to the Sri Lankan government and see if we cannot get what we did post-Vietnam war—an orderly departure program.' The boats would stop coming instantly if we were to do that.[47]

3.39 Ms Pamela Curr of the Asylum Seeker Resource Centre submitted that information from asylum seekers in Indonesia supported the view that an inability to

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43 See for example Dr Elizabeth Biok, Refugee Council of Australia, *Committee Hansard*, 16 April 2010 pp 25-26; Ms Hannah Quadrio, *Submission 13*, p. 9; Ms Kath Morton, *Submission 22;* Ms Margaret O'Donnell, *Submission 28*.

44 *Submission 23*, p. 6. See also Associate Professor Ben Saul, *Committee Hansard*, 16 April 2010, p. 5; Asylum Seeker Resource Centre, *Submission 12*, p. 14.

45 *Submission 5*, p. 3. See also Immigration Advice and Rights Centre Inc, *Submission 7*, p. 2.

46 *Submission 5*, p. 3. See also Asylum Seeker Resource Centre, *Submission 12*, p. 15

47 *Committee Hansard*, 16 April 2010, p. 7.

> We thought people were coming through Indonesia as part of their journey to Australia from Afghanistan, but what we found was that they were coming to Indonesia because it is the first UNHCR office at which they can formally lodge a refugee application. It is only when they get there that they find out it can take up to 18 months for them to get a refugee status determination and that there is then a lengthy period for resettlement. ...With the current number of 2,500 registered in Indonesia ...and with the average number of people Australia has accepted for resettlement from Indonesia having been 50 a year for the past nine years, that means a 40- to 50-year queue exists in Indonesia. ...That is the problem and that is why people are availing themselves of the informal transportation methods.[48]

3.40 In addition to providing timely resettlement options, Dr Biok of the Refugee Council of Australia suggested that educating asylum seekers in Indonesia and Malaysia would help to deter people from undertaking the dangerous sea journey to Australia:

> If people did not feel that this was the only alternative, if someone could actually go to asylum seekers ...to educate them about the journey and what would happen at the end of the journey—that they would end up in Christmas Island—that would also have a very important impact. I think that is another way of looking at deterrence. Deterrence can also be providing information and education.[49]

3.41 Finally, Amnesty International outlined the difficulties confronting asylum seekers in transit countries such as Indonesia and Malaysia and submitted that addressing those difficulties is the key to reducing people smuggling:

> If Australia is serious about putting an end to people smuggling, it needs to address the reasons why asylum seekers risk getting on a boat. Australia must work with transit countries to provide asylum seekers with adequate protection by ensuring that they have access to health care, legal frameworks, employment opportunities and schooling for their children. Drastic improvements must also be made to the registration and resettlement processes to give asylum seekers more hope that their claims are being considered in a transparent and timely manner.[50]

Department response

3.42 The Attorney-General's Department noted that the Bill is only one element of the Government's strategy to prevent, deter and disrupt people smuggling ventures. The strategy includes:

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48 *Committee Hansard*, 16 April 2010, pp 24-25. See also *Submission 12*, p. 5; Amnesty International Australia, *Submission 16*, p. 7; Project Safecom Inc, *Submission 17*, pp 9-10.

49 *Committee Hansard*, 16 April 2010, p. 25.

50 *Submission 16*, p. 7. See also pp 4-5; Ms Sue Hoffman, *Submission 25*, pp 7-8.

