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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**ANTI-PEOPLE SMUGGLING AND OTHER MEASURES BILL 2010**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Robert McClelland MP)

## ANTI-PEOPLE SMUGGLING AND OTHER MEASURES BILL 2010

### GENERAL OUTLINE

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

The purpose of this Bill is to strengthen the Commonwealth's anti-people smuggling legislative framework by ensuring that an appropriate range of offences are available to target and deter people smuggling activity and by creating greater harmonisation across Commonwealth legislation. The Bill will put in place laws to provide greater deterrence of people smuggling activity and to address the serious consequences of such activity. The Bill will also provide greater capacity for Australian Government agencies to investigate and disrupt people smuggling networks. In this manner, the Bill supports an intelligence led approach to countering the crime of people smuggling.

**Part 1 of Schedule 1** amends the Migration Act and the Criminal Code to strengthen the Commonwealth legislative framework on people smuggling offences.

Australia's domestic legislative framework criminalising people smuggling is set out in the Migration Act for ventures entering Australia and the Criminal Code for ventures entering foreign countries, whether or not via Australia. The Bill will insert a new offence of supporting the offence of people smuggling in both the Migration Act and Criminal Code.

The Bill will also harmonise people smuggling offences between the Criminal Code and the Migration Act to ensure that offences for people smuggling ventures entering Australia or foreign countries are consistently criminalised. In particular, the Bill amends the Migration Act to include a section equivalent to section 73.2 of the Criminal Code so that the aggravated offence of exploitation or danger of death or serious harm also applies to people smuggling ventures entering Australia.

In summary, the amendments in Part 1 of Schedule 1 will:

- establish a new offence of providing material support or resources towards a people smuggling venture
- establish in the Migration Act the aggravated offence of people smuggling involving exploitation or danger of death or serious harm and make other associated legislative amendments to harmonise people smuggling offences in the Criminal Code and Migration Act
- make minor technical amendments to the Migration Act and Criminal Code to better structure and harmonise the provisions dealing with people smuggling offences, and
- extend the mandatory minimum penalty provisions in the Migration Act to apply the higher minimum sentence and non-parole period for the new

aggravated offence of people smuggling involving exploitation or danger of death or serious harm, and where a person is convicted of multiple offences.

**Part 2 of Schedule 1** amends sections 5 and 5D of TIA Act and section 30 of the SD Act.

The SD Act establishes the framework for the use by Commonwealth law enforcement agencies (and State agencies investigating offences with a federal aspect) of data surveillance devices, listening devices, optical surveillance devices and tracking devices. Normally, a warrant is required to install, use and remove surveillance devices. The SD Act, however, provides for the use of surveillance devices without a warrant in certain circumstances, including when:

- the use of the surveillance device is immediately necessary to prevent the loss of any evidence relevant to that investigation
- the circumstances are so serious and the matter is of such urgency that the use of the surveillance device is warranted, and
- it is not practicable in the circumstances to apply for a surveillance device warrant.

Currently, an emergency authorisation is only available in connection with the investigation of one offence relating to people smuggling: an aggravated offence of people smuggling with circumstances of exploitation or a danger of death or serious harm under section 73.2 of the Criminal Code. The amendments to section 30 of the SD Act will extend this to cover all the aggravated people smuggling offences in both the Criminal Code and Migration Act.

The amendment to the definition of “serious offence” within section 5D of the TIA Act will:

- streamline the current provisions of section 5D in relation to the use of telecommunications interception to combat people smuggling, and
- include the new people smuggling offences within section 5D so that these offences can be investigated with the assistance of telecommunications interception.

The purpose of the amendments to the SD Act and TIA Act under Part 2 of Schedule 1 is to enable law enforcement agencies to have consistent access under both Acts to the appropriate investigative tools in relation to the existing people smuggling offences which are serious offences under the TIA Act and the new offences in the Bill.

Part 2 of Schedule 1 also makes consequential amendments to the *Proceeds of Crime Act 2002* to include the new people smuggling offences.

**Schedule 2** amends the ASIO Act to enable the Australian Security Intelligence Organisation (ASIO) to play a greater role in support of whole of government efforts

to address serious threats to Australia’s territorial and border integrity, such as people smuggling.

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.

Schedule 2 will amend the definition of ‘security’ in section 4 to include ‘the protection of Australia’s territorial and border integrity from serious threats’.

**Schedule 3** will amend the TIA Act to align the definition of foreign intelligence in the TIA Act with the concept of foreign intelligence in the *Intelligence Services Act 2001* (IS Act).

One of the functions of ASIO is to obtain within Australia foreign intelligence pursuant to sections 11A, 11B or 11C of the TIA Act and communicate any such intelligence in accordance with the TIA Act or the ASIO Act. Under the TIA Act, the Attorney-General can issue a telecommunications interception warrant, on advice from the Minister of Defence or the Minister for Foreign Affairs, to collect foreign intelligence information where that information relates to the capabilities, intentions or activities of a foreign government or foreign political organisation.

