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No. 120 2003–04

## Anti-terrorism Bill 2004

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I N F O R M A T I O N   A N D   R E S E A R C H   S E R V I C E S

Bills Digest  
No. 120 2003–04

Anti-terrorism Bill 2004

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Law and Bills Digest Group  
19 April 2004

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# Anti-terrorism Bill 2004

**Date Introduced:** 31 March 2004

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** The Act commences on the day after it receives Royal Assent.

## Purpose

The Bill seeks to amend the *Crimes Act 1914*, the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Criminal Code Act 1995* and the *Proceeds of Crime Act 2002* to strengthen Australia's counter-terrorism measures.

## Background

### Crimes Act

The Bill seeks to redefine and extend the investigation period set out in the Crimes Act for terrorism offences. Primarily, the proposed amendment extends the period of arrest (or investigation period) for a person arrested for a terrorism offence to enable law enforcement agencies to investigate the offence. (See the **Main provisions** section of this Digest for further detail and discussion of the individual provisions of the Bill.)

Currently, **section 23C** of the Crimes Act provides that if a person is arrested for a Commonwealth offence, the person 'may be detained for the purpose of investigating' whether the person committed the offence or another Commonwealth offence. Subsection 23C(2) provides that the person may not be detained 'after the end of the investigation period'. Subsection 23C(4) provides that the 'investigation period' does not extend beyond four hours unless, after the arrest, 'the period is extended under section 23D'. (Note that for indigenous persons and minors, the initial investigation period is two hours not four hours.)

**Section 23D** of the Crimes Act deals with the extension of the investigation period if a person is under arrest for a 'serious offence'. The term 'serious offence' is defined in subsection 23D(6) to mean 'a Commonwealth offence that is punishable by imprisonment for a period exceeding 12 months'. The application to extend the investigation period is

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usually made to a magistrate: subsection 23D(2). Subsection 23D(5) provides that the investigation period ‘may be extended for a period not exceeding 8 hours, and must not be extended more than once’.

The proposal to increase the statutory time limit on an investigation period seems to have come from Victorian Police Chief Commissioner, Christine Nixon, who is reported to have said that ‘if a Madrid-style attack were carried out in Australia, state police officers would not have enough time to interrogate suspects because federal law required them to be charged’.<sup>1</sup> On the issue of what extension of time may be appropriate, the Commissioner said: ‘We think up to 24 hours is appropriate. We understand that 16 to 24 hours would be considered reasonable by the federal Government’.<sup>2</sup> The Prime Minister was reported to be ‘sympathetic’ to the proposal.<sup>3</sup> Opposition Leader, Mark Latham MP, was reported to support the proposal in principle.<sup>4</sup>

### Crimes (Foreign Incursions and Recruitment) Act

The Crimes (Foreign Incursions and Recruitment) Act currently deals with incursions (hostile invasions) into foreign states by Australian citizens or residents. A journalist recently described the Act as ‘anti-mercenary’.<sup>5</sup>

Among other things, the Crimes (Foreign Incursions and Recruitment) Act creates the offences of entering a foreign state with intent to engage in a hostile activity in that state, and engaging in a hostile activity in a foreign state (**paragraphs 6(1)(a) and (b)**). The objective of the activity must be to overthrow the government of the foreign state; engage in armed hostilities; cause death or bodily injury (or fear thereof) to the head of state or a person who holds or performs the duties of public office; or unlawfully destroy or damage any real or personal property belonging to the government of the foreign state: **subsection 6(3)**.

A person does not commit an offence under subsection 6(1) if he or she was serving ‘in any capacity in or with’ the armed forces of the government of a foreign state or ‘any other armed force in respect of which a declaration by the Minister under subsection 9(2) is in force’: **subsection 6(4)**. In the Second Reading Speech for the original bill (1978), Senator Durack, the then Attorney-General, explained the rationale for permitting Australians to serve in foreign armies in the following way:

... the legislation will not prevent an Australian from going overseas and enlisting in another country. The Government recognises that occasions will arise where persons will wish to enlist and serve in armed forces of another country because of a deeply-held belief.<sup>6</sup>

The Crimes (Foreign Incursions and Recruitment) Act also creates offences of preparing for incursions into foreign states (**section 7**); recruiting persons to join organisations engaged in hostile activities against foreign governments (**section 8**); and recruiting persons in Australia to serve in or with an armed force in a foreign state (**section 9**). The

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Act also provides that the written consent of the Attorney-General is required before instituting a prosecution for an offence under the Act (**section 10**).

At the Security in Government conference in Canberra on 17 March 2004, the Attorney-General outlined his plan to amend the Crimes (Foreign Incursions and Recruitment) Act 'to make it an offence to fight with a rogue or terrorist state'.<sup>7</sup> Mr Ruddock explained the rationale for the amendment as follows:

The reason is quite clear. In looking at the matters of Hicks and Habib where we sought to see whether there was a basis on which they could be prosecuted in Australia for their behaviour abroad ... we found that enactment did not enable us to deal with a range of situations, particularly where terrorist organisations are in fact instruments of a state such as the Taliban.<sup>8</sup>

