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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION
COMMITTEE

Reference: Anti-People Smuggling and Other Measures Bill 2010

FRIDAY, 16 APRIL 2010

SYDNEY

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**SENATE LEGAL AND CONSTITUTIONAL AFFAIRS
LEGISLATION COMMITTEE**

Friday, 16 April 2010

Members: Senator Crossin (*Chair*), Senator Barnett (*Deputy Chair*), Senators Feeney, Ludlam, Marshall and Parry

Substitute members: Anti-People Smuggling and Other Measures Bill 2010 [Provisions]—Senator Hanson-Young to replace Senator Ludlam

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Farrell, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Johnston, Joyce, Kroger, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Payne, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Crossin, Feeney, Hanson-Young and Trood

Terms of reference for the inquiry:

To inquire into and report on:

Anti-People Smuggling and Other Measures Bill 2010

WITNESSES

BIOK, Dr Elizabeth Mary, Board Member, Refugee Council of Australia.....	28
CONNOLLY, Mr Chris, Board Member, Australian Privacy Foundation.....	40
CROCK, Professor Mary Elizabeth, Professor of Public Law and Member, Management Committee, Sydney Centre for International Law.....	3
CURR, Ms Pamela, Campaign Coordinator, Asylum Seeker Resource Centre	28
DONOVAN, Ms Helen, Co-Director Criminal Law and Human Rights, Law Council of Australia	17
FRICKER, Mr David, Deputy Director General, Australian Security Intelligence Organisation.....	46
HERIOT, Dr Dianne, Assistant Secretary, Border Management and Crime Prevention, Attorney-General's Department	46
McDONALD, Mr Geoffrey Angus, First Assistant Secretary, National Security Law and Policy Division, Attorney-General's Department	46
SAUL, Associate Professor Ben, Co-Director, Sydney Centre for International Law.....	3

Committee met at 10.31 am

CHAIR (Senator Crossin)—I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Anti-People Smuggling and Other Measures Bill 2010. The inquiry was referred to the committee by the Senate on the 11 March 2010 for inquiry and report by 11 May 2010. The bill amends the Australian Security Intelligence Organisation Act 1979, the Criminal Code Act 1995, the Migration Act 1958, the Proceeds of Crime Act 2002, the Surveillance Devices Act 2004 and Telecommunications (Interception and Access) Act 1979 with a view to strengthening the Commonwealth's anti-people-smuggling legislative framework. In particular, the bill introduces a range of offences to target and deter people-smuggling activity and provides the Australian Security Intelligence Organisation with powers to investigate serious border security threats. The committee has received 12 submissions for this inquiry. They have all been authorised for publication and are available on the committee's website.

I remind witnesses that, in giving evidence to the committee, you are protected by parliamentary privilege and that it is unlawful to threaten or disadvantage a witness on account of evidence given to a committee. Any such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. The committee prefers all evidence to be given in public, but there is a capacity for witnesses to provide evidence in camera. Witnesses are requested to inform the committee if they wish to do so.

[10.34 am]

CROCK, Professor Mary Elizabeth, Professor of Public Law and Member, Management Committee, Sydney Centre for International Law

SAUL, Associate Professor Ben, Co-Director, Sydney Centre for International Law

CHAIR—Welcome. Would you care to add anything about the capacity in which you appear?

Prof. Crock—I am in two minds about whether I should appear on my own behalf; I have done this for so many years. But I believe I will appear on behalf of the Sydney Centre for the International law.

CHAIR—You have lodged a submission with the committee which we have numbered 11 for our purposes. Do you wish to make any amendments or additions to that?

Prof. Saul—No, thank you.

CHAIR—I invite you to make an opening statement and then we will go to questions.

Prof. Saul—Thank you for the opportunity to appear. We have a few comments and concerns about this bill. Our primary concern is that its definition of the offences of people smuggling and support for people smuggling depart from the international protocol and in particular the fault elements in that protocol and also the requirement that there be a profit motive behind people smuggling. There are a number of consequences of that departure. The first is that, because there is no absolute liability for people smuggling itself, it criminalises a whole lot of entirely innocent and proper and lawful conduct under international law. In particular, it is now an offence for a master of a ship or a pilot of an aircraft to unknowingly bring stowaways into Australia. It becomes an offence for the Australian Navy to rescue people on the high seas and bring them into Australian waters. It becomes unlawful for somebody on a ship or an aircraft to bring people into Australia who have apparently valid travel documents but which are later found to be fraudulent, when the carrier has no understanding that they were fraudulent at the time. It criminalises the rescue of life at sea and bringing such persons into Australia when they are foreign nationals, including in circumstances like the *Tampa* in recent times.

The support for people-smuggling offence is problematic because there is no requirement of an intention in giving the money that that money or resources be used for the purpose of people smuggling. In other words, it is an incredibly strict form of liability. There is no intent requirement, no recklessness requirement, so that any person who gives money to somebody overseas runs the risk of being criminalised by this offence, and we think that is a serious problem.

To the extent that entirely innocent conduct is now captured by these offences, we think that the extension of telecommunications intercept warrants over that kind of conduct would be unlawful under international human rights law because it would breach the right to privacy where there is no legitimate justification for interfering in such unlawful conduct. We think the

offences relating to false documents go very close to punishing illegal entry, which is prohibited under the refugee convention. Finally, to the extent that ASIO can now seek to use information collected in relation to people or organisations outside Australia in security based deportations where no procedural fairness rights may apply to foreign nationals, we think that runs the risk of violating Australia's obligations to guarantee the right to a fair hearing under the International Covenant on Civil and Political Rights.

In conclusion, I would say that the real problem here is that, whereas countries like Australia have traditionally guaranteed the institution of asylum and freedom from persecution and so forth, people-smuggling laws have much reduced that area of freedom. Such laws send a paradoxical and hypocritical message. On the one hand, refugee status is available rightly if you reach Australia. On the other hand, it is a crime for anyone to help you to get here in circumstances where you simply cannot often get protection elsewhere because there are no queues or the queues require you to waste decades of your life in a refugee camp elsewhere in suspended animation.

I close with a personal story. In 1999 I worked with the UN High Commissioner for Refugees in Nepal. About 100,000 Bhutanese refugees were expelled from Bhutan in the late 1980s. My driver and translator sat in that refugee camp from 1991 until last month, when he was resettled in Cairns by the Australian government. He spent 20 years of his life in a refugee camp waiting for a resettlement opportunity. It is a miracle of human patience and endurance that my friend waited in that camp for so long. If I were in his position living in a bamboo and hessian hut in a dusty field for 20 years, where you have no work rights and no rights to education or to own property or to develop your full potential, of course I would pay someone to get out of that camp to come to Australia or to come to some other country where I could develop a career and a family and where I could live with dignity and with certainty of a better future. I daresay that many of us in this room would make the same choice in those circumstances. Thank you. I will pass to Professor Crock.

Prof. Crock—I have been appearing before this committee for very many years now. It is, in fact, 10 years since I assisted this committee in a big inquiry into Australia's humanitarian and refugee program. I was doing that at the behest of Senator Harradine, something that I will always be very proud of having done. I have to say that I have waited 10 years for the feelings that we had at that time to be addressed by a new government. Today, as I appear before you, it feels like Groundhog Day. This has to be one of the worst pieces of legislation I have ever had to address before this committee. I agree entirely with my colleague Associate Professor Saul that there are a number of respects in which it breaches our international legal obligations, but what about our domestic obligations? What about the basic common-law principle that people should be able to get up in the morning and organise their lives knowing that what they are doing is going to be within the law and lawful?

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.

I agree with you that in my experience, which is a long experience, most people who come here—by boat at least—seem to have a connection of some kind in Australia. We know for a fact that people are using their mobile phones and are communicating with individuals in Australia. I have colleagues, by the way, who will be affected by these ASIO taps. I have in the past been affected by these ASIO taps, because we occasionally receive communications from people overseas. The problem, however, is that this legislation is drafted so badly and cast in such broad terms that it will catch everybody, whether they are an ingrained people smuggler or an innocent person.

My submission to you is that this is utterly the wrong approach to be taking. If I see, as I think we will, that the good measures that you are working on at the moment have gone off the legislative agenda to be replaced by this legislation, it is just too bad; it really is. Yes, you inherited an enormous mess when you took government in 2007. But, with respect, this does nothing to address the problem. It is going to make it worse, because it will close down communities that you should be talking to and working with in order to persuade them to actively dissuade their relatives from taking illegal measures to get here.

From a legal perspective, I think that there is potential, at least, that the uncertainty of this legislation and the potential to capture innocent individuals puts the legislation at risk of being declared uncertain and possibly retrospective in its operation, because people can do things at one time and, if the money is later used for a purpose that they never intended, it puts them at risk of being criminalised. It puts Qantas at risk of being criminalised. We have carrier sanctions. In talking about this bill, we naturally think about boat people, but it is not limited to boat people; it covers everybody who comes here without authorisation. For that reason, it is too broad, uncertain and vague and it sends the wrong message.

CHAIR—Thank you very much. We will now go to questions.

Senator PARRY—I will ask the same question to both of you. You say the legislation is very tough in your view. Do you think it would act as a deterrent for people smugglers?

Prof. Crock—No.

Prof. Saul—Probably not.

Senator PARRY—What else do we have to do to deter people smuggling?

Prof. Crock—If you have got some time, I would be very happy to talk to people about that.

Senator PARRY—We have got until 11 o'clock, but my colleagues also have questions.

Prof. Crock—In the past we have had these phenomena. We have had waves of people coming. My view is that we have been going down the wrong track for a number of years now and that it was always going to be the case. There were particular circumstances surrounding September 11 that enabled the government of the day to shut down the people smuggling through a variety of mechanisms, some of which nobody would want to see return. I think what really stopped the boats was the sinking and the loss of the lives of over 700 people in 2001. If you want my honest opinion, that is why the boats stopped coming.

Senator PARRY—Why did they start again?

Prof. Crock—They started coming again around about 2005. I have in fact done some work on this to look at the arrival of boats relative to the push factors and relative to the change of policies. It seems to me that there is no doubt whatsoever that the most significant reason for the boats coming again has always been and will always be the degeneration of conditions in particular countries, most particularly in Sri Lanka and Afghanistan. Having said that, there is no doubt that a role is played by the media in publicising the changes that have been made. You see a slight increase happening from the time that children were allowed out of detention. I have not heard anybody say we should be putting them back in detention. The way that the opposition has made international headlines of Labor's perceived softening acts without doubt, in my mind, as a free advertisement for the people smugglers, who go to their clients and say, 'They will close this down again. If you want to come, you have got to come now.' That is the message we are hearing back.

Prof. Saul—Can I say very simply that I think the solution to people smuggling is to provide avenues for protection for the millions of refugees internationally who need it. The reason a demand for people smuggling exists is because you cannot get resettlement if you are one of the millions of people sitting in a UNHCR refugee camp abroad. So, as long as people do not have permanent solutions when they fear persecution or torture or the death penalty and so on, there is always going to be a demand for people smuggling. It is no good just criminalising people smuggling without working on providing those long-term solutions. That is hard and Australia cannot do it by itself, but Australia can play a very active role in developing bilateral or regional resettlement solutions, providing funding to UNHCR and providing funding through AusAID for developmental outcomes to assist in the resettlement of people in countries nearer to the source countries. We are not doing enough of all of those things.

Senator PARRY—You are talking about an orderly solution, which is fine, but unfortunately we do not have an orderly solution and a deterrent has to be created.

Prof. Saul—We agree that some people-smuggling offences exist. Our concern with these offences is the removal of the definitional elements from the international protocol, which require that it be done for profit. That is why people smuggling is bad—the commercial exploitation of vulnerable people, not humanitarian assistance to vulnerable people when you rescue them on a boat at sea and bring them to Australia, which is criminalised by these offences. There is not so much of a problem if you reinsert the fault elements that, when giving resources in support, you intend to give that money for the purpose of somebody else smuggling people, but that has been taken out of this bill. We also think 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 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.

Prof. Crock—This legislation would actually give you the wherewithal to charge Arne Rinnan on people-smuggling offences and put him away for 20 years. If that is what you want to do—

Senator PARRY—With all respect to both of you, to suggest that the Navy in rescuing people at sea and taking on board people involved in getting here by boat would somehow constitute an offence—it may technically, as many laws in this country technically could be applied, but the practical collection of law would not go down that path. I think it is a little bit scaremongering in that sense.

Prof. Saul—Senator, you may have more confidence in the discretion exercised by our federal prosecutors, and I agree they probably would not go after the government. But I think it is a real concern if you draft criminal offences which are so broad that they do cover circumstances which should not be covered. There is a very easy way to fix that. You just reinsert definitional elements or you put in defences of lawful excuse and so on, which cover those circumstances which you do not want included. I think it is entirely inappropriate for the criminal law to send a message that, even if you are helping someone not for a fee but because they are about to be tortured in Sri Lanka and you want to help them to get into Australia, to suggest that that is people-smuggling and should be potentially liable to prosecution but you do not know because you are relying on the good grace of federal—

Senator PARRY—Sometimes you need a broad net to catch the trickier fish. Anyway, we have got limited time. I would like to ask a lot more but I will finish there.

Prof. Crook—Could I add that under the protocol, which is ultimately what we have signed on to, the protocol require states to ensure that nothing is done in the name of the protocol that would affect basic rights and obligations of states. At the very least we would suggest that you include in this legislation a clause reflecting article 19(1) of the protocol against the smuggling of migrants, which reads: ‘Nothing in this protocol shall affect the other rights, obligations and responsibilities of states and individuals under international law, including international humanitarian law and international human rights law, and in particular where applicable the 1951 convention and the 1967 protocol relating to the status of refugees and the principle of non-refoulement as contained therein.’

Senator HANSON-YOUNG—Thank you to both of you for your opening remarks. I wanted to pick up on one thing Senator Parry said, which may have been a throwaway comment but I actually think it goes to the heart of your concern about this legislation, that you need a broad net in order to catch the tricky fish. With your legal hats on, could you give us some examples of other pieces of federal legislation that are so broad they capture everybody simply to catch the tricky fish?

Prof. Saul—I would certainly say there has been a problem we have raised with this committee in the past about the antiterrorism legislation, for example, the definition of which captures conduct which may be entirely lawful under the law of armed conflict. It is a similar problem. Australian forces fighting in armed conflict in Afghanistan or Iraq falls within the definition of terrorism; it is the use of violence in order to compel a foreign government to do something. That is the definition of terrorism. We have insisted time after time do what other countries have done, which is to create a carve-out for armed conflict so that you are not criminalising anything which is entirely lawful for Australian forces to do in armed conflict. Although you can say, look, the prosecutor will exercise good judgment, sometimes they do not. We know circumstances where prosecutors have gone after people with very old security

offences which nobody thought would or should be used anymore and they throw the book at people. I think it makes it very difficult.

This is ultimately a rule of law question. It makes it very difficult for any citizen or person in Australia to prospectively know the scope of their legal liabilities if they do not know what the good grace of a prosecutor will do to them down the line, because they are captured by incredibly wide laws and you just rely on the fact that a prosecutor in Canberra will make good judgment, and they do not always do that. I have great confidence in our prosecutors most of the time, but from a rule of law point of view international human rights law requires in article 15 of the ICCPR that any criminal offence be sufficiently specific and non-vague so as to enable people to know what their criminal liabilities are, and I do not think that these offences satisfy that obligation.

Senator HANSON-YOUNG—Would there then also be a risk that those that are perhaps guilty of committing some type of criminal activity, which is meant to be caught under this legislation, could perhaps challenge the decision based on the fact that the legislation is so broad that it is not specific enough, it breaches various parts of other conventions and so forth so that it is going to be laughed at anyway?

Prof. Saul—Unfortunately, not in Australia because unlike Great Britain and the whole of Europe we do not allow challenges on human rights grounds in Australian courts and so whereas Britain is streets ahead of us in a lot of these areas we do not provide that if people get caught. There may be a policy choice by parliament that it is appropriate to cast the net widely and so on—that is a political judgment—but we say it does raise legal problems.

I have one final point which is related to this over broad criminalisation. I would simply say the problem there is that even if prosecutors do not use the law, there is still ultimately a chilling effect in the community. We have seen this in relation to the sedition laws where artists, members of the Muslim community and so on have been running scared for the last few years over whether these laws will be used against them and are they targeted against them. Federal prosecutors may never want to use them but the fact is that they are hanging over their heads. The sense that the community gets is that they are targeted at members of the community in expressing their religious beliefs, their political beliefs and so on and that tends to alienate communities from the law. That is not good for the justice system. It just means that people do not regard the legal system as legitimate, it makes people in those communities far less likely to want to cooperate with law enforcement officials and it makes law enforcement much harder in policing those communities.

Prof. Crock—There are precedents for courts. The present chief justice of the High Court, for example, when he was on the full Federal Court, struck down the legislation that was passed for World Youth Day you may recall in 2008 in a case called *Evans* against New South Wales where they tried to make regulations to criminalise the annoyance of pilgrims. The chief justice in that case was prepared to say that that breached certainty laws and basic human rights as well. I think that if an attempt were made to convict or charge somebody in the community with supporting people-smuggling who had innocently sent money abroad, the legislation could possibly be susceptible to that. Having said that, I agree with Associate Professor Saul that the record of primary legislation in Australia being supported on the basis that if it deals with any form of non-citizen, you can do anything you like is pretty strong.