This is narrower than the concept of foreign intelligence in the IS Act which also includes information about foreign persons and foreign organisations. The broader concept in the IS Act is more relevant to the current security environment. The activities of foreign individuals or groups not associated with foreign governments, such as people smuggling, can pose significant risks to Australia’s security interests. Amending the TIA Act to align with the IS Act will enhance the Australian Government’s ability to respond to activities that undermine Australia’s national interests.

## **FINANCIAL IMPACT STATEMENT**

The amendments in this Bill have no financial impact on Government revenue.

## **ACRONYMS**

|          |   |
|----------|---|
| AI Act   | <i>Acts Interpretation Act 1901</i>                               |
| ASIO     | Australian Security Intelligence Organisation                     |
| ASIO Act | <i>Australian Security and Intelligence Organisation Act 1979</i> |
| CDPP     | Commonwealth Director of Public Prosecutions                      |
| IS Act   | <i>Intelligence Services Act 2001</i>                             |

|                    |  |
|--------------------|--|
| PJCIS              | Parliamentary Joint Committee on Intelligence and Security   |
| Smuggling Protocol | Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime |
| SD Act             | <i>Surveillance Devices Act 2004</i>   |
| The Guide          | <i>Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers</i>  |
| TIA Act            | <i>Telecommunications (Interception and Access) Act 1979</i>   |

## **NOTES ON CLAUSES**

### **Clause 1: Short Title**

This clause provides that when the Bill is enacted, it is to be cited as the *Anti-People Smuggling and Other Measures Act 2010*.

### **Clause 2: Commencement**

This clause sets out when the various parts of the Act are to commence.

### **Clause 3: Schedule(s)**

This is a formal clause that enables the Schedules to amend Acts by including amendments under the title of the relevant Act.

## **Schedule 1 – Amendments relating to people smuggling**

### **Part 1 – Main amendments**

#### *Criminal Code Act 1995*

##### **Items 1 and 2 – Paragraph 73.1(1)(d)**

Together these items repeal paragraph 73.1(1)(d) of the Criminal Code. The effect of this amendment will be that the prosecution is no longer required to prove that a 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). This amendment aligns the primary people smuggling offence contained in section 73.1 of the Criminal Code with the primary people smuggling offence in the Migration Act ( proposed section 233A).

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.

##### **Item 3 – Paragraph 73.2(1)**

This item amends the current paragraph 73.2(1)(c) of the Criminal Code to better structure the elements of the offence. The title of section 73.2 has also been changed to ‘Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc.)’. This title better reflects the offences contained in the section. This amendment will also provide for alignment with the aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc) contained in proposed section 233B of the Migration Act.

This item inserts a new subsection 73.2(2) which provides there is no fault element for the physical element of conduct described in subsection (1) other than the fault elements (however described), if any, for the underlying offence.

This item also inserts a new subsection 73.2(2A) which is an avoidance of doubt provision that the first person may be convicted on an offence against this section even if the person has not been convicted of the underlying offence. However, the prosecution would need to establish the elements of the underlying offence.

#### **Item 4 and 5 – Paragraph 73.3(1)(d)**

Together these items repeal paragraph 73.3(1)(d) of the Criminal Code. The effect of this amendment will be that the prosecution is no longer required to prove that a person who organises or facilitates the unlawful entry of a group of five or more persons into a foreign country did so having obtained or intending to obtain a benefit (whether directly or indirectly). This amendment aligns section 73.3 with the primary people smuggling offence contained in section 73.1 of the Criminal Code and with its equivalent aggravated people smuggling offence in the Migration Act (proposed section 233C).

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.

#### **Item 6 – After section 73.3**

This item inserts a new section 73.3A after section 73.3 of the Criminal Code.

Section 73.3A provides for a new offence of supporting the offence of people smuggling.

Section 73.3A establishes that a person is guilty of an offence if that person provides material support or resources to another person or organisation and the provision of the support or resources aids the commission of the offence of people smuggling.

Section 5.6 of the Criminal Code will apply the automatic fault elements to the physical elements of the offence set out in paragraphs 73.3A(1)(a) and (b). To establish this offence, the prosecution would need to prove beyond reasonable doubt that:

- the person intentionally provided material support or resources to another person or an organisation (the receiver), and
- the person was reckless as to the circumstance that the provision of the support or resources aided the receiver or another person or organisation to engage in conduct constituting a people smuggling offence.

Section 5.4 of the Criminal Code provides that a person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

Subsection 73.3A(2) provides that subsection (1) does not apply if the conduct constituting the offence of people smuggling relates to the first person or a group of persons that includes the first person. The defence has been included to exclude the application of the offence provision to a person who provides support or resources for the smuggling of themselves or a group of which they are a part.



