CHAPTER 3

KEY ISSUES

3.1 The vast majority of submissions and witnesses opposed most aspects of the Bill, in particular the proposed amendments to Division 102 of the Criminal Code. Only one submission supported the Bill in its entirety.[1] This chapter discusses the key issues raised in the course of the Committee's inquiry.

Schedule 1 – Foreign travel documents

3.2 Of the submissions concerning the proposed amendments to the Passports Act in Schedule 1 of the Bill, opinion was divided between the supporters—the Department of Foreign Affairs and Trade (DFAT) and the Attorney-General's Department—and the detractors—represented by the balance of submissions received.

3.3 DFAT expressed confidence in the appropriateness of the proposals and made the following observations:

- the surrender powers for foreign travel documents paralleled those introduced in 1979 for Australian passports specifically to combat terrorism;
- the proposals would prevent an individual with a cancelled Australian passport from leaving Australia on a foreign passport;
- the Australian Federal Police (AFP) and ASIO were expected to be the 'competent authorities' under the Bill;
- the Minister's power to list, by disallowable instrument, conduct which might constitute an indictable offence against Commonwealth law would allow for the inclusion of conduct which might not otherwise qualify under the general provisions;
- the administrative review regime for the new provisions had worked well under existing provisions;
- the increased penalties would constitute 'a greater deterrence factor' and were consistent with existing legislation regarding the use of false identity and citizenship documents.[2]

3.4 In contrast to DFAT's views, submissions from the Castan Centre for Human Rights Law (Castan Centre), the Public Interest Advocacy Centre (PIAC) and the

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1 AFP, *Submission 81*.

2 *Submission* 67, pp. 1-2.

Human Rights and Equal Opportunity Commission (HROEC) identified what were described as quite serious shortcomings with key elements of the Bill relating to:

- whether there was a need for a power to confiscate a person's foreign travel documents;
- the matters on which the Minister's power to issue an enforcement order were founded;
- penalties, offences and the availability and scope of the 'reasonable excuse' defence; and
- the opportunities for administrative review and review generally.

3.5 In its submission, the Attorney-General's Department responded to a number of criticisms about the Bill.

3.6 The Committee will now discuss the new provisions taking into account concerns raised in submissions and the Attorney-General's Department's responses.

The need for a confiscation power

3.7 PIAC was concerned that the Bill went further than was required to achieve its objectives. The PIAC questioned why a confiscation power would be needed if an arrest warrant had been issued either in Australia or by a foreign country with which Australia had an extradition treaty. In the first case, the PIAC argued that the arrest itself would prevent a person from leaving Australia. In the second case, the PIAC's view was that 'the effect of arresting someone would be to prevent them from leaving Australia until formal extradition is arranged.'[3]

3.8 Where no extradition treaty existed, the PIAC considered it would be inconsistent with the principles of natural justice and the separation of powers doctrine to empower a member of the executive to make an order for the person's arrest or the surrender of documents.[4] The PIAC raised similar concerns about proposed section 15. This section bases the confiscation power on a competent authority's suspicion on reasonable grounds that a person is likely to engage in conduct that might endanger Australia's security and so on if the person's foreign travel documents are not surrendered.[5]

3.9 The Attorney-General's Department disputed the PIAC's claims that a confiscation order would be unnecessary where an arrest warrant had been issued. On this point, the Department said:

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3 *Submission* 89, pp. 4-5.

4 ibid, p. 5.

5 ibid, p. 5.

> …an 'enforcement officer' may demand the surrender of a person's foreign passport where that person is the subject of an arrest warrant. The 'enforcement officer' may not have authority to make an arrest in the circumstances. Accordingly, the enforcement officer must have the power to seize the passport to prevent the person from leaving Australia.[6]

3.10 The Attorney-General's Department appeared not to share the PIAC's broader concerns that the Minister's powers to issue confiscation orders were inconsistent with the doctrine of the separation of powers and commented that:

> The circumstances and process for ordering the seizure of a person's foreign passport are comparable with those for cancelling and not issuing an Australian passport under the Passports Act.[7]

Matters underpinning the Minister's power

3.11 HREOC argued that new sections 13, 14 and 15 under which a competent authority will be able to ask the Minister for a confiscation order, potentially infringed article 12 of the *International Covenant on Civil and Political Rights* (ICCPR) regarding freedom of movement. In HREOC's view, the proposals went beyond the minimum means to achieve the Bill's objectives and, as such, failed to comply with the ICCPR.

3.12 Using proposed section 14 to highlight this point, HREOC contended that the executive's power to make an order should not be predicated on the existence of an arrest warrant issued by a foreign court without any consideration of the reasons for, or the circumstances surrounding, the issue of that arrest warrant. In this regard, HREOC argued that the individual concerned should be permitted to make submissions before seizure was ordered.

3.13 HREOC saw a definite need for protections in the Bill:

> …to ensure that foreign arrest warrants or foreign court orders preventing a person travelling internationally are not prima facie a sufficient basis for ordering the surrender of a person's travel documents.[8]

3.14 In a similar vein, the Castan Centre proposed that section 14 should only provide for confiscation of a foreign passport where a foreign arrest warrant, court order, bail, or parole condition related to a matter which would be a serious offence under Australian law. The Castan Centre argued that the existing section should take into account that foreign countries could have 'unjust legal systems and unreasonable laws' which opened up scope for abuse.[9]

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6 *Submission 95*, p. 26.

7 ibid.

8 *Submission 71A*, p. 6.

9 *Submission 79*, p. 2.

3.15 On this point, the Attorney-General's Department disagreed and responded that:

> The amendments include appropriate safeguards and limitations to ensure the powers are used appropriately. For example, it would not be feasible for a foreign government to compel Australian authorities to order the surrender of a passport because the independent decision about the passport is reviewable. The amendments specify the circumstances where a competent authority can apply for an order. These safeguards complement existing safeguards in other legislation. Under the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), if an order is made on the basis of advice of an adverse ASIO assessment, that person must be given a copy of the assessment (section 38). The person may also apply to the Administrative Appeals Tribunal for a review of ASIO's security assessment (ASIO Act, section 54). In addition, new subsection 23(1) provides for appeals against decisions under section 16 to order the surrender of a foreign passport.[10]

Offences and the availability and scope of the 'reasonable excuse' defence

3.16 HREOC argued that the offences in proposed sections 21 and 22 were in potential conflict with article 31 of the *Convention Relating to the Status of Refugees, 1951* (1951 Convention) which states that:

> States shall not impose penalties, on account of their illegal entry or presence, on refugees who…enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.[11]

3.17 HREOC noted that the drafters of the 1951 Convention envisaged that a refugee fleeing his country of origin would rarely be able to meet the requirements for legal entry into a country of refuge.

3.18 HREOC's view, if sections 21 and 22 applied to refugees or asylum seekers 'who present themselves without delay to the authorities and show good cause for their illegal entry or presence', this would be inconsistent with the 1951 Convention. Furthermore, HREOC considered that the defence of 'reasonable excuse' should be clearly defined in the Passports Act and expressly include refugees and asylum seekers. HREOC proposed a definition having 'an inclusive example such that a "reasonable excuse" would include being a refugee or asylum seeker with a well-founded fear of persecution'.

3.19 The Castan Centre echoed these sentiments in its proposal that the 'reasonable excuse' defence, to ensure Australia's compliance with its international obligations, should expressly apply to a person who believed that his or her safety or wellbeing or

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10 *Submission 95*, p. 25.

11 *Submission 71A*, p. 3.

that of his or her family depended upon the use or possession of the false or cancelled foreign travel documents.[12]

3.20 HREOC saw a need for the wider application of the 'reasonable excuse' defence for offences proposed in sections 18, 19 and 20 to ensure consistency with article 31 of the 1951 Convention insofar as refugees were concerned. It proposed that the amendments should include 'appropriately worded defences' to the offences in sections 18, 19 and 20 to take into account the special circumstances of refugees and asylum seekers. The following excerpt from HREOC's evidence gives some insight into what these circumstances would be:

> The Commission submits that it is important to recognise that people seeking asylum may be affected by various factors including culture, language and interpretation, trauma and fear of authority figures. The United Nations High Commissioner for Refugees has noted that refugees may distort or conceal part of their stories out of fear for the safety of persons remaining in their country of origin, out of fear of the authority figures questioning them, or, and especially in the case of persons who have suffered sexual violence, out of shame in respect of their past experiences. Women may also be reluctant to discuss domestic violence. Such distortion or concealment may lead to the impression that refugees are lying to or misleading authorities. Women may also fail to corroborate claims by male relatives, leading to an adverse assessment of credibility, when in fact such failure may be the result of information not having been shared with them. Issues relating to language and interpretation also have the potential to lead to misunderstandings. (UNHCR Training Module RLD4: Interviewing Applicants for Refugee Status, 1995).[13]

3.21 The Bill's proposals to increase the penalties for foreign passport offences attracted criticism from the Castan Centre. The Castan Centre disagreed with claims in the Explanatory Memorandum to the Bill that the penalties were consistent with those in related legislation and argued that the new offences involved were 'far broader' and, for example, applied to possession, without reasonable excuse of a false foreign passport or a foreign passport issued to another.

