

SUBMISSION TO INQUIRY INTO THE PROVISIONS OF THE ANTI-TERRORISM BILL (NO 2) 2004

0. Introduction

This submission relates to the Committee's current inquiry into the Anti-Terrorism Bill (No 2) 2004 ('the Bill'). The Bill's five schedules would make a number of amendments to Commonwealth law relating to a variety of subjects. This submission will consider in turn Schedules 1, 2 and 3, each of which raises matters of concern.

On June 24, the Attorney-General introduced into the House of Representatives the Anti-Terrorism Bill (No 3) 2004, which reproduces (in its Schedules 1, 2 and 3) Schedules 1, 2 and 5 of the Bill. In his second reading speech, the Attorney-General foreshadowed the introduction of government amendments to excise those Schedules from the Bill.¹ These amendments to the Bill were passed on the same day.² Nevertheless, this submission comments on matters of concern raised by Schedules 1 and 2 of the Bill.

1. Schedule 1 – Amendments to the *Passport Act 1938* (Cth)

The effect of this Schedule would be to amend the *Passport Act 1938* (Cth) so as to remove any reference to foreign travel documents in the current provisions of the *Passport Act*,³ and to introduce into the *Passport Act* three new Parts relating to travel documents issued by a foreign country.⁴

The new provisions that this Schedule of the Bill would introduce into the *Passport Act* raise three matters of concern.

First, the new section 14 that would be introduced into the *Passport Act* would (in conjunction with section 16) enable the confiscation of a foreign passport from an individual if that individual:

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, p 30562.

² Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, p 30725.

³ Items 9 to 21 of Schedule 1. Unless noted, all references are to the Bill.

⁴ Item 22 of Schedule 1.

- is the subject of an arrest warrant issued in a foreign country in respect of an offence for which the maximum penalty is death, or at least one year's imprisonment;⁵ or,
- is subject to an order of a court of a foreign country, or to a condition of bail or parole pursuant to the law of a foreign country, which requires that person to remain in that foreign country and surrender his or her passport.⁶

There are many foreign countries with unjust legal systems and unreasonable laws. It would be objectionable if, on the basis of an unjust legal determination by a foreign country, an individual resident in Australia was then compelled by the Australian minister to surrender his or her passport. Proposed section 14 of the *Passport Act* should therefore be amended to ensure that a foreign arrest warrant, court order or bail or parole condition provides sufficient grounds for the confiscation by the Australian government of an individual's foreign passport only if that warrant, court order or bail or parole condition has been issued or made in relation to a matter which would be a serious offence under Australian law.

Second, these provisions open the door to the possibility of abuse. For example, a number of countries with unjust legal systems are allies of Australia and the United States in the pursuit of the so-called 'war on terrorism'. This means that diplomatic or political pressure might be applied to the government of such a country in order to generate an arrest warrant or court order which could then provide a basis for the confiscation of an individual's passport. At a minimum, then, proposed section 16 of the *Passport Act* should be amended to oblige an order that an individual surrender his or her passport to be accompanied by a description of any arrest warrant or court order pursuant to which the confiscation is taking place. This would facilitate that individual taking the appropriate steps to challenge the confiscation order, if the warrant or court order has not been issued on reasonable grounds.

Third, the current penalty for possession of a falsified foreign passport, or a document that purports to be, but is not, a foreign passport, is a fine of up to \$5,000 or imprisonment for up to 2 years.⁷ The current penalty for falsifying a foreign passport is imprisonment for up to 7 years.⁸ The penalty for making false or misleading statements in relation to the issuing of a

⁵Item 22 of Schedule 1, s 14 (1) (a), paragraph (a) of definition of 'serious foreign offence' in s 14 (2).

⁶Item 22 of Schedule 1, s 14 (1) (b), definition of 'prevented from travelling internationally' in s 14 (2).

⁷*Passports Act 1938* (Cth), s 9A (1).

⁸*Passports Act 1938* (Cth), s 9B.

foreign passport is currently a fine of up to \$5,000 or imprisonment for up to 2 years.⁹ In all cases, the Bill would increase the penalty to one of imprisonment for up to 10 years and/or 1,000 penalty units.¹⁰ The Bill would also introduce a new series of offences, related to improper use of a foreign travel document, subject to the same penalty.¹¹

The Explanatory Memorandum offers the following justification for this increase in penalties:

This increase in penalties is to deter identity document fraud, which has been identified as a serious national and international problem. The new penalties will also be consistent with those in related legislation.¹²

The ‘related legislation’ referred to would seem to be the *Criminal Code Act 1995* (Subdivision B of Division 73 – People smuggling and related offences) and the *Migration Act 1958* (section 234).¹³