A defendant will bear an evidential burden in relation to subsection 73.3A(2). Section 13.3 of the Criminal Code provides that in the case of a standard ‘evidential burden’ defence, the defendant bears the burden of pointing to evidence that suggests a reasonable possibility that the defence is made out. If this is done, the prosecution must refute the defence beyond reasonable doubt (section 13.1). The use of the evidential burden defence in subsection 73.3A(2) is consistent with Commonwealth criminal law policy, as described in the Guide. The Guide refers to the principle that it is legitimate to cast a matter as an evidential burden defence where a matter is peculiarly within the defendant’s knowledge and is not available to the prosecution.

The maximum penalty for this offence will be imprisonment for 10 years or 1,000 penalty units (\$110,000), or both.

The term ‘material support or resources’ is not defined in Commonwealth legislation. However, drawing reference from section 2339A of the United States of America Criminal Code, ‘material support or resources’ may include, but is not limited to: property, tangible or intangible, or service, finances including currency or monetary instruments or financial securities, financial services, false documentation or identification, communications equipment, facilities and transportation.

The term ‘material support’ has been used in accordance with a recommendation by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) made in their *Review of Security and Counter-Terrorism Legislation* in December 2006. The PJCIS recommended that the terrorism offence in section 102.7 of the Criminal Code be amended to provide for ‘material support’ to remove any ambiguity. For consistency across Commonwealth legislation, the term ‘material support’ has been used to make clear that the level of support required to commit the offence goes beyond mere support and is support that is real and concrete.

This offence 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 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.

The offence will not apply to a person who pays smugglers to facilitate their own passage or entry to Australia or who pays for a family member on the same venture. However, the offence will apply to persons in Australia who pay smugglers to bring their family or friends to Australia on a smuggling venture. The Government is determined to reinforce the message that people should use authorised migration processes for seeking asylum and migrating to Australia, and that people in Australia should not assist people smuggling by providing finance or other assistance.

This amendment is replicated in a proposed section 233D of the Migration Act (see item 8 under subheading *Section 233D*).

## ***Migration Act 1958***

### **Item 7 – Subdivision A of Division 12 of Part 2 (heading)**

This item repeals the existing heading of Subdivision A ‘General offences’ and replaces it with the heading ‘People smuggling and related offences’.

Currently the Migration Act does not clearly identify that the offences contained in Part 2, Division 12, Subdivision A are people smuggling offences. In contrast, Chapter 4, Division 73, Subdivision A of the Criminal Code makes it clear that the offences contained within are people smuggling offences. This amendment ensures the people smuggling offences in the Migration Act are readily identifiable and consistent with presentation in the Criminal Code.

### **Item 8 – Sections 232A to 233C**

This item repeals the following sections:

- 232A – Organising bringing groups of non-citizens into Australia
- 233 – Persons concerned in bringing non-citizens into Australia in contravention of this Act or harbouring illegal entrants
- 233A – Other offences relating to groups of non-citizens etc
- 233B – No discharge of offenders without proceeding to conviction for certain offences
- 233C - Mandatory penalties for certain offences

The following sections substitute the repealed sections:

- 233A – Offence of people smuggling (current paragraph 233(1)(a))
- 233B – Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc.) (new offence)
- 233C – Aggravated offence of people smuggling (at least 5 people) (current section 232A)
- 233D – Supporting the offence of people smuggling (new offence)
- 233E – Concealing and harbouring non-citizens etc. (current paragraphs 233(1)(b) and (c) and subsection 233(2))

This item restructures the existing offences in the Migration Act to provide for greater clarity in the structure of the offences. For example, the primary offence of people smuggling begins at section 233A followed by the aggravated people smuggling offences and then by the related offences. Current section 233A is repealed and is moved to another part of the subdivision (see item 9). The provisions dealing with discharge of offenders and mandatory minimum penalties are also relocated to the end of the subdivision (see item 10).

### *Section 233A*

This item amends the current section 233 of the Migration Act to align it more with the people smuggling offence contained in section 73.1 of the Criminal Code and also to align it with the aggravated offence of organising or facilitating a group of five or more persons (current section 232A - new proposed section 233C). Proposed section 233A has three physical elements.

Paragraph 233A(1)(a) sets out the physical element of conduct for the people smuggling offence. The conduct element is organising or facilitating the bringing or coming to Australia, or the unlawful entry or proposed entry into Australia of a second person who is an unlawful non-citizen. The use of the term organise and facilitates is used to cover all conduct associated with people smuggling and is consistent with term used in the current section 232A of the Migration Act. The fault element of intention will attach to the physical element of conduct of organising or facilitating, by operation of the default elements in section 5.6 of the Criminal Code.

Paragraph 233A(1)(b) contains the second physical element which is the circumstance that the second person is a non-citizen. Absolute liability applies to the physical element by way of subsection 233A(2). This has been adopted from the equivalent provisions in the Criminal Code (paragraph 73.1(1)(c) and subsection 73.1(2)). The application of absolute liability means that it will not be necessary for the prosecution to prove a fault element in relation to that particular physical element, and that the defence of mistake of fact will not be available to the defence. It will still be necessary to show that the person was not a person who had a lawful right to come to Australia.