The Attorney-General said that the amendment would not be retrospective, with the effect that the amended law 'could not be used to bring Hicks and Mahmoud Habib, the two Australians detained in Guantanamo Bay, Cuba, back to Australia to be prosecuted'.<sup>9</sup> Shortly after the announcement, the media reported that the Opposition 'would consider the legislation on its merits once the detail had been seen' and that it would 'wait to see the detail of the proposals before commenting'.<sup>10</sup> Stephen Hopper (Habib's lawyer) is reported as saying that laws which promote peace and good behaviour should not be used selectively. He said that 'Australians did military training in Israel, the United States and other countries, without being subjected to the same treatment as Habib'.<sup>11</sup>

The Bill seeks to amend the Crimes (Foreign Incursions and Recruitment) Act to broaden the scope of the offence contained in **section 6** of entering a foreign state with intent to engage in a hostile activity (or actually engaging in such conduct). The Bill provides that the defence in subsection 6(4) does not apply if the person enters a foreign state 'while in or with an organisation' which has been prescribed by the regulations as a 'terrorist organisation' at the time of entry. The Bill also provides that the defence in subsection 6(4) does not apply if the person engages in a hostile activity in a foreign state 'while in or with an organisation' which is a prescribed organisation at the time of the hostile activity. This amendment may create problems for a person who leaves Australia to join a foreign armed force (knowing that that army is not a prescribed organisation), but the organisation is later prescribed. The person may not be aware of the change of status of the organisation (that is, prescription) but may commit an offence under section 6. The Explanatory Memorandum states that the regulations prescribing organisations will not be retrospective.<sup>12</sup> However, the knowledge deficit problem remains.

Further, the Explanatory Memorandum states that the amendment to the Act enabling the making of regulations is designed to 'outlaw participation with new and emerging terrorist groups from the moment it becomes evident that they pose a threat to Australia's security'.<sup>13</sup> However, this criterion is not included in the amendments. Notably, the Bill also seeks to increase the penalty for an offence under section 6.

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## Criminal Code Act

The Bill seeks to amend the Criminal Code Act ('the Criminal Code') by revising the offences of being a member of a terrorist organisation in **section 102.3** and of training a terrorist organisation (or receiving training from a terrorist organisation) in **section 102.5**.

First, the Bill seeks to extend the operation of the membership offence in **section 102.3** to include membership of an organisation which falls within paragraph (a) of the definition of 'terrorist organisation' in subsection 102.1(1). At present, a person commits an offence under **section 102.3** if:

- the person intentionally is a member of an organisation
- the organisation is a specified terrorist organisation (being one which falls within paragraphs (b)–(e) of the definition of 'terrorist organisation' in subsection 102.1(1)), and
- the person knows the organisation is a terrorist organisation.

The offence carries a penalty of a maximum of 10 years' imprisonment. According to **section 5.3** of the Criminal Code, a person 'has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events'.

The term '**member** [of an organisation]' is defined in **subsection 102.1(1)** of the Criminal Code to include 'a person who is an informal member of the organisation', 'a person who has taken steps to become a member of the organisation', and 'in the case of an organisation that is a body corporate—a director or an officer of the body corporate'. The amendment may therefore lead to uncertainty about the commission of an offence, particularly if a person is an informal member of an organisation which may fall within paragraph (a) of the definition of 'terrorist organisation' or if the person has taken steps to become a member of the organisation.

It is arguable that the proposed amendment may have the effect of curtailing freedom of association, particularly if the organisation is not already a specified terrorist organisation or the organisation does not have a formal organisational structure or membership processes.

Second, the Bill amends the offences in **section 102.5**. Currently the Act provides two offences:

- if a person intentionally provides training to, or receives training from, an organisation and the organisation is a terrorist organisation (as defined in subsection 102.1(1)) and the person **knows** the organisation is a terrorist organisation—penalty: up to 25 years' imprisonment, and

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- if a person provides training to, or receives training from, an organisation and the organisation is a terrorist organisation (as defined in subsection 102.1(1)) and the person is **reckless** as to whether the organisation is a terrorist organisation—penalty: up to 15 years' imprisonment.

The Bill now distinguishes between:

- non-proscribed organisations (or those which a court may find fall within paragraph (a) of the definition of 'terrorist organisation' when a terrorist offence is prosecuted) (**proposed subsection 102.5(1)**), and
- those organisations specified as terrorist organisations (**proposed subsection 102.5(2)**).

(This distinction is discussed further in relation to **items 19 and 20** of Schedule 1 in the **Main Provisions** section of this Digest.)

Although the Prime Minister mentioned this aspect of the Bill when speaking on the *Sunday* television program on 28 March 2004, there has been little press commentary directly on this issue. Presumably, the justice spokesman for the Australian Democrats, Senator Greig, was referring to the proposed amendments to **section 102.3** when he said that 'the laws could lead to uncertainty about what constituted a terrorist organisation'.<sup>14</sup>

## Proceeds of Crime Act

Among other things, the Proceeds of Crime Act currently empowers a court to control certain proceeds from publications that relate to an indictable offence (being an indictable offence against Commonwealth law) or a foreign indictable offence (defined below). In relation to indictable offences, a court can control literary proceeds (defined largely as any benefit a person derives from the commercial exploitation of notoriety arising from the offence).<sup>15</sup> In relation to a foreign indictable offence (defined below), the court can currently control only literary proceeds that are derived *in Australia*.

The Bill amends the definition of 'foreign indictable offence' in the Proceeds of Crime Act. Currently, 'foreign indictable offence' is defined in **section 338** of the Proceeds of Crime Act as follows:

*foreign indictable offence* means an offence against a law of a foreign country constituted by conduct that would have constituted an offence against a law of the Commonwealth, a State or a Territory punishable by at least 12 months imprisonment if it had occurred in Australia.

