

QUESTIONS ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

INQUIRY INTO THE ANTI-TERRORISM BILL (No. 2) 2004

PUBLIC HEARING 26 JULY 2004



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SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
INQUIRY INTO THE ANTI-TERRORISM BILL (No. 2) 2004

Senator Ludwig asked the following questions at the hearing on 26 July 2004:

The whole bill is before the Committee and we can take submissions in respect of that. It is a question of whether you want to add a supplementary submission in respect of those provisions that you would have otherwise commented on, were you not under a view that only certain provisions were before the Committee.

Does the Commission have a view as to whether the proposed amendments to the *Passports Act 1938* would, or could conceivably, conflict or interact with the Refugee Convention?

The answer to the honourable Senator's question is as follows:

1. The Commission makes the following submissions on the amendments to the *Passports Act 1938* ('Passports Act'). The Commission notes that these amendments were initially contained within the Anti-Terrorism Bill (No. 2) 2004 and now form Schedule 1 to the Anti-Terrorism Bill (No. 3) 2004.

Part 3 – Offences relating to foreign travel documents

2. The Commission's primary concerns are in respect of new Part 3 to the Passports Act. The Bill amends the Passports Act to insert a new Part 3 which describes certain activities that constitute an offence if performed on or with a foreign travel document. These offences include:
 - (a) making false or misleading statements in connection with an application for a foreign travel document (s.18);
 - (b) giving false or misleading information in connection with an application for a foreign travel document (s.19);
 - (c) providing false or misleading documents in connection with an application for a foreign travel document (s.20);
 - (d) improper use or possession of a foreign travel document in connection with travel or identification (s.21); and
 - (e) possessing, making or providing false foreign travel documents (s.22).
3. The penalty for each of these offences is imprisonment for 10 years or 1,000 penalty units, or both. A defence of reasonable excuse applies to the offences within ss.21 and 22 only.

Refugee Convention, 1951

4. The Commission has a number of concerns in respect of the new Part 3 of the Passports Act.

5. The new offences at ss.21 and 22 of the Passports Act potentially conflict with the responsibilities imposed on contracting States by article 31 of the *Convention Relating to the Status of Refugees*, 1951 ('1951 Convention').¹ Article 31(1) provides 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.'
6. The term 'penalties' within article 31 includes, but is not necessarily limited to, prosecution, fine and imprisonment.² The meaning of 'illegal entry' includes arriving or securing entry through the use of false or falsified documents, the use of other deception and clandestine entry.³ As was said by the drafters of the 1951 Convention, '[a] refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge.'⁴
7. In the decision of the United Kingdom Divisional Court in *R v Uxbridge Magistrates Court & Another ex parte Adimi*⁵ Simon Brown LJ observed that the need for article 31 had by no means diminished since it was drafted. That is because '[t]he combined effect of visa requirements and carrier's liability has made it nigh impossible for refugees to travel to countries of refuge without false documents.' Simon Brown LJ identified the broad purpose sought to be achieved by article 31 as 'to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law', adding that it applied as much to refugees as to 'presumptive refugees', and to those using false documents, as to those entering clandestinely.⁶
8. The Commission submits that the new offences in s.21 (improper use or possession of a foreign travel document) and s.22 (possessing, making or providing false foreign travel documents) potentially infringe article 31 of the 1951 Convention in so far as they apply to refugees or asylum seekers who present themselves without delay to the authorities and show good cause for

¹ Australia ratified the 1951 Convention on 22 April 1954 and the 1967 Protocol on 13 December 1973. States Party to the 1951 Convention/1967 Protocol undertake to accord certain standards of treatment to refugees, and to guarantee them certain rights. They necessarily undertake to implement those instruments in good faith.

² G.Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection', A paper presented at the request of the Department of International Protection for the UNHCR Global Consultations, October 2001 at p 9. Geneva Expert Round Table, 'Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees' at para 10(h).

³ G.Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection', October 2001 at p 11.

⁴ Draft Report of the *Ad hoc* Committee on Statelessness and Related Problems. Proposed Draft Convention relating to the Status of Refugees: UN doc. E/AC.32.L.38, 15 February 1950.

⁵ [1999] Imm AR 560.