Paragraph 233A(1)(c) sets out the third physical element which is the circumstance that the second person has or had no lawful right to come to Australia - that the bringing or coming, or entry or proposed entry does not or would not comply with the entry requirements under Australian law. This amendment aligns the provisions of the Migration Act so that the primary people smuggling offence contained in proposed section 233A has the same elements as the aggravated offence involving smuggling of five or more persons contained in proposed section 233C (current section 232A).

Currently section 233 of the Migration Act requires that the bringing or coming to Australia of a non-citizen under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of this Act. Strict liability applies to this element. The amendment to paragraph 233A(1)(c) has adopted the wording from the more frequently used current section 232A of the Migration Act, that is, the person has or had no lawful right to come to Australia.

Recklessness will attach to the physical element of circumstance in paragraph 233A(1)(c) by operation of the default elements in section 5.6 of the Criminal Code. Section 5.4 of the Criminal Code provides that a person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

Proposed section 233A now complies with current practices regarding the drafting of offences. The three physical elements of the offence have been separated and the word 'shall' has been removed from the opening words and instead the standard words of 'A person commits an offence if' have been used.

Proposed section 233A is titled as the 'Offence of people smuggling' Subsection 233A(3) has been inserted to make it clear that for the purposes of the Migration Act subsection 233A(1) is to be known as the offence of people smuggling. Subsection 233A(3) is identical to subsection 73.1(3) of the Criminal Code.

The amendment also removes the provisions concerning concealing and harbouring of an unlawful non-citizen from section 233A (see under subheading *Section 233E*).

The maximum penalty of 10 years imprisonment or 1,000 penalty units (\$110,000) or both has not been changed and remains consistent with the maximum penalty for the primary offence of people smuggling in the Criminal Code.

### *Section 233B*

This item inserts a new section 233B into the Migration Act which is the aggravated offence of people smuggling involving exploitation or danger of death or serious harm.

Section 233B is a replica of its equivalent provision in the Criminal Code (section 73.2), which applies to ventures entering foreign countries, whether or not via Australia. Inserting this section will ensure that the aggravated offence of exploitation or danger of death or serious harm currently in the Criminal Code also applies to people smuggling ventures entering Australia.

The aggravated offence will exist where the elements of the people smuggling offence in subsection 233A(1) are present, and where that offence occurred in the prescribed aggravating circumstances. Those circumstances are derived from Article 6 of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (the Smuggling Protocol), which provides that aggravating circumstances to the offence of people smuggling should include circumstances that endanger, or are likely to endanger, the lives or safety of the unlawful non-citizens concerned, or that entail inhuman or degrading treatment, including for exploitation of the unlawful non-citizens.

The aggravating circumstances are set out in paragraphs 233B(1)(a)-(c).

Paragraph 233B(1)(a) covers where the perpetrator of the people smuggling offence commits the offence of people smuggling intending that the person being smuggled will be exploited after that person enters Australia.

The second aggravating circumstance is set out in proposed paragraph 233B(1)(b). That paragraph covers where, during the commission of the people smuggling offence, the perpetrator of that offence subjects the smuggled person to cruel, inhuman or degrading treatment. As with proposed paragraph 233B(1)(a), the aggravating elements in this paragraph are derived from the Smuggling Protocol. Whether or not certain conduct constitutes cruel, inhuman or degrading treatment will

be a matter determined by the trier of fact on the facts of the relevant case. The words ‘within the ordinary meaning of that expression’ have been included so that any similar definition of that expression contained in the Migration Act will not apply. This is consistent with the Criminal Code in which it is the trier of fact that will determine whether or not conduct constitutes cruel, inhuman or degrading treatment.

The third aggravating circumstance is set out in proposed paragraph 233B(1)(c). That paragraph covers where, during the commission of the people smuggling offence, the perpetrator of that offence engages in conduct which gives rise to a danger of death or serious harm occurring to the smuggled person. As with subsection 73.2(1)(c) of the Criminal Code, this proposed subsection draws on the endangerment offences in sections 5.1.25 and 5.1.26 of the Model Criminal Code (Non Fatal Offences Against the Person Report, September 1998).

The offence in proposed section 233B is punishable by a maximum penalty of 20 years imprisonment or 2,000 (\$220,000) penalty units, or both. This penalty is consistent with the maximum penalty for the equivalent aggravated people smuggling offence in the Criminal Code (section 73.2).

Subsection 233B(2) provides that there is no fault element for the physical elements described in subsection (1) other than the fault elements (however described), if any, for the underlying offence.

Subsection 233B(3) is an avoidance of doubt provision which provides that the person may be convicted on an offence against this section even if the person has not been convicted of the underlying offence. However, the prosecution would need to establish the elements of the underlying offence.

Subsection 233B(4) lists the relevant definitions applicable to this section. The verb ‘exploit’ has been used as section 18A of the *Acts Interpretation Act 1901* (AI Act) provides that if a word or phrase is given a particular meaning in an Act, other grammatical forms of that word have the same meaning, ‘exploitation’ and ‘exploited’ are also defined. ‘Forced labour’, ‘sexual servitude’ and ‘slavery’ have been referred to in this subsection as each of these terms are referred to in the definition of exploitation in the Criminal Code.