The amendment replaces that definition with a more complicated definition. The revised definition extends the meaning of 'foreign indictable offence' to provide that where a person commits an offence against a foreign law at a time when the conduct was not an

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offence against Australian law, but where the conduct is an offence against Australian law at the time when an application is made for a restraining or confiscation order under the Proceeds of Crime Act is first made, the conduct is treated as a ‘foreign indictable offence’. In this way, the effect of the proposed amendment is to provide for the retrospective application of future offence provisions, not to charge or convict a person but to prevent a person deriving a commercial benefit from the conduct.

The Bill also extends the operation of the legislation to situations where literary proceeds are derived overseas **but later transferred to Australia**.

According to the Second Reading Speech, the purpose of the proceeds of crime legislation ‘is to discourage and deter crime by diminishing the capacity of offenders to finance future criminal activities and to remedy the unjust enrichment of criminals who profit at society’s expense’.<sup>16</sup>

In submissions made to the review of the *Proceeds of Crime Act 1987* by the Australian Law Reform Commission in 1999, various legal bodies suggested that the widest discretion should vest in a court so that the legislation does not produce unjust results. They also suggested that literary proceeds could be used to pay compensation to victims of crime, and that where a person donates literary proceeds to charity, a court should not confiscate the proceeds. They suggested that literary proceeds should not be confiscated if there is no connection between the literary work and the offence (that is, if the author writes about matters unrelated to his or her criminal activities, even if the author trades on notoriety gained from those activities). Finally, they suggested that proceeds of crime legislation (and literary proceeds orders) should not be seen as inhibiting free speech, because it targets the profit rather than the speech itself.<sup>17</sup>

It is important to note that **subsection 153(1)** of the Proceeds of Crime Act refers to the person ‘committing’ an indictable offence or a foreign indictable offence; it is not necessary for the person to be ‘convicted’ of the offence for the provision to take effect. It remains, nonetheless, a question of proof.

**Section 154** of the Proceeds of Crime Act sets out the matters which a court must take into account in deciding whether to make a ‘literary proceeds order’.<sup>18</sup> Those matters include:

- (i) the nature and purpose of the product or activity from which the literary proceeds were derived; and
- (ii) whether supplying the product or carrying out the activity was in the public interest; and
- (iii) the social, cultural or educational value of the product or activity; and
- (iv) the seriousness of the offence to which the product or activity relates; and
- (v) how long ago the offence was committed.

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Speaking on the *Sunday* television program on 28 March 2004, the Prime Minister said:

I think most people would regard it as pretty offensive that somebody can be associated with a terrorist organisation which has killed people, including associates, may have killed our people in Bali, and then they go and write a book about it. I think that sticks in the craw of most Australians ...<sup>19</sup>

A spokesman for the Attorney-General has denied that the amendment is aimed specifically at David Hicks.<sup>20</sup> On behalf of the Democrats, Senator Greig said: 'We already have laws against profiting from crime which covers films and books, as in the Mark 'Chopper' Read case, so these new laws would be an unnecessary duplication'.<sup>21</sup>

## Generally

The measures contained in the Bill (if not the Bill itself) seem to have the support of the Opposition. Nonetheless, the Opposition is cautious about the proposed amendments, as evidenced by the following comments by its foreign affairs spokesman, Kevin Rudd MP:

Our examination and our response to those draft laws will be taken on the basis of our judgment of the Australian national interest.

We place a high priority on the counter-terrorism fight here at home and we will be looking carefully at the draft proposals put to us by the Prime Minister.<sup>22</sup>

The Democrats are reported to have said that the proposed amendments 'would not stop terrorists and could harm the civil liberties of Australians' and that the laws are a 'drastic over-reaction'.<sup>23</sup>

On 31 March 2004, the Greens issued a press release in which Senator Bob Brown called for a Senate inquiry into the Bill 'in view of serious erosion of civil rights for Australians involved'. Senator Brown drew attention to the possibility that '[i]nnocent citizens, including range or pilot instructors, may be convicted of training terrorists'.<sup>24</sup> However, on 30 March 2004, the Senate Standing Committee on the Selection of Bills had already resolved to recommend that 'the provisions of the Anti-terrorism Bill 2004 be referred immediately to the Legal and Constitutional Legislation Committee for inquiry and report on 11 May 2004'.<sup>25</sup> On 31 March 2004, the Senate referred the provisions of the Bill to the Committee. Submissions are called for before 19 April 2004.<sup>26</sup> The principal matters for the Committee to consider are as follows:

The benefits of the bill for the investigation and prosecution of Commonwealth terrorism offences.

The extent to which the amendment advances the objective of the Proceeds of Crime Act 2002 to prevent individuals obtaining financial benefit from criminal activity.<sup>27</sup>

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## Main provisions

### Schedule 1

#### Amendments to the Crimes Act

**Item 1** amends the definition of ‘investigation period’ in **subsection 23B(1)** of the Crimes Act to add reference to **proposed section 23CA**, which relates to the period of arrest (or investigation period) if a person is arrested for a terrorism offence (see commentary on **item 5** below).

