



Australian Government
Attorney-General's Department

**Security and Critical
Infrastructure Division**

18 August 2006

Ms Jane Hearn
Inquiry Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

Dear Ms Hearn

Review of Security and Counter Terrorism Legislation

I refer to your letter of 7 August 2006.

Please find **attached** responses to the Questions on Notice received from the Parliamentary Joint Committee on Intelligence and Security on Tuesday, 1 August 2006.

Yours sincerely

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**Parliamentary Joint Committee on Intelligence & Security
Review of Security & Counter-Terrorism Legislation**

Questions on notice

Attorney-General's Department

Question 1: Community consultations at pages 8 and 9

ANSWER

During the development of the *Security Legislation Amendment (Terrorism) Act 2002* and related legislation, the Government did not undertake specific community consultation. Public scrutiny of the then bills was undertaken when the Government referred the proposed legislation to the Senate Legal and Constitutional Committee and other related committees. Of note, the Senate Legal and Constitutional Committee (Senate Committee) received over 400 submissions regarding the proposed legislation. Most submissions came from community groups, individual members of the public and other relevant stakeholders including the Islamic Council of Victoria (submission no. 138), the Supreme Islamic Council of NSW Inc (submission no. 177) and the Australian Muslim News (submission no. 313).

In addition to the Senate Committee's public review of the Anti-Terrorism Bill 2005 (which was subsequently split into the *Anti-Terrorism Act 2005* and the *Anti-Terrorism Act (No 2) 2005*), the Government undertook consultation with the Muslim Community Reference Group (MCRG). At the first meeting of the MCRG, on 21 September 2005, Departmental staff and Minister Cobb gave a general briefing on the human rights safeguards in the draft Anti-Terrorism Bill 2005. Further, on 6 October 2005, the Attorney-General briefed the MCRG on the detail of the Anti-Terrorism Bill 2005. This was followed by a written briefing being provided to the MCRG in November 2005. The brief was also posted on the Department of Immigration, Multicultural and Indigenous Affairs website.

Question 2: Legal burdens in Commonwealth criminal law page 11

ANSWER

For the purposes of clarifying the application of 'legal burden' within the Criminal Code, the following explanation of Division 13 of the *Criminal Code Act 1995* (the Code) is provided to the Committee. In both criminal and civil matters, there are two elements to the burden of proof – evidential and legal.

The evidential burden of proof determines which party bears the obligation to adduce or point to evidence that suggests a reasonable possibility that a matter exists or does not exist. Section 13.3 of the Code provides that the defendant bears an evidential burden where they seek to deny criminal responsibility by relying on provisions of Part 2.3, which sets out circumstances in which there is no criminal responsibility. Section 13.3 also provides that a defendant bears an evidential burden if they wish to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence.

The legal burden of proof means the burden of proving the existence of a matter and lies with the party who asserts an issue. Section 13.1 of the Code provides that the prosecution bears a legal burden of proving every element of an offence that is relevant to the guilt of the accused. The prosecution also bears a legal burden of disproving any matter where the defendant has discharged an evidential burden of proof. A legal burden of proof is always borne by the prosecution unless the law expressly specifies that either the defendant bears a legal burden, requires the defendant to prove a matter or where there is a presumption that a matter exists (section 13.4). The legal burden of proof on the prosecution must be discharged beyond reasonable doubt (section 13.2) whereas the legal burden of proof on the defendant must be discharged on the balance of probabilities (section 13.5).

There are a number of provisions in the Code in which the defence bears the legal burden. These provisions are:

- Section 102.3- Membership of a terrorist organisation
- Section 102.6- Getting funds to, from or for a terrorist organisation
- Section 270.3- Slavery offences
- Section 302.5- Presumption where trafficable quantities are involved (trafficking controlled drugs)
- Section 303.7- Presumption where trafficable quantities are involved (commercial cultivation of controlled plants)
- Section 305.6- Presumption where trafficable quantities involved (commercial manufacture of controlled drugs)
- Section 306.5- Presumption for pre-trafficking controlled precursors- sale
- Section 306.6- Presumptions for pre-trafficking controlled precursors- manufacture for drug manufacture
- Section 306.7- Presumptions for pre-trafficking controlled precursors- manufacture for sale
- Section 306.8- Presumptions for pre-trafficking controlled precursors- possession
- Section 307.2- Importing and exporting marketable quantities of border controlled drugs or border controlled plants
- Section 307.3- Importing and exporting border controlled drugs or border controlled plants
- Section 307.5- Possessing commercial quantities of unlawfully imported border controlled drugs or border controlled plants
- Section 307.6- Possessing marketable quantities of unlawfully imported border controlled drugs or border controlled plants
- Section 307.7- Possessing unlawfully imported border controlled drugs or border controlled plants

- Section 307.8- Possessing commercial quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported
- Section 307.9- Possessing marketable quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported
- Section 307.10- Possessing border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported
- Section 307.12- Importing and exporting marketable quantities of border controlled precursors
- Section 307.13- Importing and exporting border controlled precursors
- Section 307.14- Presumptions for importing and exporting border controlled precursors
- Section 308.2- Possessing controlled precursors
- Section 308.4- Possessing substance, equipment or instructions for commercial manufacture or controlled drugs
- Section 309.5- Presumption where trafficable quantities are involved
- Section 309.12- Procuring children for importing or exporting marketable quantities of border controlled drugs or border controlled plants
- Section 309.13- Procuring children for importing or exporting border controlled drugs or border controlled plants
- Section 309.14- Procuring children for importing or exporting marketable quantities of border controlled drugs or border controlled plants
- Section 309.15- Procuring children for importing or exporting border controlled precursors
- Section 313.4- Alternative verdict- mistake as to quantity of drug, plant or precursor
- Section 313.5- Alternative verdict- mistake as to identity of drug, plant or precursor
- Section 400.9- Possession etc of property reasonably suspected of being proceeds of crime etc