> ...developing information campaigns aimed at deterring potential irregular immigrants and people smugglers from participating in ventures, including collaborative activity with partner governments in Sri Lanka, Indonesia and Malaysia. Australian law enforcement agencies work closely with their counterparts to disrupt irregular maritime arrivals: since September 2008, there have been177 disruptions involving some 4600 persons.[51]

Expanded role for ASIO

3.43 The committee received evidence from several organisations expressing concern about the amendments in Schedule 2 of the Bill which would expand the role of ASIO to include gathering and communicating intelligence in relation to serious threats to Australia's territorial and border integrity. Mr Chris Connolly of the Australian Privacy Foundation argued that, in light of ASIO's exemption from the *Privacy Act 1988*, the proposed extension of its role should be subject to much greater public scrutiny:

> We believe this is quite a significant extension to both the jurisdiction and powers of ASIO. In our view there seems to have been little debate or time to consider such a major extension.[52]

3.44 He suggested that:

> ...a more appropriate process for a change of that nature is to call for submissions from the public in response to a discussion paper which set out the pros and cons of expanding ASIO's role. A wide range of individuals and organisations might have views on that. There are a number of experts who monitored the activities of ASIO over the years. There are quite a lot of non-government organisations that have an interest in ASIO's powers.[53]

3.45 The Law Council raised related concerns that insufficient justification had been provided for the proposed expansion of ASIO's role:

> 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.[54]

3.46 Ms Donovan expanded on the Law Council's position at the public hearing:

> ASIO is a very different beast from the law enforcement agencies. It applies to the minister for a warrant, not to the courts. It can exercise a number of

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51 Attorney-General's Department, *Answers to questions on notice*, 23 April 2010, p. 2.

52 *Committee Hansard*, 16 April 2010, p. 30. See also *Submission 15*, p.2; section 7 of the Privacy Act and the definition of 'intelligence agency' in subsection 6(1) of that Act.

53 *Committee Hansard*, 16 April 2010, p. 34.

54 *Submission 9*, p. 9. See also Ms Helen Donovan, Law Council, *Committee Hansard*, 16 April 2010, pp 13-14; Refugee Council of Australia, *Submission 10*, p. 5.

> its powers in secret. It can ask someone to come and have a chat and it does not need to say to them, 'You don't have to come with us,' or 'You can get your lawyer if you want.' ...It is important, given that ASIO is such a different beast and that it operates under that veil of secrecy, that the scope of its endeavours is limited to certain very serious matters that law enforcement is not appropriately positioned to deal with.
>
> The Law Council does not see the evidence for putting people-smuggling in the category of matters that are better dealt with by ASIO than by law enforcement agencies.[55]

3.47 The UNSW submission opposed the amendments in Schedule 2 and argued that asylum seekers arriving by boat do not pose a threat to Australia's national security:

> 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.[56]

3.48 Associate Professor Saul put forward a similar argument that people-smuggling is primarily a law enforcement problem not a security problem:

> For that reason, I would be reluctant for ASIO to be given powers in relation to people-smuggling specifically, because it is a crime problem. It is a serious organised crime problem but it is not a national security problem... ASIO should be dealing with foreign espionage, terrorism, nuclear proliferation and so on, not this ...relatively low-level stuff...[57]

Department and ASIO response

3.49 The Deputy Director-General of ASIO explained that at present ASIO can assist law enforcement agencies in relation to people smuggling issues only where there is a nexus to the existing definition of 'security' under section 4 of the ASIO Act (for example, people smuggling ventures organised by a terrorist group). He stated that in practical terms the amendments in Schedule 2 of the Bill:

> ...would mean that, if a people-smuggling operation was being led by, for example, the Australian Federal Police, and they required some analytical capacity that ASIO possessed, they can ask us—for no other reason than to investigate people smuggling, they could make that request to us and we would be able to contribute.[58]

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55 *Committee Hansard*, 16 April 2010, p. 18.

56 *Submission 23*, p. 27.

57 *Committee Hansard*, 16 April 2010, p. 7. See also Sydney Centre for International Law, *Submission 11*, p. 3; Amnesty International Australia, *Submission 16*, p. 8; Mr Chris Connolly, Australian Privacy Foundation, *Committee Hansard*, 16 April 2010, pp 31-32.