**Item 2** inserts a definition of ‘terrorism offence’ into **subsection 23B(1)** of the Crimes Act. The term is defined as ‘an offence against Division 72 of the Criminal Code’ or ‘an offence against Part 5.3 of the Criminal Code’. **Division 72** (being sections 72.1–72.10) deals with international terrorist activities using explosive or lethal devices. **Part 5.3** (being Divisions 100–106) deals with terrorism. Among other things, it contains the definitions of ‘terrorist act’ and ‘terrorist organisation’. As a result of the application of the Criminal Code, ‘terrorism offences’ will also include ancillary offences such as attempt, inciting, conspiracy and complicity.

**Item 3** excludes terrorism offences from the application of **section 23C** of the Act. As noted earlier, section 23C currently deals with the period of arrest for a Commonwealth offence. The Bill seeks to replace the heading to section 23C to make it clear that section 23C applies only to arrests for non-terrorism offences. Consequently, the Bill also seeks to insert **proposed section 23CA** to deal with the period of arrest if a person is arrested for a terrorism offence (see below). The Bill does not amend the period of arrest for a person arrested for a non-terrorism offence—the initial period of arrest remains at four hours unless the period is extended once (for up to eight hours) under section 23D. (Note that if ‘the person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander’, the initial period is two hours).

**Item 4** amends **subsection 23C(6)** to provide for the calculation of the arrest period under section 23C if the person has already been arrested more than once in a period of 48 hours for either a non-terrorism offence or a terrorism offence.

**Item 5** inserts **proposed section 23CA** to deal with the period of arrest if a person is arrested for a terrorism offence. In large measure, it replicates section 23C (as amended by **items 3 and 4 of Schedule 1**). The initial period of arrest (or investigation period) is four hours (or two hours for minors or indigenous persons to whom paragraph 23CA(4)(a) applies). Time does not run when the questioning of the person has been suspended, among other things, ‘to allow the person to rest or recuperate’ (**proposed paragraph 23CA(8)(j)**), or to allow ‘the investigating official to obtain information relevant to the investigation from a place outside Australia that is in a different time zone, being a period that does not exceed the amount of the time zone difference’

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(**proposed paragraph 23CA(8)(m)**). (It should be noted that proposed paragraph 23CA(8)(m) is not replicated in section 23C for non-terrorism offences.)

**Item 6** amends **subsection 23D(1)** to exclude terrorism offences from the operation of that provision (which deals with the extension of the investigation period where a person is under arrest for a serious offence). Consequently, **item 7** inserts **proposed section 23DA** to deal with the extension of the investigation period if a person is arrested for a terrorism offence. Proposed section 23DA largely replicates section 23D (as amended by **item 6**). The main difference between the provisions is found in **proposed subsection 23DA(7)** which provides that the ‘investigation period may be extended any number of times, but the total of the periods of extension cannot be more than 20 hours’. (Compare **subsection 23D(5)** which provides that the investigation period ‘may be extended for a period not exceeding 8 hours, and must not be extended more than once’.)

**Items 8–12** make consequential amendments to other provisions of the Crimes Act to give effect to the proposed amendments to the Crimes Act mentioned above.

### **Amendments to the Crimes (Foreign Incursions and Recruitment) Act**

**Item 13** increases the penalty for the offence of entering a foreign state with intent to engage in a hostile activity (or actually engaging in a hostile activity in a foreign state) in **subsection 6(1)** of the Crimes (Foreign Incursions and Recruitment) Act from a maximum of 14 years’ imprisonment to a maximum of 20 years’ imprisonment.

**Item 14** increases the scope for the commission of the offence in **subsection 6(1)** by amending **section 6(2)**. The effect of the amendment is that if the person alleged to have committed the offence is not an Australian citizen or ordinarily resident in Australia but the person was ‘present in Australia at any time before’ the act said to constitute the offence and the person’s presence in Australia was connected with that act, then the person can be prosecuted for an offence against section 6. Currently the person must have been an Australian citizen, ordinarily resident in Australia, or in Australia within a year of the act said to constitute the offence to be liable for prosecution for an offence against section 6.

**Item 15** inserts **proposed subsections 6(5), (6) and (7)**, which are designed to limit the operation of the defence in **paragraph 6(4)(a)**. Currently paragraph 6(4)(a) provides that section 6 does not apply to ‘an act done by a person in the course of, and as part of, the person’s service in any capacity in or with ... the armed forces of the government of a foreign state’. In other words, service in the armed forces of a foreign government excuses a person from liability for the offence.

**Proposed subsection 6(5)** provides that the defence in paragraph 6(4)(a) will not apply if a person ‘enters a foreign State with intent to engage in a hostile activity in that foreign State while in or with an organisation; and ... the organisation is a prescribed organisation at the time of entry’. In other words, if the person is serving in or with ‘the armed forces

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of the government of a foreign state' but those forces are a prescribed organisation, then the defence in paragraph 6(4)(a) will not apply. Proposed subsection 6(5) may create problems for a defendant who is abroad when the organisation is prescribed in Australia and may not be aware of the prescription (or have the ability to find out).

**Proposed subsection 6(6)** provides that the defence in paragraph 6(4)(a) does not apply if a person 'engages in a hostile activity in a foreign State while in or with an organisation; and ... the organisation is a prescribed organisation at the time when the person engages in that hostile activity'. Again, this provision may cause problems for a defendant who is abroad when the organisation is prescribed in Australia and may not be aware of the prescription.