3.22 Furthermore, claims in the Explanatory Memorandum that higher penalties would deter identity document fraud were dismissed by the Castan Centre as mere assertions. It considered this an insufficient basis on which to increase penalties.[14]

3.23 The Attorney-General's Department disagreed:

> The penalties for the new offences reflect the seriousness of those offences. They have been set at a level that will help deter identity document fraud, which has been identified as a serious national and international problem.

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12 *Submission 79A*, p. 1.

13 *Submission 71A*, p. 4.

14 *Submission 79*, pp. 4-5.

> The penalties are also consistent with penalties for like offences under other Commonwealth legislation, including offences in the *Passports Act 1938* (Passports Act) relating to Australian passports, as well as existing offences in the *Criminal Code Act 1995* and the *Migration Act 1958*.[15]

Scope for review of orders

3.24 PIAC considered that a demand made under proposed section 16 for the surrender of a person's foreign travel documents should be accompanied by details of any arrest warrant or court order pursuant to which the demand is based. The Castan Centre considered that individuals against whom a confiscation order was made, should be provided with these details in the event that they might wish to mount a challenge.[16]

3.25 PIAC argued that the limitations proposed by subsection 23(4) on the Administrative Appeals Tribunal's powers of review should be removed, and a person against whom an order was made should be given a copy of an adverse ASIO assessment if this was the basis for the order.[17]

3.26 The Attorney-General's Department's response to this was that:

> The amendments provide that a person can apply to the Administrative Appeals Tribunal for review of a decision by the Minister to order the surrender of foreign travel documents. The Minister will be able to certify that a decision made in response to a request relating to potential for harmful conduct involves matters of international relations or criminal intelligence. Only where the Minister has certified that a decision involves matters of international relations will provide the Tribunal be restricted to affirming the decision or remitting it to the Minister for consideration. This is both appropriate and consistent with the regime for review of decisions not to issue or to cancel an Australian travel document.[18]

3.27 HREOC considered that the scope for review by the Administrative Appeals Tribunal under proposed section 23 was too limited. It proposed that the Minister's orders should be judicially reviewable under the *Administrative Decisions (Judicial Review) Act 1977* and that the limitation proposed in subsection 23(3) should be removed.

> The Commission submitted also that the Bill should require a Ministerial review of the competent authority's retention of confiscated documents at, say, three-monthly intervals.[19]

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15 *Submission 95*, p. 26.

16 *Submission 79*, p. 2.

17 *Submission 89*, pp. 6-7.

18 *Submission 95*, pp. 26-27.

19 *Submission 71A*, p. 7.

Miscellaneous

3.28 PIAC proposed amendments to paragraphs (iv) and (v) of subsection 15(1) so that the conduct under suspicion 'would'—rather than 'might'—constitute an indictable offence against the Act or against a law of the Commonwealth.

3.29 PIAC noted that the definitions of 'competent authority' in the Bill were slightly different in proposed sections 13, 14 and 15. It suggested that the Committee should investigate the intended scope and coverage of the definitions and whether particular agencies such as the AFP should be specified.[20]

3.30 The response of the Attorney-General's Department to these proposals was:

> The definition of 'competent authority' in the Bill is limited to ensure suitable authorities are authorised to make requests. Only an approved representative, an agency or an employee of the Australian Government of a class specified in a Minister's determination can be a competent authority.[21]

The Committee's views

3.31 The Committee is satisfied, on the basis of evidence before it, that there is a need for amendments to the Passports Act to ensure that, in certain circumstances relating to Australia's national security, a person cannot use foreign travel documents for overseas travel if that person's Australian passport has been cancelled.

3.32 The Committee notes the concerns of HREOC that individuals cannot challenge confiscation orders before their issue particularly where they are predicated on the existence of foreign country documents. While the Committee appreciates these concerns, it envisages that matters relating to national security can require urgent responses that would preclude pre-confiscation order challenges.

3.33 In the circumstances, the Committee believes that any potential for harm will be adequately dealt with by the administrative review provisions.

3.34 Having said this, the Committee is concerned that the 'reasonable excuse' defence does not apply to offences created by sections 18, 19 and 20 and specifically notes the points made in this regard by HREOC.

Recommendation 1

3.35 The Committee recommends that the Commonwealth Government review Schedule 1 of the Bill, with a view to determining whether a defence for 'reasonable excuse' should be included in proposed sections 18, 19 and 20, and report to the Parliament.

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20 *Submission 89*, p. 5.

21 *Submission 95*, p. 26.

Schedule 2 – Persons in relation to whom ASIO questioning warrants are being sought

3.36 Schedule 2 of the Bill seeks to amend the ASIO Act to provide that if the Director-General of ASIO asks the Attorney-General to consent to request an issuing authority to issue a questioning warrant, the person who is the subject of that request may be required to provide their passport to an enforcement officer.[22] In such circumstances, if the person has been informed of the effect of proposed subsection 34JBB(1) and fails to supply their passport they face a possible penalty of 5 years imprisonment.[23]

Background to the provisions

3.37 At the hearing a representative of ASIO argued that the provisions of schedule 2 were needed to provide for circumstances where a person was to be the subject of an application for a warrant, but intended to flee the country:

> …this provision is designed to deal with the situation where ASIO receives information which leads the Director-General to conclude that a request should be made for the issuing of a questioning warrant but then receives information before the warrant can be issued that someone with vital information about a terrorist offence is set on fleeing the country in a hurry. In that circumstance, we consider that it is very important that the director-general should be able to trigger the tool required to prevent the person leaving the country for enough time as is needed to get the warrant up, which would be a very short space of time given the request that would have to be made to the Attorney for him to consent to the issuing of the warrant.[24]

3.38 This part of the Bill attracted criticism from several submissions and witnesses. Those opposed to Schedule 2 argued that it would:

- allow a person to have their passport taken away without judicial or even Ministerial review and would undermine the current protections regarding the issuing of ASIO warrants; and
- infringe on a person's right to freedom of movement.

Accountability measures

3.39 PIAC argued that the Bill would require a person to surrender their travel documentation on the basis of a request to the Minister, which means that the matter has not had Ministerial or judicial scrutiny:

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22 Proposed subsection 34JBA(1).

23 Proposed subsection 34JBB(1).

24 *Committee Hansard*, 26 July 2004, p. 38.

> The role of ASIO is to gather intelligence, not to have unconstrained powers to prevent a person's freedom of movement, including leaving Australia. If a warrant for arrest exists then it is consistent with the law that that person will be taken into custody for questioning by the Australian Federal Police or ASIO. However, it is not acceptable that the mere *request* to the Minister for approval to seek the issue of a warrant empowers the violation of the right to freedom of movement.[25]

3.40 The Castan Centre also argued that, if enacted, Schedule 2 would undermine current safeguards that exist for the issuing of an ASIO warrant.[26] At the hearing Mr Patrick Emerton from the Castan Centre explained:

> In my submission I give a list of things that have to happen before a warrant can be issued. You have to give information about previous warrants; you have to give information about times of detention and you have to be satisfied on reasonable grounds that the person can provide the intelligence. The issuing authority as well as the minister has to be satisfied of those matters and so on. If the schedule 2 amendments were passed all those issues would be circumvented in relation to confiscating a passport. All that the Director-General of intelligence has to do to activate those provisions is to write a request to the minister for the issuing of a warrant. The issuing of the request is the first step in the process so it is not subject to any of the safeguards. So that could be done and then the passport would have to be forfeited, even if the matter were—'frivolous' seems the wrong word. If there were no genuine intention to detain and interrogate the person but, for example, ASIO wanted to keep them under surveillance and therefore wanted to have their things confiscated so that it could keep them under surveillance, even though it had no grounds for thinking that a warrant would be issued.[27]

3.41 In the hearing a representative of ASIO explained that in seeking the Attorney-General's consent to the issuing of a warrant they must be satisfied that the statutory criteria in section 34C of the ASIO Act have been met:

> The important point that has to be made is that the Director-General can only request the Minister's consent to the issuing of a warrant if satisfied that the statutory criteria in section 34C of the act have been met—that is, 'that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence'. He must have formed that state of satisfaction to have made the request and 'that relying on other methods of collecting that intelligence would be ineffective'—that is, it is a measure of last resort. He would have to have that state of mind. In no circumstance could the Director-General request the Minister's consent to the issuing of a

25 Public Interest Advocacy Centre, *Submission 89*, p. 8.

26 Castan Centre for Human Rights Law, *Submission 79*, p. 5.

27 *Committee Hansard*, 26 July 2004, p. 16.