However, while related, these provisions are not identical. Unlike the offences under the *Criminal Code Act 1995*, the offences that the Bill would create do not require that the false documents be created with, or used with, the purpose of obtaining the unlawful entry of a person into a foreign country, nor that any benefit be derived or anticipated from the production or possession of the document. And unlike the offence under the *Migration Act 1958*, the offences that the Bill would create do not require that the false documents be used in an effort to remain in Australia. The offences that the Bill would create are far broader in their application, including, for example, possession without reasonable excuse of a false foreign passport, or of a foreign passport issued to someone else.¹⁴ The Committee should therefore seek further evidence, such as the number and success rate of prosecutions under the existing legislation, which would demonstrate the need to increase the penalty for these offences. Mere assertions of the seriousness of identity document fraud are not sufficient.

⁹ *Passports Act 1938* (Cth), s 10 (2).

¹⁰ Item 22 of Schedule 1, ss 19, 20, 22 (1), definition of ‘false foreign travel document’ in s 22 (4).

¹¹ Item 22 of Schedule 1, s 21.

¹² Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2004, p 22.

¹³ These are referred to in Explanatory Memorandum, Australian Passports Bill 2004, p 17. The Australian Passports Bill 2004 would provide for a similar increase in penalties in relation to false and misleading statements made in relation to the issuing of an Australian passport.

¹⁴ Item 22 of Schedule 1, ss 21 (4), (5), 22 (1), (3).

2. Schedule 2 – Amendments to the *Australian Security Intelligence Organisation Act 1979 (Cth)*

In December 2003, the *Australian Security Intelligence Organisation Act 1979 (Cth)* was amended

- to require an individual against whom a warrant has been issued pursuant to section 34D of that Act to surrender any passport in his or her possession or under his or her control;¹⁵
- to make it an offence for such a person to leave Australia during the life of the warrant without the permission of the Director-General of Security.¹⁶

The penalty for contravening these provisions is imprisonment for up to 5 years.¹⁷

Item 1 of Schedule 2 of the Bill would introduce two new provisions into the *Australian Security Intelligence Organisation Act 1979 (Cth)*, which would have the effect of requiring an individual to surrender any passports, and to not leave Australia, upon the Director-General of Security, pursuant to s 34C, seeking the Minister's consent to a request for the issues of a warrant under s 34D (henceforth, an 'ASIO warrant').¹⁸ These provisions are highly objectionable.

The current provisions for the issuing of an ASIO warrant set out a number of steps:

- the Director-General of Security must seek the Minister's consent to a request that an ASIO warrant be issued;¹⁹
- that request must detail any previous ASIO warrants issued in respect of the same person, including the duration of any questioning and/or detention;²⁰
- the Minister must consent to the request only if:
 - he or she is satisfied that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the

¹⁵ *Australian Security Intelligence Organisation Act 1979 (Cth)*, s 34JC.

¹⁶ *Australian Security Intelligence Organisation Act 1979 (Cth)*, s 34JD.

¹⁷ *Australian Security Intelligence Organisation Act 1979 (Cth)*, ss 34JC (1), 34JD (1)

¹⁸ Item 21 of Schedule 2, ss 34JBA, 34JBB.

¹⁹ *Australian Security Intelligence Organisation Act 1979 (Cth)*, ss 34C (1), (4).

²⁰ *Australian Security Intelligence Organisation Act 1979 (Cth)*, ss 34C (2) (c), (d).

collection of intelligence that is important in relation to a terrorism offence;²¹

- he or she is satisfied that relying on other methods of collecting that intelligence would be ineffective;²²
- in the case of a request for a detention warrant, he or she has taken account of the fact that any previous detention pursuant to an ASIO warrant has taken place, if it has;²³
- in the case of a request for a detention warrant, where it is the case that the person has previously been detained pursuant to an ASIO warrant, he or she is satisfied that the issue of the warrant is justified by information that is additional to or materially different from that known to the Director-General at the time the Director-General sought the Minister's consent to request the issue of the last of the earlier warrants;²⁴
- if the Minister has consented, the Director-General of Security must then make a request to an issuing authority;²⁵
- the issuing authority may issue the warrant only if he or she is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

At present, it is only once all these steps have been carried out that an individual becomes liable to surrender passports, and becomes prohibited from leaving Australia. If the Bill were passed, it would be possible for the Director-General of Security, acting unilaterally, to compel an individual to surrender any passport in his or her possession or under his or her control, and to prohibit that individual from leaving Australia. This is not a power that should be vested in the head of a covert intelligence agency. It subjects individuals to the risk of arbitrary interference with their right to freedom of movement, a right which Australia is

²¹ *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34C (3) (a).