Senator HANSON-YOUNG—Could you expand your comments in relation to the expanded responsibilities and powers that would be given to ASIO under this legislation in terms of accessing information, surveillance and those types of things beyond Australia's borders which of course is quite a shift from the usual activities of that organisation? We have defence intelligence which often looks at the more foreign intelligence issues as opposed to domestically.

Prof. Crock—I think this legislation does broaden in an unjustifiable way the powers of ASIO. I am very conscious, however, that ASIO has been very active in this area anyway over many years. I remember intercepts were placed on Captain Arne Rinnan when he was in a stand-off with Australia. There is not a lot that has not been done before in this area. As I mentioned I know that intercepts have been placed on the phones of community members over time. Sometimes they put active tails on people as well to intimidate individuals in the community. For me it is a huge disappointment that this government is continuing down the same road and all the time trying to take it further and further but Associate Professor Saul is better qualified to speak about this.

Prof. Saul—I would say simply that I think it is appropriate actually that ASIO gets powers in relation to people and organisations and not only in circumstances limited to foreign governments. I think it is clear from recent cases, including in the High Court in the Thomas and Mowbray control order decision, that the use of the defence power and so on in relation to security threats must encompass not just state based threats. I think the situation of contemporary terrorism is an example of that.

On people-smuggling, I am a bit more circumspect, because I think people-smuggling primarily is a law enforcement problem; it is not primarily a security problem. If a person is coming into Australia through a people-smuggling operation, they are pretty unlikely to be a terrorist about to mount an attack on Australia. It would be the worst possible way you could imagine of trying to get into Australia, because you always get picked up by the Navy, you get taken to Christmas Island and you get stuck there in detention and processed under enormous security. It is very hard for you to be a security threat to Australia in those circumstances.

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 in the way of the things that I think ASIO should be focusing its resources on. ASIO should be dealing with foreign espionage, terrorism, nuclear proliferation and so on, not this kind of relatively low-level stuff which is now being seen as an ASIO problem. I do not think it is.

Senator FEENEY—Professor Crock, you made a brief remark about the fact that you think one possible and unexplored avenue for Australia to combat people-smuggling is to encourage Australians in contact with asylum seekers overseas to dissuade them from making an attempt to come to Australia. I am interested in hearing a little bit more from you about that notion.

Prof. Crock—Associate Professor Saul talked about millions of people needing to be resettled overseas. The point I would like to make is that our experience here suggests that it is not millions of people who are trying to get to Australia. We receive tiny numbers and they come from places that are readily identifiable. I have not had the time to talk about what we should do. 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.

You have still got the problem of people-smuggling. It is almost impossible to stop that, but there is a lot more that we can be doing to look at the source countries where these people are coming from and to deal with it at source. We should not start thinking there are millions and we cannot be the basket case for the world. It is very easy to get public emotions and fears built up to a frenzy, as happens. Look at the feedback whenever articles are published in the paper. It is dead easy to press the fear button and to play it for all it is politically worth. But if you actually want to stop the boats coming—which is what I want to do, because it is very dangerous; hundreds of people die; it is a very bad way to try and deal with the issue—then you go to the source.

That is what Labor has traditionally done in the past, with enormous success. If you actually look at irregular arrivals over time, Labor has had much more success in dealing with this. But Labor has done it by going to the source, talking to communities and working with communities, not by meeting them head-on with ridiculously broad legislation. This is an embarrassment. I had to think very hard about coming to speak to you. I have a major grant application in at the moment with the department of immigration. I was very pleased to hear your comment at the start, Chair, about nobody being disadvantaged as a result of giving evidence. I really thought last night if I come here my chances of getting the support of the department of immigration to do this major multinational policy project are probably going to go down the drain, but I just thought I have to do it anyway.

Senator FEENEY—I am emboldened to say, firstly, it is a ludicrous notion that your evidence here and your participation in civic life in Australia would prejudice an application like that and, secondly, I encourage you to return to the question.

Prof. Saul—I agree with Professor Crock's suggestion that we need to provide solutions. In terms of what advice I would give to people overseas, I would say, firstly, look to what avenues are available. Is there a UNHCR prospect? Is there an Australian embassy to which you can apply for an offshore visa? I would lay out the information in terms of the processing times in those procedures, the accessibility of those procedures and the prospects of resettlement. I would do this in advising any client, as a barrister. But I have to say I would also be upfront about the fact that people smuggling is an option too. I would not advise in favour of it, but it is for a person in fear of their life or torture to make that decision. We have colleagues all around the world who we work with through our centre who are at risk. Our partner at a university in Nepal is currently being threatened. He and his two daughters are being threatened by the Maoists because he is an adviser to the Nepalese government. We have colleagues who are journalists and academics in Sri Lanka—and Sri Lanka is the most dangerous place in the world to be a journalist right now—who are in fear for their lives.

Senator FEENEY—I think Mindanao is competing strongly on that front.

Prof. Saul—That is absolutely right. Some months ago—and this, I am afraid, is a shocking story—we trained an Iraqi government delegation here in Sydney at our law school on behalf of AusAID. About six weeks ago the leader of the delegation, who was a senior bureaucrat in the Iraqi government, was shot dead because of his involvement in the political reform process in Iraq. So these are real questions. When people like that come to me for advice, I am not going to say you should sit in a refugee camp for 20 years. I would say to them you need to do what you need to do in order to reach safety and to bring your family to safety. That would include a people-smuggling option if that were the only way you can avoid being killed.

Prof. Crock—Senator Feeney, I was trying to answer your question before. I thought I was being asked: what are the alternatives and how can you set them up? I feel very passionately that we need to have alternatives to people smuggling, because I really find it abhorrent. That is why I get so upset about this. To see the government not following the line that Labor governments have in the past really upsets me deeply. There are always going to be incidents like this where individuals are at risk, but there are broader groups of people that we know are at risk that we can address through broader measures. That is what we should be doing, rather than just taking this punitive approach.

Senator BARNETT—I want to ask you about the protocol, illegal arrivals by air and the inconsistency between the Criminal Code and the Migration Act. But before doing that I want to ask you about your response to the government's announcement last Friday, which got a lot of publicity. I would like to know whether you agree that it was more of a political fix than a policy initiative.

CHAIR—I am not entirely sure that is within the realms of this legislation or the subject of any evidence that has been presented to us in the contribution of Professor Saul and Professor Crock this morning.

Senator BARNETT—Chair, I will not be instructed on how to ask my questions. The question relates to last Friday's announcement, which you would be well aware is targeting people smugglers and border protection measures generally. This bill is about anti-people-smuggling. I am asking the witnesses their views of a key government initiative, as of days ago, and their response to it—whether it was a political fix or whether it had some merit.

Prof. Saul—The entire thrust of the refugee convention is a requirement that each person who has a legitimate fear or risk of danger at home be given an opportunity to make that case. If you suspend processing for whole groups of people on the basis of their nationality it does not provide each individual an opportunity to make their case. I say that regardless of whether the country's conditions have changed, because you can never say, in a situation like Afghanistan or Sri Lanka, that everybody who comes here must somehow be able to return to their country. Many of them might be able to, but many of them, or at least some of them, will not be able to. I do not think it will discourage people smuggling because Australia is not returning them—we cannot; it is illegal to do it under the refugee convention, and Australia, most of the time, I am pleased to say, has respected that obligation. People will still know it is possible to come to Australia because Australia is a free, democratic country which has for a long time protected the institution of asylum. We inherited that from Britain, it is hundreds of years old, and I think we should respect that.

Senator BARNETT—Thank you. I will go on. I will try and be brief with these questions. Regarding the protocol, you are aware of other countries that have enacted legislation to criminalise people smuggling? Can you identify the countries?

Prof. Saul—I have not done a comparative review.

Senator BARNETT—Is it possible to take that on notice? Are you able to advise us accordingly?

Prof. Saul—Yes.

Senator BARNETT—Regarding the inconsistency between the Criminal Code and the Migration Act, the changes here change the Criminal Code to ensure that, with respect to people smuggling, they do not have to obtain a benefit—we should be aware of that—and yet that same change is not in the Migration Act. What do you say about that inconsistency?

Prof. Saul—As far as possible, it is better to have consistency across the board. In fact, in my view, you only need it in one place. Why do you have it in the Migration Act and duplicated in the Criminal Code? The Commonwealth Criminal Code is the comprehensive statement of criminal offences under federal law. That is where all criminal offences should be. I understand there may be, historically, constitutional reasons for it being in the Migration Act—because of the limitations on federal criminal legislative power. If you criminalise offences as an incident to migration control, which is a legitimate power, then it gives you a legislative basis. These days it would be well accepted that people-smuggling offences would be supported by the external affairs power, possibly the nationhood power but also as an incident of another federal power—that is, migration. There is no problem there.

Senator BARNETT—That is good. I appreciate that feedback. Finally, you mentioned in your introductory statement—and I think Professor Crock also mentioned this—the impact of this legislation on organisations like Qantas. I would like your view on the extent of people smuggling by air, and could you outline your concerns about the impact of this legislation on air carriers such as Qantas.

Prof. Crock—Traditionally, we have always received very many more asylum seekers and irregular arrivals by air than we have by boat. That is a historical fact and it is a fact that is unlikely to alter in the future.

Senator BARNETT—Professor Crock, on notice could you provide some evidence to support that, just to assist the committee?

Prof. Crock—The Parliamentary Library provided a background brief a couple of months ago.

Senator BARNETT—Yes, I have that. Do you think all the information that you are referring to is in that document?

Prof. Crock—Yes.

Prof. Saul—I would also refer you to a book, coauthored by Professor Crock and me in 2006, called *Future seekers II: refugees and irregular migration in Australia*—available in all good book stores!

Senator BARNETT—That is a good plug!

Prof. Crock—It is a little out of date. I have text forthcoming that is a little more up to date than that. What was your specific question?

Senator BARNETT—It was regarding Qantas.

Prof. Crock—I think the point here is that you are using a sledgehammer to crack a nut, as we have been want to do for many, many years now but this is a particularly large sledgehammer. I don't know that the airlines have had their legal departments' attention drawn to this matter. Again, I have no doubt that you will say, 'Well, we would never charge Qantas,' but in fact the way that this legislation has been drawn it is broad enough to supplement the carrier sanctions that have existed in the legislation since 1979 with criminal penalties. To say, 'We would not charge anyone,' is no answer to the point that this legislation plainly could be used to do just that.

Senator BARNETT—So you are saying that Qantas could be charged with a crime—

Prof. Crock—Of course.

Senator BARNETT—and they would suffer the penalties under the act, and the chief executive or representatives thereof would suffer—

Prof. Crock—Yes.

Senator BARNETT—Would they suffer a jail sentence?

Prof. Crock—If there were enough people on the plane, they could be up for an aggregated offence of 20 years, and subject to mandatory minimum terms of imprisonment as well.

Senator BARNETT—Thank you.

Senator TROOD—Just on this point that Senator Barnett is raising, is it your argument to the committee that this is the intent of the legislation—that is to say, that captains of Qantas aircraft and masters of ships et cetera should be charged, or is it your argument that one of the consequences of the legislation is that they could be—

Prof. Crock—That is right.

Senator TROOD—That this is an undesirable consequence of the legislation?

Prof. Crock—I think the thrust of our submission today is that you have cast the net too broadly and that there are a lot of innocent parties. Qantas is just one example. The more likely

victims, however, are the small people within the communities who will be picked up for supporting people smugglers.

Senator TROOD—So you are not arguing as a matter of policy that we ought to be charging captains of aircraft and masters of ships et cetera?

Prof. Crock—No, we are arguing as a matter of law that—

Senator TROOD—That it is a possibility?

Prof. Crock—That it is a possibility

Prof. Saul—The terms of the legislation should reflect the intent.

Senator TROOD—Which part of the legislation do you think has that consequence?

Prof. Saul—Firstly, the people-smuggling definition of the people-smuggling offence itself.

Senator TROOD—In which section?

Prof. Saul—In the proposed section 233A on page 5 of the bill in removing the requirement that a benefit be obtained; in other words, anyone who brings someone here, even if it is not for profit—this is the change on the existing definition—that is, it is a rescue and so on, would be captured.

Senator TROOD—Qantas is carrying people for profit, I assume. How does that get you out of the problem.

Prof. Saul—I think ultimate purpose of the carrying a person for a benefit provision is that the benefit is to effect an illegal entry. Qantas is not doing it in order to effect an illegal entry. I do not think Qantas would be in the business of taking people on board for the purpose of violating Australian immigration. They may do it by mistake, and if it is by mistake it should not be captured by the legislation.

Senator TROOD—I agree with that. I think they are probably not in that business, but I am not sure that reintroducing the profit element is necessarily going to solve your problem, is it?

Prof. Crock—Yes, because it is the profit for the purpose of facilitating illegal entry.

Senator TROOD—So that is the phrase you want reintroduced?

Prof. Crock—You are entitled to charge for your services to bring someone to the country. What you are not entitled to do is make a profit out of their unlawful status by putting a surcharge on that. That is what you should be criminalising.

The **Senator TROOD**—Good. I just want to clarify your position. I gather your concern relates to the offence of supporting people-smuggling, which you argue it is too wide—is that right?

Prof. Crock—Yes.

Have **Senator TROOD**—And that is the situation where, as I understand your evidence, it will catch potentially families sending money overseas and things of that nature.

Prof. Crock—Yes.

Senator TROOD—It is 73.3A of the act. Is that the element of this change that concerns you?

Prof. Saul—Yes, and we would simply say insert a clear fault element. In other words, a person must give the money with the intention that the money be used to smuggle—

Prof. Crock—For people-smuggling purposes.

Prof. Saul—or even, as you have done in the terrorism context, recklessly. In other words, the person is aware of a substantial risk—that it would be used for the purpose of people-smuggling. At the moment liability is so strict that if you give money to somebody and you do not know that they are going to use it for people-smuggling, it is criminal under this offence. It is drafted incredibly badly.

Senator TROOD—So, if 73.3A were to be amended in the way in which you suggest, then it would link the concerns you have about that—

Prof. Saul—Predominantly, yes.

Senator TROOD—You probably do not like the offence. If, as a matter of public policy, the government formed the view that the offence ought to remain there, then making those amendments to those provisions would meet your concerns—is that right?

Prof. Saul—It would much improve it. I think there would still be concerns based on the phrasing here. Material support is clearly drawn from US antiterrorism standards, and those standards are currently being litigated in the US federal courts. There is a concern that the notion of providing material support is itself unconstitutionally vague under the US Constitution, because it does not specify in sufficient data what it is that constitutes material support. How much money do you have to give? What if you send somebody some letterhead which they can then use in order to create a false document and so on? There is a criminal law question about what that phrase means. It can be worked out in precedent in the courts but it still raises a concern.

Senator TROOD—That is the problem of the Americans; it is not ours necessarily.

Prof. Crock—Why do we need to recreate it here, though?

Prof. Saul—It is a rule of law problem because the concern about unconstitutional vagueness is the concern that a person affected by a criminal offence provision cannot prospectively know what it is that is unlawful in advance—before they do something.

Senator TROOD—There is a reference in your submission, I think, to retrospectivity.

Prof. Crock—That is a related point.

Senator TROOD—I am not quite clear as to how that issue arises.

Prof. Saul—In international human rights law the prohibition on retrospective criminal punishment imports what is described as a—

Senator TROOD—May I interrupt—I think most members of the committee would have objections to retrospective legislation.

Prof. Crock—Yes; it is domestic too.

Senator TROOD—What I want from you is: how does that issue arise in relation to this particular legislation?

Prof. Saul—The prohibition on retrospective punishment includes what is known as the principle of legality. That means criminal offences must be defined with sufficient specificity in advance so that a person knows what it is that is criminal about their behaviour before they do it.

Prof. Crock—At the time that they do it.

Prof. Saul—This is where the US constitutional cases are important, because if you have an offence which says, ‘Material support is an offence but we’re not telling you what “material” means,’ that could mean a whole range of difficulties.

Senator TROOD—So your argument is that the legislation is not to operate retrospectively, but anybody looking at the legislation, should they choose to do so, will not be clear on the nature of the offence they might be committing?

Prof. Saul—That is right—the international human rights law meaning of retrospectivity, as opposed to the domestic sense of the retrospective application of a law which is passed tomorrow.

Prof. Crock—It would also have a retrospective effect in the sense that someone might do something innocently at point A in time only to be told at point B, further on, that what they did at point A was illegal.

Senator TROOD—But you cannot be charged with offences that were not offences at the time you committed them, can you?

Senator HANSON-YOUNG—Or if you are sending money to them because you think they need money to pay their bills that week and in fact that gets put into a piggy bank that then pays a people-smuggler, how is that not retrospective?

Prof. Saul—There was no law at the time—

Senator HANSON-YOUNG—No, but if the law—this is the point; it is about the action that is retrospective.

Senator TROOD—It is a long time since I studied criminal law but my understanding is that you cannot be charged with offences which may become offences subsequently but were not at the time you committed an offence, or what became an offence.

Prof. Saul—That is correct—a high distinction. But I think that the finer point is simply that—let us say a new law is passed and you do not know what that law means because it is cast so vaguely. You may innocently give money or resources to somebody abroad not knowing that they will use it for people-smuggling. So, at the point at which you did it, you did not think it was criminal but in fact it was, but that is because the offence is cast too vaguely to give people a sense of—

Senator TROOD—That is your earlier point. Thank you.