> warrant and then, based on the fact of the person then surrendering his or her passport, consider that the warrant is no longer required.[28]

3.42 The Attorney-General's Department also argued that there is sufficient oversight and accountability to ensure that the provisions would not be abused:

> …to ensure the conduct of ASIO is appropriate in this and other aspects of its operations, there are a range of significant accountability mechanisms and other safeguards designed to avoid abuses of power. These include internal evaluations, audit and fraud control measures. In addition, ASIO is subject to considerable external scrutiny, including oversight by the Attorney-General, the Inspector-General of Security and Intelligence (IGIS), and a Joint Committee on ASIO, ASIS and DSD. All ASIO operational activity must also comply with the Attorney-General's *Guidelines for the Collection of Intelligence,* which requires the use of methods commensurate with the assessed risk. ASIO is also subject to judicial and administrative review of its decisions.[29]

Restriction on the right to freedom of movement

3.43 The Castan Centre also voiced concern over the impact that Schedule 2 of the Bill would have on freedom of movement, and the possibility that the Director-General could make serial requests to prevent a person leaving the country on an ongoing basis:

> It subjects individuals to the risk of arbitrary interference with their right to freedom of movement, a right which Australia is bound to protect, pursuant to article 12 of the *International Covenant on Civil and Political Rights*. Furthermore, it is open to significant abuse, including the issuing by the Director-General of serial requests to the Minister where there is no reasonable basis for supposing that the request will be consented to, or that an issuing authority will issue the warrant requested, simply for the purposes of invoking these provisions.[30]

3.44 A representative of ASIO addressed the issue of serial requests, and explained that in addition to the Director-General being required to satisfy the elements of section 34C of the ASIO Act as described above, additional requests could only arise where new or additional information has arisen:

> … it would only be where additional information has been obtained that the Director-General could consider making a further request for the issuing of a warrant. In the absence of any further information, it is just not conceivable that a further request would be made, particularly given that oversight that has been mentioned.[31]

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28 *Committee Hansard*, 26 July 2004, p. 39.

29 Attorney-General's Department, *Submission 95*, p. 28.

30 Castan Centre for Human Rights Law, *Submission 79*, pp. 5-6.

31 *Committee Hansard*, 26 July 2004, p.40.

3.45 The Attorney-General's Department also addressed this issue in a submission to the Committee following the hearing:

> Where the Director-General makes a request to the Attorney-General, the person's passports can only be retained until the Attorney-General refuses consent to apply for a questioning warrant, an issuing authority refuses to issue a questioning warrant, or, if a questioning warrant is issued, until the time specified in the warrant ends. Once the Director-General commences the process for obtaining a questioning warrant, the process is conducted as expeditiously as possible for operational reasons.[32]

The Committee's view

3.46 Whilst the Committee appreciates the serious implications that are involved in restricting a person's right to freedom of movement, the Committee is of the view that there may be circumstances where in an emergency it is necessary to prevent a party from leaving the country before it has been possible to obtain a warrant.

3.47 The Committee notes the point made by ASIO that where the Director-General would seek the consent of the Attorney-General to issue a warrant, the Director-General would have to be satisfied that the criteria of section 34C of the ASIO Act had been met.

3.48 The Committee also notes the comments of the Attorney-General's Department that the provisions of Schedule 2 would provide that a person's passport can only be held until the Attorney-General refuses consent to apply for a questioning warrant, an issuing authority refuses to issue a questioning warrant, or if a warrant is issued, until the time specified in the warrant ends.

3.49 The Committee recommends that Schedule 2 of the Bill proceed.

Recommendation 2

3.50 The Committee recommends that Schedule 2 of the Bill proceed.

Schedule 3 – Associating with terrorist organisations

3.51 Most of the evidence received by the Committee was in relation to the proposed amendments to Division 102 of the Criminal Code. Serious concerns and strong opposition were expressed by all those who commented on the proposed 'Association with a Terrorist Organisation' offence, excluding the AFP. Some of the issues raised were:

- concerns relating to the breadth of the offence;
- the narrowness of the exceptions to the offence which may adversely impact on family, religious and community life, particularly for the Muslim community; and

32 Attorney-General's Department, *Submission 95*, p.28.

- the potential threat to other legitimate activities, including legal and other professional assistance and the freedom of political association.

3.52 These issues are discussed further below.

The breadth of the offence

3.53 The Committee received evidence objecting to the broad and uncertain scope of the proposed offence. For example, the Castan Centre argued that the offence 'significantly widens the scope of criminal liability under a regime of criminal law that is already too broad in its application'[33] by further expanding the scope of existing 'guilt by association' offences.[34] Dr Waleed Kadous of the Australian Muslim Civil Rights Advocacy Network (AMCRAN) told the Committee that:

> Ironically, the breadth of the association crime is matched only by the narrowness of the defences which are, by and large, very strictly defined.[35]

3.54 The Castan Centre also argued that, putting aside concerns about the scope of 'terrorism' in Australian law, the offence does not require any intention that the 'association' support the relevant organisation in the pursuit of criminal activity.[36] Arguably, therefore, the purported purpose of Schedule 3 to 'suffocate those organisations by making recruitment more difficult'[37] is frustrated:

> It is important to emphasise … that proposed section 102.8 would not target terrorist violence, nor terrorists (who, under Australian law, need not be violent, but merely creators of risks to public health or safety), nor terrorist organisations (which under Australian law, need not be directly engaged in terrorist acts) … The section would target those who associate with members, leaders or promoters of banned organisations – regardless of their views about, and their support for or opposition to, political violence, terrorism or the violent or terrorist activities of any organisation.[38]

3.55 The Law Council of Australia held a similar view:

> The offence would be constituted wherever a person intended the association to support an organisation to expand or exist. But the association does not necessarily need to relate to a specific act of terrorism or any other criminal act for that matter.[39]

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33 *Submission 79*, p. 7.

34 ibid, p. 9.

35 *Committee Hansard*, 26 July 2004, p. 22.

36 *Submission 79A*, p. 6. This is contrary to the suggestion by Commissioner Mick Keelty, AFP, *Committee Hansard*, 26 July 2004, p. 52.

37 Attorney-General's Department, *Committee Hansard*, 26 July 2004, p. 37.

38 *Submission 79A*, p. 6.

39 *Submission 93*, p. 5.

3.56 In addition to objections to the offence on the grounds of its breadth, the Committee received evidence relating to potential problems with definitions in Schedule 3. For instance, Mr Patrick Emerton from the Castan Centre argued that the offence is poorly defined:

> Under division 102 of the Criminal Code 'member' is defined to include an informal member, whatever that is, and a person who has taken steps to become a member of an organisation. The vagueness of the concepts 'member', 'informal member' and 'the taking of steps to become a member' make it extremely difficult for an individual to know whether or not he or she is committing an offence. One possible consequence of this vagueness could be a general undermining of the community among Muslim Australians. If the bill is passed it is probably more likely that Muslims will go about their business as usual but the vagueness of the offence would then be used as the basis for selective arrests and for prosecution of selected individuals which would be a further example of the arbitrary character of the offence.[40]

3.57 Mr Emerton also noted that the word 'communicates' in Schedule 3 is not defined. This could be problematic:

> One example which was offered in a second reading speech by the member for Kooyong raised the possibility that publication in a newspaper of a letter of support could be construed as communication with an individual. In addition to that possibility one wonders about posting a reply, for example, on a public Internet message board where replies are public but hang in response to another posted message. So there is the general question of when a public message of sympathy or solidarity becomes communication and therefore criminal communication with another person.[41]

3.58 PIAC also noted some definitional difficulties with the word 'associate', arguing that the definition is too broad.[42]

3.59 HREOC articulated concerns with the width of the term 'assist' and the range of activities that may fall within it. HREOC's key submission was that the term must be defined with sufficient detail in order to conform to the principle of proportionality:

> The Commission submits that in order to conform with the principle of proportionality the offence must be defined with precision in order to identify the nature and extent of the risk that the offence is intended to address. The Commission submits that the term could be defined with reference to particular examples. In the United States, for example, the legislation lists specific examples including, the provision of financial

40 *Committee Hansard*, 26 July 2004, p. 10.

41 ibid.

42 *Submission 89*, p. 9.

services, weapons, expert advice, safe houses, false documentation, or personnel.[43]

3.60 HREOC continued:

> The Commission, however, notes with concern that it appears to be the very intention of the amendment that the term 'assist' be wide ranging. It is stated in the Explanatory Memorandum that 'the amendment is by necessity wideranging in terms of the types of activities or persons who might be subject to it.' The Commission questions the necessity for such a wide ranging provision. This is particularly the case when a range of activities that could fall within its scope are already proscribed under the Criminal Code.[44]

3.61 Dr Waleed Kadous for AMCRAN argued that:

> … the definitions used in the legislation should be tightened and refined to provide clarity. In particular, the amendments should clearly define the notions of promotion, the concept of support and the concepts of humanitarian aid and they should further clarify the original 2002 bill with regard to the definition of 'membership'.[45]

3.62 The AFP expressed support for wide definition of the term 'assists' since a specific definition:

> … would allow terrorist organisations to rearrange the way that they garner assistance from outside their organisation. Any specific definition of 'assists' could have the effect that terrorists and their associates may avoid legal consequence while continuing to receive assistance from outside a listed terrorist organisation.[46]

3.63 The Attorney-General's Department informed the Committee that the term 'assist' has:

> ... an ordinary meaning capable of being understood by the community. The primary meaning … is to provide help to the organisation.[47]

3.64 In relation to the term 'support', the Department stated that:

> The concept of 'support' is taken from existing terrorism offences at section 102.7 of the Criminal Code (Providing Support to a Terrorist Organisation). While it has not been defined in this offence, or for the purposes of section 102.7, it is not vague. It has an ordinary meaning capable of being understood by the community. The primary meaning here is to 'lend

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43 *Submission 71*, p. 8.