⁶ That is, although expressed in terms of the 'refugee' the provision extends to asylum seekers; *R v Uxbridge Magistrates Court; ex parte Adimi* [1999] Imm AR 560, United Kingdom. See also *Alimas Khaboka v Secretary of State for the Home Department* [1993] Imm AR 484, United Kingdom.

their illegal entry or presence. The notion of 'good cause' includes being or claiming to be a refugee with a well-founded fear of persecution.⁷

9. The Commission notes that a measure of protection is perhaps afforded to refugees and asylum seekers by the defence of reasonable excuse.⁸ There is, however, no definition of reasonable excuse within the Passports Act or the proposed amendments. Further, it is not clear on the face of the Bill that the offences are not intended to apply to refugees or asylum seekers. If article 31 is to be effectively implemented, clear legislative or administrative action is required to ensure that proceedings are not commenced and that no penalties are in fact imposed.⁹
10. The Commission submits that the term 'reasonable excuse' should be defined within the Passports Act and it should specifically include refugees and asylum seekers. The term could be defined by way of an inclusive example such that a 'reasonable excuse' would include being a refugee or asylum seeker with a well founded fear of persecution. The Commission refers the Committee to the United States document fraud offences which specifically exclude 'acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well-founded fear of persecution...'¹⁰
11. The Commission is also concerned that the defence of reasonable excuse does not extend to those offences at proposed ss.18, 19 and 20 of the Passports Act, dealing with the provision of false statements, false information and false documents in connection with an application for a foreign travel document. The Commission submits that in so far as these offences apply to refugees, they could also potentially infringe article 31 of the 1951 Convention.
12. 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.¹¹ Any offences such as those

⁷ G.Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection', October 2001 at p 11.

⁸ Sections 21(5) and 22(3) of the Passports Act.

⁹ G.Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection', October 2001 at p 9.

¹⁰ United States of America 8 Code of Federal Regulations Part 270 – Penalties for Document Fraud. Sec. 270.2 Enforcement procedures (j) Declination to file charges for document fraud committed by refugees at the time of entry.

¹¹ UNHCR Training Module RLD4: Interviewing Applicants for Refugee Status, 1995.

proposed to be included in ss.18-20 of the Passports Act should recognise and allow for those matters through appropriately worded defences.

13. The Commission therefore submits that a defence of reasonable excuse should be available to the offences defined in ss.18, 19 and 20 of the Passports Act, at least in so far as the offences apply to refugees and asylum seekers. Further, the defence of reasonable excuse should be defined with precision for the reasons outlined above.

Part 2 – Enforcement Officers’ powers in relation to foreign travel documents

14. The Bill also introduces a new Part 2 into the Passports Act, the purpose of which is to include in the Act powers of enforcement officers in relation to foreign travel documents.
15. New ss.13, 14 and 15 confer on a competent authority a power to request the Minister to order the surrender of a person’s foreign travel documents where the competent authority believes on reasonable grounds that:
 - (a) a person is the subject of an arrest warrant issued in Australia in respect of an indictable offence; or a person is prevented from travelling internationally by force of an order of an Australian court, a condition of parole granted under a law of the Commonwealth, a State or Territory, or a law of the Commonwealth (s.13); or
 - (b) a person is the subject of an arrest warrant issued in a foreign country in respect of a serious foreign offence; or a person is prevented from travelling internationally by force of an order of a court of a foreign country, a condition of parole granted under a law of a foreign country, or a law of a foreign country (s.14); or
 - (c) a person would be likely to engage in harmful conduct, including conduct that might prejudice the security of Australia or a foreign country, interfere with the safety or rights and freedoms of other persons, or constitute an indictable offence against a law of the Commonwealth (s. 15).
16. New s.16 provides that the Minister for Foreign Affairs may order the surrender of a person’s foreign travel documents if a competent authority makes a request under ss.13, 14 or 15 of the Passports Act. A foreign travel document obtained by an enforcement officer under this section may be retained for as long as the competent authority believes that a circumstance mentioned in ss.13 or 14 applies in relation to the person or so long as the competent authority suspects that a circumstance mentioned in s.15 applies in relation to the person.