CHAIR—Senator Hanson-Young, has your question been answered?

Senator HANSON-YOUNG—My question was about the US litigation and you have answered that.

CHAIR—We do not have any other questions. I am sorry to have kept you over time. We certainly appreciate your knowledge and your contribution to our inquiry. Thank you, Professor Saul and Professor Crock.

Prof. Saul—My pleasure. Thank you and good luck.

[11.26 am]

DONOVAN, Ms Helen, Co-Director Criminal Law and Human Rights, Law Council of Australia

CHAIR—Welcome. Thank you for appearing before our committee. The Law Council very reliably—and we thank you again—has provided us with a submission for our inquiry, which is No. 9 for our purposes. Do you have any changes or amendments you wish to make to that?

Ms Donovan—No.

CHAIR—I invite you to make an opening statement and then we will go to questions.

Ms Donovan—Firstly, I would like to thank the committee for the opportunity to make a submission on the bill and to appear today to talk to the submission in more detail. The Law Council's submission is very much focused on the specific legislative changes which are introduced by the bill rather than on broader policy debates about Australia's refugee or migration law policies. That is not to say that the Law Council does not have a strong position on Australia's obligations to adhere to its commitments under international law and particularly under the refugee convention; however, I suspect others—and I have just seen this in practice—with great expertise and insight will speak to those broader issues. Therefore, I will focus on the terms of the bill itself.

The Law Council has raised a number of concerns with the bill. I will quickly outline some of those now. The Law Council is concerned, like the previous witnesses, with the introduction of the new offence of providing support to people smuggling in both the Criminal Code and the Migration Act. We have made a number of similar submissions now to this committee on different occasions and in different contexts about these types of provisions. When the new antiterror offences were first introduced—offences which extended and departed from traditional notions of criminal responsibility—concern was expressed that it would not be long before we saw those offences replicated in other contexts, and that is exactly what has come to pass. These new two offences are based on section 102.7 of the Criminal Code—that is, providing support to a terrorist organisation. That is a provision that has been subject to considerable criticism and as a consequence it is a provision that is currently under review and yet it is replicated here, albeit in a modified form.

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 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.

There are a number of other matters raised in our submission, including the removal of the requirement from the Criminal Code offence that the defendant must have obtained or intended to obtain a benefit, the amendment to the Telecommunications (Interception) Act to simplify the procedure for obtaining an interception warrant in relation to the investigation of an offence under the Migration Act, amendment to the Telecommunications (Interception and Access) Act to broaden the definition of 'foreign intelligence', amendment to the Surveillance Devices Act to allow for increased access to emergency authorisations and the amendment to the ASIO Act to expand the definition of 'security'. I will let the submission speak for itself on the majority of those points. I do, however, just want to comment briefly on the expansion of the definition of 'security' in the ASIO Act.

The Attorney-General's submission has pointed out quite correctly that this amendment does not give ASIO any new powers, and we have not and would not suggest that it does. What the amendment does do is broaden the areas in which ASIO can employ its existing powers. We submit that this is not a minor matter and it warrants detailed scrutiny. The Attorney-General's submission also points out that ASIO's functions are different to those of law enforcement agencies. It gathers intelligence; it does not gather evidence to support charge and prosecution. The Attorney-General's submission points out that this is not changed by the amendment, and again that is agreed. However, we would add that the traditional division between intelligence agencies and law enforcement agencies is about not just the different purposes for which they undertake their activities but also the type of subject matter they are concerned with. This represents a convergence in that subject matter and the amendment does raise the spectre of a blurring of the roles of the different agencies, particularly if it is symbolic of a trend whereby a broadening of the concept of what national security encompasses translates into a broadening of the types of issues with which ASIO is concerned.

Senator HANSON-YOUNG—Part of your submission talks about the concerns you have with the amendments in the current bill in relation to material support. Would you agree with the previous witnesses that the way this is drafted is too vague and it is quite incomprehensible for somebody to actually understand exactly what 'material support' means?

Ms Donovan—I think what is encompassed by the offence provision is certainly unknown. It must be something more than aiding and abetting or conspiring or we would not need this position. It must be something more than organising or facilitating because again we would not need this provision, because the primary offence provision already captures that. That is really our primary problem. It is not explained what sort of conduct that is not already captured is captured by this. We have seen in practice that what constitutes 'material support' means different things to different people and is yet to be definitively decided by the courts.

I am not entirely sure I agree with the previous witnesses that recklessness is not already a part of the offence. As I understand the offence provision, you must intentionally provide the support or the resources to a person or organisation and that support must in fact aid the receiver or another person—

Senator TROOD—Which offence are you talking about: the primary offence or—

Ms Donovan—The new offence of providing material support to people smuggling. Sorry, was I asked about the primary offence?

Senator HANSON-YOUNG—No, you were asked about material support.

Ms Donovan—My reading of the section is that you must intentionally provide the support and it must in fact aid the receiver to engage in people smuggling and you must have been reckless to that consequence, which means under the Criminal Code that you must have averted to that substantial risk and proceeded regardless.

CHAIR—So that would not include a Qantas pilot, for example?

Ms Donovan—I would not have thought so, but I am reluctant to disagree with the previous witnesses, who are much more experienced than I am. You might notice that my nametag says ‘Ms’ rather than ‘Doctor’ or ‘Professor’. I have no doubt the department will have a view on that.

Senator TROOD—That does not necessarily lend to wisdom.

Senator HANSON-YOUNG—Can I just confirm that your concern is more about the fact that we already have provisions that would cover it?

Ms Donovan—Well, we already have provisions which would cover the types of things which the explanatory memorandum says we need to cover—facilitating or organising people smuggling. We already have provisions which spread the net another step broader to capture those who aid and abet or who conspire. This must do something different, we assume; otherwise, it would not be here. But what precisely it does I am not sure, and that in itself presents a problem.

Our primary point is that that is not addressed in the explanatory memorandum. That has not really been addressed in the debate which has surrounded the bill. There is a sort of throwaway line that serious and organised crime are involved in people smuggling, that they are complex organisations and that a lot more people are involved than just the direct perpetrators, so we need this offence and this offence will fix that. I think that that sort of statement deserves more scrutiny, particularly when we consider the origins of this offence. This originally came into the Criminal Code when the antiterror offences were introduced. We have since seen it replicated in the serious and organised crime bill. We see it here again. It seems to be the offence of the moment. We already have chapter 2 of the Criminal Code, which has ancillary offences which expand criminal liability in ways which are consistent with accepted notions of criminal law. Why do we need this and the uncertainty it creates? We saw in the Haneef case that it does create uncertainty. I think that is agreed.

Senator HANSON-YOUNG—Are there any other particular parts of the bill that you think carry that lack of clarity in relation to not just material support but this idea of changing the definition, for example, of what supporting people smuggling means and changing the idea of what the intent is for somebody involved, whether it is for profit based on the fact that you are going to smuggle somebody as opposed to the profit for transportation?

Ms Donovan—Certainly removing that requirement broadens the existing offences in the Criminal Code. Precisely who would now be captured who was not previously captured is difficult to determine. Obviously community members, friends and humanitarian organisations

are potentially captured by the Criminal Code provisions in a way which they were not previously. No-one can foresee all the various factual scenarios or all the ways that this might play itself out, and I guess that is where the uncertainty is introduced.

Senator HANSON-YOUNG—Does the Law Council have a general view, then, about legislation that is drafted and enacted by parliament that is so broad that the question is how anybody is going to know until it is actually tested?

Ms Donovan—The Law Council's position, consistent with the previous witnesses, is that people should be able to know in advance precisely the type of behaviour which will attract criminal sanction. To the extent that an offence provision is not clear in that regard, it creates fear and uncertainty in the community and puts pressure on police and prosecutors, who themselves are often left scratching their heads about whether they should act and how.

Senator HANSON-YOUNG—Do you think it creates problems when it comes to the point of a particular case being challenged or prosecuted?

Ms Donovan—Yes, it can create problems in a particular prosecution. One of the things, for example, which Clarke concluded in the Clarke inquiry, which examined 102.7 of the Criminal Code, was that it would be almost impossible to instruct a jury on this offence provision because there were so many different interpretations of it. Whether or not it could be subject to challenge I think is debatable. Because of the human rights framework in Australia, there is not a clear pathway to challenging some of this legislation on the basis that it is vague or uncertain, but there are always avenues.

Senator HANSON-YOUNG—Thank you.

Senator BARNETT—Thanks, Ms Donovan, for being here today. It is much appreciated, and as usual the Law Council submission is comprehensive and very much appreciated. First of all, can I just ask you whether the Law Council has a position on the government's announcement last Friday with respect to Afghanistan and Sri Lanka and the processing of such claims?

Ms Donovan—No. Our concern is whether or not that position is contrary to Australia's obligations under international law.

Senator BARNETT—That is why I asked you, because I know you have a special interest in international treaties and Australia's obligation to meet those conditions.

Ms Donovan—We have sought advice from people about whether or not it is consistent with the treaty but I do not have a conclusive view at this point. Certainly some preliminary evidence would suggest that it might be because it is discriminatory in its application—that that might fall foul of the convention. The Australian Human Rights Commission, obviously, has spoken about the possibility that it might signal a return to indefinite detention, which again would fall foul of our international human rights obligations. But we do not have a concluded view at this point.

Senator BARNETT—I am interested in the views of the Law Council, if you could take that on notice and forward that to the committee. Specifically, in and of itself, is it a breach of any of our international obligations?

Ms Donovan—I will take that on notice.

Senator BARNETT—Thank you.

Ms Donovan—I am sorry; refugee law is not my area.

Senator BARNETT—That is not a problem. I have a question about the division between the Migration Act and the Criminal Code. In part of your submission, on pages 7 and 8, you have covered that, and thank you very much for it. I have just been perusing the Attorney-General's submission. We have only received it this morning. It says:

Offences relevant to people smuggling are located in both the Criminal Code (for ventures departing or transiting Australia) and the Migration Act (for ventures entering Australia).

They go on, and I do not want to misconstrue what they say, but they say they are different processes, and therefore there is an argument that perhaps there should be a different law and different standards that apply. Clearly the Law Council appears to have a different view. I am wondering if you can outline to the committee more clearly your views as to the need for consistency between the Migration Act and the Criminal Code and on this issue of whether there should have been obtained or an intention to obtain a benefit from the people-smuggling activity.

Ms Donovan—I understand that the Attorney-General's submission and indeed the bill are supporting the position that there in fact should be consistency between the Migration Act offences and the Criminal Code offences and that that part of the Attorney-General's submission simply explains the difference in the two types of offence provisions and why one is located in the Migration Act and the other in the Criminal Code.

Throughout our submission, on a number of occasions, we have said that, to the extent that the amendments are concerned with achieving that consistency, we do not object to it, but there are some circumstances in which there is a reason why there might be a difference between the two sets of provisions, and on that basis we have objected to amendments which were introduced purely in the name of consistency.

Senator BARNETT—But you say in your submission:

There is an important difference between the people smuggling offences in the Criminal Code and the people smuggling offences in the Migration Act.

Ms Donovan—That is right. At the moment, under the Criminal Code it is a requirement that the person who engages in the people smuggling obtains or intends to obtain a benefit. That is not a requirement under the Migration Act, so the bill seeks to remove that requirement from the Criminal Code so that the two sets of provisions are consistent. We have submitted that there is in fact a reason why they may have been different in the first place and should remain different.

The Migration Act offences are concerned with people who come to Australia, and therefore the policy which informs them is the policy of the Australian government about how we best defend our own borders et cetera. The Criminal Code offences are concerned with movement either from Australia or transiting Australia or in fact not through Australia at all but from one

country to another, and to that extent the Law Council's submission is that they really ought to be informed by what our international obligations are, because presumably we have enacted them in order to be part of a global effort against people smuggling.

Senator BARNETT—You say that in your submission, in the second last paragraph on page 7. The question is: how should the bill change to reflect those international obligations, if that is the view of the Law Council?

Ms Donovan—The view of the Law Council is that the requirement that the person is seeking to obtain or intending to obtain a financial benefit should remain a part of the Criminal Code provisions, as it is now. It should not be removed, as is proposed in the bill. I note that a number of other submitters have said that if consistency is sought then it should be introduced as a requirement into the Migration Act provisions, and I think there is a lot of merit in those submissions. Other submissions have gone into great detail about why that would draw a more appropriate line between family members, community members, humanitarian assistance et cetera, and those who seek to take advantage of the vulnerable.

Senator BARNETT—All right. I want to ask you the question I asked the earlier witnesses about protocol in other countries that may or may not have criminalised people-smuggling. Do you have—

Ms Donovan—Again, I am not a position to answer that, but I will—

Senator BARNETT—If you are happy to check and liaise and let us know, that would be good, because that is certainly of interest.

Ms Donovan—Yes.

Senator BARNETT—Thank you.

Senator PARRY—Ms Donovan, in relation to the material support—following on from Senator Hanson-Young's question—you said it is too broad. You indicated that other statutes often have the words 'aiding and abetting', which are semi broad, in that sense. Quite often, under 'aiding and abetting', you have aiding and abetting in some material particular. So we are still getting down to this material. I cannot see another way around it unless you physically list 20 pages of specified issues.

Ms Donovan—My point was that chapter 2 of the Criminal Code sets out these ancillary offences: aiding and abetting, conspiring et cetera. They already apply to these offences. Whenever a Commonwealth offence is created, whether it be under the Criminal Code or in fact another type of offence, automatically attaching to the primary offence are the ancillary offences of aiding and abetting, conspiring et cetera. So we already have an offence of aiding and abetting people-smuggling; we already have an offence of conspiring to people-smuggle. Chapter 2 of the Criminal Code was a product of a very long process of consultation. It has been subject to considerable judicial comment and review et cetera, and it is under review at the moment, because it is such an important part of the code. But this offence lies outside of that.

Senator PARRY—It sidesteps it, yes.

Ms Donovan—Yes. And you will notice there is no mention in the explanatory memorandum or the Criminal Code of the fact that there are already these ancillary offence provisions. So, because there is no mention of it, there is no discussion of why this is necessary—why it is different. That is why it therefore takes us beyond all of the established case law around these existing provisions. I can see some differences between the offence provision and the existing offence provision, and there may well be a reason why those existing offence provisions have proved, in this particular context, to be unworkable. However, the parliament should hear about that so that they can make an informed decision about why this departure is necessary, rather than just having an offence of the moment that is replicated again and again, because we have got to get the people behind the people.

Senator PARRY—That is right. That is exactly right. You also mentioned intent. You said, in defence of section 73.3A of the bill, I believe, that there needed to be intent. I can only find a mention of intent under 233B, which is the more serious ‘Aggravated offence of people smuggling’. Were you suggesting that intent should be there, or have you read that into it but I have not?

Ms Donovan—Again, it is read into it by the operation of chapter 2 of the Criminal Code, which sets out that certain fault requirements attach to every Commonwealth offence provision.

Senator PARRY—One being intent.

Ms Donovan—Yes. So, where it is an action, it is necessary that the person intend that action; where it is a consequence, recklessness suffices as the fault element.

Senator PARRY—There is not a specific intent as under 233B, where the specific intent is that the victim will be exploited after entering into Australia, for example? You are talking about a more general provision under chapter 2?

Ms Donovan—It is automatically incorporated into the offence provisions. No doubt the department will explain that to you much more eloquently, as they must have done so many times before many such hearings. It often does confuse people when they come to the legislation. I know that that might be why there is some difference between my reading of these provisions about whether recklessness is already an element of the material support provision and that of the earlier witnesses, because, of course, there is no mention of recklessness. I assume that, because it talks about a consequence of providing the assistance, a person must be reckless to that consequence.

Senator TROOD—Ms Donovan, in relation to the matter of aiding and abetting, is it your view that the existing provisions of the code regarding aiding and abetting cover all of the offences that are sought to be covered by these new provisions?

Ms Donovan—The aiding and abetting provision is slightly different from providing support in the sense that you must intend to aid and abet and the offence must occur; you must intend to aid and abet a specific offence. So there are some differences. Obviously, ‘conspiring’ has its own definition—that is, you must agree with another person and there must be at least one overt act which is undertaken in furtherance of the conspiracy. My point is that those provisions would appear to cover all the sorts of activities which the explanatory memorandum says we need to

target, beyond just the people on the boat and beyond just the crew of the boat, for example. So our submission is that those provisions already cover that sort of ancillary or enabling behaviour. Those provisions are somewhat different. They must be different from the providing material support provision otherwise, as I said, why would it have been introduced? It must be different somehow, but exactly how and exactly what the consequences of that difference are matters that I think the onus is on the government to explain.

Senator TROOD—We will ask them, but are you saying that you cannot see the difference, that it is not immediately obvious?

Ms Donovan—I can see that 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. It seems to be somewhat more vague than that. You provide support. It is not clear what that is exactly and how it might be different from aiding and abetting, but perhaps it is. 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.

Senator TROOD—Does the Law Council have a view as to whether that is a desirable public policy goal, that in fact this offence should not be as onerous?