**Proposed subsection 6(7)** defines 'prescribed organisation' for the purposes of proposed subsections (5) and (6). The term means an organisation prescribed by the regulations for the purposes of paragraph 6(7)(a) or an organisation specified by the regulations for the purposes of paragraph (b) of the definition of 'terrorist organisation' in subsection 102.1(1) of the Criminal Code (in other words, a specified terrorist organisation). This provision thus contemplates the prescription of organisations other than those specified as terrorist organisations. The regulations will be subject to disallowance by either House of Parliament.

**Item 16** amends **paragraph 7(2)(b)** of the Crimes (Foreign Incursions and Recruitment) Act to increase the scope of the operation of **section 7** (being offences of preparing for incursions into foreign states for the purpose of engaging in hostile activities). Presently, the Act provides that for a person to commit an offence against section 7, the person must be an Australian citizen or an Australian resident or present in Australia during one year before the offence. The effect of the amendment will be to remove the 'one year' time limit on a person's presence in Australia prior to the offence and to replace it with reference to the person being in Australia at any time 'before' the offence. Accordingly, a person who is an Australian citizen, an Australian resident or who has been in Australia at any time before the doing of the act giving rise to the offence (if the person's presence was connected with the offence) may be taken to have committed the offence.

**Item 17** inserts **proposed subsection 11(3A)**. **Section 11** deals with evidentiary certificates of Ministers that can be used in proceedings for offences against the Act. Proposed subsection 11(3A) provides that a certificate by a Minister stating that an organisation named in the certificate was not on a specified day or period 'an armed force, or part of an armed force, of the government of a foreign State specified in the certificate' is *prima facie* evidence of the matters stated in the certificate. One of the reasons for relying on ministerial certificates is that a matter is difficult to prove. However, it may also be difficult in practice for a defendant to rebut the facts contained in the certificate.<sup>28</sup>

**Clause 4** of the Bill provides that the amendment made by **item 17** 'does not apply to proceedings for offences alleged to have been committed before the commencement of this Act'.

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**Item 18** inserts **proposed section 12** to provide that the Governor-General may make regulations prescribing matters for the purposes of the Crimes (Foreign Incursions and Recruitment) Act. As mentioned earlier, the regulations would be subject to disallowance.

### **Amendments to the Criminal Code Act**

**Item 19** amends the offence of being a member of a terrorist organisation in **section 102.3** of the Criminal Code. It replaces the requirement that the organisation must be a ‘terrorist organisation’ within paragraph (b), (c), (d) or (e) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the Criminal Code (that is, an organisation specified by the regulations as a ‘terrorist organisation’) with the requirement that the organisation ‘is a terrorist organisation’ (that is, including paragraph (a) of the definition of ‘terrorist organisation’).<sup>29</sup>

It is arguable that the proposed amendment may have the effect of curtailing freedom of association, particularly if the organisation is not already a specified terrorist organisation and a person is unsure about whether an organisation’s activities would cause a court to determine that it is a ‘terrorist organisation’ under paragraph (a) of the definition of a ‘terrorist organisation’ when an offence is prosecuted. Nonetheless, given that paragraph (a) of the definition of ‘terrorist organisation’ may already introduce some uncertainty to the definition of ‘terrorist organisation’, it is also arguable that the amendment does no more than ensure that the whole of the existing definition of ‘terrorist organisation’ (contained in subsection 102.1(1) of the Criminal Code) applies to the offence contained in section 102.3.

**Proposed subsection 102.5(1)** provides that a person commits an offence if the person intentionally provides training to, or intentionally receives training from, an organisation, and the organisation is a terrorist organisation (including an organisation which is not currently specified as a terrorist organisation), and the person is **reckless** as to whether the organisation is a terrorist organisation. The penalty is up to 25 years’ imprisonment.

**Proposed subsection 102.5(2)** provides that a person commits an offence if the person intentionally provides training to, or receives training from, an organisation, and the organisation is a specified terrorist organisation. **Proposed subsection 102.5(3)** introduces strict liability into the offence contained in **subsection 102.5(2)**. This means that the prosecution need not prove that the person considered whether the organisation was a specified terrorist organisation, but the person may raise a defence of mistake of fact (see **sections 6.1 and 9.2** of the Criminal Code).

Further, **proposed subsection 102.5(4)** provides a defence of recklessness. This means that the person bears the evidential burden of proving either that he or she was not ‘aware of a substantial risk that the circumstance [being proscription] exists or will exist’ or that ‘having regard to the circumstances known to him or her, it was not unjustifiable to take the risk’. (See **subsection 5.4(1)** of the Criminal Code.) It is not, however, clear how the

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defendant would prove that he or she was not reckless as to whether an organisation was a specified terrorist organisation. The penalty for the offence is 25 years' imprisonment.

In relation to **proposed subsection 102.5(3)**, it should be noted that it is unusual for serious Commonwealth offences to contain elements of strict (or absolute) liability.<sup>30</sup> The rationale for the introduction of strict liability (and the reversal of the onus of proof) is explained in the Second Reading Speech:

The effect of the proposed strict liability provision is that the prosecution still has to prove that the person intentionally provided training to or intentionally received training from an organisation, and that the organisation is a terrorist organisation specified by regulations.

However, the prosecution would not have to prove that the person was aware that it was a specified terrorist organisation.

A person will have available a defence of mistake of fact.

In addition, the offence will not apply if the person is not reckless as to the organisation being a specified terrorist organisation.

The effect of this amendment is to place an onus on persons to ensure that they are not involved in training activities with a terrorist organisation.