Under the proposed section 236B, a mandatory minimum sentence of eight years imprisonment and a non-parole period of five years is applicable when sentencing for an offence against section 233B (see item 10). The Court maintains a judicial discretion to apply a sentence between the minimum and maximum sentence.

### *Section 233C*

This item inserts a new section 233C which provides for the aggravated offence of people smuggling involving at least five people. This amendment remodels the current section 232A which is titled ‘Organising bringing groups of non-citizens into Australia’. The title has changed to ‘Aggravated offence of people smuggling (at least 5 people)’ to make it consistent with its equivalent offence in the Criminal Code.

The amendment also aligns this offence with the primary people smuggling offence contained in proposed section 233A. The physical and fault elements are mirrored

between section 233A and 233C, the only difference being that the smuggling involves at least five people.

Section 233C has three physical elements. The proposed paragraph 233C(1)(a) sets out the physical element of conduct for the people smuggling offence. The conduct element is organising or facilitating the bringing or coming to Australia, or the entry or proposed entry into Australia, a group of at least five persons. The use of the term 'organise and facilitate' is used to cover all conduct associated with people smuggling and is consistent with term used in the current section 232A of the Migration Act. The fault element of intention will attach to the physical element of organising or facilitating, by operation of the default elements in section 5.6 of the Criminal Code.

The second physical element in paragraph 233C(1)(b) is the circumstance that at least five of the other persons are non-citizens. Absolute liability applies to the physical element in paragraph 233C(1)(b) by way of subsection 233C(2). This has been adopted from the equivalent provisions in the Criminal Code (paragraph 73.3(1)(c) and subsection 73.3(2)). The application of absolute liability means that it will not be necessary for the prosecution to prove a fault element in relation to that physical element, and that the defence of mistake of fact will not be available. It will still be necessary to show that the persons were not persons who had a lawful right to come to Australia.

Paragraph 233C(1)(c) sets out the physical element of a circumstance that the persons referred to in paragraph (b) have or had no lawful right to come to Australia - that the bringing or coming, or entry or proposed entry does not or would not comply with the entry requirements under Australian law. This section is now aligned with the primary people smuggling offence in the Migration Act. The physical element in paragraph 233C(1)(c) has not altered from the current section 232A. The words 'does so reckless as to whether the people' were removed, as the default element of recklessness will attach to the physical element of circumstance by operation of the default elements in section 5.6 of the Criminal Code.

Section 5.4 of the Criminal Code provides that a person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

Subsection 233C(3) has been replicated from the equivalent subsection 73.3(3) in the Criminal Code. If in a trial for this aggravated offence the trier of fact (the jury) is not satisfied that the person committed the aggravated offence but is satisfied that the person committed the people smuggling offence in section 233A, proposed subsection 233C(3) provides that the trier of fact may give an alternative verdict. This is included because it is possible that although charged with smuggling five persons, the trier of fact may only be satisfied that the defendant intended to smuggle a lesser amount of people.

The maximum penalty of 20 years imprisonment or 2,000 penalty units (\$220,000) or both has not been changed and remains consistent with the maximum penalty for the equivalent aggravated offence of people smuggling in the Criminal Code.

### *Section 233D*

This item inserts the proposed section 233D which provides for a new offence of supporting the offence of people smuggling.

Section 233D establishes that a person is guilty of an offence if that person provides material support or resources to another person or organisation and the provision of the support or resources aids the commission of the offence of people smuggling.

Section 5.6 of the Criminal Code will apply automatic fault elements to the physical elements of the offence set out in paragraphs 233D(1)(a) and (b). To establish this offence, the prosecution would need to prove beyond reasonable doubt that:

- the person intentionally provided material support or resources to another person or an organisation (the receiver), and
- the person was reckless as to the circumstance that the provision of the support or resources aided the receiver or another person or organisation to engage in conduct constituting a people smuggling offence.

Section 5.4 of the Criminal Code provides that a person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

Subsection 233D(2) provides that subsection (1) does not apply if the conduct constituting the offence of people smuggling relates to the first person or a group of persons that includes the first person. The defence has been included to exclude the application of the offence provision to a person who provides support or resources for the smuggling of themselves or a group of which they are a part.

A defendant will bear an evidential burden in relation to subsection 233D(2). Section 13.3 of the Criminal Code provides that in the case of a standard 'evidential burden' defence, the defendant bears the burden of pointing to evidence that suggests a reasonable possibility that the defence is made out. If this is done, the prosecution must refute the defence beyond reasonable doubt (section 13.1). The use of the evidential burden defence in subsection 233D(2) is consistent with Commonwealth criminal law policy, as described in the Guide. The Guide refers to the principle that it is legitimate to cast a matter as an evidential burden defence where a matter is peculiarly within the defendant's knowledge and is not available to the prosecution.

The maximum penalty for this offence will be imprisonment for 10 years or 1,000 penalty units (\$110,000), or both.