Ms Donovan—The position of the Law Council would be that the net should not be broadened in that way when there is no demonstrated need for it to be and when possibly people whom we cannot envisage sitting here would be captured or would be intended to be captured. I know Senator Parry expressed the view earlier that it takes a broad net to catch the tricky fish, but the submission of the Law Council is that 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.

Senator TROOD—I see. I am a bit puzzled about some other parts of your evidence. The council and you particularly seem to appreciate the reality with which we are trying to contend here—that is to say, the convergence between crime and national security issues; that, in the real world, the nice baskets of difference that exist between criminal activity and threats to security, broadly described as national security, no longer exist and we have a convergence. You seemed to be appreciative of that point in your remarks. Perhaps I misinterpreted what you are saying.

Ms Donovan—We are appreciative that that point has been made. There is certainly a push to talk about national security in broader terms.

Senator TROOD—My question then is: why shouldn't law enforcement authorities, broadly described, also be cognisant of that change and seek to deal with it within legislation? This convergence applies largely to the ASIO area and intelligence interception. Why shouldn't governments arm themselves as best they can to deal with the realities that exist in the international world?

Ms Donovan—I am not sure that these changes are necessary to allow that to happen. 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 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 can rely on people’s ignorance, on perhaps thinking they are under coercion, to secure their cooperation. 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. Certainly, no particular case is made for that. The AFP and Customs have intelligence-gathering capacity. They are not limited solely to the collection of evidence for the prosecution of a specific offence. They are already undertaking intelligence gathering around this area. Why the assistance of ASIO is required I am not sure.

Senator TROOD—I think you said, did you not, that they had a different kind of capability which could be germane or relevant to this area of activity?

Ms Donovan—They do operate differently, but why that different type of capability should be employed in this field, why the resources and tools and powers which are available to the law enforcement agencies are insufficient is not clear. It is not that ASIO is not in this field—and, in fairness, that is explained in the Attorney-General’s submission as well. ASIO is able to investigate irregular entry to Australia where there is a clear nexus with a threat to national security, with terrorism et cetera, but it does not have the ability to gather intelligence on migration violations per se where that nexus has not been established.

Senator TROOD—One of the things the Attorney-General might say, presumably, is that ASIO is dabbling in this area already and we would be better off clearing up the legislation so that we regularise their dabbling and we all know the rules by which they are operating, rather than leaving them vague and unclear. Precisely for the reasons that you are saying, ASIO has considerable investigative authority and we ought to be very clear, as a matter of public policy, what ASIO is doing. This achieves that purpose.

Ms Donovan—Our submission would be that, as a matter of public policy, we ought to be very clear about how and where we want ASIO to operate. Certainly I would not want those decisions to be made on the basis of: ‘They’re sort of doing it anyway so we’d better formalise it.’

Senator TROOD—That is what I am saying, that to the extent that this—

Ms Donovan—If they are operating in a way that is not currently authorised under the act then I do not think that is a justification for amending the act.

Senator TROOD—I do not disagree with that, but the fact is that there is a capability there that can be used in this area. ASIO is conscious of it and conscious of the uncertainty that exists about its responsibilities and those that might exist, for example, with AFP. As a matter of public

policy, is it not better to clarify the areas of responsibility so that ASIO is clear about its mandate?

Ms Donovan—There is nothing in the material supporting the bill which says why ASIO's specific and distinct capabilities should be employed for this purpose. To expand the area within which ASIO operates without providing any justification, I think, is a dangerous precedent.

Senator TROOD—We can explore the justification of the issue, but we ought also to explore the consequences of the extension, which is what you have alluded to in your submission. Can you just clarify the nature of that, please. It seems to be an argument about whether, if there is justification, then it is such a comprehensive justification that it intrudes into areas of privacy and interferes in relation to the rights of individuals that go beyond anything that is desirable. I am just looking at the telecommunications interception points that you have made here in your submission.

Ms Donovan—The point we have made there is that there are amendments made to 11A, B and C, the circumstances in which ASIO can apply to the minister for a telecommunications interception warrant. Again, there is no reason given for why the circumstances in which a telecommunications interception warrant is available under those provisions is required. The AFP is also able to obtain telecommunications interception warrants for the investigation of people-smuggling offences. There are provisions under which ASIO can apply to the minister to obtain a telecommunications interception warrant, including where they are looking at an individual and not a foreign government or an organisation of a foreign government. This expansion is not justified or explained by reference to the existing framework.

Senator TROOD—I understand that point, but I thought you were also making a point that when you start talking about the generality of foreign intelligence and the generality of national security issues broadly defined then you are opening up a whole area of imprecision.

Ms Donovan—It would seem that way in reading how foreign intelligence is to be redefined and then the threshold test, which the minister would have to be satisfied with before issuing a warrant. The point of these provisions in the Telecommunications (Interception) Act is that the decision-maker—whether it be a judge, or an AAT member in the case of law enforcement agencies, or the minister—is able to turn their mind to a specific set of criteria and think: is this necessary in the circumstances? It will automatically involve an invasion of somebody's privacy because that is an inevitable consequence of tapping their phone et cetera. What aim is sought to be achieved and is this the only method of achieving that aim? Is it a proportionate means of achieving that aim? Is it justified in the circumstances? If we amend the test to say that foreign intelligence means 'intelligence about the capabilities, intentions or activities of people or organisations outside of Australia', I think that we can all agree that that is pretty broad and largely without limit. It means anything that anyone is doing overseas and you need to obtain that intelligence in the interests of 'Australia's national security, foreign relations or national economic wellbeing'. That test is not quite so broad, but, again, it is very broad. So how the minister in that circumstance is able to consider whether the invasion of privacy is justified in circumstances and whether it is the only means necessary to achieve the identified social good, is the issue, and I do not think that there is a meaningful test left there.

Senator TROOD—To summarise this—I hope accurately—you are not persuaded that there is a justification for ASIO having these kinds of responsibilities and, even if you were persuaded about that, then the way in which they had been given to ASIO is too comprehensive and so broad as to leave it unclear about the kinds of activities that are being investigated—

Ms Donovan—That would now warrant the issue of a warrant.

Senator TROOD—Yes. Is that right?

Ms Donovan—That is correct. But our submission is that if a proper justification was given, if there was some genuine discussion about why this is necessary, then the amendment that was subsequently proposed would probably be more carefully crafted because it would reflect what the current failure is and how this seeks to address what the current failure and inadequacy of the existing law is. But because only broad brushstroke justifications are given, broad amendments follow and it is very difficult to have an intelligent conversation about whether they address the inadequacy.

Senator FEENEY—Just on that point, do you have any views on concealing a noncitizen? Do you have any comment about how the powers might relate to dealing with that issue?

Ms Donovan—Are you talking in particular about how we address that in our submission?

Senator FEENEY—Yes. It seems to me that that is an area where the intercept powers might come into play.

Ms Donovan—That is right. That is an offence, currently, under the Migration Act. In order to get a telecommunications interception warrant to investigate that offence, not only do you have to demonstrate that you are investigating that offence and that the interception warrant is necessary in the investigation of that offence; you also have to satisfy a number of other threshold tests about the sophisticated nature of the offender—

Senator FEENEY—The cartel you are looking at.

Ms Donovan—for example, if it involves two or more offenders or involves planning, organisation, and is sophisticated et cetera. The changes will mean you no longer have to satisfy those additional threshold tests in order to get a telecommunications interception warrant to investigate the harbouring or concealing offence. In our submission we have suggested that it is different from some of the other Migration Act offences in that, like the offence in section 236 of the Migration Act, it is something which could occur on quite a small scale and involve family members and not be a part of any kind of serious organised criminal activity. Therefore, those additional threshold tests should still apply.

Senator FEENEY—It might well be that noncitizens are being harboured or concealed in a manner that is not sophisticated and that, frankly, would not meet those tests but is nonetheless undesirable.

Ms Donovan—It would still be subject to criminal sanctions. But the telecommunications interception warrants are not available in the investigation of the full range of criminal offences. It is recognised that they involve—

Senator FEENEY—A higher standard perhaps?

Ms Donovan—a significant invasion of personal privacy and therefore they should only be available in certain serious offences or on certain serious occasions that the parliament has identified. Admittedly, that has been broadened to the point where most people perhaps think we are silly to even make these submissions, because when is a telecommunications interception warrant not available? But I think it is important that we try to maintain that differentiation.

Senator FEENEY—But, in its essence, you do not think concealing or harbouring a noncitizen warrants—to use that pun again—the use of intercept powers? You do not think it should be readily—

Ms Donovan—I do not think it should automatically meet that threshold. The theme seems to have been that that threshold involves more organised criminal activity, rather than perhaps just interaction between family members. We can all imagine the scenarios that that might involve.

Senator FEENEY—I understand. Thank you.

CHAIR—Ms Donovan, thank you very much for appearing on behalf of the Law Council of Australia. We thank you for your time this morning.

[12.11 pm]

BIOK, Dr Elizabeth Mary, Board Member, Refugee Council of Australia

CURR, Ms Pamela, Campaign Coordinator, Asylum Seeker Resource Centre

Evidence from Ms Curr was taken via teleconference—

CHAIR—I now welcome Ms Pamela Curr from the Asylum Seeker Resource Centre and Dr Elizabeth Biok, representing the Refugee Council of Australia. The Asylum Seeker Resource Centre has lodged a submission with us, which we have numbered 12 for our purposes. The Refugee Council's submission is numbered 10. I am assuming that you do not have any changes or alterations to make to those submissions.

Dr Biok—No.

Ms Curr—No.

CHAIR—Then I invite you both to make a short opening statement. Then we will go to questions. I understand, Ms Curr, that you are going to go first.

Ms Curr—I would like to thank you for the opportunity to provide a submission on this bill on behalf of the Asylum Seeker Resource Centre in Melbourne. Our principal concerns in relation to the legislation are the potential criminalisation of humanitarian responses to assist people in need and the punishment and mandatory sentences to be imposed on the impoverished Indonesian fishermen who sail the boats to Australia.

The ASRC, through its work and connections with refugees in the past and the present, has links with asylum seekers and refugees offshore. The ASRC legal program, in many cases, continues to assist former asylum seekers with their family reunification applications. We are well aware of the pain and trauma of separation for many families as the available places under both the refugee and humanitarian programs continue to vanish.

I was in Indonesia in January this year, and there I met a number of asylum seekers. I also met with the director and deputy director of diplomatic security, and we discussed in particular the asylum seekers on the Merak seaport boat. Some of the asylum seekers I met from the community had been in Indonesia for four or five years and others were recent arrivals.

I do not think there is an understanding of the way in which the situation in Indonesia has changed most recently. Conditions were formerly fairly benign for refugees in Indonesia. Although they did not have the right to work, their children had no rights to education and they were limited in their right of movement et cetera they at least had shelter and food. Now what has happened is that all single people are detained in detention prisons, and those detention prisons make a tent on Christmas Island look like Buckingham Palace.

I saw for myself the conditions in one such place in Jakarta, where nine men are detained in a room five metres by three metres. There is limited light from a small window and no furniture in the room, and there they are 24 hours a day. Some have been there for two or three months. Twice a day they are fed by IOM, the International Organisation for Migration, which is funded by Australia. They are given two plastic bags with rice impregnated with chilli oil and some curry slops twice a day. They have no implements, no plates, no spare clothes, no amusements, no papers. They just sit in the room. There are five men in a slightly smaller adjacent room. There is a toilet and tap behind a partition. The conditions are fairly grim, as you can imagine.

On top of that, where in the past people in detention centres in Indonesia were able to have their phones and make contact with advocates in Australia and family members, in the last five to six months these phones have been confiscated. It is with great difficulty that people hold on to a secret phone. The other issue is that unaccompanied minors, young teenagers under the age of 18, are held in these detention prisons. The aim of course is to ensure that they do not get on boats.

I am in contact with some people in these detention prisons who were granted refugee status determinations by UNHCR up to nine months ago but are still not being released. In the past, once UNHCR recognised a person as a refugee they notified the Indonesian immigration authorities and that person was released to the care of the IOM, placed in a hostel and given food and shelter. Now those people are remaining in detention centres. I have taken this up with UNHCR in Jakarta. The men were being told that it was the UNHCR which was refusing to let them out, but I have since found from UNHCR that that is not the case. UNHCR say they officially notify Indonesian immigration but people are remaining in detention. So in effect Australia has, unfortunately, exported its indefinite mandatory detention provision.

There is another issue. I met a man while I was up there who was obviously distressed. He had been approached by a wealthy Saudi Arabian and asked for his kidney. He was considering selling his kidney when another Iraqi refugee intervened, sold his wife's jewellery, gave the man the money and said, 'You must never sell a part of your body.' That man was clearly very unwell, and no doubt that is why it was disclosed. I have concerns that if people are cut off from funds this could be the outcome.

I have another concern. Not just Australians with refugee backgrounds but many Australian refugee advocates send money to Indonesia and to other offshore places through Western Union. Sometimes, for the African refugees, we have to use the less well-known money remittance agencies. We send that money to ensure that people have food, tents and clothing and that their children get the medical help that they need.

My concern is that this bill will place the actions of humanitarian people in Australia at risk of incurring criminal penalties. It will undermine the fabric of our rainbow nation if Australians of refugee background feel that they are being watched by ASIO, that their phone calls, bank accounts and moneys are being monitored and that they risk being criminalised for assisting families in need. I do not think any of us would like to believe that in our democracy we have a government that is looking over our shoulder at every piece of money we send to people, at what we do with our money or at who we talk to. I would like to leave it there. I will willingly take whatever questions you have. Thank you.

CHAIR—Thank you.

Dr Biok—I would also like to thank the committee for the opportunity to talk on this bill. It is a matter of concern for the Refugee Council. Like Ms Curr, we are very concerned about the material support provisions. For the committee's knowledge, I am also a refugee lawyer, and I regularly represent people who have been smuggled into Australia not by boat but by plane. These are often unaccompanied minors who end up in Villawood Immigration Detention Centre.

The council is very concerned about the general uncertainty in this legislation and the fact that there are no precise definitions. There seems to be a concern about people smuggling, and that is valid, because it is a very fast-growing industry within our region and it is one where a lot of people are being exploited. But our concern is that the provision in the proposed section 233 of the Migration Act is going to cause criminalisation of a link between two very vulnerable groups.

Firstly, we have to accept that there are a lot of vulnerable people in our region—people in persecutory states stretching from Afghanistan all the way to North Korea. Also, we have vulnerable groups of long-term asylum seekers in protracted situations. I have just completed my research on asylum seekers in the Asia-Pacific. I visit Indonesia regularly, but I have also spent a lot of time in Malaysia and Thailand. There are groups there who have been in protracted refugee situations for 10 or 15 years, and some of those are dependent on support from their families not only in Australia but in America, Canada and Europe.

The council is also concerned about the extension of the ASIO power, which will make the vulnerable refugee community—the recently arrived people who were recently granted protection visas—very frightened of what may happen to them in Australia and whether security forces will be listening to them in Australia just as they were in the country that they have fled.

We are also concerned about the joint impact of mandatory sentencing on asylum seekers and the fact that the 'no material benefit' provision would be removed. That has the impact of criminalising and providing a long term of imprisonment for a person who is himself a refugee and who organises another group of refugees to come to Australia. For me, the classic example would be Herman Wainggai and the 43 West Papuans who arrived here in 2006. This legislation appears to me to be so broad and uncertain that Herman Wainggai would have been imprisoned because of what he did in organising the group of students and helping them to make their way, with him and members of his family, to Australia over quite a long period of time.

I will just go back to the material support provisions. The Refugee Council is very concerned that 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. That money may be for medical care. It may be—for example, in Indonesia—for some of the children to go to school. It may be, in Malaysia, for people to have more than just the basic food or to pay bribes to Malaysian police. 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. It seems for one thing that it would be a very hard thing to prove in a criminal

court, and therefore it seems wrong that there is no clear intent provision—that the person who is sending the support has to intend that it will only be used for organising people smuggling.

Now, it seems that these provisions fly in the face of what refugee communities do for their relatives. They do provide that, and this is something that various countries are totally dependent on. Certainly, in Pakistan and in Iran, refugee communities are dependent on money from the diaspora, and most of that money is not used for people-smuggling. From my own refugee experience, because I am a Hungarian refugee, I know my community sent a lot of money to people in eastern Europe. The money was never intended for people-smuggling, but somebody may have got a false document one day and so people could have been caught by that. So I think we have got to be very careful about making sure that innocent people who are acting with the best intentions to help their family, people who are often very traumatised by being the survivor—the person who was sent out of their country and therefore feels a lot of guilt—are not then made to feel worse and their psychological distress is not compounded.

In connection with that, I am very concerned, and the council is concerned, that the increase of ASIO's surveillance powers might reduce Australia to the standing of some of the persecutory countries that these people have fled. Many people will tell you, 'Yes, I spoke to my mother last night.' 'What did she tell you?' 'She just said things are bad.' 'Why didn't she tell you what happened to your brother who was taken by the Taliban?' 'Oh, we're all too frightened to talk on the telephone.' Too often, people are scared to speak on the phone because of who may be listening, and they are scared of that in Afghanistan, in Indonesia, in Malaysia, in Thailand and certainly in Burma. I would hate it if people here were frightened about speaking on the telephone to their relatives because Australian security forces might be listening to things like, 'I'm going to send you \$500 when I get paid next month.'