44 ibid.

45 *Committee Hansard*, 26 July 2004, p. 23.

46 *Submission 81A*, p, 1.

47 *Submission 95*, p. 12.

> assistance and countenance; to back up' (see Macquarie Dictionary, 3rd Edition, p.2126). "Support' has an ordinary meaning that is well understood in the community. The meaning of the word is informed by the conduct, in this case communicating or meeting, and the purpose of the support, in this case assisting a terrorist organisation to expand or continue to exist.
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> The word has been used in legislation before and in each case it has not been defined.[48]

3.65 In evidence at the public hearing, Mr Bret Walker SC, Past President of the Law Council of Australia and Past President of the New South Wales Bar Association acknowledged the 'very serious effort … to do things properly'[49] in Schedule 3. However, he expressed some concern about the terminology used in proposed section 102.8, along with views relating to possible difficulties in prosecution of the offence:

> The fact is, when we are talking about the two abstract nouns 'association' and 'support' and we know that that is not to do with what is well and truly already criminalised—that is, actually taking part in the organisation of terrorist acts—then I think that it casts a wide net. That is cause for concern, but the concern is as much aimed at the fuzziness of the law in terms of being able to prosecute and prosecute successfully.
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> … it seems to be that there is a genuine, important social interest to make sure that we devise laws, particularly for lower order involvement which might be thought to be more abundant than that of the kingpins, where the prosecutions succeed and you can get a conviction. The more fuzziness we have, obviously the more scope there will be for powerful, legitimate arguments in defence giving the benefit of the doubt to the accused.[50]

3.66 Mr Walker also questioned the need for the offence in Schedule 3, given that 'real support'[51] for terrorist organisations has already been 'well and truly criminalised at the higher level.'[52] He argued that:

> Personally, I see merit in resisting the creation of too many graded steps of criminalising support for terrorist organisations. Leave that to the sentencing discretion. Some will be 20-year cases and others will be two-year or five-year cases. Let that emerge from the facts of a particular case rather than, as it were, accidentally start introducing charges of wildly different seriousness for very similar conduct expressed in conceptual terms...[53]

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48 ibid, pp. 11-12.

49 *Committee Hansard*, 26 July 2004, p. 4.

50 *Committee Hansard*, 26 July 2004, p. 5.

51 ibid, p. 7.

52 ibid, p. 8.

53 ibid.

3.67 AMCRAN also argued that existing legislation is sufficient to cover the type of behaviour that the association offence seeks to prohibit:

> … existing ancillary offences such as aiding and abetting, counselling, procuring or facilitating the commission of an offence under the *Criminal Code* are more than sufficient to cover the type of behaviour that is proposed to be prohibited by the introduction of the association offence. The government tries to justify the introduction of the offence by stating that these existing offences are more difficult to prove because they contain a causal element that is linked to the commission of a terrorist act, whereas the proposed offence will be much easier to prove. This justification defies logic. Since the introduction of the terrorism offences under Part 5.3 of the *Criminal Code*, not one person has been charged, successfully or otherwise, with aiding and abetting, counselling, or procuring the commissions of a terrorist act. Hence there is no evidence to suggest that the existing ancillary offences are inadequate in any way such as to justify the introduction of the new association offence.

3.68 There was other support for this position. For example, Mr Patrick Emerton from the Castan Centre argued that the examples offered by the AFP in evidence at the public hearing[54] in support of the offence 'are in many ways beside the point'[55] because they would already appear to fall within the scope of section 102.7 of the Criminal Code.[56]

3.69 The Attorney-General's Department did not agree:

> The principal difference between the proposed offence and section 102.7 'Providing Support to a Terrorist Organisation' is the causal link to a 'terrorist act'. The offence at section 102.7 targets the provision of support or resources that would help the organisation prepare, plan, assist in or foster the doing of a *terrorist act*. This feature of the section 102.7 offence creates a significant burden for the prosecution to bear.
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> If evidence cannot be adduced demonstrating a link to such a 'terrorist act' then the offence cannot be made out. The proposed association offence would target conduct that is more remote to the planning, preparing, assisting in or fostering the doing of a terrorist act. For example, the preliminary stages of recruiting a person into a terrorist organisation, or the lending of public support to a terrorist organisation in an effort to lend credibility to that organisation. Although more remote, such conduct can play an important part in the life and growth of terrorist organisations. In recognition of the fact that the relevant conduct is more remote, lower maximum penalties of imprisonment for 3 years apply.[57]

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54 See Federal Agent Graham Ashton, AFP, *Committee Hansard*, 26 July 2004, pp. 51-52.

55 *Submission 79A*, p. 6.

56 ibid.

57 *Submission 95*, pp. 8-9.

3.70 The Department argued further that existing ancillary offences or state and territory consorting offences would not provide a prosecutorial avenue in the association scenarios that are intended to be caught by the new offence. Unlike some existing offences, the proposed association offence does not require proof that the support actually assisted the organisation or that the associate is somehow connected to another person having committed an offence. It is the intention of the associate that is important in the proposed offence.[58]

3.71 The AFP was the sole supporter of the proposed offence, arguing that it 'provides an earlier intervention point before any substantive terrorist offence may have been committed.[59] The AFP stressed the importance of 'disrupting support networks [which] may disrupt planning and preparation for terrorist attacks'[60] and supported the view that, since membership of terrorist organisations is illegal, activity supporting the existence or expansion of an illegal organisation should also be a crime.[61]

3.72 These arguments were contested by Mr Patrick Emerton from the Castan Centre:

> In the context of the proposed offence 'disrupting support networks' seems to me to mean convicting, in many cases, fundamentally innocent people of an offence that would make them liable for three years imprisonment. I just note that collective punishment and also the fighting of crime by disruption of the community to which the alleged criminals belong are both, so far as I can see, quite contrary to the rule of the law.[62]

3.73 With respect to making support of the existence of expansion of an illegal organisation a crime, Mr Emerton argued that:

> That strikes me as being a non sequitur. It would exclude any attempts to reform an organisation, to persuade the government to delist it, or simply to express sympathy for the circumstances in which one's friends or family have found themselves. It seems to me that a free country does not need this sort of illiberal or even totalitarian law.[63]

3.74 However, in evidence at the public hearing, Commissioner Mick Keelty reiterated the AFP's viewpoint:

> Terrorist organisations rely on support and assistance from outside their membership structures to exist. Importantly, our experience has shown that their capacity to use modern and emerging technologies is frightening. The

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58 ibid, p. 9.

59 *Submission 81*, p. 1.

60 ibid.

61 ibid, p. 3.

62 *Committee Hansard*, 26 July 2004, p. 10.

63 ibid, p. 11.

> proposed offence will help close the gap through which listed terrorist organisations use people outside their membership structure as a means of support and assistance. Many states and territories have consorting offences that are intended to inhibit organised crime. The Commonwealth does not have a similar offence which can be applied to prevent terrorist organisations securing their ongoing support. Without an appropriate provision, law enforcement's capacity to prevent the provision of support to listed terrorist organisations is limited. The gap allows people to knowingly assist terrorist organisations without the risk of prosecution.[64]

3.75 Indeed, Commissioner Keelty argued that the proposed new offence does not go far enough:

> I think the reality is that I do not think this bill goes far enough, to be honest with you. The reality is that it comes back to inchoate crimes and that it comes back to the very embryonic stage of a crime being committed. As Mr Ashton said, often at that point the substantive crime is going to be unknown. It really is taking a shift in our criminal justice system to understand this, but I have to say that this is the nature of terrorism.[65]

3.76 Commissioner Keelty also emphasised that there are significant safety nets in place to counter the potential wide ambit of the offence:

> There are safety nets in the sense that we have not got the resources to investigate each and every person in the community who may be a member of something for an innocent reason. Hopefully, our resources are being placed at the critical level, based on intelligence received from the intelligence community and from our own operations. That is the first safety net.
>
> The second one is that we are not about to investigate innocent people, the same as applies for any offence … the safety net of police discretion … is a strong one … I would like to think that the Commonwealth Director of Public Prosecutions, like me, operates independently of the government of the day and operates in favour of the criminal justice system.[66]

3.77 Commissioner Keelty continued:

> The next safety net is the court itself—if the court is not satisfied that the intent is a criminal intent or that the involvement, the association or the promotion is of a criminal nature … We have to rely on our court, our prosecution and our defence counsel to elicit the veracity of the evidence that is before them and decide the issue as a matter of fact and as a matter of law.[67]

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64 *Committee Hansard*, 26 July 2004, p. 50.