Freedom of movement

17. The Commission has concerns in respect of these proposed amendments to Part 2 of the Passports Act.

18. The new Part 2 potentially infringes article 12 (freedom of movement) of the *International Covenant on Civil and Political Rights* ('ICCPR'). As noted in the Commission's written submissions to the Committee dated 8 July 2004, such infringements will only be permissible if they conform to the principle of proportionality and are the least intrusive means to achieve the stated aim. For the reasons set out below, the Commission is concerned that these requirements are not met.
19. New s.14 provides that the fact of an arrest warrant issued by a foreign court or the fact of an order of a foreign court preventing a person from travelling internationally can be accepted by the executive, without further scrutiny, as the basis for an order that a person's foreign travel documents be surrendered.
20. The Commission submits that, in order to conform with the principle of proportionality, some inquiry (preferably judicial) should be made into the basis for or the circumstances surrounding the relevant arrest warrant or foreign court order before such an order or warrant could be relied upon in Australia as the basis for seizing a person's travel documents. Further, the individual concerned should be allowed the opportunity to make submissions in relation to the circumstances of the arrest warrant or foreign court order before having their freedom of movement restricted by the seizure of their travel documents.
21. The Commission submits that an arrest warrant issued by a foreign court or a foreign court order ought not be relied upon by the executive in Australia as contemplated by s.14 if, for example:
 - (a) the offence committed was a political offence;
 - (b) assuming the conduct constituting the offence, or equivalent conduct, had taken place in Australia, that conduct would have not have constituted an offence under the ordinary criminal law of Australia; or
 - (c) the person has been acquitted or pardoned by a competent authority in the foreign country or in Australia, or has undergone the punishment provided by the law of that country or Australia.¹²
22. The above list is not exhaustive and is intended only to highlight the need for safeguards or caveats 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.
23. The Commission notes that similar offences in relation to Australian passports and travel documents are proposed in the Australian Passports Bill 2004. Although it is acknowledged that the Australian Passports Bill 2004 is outside

¹² These grounds are sufficient to establish an 'extradition objection' within the meaning of s.7 of the *Extradition Act 1988* (Cth). That is, when surrender of a person is sought by an extradition country pursuant to the *Extradition Act 1988* (Cth), surrender of a person can only be ordered if the person fails to satisfy the magistrate that there are substantial grounds for believing that there is an 'extradition objection' in relation to the offence.

the scope of this Committee's inquiry, the Commission notes that it has similar concerns in respect of these proposed amendments.

Judicial review

24. There is some provision at s.23 of the Passports Act for a review by the Administrative Appeals Tribunal of the Minister's decisions under s.16 of the Passports Act to order the surrender of a person's foreign travel documents. The scope for this review is very limited in the context of a decision by the Minister in response to a request under s.15 of the Passports Act.¹³
25. The Commission submits that in order to conform with the principle of proportionality, orders of the Minister under new s.16 of the Passports Act should be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The Commission also submits that no restriction should be placed on the scope for review of a decision made in response to a request under s.15 of the Passports Act.
26. The Commission also notes with concern that foreign travel documents seized under the new Part 2 may be retained for as long as the competent authority believes that a circumstance mentioned in ss.13 or 14 of the Act applies in relation to the person or so long as the competent authority suspects that a circumstance mentioned in s.15 of the Act applies in relation to the person.
27. The Commission submits that in order to conform with the principle of proportionality, there should be a requirement in the Bill for a Ministerial review of the competent authority's decision to retain the documents at regular intervals, for example, every 3 months.

¹³ New s.23(3) of the Passports Act provides that the Minister may, if the Minister makes a decision in response to a request under s.15, certify that the decision involved matters of international relations or criminal intelligence. Despite s.43 of the *Administrative Appeals Tribunal Act 1975*, if the Minister has issued such a certificate then in any review of that decision the Administrative Appeals Tribunal may only make a decision affirming the Minister's decision or remitting the decision to the Minister for reconsideration (s.23(4) Passports Act).

Senator Payne asked the following question at the hearing on 26 July 2004.

The Commission expressed a concern that the exemption to the new offence of 'association' in the Criminal Code for legal advisors is too narrow. Does the Commission have any suggestions as to how this exemption could be amended to improve it? Does the Commission consider that this exemption should extend to other professional advisors to terrorist organisations or members of terrorist organisations?