These are our concerns; they are the humanitarian concerns. One particular group I would like to draw to your attention who I think could fall foul of the material support provisions are young unaccompanied minors. The boy who is considered to be at greatest risk is sent out of the country. He arrives here in Australia, he often knows nobody and he desperately wants to do what he can for his family. His mother—because dad is usually dead—and younger siblings could be anywhere from Jordan through to Thailand, and this person desperately wants to send money to his family. This person also tries to do a humanitarian offshore application to bring his family members here, but you well know that those applications are very difficult. They are long, they are often refused and they have to be repeatedly submitted. It may take six or seven years before the family can be reunited. And that money is being sent all the time.

The other concern I have—and it is not clear in the legislation—is that there is an offence of assisting people to get false documents. Now, false documents are the way a lot of Burmese are able to actually leave Burma. There are a lot of countries where a false document is the only way that you can get out—or you have to climb over mountains and go through jungles. Is it providing material support to a people smuggler if a person gets a false document to do the first step of the journey but, five or six steps down the journey, there is a people smuggler involved? To me, the chain in people-smuggling is not clear. People do not necessarily hire a people smuggler, when they leave their home, for that person to take them to Australia. If they do, that person is likely to arrive in Australia by plane; that is my understanding. It is more likely that people who come by steps and stairs and engage a people smuggler in Indonesia are going to do

that without really understanding the process until they get to Indonesia, and maybe there is no material support chain for them.

The Refugee Council is very concerned that the extension of ASIO powers may also have an unwarranted impact on the processing of asylum seeker applications. As you well know, PV applications should be completed in 90 days. That is not happening at the moment. One of the reasons it is not happening is that everybody has to go through an ASIO check—and that is exactly as it should be: those ASIO checks are linked with criminal activity and terrorist activity, and the groups who are having to wait the longest periods are those from countries where there may be involvement with terrorist groups. I do not think that anybody in Australia would object to that. It is something that the Refugee Council does not object to. My concern is that, if ASIO is also going to be involved in monitoring material support and people-smuggling, is that going to put another layer of surveillance and checking in this protection visa application process? I would like to remind the committee that I have clients who have been waiting for an ASIO check for over a year. They are Indonesian citizens. So it concerns me that we could have people waiting for 18 months for an ASIO check who may even fail the ASIO check because they have been in contact with and sending money to people overseas, not for people-smuggling.

So the Refugee Council's view is that the bill has too many problems in it. There are too many concerns in the material support provision. We would like the Australian protection visa holder to think that they can communicate with their family overseas and provide them with assistance.

We are also concerned that with there is no disclaimer with the mandatory sentencing provisions such that, if a person is found to be a refugee, and has organised a group of five people to come to Australia, there be some way that a judicial determination can be made that there are mitigating circumstances in that situation.

CHAIR—Thanks, Dr Biok.

Senator PARRY—You mentioned the ASIO checks taking so long. Is it also a requirement that ASIO verify identification?

Ms Curr—That is a separate unit.

Dr Biok—Yes, there is a departmental unit that does that. I am not sure—

Senator PARRY—But is that part of the overall ASIO package of checks?

Dr Biok—My understanding is that that is done quite early on in the process. The ASIO checks will then come in after a person has had their immigration interview. If the interview is considered to be successful then the ASIO checks are triggered. It is hard to know, because this is never transparent.

Senator PARRY—It is something we can put to ASIO later. Moving to a different topic, you mentioned children coming by plane. I assume they are placed on the plane either with their correct identity or an assumed identity at the point of departure and arrive in Australia and are detected as being an illegal immigrant at that point—or are self-declared. You are involved with the care of these people at some point after that process.

Dr Biok—I work at the Legal Aid Commission. At the moment I have a 15-year-old client. They are referred to us by the department of immigration for us to take them on through the Immigration Advice and Application Assistance Scheme.

Senator PARRY—Are they people from more affluent backgrounds?

Dr Biok—No. This is something that concerns me about the ‘material support’ provision. If families are concerned about their children—and it is often the oldest boy—then they will do whatever they can to get the money together. It is not family in Australia or overseas who will be sending all of the money for the people-smuggler. Mum will send all of her gold. For my most recent client they sold their whole farm to raise the money. So the money is not dependent on somebody send it from overseas.

Senator PARRY—Have you had experience representing people who have been smuggled in through boats?

Dr Biok—Yes, in the past I have.

Senator PARRY—Did you get consequent evidence of horrific journeys and difficulties in getting here and lives placed in danger?

Dr Biok—Most certainly.

Senator PARRY—Do you think it would be wise that our borders were secure enough and there was a strong enough deterrent to prevent that embarkation in the first instance?

Dr Biok—Quite honestly, I have spent a lot of time in Indonesia and my concern is that there are people there who are undertaking this trip who have no idea of how long it will be and the risk they are undertaking. There is a real problem in that you have people who are not seafarers—Iraqis and Afghans, let us say—who get off a plane in Malaysia and then take quite a short boat trip to Sumatra. When they get on the boat again, on the southern coast of Java, they think it is going to be the same trip.

Senator PARRY—So because people are attracted to Australia—and we can argue why there is an attraction, but let us leave that to one side—there are people who are using this as a business venture and undertaking a criminal activity. If there were a strong enough deterrent to prevent people from leaving Indonesia to take this perilous journey—again, we will not argue what the deterrent should be—wouldn’t that be a better outcome?

Ms Curr—I have spoken to a number of young people in Indonesia. Geoffrey Taylor did some research up there which surprised us. 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. UNHCR has just submitted the resettlement numbers for 2007. What that means is that anybody who arrived after 2007 is not even in the pipeline. As you would know, it was in 2008, 2009 and 2010 that there was a huge spike in the number of Afghans in particular heading

towards Indonesia. With the current number of 2,500 registered in Indonesia, which was disclosed by both DEPLU and UNHCR in the past week, 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. When I talk to these young people and urge them to go to the UNHCR and register, they tell me they sleep outside the building in order to be among the first five or 10 a week—because UNHCR only register up to 20 per week from the community. They then have to wait six months for an interview and up to 12 months for a decision. That is the problem and that is why people are availing themselves of the informal transportation methods. There is no way for them to get out of Indonesia and, if they get picked up, they are put into detention, with the conditions I described before.

Senator PARRY—I do not want to have a debate about the policy, but this is bordering on a different policy—about point of departure. We are examining legislation that is trying to strongly deter people-smuggling activity. The name reason for the legislation is the protection of the life of people who are in danger of dying at sea, not to mention the inhumane conditions that some of them face. I am not disputing anything you have just said, but would you agree that having a stronger deterrent factor, as there is in this bill, would reduce the perilous nature of travel and reduce the number of people travelling by that means in the first instance?

Ms Curr—I do not think that Australia, a human rights respecting democracy, could ever legally put in place sufficient deterrence to stop these young people from taking the risk. We can never compete with what the Taliban have done to their families, we can never compete with the conditions of detention centres in Indonesia, because we are not that sort of country. So, short of sending the Navy out to shoot people on the boats, which is not going to happen because Australia is not that sort of nation, it is impossible for us to deter people from taking that risk.

Senator PARRY—I will just conclude on this. During the 2002-2003 financial year zero people arrived by boat into Australia. There were 82 the following year and zero the next year. So I think that it indicates that with a reasonable deterrent policy we can stop people making the perilous journey, and that is the premise of my questioning.

Ms Curr—Senator, I just draw your attention to our submission—and I will not take up the time—pointing out that those numbers are not correct. When you read this submission you will see that in 2002 there were quite a number of people who attempted to reach Australia, but they were not counted because the boats were pushed back. Some boats sank and the people were transferred and taken to Nauru. Those figures were not included in the figures of people reaching Australia. The ones from Nauru, of course, did reach Australia, but that was five years later.

CHAIR—You are referring to pages 9 and 10 of your submission, Ms Curr, aren't you?

Ms Curr—Yes, that is right.

Senator PARRY—I am aware of that, but the numbers are relatively low and I think that a good deterrent policy would assist in saving countless lives.

Dr Biok—Senator, I suggest also that what would assist in saving people's lives—and I agree with you, I think that we need to do what we can to stop a lot of these boats from leaving—is to try to educate people in Indonesia and Malaysia and also to make their lives more worthwhile

there. There is a lot of connection now between the Australian government and the Indonesian government. I deal quite regularly with people in the Indonesian Embassy and try to provide them with some training and assistance on refugee matters. If people did not feel that this was the only alternative, if someone could actually go to asylum seekers—and there are some wonderful human rights organisations in Indonesia—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.

Senator HANSON-YOUNG—In relation to the evidence about ASIO assessing everybody and coming up with zero security threats in terms of people who have sought asylum in Australia—my understanding is that there have only been five in recent months and they of course have been detained on Christmas Island. Putting that aside, the explanatory memorandum fails to acknowledge the big issue of how many people in Australia are by virtue of their aiding and abetting providing some type of material support to people smugglers, as opposed to those who are actually making money out of this, the people smugglers, those who are actually not based in Australia or Australian citizens. In fact these people are at the various points through which people travel. I fail to see how this bill is going to act as a deterrent to somebody who is operating their people-smuggling activities from Kuala Lumpur, for example. Do you have any information in relation to the stories of the people you work with to suggest that my reading of the lack of evidence in the explanatory memorandum of the bill would be somehow wrong?

Dr Biok—The ASIO checks would not necessarily show this up. Their numbers would not show up the people who have been refused. If somebody fails the ASIO check, then they are not granted a protection visa—

Senator HANSON-YOUNG—I realise that.

Dr Biok—and then they go through to the Administrative Appeals Tribunal and try and dispute—

Senator HANSON-YOUNG—But ASIO's own evidence at estimates suggest zero in the last year. That is what I am saying. Obviously it is not those that are not released into the community, but those who are given assessment—and they have to assess everybody. My understanding from questions asked of ASIO directly is that last year, for example, the 2008-09 year, there were zero failures in passing the test.

Dr Biok—I am not aware of any. Certainly, I have sat in on ASIO interviews with my clients who have been asked about various things, including how they got here. Nobody would dispute that. Certainly the Refugee Council would not question that that is not a proper place for ASIO to be. I agree with you, though, that it is not the money and the people in Australia who are the problem with people smuggling; it is the emergence of criminal networks within our region. This is something that has happened over the last decade. It is something that needs a multilateral and multinational approach. It is something that I do not think this bill will have an impact on. By criminalising material support at the low level, that is who will be caught—low-level people. It will not have a big impact on it, unfortunately.

Senator HANSON-YOUNG—Picking up on Senator Parry’s questions around needing a deterrent to stop people from taking this awful trip across the seas, which is dangerous, and landing in the situation where they have perhaps been falsely promised some type of visa that they are not going to necessarily get—there are a whole lot of things they have to do in order to prove that they are in genuine need of protection—are you suggesting that, in this particular bill, there is really no deterrent because it is not focused on the right people?

Dr Biok—There is no deterrent. Regarding the material support provisions, that is not sending \$500 to your family in Peshawar. That is not enough for somebody to be able to engage a people smuggler to get them by plane from Pakistan to Australia. There is a lot more money required. It is just going to get at people sending small amounts of humanitarian relief. The real deterrent is if there were greater cooperation between our law enforcement agencies and regional law enforcement agencies to stop this. It is very clear that you can travel around Kuala Lumpur and Jakarta and see these networks operating. It is something that the AFP and ASIO have to work with the Indonesian and Malaysian police on. That is where the greater deterrents would be. As said before, asylum seekers who are stranded for long periods of time need to have lives that are a little bit more worthwhile so that they can work and their children can go to school so that they are not marginalised and put into detention, both in Malaysia and Indonesia.

Ms Curr—Could I also add a point about providing refugee assessment at source. Our current intake, by and large, comes from Afghanistan. If we were provided with an assessment at source in Pakistan, then I am not saying it would stop all the boats, but there would be people who are not eligible for refugee protection and they could receive that advice and be told that there is no point in going because they are not going to be eligible. For those who are eligible, if they were given a realistic assessment for resettlement, then they would not be availing themselves of the people smugglers and their families would not be selling everything they own in order to get someone out. As for the Indonesian intake, taking 50 people per year from Indonesia when the numbers are currently so large is not a realistic option. I know that people will talk about pull factors, but there are ways and means to deal with it other than deterrents, and that is giving people realistic options for survival.

Senator BARNETT—Ms Curr, you mentioned in your opening remarks the role of al-Qaeda and terrorists. Are you concerned about the story in the *Sydney Morning Herald* yesterday, on the front page, where an al-Qaeda recruit, described as the No. 1 terrorist threat to America, was engaged by a Sydney youth group to address hundreds of young people—

Ms Curr—You probably had a lot of speakers this morning. I have not mentioned al-Qaeda at all. It must have been someone else.

Senator BARNETT—Nevertheless, would you have concern about the fact that this No. 1 person on the CIA kill list in the USA has been here teaching and preaching to Australian students?

Ms Curr—I am sorry, Senator. I have been looking at this legislation and its effect on the Australian community. That is another matter. I do not know that it is relevant to this.

Senator BARNETT—No. Fair enough. Let us go on. Are you familiar with the reports in today’s media that, as a result of the resource pressures on Immigration officials, these officials

have been advised to ‘back off all non-essential visa checking’? That is on the front page of today’s *Australian*. If that is the case, if it is true, would you be concerned about the ability to properly manage Australia’s immigration system and ensure that the people that you think should be cared for and assessed can be properly, quickly and efficiently processed?

Ms Curr—They are actually two separate groups. I was contacted by the *Australian* concerning that story. My understanding is that, if that is correct, somebody has been told not to pick up fruit pickers and those who have overstayed their visas. Obviously, they are resource issues for government. I do not believe they present any threat to Australia, but they are obviously resource issues. But we are not talking about fruit pickers and overstayers. We are discussing refugees who are fleeing for their lives and the modes of travel they use and the inherent dangers therein. I do not think that the fruit pickers have much to do with that.

Senator BARNETT—I guess the issue, Ms Curr, is that today it might be fruit pickers but tomorrow it might be refugees; you do not know. We have already had complaints and concerns expressed by ASIO. You now have a burgeoning Christmas Island population and people coming into detention centres on mainland Australia. Clearly, the resource issue, as you call it, is a very serious one, and Immigration will need to make decisions about where they apply their resources and where they do not. We will be asking the department about that this afternoon, but I am really asking you if you are concerned. You have obviously thought about it and, as you say, it is an issue for fruit pickers. I am just asking if you think it is a concern more generally.

Ms Curr—I am more concerned about refugees suffering loss of life such as by drowning en route between Indonesia and Australia, and about people being detained for lengthy periods of time when they have suffered torture and trauma. My concerns are more about the refugee and asylum seeker group. The fruit pickers and the overstayers are easily dealt with. I believe 40,000 to 50,000 of them come from the UK. They have passports in hand and they can very easily be put on a plane and sent home, as many thousands of Australians are sent home from the UK when they in turn have overstayed their visas. They do not present a security risk. Australians have a great habit of overstaying in the UK. I do not know your age group, but I remember well my age group doing so. My concern, though, is about the refugees, their possible loss of life, their ability to be resettled and how Australia is going to respond to this.

Senator BARNETT—You have specific concerns about refugees, or alleged refugees, and those seeking asylum, but what about ASIO’s concerns? I think Dr Biok said earlier today that some of these assessments take a good deal of time, and you expressed concern and dismay about the length of time they can take. ASIO have expressed concern about their lack of resources to undertake those assessments. Do you agree that that delay could be reduced markedly if they had adequate resources, and do you think that is something that needs to be attended to?

Ms Curr—I have looked at ASIO over the last decade, and there has certainly been a marked increase in its allocation of funding et cetera. Obviously, we need to have ASIO checks. Sometimes it does seem an inordinate amount of time to investigate a young Afghan widow or, as I experienced with recently, some teenagers from Darfur. I understand that it is difficult for them to get information on people who may not have documents, including birth certificates, particularly in the instance of, say, the Hazaras. Their ... is the equivalent of a birth certificate

and not always given to them. They do not even know the year they were born. I understand there are difficulties, but—

Senator BARNETT—I make the point that ASIO has been given increased responsibilities under this bill. I have the forward estimates for ASIO here. In 2008-09, and going from year to year, the funding figures are \$353 million, \$409 million, \$413 million, \$417 million and \$419 million. I do not consider those exorbitant increases at all. Now they will have increased responsibilities under this bill. Don't you think it is fair that perhaps there should be consideration given to increasing their resources and their funding support?

Ms Curr—Perhaps ASIO could spend a little more time doing the vital security checks around immigration and a little less time sitting around in coffee shops watching Australians, as I believe is being promoted in the advertisements we have seen trying to lure young Australians into ASIO. They are told that they will spend their time sitting in coffee shops watching Australians and listening to Australians' conversations. We do not want to become a culture of spies and whispers.

Senator BARNETT—We will ask ASIO about their role in coffee shops this afternoon.

Dr Biok—I think ASIO is in sore need of more resources. It is not only the manpower to get the checks done; also, I have sat in on interviews for people who are coming and the interviews take a very long time because the officers are very young and often not very experienced and do not have a lot of pertinent training in how to go through the process of questioning and talking to somebody who is from a non-English-speaking background, is often illiterate and is quite traumatised. I am not putting tickets on myself, but what I could do in a two-hour interview with a good interpreter ends up taking perhaps four hours. If that is being compounded all the way along the chain, this is why they need a lot more resources. I think the resources are more manpower but also better training.