65 ibid, p. 53.

66 ibid, pp. 53-54.

67 ibid, p. 54.

Effect of exemptions to the offence

Possible discriminatory application to the Muslim community

3.78 Many submissions were form letters from members of the Muslim community, expressing concern that the creation of such an offence depends upon executive discretion in declaring an organisation to be a 'terrorist organisation' which may be selectively exercised. This may disproportionately and unjustly impact on the Muslim community.[68] This was also a common argument raised in many other submissions. Both the Attorney-General's Department and the AFP stated that this was emphatically not the purpose of the Bill, nor of the anti-terrorism measures of the Commonwealth Government.

3.79 For example, Mr Joo-Cheong Tham argued that:

> The breadth of this offence also means that broad executive discretion will be conferred in terms of who is investigated and who is prosecuted. This discretion is laid upon the significant discretion conferred upon the Attorney-General in terms of which organisation is prescribed as a terrorist organisation. The danger with such discretion has always been selective and arbitrary application. There is no good evidence that this danger has been realised. The parliamentary joint committee on ASIO, ASIS and DSD, in its review of the listing of Palestinian Islamic Jihad urged 'a more considered process in the prescription of terrorist organisations.'
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> The Parliamentary Library recently released an excellent research note entitled, 'The Politics of Proscription in Australia'. Its key thesis is that the proscription power to date has been exercised on an inconsistent basis.[69]

3.80 In his supplementary submission, Mr Tham argued further:

> … there is evidence that the anti-terrorism laws have been disproportionately applied to Muslim members of the Australian community. So far, all persons charged with either a 'terrorist act' or a 'terrorist organisation' offence have been Muslim. Moreover, the overwhelming majority of individuals and organisations proscribed under the *Criminal Code Act* and *Charter of United Nations Act 1945* Cth) appear to be Muslim. There is then some reason to suspect that this proposed offence, if enacted, will be directed at Muslim individuals and groups. If so, this will undermine a key tenet of the rule of law, equality before the law. It will also erode the multicultural fabric of Australian society.[70]

3.81 AMCRAN expressed similar apprehension:

> … for whatever reasons, all proscribed organisations are Muslim organisations, hence, the 'associating with terrorist organisations' offence at

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68 See, for example, Mr Fauad Nagm, *Submission 2*.

69 *Committee Hansard*, 26 July 2004, p. 17.

70 *Submission 50A*, p. 8.

> the current time applies to associating exclusively with Muslims. For these reasons, the impact of this legislation on the Muslim community must be considered.
>
> The Muslim community has, as a result of terrorist acts committed by those who claim to be Muslim, compounded by the anti-terrorism legislation, and the "Be Alert, but not Alarmed," campaign, suffered unprecedented levels of racism and discrimination26. One of the main effects of this Bill is that it will create two further levels of isolation: it will create isolation between the Muslim community and the wider Australian community, since non-Muslim Australians will fear, rationally or irrationally, that they may be talking to a member of a terrorist organisation and will thus shun Muslims, and likewise within the Muslim community, it will lead to people not wanting to talk to one another, again, for fear of falling foul of this legislation. This is at a time when both Muslim and non-Muslim Australians need to work together closely to prevent terrorism.[71]

3.82 The Attorney-General's Department rejected these arguments:

> Organisations cannot be listed arbitrarily by the Australian Government. Strict legislative criteria must be met before an organisation may be listed in regulations as a terrorist organisation.[72]

3.83 The Law Council of Australia agreed that Schedule 3 of the Bill has 'the potential to operate harshly and will unfairly target members of minority groups, especially those of the Islamic faith.'[73] The Castan Centre expressed similar sentiments, noting the:

> … arbitrary character of criminal liability which turns upon the exercise of discretion by the political arms of government [which] is doubly so when the effect of such discretion is not just arbitrary but discriminatory in its application to one segment of the community, namely, the Muslim community in Australia – given that it is only Islamic organisation which have been proscribed.[74]

3.84 There are fears in the Muslim community that the creation of the new offence will have a negative effect on many legitimate Muslim activities, such as certain religious festivals and gatherings, as well as education classes and study groups.[75] Dr Waleed Kadous from AMCRAN told the Committee that:

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71 *Submission 84*, p. 13.

72 *Submission 95*, p. 11.

73 *Submission 93*, p. 4.

74 *Submission 79A*, p. 5.

75 See further Australian Muslim Civil Rights Advocacy Network, *Submission 84*, p. 15; Dr Waleed Kadous, Australian Muslim Civil Rights Advocacy Network, *Committee Hansard*, 26 July 2004, pp. 22-23.

> … there is the uncertainty surrounding the legislation. Because of the definitions of these terms on which I elaborated there is a lack of clarity as to exactly what constitutes a crime under this legislation. This effectively leads to every interaction being questionable and uncertain. I can give you real-world examples of that to illustrate this problem. It will have a huge impact on what I believe to be quite legitimate activities of Muslim organisations.[76]

3.85 The impact on Muslim families was also raised in the form letters received by the Committee:

> Muslim communities are closely-knit, and the religion of Islam actively encourages the provision of support to others in need, even if they are not related, indeed, even if they are strangers. There is no appropriate regard to this under the Bill. It would be extremely easy for this kind of general support offered by a Muslim to be misinterpreted as a crime under this new amendment.
>
> … Specifically, only close family members are excluded from the application of the offence. It is not unusual for Muslims to be close to their extended family also, yet under this Bill, an uncle of a cousin cannot communicated with a person who may have some connection to an organisation that the government proscribes as a terrorist organisation.[77]

3.86 Dr Kadous argued that the exemption for an association with a 'close family member', if considered necessary, 'should be extended to include extended families, which includes cousins, aunts, uncles, nieces, in-laws and nephews.'[78]

3.87 The AFP explicitly rejected any expansion of the exemptions as currently drafted in Schedule 3, arguing that they are already too extensive:

> The exceptions potentially leave a loophole that terrorist organisations may exploit, for example, by having their members associate with other family members for the purpose of sustaining or expanding the organisation. The Australian Federal Police respects the need for certain exceptions where the relationships are not criminal, and considers that the proposed amendments represent an appropriate balance between the rights of association and law enforcement's requirement to protect the public interest.[79]

3.88 The AFP argued that exemptions would only be required where a person has the intention that their assistance will help the terrorist organisation to continue to exist or expand:

> The only circumstances where a legal practitioner or close family member will need to rely on the exemption is where they are intertwined in the

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76 *Committee Hansard*, 26 July 2004, pp. 22.

77 For example, Mr Fauad Nagm, *Submission 2*, p. 2.

78 *Committee Hansard*, 26 July 2004, pp. 22

79 *Submission 81*, p. 2.

> terrorist activity to the extent that they have the required intent to assist the listed organisation to continue to exist or expand.[80]

3.89 The Attorney-Generals Department also strongly rejected that the Bill is in any way discriminatory towards the Muslim community. A representative from the Department told the Committee that '(t)he targeting of terrorist groups is based on their violence not their ethnic or religious origins.'[81]

3.90 In answering a question on notice from the Committee in relation to this issue the Department elaborated:

> The offence is not directed at the Muslim population. There is a broad range of religious beliefs in Australia and the Government has said on many occasions it is committed to maintaining the Australian traditions of tolerance and respect, which are fundamental to a free and democratic society. There is a strong commitment in Australia to maintaining the right of people of all religions to practise their religion, within the scope of the law, without intimidation or harassment … The counter-terrorism laws target terrorists regardless of their religious, ideological or political motivation. Terrorist organisations listed for the purposes of the criminal law have been shown to be directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act and the Government's counterterrorism laws target terrorists and those assisting them, not persons of a particular religious or racial persuasion.[82]

3.91 The Department also commented on the suggestion by AMCRAN that the exception for an association with a 'close family member' be amended to include a greater number of family relationships to account for the nature of family relationships in Muslim communities:

> The importance of extended families is not limited to Arab and Islamic cultures. It is common to cultures throughout the world, whether it be elsewhere in Asia and Africa, the Americas, much of Europe and in the Pacific. However, the exception is not unfair to any of these cultures.
>
> The exception does not come into play until the prosecution can prove beyond reasonable doubt the stringent fault elements of the offence.

3.92 Further, the Department pointed out that:

> Even if the close relative was culpable [by satisfying all the elements of the offence set out in proposed paragraph 102.8(4)(a)], there is an exception from the offence if the association relates to a matter of family or domestic concern. In practical terms a mother could know she is providing support to a terrorist organisation by providing food and lodging for her son for that reason as well as her love of the son. The Government has taken the view

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80 *Submission 81A*, p. 2.

81 *Committee Hansard*, 26 July 2004, p. 37.

82 *Submission 95*, p. 9.