Question 3 : Community education page 12

ANSWER

In January 2006, the Department arranged for 4500 copies of the pamphlet to be printed. This number included 1000 pamphlets printed in English, 500 printed in French, 500 in Vietnamese, 500 in Traditional Chinese, 500 in Spanish, 500 in Arabic, 500 in Bahasa Malay and 500 in Turkish. In addition, in July 2006 the Department ordered a further 4400 copies of the pamphlet to be printed.

These pamphlets are distributed by Departmental officers at forums and seminars that Departmental officers are invited to speak at about the Australian Government's counter-terrorism legislation. Departmental officers spoke at the following forums:

- 27 February 2006 - Departmental staff briefed the Muslim Community Reference Group on the new counter-terrorism laws;
- 19 April – Departmental staff participated in a legislation and policy forum held at Monash University to discuss the counter-terrorism legislation;
- 19 and 20 May 2006 – Departmental staff provided a presentation on the Government's counter-terrorism legislation at a forum hosted by the Citizens for Democracy in Armidale.
- 28 May 2006 – Departmental staff provided a presentation on the Government's counter-terrorism legislation to a forum hosted by the Young Lawyers Association in Sydney;
- 2 June 2006 – Departmental staff addressed the Attorney-General's Non-Government Organisation Forum on Human Rights; and
- 19 July 2006, Departmental staff provided a presentation on the implications of Australia's new terrorism laws on specific ethnic communities at a conference of The Northern Migrant Resource Centre Inc. in Melbourne.

Question 4: Potential application of s.101.2 to an Australian national serving in the armed forces of another country

ANSWER

The Criminal Code makes it an offence to commit a terrorist act, train for, prepare, plan, finance or otherwise support terrorist activities. All these offences have extraterritorial operation. A terrorist act covers actions which cause death, physical harm or endangerment of life, create a serious risk to public health or safety, cause serious damage to property, or serious interference, disruption or destruction of an electronic system. In order to be a terrorist act such actions must be done *with the intention of* advancing a political, religious or ideological cause and done *with the intention of* coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or intimidating the public or a section of the public. A reference to the public includes a reference to the public of a country other than Australia.

While no case has arisen, terrorist act offences such as the training offence in section 101.2, are not the appropriate charge applicable to training or service in foreign state armed forces. The elements of section 101.2 are:

- that the person intentionally provides or receives training; and
- the training is connected with the preparation for or engagement in, or assistance in a terrorist act; and
- that the person has knowledge or is reckless as to that connection.

An accused can be convicted of the section 101.2 offence where he or she knows the organisation is connected with a terrorist act and the accused is training with that organisation.

In the scenario mentioned in the question, section 101.2 would not be applicable because the definition of 'terrorist act' would not be interpreted to include action taken by the armed forces of a foreign country taking action on the international stage in accordance with what they perceive to be their national interests and international law. If the action of a country's armed forces is not lawful, it would fall to be considered under other provisions and by courts constituted for that purpose and having jurisdiction over the subject matter.

Application of applicable offences

Where an Australian is engaged in hostile activity in a foreign state, depending on the particular circumstances, an offence could be committed against the *Crimes (Foreign Incursions and Recruitment) Act 1978* or other offences found in the Criminal Code including those contained in Division 268.

Crimes (Foreign Incursions and Recruitment) Act 1979

Under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Crimes Foreign Incursions Act) Australian citizens and residents commit an offence if they enter a foreign state with the intent to engage in hostile activities or if they engage in hostile

activities in a foreign state. In addition it is an offence while in Australia to do any act preparatory to any foreign incursion offence, which includes accumulating weapons or training with the intention of committing a foreign incursion offence and recruitment, provision or receipt of money or provision of goods or services with the intention of supporting a foreign incursion offence. There is an exception for humanitarian aid purposes.

However, the offence does not apply if a person is serving with the armed forces of a government of a foreign state. For example, the offence does not apply where a dual citizen of Australia and another country is a member of the armed forces of that country.

The exception under the Crimes Foreign Incursions Act for a person serving in an armed force of a foreign state does not apply to a person who enters a foreign state with the intent to engage in hostile activities (or to a person who engages in hostile activities) while with or in a terrorist organisation (listed under the Criminal Code or section 6(7)(a) of the Crimes Foreign Incursions Act).

War crimes - Division 268 of the Criminal Code

If an Australian is engaged in hostile activity as a member of an armed force of a foreign country, an offence under the Criminal Code could be relevant if that person commits a war crime within the meaning of Division 268 of the Criminal Code. The war crimes offences contained in Division 268 of the Criminal Code have extraterritorial application and apply to all persons, whether Australian citizens or otherwise. Whether the elements of the offence are made out will depend on the facts of each case. This includes whether the conduct takes place in the context of and is associated with either an international or a non international armed conflict.