Senator TROOD—You have both raised this issue of humanitarian aid and the concerns that these provisions might capture aid. I wonder whether you could refer me to the particular sections of the bill that are of concern to you as they relate to this issue.

Dr Biok—It is proposed section 233D, relating to material support, of the Migration Act. (1)(b) reads:

... the support or resources aids the receiver, or a person or organisation other than the receiver, to engage in conduct constituting the offence of people smuggling.

Senator TROOD—There are two parts to this. It is about material support, but it is also about assisting people smuggling.

Dr Biok—Yes, but the people smuggling may come right at the end of the chain. The aid may have been sent for generic purposes. You may be sending money to your family in Thailand because they are in need.

Senator TROOD—I would be surprised if that were the intent of the bill. But that is your concern; you want clarification of that?

Dr Biok—This is exactly our concern—that it is so unclear. There is no clear intent provision there. Perhaps there could be a part (c), which could provide that the support or resources were intended by the sender to assist in constituting the offence—a clear content provision. As it stands at the moment, anything would be—

CHAIR—Dr Biok, is the explanatory memorandum not clear enough for you?

Dr Biok—No.

Senator TROOD—Do you concur with that, Ms Curr? Do the concerns you have with the humanitarian aid relate to 233D?

Ms Curr—Yes, and also the fact that this legislation builds on the protocol against smuggling of migrants by land, sea and air, but in that protocol they make it very clear that the primary focus is to target organised criminal groups who receive a financial or other material benefit. They say that the drafters did not intend that the protocol apply to others such as family members or charitable organisations who procure the illegal entry of migrants for reasons other than gain. That distinction is not maintained in this legislation.

Senator TROOD—Thank you for that. I have a question about ASIO powers. It seems to me, Dr Biok, from reading the Refugee Council's submission, that you are acknowledging that perhaps there is a need for ASIO to have these powers but you want them restricted in various kinds of ways. Is that an accurate representation of your position?

Dr Biok—It is. We accept that ASIO has to be involved in doing checking before people are granted a visa, and this applies to everybody who applies for a visa to remain in Australia, not just to refugees. Our concern is that, with the material support provisions, which are targeting asylum seekers and people who have recently been granted protection visas, there is a real fear that ASIO powers are being extended in an unnecessary way. I arrived to hear the end of Helen Donovan's submission to the committee and what she had to say about the fact that ASIO has those powers under other heads, so it need not have them in this new extended form.

Senator TROOD—Thank you.

CHAIR—We are at the end of our questioning so can I thank you, Ms Curr, for your submission, your knowledge and the time you have provided for our committee today. Similarly, Dr Biok, thank you very much for your submission and your time today.

Ms Curr—Thank you, Chair. I wonder if there is time for a small addition. I have a concern about the sentencing of the Indonesian fishermen. When I was in Indonesia in January meeting with diplomatic security, that was obviously an area of great concern for them. In fact, the only time they became heated was when they said to us, 'What are you Australian advocates doing about our fishermen locked up in your Western Australian prisons?' 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. I think Australia is a better country than that.

Senator FEENEY—I have a quick question about that. Would you hold the same view if those same impoverished fishermen were moving drugs rather than people into Australia?

Ms Curr—No, I would not, but they are not moving drugs and they are not people trafficking—that is, gaining a material benefit by transporting people to where they will be exploited. What they are doing is facilitating the transport of people who are vulnerable and can find no other way to safety.

Senator FEENEY—Thank you.

Ms Curr—Thank you, and thank you very much for your patience and for giving me the opportunity to talk over a phone line.

CHAIR—Thanks very much to both of you.

Proceedings suspended from 1.04 pm to 2.05 pm

CONNOLLY, Mr Chris, Board Member, Australian Privacy Foundation

CHAIR—I formally reconvene this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee. I welcome Mr Chris Connolly, from the Australian Privacy Foundation. Good afternoon and welcome to our hearing.

Mr Connolly—Good afternoon.

CHAIR—Thanks for your submission. The Privacy Foundation submission has been lodged with us and we have numbered it 15 for our purposes. Are there any amendments or changes you want to make to that?

Mr Connolly—There are no changes.

CHAIR—I invite you to make a short opening statement and we will then go to questions.

Mr Connolly—Thank you, chair and senators. The Privacy Foundation is a non-profit, non-government organisation dedicated to the protection and promotion of privacy and civil liberties issues. We have only had a short time, as have other parties, to consider this bill, so I apologise that the submission is fairly brief and that my own comments today might be quite limited. I will try and be of as much assistance to the committee as possible.

Overall, the Privacy Foundation supports the objectives of the bill. However, as we have raised in our submission, we have a couple of minor concerns regarding surveillance and a more significant concern regarding the extension of ASIO jurisdiction.

I will mention ASIO jurisdiction first. 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. This contrasts, for example, with my own experience looking at ASIO's powers in the lead-up to the Olympic Games in Sydney. There were some very minor extensions to ASIO jurisdiction and they were the subject of almost 12 months of discussion papers, debate, consideration by the Joint Intelligence Committee et cetera. Yet here we see ASIO's powers being extended to border security without the same level of debate. Why is a privacy advocacy organisation interested in that issue? ASIO is one of only three organisations—ASIS and ONA are the others—who enjoy a complete exemption from the Privacy Act. Most government agencies have at least some coverage under the Privacy Act. ASIO does not, so we always take a close oversight of any extension to ASIO's powers.

ASIO's current jurisdiction is a list of very serious offences, basically violence against individuals or the state motivated by politics, espionage and attacks against the Defence Forces of Australia. So to suddenly see it extended to border security, which in many cases is a purely economic crime without the same consequences as terrorism et cetera, seems to be quite a stretch. And the Privacy Act exemption will continue to apply even though the offences are much less significant. We believe there are numerous other organisations who have responsibility for border security, and those organisations are covered by at least parts of the Privacy Act. It is our view, therefore, that this extension is quite high risk and should be subject

to much greater public scrutiny. I do not believe the public is aware at all that this is going on. Overall, from a privacy perspective, we do not want ASIO to have its powers extended in this way.

I mentioned that we have got a couple of other minor concerns, which will only take me a minute to touch on, and they relate to surveillance. The first of those concerns is that there is a proposed amendment to the Surveillance Devices Act. Under that act agencies can apply for an emergency authorisation to place a surveillance device—a camera or a listening device. That is a power that privacy and civil liberty groups oppose. We do not believe that in a modern society with an accessible judiciary and modern electronic communications such as SMS, email et cetera, there is any reason why we should have an emergency power for authorising a surveillance device. It should be accessible to agencies to obtain a warrant from an independent party. Those emergency powers mean that for 48 hours agencies can use a surveillance device without independent oversight. We do not believe that is in Australia's interests. We believe that leads us towards being a surveillance state. It is a way of sidestepping a lot of the privacy protections that we have.

In the bill currently before you, there are some provisions that would extend the offences for which you can get a surveillance device using the emergency provisions. We oppose that extension. We particularly oppose the extension to the offence of people smuggling where you smuggle more than five people. In that case, there is no emergency. It is not one of the aggravated provisions where there is an imminent threat or risk to the life of the individuals involved. It is just that it is a larger group of people than the non-aggravated offences. So we are not supporting the extension of the emergency authorisation for surveillance devices. We would prefer to see all of those done subject to a judicial warrant.

There is also a tidy-up provision relating to the telecommunications interception act warrants. We accept that the bulk of that provision is in fact just tidying up and attempting to achieve some consistency between the information that needs to be provided for a warrant under the interception act. However, we are concerned that the extension covers a proposed offence in section 233E, which to us just 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. It might be an offence, but we do not see it as being a serious offence or the type of thing that would justify a telecommunications interception warrant being issued. We are surprised to see that it is purported to be subject to TIA warrants in the current proposal. We can see that it may be an unintended consequence or a drafting error, but we would urge the committee to look at that and see if that is something that parliament intends. Telecommunications warrants are usually reserved for major organised crime, drug dealers, terrorists et cetera. Are we really intending to extend them to harbouring and concealing non-citizens, which to us appears as a significantly more minor offence compared to the others?

We have also looked briefly at the foreign intelligence provisions that are before you in the bill. On paper they look acceptable, but again this appears to be a very major change to the direction of our intelligence jurisdiction to change from intercepting and gathering intelligence, for example, on foreign states to suddenly including foreign commercial organisations, private individuals et cetera. It just strikes us that it is unusual that it is tacked on at the end as a fairly

minor part of people-smuggling legislation and is not the subject of a separate piece of legislation with its own discussion and its own consideration. Having said that, we do not actually oppose the provisions as they are currently drafted.

My final point, and this is not purely a privacy point but it is one that is discussed in great detail in the broader non-government civil liberty movement, is that there are a few offences in the bill that are supporting offences where you are not actually engaged in people smuggling but you are the supporting individual—for example, proposed section 233D. Our view and the view of many others is that these are unnecessary. The criminal law already allows for offences of aiding and abetting criminal activity. They are very controversial. They have failed in high-profile cases, such as the Dr Haneef case. Our understanding is that they are the subject of ongoing review in other contexts, such as terrorism, and we do not support supporting offences which expand liability, even though there is no intent on the part of the individual and no actual criminal act on the part of the individual. We do not believe that they should be included in this bill at this time and would suggest that their inclusion be postponed until the review of supporting offences in terrorism legislation at least draws some conclusions about whether or not they are workable in practice. I hope that has been useful. I apologise for the brevity of our submission and my comments, but I am happy to answer any questions.

Senator PARRY—You just mentioned that you regard people smuggling as a purely economic crime. We could say the same about murder for money being a purely economic crime, if we wanted to look at it that way. What is your response to the fact that people's lives are being placed in danger and a lot of people die because there is an avenue open for people to use the services of people smugglers? That does not even go to other things such as servitude and things like that. Do you have a response to my suggestion that it is not a purely economic crime?

Mr Connolly—Thank you for the question. I am fairly confident that I did not say 'purely economic crime', but if the *Hansard* reflects that—

Senator PARRY—I think the *Hansard* will reflect that you did, because I wrote it down as you said it.

Mr Connolly—My intention was to say a 'largely economic crime' compared to terrorism, which is politically motivated, a tax on the Defence Force et cetera. I believe that we have an intelligence agency in ASIO which has very significant powers, complete exemption from a lot of the oversight that other agencies have and we need to be careful about limiting—

Senator PARRY—I take you back to the context of when you said that. You did not want ASIO to have increased powers because you thought this was a largely economic crime—I am happy to give you that concession now, but earlier you said 'purely'—but it does involve death. It does potentially involve the death of quite a large number of people. Does that give you more gravity to say that ASIO is more warranted?

Mr Connolly—I do not believe so, partly because there are so many other agencies which also have a role to play and a responsibility for border security, and very much because the entire focus of the intelligence agency for many years has not been on that type of criminal activity; it has been on much more significant threats and risks to Australia as a nation, to our sovereignty,

to violence against individuals and Australian citizens et cetera. Of course I accept that there are enormous risks in people smuggling and we do accept the overall objectives of the legislation. We just do not believe that ASIO, with all of its special powers and exemptions, is the correct agency to suddenly acquire border security responsibilities.

Senator PARRY—Let me take you to another comment of yours. You mentioned harbouring or concealing noncitizens. You regarded that as being a quite minor aspect in the scheme of things. Without someone to harbour or conceal, a people smuggler has less of a chance to bring people into the country, and without people who want to come here illegally they do not have as much of a chance. You could get someone who was consistently doing that. You might have a regular harbourer or concealer who becomes quite an integral part of the chain or someone who is known to assist people who wish to remain in the country illegally. I think you placed that in the context of: one person might harbour one person—like a sister for a brother, or something like that. This could also cover—and I hope you would concede this—a regular network of harbourers or concealers, without the possibility of telephone interception and other means of surveillance, and those people might not be detected as readily as they could be. Would you concede that?

Mr Connolly—I concede that there will be a large scale and quite a diverse range of people who engage in harbouring and concealing but that the nature of the offence, in my view, is likely to be, in the majority of cases, quite minor compared to the organisation that is engaged in the people smuggling. It will pick up a lot of cases and a lot of individuals where it will be an offence, but our view is that it would be relatively minor because it would be borne out of, potentially, just desperation or links with family members et cetera. On plain understanding of the severity of all the offences listed in the current bill, the harbouring and concealing ones are minor compared to some of the others. I note that legally the penalties are all the same—10 years or a fine—but I would imagine that, before the judiciary, the concealing and harbouring offences, especially where it was an individual, would be treated much less seriously.

Senator PARRY—That may be part of the judgment and part of the penalty being handed down, but the harbourer or concealer or multiples of those could form part of this organisational network and part of a serious and organised crime network. That might be the entry point. Without the ability to at least surveil or take some form of evidence or intelligence in relation to telephone interception and the like, that might not provide the entry into breaking a people-smuggling ring. We cannot just break a little bit and say, ‘That doesn’t count because it seems to be minor.’ That could be the actual entry. That is how a lot of investigations work, by starting with discovering small pieces of information at the small end of the scale.

Mr Connolly—In my view that is a decision for the government and perhaps this committee to undertake a bit of a balancing act here: how many people engaged in very minor concealing activities or harbouring activities are going to be subject to surveillance before one of those leads leads to a breakthrough, as you suggest, in the organised part of people-smuggling. I think that for a lot of individuals and some organisations, churches et cetera, who occasionally end up caring for a noncitizen the idea that they would be the subject of surveillance is not acceptable.

Senator PARRY—I will conclude on this point. What you are saying is, ‘Let’s not police the good people harder for the sake of getting the top end of the scale.’ I suppose you would say: why should all us good people be restricted to 60 kilometres an hour just to stop the one or two

who want to do 80? I think that is the way of modern policing. Anyway, that is my view and that is your view. Thank you for expressing that.

Senator TROOD—On the matter of the ASIO powers, is it your position that ASIO should not be given any responsibilities in this general area of people-smuggling, border protection et cetera?

Mr Connolly—Our understanding is that ASIO already has jurisdiction over, for example, a border security incident where there is a link with their other powers such as terrorism or a significant threat of violence. So there may well be cases, and they currently have a role in security vetting of some people who arrive in Australia. But it is because of those other links, because occasionally there might be an extreme case. It is not our view at all that that means that they should have complete *carte blanche* responsibility and be able to extend their powers to all matters covered by the term ‘border security’, because there is such a broad term. If you look at the list of their current powers, it includes espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia’s defence system or acts of foreign interference. That list to me is on a completely different plane to border security. It may be that sometimes border security has a crossover with one of these. It could be promotion of politically motivated violence. That could be a very rare case. ASIO already has powers if that is the case.

Senator TROOD—The breaching of one’s border involves the breaching of one’s sovereignty, though, doesn’t it?

Mr Connolly—I think that is quite an extreme position. Australia has signed numerous international treaties and has obligations regarding the treatment of refugees et cetera. We do not regard every breach of our border as a breach of sovereignty. We recognise that Australia is part of a complex globe which has a lot of people movement. I thought this bill was aimed at people-smuggling and not at classing every possible breach of the border as a breach of sovereignty.

Senator TROOD—What do you say to the proposition that could perhaps be put that, because ASIO is in this area already, there is some value in clarifying the extent of its powers in the area?

Mr Connolly—I accept that the modern form of border security, and law enforcement generally, is a whole-of-government approach with multiple agencies sharing information et cetera. We just need to remember, though, that most of those agencies are subject to the Privacy Act and effective independent oversight. ASIO has been exempted from that because of the serious nature of these offences—espionage, sabotage, et cetera. So from a privacy point of view we do not accept that we can simply say, ‘ASIO is there; it’s convenient if we can use its intelligence powers here as well.’

Senator TROOD—There are parliamentary processes for scrutiny of ASIO’s activities, of course.

Mr Connolly—Yes, but they are—

Senator TROOD—They may not be in relation to the Privacy Act.

Mr Connolly—I should concede that there are some guidelines that ASIO is bound to comply with, and some of those guidelines relate to privacy. ASIO reports to the Inspector-General of Intelligence and Security on its compliance with those guidelines, but it is not legislation and it is not an open, transparent process. I cannot complain to the Privacy Commissioner about ASIO.

Senator TROOD—Based on those remarks, I gather that you are not impressed by the addition of the word ‘serious’ to this definition—‘the protection of Australia’s territorial and border integrity from serious threats’. That, from your perspective, adds very little to—

Mr Connolly—Actually, we did look at that, and I was obviously pleased to see that it was there. But, in the context of the way that the bill has been presented and the explanatory memorandum and some of the discussion there, it appears clear that the intention—unless that is further clarified—is that all of the people-smuggling offences in the bill would now come within the jurisdiction of ASIO. That appears to be the intention. I am not sure if the word ‘serious’ removes that. If you are engaged in intelligence gathering, surveillance et cetera, you might not know if the threat is serious or not. It might be as simple as harbouring or supporting people-smuggling et cetera.

Senator TROOD—In relation to this problem of support of people-smuggling, did I understand you to say that you were of the view that the ‘aiding and abetting’ provisions of the Criminal Code were adequate to deal with these kinds of offences?