²² *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34C (3) (b).

²³ *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34C (3D) (a).

²⁴ *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34C (3D) (b).

²⁵ *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34C (4).

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.

Schedule 2 of the Bill therefore should be opposed.

3. Schedule 3 – Amendments to the *Criminal Code Act 1995* (Cth)

Schedule 3 of the Bill would introduce a new offence into the *Criminal Code Act 1995* (Cth). The offence created would be that of associating with terrorist organisations.

If the Bill is passed, an individual will commit the offence if:

- he or she intentionally meets or communicates with another person;²⁶ and,
- that other person is a member of, or is a person who promotes or directs the activities of, an organisation that has been proscribed pursuant to subsections 102.1 (1) of the *Criminal Code*;²⁷ and,
- he or she knows that that other person is a member of, or promotes or directs the activities of, an organisation which he or she know to be a ‘terrorist’ organisation;²⁸ and,
- the meeting or communication provides support to the organisation in question, and he or she intends this support to assist the organisation to continue or expand;²⁹ and,
- all the above occurs on two or more occasions, or on a single occasion if a person has already been convicted of the offence.³⁰

An individual convicted of this offence is subject to up to 3 years imprisonment.

²⁶ Item 1 of Schedule 3, definition of ‘associate’, together with Item 3 of Schedule 3, ss 102.8 (1) (a) (i), 102.8 (2) (b).

²⁷ Item 3 of Schedule 3, ss 102.8 (1) (a) (i), (b), 102.8 (2) (b), (g).

²⁸ Item 3 of Schedule 3, ss 102.8 (1) (a) (ii), (v), 102.8 (2) (c), (f).

²⁹ Item 3 of Schedule 3, ss 102.8 (1) (a) (iii), (iv), 102.8 (2) (d), (e).

³⁰ Item 3 of Schedule 3, ss 102.8 (1) (a), 102.8 (2) (a). In addition, s 102.8 (7) provides that, on the first occasion of being convicted with the offence, an individual may not be punished for any conduct that took place at the same time as, or within 7 days before or after, the conduct in respect of which the conviction has been obtained.

It will be a defence if the accused individual was not reckless as to the fact that the ‘terrorist’ organisation had been proscribed,³¹ or was operating under a reasonable, although mistaken, belief that the ‘terrorist’ organisation was not proscribed.³² In addition, it will be a defence if the meeting or communication

- was with a ‘close family member’, defined to mean a spouse, partner, parent, step-parent, grandparent, child, step-child, grandparent, sibling, step-sibling, guardian or carer, and was related to a matter that could reasonably be regarded as one of domestic or family concern;³³
- occurred in the course of practicing religion in a place being used for public religious worship;³⁴
- was only for the purpose of providing humanitarian aid;³⁵
- was only for the purpose of providing legal advice or representation in connection with criminal proceedings, or with proceedings relating to whether the organisation in question is a terrorist organisation.³⁶

In all these cases the accused bears an evidential burden in relation to the defence, meaning that he or she must adduce or point to evidence that suggests a reasonable possibility that the grounds of the defence are made out.³⁷

This offence is objectionable on a number of grounds.

First, it significantly widens the scope of criminal liability under a regime of criminal law that is already too broad in its application. When considering amendments to Part 5.3 of the *Criminal Code*, it must be borne in mind that the phrase ‘terrorist organisation’ has a statutorily specified meaning. A ‘terrorist’ organisation is an organisation which is, or which has been proscribed by the Minister on the basis of a reasonable belief that it is, ‘directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act

³¹ Item 3 of Schedule 3, s 102.8 (5).

³² *Criminal Code* s 9.2 (defence of mistake of fact in relation to strict liability) together with Item 3 of Schedule 3, s 102.8 (3).

³³ Item 2 of Schedule 3, definition of ‘close family member’, together with Item 3 of Schedule 3, s 102.8 (4) (a).

³⁴ Item 3 of Schedule 3, s 102.8 (4) (b).

³⁵ Item 3 of Schedule 3, s 102.8 (4) (c).

³⁶ Item 3 of Schedule 3, s 102.8 (4) (d).

³⁷ *Criminal Code* ss 13.3 (3), (6).