This amendment will send a clear message to those who would engage in the training activities of terrorist activities, which could result in an attack of the kind seen in New York or in Bali, that they can expect to be dealt with harshly.<sup>31</sup>

In this context, it should be noted that 'training' is not defined in the Criminal Code or in the Bill. There is potential for the term to be construed broadly (for example, it could include receiving a training manual).

### **Amendments to the Proceeds of Crime Act**

**Clause 4** of the Bill provides that the amendments to the Proceeds of Crime Act contained in **items 21–27** have retrospective operation. The amendments are said to apply to applications in relation to 'conduct that occurred ... proceeds derived or realised ... or ... literary proceeds derived or transferred to Australia before the commencement of this Act'.

**Item 21 of Schedule 1** amends **paragraph 20(1)(d)** of the Proceeds of Crime Act. The main distinction between the current provision and **item 21** is that the amendment will enable a court to make a restraining order in relation to literary proceeds which are not derived in Australia but which are transferred to Australia. Likewise, **item 22** amends **paragraphs 20(3)(b) and (c)** to extend the operation of section 20 to literary proceeds derived outside Australia.

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**Item 23** amends **subsection 152(2)** to provide that a court with ‘proceeds jurisdiction’ may make a literary proceeds order if it is satisfied that a person has committed a foreign indictable offence and the person has derived literary proceeds in relation to the offence. Currently paragraph 152(2)(c) provides that the person has derived the literary proceeds in Australia, but **item 23** seeks to remove the reference to Australia. As noted earlier, **subsection 153(1)** refers to the person ‘committing’ an indictable offence or a foreign indictable offence; it is not necessary for the person to be ‘convicted’ of the offence for the provision to take effect.

**Item 24** amends the definition of ‘literary proceeds’ in **section 153** to provide that they are a benefit a person derives from the commercial exploitation of (among other things) ‘the person’s notoriety resulting **directly or indirectly** from the person committing an indictable offence or a foreign indictable offence’ (proposed amendment emphasised). It is arguable that these words could have been inferred in the provision as it currently stands, but the proposed amendment may clarify the situation.

**Item 25** also amends the definition of ‘literary proceeds’ in **section 153** by inserting **proposed subsection 153(3A)**. That provision states that if the offence is a foreign indictable offence, then a benefit is not treated as ‘literary proceeds’ unless the benefit is derived in Australia or transferred to Australia. In other words, a court having ‘proceeds jurisdiction’ could not make an order for payment to the Commonwealth under Part 2–5 of the Proceeds of Crime Act if the person committed a foreign indictable offence but did not derive any benefit in Australia and maintained the proceeds in a foreign bank (so long as no benefits are transferred to Australia).

**Item 26** inserts **proposed section 337A** defining ‘foreign indictable offence’. The term is currently defined in section 338, but the proposed definition is wider. As mentioned earlier, the revised definition extends the meaning of ‘foreign indictable offence’ to provide that where a person commits an offence against a foreign law at a time when the conduct was not an offence against Australian law, but where the conduct is an offence against Australian law at the time an application is first made for a restraining or confiscation order under the Proceeds of Crime Act is made, the conduct is treated as a ‘foreign indictable offence’. This provision (referred to in the Second Reading Speech as ‘the double criminality test’) has retrospective operation, which may be unfair if a person commits a crime overseas which is not a crime in Australia at the time the conduct giving rise to the offence occurs. In some circumstances, however, it is arguable that a crime may be so morally reprehensible that the perpetrator should not go unpunished, particularly if the perpetrator has derived a benefit from the commission of the offence.

The term ‘offence against a law of a foreign country’ includes an offence triable by a military commission of the United States under a specific military order: ‘Detention, Treatment, and Trial of certain Non-Citizens in the War Against Terrorism’, issued by President George W Bush on 13 November 2001.<sup>32</sup> Offences triable by a military commission include, for example, certain war crimes, attacking civilians or civilian property, terrorism, aiding the enemy and ancillary offences.<sup>33</sup>

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**Item 27** repeals the current definition of ‘foreign indictable offence’ in section 338 and replaces it with a cross-reference to the definition of the term in **proposed section 337A** (see **item 26** above).

## Concluding comments

### Personal liberty versus detention

Tensions exist between the right to personal liberty and the need to detain a person to enable law enforcement officers to investigate crime. These tensions have been the subject of numerous reports and legal decisions. See, for example, the decision of the High Court of Australia in *Williams v The Queen* (1986) 161 CLR 278 where Mason and Brennan JJ said (at 299):

The jealous protection of personal liberty accorded by the common law of Australia requires police so to conduct their investigation as not to infringe the arrested person's right to seek to regain his personal liberty as soon as practicable. Practicability is not assessed by reference to the exigencies of criminal investigation; the right to personal liberty is not what is left over after the police investigation is finished.

By contrast, it has been argued that the common law protection afforded to personal liberty is too great:

The criminal law must strike a balance between the protection of personal liberty and the exigencies of criminal investigation. There is a strong argument in favour of the view that the common law and its statutory equivalents as now interpreted by the courts unrealistically fail to give due weight to the latter consideration, with the consequence that if the law were strictly enforced the proper investigation of crime would be likely to be seriously hampered and offenders would be likely to escape justice.<sup>34</sup>

In the case of the present Bill, Parliament may want to consider whether the balance is right between the need for law enforcement officers to investigate crime and the rights of the suspect not to be detained for an unreasonable period of time. It may also want to consider whether the extended period of involuntary detention to enable investigations to occur sits comfortably with the potential of the extended period of detention to erode the suspect's right to remain silent.