The answer to the honourable Senator's question is as follows:

1. The Commission is concerned that the exemption for legal advisors at s.102.8(4)(d) of the *Criminal Code Act 1995* ('Criminal Code') is too narrow as it applies only to legal advice and representation in connection with actual or contemplated criminal proceedings, or proceedings relating to whether the organisation is a terrorist organisation. The exemption does not include, for example:
 - (a) legal advice to the organisation to have its declaration as a terrorist organisation revoked;
 - (b) legal advice or representation in connection with an Australian Security Intelligence Organisation ('ASIO') warrant;
 - (c) legal advice or representation in connection with a telecommunications interception warrant; or
 - (d) legal advice or representation in relation to an application pursuant to s.17 of the *Charter of the United Nations Act 1945* to have a listing under that Act revoked.
2. The Commission submits that there should be no restriction on a person's ability to seek legal advice or representation, regardless of whether that person is member of, or a person who promotes or directs the activities of, a proscribed terrorist organisation.¹⁴ Accordingly, the Commission suggests the following amendment to s.102.8(4). This section does not apply if:
 - (d) the association is only for the purpose of providing legal advice or legal representation.
3. The Commission notes that the defendant, in this case the lawyer, bears the evidential burden of proving that the association was only for the purpose of providing legal advice or representation. The Commission also notes that it is well known that lawyers, when acting in their professional capacity, are subject to a range of ethical duties and obligations. Of course, it may be that the Commonwealth has in mind some particularly problematic forms of legal assistance which have not been made clear in the Bill or the Explanatory

¹⁴ A person's right to seek legal advice and representation in respect of any criminal proceedings is enshrined in Article 14 of the International Covenant on Civil and Political Rights.

Memorandum. If so, they should be clearly identified and more precisely excluded from the exemption (if their exclusion is consistent with the international standards outlined in the Commission's submission). It is important to note, in that regard, that it is for the State Party to justify incursions on the freedoms protected by the ICCPR.¹⁵

4. Further, the Commission concurs with Mr Walker's suggestion¹⁶ that other professional advisors, who provide professional services for reward to a member of, or a person who promotes or directs the activities of, a proscribed terrorist organisation may require protection for legitimate associations. For example, a medical practitioner providing medical services to a member of a proscribed terrorist organisation may require protection from the offence of association, particularly given that there appears to be some uncertainty as to the scope of the humanitarian aid exemption.¹⁷ Another example might be accountants providing professional services to terrorist organisations. Take, for example, a proscribed organisation which is incorporated.¹⁸ That organisation would be required to file a tax return if it receives income in a particular financial year. An accountant who associates twice with a member of the organisation for the purpose of preparing the return (knowing that the organisation is a terrorist organisation) might be found to have provided support to the organisation and to have intended that that support assist the organisation to continue to exist (by ensuring that it complies with its legal obligations). Assume further that, having been proscribed, the organisation makes a successful de-listing application under s.102.1(17). Notwithstanding that fact, the accountant would be potentially liable under proposed s.102.8. Alternatively (and more probably) the organisation may be subject to penalties¹⁹ if it was unable to secure the services of an accountant by reason of the proposed offence in s.102.8. Professionals provide a range of other services which assist organisations meet their legal obligations. There should be closer scrutiny of such services and consideration of additional exemptions to accommodate the unfairness which may arise from anomalies like the example above.

¹⁵ *Kim v Republic of Korea* (574/94), Human Rights Committee, 3/11/98.

¹⁶ Proof Committee Hansard, Senate Legal and Constitutional Legislation Committee, Anti-Terrorism Bill (No. 2) 2004, 26 July 2004, p 4.

¹⁷ Proof Committee Hansard, Senate Legal and Constitutional Legislation Committee, Anti-Terrorism Bill (No. 2) 2004, 26 July 2004, p 23 per Dr Kadous, Co-convenor, Australian Muslim Civil Rights Advocacy Network..

¹⁸ 'Organisation' is defined at s.100.1(1) of the Criminal Code to mean a body corporate or an unincorporated body, whether or not the body: (a) is based outside Australia; or (b) consists of persons who are not Australian citizens; or (c) is part of a larger organisation.

¹⁹ Administrative penalties are imposed under Div 286 in Schedule 1 to the *Taxation Administration Act 1953* if a taxation law requires an entity to lodge with the Commissioner a return, notice, statement or other document and the entity fails to lodge it on time or in the approved form: s.286-75(1). In addition, s.8C of the *Taxation Administration Act 1953* makes it an offence to fail to comply with taxation requirements, for example, failure to lodge a return or other approved form.