58 Mr David Fricker, *Committee Hansard*, 16 April 2010, pp 44-45.

3.50 The Deputy Director-General stated that the proposed changes in Schedule 2 of the Bill would not alter ASIO's key priorities or require additional resources:

> Our priorities at the moment are on counterterrorism and counterespionage. They are our key priorities, and that will not change should this change go through. ...We anticipate that this change will allow us to provide some niche capability to work with other agencies already engaged in anti-people-smuggling activities. We do not see this change as bringing forward a big resource hit on ASIO and for that reason we do not anticipate requiring additional resources to make an effective contribution to the whole-of-government efforts in this area.[59]

3.51 The Deputy Director-General also noted that ASIO's role would be limited to *serious* threats to Australia's territorial and border integrity:

> The word 'serious' of course means they are neither minor not trivial offences and 'serious' pitches that change to our head of security to ensure that ASIO's attentions are focused on matters of national significance, so they would be matters of organised people-smuggling and transnational crime—for example, armaments et cetera that might be crossing the border and threatening its integrity. So it is just to distance our activities from those minor or trivial threats and issues that might occur and make sure that ASIO is focused on matters of national security significance.[60]

3.52 The Attorney-General's Department further submitted that the changes are consistent with the traditional separation between law enforcement and intelligence agencies in Australia:

> The amendments will not allow ASIO to undertake activities that are more appropriately undertaken by law enforcement agencies. ASIO is not a law enforcement or prosecution agency. It has no powers of arrest and is not tasked with investigating and collecting evidence for prosecutorial purposes.[61]

Telecommunications interception

Warrants to investigate people smuggling

3.53 The Law Council did not oppose the amendments to the TIA Act which would allow telecommunications interception warrants in relation to people smuggling offences under the Migration Act on the same basis as warrants for the equivalent offences under the Criminal Code.[62] However, the Law Council argued that the existing more stringent requirements for obtaining a warrant in relation to the offence of concealing or harbouring a non-citizen should be retained.[63] This provision

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59 Mr David Fricker, *Committee Hansard*, 16 April 2010, p. 36. See also *Committee Hansard*, 16 April 2010, p. 39; Attorney-General's Department, *Submission 8*, p. 4; Mr Geoffrey McDonald, Attorney-General's Department, *Committee Hansard*, 16 April 2010, p. 42.

60 Mr David Fricker, *Committee Hansard*, 16 April 2010, p. 40.

61 *Submission 8*, p. 3.

62 *Submission 9*, p. 10.

63 Proposed section 233E of the Migration Act.

does not have a corresponding offence provision in the Criminal Code. The Law Council submitted that:

> 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) – ...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...[64]

3.54 Mr Connolly of the Australian Privacy Foundation expressed similar concerns and noted that the offence of concealing or harbouring a non-citizen under proposed section 233E of the Migration Act:

> ...does not look like a serious offence. It is not an aggravated offence. It is not actually people smuggling. It is not even supporting people smuggling. It is just the offence of harbouring or concealing a non-citizen. In a lot of cases, that would be a generally law-abiding Australian citizen or permanent resident perhaps looking after someone in desperate circumstances.[65]

Warrants to collect foreign intelligence

3.55 The Law Council opposed the proposed amendments in Schedule 3 of the Bill which would broaden the powers of the Attorney-General to issue a telecommunications interception warrant to ASIO for the purpose of collecting foreign intelligence. The Law Council submitted that:

> 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 [of the TIA Act], will mean that telephone interception warrants are available to ASIO in a very broad range of circumstances. 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

64 *Submission 9*, p. 10. See also See also Ms Helen Donovan, Law Council, *Committee Hansard*, 16 April 2010, p. 20; Rule of Law Association of Australia, *Submission 27*, pp1-2.

65 *Committee Hansard*, 16 April 2010, p. 31. See also *Committee Hansard*, 16 April 2010, p. 32; *Submission 15*, p. 3.