The term 'material support or resources' is not defined in Commonwealth legislation. However, drawing reference from section 2339A of the United States of America Criminal Code, 'material support or resources' may include, but is not limited to: property, tangible or intangible, or service, finances including currency or monetary instruments or financial securities, financial services, false documentation or identification, communications equipment, facilities and transportation.

The term ‘material support’ has been used in accordance with a recommendation by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) made in their *Review of Security and Counter-Terrorism Legislation* in December 2006. The PJCIS recommended that the terrorism offence in section 102.7 of the Criminal Code be amended to provide for ‘material support’ to remove any ambiguity. For consistency across Commonwealth legislation, the term ‘material support’ has been used to make clear that the level of support required to commit the offence goes beyond mere support and is support that is real and concrete.

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

The offence will not apply to a person who pays smugglers to facilitate their own passage or entry to Australia or who pays for a family member on the same venture. However, the offence will apply to persons in Australia who pay smugglers to bring their family or friends to Australia on a smuggling venture. The Government is determined to reinforce the message that people should use authorised migration processes for seeking asylum and migrating to Australia, and that people in Australia should not assist people smuggling by providing finance or other assistance.

This amendment is replicated in a proposed new section 73.3A of the Criminal Code (see item 6).

#### *Section 233E*

This item inserts a new section 233E which contains the offences of concealing and harbouring of non-citizens. These offence provisions were removed from the new section 233A in order to separate the offences from the primary people smuggling offence. These are now established as offences in their own right. These offences have been re-drafted in accordance with the current drafting practice of separating the elements. However, the operation of the offence has not been changed.

#### **Item 9 – After section 234**

The title to section 234 is replaced by the title ‘False document and false or misleading information etc. relating to non-citizens’. This is to better reflect the offence contained in the section.

This item inserts the current section 233A after section 234 by inserting a new section 234A. The operation of the current section 233A has not changed by this amendment.

Proposed section 234A contains a new title ‘Aggravated offence of false documents and false or misleading information etc. relating to non-citizens (at least 5 people)’. This title better reflects the offence contained in the section. The relocation of the offence and the amendment to the title make it clearer that it is the aggravating offence of section 234.



## **Item 10 – After section 236**

This item inserts the current section 233B at the end of the Subdivision by inserting a new section 236A. No amendments were made to the operation of this section.

The item also inserts the current section 233C at the end of the Subdivision by inserting a new section 236B. This item amends the title from ‘Mandatory penalties for certain offences’ to a new title ‘Mandatory minimum penalties for certain offences’. This better reflects that it is the minimum penalty that is being prescribed and that the court still retains sentencing discretion.

The proposed section 236B contains amendments to the current section 233C which applied mandatory penalties to the current aggravated offences in the Migration Act (sections 232A and 233A). This amendment extends this provision to a broader range of circumstances and includes the proposed people smuggling offences in the Migration Act.

Subsection 236B(1) provides that this section applies if a person is convicted of an offence against the following sections of the Migration Act.

- 233B – Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc.)
- 233C – Aggravated offence of people smuggling (at least 5 people)
- 234A - Aggravated offence of false documents and false or misleading information etc. relating to non-citizens (at least 5 people)

Subsection 236B(2) provides that the court is not to apply the mandatory minimum penalties to a person who was under 18 years of age when the offence was committed.

Subsection 236B(3) sets out when the court must impose a minimum sentence of imprisonment, while subsection 236B(4) sets out when the court must impose a minimum non-parole period.

Paragraphs 236B(3)(a) and 236B(4)(a) provide that the new aggravated offence of people smuggling (exploitation, or danger of death or serious harm) will automatically receive the higher mandatory minimum penalty of eight years imprisonment with five years non-parole period. This is to reflect the serious nature of this offence.

Paragraphs 236B(3)(b) and 236B(4)(a) provide for the circumstance of ‘repeat offence’ to attract the higher mandatory minimum penalties. In the current subsection 233C(4) of the Migration Act a ‘repeat offence’ is defined as that on a ‘previous occasion’ a court convicted the person of an offence against current sections 232A or 233A or found without recording a conviction that the person had committed another such offence. This has been interpreted to mean a people smuggler who is convicted for conduct relating to two or more ventures during the same court hearing is subject to the same lower mandatory minimum sentencing requirements as a first-time offender because there has not been a previous court hearing.

This amendment extends the definition of ‘repeat offence’ in proposed subsection 236B(5) to include the circumstance that involves a person being convicted of another offence against proposed sections 233B, 233C or 234A of the Migration Act whether

in the same proceedings as the proceedings relating to the offence or in previous proceedings. This means that a person who is convicted of multiple offences in the same proceeding will be subject to the higher mandatory minimum penalties of eight years imprisonment with a non-parole period of five years. This will capture people smuggling organisers who have been involved in multiple people smuggling ventures but are coming before the court for the first time in relation to multiple offences.