Mr Connolly—In both this context and the earlier context of the amendments to the antiterrorism legislation, we supported the view that we have ‘aiding and abetting’ provisions. If they are not working, we should perhaps be expanding and clarifying those rather than introducing new provisions of the type which are called ‘supporting’. For example, it has caused a lot of controversy in the sedition provisions; ‘supporting’ was debated there, in the context of the terrorism legislation. I guess we are surprised to see that it has come up again in this bill when our understanding is that it is being reviewed in those other contexts and, indeed, in relation to the sedition laws; quite major changes are proposed there. So we would prefer to see a comprehensive approach across all criminal laws regarding ‘aiding and abetting’. I understand that is the position of quite a few organisations who have made submissions to this inquiry as well.

Senator HANSON-YOUNG—Mr Connolly, when you outlined your major concerns in your opening statement at the beginning, you mentioned that part of the problem was that people have not been able to participate in discussing whether this is a change to the types of roles that ASIO currently have, and you referenced how extensive the debates have been. Has your organisation been consulted at all by the government departments in terms of putting this legislation together, or is this the first time you have had an opportunity to feed back?

Mr Connolly—This is the first opportunity that the Australian Privacy Foundation has had to provide feedback. I cannot speak for other civil liberties organisations that have a broader remit.

Senator HANSON-YOUNG—If you were to be able to suggest what it is that should happen in terms of being able to have a more extensive look, are you suggesting that this legislation would not go to parliament as yet, that you would want a more extensive inquiry? What were those comments directed to?

Mr Connolly—I was certainly surprised when I received the draft of the Anti-People Smuggling and Other Measures Bill to see that, right at the end—very briefly, in a couple of lines—it expanded ASIO’s powers to include border security. I think 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. As I said, when some fairly minor changes to ASIO’s powers were suggested to beef up security for the Sydney Olympics, there was actually quite a heated and lengthy debate with multiple consultations and a hearing of a different Senate committee.

CHAIR—We do not have any other questions for you, so I thank your organisation for the submission and the time you have taken to appear with us this afternoon. It is much appreciated.

[2.33 pm]

FRICKER, Mr David, Deputy Director General, Australian Security Intelligence Organisation

HERIOT, Dr Dianne, Assistant Secretary, Border Management and Crime Prevention, Attorney-General's Department

McDONALD, Mr Geoffrey Angus, First Assistant Secretary, National Security Law and Policy Division, Attorney-General's Department

CHAIR—Welcome. I remind you as we start this next session that the Senate has resolved that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy. There shall be given reasonable opportunity to refer questions asked of the officer to superior officers or in fact to a minister. This resolution prohibits only questions asking for opinions on matters of policy, and it does not preclude questions about explanations for policies or factual questions about how and when policies were adopted. I also want to remind officers of the department that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for that claim.

We have a submission from the Attorney-General's department, which we have numbered 8. Also, we have a submission from the Commonwealth Director of Public Prosecutions, which we have numbered 14. I understand it is a separate agency, but I draw that to people's attention. I am not imagining or assuming there are any alterations or changes to be made to that submission so I invite you to make an opening statement and then we will go to questions.

Dr Heriot—Thank you, Chair. I do not have an opening statement but I would like to address a couple of points which I think were made by the first witnesses. The Anti-People Smuggling and Other Measures Bill 2010 proposes no changes to the elements of the people-smuggling offence in the Migration Act. There is no requirement in that act that a smuggler obtain a benefit from people-smuggling and this has never had the effect of criminalising rescues at sea or activities as had been suggested for the reasons so clearly set forth by Ms Donovan. In regard to the proposed offence of material support, as it states at page 14 of the explanatory memorandum, 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. I think Dr Saul suggested that recklessness should apply but it is already embedded there.

CHAIR—Mr McDonald, do you have anything to add?

Mr McDonald—Nothing further to say except that I agree.

CHAIR—Mr Fricker?

Mr Fricker—No, nothing for me.

CHAIR—We will go to questions.

Senator BARNETT—Thank you for your submission to the committee and for your opening statement. I concur that it does some of the questions we have and we may draw down on a few of those shortly. With respect to your response to Friday's announcement by the government—a very significant announcement which does have a connection to the anti-people-smuggling objectives of the government—where you or members of your department consulted with respect to that announcement? I have the same question for ASIO.

CHAIR—I did draw to your attention that the announcement was between the minister for immigration, the Minister for Foreign Affairs, the minister for Customs, the Minister for Home Affairs and Minister Ludwig as well.

Senator BARNETT—So the question remains. Do you have an answer to the question?

Mr Fricker—ASIO had no significant material advice that featured in that policy. We are of course engaged with DIAC in providing security advice surrounding our work with Christmas Island more generally and, where we have advice relevant to the maintenance of security on Christmas Island, of course we do. I offer that as some incidental ongoing engagement we have with the immigration department but not specifically towards that policy announcement.

Senator BARNETT—So, with respect to the announcement on Friday, you were not specifically consulted nor was your advice sought?

Mr Fricker—In terms of the refugee policy, no. ASIO has no remit in that area.

Senator BARNETT—I can understand that. Mr McDonald?

Mr McDonald—There were clearly cabinet processes. All departments get consulted as part of cabinet processes, which makes it a little bit difficult for me to be very specific in an answer. There is quite an extensive process leading up to cabinet meetings and the like. That is the most I can say.

Senator BARNETT—So you were not aware yourself, but it is possible that the department was consulted specifically on that—or are you not sure?

Mr McDonald—The head of our department is obviously across all the different cabinet processes. I am not specifically. I obviously am not responsible for that specific issue but certainly I think the head of our department would have been aware of the cabinet process. We will take in on notice if you like.

Dr Heriot—I think it would be appropriate to say that normal processes of government applied to government reaching that decision.

Senator BARNETT—I have asked a specific question, so if you are happy to take that on notice and get back to me—it is a pretty specific question and I am hoping for a specific answer—I would appreciate it.

Mr McDonald—It is probably best that we take it on notice.

Senator BARNETT—Does the Attorney-General's Department have a view that that announcement is consistent with our international obligations and not in any way in breach of our international obligations?

Dr Heriot—The government is satisfied that the arrangements announced last Friday are compliant with our international obligations.

Senator BARNETT—In terms of the report on the front page of today's *Australian* that advice has been given within the department of immigration that government officials should 'back off on all non-essential visa checking', are you aware as to whether that advice is accurate? If so, can you describe the nature of the advice.

Dr Heriot—You have the advantage of me; I have not seen the story. But that is a question for the department of immigration.

Senator BARNETT—All right. Has similar advice been promulgated through to the Attorney-General's Department or, indeed, to ASIO?

Mr McDonald—I am not aware of any.

Mr Fricker—Not to my knowledge.

Dr Heriot—No.

Senator BARNETT—With respect to ASIO and this bill in particular, you have an increased area of responsibility under the bill before us. Have you been advised as to the likelihood of any increase in funding resources to assist you in your role?

Mr Fricker—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. The people-smuggling activities will form part of our prioritisation of general activity but they are not going to alter the key priorities that ASIO face. 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. Of course in the future the security situation may change, and through normal budget processes we may well come forward with resourcing proposals. But today we do not anticipate this as placing an additional resource demand on us.

Senator BARNETT—Related to that, was either the Attorney-General's Department or ASIO aware of the presence in Sydney of the No. 1 terrorist threat to America, Anwar al-Awlaki, in his address to Sydney youth?

Mr Fricker—Without wishing to go into any operational information surrounding ASIO's interest in that individual, my understanding is that the media reporting you are referring to is talking about streaming audio lectures not physical presence in Australia.

Senator BARNETT—Yes.

Mr Fricker—That individual is of course a person of security interest, but I would not go any further in terms of ASIO's activities around him.

Senator BARNETT—Is the department able to offer any further advice?

Mr McDonald—I cannot add anything to that.

Senator BARNETT—But you were aware of the presentation at the time?

Senator FEENEY—On a point of order, Chair: I am starting to wonder to what extent this questioning actually goes to the matter before us—that is, the bill. Obviously, if Senator Barnett feels that these questions are important the Senate has an estimates process. These agencies appear before estimates, and he will be afforded the opportunity at the appropriate moment to ask them. But that appropriate moment is not now.

CHAIR—I think there is a point of order there, Senator Barnett. I draw your attention back to the legislation we have got before us.

Senator BARNETT—Thank you very much for that. I was about to move on to the consultation process for the bill. Can you advise which stakeholders you consulted in the preparation of the bill?

Mr McDonald—Dr Heriot?

Dr Heriot—After you.

Mr McDonald—No, you go ahead. It is your bill!

Dr Heriot—There was consultation with government stakeholders.

Senator BARNETT—Dr Heriot, could you perhaps be a little bit more specific? Do you mean government departments?

Dr Heriot—I do, yes—and agencies.

Senator BARNETT—Could you identify them?

Dr Heriot—I would have to take the specifics on notice lest I mislead you.

Senator BARNETT—That is fine, but can we assume that there are no other stakeholders outside government?

Dr Heriot—No.

Senator TROOD—We cannot assume that or are you saying no?

Dr Heriot—No. I am racking my brain and saying no.

Senator BARNETT—You are saying no?

Dr Heriot—Yes.

Senator BARNETT—Can we assume that ASIO was consulted in the drafting of the bill?

Mr Fricker—ASIO certainly was.

Senator BARNETT—With regard to the protocol, can you advise which countries have criminalised the anti-people-smuggling activities? Do you have that list? I asked that question earlier today.

Dr Heriot—No, I do not have a list of countries that have criminalised.

Senator BARNETT—Is that something you could advise the committee on as soon as possible—specifically, countries that have criminalised it, countries that have expressed an interest in doing so and perhaps any advice you have on the timing of that legislative proposal in those countries?

Dr Heriot—I can take that on notice, to the extent to which we are able to discover that information. I am not aware whether there is going to be a central repository that will have that information, but we will make inquiries and we will provide what we can on notice.

Senator BARNETT—You will use your best endeavours.

Dr Heriot—Yes.

Senator BARNETT—Thank you for that. I will finish with the issue about the consistency between the Migration Act and the Criminal Code, which you touched on earlier. I think you provided advice on your support for consistency. Can you confirm that with us in terms of obtaining a benefit under the Criminal Code, which has now been removed under this bill? There was some discussion on that issue earlier today with a number of witnesses. Could you advise the committee as to the reasons for going down the track you have?

Dr Heriot—The two acts had arisen under different circumstances and there was a consequent element of inconsistency between them. The bill we primarily use to prosecute people smuggling is the migration bill, and we are seeking to amend the Criminal Code so it reflects that.

Senator BARNETT—So you did not consider changing the Migration Act accordingly to make it consistent with the Criminal Code. You have gone the other way.

Dr Heriot—Yes. That is the act we primarily use and it has shown to be an effective provision.

Senator BARNETT—Thanks for that.

Senator TROOD—I would like to start with the issue about material support which has been raised during the course of the hearing. The explanatory memorandum makes it clear that it is not defined, but you rely upon the United States jurisdiction providing some guidance at the very least as to what it means. I understood one of our witnesses to be saying that was the contentious matter within the United States jurisdiction. What do you say to the concerns that have been raised in some of the submissions with regard to the definition of material support that is in the legislation?

Mr McDonald—The idea of something being material is pretty common. Senator Parry alluded to it being a term that is designed to prevent us from having a huge list of possibilities and then missing something out on the list. There was some discussion about the ‘supporting terrorism’ offence, and in the discussion paper on that it was suggested we add the word ‘material’ because it did not actually have it. In the various submissions that we received on that, people thought it was a worthwhile way of expressing it. It is not just US case law; the 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. However, in the context of our discussion paper and the like there was some support, including from the Clarke review, for putting the word ‘materiality’ in there.

Senator TROOD—The proposition you are putting is that this actually narrows the definition, making it a stricter and more difficult test to meet than it would otherwise be.

Mr McDonald—Yes, and the court will police that.

Dr Heriot—There are some framework examples in the explanatory memorandum to indicate the sorts of indicia we would be looking at without limiting it to those sorts of circumstances, given the innovative and evolving nature of criminal enterprise.

Senator TROOD—I have seen those and they do indeed narrow the idea of support. But the witnesses we have had, as you know, have been arguing that the legislation has been drafted so loosely that, even though this is in the explanatory memorandum, it opens up all sorts of possibilities, which in their view is undesirable.

Mr McDonald—It is sad, but people commonly use the term ‘loose’ to describe legislation. We have the tension between drafting legislation in a clear way and in a way which can be reasonably presented in court and, at the same time, making it as precise as possible. But there is no question that the concept of materiality is quite a time tested way of providing some guidance to everyone in the process.

Senator TROOD—There is the perhaps related matter of the aiding and abetting powers that exist within Criminal Code, which was raised, the argument being, as you will have heard, that we have all the aiding and abetting offences and they would seem to be broad enough to cover at least the supporting of people-smuggling activity. Why is that not a respectable argument?

Mr McDonald—I was involved in putting together the Criminal Code. Chapter 2 of the Criminal Code has the general principles of criminal responsibility and, it is correct, aiding and abetting offences, which are under complicity, conspiracy and the like but they are general principles of criminal responsibility. 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, as was acknowledged by Helen Donovan earlier on, 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. At the end of the day, it is important that we just look at the wording of the offences to determine whether that is sufficiently culpable conduct and in this case parliament certainly took the view that in a number of different contexts there is the justification of having these support offences. With terrorism the offence has been used and prosecuted. Certainly, there have been no complaints about those particular incidences. The Haneef case was mentioned earlier but that is probably not so much the offence as other issues.

Dr Heriot—Some of the earlier witnesses mentioned that some people in the community may have trouble understanding what would be criminalised under the material support offence. The criminal support offence has a definition around it and some explanatory material in the end that seeks to define it. I think that would be far clearer in setting a scope or a concept of a criminal behaviour than expecting people to understand what would be part of a conspiracy or an abetting offence. It does have that sort of broader focus too. It makes it more clear what behaviour parliament would be seeking to criminalise.

Mr McDonald—It does sort of show what we saw today that there is probably a need for some educative effort which we found with the terrorism offences too. A lot of people read into them stuff that just was not there and in some cases people were keen to propagate that view. It is important that we ensure that well-meaning people are not misled by misinformation.

Senator TROOD—Does that proposition apply to the argument about retrospectivity as well which was my earlier remark?

Mr McDonald—It is an unusual view of the world. I have not personally heard of retrospectivity described in that way. Retrospectivity is as was explained—it might have been by you. Clearly, it is important that people are aware of what the law provides. There is a basic principle, of course, in the Criminal Code that knowledge of the law is something that—

Senator Trood interjecting—

Mr McDonald—Yes, that is exactly right. It is the responsibility of us but also, I would say, all lawyers to ensure that people are well informed about what it actually says.

Dr Heriot—The other issue is, of course, that the vision of retrospectivity that was used earlier does not actually sit with the definition in the code of recklessness either. That would be another limiting factor for that interpretation.

Senator TROOD—It looked quite creative, actually.

Mr McDonald—International law is not my field, so there may be something there that I do not see.

Senator TROOD—Mr Fricker, in relation to this supposed expansion of ASIO's activities, which clearly is on the minds of some of the witnesses we have heard from, you make the point in your submission that ASIO does not have the legislative mandate to use its intelligence capabilities in relation to people smuggling et cetera. As I understand the submissions, this is precisely what it seems most of these people are arguing for—that they want the situation to remain as it is. They feel that ASIO ought not have this expanded responsibility and that in fact it is an unwarranted and unjustified intrusion into areas which should normally and properly be ASIO's responsibilities, which relate to—this is not quite the right phrase—high crimes and activities relating to the essence of state security. What is your response to the argument in relation to the need to expand ASIO's powers?

Mr Fricker—People smuggling and other threats to border security have been identified as significant and enduring national security priorities. This change will allow ASIO to make a contribution to the whole-of-government coordinated effort in response to those national security priorities. It recognises that ASIO has capabilities now which could be applied to this new—new for us—security issue. Again, it just means that an impediment has been removed to enable ASIO's capabilities, its skills and expertise, to be applied as a complement to the skills that other agencies already working on this issue have. Really, I would characterise it as simply as that—that this is a new and enduring national security priority and an opportunity for ASIO to participate in addressing that national security priority.

Mr McDonald—I would add that it is pretty clear that people are dying because of people smuggling. There is a mentality, which I think we saw demonstrated here a little while ago, that it is just an economic crime or something like that. But it is quite a serious crime; large numbers of people can die at the same time. In the same way that that is the case with some of the other security heads, you can see that it is in fact quite serious. The other thing to say is that it is quite multidimensional; there is the opportunity through people smuggling for the wrong people to end up here too.

Senator TROOD—All that is true. People are dying and syndicates are involved in this exercise—in other words, a lot of activity comes at the serious end of people smuggling—but I think the point that was being made to us was that there could easily be covered under these provisions a lot of activity which is not at the serious end or at the end of activity which properly ought to be ASIO's concern. My understanding was that the witnesses were saying to us, 'Yes, we're not uneasy about the idea that we ought to be covering criminal activity and syndicate activity and situations where people are dying, losing their lives at sea, but we are uneasy about the fact that these powers are so broad that they allow ASIO to get into areas which aren't related to those higher end activities.'