> that it should not intrude on families to that extent. However, to extend the exception to the whole extended family would open a loop hole that would significantly reduce the effectiveness of the offence.[83]

3.93 The Department also stated that family members such as uncles, aunts and cousins are not exempted as they do not fall within the definition of close family:

> The current exemption is generous when consideration is given to the knowledge requirements that must be met before a person can commit an offence. It is consistent with the definition of close family under section 100A of the NSW Crimes (Sentencing and Procedures) Act 1999.[84]

3.94 In relation to the 'public religious worship' exception set out in paragraph 102.8(4)(b), the Department stated that:

> Public worship is intended to cover churches and places set aside for religious purposes; for example school halls, parks or stadiums. The intention of all the exemptions is to focus on the activities of the organisation. Exceptions based on location or residential contexts would provide a loophole that could quickly be abused by terrorists.[85]

3.95 The Department noted the concerns raised by the Australian Muslim Civil Rights Advocacy Network's submission to the Committee in relation to classes and study groups being frequently conducted in people's homes:

> The Department will provide advice to Government on this submission. While the exception could apply to these activities if the particular home is open to the public for worship, there will be other circumstances where it will not. However, if the classes and study groups are focused on religious worship it will be very unlikely that the prosecution would be able to prove that the association was intended to assist the terrorist organisation to exist or expand.[86]

3.96 The Department advised that such a study group or class conducted in a private home or other place not open to the public would not constitute 'public religious worship' within the meaning of those words in paragraph 108(4)(b) of the Bill, as currently drafted.[87] However, the Department stated that '(i)t is not the purpose of the proposed offence to prohibit the free exercise of religion.'[88] Rather, 'the purpose of the offence is to prevent support that would assist terrorist organisations from continuing to exist or expand.'[89]

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83 ibid, pp. 1-2.

84 ibid, p, 19.

85 ibid, p. 2.

86 ibid.

87 ibid, pp. 2-3.

88 ibid, p. 3.

89 ibid.

3.97 As to whether the exception might be amended to include religious practice or study taking place in a private home or other place not open to the public, the Department stated that:

> An amendment of this nature would be a matter for Government. However, in some cases these type of activities could be a front for associations with members of terrorist organisations and a blanket exemption could undermine the objectives of the offence. It is not the intention of the legislation to prevent people practising religion in their own home. For such meetings to constitute an offence the prosecution would need to prove beyond reasonable doubt that such meetings involved associations with the intention of providing support to the organisation to continue to exist or expand.[90]

Other potential incursions on legitimate activities

3.98 The Committee received evidence that the Bill potentially criminalises a wide range of legitimate activities, including possible infringement of the right to freedom of association,[91] the implied freedom of political communication,[92] the provision of legitimate legal advice and legal representation,[93] and the provision of humanitarian aid.[94]

3.99 Mr Craig Lenehan from HREOC told the Committee that:

> The proposed offence potentially infringes the rights prescribed in article 19 of the International Covenant on Civil and Political Rights—that is the right to freedom of expression—and article 22 of that covenant, which is the right to freedom of association. The commission submits that such infringements are permissible only if the proposed offence conforms to the principle of proportionality and is the least intrusive means of achieving that stated aim. The commission is concerned that, in view of the width of the offence and the lack of precision in its terms, those requirements are not met.[95]

3.100 HREOC submitted further that the exemption relating to political communications is not clear and does 'not provide any certainty for journalists as to whether their opinion pieces on proscribed organisations would fall within the ambit of implied freedom of political communication.'[96]

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90 ibid.

91 See for example, Amnesty International Australia, *Submission 88*; Castan Centre for Human Rights Law, *Submission 79*.

92 See, for example, HREOC, *Submission 71*, p. 9.

93 See, for example, Dr Greg Carne, University of Tasmania, *Submission 87*.

94 Amnesty International Australia, *Submission 88*, pp. 7-8.

95 *Committee Hansard*, 26 July 2004, p. 27.

96 ibid.

3.101 The New South Wales Council for Civil Liberties agreed, arguing that Schedule 3 'would have a particularly harsh effect in respect of journalists who are seeking to investigate terrorism matters.'[97] Further:

> … the legislation would provide further inroads and attacks on the right of free speech and dissemination of information and further constraints on the operation of the news media. Such legislation could be used as a threat by the authorities to stop investigative journalists carrying out exposes of corrupt or abuse of power by law enforcement bodies.[98]

3.102 The Attorney-General's Department advised the Committee that the offence would not cover bona fide investigative journalists or the reporting of news and current affairs. If the prosecution is able to prove the requirements in proposed paragraph 102.8(4)(a) then the journalist may be able to rely on the implied freedom of political communication exemption. The journalist bears the evidential but not the legal burden of proof in relation to whether the exemption applies. The defendant would have to point to some evidence to show that the exemption applies but it would then be for the prosecution to prove beyond reasonable doubt that it does not apply.[99]

3.103 The Committee received considerable evidence arguing that the exemption in relation to legal advice or representation is too narrow. For example, Dr Greg Carne from the University of Tasmania submitted that paragraph 102.8(4)(d) 'strips away basic and fundamental rights of legal advice and representation … by criminalising that meeting and communication conduct by legal advisers and legal representatives.'[100] Dr Carne also suggested that, amongst other things, the provision could be open to abuse.[101]

3.104 HREOC also argued that the exemption is too limited since 'it applies only to legal advice and representation in connection with actual or contemplated proceedings, or proceedings relating to whether the organisation is a terrorist organisation'[102] and does not include, for example, 'legal advice to the organisation to have its declaration as a terrorist organisation revoked'.[103] HREOC submitted further that there should be no restriction on a person's ability to seek legal advice or representation, regardless of whether that person is a member of, or a person who promoted or directs the activities of, a proscribed terrorist organisation.[104]

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97 *Submission 76*, p. 2.

98 ibid.

99 *Submission 95*, p. 5.

100 *Submission 87*, p. 3.

101 ibid.

102 *Submission 71A*, p. 8.

103 ibid.

104 ibid.

3.105 In response to this issue, the Attorney-General's Department stated the following:

> The aim of the offence is to isolate terrorist organisations. To cut the access of these organisations to commercial and other freedoms that can be used to make an organisation prosper in a democratic society. Many commercial activities require the provision of legal advice, such as on conveyancing or drafting of contracts. Further, some lawyers in the past have used their professional status to involve themselves in organised crime. It is not inconceivable that the same could occur in the context of relationships with terrorist organisations. It was considered necessary to carefully circumscribe the exception in a way which would at the same time not impact on the ability of those accused of terrorist related activity from being able to defend themselves against those allegations.[105]

3.106 The Department also pointed out that the exception regarding legal assistance would not cover situations where the assistance was provided by a person not legally qualified, including financial assistance with legal expenses. However, for such support to be an offence the prosecution would have to prove beyond reasonable doubt that the service provided intended that the provision of their services would assist the terrorist organisation to expand or continue to exist.[106]

3.107 In relation to fundraising activities to assist in legal proceedings, the Department advised that:

> The prosecution would need to prove that the purpose of the fundraising was intended to assist the organisation to continue to exist or expand, not just to save the hide of an individual. An exemption of this type could be abused. It has been suggested in the past in the context of Proceeds of Crime legislation that extravagant estimates of legal fees have been used to shield the siphoning off of money for other purposes.[107]

Interaction with existing legislation

3.108 Some submissions raised issues relating to the interaction of Schedule 3 with existing legislation. PIAC and AMCRAN raised the issue of the combined effect of the provision with the recently introduced presumption against bail and setting of minimum non-parole periods in relation to terrorism offences. According to PIAC this would mean that:

> … a suspect could be detained without charge for an investigation period of up to 24 hours (which can be suspended or delayed for various reasons), charged with "intentionally associating" with a member of a proscribed terrorist organisation, denied bail, and, if found guilty, subject potentially to

105 *Submission 95*, p. 3.

106 ibid. p. 4.

107 ibid, p. 17.

> a nonparole period of 3/4 of the three-year sentence. Together, such measures seem extreme and excessive.[108]

3.109 AMCRAN pointed out that 'Article 9 of the ICCPR states that it shall not be a general rule that persons awaiting trial shall be detained in custody'[109] and the combined effect of the new offence and the bail provisions 'constitutes an unacceptable infringement of a person's civil liberties in view of the objective seriousness of the offence.'[110]

3.110 The Attorney-General's Department informed the Committee that the bail reforms were in part justified by the seriousness of other terrorism offences so there is some incongruity with applying them to the offence in Schedule 3. However, the Department argued that 'it is open to conclude that the fact the offence is concerned with preventing terrorism is justification in itself for applying the bail reforms to this offence.'[111]

3.111 AMCRAN also expressed concern about interaction of the offence with the *Telecommunications (Interception) Act 1979* which 'would expand the surveillance powers of ASIO and the police subtly, but also immensely, since the scope for this particular crime is much greater than that of any of the other terrorism-related crimes and carries a much lower barrier for suspicion.'[112]

3.112 Dr Greg Carne also noted that the Bill potentially undermines the statutory provisions of access to legal advice as set out in the ASIO Act.[113]

The Committee's view

3.113 The Committee is concerned about the proposed association offence. The evidence does not persuade the Committee of the need for the offence in the first place, given the already wide ambit of terrorism offences under current law in Australia, the breadth of the definition of 'terrorist organisation' contained in the Criminal Code, and other existing laws such as the law of conspiracy and accessory liability. The Committee notes with apprehension the tendency towards 'legislative overreach' in relation to counter-terrorism measures in Australia.