Paragraphs 236B(3)(c) and 236(4)(b) provide that in any other case for an offence against sections 233B, 233C and 234A, the lower mandatory minimum penalties of five years imprisonment and three years non-parole period applies.

Mandatory minimum penalties reflect the seriousness of the offences and only apply to those offences in the Migration Act which carry a maximum penalty of 20 years imprisonment. Mandatory minimum penalties still provide a court with discretion when determining the appropriate sentence, providing that the court does not go below the mandatory minimum sentence and non-parole period. This allows the court to have regard to the circumstances of both the offence and the offender. The court also has discretion to impose higher sentences on the offender depending on the person's culpability so long as they do not exceed the maximum penalty prescribed for the offence.

### **Item 11 - Application**

This item ensures that new proposed section 236A will only apply to offences committed on or after commencement of the item.

## **Part 2 – Consequential amendments**

### ***Migration Act 1958***

#### **Item 12 – Subsection 492(3)**

This item makes a consequential amendment to section 492 of the Migration Act which deals with commencement of prosecutions. The amendment inserts the new proposed sections. This amendment does not alter the substance of section 492.

### ***Proceeds of Crime Act 2002***

#### **Item 13 – Section 338**

This item makes a consequential amendment to section 338 of the *Proceeds of Crime Act 2002* to replace the old titled sections with the new titled sections of the Migration Act and to include the new offences of people smuggling involving exploitation, or danger of death or serious harm and supporting the offence of people smuggling.

### ***Surveillance Devices Act 2004***

#### **Item 14 – subparagraph 30(1)(a)(vi)**

This item will amend subparagraph 30(1)(a)(vi) of the Surveillance Devices Act to enable an emergency authorisation to be obtained to investigate offences against sections 73.2 and 73.3 of the Criminal Code. This amendment ensures that this

investigative tool is available for all of the current and proposed aggravated people smuggling offences.

The power is limited to aggravated offences to ensure that it is appropriately limited to the most serious offences.

#### **Item 15 – after subparagraph 30(1)(a)(viii)**

This item will insert new subparagraph 30(1)(a)(ix) of the Surveillance Devices Act to enable an emergency authorisation to be obtained to investigate offences against sections, 233B and 233C of the Migration Act. This amendment ensures consistency in section 30 in relation to people smuggling offences contained in both the Criminal Code and the Migration Act. As is the case in item 14, only the aggravated offences in the Migration Act can be investigated with the assistance of this tool.

#### **Item 16 – Application**

This item inserts an application provision, which states that agencies will only be able to use emergency authorisations for investigations that commence on or after the provisions of this Bill have commenced.

This means that investigations that started before the commencement of this Bill into offences that at the time were not included within section 30 of the Surveillance Devices Act will not be able to use emergency authorisations to obtain evidence.

#### ***Telecommunications (Interception and Access) Act 1979***

#### **Item 17 – Section 5 (definition of immigration offence)**

Under the TIA Act, subsection 5D(3) allows an agency to apply for telecommunications interception warrants to investigate certain offences against the Migration Act. These offences are classified as ‘immigration offences’ in subparagraph 5D(3)(d)(xii) of the TIA Act.

Currently section 5 of the TIA Act defines ‘immigration offence’ as an offence against sections 232A, 233, 233A, 234 or 236 of the Migration Act and directly relates to people smuggling activities, or activities that can be related to people smuggling, such as the preparation and provision of false documents.

Offences contained within subsection 5D(3) of the TIA Act involve planning and organisation. In addition to apply for a telecommunications interception warrant to investigate offences listed in subsection 5D(3) of the TIA Act, the agency must not only show that the conduct constituting the offence is taking place, but must 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, subsection 5D(3A) allows an agency to apply for a telecommunications interception warrant to investigate similar people smuggling offences set out in the Criminal Code. A telecommunications interception warrant is available in connection with the investigation of these offences without needing to demonstrate the additional criteria required in relation to offences against the Migration Act.

This item amends the definition of an ‘immigration offence’ in subsection 5(1) of the TIA Act so that it only relates to the offences against section 236 of the Migration Act. Section 236 of the Migration Act 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.

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. Offences against section 236 will therefore remain in subsection 5D(3) of the TIA Act where a telecommunications interception warrant will only be available when the additional tests are met.

The remaining offences that currently fall within the definition of “immigration offence” will be transferred to subsection 5D(3A) of the TIA Act so that a telecommunications interception warrant will be available for the investigation of the offence without needing to satisfy the additional criteria set out in subsection 5D(3). This will ensure consistency between the similar offences set out in the Migration Act and the Criminal Code.

### **Item 18 – Subsection 5D(3A)**

This item ensures consistency for agencies that apply for a telecommunications interception warrant to investigate people smuggling offences.

As outlined in relation to item 17, there are different legislative tests to satisfy before an agency can obtain a telecommunications interception warrant to investigate people smuggling offences against the Migration Act, as opposed to investigating similar offences against the Criminal Code.

This item amends subsection 5D(3A) of the TIA Act so that an agency no longer must satisfy additional tests to obtain a warrant to investigate a people smuggling offence against the Migration Act, when no such additional tests are required to obtain a warrant to investigate offences against the Criminal Code.