### Constitutional arguments (freedom of communication)

A doctoral candidate at the Australian National University recently described the proposed amendments to the Crimes Act and the Crimes (Foreign Incursions and Recruitment) Act (as contained in the present Bill) as ‘certainly sensible’. However, the same candidate

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referred to the other proposed amendments as ‘deeply worrisome’. He referred specifically to the proposed amendments to the Proceeds of Crime Act as follows:

While effectively curtailing the freedom of speech, a fundamental principle in any liberal democracy, provisions like these are also counterproductive. History provides numerous examples for defectors of terrorist groups publishing books or memoirs and thus providing rare insights into the respective group’s organisational structures and motivations.<sup>35</sup>

Questions might be raised about whether the proposed amendments to the Proceeds of Crime Act infringe the implied constitutional freedom of communication concerning political and governmental matters. Freedom of communication is considered to be central to the system of representative government. However, as the High Court of Australia explained in *Lange v Australian Broadcasting Corporation* (1997) [189 CLR 520](#), the freedom is not absolute. A law which might otherwise breach the freedom is valid if it satisfies two conditions (at 567-568) (footnotes omitted):

When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively ‘the system of government prescribed by the Constitution’). If the first question is answered ‘yes’ and the second is answered ‘no’, the law is invalid.

In deciding whether a law impermissibly infringes the implied freedom, a court might look at whether ‘political communication’ was involved, and if so, whether a law preventing a person profiting from their work effectively burdens political communication. If the answer to these questions is ‘yes’, the court would need to consider whether the law is ‘reasonably appropriate and adapted’. As mentioned in the **Background** section to this Digest, the Australian Law Reform Commission considers that proceeds of crime legislation does not inhibit free speech, because it targets profit rather than speech.

It should be noted that the High Court of Australia has never found a right to freedom of association implied in the Constitution.

### Literary proceeds orders

The proposed revision of the term ‘foreign indictable offence’ in the Proceeds of Crime Act has two components: the offence must be an offence against the law of a foreign country (which includes an offence triable by a military commission), and the activity

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must be an offence against Australian law at the ‘testing time’ (that is, when an application is first made for a restraining order or a confiscation order under the Proceeds of Crime Act). While Hicks and Habib may not have committed an offence against Australian law at the time they were apprehended, it is possible (depending on the evidence) that their activities may constitute an offence at a future ‘testing time’. For instance, there is now a range of terrorist act and terrorist organisation offences, war crimes and other offences under the Criminal Code (including ancillary offences). If passed, the Bill will add modified offences under the Crimes (Foreign Incursions and Recruitment) Act relating to preparation for foreign incursions to this list, as well as new terrorism offences.

If this is the case, then the Proceeds of Crime Act (as amended by the Bill) could apply to Hicks and/or Habib. By virtue of **proposed section 337A** of the Proceeds of Crime Act (being the definition of ‘foreign indictable offence’), if the conduct of Hicks (and/or Habib) constituted an offence against a law of a foreign country and if the conduct had occurred in Australia at the testing time, the conduct would have constituted an offence under Australian law punishable by at least 12 months’ imprisonment at the testing time, then the conduct would constitute a ‘foreign indictable offence’. The Commonwealth could then seek a restraining order or a confiscation order in relation to any literary proceeds which Hicks may derive from publishing a book (provided the benefit was derived in Australia or transferred to Australia). Neither Hicks nor Habib need be charged or convicted of an offence for the Proceeds of Crime legislation to take effect; **section 152** of the Proceeds of Crime Act refers to a court being satisfied that the person has committed an indictable offence or a foreign indictable offence (whether or not the person has been convicted of the offence) and ‘that the person has derived literary proceeds in relation to the offence’.

## Endnotes

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- 1 Brendan Nicholson, ‘Police may get more time to hold terror suspects’, *The Age*, 20 March 2004, p. 7.
- 2 Martin Chulow, ‘PM backs new power to detain’, *The Weekend Australian*, 20 March 2004, p.4.
- 3 Martin Chulow, ‘PM backs new power to detain’, *The Weekend Australian*, 20 March 2004, p.4, and [unidentified author], ‘Longer detention for terror suspects’, *Daily Telegraph*, 20 March 2004, p. 5
- 4 Martin Chulow, ‘PM backs new power to detain’, *The Weekend Australian*, 20 March 2004, p. 4, and Brendan Nicholson, ‘Police may get more time to hold terror suspects’, *The Age*, 20 March 2004, p. 7.
- 5 Mark Phillips, ‘New law to fight terrorism’, *Herald Sun* (Melbourne), 18 March 2004, p. 5.