> relevant to Australia's national security, Australia's foreign relations or Australia's national economic well-being.[66]

3.56 In addition, the Law Council noted 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.[67]

3.57 The Rule of Law Association of Australia expressed reservations about both the existing and proposed provisions relating to foreign intelligence warrants on the basis that these warrants should be issued by a member of the judiciary rather than the Attorney-General.[68]

Department response

3.58 The Attorney-General's Department submitted that the amendments related to foreign intelligence warrants are required because the existing provisions in the TIA Act only allow warrants to collect information in relation to the capabilities, intentions or activities of foreign governments or foreign political organisations. The department argued that this:

> ...no longer adequately reflects the reality of Australia's contemporary threat environment where... activities such as people smuggling are usually undertaken by non-State actors...[69]

3.59 In the department's view, the amendments related to foreign intelligence warrants:

> ...will enhance the ability of intelligence agencies to collect intelligence about people smuggling networks and other non-State actors threatening national security and to share information critical to protecting Australia's national interests within the national security community.[70]

Committee view

3.60 The committee notes that the majority of evidence received during the inquiry supported the broad policy aims of the Bill to target and deter people smuggling. Nevertheless, issues have been raised about whether the Bill, in some respects, goes further than is necessary to achieve those aims.

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66 *Submission 9*, p. 11. See also Ms Helen Donovan, Law Council, *Committee Hansard*, 16 April 2010, p. 19.

67 *Submission 9*, p. 11.

68 *Submission 27*, p. 2.

69 *Submission 8*, p. 5.

70 *Submission 8*, p. 5.

People smuggling offences

New offences of supporting people smuggling

3.61 The committee strongly endorses the intent of the new offences of supporting the offence of people smuggling to target organised criminal networks which facilitate and profit from people smuggling.

3.62 Some evidence to the committee suggested that since it is not illegal for refugees to seek asylum in Australia it ought not to be illegal to assist a refugee to do so. The committee rejects this view. It is true that the circumstances of asylum seekers in transit countries are exceedingly difficult and that awaiting resettlement is a long and arduous process. However, this does not provide an excuse to those who assist people to avoid authorised migration processes. Some people who pay money to people smugglers lose their funds and never see the smuggler again, others are transported in ways that place their lives in grave danger. It is entirely appropriate that people who seek to profiteer from people smuggling, often with scant regard for the safety of those they smuggle, should face serious criminal sanctions.

3.63 The committee heard concerns about the potential application of the new offences to family members who provide support to relatives who are overseas. Some witnesses also considered that the offences, as drafted, may capture other people who provide funds for humanitarian reasons to asylum seekers if there is a risk those funds will be used to pay a people smuggler.

3.64 Some of the concerns raised about these new offences arose from confusion about the fault elements that apply to the offences. The Criminal Code will automatically require that the person providing the support was reckless about whether that support would aid a people smuggling offence. This means that the prosecution would have to prove that the accused was aware of a substantial risk that the support would aid the commission of a people smuggling offence and, having regard to the circumstances known to the accused, it was unjustifiable to take that risk.[71] The committee considers that, in weighing up whether conduct was reckless, a court will have sufficient discretion to take into account the individual circumstances of family members and others who provide funds to refugees. In addition, the committee notes that the defence of mistake or ignorance of fact will apply where money was provided for legitimate purposes but was used to pay a people smuggler, provided the mistaken belief or ignorance was reasonable in the circumstances.

3.65 The committee also endorses the view of the Attorney-General that people in Australia should not support the life-threatening business of people smuggling by providing finance or other support. Paying a people smuggler to transport family members may seem an attractive option to those who have been separated from their family for an extended period but the risks involved in placing lives in the hands of organised criminal syndicates are simply too great.

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71 Sections 5.4 and 5.6 of the Criminal Code; Explanatory Memorandum, pp 7 and 14.