As the particular offences against the Migration Act and the Criminal Code are so similar, there is no reason that different tests should apply to obtaining warrants to investigate the offences. This item also amends section 5D(3A) to include the new offences being inserted into the Criminal Code and Migration Act.

## **Schedule 2 – Amendment of the Australian Security Intelligence Organisation Act 1979**

### *Australian Security Intelligence Organisation Act 1979*

#### **Item 1 – Section 4 (after paragraph (a) of the definition of *security*)**

This item inserts a new paragraph (aa) after paragraph (a) of the definition of ‘security’ in section 4.

Paragraph (aa) provides that security also means the protection of Australia’s territorial and border integrity from serious threats.

The addition of proposed paragraph (aa) would enable ASIO to carry out its section 17 functions relating to security to address serious threats to Australia’s territorial and border integrity, such as those posed by people smuggling activities. For example, ASIO would be able to use its intelligence collection and assessment capabilities, including its warranted collection powers, in relation to people smuggling.

This amendment would also provide ASIO with greater capacity to communicate intelligence relating to the protection of Australia’s territorial and border integrity from serious threats. Paragraph 17(1)(b) provides that ASIO may only communicate intelligence for purposes relevant to security and not otherwise (noting that there are some exceptions in sections 18 and 19). Paragraph (aa) 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.

#### **Item 2 – Section 4 (paragraph (b) of the definition of *security*)**

This item amends paragraph (b) of the definition of ‘security’ to also include ‘or the matter mentioned in paragraph (aa)’. This amendment ensures that paragraph (b) applies not only to the matters mentioned in the existing paragraph (a) but also to the matter mentioned in the proposed new paragraph (aa). This amendment would make it clear that ‘security’ also includes the carrying out of Australia’s responsibilities to any foreign country in relation to the protection of Australia’s territorial and border integrity from serious threats.

## **Schedule 3 – Amendment of the Telecommunications (Interception and Access) Act 1979**

*Telecommunications (Interception and Access) Act 1979*

### **Item 1 – Subsection 5(1) (definition of *foreign intelligence*)**

This item amends the definition of foreign intelligence in subsection 5(1) of the TIA Act to reflect the changing nature of threats to Australia.

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’.

The definition 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.

Item 1 amends the definition of foreign intelligence to remove the requirement for foreign government or foreign political organisation involvement before foreign intelligence can be collected. Removing this requirement will enable information about foreign individuals or groups operating without government support to be collected in accordance with a warrant issued under Part 2-2 of the TIA Act.

### **Items 2 and 3 – Subsection 5(1)**

Items 2 and 3 insert new definitions of the Minister for Defence and Minister for Foreign Affairs into subsection 5(1) of the Act. See explanation below.

### **Item 4 – Section 5**

Item 4 inserts a definition of Australia into the TIA Act in order to clarify the geographical area addressed in the new definition of foreign intelligence at item 1 of this Bill.

Currently, the TIA Act does not define the term Australia, meaning that the definition set out in section 17 of the AI Act applies. Under the AI Act, Australia, when used in a geographical sense, includes the Cocos Islands and Christmas Island, but does not include other external territories. This definition is narrower than the IS Act and ASIO Act which define Australia as including the external territories.

Item 4 aligns the definition of Australia, for the purpose of obtaining a foreign intelligence collection warrant under sections 11A, 11B or 11C of the TIA Act, with the definitions used in the IS Act and ASIO Act in order to ensure consistency in the collection of foreign intelligence information.

For all other provisions of the TIA Act, the definition of Australia, when used in a geographical sense, includes the Cocos Islands and Christmas Island, but not the other external territories.

### **Items 5, 6, 7, 8 and 9 – Sections 11A, 11B and 11C**

Items 5, 7 and 9 amend the conditions that the Attorney-General must be satisfied of before issuing a warrant for the collection of foreign intelligence.

Currently, a foreign intelligence collection warrant can only be issued where the Attorney-General is satisfied, on the basis of advice received from the “relevant Minister”, that the collection of foreign intelligence on a particular matter is important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth’s international affairs. The new conditions recognise the broader nature of the contemporary threat environment by allowing a warrant to be issued where it is in the interests of Australia’s national security, foreign relations or national economic well-being. This aligns the conditions for issuing warrants under the TIA Act with the scope of functions of intelligence agencies under the IS Act. The amendment will ensure consistency in the function of those agencies and will enable information critical to protecting Australia’s national interests to be shared within the national security community.

Sections 11A, 11B and 11C require that the Attorney-General must be satisfied that these conditions are met on the basis of advice received from “the relevant Minister”. Currently the TIA Act does not define who the relevant Ministers are for this purpose. Items 5, 6 and 8 clarify that only the Minister for Defence and the Minister for Foreign Affairs can advise the Attorney-General on the need to issue a warrant for the collection of foreign intelligence as the role of each Minister encompasses Australia’s relevant international interests.