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- 6 Senator Durack, Attorney-General, 'Second reading speech: Crimes (Foreign Incursions and Recruitment) Bill 1978', Senate, *Debates*, 7 March 1978, p. 364.
- 7 Sophie Morris, 'Ruddock in grab for terror powers', *The Australian*, 18 March 2004, p. 2.
- 8 Mark Phillips, 'Terrorists face our courts; Legislation to toughen security', *Daily Telegraph*, 18 March 2004, p. 5, and Verona Burgess, 'Ruddock bid for secret trials', *The Canberra Times*, 18 March 2004, p. 2.
- 9 Brendan Nicholson, 'Legal push to tackle terrorism', *The Age*, 18 March 2004, p. 2.
- 10 Sophie Morris, 'Ruddock in grab for terror powers', *The Australian*, 18 March 2004, p. 2, and Mark Phillips, 'New law to fight terrorism', *Herald Sun* (Melbourne), 18 March 2004, p. 5.
- 11 Brendan Nicholson, 'Legal push to tackle terrorism', *The Age*, 18 March 2004, p. 2.
- 12 Explanatory Memorandum to the Anti-terrorism Bill 2004, p. 19 (item 15).
- 13 Explanatory Memorandum to the Anti-terrorism Bill 2004, p. 18 (item 15).
- 14 'Bid to outlaw profits from terror memoirs', *The Canberra Times*, 29 March 2004, p. 2.
- 15 Currently, **Part 2–5** of the Proceeds of Crime Act deals with **literary proceeds orders**. It forms part of Chapter 2 of the Act, which deals with the confiscation scheme. The term 'literary proceeds' is defined in **subsection 153(1)** of the Proceeds of Crime Act as follows:
- Literary proceeds* are any benefit that a person derives from the commercial exploitation of:
- (a) the person's notoriety resulting from the person committing an indictable offence or a foreign indictable offence; or
- (b) the notoriety of another person, involved in the commission of that offence, resulting from the first-mentioned person committing that offence.
- (The term 'commercial exploitation' is defined in subsection 153(2) as including '(a) publishing any material in written or electronic form; or (b) any use of media from which visual images, words or sounds can be produced; or (c) any live entertainment, representation or interview'. The term 'benefit' is defined in section 338 as including 'service or advantage'.)
- 16 The Hon Philip Ruddock, Attorney-General, 'Second reading speech: Anti-terrorism Bill 2004', House of Representatives, *Debates*, 31 March 2004, p. 26 476.
- 17 Australian Law Reform Commission, *Confiscation that counts: A review of the Proceeds of Crime Act 1987*, Report No 87, 1999. The report is available electronically at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/87/> (at 13 April 2004). See particularly Chapter 18 'Literary proceeds' at paragraphs 18.37–18.43.
- 18 A 'literary proceeds order' is an order under section 152 requiring a person to pay an amount to the Commonwealth where the person has derived literary proceeds from the commission of an indictable offence.

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- 19 John Howard, Prime Minister, Transcript of interview with Laurie Oakes, *Sunday*, Channel 9, 28 March 2004; also quoted in Jason Frenkel, 'Crackdown on suspects cashing in; PM toughens detention laws', *Herald Sun* (Melbourne), 29 March 2004, p. 2.
- 20 'Bid to outlaw profits from terror memoirs', *The Canberra Times*, 29 March 2004, p. 2.
- 21 'Bid to outlaw profits from terror memoirs', *The Canberra Times*, 29 March 2004, p. 2.
- 22 Brendan Nicholson, 'Coalition reviews anti-terror laws', *The Age*, 29 March 2004, p. 5, and Tony Maguire, 'PM flags new laws to fight terror', *Daily Telegraph*, 29 March 2004, p. 2.
- 23 'Bid to outlaw profits from terror memoirs', *The Canberra Times*, 29 March 2004, p. 2, and Tony Maguire, 'PM flags new laws to fight terror', *Daily Telegraph*, 29 March 2004, p. 2.
- 24 Senator Bob Brown, 'Anti-terrorism bill's provisions require scrutiny: Greens', Press release, 31 March 2004, available at <http://www.greens.org.au> (at 1 April 2004).
- 25 Senate Standing Committee on the Selection Of Bills, Report No. 6 of 2004, *Senate Journals*, Volume 142, 31 March 2004, p. 3301.
- 26 See [http://www.aph.gov.au/senate/committee/legcon\\_ctte/anti\\_terrorism04/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/anti_terrorism04/index.htm) (at 13 April 2004)
- 27 Senator Jeannie Ferris, 'Committees: Selection of Bills Committee: Report', Senate, *Hansard*, 31 March 2004, p. 22 125.
- 28 Explanatory Memorandum to the Anti-terrorism Bill 2004, p. 19 (item 17).
- 29 Paragraph (a) of the definition of 'terrorist organisation' provides: '(a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)'.
- 30 See, for example, Attorney-General's Department, *Submission to the inquiry by the Senate Legal and Constitutional Legislation Committee into the Security Legislation Amendment (Terrorism) Bill 2002 (No. 2) and related Bills*, Submission 383A, 26 April 2002, p. 6 (which refers to other terrorism offences, sexual offences outside Australia involving minors, and offences involving UN personnel).
- 31 The Hon Philip Ruddock, Attorney-General, 'Second reading speech: Anti-terrorism Bill 2004', House of Representatives, *Debates*, 31 March 2004, p. 26 475 (available electronically at: <http://www.aph.gov.au/hansard/reps/dailys/dr310304.pdf>).
- 32 See <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html> (at 1 April 2004).
- 33 Department of Defense (USA), *Military Commission Instruction No. 2* (Subject: Crimes and Elements for Trials by Military Commission), 30 April 2003.
- 34 Review of Commonwealth Criminal Law, (chaired by Sir Harry Gibbs), Discussion Paper No. 3, 'Arrest and related matters', September 1987, p. 20 at paragraph 5.5.
- 35 Christopher Michaelson, 'Little basis for tougher terrorism laws', *The Canberra Times*, 6 April 2004, p. 11.

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