3.114 Further, the Committee is of the view that the drafting of the offence provision results in it lacking certainty and clarity. The breadth of the offence, its lack of detail and certainty, along with the narrowness of its exemptions lead the

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108 *Submission 89*, p. 10.

109 *Submission 84*, p. 9.

110 ibid.

111 *Submission 95*, p. 6.

112 *Submission 84*, p. 10. On this point, see further, pp. 9-11.

113 *Submission 87*, p. 4.

Committee to conclude that serious difficulties would result in it practical application. Some of these difficulties include the offence's potential capture of a wide range of legitimate activities, such as some social and religious festivals and gatherings, investigative journalism, and the provision of legal advice and legal representation. Evidence received also shows that it is likely to result in significant prosecutorial complications. Further, the Committee is not satisfied by the Attorney-General Department's justification for the offence, in particular its argument that prosecutorial discretion is in effect its only safeguard against misuse.

3.115 The Committee considers that the offence provision could be significantly amended to make it less opaque and that the exemptions to the offence could also be expanded.

Recommendation 3

3.116 The Committee recommends that the terms 'membership', 'associates', 'support', 'assist', 'promotes' and 'family or domestic concern' contained in Schedule 3 of the Bill be defined.

Recommendation 4

3.117 The Committee recommends that provisions relating to the presumption against bail in the Anti-Terrorism Act 2004 not apply to the proposed offence in Schedule 3.

Recommendation 5

3.118 The Committee recommends that the exemption in proposed paragraph 102.8(4)(b) of Schedule 3 of the Bill be extended to cover religious practice in places other than public places being used for religious worship.

Recommendation 6

3.119 The Committee recommends that the Commonwealth Government report to the Parliament on the types of aid contemplated by the phrase 'providing aid of a humanitarian nature' in paragraph 102.8(4)(c) of Schedule 3 of the Bill.

Recommendation 7

3.120 The Committee recommends that the exemption in proposed paragraph 102.8(4)(d) of Schedule 3 of the Bill be amended to ensure that access to legal advice required to meet the obligations and exercise the rights in broader anti-terrorism legislation is permitted.

Recommendation 8

3.121 The Committee recommends that the operation of the proposed offence in Schedule 3 of the Bill be subject to independent review after three years.

Schedule 4 - Transfer of Prisoners

3.122 The Committee received evidence expressing concerns in relation to various aspects of Schedule 4 of the Bill.

3.123 The Law Council of Australia argued that the proposed provisions:

> … will allow for the transfer of remand prisoners without notice and without regard for the personal circumstances of the detainee, including their prospective distance from family or other support networks as a result of a decision of the Attorney-General under this legislation. Moreover, any transfer based on "security grounds" may in itself jeopardise a remand prisoner's right to a fair trial unless news of the transfer is in some way suppressed (an unlikely prospect). In our view, such decision in respect of remanded detainees should require the approval of a court.[114]

3.124 The Law Council of Australia also expressed apprehension in relation to decisions of the Attorney-General under the new provisions not being subject to judicial review, meaning that there will be no opportunity for detainees or prisoners to request a court to examine the security grounds upon which a decision of the Attorney-General is based. The Law Council of Australia noted that '(t)his is part of a recent trend by the Federal Government toward exempting judicial review in sensitive administrative areas, which is of great concern to the Law Council.'[115]

3.125 Mr Craig Lenehan from HREOC raised similar issues at the hearing:

> The commission's principal concern in relation to this issue is that the security transfer orders create the possibility for delay in bringing a remand prisoner to trial and, accordingly, the possibility for prolonged pretrial detention which may contravene article 9 of the International Covenant on Civil and Political Rights. The commission submits that issues of national security should not be decisive in determining the length of time a person charged with a criminal offence must await trial. Rather, a person should be brought to trial as soon as is reasonably practicable, having regard to the criteria set out by the European Court of Human Rights.[116]

3.126 Mr Lenehan continued:

> The proposed amendments to this act create the risk that security transfer orders could operate so as to delay trial in a manner that would breach international standards. The commission also submits that the power to order a prisoner or a remand prisoner to be brought before the court should remain with the judiciary. The bill seeks to transfer that power to the executive. The commission acknowledges that some measure of judicial control is retained in the act in respect of remand prisoners. However, the

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114 *Submission 93*, p. 5.

115 ibid, p. 6.

116 *Committee Hansard*, 26 July 2004, p. 27.

> procedure by which judicial input is received is not at all clear. For example, it is not at all clear whether the court would seek submissions from the remand prisoner. One might also expect that there may be some degree of judicial difference when the court is informed that the Attorney considers that it is essential, in the interests of national security, that a remand prisoner remain in custody.[117]

3.127 Mr Lenehan also argued that the Attorney-General's decisions under the new provisions should be subject to judicial review:

> The individual must be able to challenge the executive's assertion that national security is at stake in the more simple procedures provided for under the Administrative Decisions (Judicial Review) Act. Courts must be able to react in cases where invoking that concept has no reasonable basis or reveals an interpretation of national security that is unlawful or arbitrary.[118]

3.128 The Attorney-General's Department was dismissive of such arguments and responded to them in the following way:

> The Attorney-General is not required to make the order for transfer if he or she believes on reasonable grounds that it is essential in the interests of security that the order transferring the prisoner not be made. This is a high test and could only be met in exceptional circumstances. The provisions also require the agreement of the court that remanded the prisoner in custody to the prisoner's continued detention (proposed s.16E(2)(a)(ii)).
>
> Access to legal counsel, family and friends will be in accordance with corrective service administration arrangements in the State or Territory in which the prisoner is held. The draft National Custodial Management Guidelines address some of these issues. Access to legal counsel would need to be facilitated to allow the remand prisoner to adequately prepare for proceedings relating to the remand offence. These issues require balancing the interests of the administration of justice and the prisoner's welfare against the interests of security.[119]

3.129 The Department also maintained the Commonwealth Government's commitment to its human rights obligations under the ICCPR.[120]

3.130 The Committee received evidence from the Hon John Hatzistergos MLC, New South Wales Minister for Justice, which was critical of the lack of consultation by the Commonwealth Government with the states and territories in developing the amendments.[121] The Attorney-General's Department did not agree with this criticism,

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117 ibid.

118 ibid, p. 28.

119 *Submission 95*, p. 24.

120 ibid, p. 25.

121 See, for example, *Committee Hansard*, 26 July 2004, p. 33.

arguing that '(a)ttempts were made by Australian Government officials to discuss the issue with NSW on 5 occasions during subsequent months [after a meeting in December 2003] and no information was forthcoming.'[122]

3.131 While admitting that including these particular provisions in the Bill did not allow time for consultation, the Department noted that the states and territories were consulted promptly after introduction of the Bill.[123] The Department also noted that the amendments are a response to the states' request for changes to prisoner transfer laws to allow transfer on national security grounds.[124] The Department stated further:

> In the public hearing the NSW Minister for Justice noted that he had written to the Australian Government Attorney-General in a letter of 23 June 2004 about the Bill. The Minister for Justice and Customs responded to the issues raised in that letter at the Corrective Services Ministers' Conference on 29 June 2004. Minister Hatzistergos was present at that conference.[125]

3.132 The New South Wales Minister for Justice outlined his main concerns relating to Schedule 4:

> The first is that the definition of security grounds for the transfer of these inmates is essentially borrowed from the ASIO legislation and is based on national security. In our view, it does not encompass the operational security issues which may also require a transfer to take place. You would be aware that there are limited facilities in a country the size of Australia for the incarceration of extremely high risk terrorist inmates who may need to be moved. The grounds upon which they may need to be moved may encompass grounds broader than simply issues of national security. They may also include grounds of operational security.[126]

3.133 Further, the Minister argued that:

> The second issue is the mechanism by which these transfers are to take place. You would be aware that under the existing transfer legislation there are essentially two grounds upon which prisoners can be moved from state to state. One is welfare and the other one is on the grounds of trial. The ground of security transfer is different to those two because it may require very rapid movement of an inmate. If intelligence is received that requires an offender to be moved interstate, bearing in mind, as I have indicated, that there are limited facilities across Australia which may be appropriate to contain an inmate of that nature, there is a need to act swiftly.[127]

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122 *Submission 95*, p. 20.

123 ibid.

124 ibid.

125 ibid.

126 *Committee Hansard*, 26 July 2004, p. 31.

127 ibid.