Removal of requirement for benefit

3.66 The committee has closely considered the provisions in Schedule 1 of the Bill which would amend the people smuggling offences under the Criminal Code by removing the requirement to prove that a person who facilitated the unlawful entry of another person or persons into a foreign country did so having obtained, or intending to obtain, a benefit. Evidence to the committee correctly pointed out that removing this requirement means that the people smuggling offences under the Criminal Code potentially capture people who facilitate the unlawful entry of a person to a foreign country for purely humanitarian reasons. This is also technically the case in relation to the existing people smuggling offences under the Migration Act which apply to smuggling of people to Australia.

3.67 It was suggested to the committee that the requirement that the accused intended to obtain a benefit from the smuggling should be retained in the Criminal Code offences and included in the offences under the Migration Act. However, the committee accepts the evidence of the Attorney-General's Department that this would exclude people smuggling for other criminal purposes from the scope of the offences. The committee also considers that is highly unlikely that a person would face prosecution in circumstances where the smuggling was undertaken for purely humanitarian reasons since such a prosecution would not meet the test of being in the public interest.

Mandatory minimum penalties

3.68 The committee acknowledges the evidence it received about the operation of the mandatory minimum penalty provisions in relation to Indonesian boat crew members. It is clear that boat crew members are rarely the main organisers of people smuggling syndicates. However, the committee considers that it is critical to deter the practice of people smuggling especially where people are transported in ways that place their lives in jeopardy. The mandatory minimum provisions only apply to the more serious people smuggling offences under the Migration Act. In addition, the provisions do not deprive the courts of sentencing discretion; they merely impose a minimum sentence. The courts are therefore able to impose sentences that reflect the level of involvement an offender had in the aggravated people smuggling offence, within the range Parliament considers appropriate.

3.69 The committee is also confident that the increased funding committed to combating people smuggling in the 2009-2010 Federal Budget will help raise awareness in transit countries about the penalties for people smuggling under Australian law.

Expanded role for ASIO

3.70 The committee acknowledges the concerns which were raised about Schedule 2 of the Bill which would expand the role of ASIO in relation to threats to border integrity. However, the committee accepts evidence that ASIO is in a position to provide niche capabilities to assist law enforcement agencies to disrupt and prosecute people smuggling syndicates, and that this will not prevent ASIO maintaining its key focus on counter-espionage and counter-terrorism. In light of the

fact that the role of ASIO will be limited to collecting and communicating intelligence in relation to *serious* threats to Australia's territorial and border integrity, the committee considers the proposed expansion ASIO's role to be entirely appropriate.

Foreign intelligence warrants

3.71 The committee accepts evidence it received in relation to the need for the amendments to the TIA Act regarding foreign intelligence warrants and, in particular, that the current provisions are not adequate to allow ASIO to investigate the activities of non-State actors who present a threat to Australia's national interest.

3.72 However, the committee is concerned that the drafting of the proposed definition of 'foreign intelligence' under subsection 5(1) of the TIA Act may not achieve the purpose described in the Explanatory Memorandum: namely to 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.[72] As drafted, the definition appears to capture intelligence about any individual *outside* Australia.[73] The new definition therefore seems to preclude a foreign intelligence warrant being issued in relation to the activities of a foreign national who is *in* Australia. While a telecommunication interception warrant might be available under sections 9 and 9A of the TIA Act, those provisions impose a stricter test that the person the warrant relates to is engaged in, or likely to be engaged in, activities prejudicial to national security. The committee considers that the proposed definition of 'foreign intelligence' in subsection 5(1) of the TIA Act should be amended to ensure that ASIO can obtain foreign intelligence warrants in relation to the activities of foreign individuals who are *in* Australia.

Recommendation 1

3.73 The committee recommends that the proposed definition of 'foreign intelligence' in subsection 5(1) of the TIA Act should be amended to ensure that ASIO can obtain foreign intelligence warrants in relation to the activities of foreign nationals who are *in* Australia.

Recommendation 2

3.74 Subject to the preceding recommendation, the committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair

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72 Item 1 of Schedule 3; Explanatory Memorandum p. 21.

73 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.