Mr McDonald—ASIO are gathering intelligence and, as I said before, one of our difficulties is that if we try to prescribe it in the legislation down to the nth degree we will have situations where there will be an unfolding situation that looks like one thing and then ends up being something else. And in a highly litigious environment in recent years, the need to ensure that people are not able to use some of these prescriptions to run a technical defence is pretty strong. So the approach that we have taken as the department looking at the policy for this legislation is to try and keep it as simple as possible for those purposes. I just do not really know we could have successfully done it in a different way, to be honest.

Senator TROOD—The witnesses would argue that that is a lack of creativity on your part, Mr McDonald.

Mr McDonald—Yes.

Senator TROOD—Legal creativity.

Mr McDonald—Yes. The problem is there is some legal creativity on the part of the people who might want to defend these people, and it is sometimes a little bit disappointing when the scope for creativity is taken away by nice clear legislation.

Senator TROOD—I have a question on the addition of the word ‘serious’. Perhaps you could inform the committee as to what impact you think that has on the way in which these provisions ought to be interpreted.

Mr Fricker—The word ‘serious’ of course means they are neither minor nor 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.

Mr McDonald—It is more a matter of reassuring people that that is going to be the case.

Senator TROOD—So there is a qualitative difference between a threat and a serious threat, in your mind?

Mr Fricker—Yes. That is the way that the legislation has been drafted. The word is in there obviously for a reason. It has meaning; it has weight. That would play into the Director-General of Security’s thoughts about prioritising particular investigating activity within the organisation. So, yes, it is a meaningful addition to that head of security.

Senator TROOD—Thank you.

Senator HANSON-YOUNG—I have a few questions but, because we are tight for time, you might have to take some on notice. While this bill has very clear intent in terms of wanting to crack down on and bring to account people who are participating in people-smuggling, and I understand and accept that, Australia has signed the UN anti-people-smuggling protocol. Why

has the definition in that protocol not been adopted in this bill since we have been a signatory to that protocol since, I believe, 2004? How come we have not included that in this particular piece of legislation?

Dr Heriot—It is always an interesting drafting exercise to translate an international convention into the idiom of the Criminal Code. We believe that the offences do embody the obligations of the Criminal Code. I am just trying to work out what you might have in mind.

Senator HANSON-YOUNG—There is the definition within the protocol of what people-smuggling is, which is not the definition that has been used within this bill. I guess the other point is in relation to how that definition is expanded within the protocol. Regardless of whether you believe people were creative in their evidence, I think one of the key concerns was the fact that the protocol, as it is set out, clearly states that the aim is not to punish persons for the mere fact that they have been smuggled or have helped smuggle somebody in on humanitarian grounds. That is clearly set out in the international protocol and yet that is not reflected in this bill. I think if there was some reflection of that there would be some understanding from the broader community as to the reasons why you want to expand provisions and the various agencies' powers. Of course, it is not illegal to seek asylum, which is why the protocol says that if it is on humanitarian grounds it needs to be considered differently.

Dr Heriot—Of course there is nothing in this bill that would endeavour to criminalise the seeking of asylum. The bill is concerned with strengthening a legislative regime for penalising people who would engage in the smuggling of people, which the international community has decided, for a whole range of reasons, including the inherent danger of the act, should be criminalised.

Senator HANSON-YOUNG—But the international protocol, to which we are signatories, suggests that the aim is not to penalise those people who have had to be smuggled or who have assisted others to be smuggled on humanitarian grounds. That is the point. Where in this bill have you made the distinction between those people who have organised themselves, or their family or friends or whoever, to move in order to have protection from persecution and not open themselves up to all of the various criminal provisions as laid out in the bill?

Dr Heriot—The reason I am struggling is that I am trying to work offence by offence to do this. With regard to the penalising of people who are seeking asylum, they are specifically excluded from the material support provision because it does not apply to people who pay for their own position on a venture or people who travel with them on the same venture. So that is excluded. In terms of the humanitarian aspects, I talked earlier about how the fault elements would address that. There is, I think, a clear intention by the government to take into account the fact that people-smuggling is frequently a transnational organised crime and to enable agencies to effectively address that. This is consistent with the convention to which we are a party and its supplementary protocols. I also draw your attention to the fact that the convention notes:

... each state party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.

That would be the intention behind the legislative amendments that are proposed.

Senator HANSON-YOUNG—By virtue of all of that, I cannot see any reason why, if this committee recommended that there needed to be a more clear or specific reference to our obligations under the protocol, even in the EM, let alone the legislation—which there is not really at all—it would be a problem. If you believe that there is no contradiction then there should not be a problem with that.

The other point is then that this legislation has nothing to do with deterring those who are taking that awful, dangerous trip across the seas from Indonesia to Christmas Island, because those people overwhelmingly are doing so on humanitarian grounds. The government's own statistics show that. So who exactly is this bill relating to if it is not relating to people who are seeking asylum?

Dr Heriot—Okay. To start a little further back, Australia's international obligations apply whether or not a piece of legislation says specifically that Australia's international obligations apply. That was a bit circular. So they are there and there is nothing in the bill that would detract from those. There is no intention in the bill to criminalise the act of seeking asylum. The measures in the bill are designed to better address those who facilitate people-smuggling and those who provide material support to people-smuggling

My colleague has, helpfully, passed on to me that I also neglected to mention that one of the other amendments that we are seeking to make to the Migration Act is to make it more compliant with the people-smuggling protocol by introducing a provision about the aggravated offence of people-smuggling involving exploitation or danger of death or serious harm, which is in the protocol and in the Criminal Code but, I think, through an accident of history, has not yet found its way into the Migration Act. So that is an area of this bill that specifically promotes or carries forward our greater compliance. Geoff, you were going to say something.

Mr McDonald—The only thing I was going to say is that 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 or something like that. So you can see why there might have been a little bit of concern about keeping the term 'gain' out, having to prove that there was gain.

Senator HANSON-YOUNG—In terms of reflecting the definition that is in the protocol.

Dr Heriot—The other thing that I think is relevant to this is the prosecution policy of the Director of Public Prosecutions, which has, I think, a two-stage test, one of which is that a prime facie case is able to be established and the second is that it is in the public interest for a prosecution to proceed.

Senator HANSON-YOUNG—My final question goes to the overarching question that has been raised within various submissions, which is: why do we actually need this bill as opposed to what we currently have? Is it because we are not able to convict the people we wish to convict? Is it because the work done by the current Customs, Home Affairs and various other agencies does not enable them to fulfil the requirements to convict felons under the current provisions of the Criminal Code? Is it because the Federal Police are not able to carry out their work? Nothing in the explanatory memorandum outlines why we need this amendment bill.

Dr Heriot—Various speeches in the second reading debate, including the minister’s speech, and the explanatory memorandum point to the fact that the purpose of the bill is to strengthen the Commonwealth’s anti-people-smuggling legislative framework to provide an appropriate range of offences so that Australian authorities are able to target and deter people-smuggling activity. We know that serious and organised crime elements are involved in people-smuggling and we know that the modes of operation and the technologies that they use are evolving very quickly, and it is a normal task to look to the criminal provisions in any area to ensure that they are sufficient and dissuasive and meet the needs of the day. It is a normal process of law reform.

Senator HANSON-YOUNG—So the argument you are putting is that currently our ability to protect our borders, whether it be a security risk or not, is not strong enough; is that what you are suggesting?

Mr McDonald—The government has concluded that these measures are needed to continuously improve what we are doing. Clearly—and I think Dianne has the statistics there—a lot of people have been prosecuted for people smuggling and there are a lot of cases in the courts, so there has been quite a deal of success, but the object of this bill is to build on that success, to have more success, because clearly it is an issue that is presenting challenges. Whether it is terrorism laws, drug laws or whatever it is always the case that we are always looking at cases that we have run, looking at our practical experience with things, and then modifying the law to make sure it is up to date and dealing with these people. These people will structure what they are doing to take into account changes in laws or their experience with laws, sentencing or whatever. Particularly when you are dealing with organised crime it is a continual battle to keep one step ahead of them. It is the same with terrorism and other national security issues as well. The fact that we have this bill forward does not mean there is a failure or anything like that; it simply means we want to make sure we stay on top of the game.

Senator HANSON-YOUNG—I struggle to see how this is not just all for show. If we honestly need all these new powers, this expansion and these new provisions, to be able to catch the people we are not able to catch now without actually giving ASIO any more dollars, I fail to see how it is not just a show for the government.

Mr McDonald—Let me address that. Clearly I am not in a position to go into ASIO’s operations or their operational experience; however, they are an agency that is working in this country and just like the other agencies—the Federal Police, Customs and so on—over the years they have developed capabilities. Clearly in this case it is seen that they cannot provide the full sort of assistance that the government would like because of the way the legislation is at the moment.

It has been explained by the deputy director-general that this is a niche activity for ASIO. That is true. This is not the biggest issue on the block for ASIO, but why have legislation that stops ASIO from being able to make a contribution, particularly where it is operationally convenient? You could have a situation where ASIO has some people in the street for another reason and they come across this. What do you do? Pull them out and bring in a whole fresh new team from the Federal Police, Customs or something like that? The idea of this is to make sure that the legal framework does not create operational inefficiencies. Of course, it is all being done keeping in place all of the apparatus we have for ensuring there is accountability for ASIO, the Inspector-General of Intelligence and Security and so on. This is not a huge thing.

Senator FEENEY—There is really only one issue remaining that I am interested in hearing from the department on and that is mandatory sentencing. Why does the bill expand the mandatory sentencing regime? Why is the absence of judicial discretion desirable? Have you taken advice on the whether such a mandatory sentencing regime contravenes Australia's obligations under the International Covenant on Civil and Political Rights?

Dr Heriot—The bill does not have a mandatory sentencing regime and the Migration Act does not; it has a mandatory minimum sentencing regime that was introduced in—2001, was it?

Mr McDonald—2002.

Dr Heriot—In 2002. I am sorry if I am wrong on the year. It 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. There were particular circumstances that led to its introduction in 2002.

Senator FEENEY—Can you remind me what they were?

Dr Heriot—There was, I understand, a concern that the sentencing that was arising from the courts was much less than the maximum penalty available and did not sufficiently reflect the seriousness with which parliament had regarded the offence in setting the maximum penalty—Mr McDonald, you lived through that period; you might want to add something—so that was what obviously motivated parliament to enact the laws.

We are seeking to extend them 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. There was already provision under the minimum mandatory sentencing provisions for a repeat offence, but that required you to have been previously convicted.

Mr McDonald—In fact, we saw some of the attitude today towards this offence: 'Oh, it's only an economic crime. It's only a minor crime.' Of course, it is a crime that kills people. If you go back and look at the paperwork for 2002, that was very much some of the motivation then.

Senator FEENEY—I take your point, but, as you yourself have said, quite properly, it is a serious crime; it is a crime that can kill people, but it is a complex crime in the sense that it may have humanitarian overlays and it may have individual circumstances that are profoundly important. I guess it is in that vein that mandatory minimum sentencing and the discretion of judges are matters where it is important for us to completely comprehend what we are doing.

Mr McDonald—You are right. That is where the prosecution decision is very important—that all those matters are taken into account. It puts much more onus on the prosecution.

Senator FEENEY—Is the driver for this expansion of mandatory minimum sentencing then a continuing frustration about court outcomes?

Mr McDonald—You cannot really specifically say that, because we have been operating under this system, but I do not know whether you have some—

Senator FEENEY—You were bold enough to declare that about 2002!

Mr McDonald—Yes.

Dr Heriot—If you were to look at the seriousness of offences in the Migration Act which currently attract a minimum mandatory provision and you were looking to be consistent, an offence attracting a penalty of 20 years because it was an aggravated offence of people smuggling attracting danger of death or serious bodily harm would be appropriate to attract a minimum mandatory sentence because it is of the same or a similar scale of seriousness. Similarly, being convicted of multiple counts at a single proceeding is again of an equivalent serious nature to fit in there. I am aware that judges are not generally fond of anything mandatory, even if it is a mandatory minimum rather than a mandatory sentence, although the two in debate usually get conflated, but even when they are critical—

Senator FEENEY—But they are related, aren't they?

Dr Heriot—Sorry?

Senator FEENEY—They might not be the same but they are related.

Dr Heriot—But there are some important differences.

Senator FEENEY—There are.

Dr Heriot—I think that even judges who may have some issues there will, in the same judgment, talk about the fact that laws are intended to act as a deterrent and that laws are important to protect sovereignty and to discourage people smuggling. Senator Feeney, I think I missed one of your earlier limbs: yes, we are satisfied that this is in conformity with our international obligations.

Senator FEENEY—Yes, although I am guessing you would say that a mandatory minimum, as opposed to a mandatory sentence, would leap that hurdle. I do not want to put words in your mouth, but I think that is the imputation I can draw from the earlier answer.

Dr Heriot—Yes. It is because courts retain discretion to impose the penalties they see fit within the space between the mandatory minimum and maximum. There is judicial discretion—as the High Court found and was satisfied.

Senator PARRY—Dr heriot, you mentioned earlier that serious and organised crime is part of people smuggling. Do you have a figure? Is it the majority of people smugglers? Is it the minority? Can you expand upon that?

Dr Heriot—I am not sure that I can expand upon it.

Senator PARRY—Can Mr Fricker assist?

Mr Fricker—No, I do not think I can.

Senator PARRY—Is it fair to say that serious organised crime is significantly involved?

Dr Heriot—Yes.

Mr McDonald—The impression I have got is that serious organised crime is mostly involved.

Mr Fricker—ASIO today is not the competent authority in this area, but it is my profound belief that, yes, the majority—

Senator PARRY—So we have established that serious and organised crime is heavily involved in people smuggling. Is that a fair and accurate statement?

Mr McDonald—It is a form of serious and organised crime.

Senator PARRY—Sorry, I mean serious and organised crime groups.

Mr Fricker—There have been people that have been arrested that are only syndicates.

Senator PARRY—Can you give us any intelligence or data as to the lucrative nature of people smuggling? Is it a good earner? Is it better than drugs? Is it worse than drugs? Do we have any information on that at all?

Dr Heriot—If it were not a good earner, organised crime would not be engaged in it.

Mr Fricker—These questions would be better put to the Customs and Border Protection Service. But it is a very lucrative business and large volumes of money are involved. It is organised. It requires a high level of logistical organisation to gather people together and move them from one point to another to meet one vessel and then another vessel and then come to Australia. It is not just one person acting alone on a one-off voyage. The amounts of money are significant. I have no statistics for you but it is very lucrative.

Senator PARRY—From listening to the evidence today, I have imputed that on some occasions, if not most occasions, these organised crime groups, whether loosely connected or with very sophisticated connections, are in fact seeking trade and using the route to Australia because it is an easy route at the moment. Forgetting any political reasons as to why, would that be a fair comment? Do you wish to make any make any statement in relation to that?

Mr Fricker—Again, I am out on a limb. I need to keep using the caveat that Customs and Border Protection would be the best people to put this question to, but my profound belief is that there are organised criminals involved. Following from that, the answer to your question is yes.

Senator PARRY—A picture is being portrayed by some that there are people waiting on the beach desperate to come to Australia. I think the opposite is probably the case: while there are willing participants, the smugglers are actively seeking people to come to Australia. Because it is a lucrative business they are in the market to attract the custom of people who wish to be asylum seekers to come to Australia. Is that a fair comment or is it a totally outrageous comment?

Dr Heriot—That is a fair comment.

Senator PARRY—I have a lot more questions along that line but I might place some of them on notice. In relation to ASIO's increased powers of surveillance—in particular, telephone interception and searches without a warrant—a good example was given by Mr McDonald. He said it would be silly to pull an ASIO crew off a particular operation just because the legislation does not allow you to continue if it develops into the sorts of matters we have been discussing today. Can you give us any examples that would be handy for us to deliberate on in relation to what ASIO would gain from these additional powers?

Mr Fricker—At the moment, ASIO can contribute to this issue where there is a nexus to 'security'—as it is currently defined—if a terrorist group is involved in a people-smuggling activity or if people smuggling is being used to transport a terrorist. While we are already involved to that extent in addressing the issue in partnership with our partner agencies, this change would allow ASIO to make a much more organised contribution to an investigation led by, for example, the AFP to apply our analysts to provide that niche analytical capability that Mr McDonald referred to earlier to a particular case. It 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. At the moment, that would not be possible.

Senator PARRY—Legally possible. That supports the notion that an additional budgetary requirement might not be that necessary because it is currently within capability.

Mr Fricker—As I said in my earlier statement, that is correct. No public servant would ever say never—give us more budget—

Senator PARRY—But not for that!

Mr Fricker—Yes, that is right. But your characterisation is exactly correct, in my view. Right now we have capability and there is a niche that we are able to contribute to. We can do that, within the capability we already possess, within the characterisation of our general threats to security. In coming years, that remains open. But that is just the normal annual budget cycle. If there were a requirement for more resources, or reallocation of resources, it would come up through those normal processes.

Senator BARNETT—Could you take it on notice to give us details of the benefits to people smugglers of people smuggling. You might have some examples of how many dollars per person they make from a boatload of people. Would it be possible to give us a feel for the sorts of benefits that flow through to the people smugglers?

Mr McDonald—It is certainly something we can take no notice.

Senator BARNETT—That would be appreciated. Thank you

CHAIR—I thank the three of you for your attendance this afternoon and for your participation and willingness to assist us with our consideration of this legislation..

Committee adjourned at 3.37 pm