3.134 The Minister continued:

> What the legislation proposes is essentially that the decision is going to be made by the federal Attorney-General, who will then seek to obtain the concurrence of the state ministers—that is, the state minister to whose jurisdiction the prisoner is to go and the state minister in whose jurisdiction the inmate is presently incarcerated. In our view, that will slow the process up. There is nothing that I can see that is being added by the Commonwealth involvement at that level. At present a Commonwealth inmate can be transferred intrastate whether they are a federal or a state offender. If they are a federal offender, the Commonwealth will simply need to be notified of that move. There is no reason, in our view, why a similar arrangement cannot operate interstate in relation to this very small group of troublesome inmates …[128]

3.135 The Minister also expressed reservations about the requirement for written documentation in Schedule 5 which might also unduly delay the transfer of prisoners:

> The legislation also sets up a process whereby this regime applies not just to Commonwealth offenders but also to purely state offenders who may be in a similar category. Again the Commonwealth is involved and the Commonwealth will need to give its approval for this transfer as well. All of this is, of course, backed up by a process which requires writing. The decisions have to be documented in writing before they are activated, whereas the process that involves the chief executive officers allows for verbal approval which is recorded.[129]

3.136 The Attorney-General's Department did not accept the concerns raised by the Minister. In relation to operational security matters, the Department pointed out that the definition of 'security' is directed at national security and is consistent with the ASIO Act since the focus of the amendments in Schedule 4 is national security. However, the Department stated that possible amendments to transfer of prisoner legislation to deal with transfers on the basis of operational security matters are on the agenda of relevant ministerial councils and is scheduled to be dealt with at a later date.[130]

3.137 The Department also argued that, since the proposed amendments are aimed at prisoners who pose a risk to the national security of Australia who can be transferred between jurisdictions without their consent, the amendments specify that written consent is required from the Attorney-General:

> Due to the impact these orders can have on a prisoner, it is appropriate that the decisions be recorded for accountability purposes. The timeliness of the approval process can be addressed through the development of effective administrative procedures in consultation with the States and Territories.

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128 ibid.

129 ibid, pp. 31-32.

130 *Submission 95*, p. 21.

> From a security perspective informing the Attorney-General of a transfer after the event will be too late. He could be aware of additional information or have a different perspective about the same information because of national rather than local interest considerations.[131]

3.138 In relation to queries by the New South Wales Minister about the appropriateness of the requirement in Schedule 4 for involvement by the Attorney-General, the Department argued that the Commonwealth Government should be involved in the transfer of prisoners on national security grounds, even if the transfer relates to a prisoner convicted or charged with a state offence:

> National security is the responsibility of the Australian Government and State and Territory Governments working collaboratively. If there is a national security risk the Australian Government should know.[132]

3.139 The states have recommended some changes to Schedule 5. These are:

A. That the definition of security be amended to include matters significant to the operational security of correctional systems.

B. That approval for an inter-state transfer of an inmate on security grounds be changed to require only that verbal approval of the two state ministers be obtained and the Commonwealth Attorney General be informed.

C. That the state ministers have the power to initiate as well as reject an interstate transfer under this legislation.[133]

3.140 The Department argued that, in relation to Recommendation C, the proposed amendments do not prevent this from occurring.[134]

3.141 The states have also developed a set of draft 'National Guidelines for Interstate Transfer of Inmates – National Security' which were provided to the Committee. The Department informed the Committee that it was not invited to participate in the development of the guidelines. The Department also argued that, consistent with the Bill, the guidelines anticipate a central role for the Attorney-General who would make a written order before the security transfer took place.[135]

3.142 Responding to concerns raised by a number of submissions and witness in relation to the exclusion of the application of the ADJR Act to decisions of the Attorney-General under Schedule 5, the Department argued that:

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131 ibid, p. 22.

132 ibid.

133 State and Territory Corrective Services Ministers, *Submission 78A*, p. 9.

134 *Submission 95*, p. 22.

135 ibid, p. 23.

> It is inappropriate for the decisions of the Australian Government Attorney-General about transfers on security grounds to be subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The decisions by the Attorney-General will require consideration of national security issues and are likely to be of a sensitive nature. The threat to 'security' may arise not from the prisoner or remand prisoner but from someone who wishes to harm that prisoner or remand prisoner (eg. because they are going to give certain evidence in court). Disclosure of such information in proceedings may alert suspects to necessarily covert activities of investigative authorities.
>
> Exclusion of decisions of this type from ADJR review is consistent with the exemption in Schedule 1 of the ADJR Act of other decisions involving national security considerations (for example, decisions made by the Attorney-General under the ASIO Act, the *Intelligence Services Act 2001* and the *Telecommunications (Interception) Act 1979*).[136]

3.143 The Department also argued that sufficient accountability mechanisms are included in Schedule 5 and, further, decisions of the Attorney-General are reviewable under section 39B of the *Judiciary Act 1903*.[137]

3.144 The Department also raised a pertinent point:

> The submission of the NSW Minister for Justice states that the interstate transfer of an inmate on security grounds should be able to occur following the verbal approval of the two State Ministers. This process contrasts starkly with the criticisms from those who do not think that review of the Attorney-General's decisions under the ADJR Act should be excluded. A balance needs to be struck between the need for speed and accountability. The Bill attempts to strike this balance.[138]

The Committee's view

3.145 The Committee is of the view that greater consultation between the Commonwealth Government and the states and territories in relation to the transfer of prisoners issue is required in order to achieve a fully effective cooperative scheme. It is apparent from the conflicting evidence received that inadequate consultation between the states and territories and the Commonwealth has occurred. The Committee encourages the Commonwealth Government and the Attorney-General's Department to continue to consult with the states and territories in an endeavour to address the differences raised in the inquiry.

Recommendation 9

136 ibid, pp. 23-34.

137 ibid, p. 24.

138 ibid.

3.146 The Committee recommends that Schedule 4 of the Bill, or any other legislative or procedural arrangements relating to the transfer of prisoners which involve or impact upon the states and territories, not proceed until further consultation between the states and territories and the Commonwealth Government is pursued.

Schedule 5 – Forensic procedures

3.147 The proposed amendments contained in Schedule 5 of the Bill extend the coverage of existing forensic procedure laws in Division 11A of Part 1D of the Crimes Act so that they apply if a mass-casualty disaster occurs within Australia. The Committee received little evidence relating to these proposed amendments.

3.148 Three submissions argued against them, briefly commenting that they would 'intrude into the privacy of citizens by allowing investigators to access the National Criminal Investigation DNA database in the event of a domestic mass casualty incident.'[139]

3.149 However, the Office of the Federal Privacy Commissioner expressed its support for these amendments:

> The Office is represented on the committee undertaking the review of Division 11A of the *Crimes Act 1914*, which was enacted to facilitate disaster victim identification and the criminal investigation of the Bali bomb incident. This committee recommended the domestic mass casualty incidents amendment to the Minister for Justice and Customs in April 2004, ahead of the finalisation of the review, as it had been raised in submissions by several organisations, and the committee considered that the need was important and urgent, particularly in light of the recent bombing incident in Madrid. For these reasons, the Office supports the amendments to the forensic procedures provisions in the *Crimes Act 1914*.[140]

3.150 The AFP was also supportive of the proposed amendments:

> Existing DNA provisions in Division 11A of the *Crimes Act 1914* have been very effective in resolving the identity of victims quickly. This has provided a great deal of comfort to the families of victims involved in tragedies such as the Bali bombings.
>
> The extension of these provisions to incidents that may occur in Australia carries with it the comprehensive privacy protections set out in existing provisions.[141]

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139 Ben Keaney, *Submission 21*, p. 1; Anna Blazey, *Submission 41*, p. 1; Lesley Millar, *Submission 91*, p. 1.

140 *Submission 80*, p. 1.

141 *Submission 81A*, p. 4.

3.151 The Attorney-General's Department informed the Committee that the proposed amendments contain certain safeguards:

> The legislative safeguards that applied to the Bali disaster victim identification processes remain unchanged and will apply to the new range of incidents falling within Division 11A. Those safeguards appropriately constrain the way that information held on the national DNA database can be accessed, used and disclosed. The amended Division 11A would only permit the national DNA database to be accessed and used for the purpose of identifying victims of the mass-casualty incident, or conducting a criminal investigation into the incident. Information obtained from the database for those purposes could only be disclosed to a limited range of people, including the relatives of a victim who has been identified, or to law enforcement bodies that are involved in the criminal investigation.[142]

The Committee's view

3.152 The Committee supports the proposed amendments contained in Schedule 5 of the Bill. The Committee is satisfied that sufficient safeguards will protect against unwarranted invasions of privacy and that the amendments will establish an effective cooperative scheme to facilitate effective disaster victim identification in relation to any domestic mass casualty incidents. In this context, the Committee notes the successful identification of victims of the Bali bombings that was facilitated under Division 11A of Part 1D of the Crimes Act and that there may be limitations in the current legislation and inter-jurisdictional arrangements that may hinder the ability of Commonwealth and state agencies to cooperate effectively in the event of a similar disaster in Australia.

Recommendation 10

3.153 The Committee recommends that Schedule 5 of the Bill proceed.

Senator Marise Payne

Chair

142 *Submission 95*, p. 29.