(whether or not the terrorist act occurs).³⁸ The statutory definition of ‘terrorist act’³⁹ is, in turn, very broad. It extends well beyond such obvious terrorist conduct as participation in a bombing or a hijacking. For example, it is a terrorist act to intentionally create a serious risk to the health and safety of a section of the public, intending thereby to intimidate a section of the public, in order to advance a political cause. Therefore certain sorts of industrial action, such as pickets by nurses of public hospitals, could constitute terrorist acts.⁴⁰

Therefore, the liability of an organisation to be found to be a terrorist organisation is likewise very broad. This liability extends far beyond criminal gangs plotting bombings or hijackings. For example, a predominantly charitable organisation, which also provides succour to revolutionaries engaged in acts of political violence, is liable to be found a terrorist organisation, on the basis that it is indirectly fostering the doing of terrorist acts.

Another example is the following. As was indicated above, a picket of a public hospital by nurses could potentially amount to a terrorist act. From this possibility, it follows that a trade union offering advice to nurses as to how they might go about establishing a picket of a public hospital might well be a terrorist organisation, as it might well be at least indirectly engaged in assisting the doing of a terrorist act.

Furthermore, regardless of its actual activities it is possible for an organisation to constitute a terrorist organisation. It is sufficient that it have been proscribed by the Minister, on the basis of a reasonable belief about its activities.

A number of offences already exist which, on the basis of this statutory definition of ‘terrorist’ organisations, are liable to impose guilt on the basis of the most tenuous association with genuinely criminal conduct. For example, knowingly being a member (including being an ‘informal member’, whatever that amounts to) of a terrorist organisation is an offence punishable by up to 10 years imprisonment.⁴¹ Liability under this offence may well extend to an individual who appears on the mailing list of a charitable organisation of the sort

³⁸ *Criminal Code* ss 102.1 (1), (2). The amendment to s 102.1 (2) made by the *Criminal Code Amendment (Terrorist Organisations) Act 2004*, extending the grounds of proscription pursuant to paragraph (d) of the definition of ‘terrorist organisation’ under s 102.1 (1), have made paragraphs (c), (d) and (e) of that definition largely redundant.

³⁹ *Criminal Code*, s 100.1.

⁴⁰ Paragraph 101.1 (3) (a), which excludes certain industrial action from the definition of ‘terrorist act’, does not exclude industrial action which is intended to create a serious risk to the health and safety of a section of the public.

⁴¹ *Criminal Code*, s 102.3, as amended by the *Anti-Terrorism Act 2004* (Cth), together with the definition of ‘membership’ in s 102.1 (1).

mentioned above. Training with a terrorist organisation is an offence punishable by up to 25 years imprisonment, even if the accused is merely reckless as to the status of the organisation, and regardless of the nature of the training or the purpose for which it is provided.⁴²

This new offence would further expand the scope of this guilt by association. Consider just one example in which it might apply: a person, who on two occasions telephones her uncle to congratulate him on his work as a member of a charitable organisation of the sort mentioned above, would be liable to be found guilty of this offence, provided that the charitable organisation had been banned by the Minister. She could be found liable even if she encouraged her uncle to try and stop the organisation providing succour to revolutionaries, as she would nevertheless be providing, to the organisation, support that is intended to assist its continuation or expansion.

In his second reading speech, the Attorney-General stated that

The new offence of ‘associating with terrorist organisations’ is aimed at the fundamental unacceptability of terrorist organisations as entities by making a wider range of activity which supports the existence or expansion of such organisations illegal.⁴³

However, there is nothing fundamentally unacceptable about the charitable organisation described above – the revolutionaries to whom succour is offered may, like the African National Congress or Fretilin, be justified in the activities which they carry out – and there is certainly nothing wrong with the conduct of the individual described in the above example. No offence which would make a criminal of such an individual should be on the statute books.

The second reason for opposing the creation of this offence is that it would unduly infringe individuals’ right to freedom of association, a right which Australia is bound to protect, pursuant to article 22 of the *International Covenant on Civil and Political Rights*.

Third, the Bill would introduce to narrow a definition of ‘close family member’. When one considers the likely targets of prosecution under this legislation, namely, Muslim individuals with traditions of family life that extend well beyond the nuclear family, a definition of ‘close family member’ that excludes uncles, aunts and cousins is far too narrow. The threat of prosecution under this legislation threatens to interfere with the family lives of many people,

⁴² *Criminal Code*, s 102.5, as amended by the *Anti-Terrorism Act 2004* (Cth).

⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 June 2004, p 30064.

contrary to Australia's obligation, pursuant to article 23 of the *International Covenant on Civil and Political Rights*, to protect the family unit.

Fourth, by creating yet a further, and very broad, ground of liability under Part 5.3 of the *Criminal Code*, the Bill would increase the scope for operation of those other statutory provisions that are triggered by reference to 'terrorist offences'. These include the possibility of a longer period of detention without charge under the *Crimes Act 1914* (Cth),⁴⁴ and also the grounds for the issuing of an ASIO warrant.⁴⁵

Fifth, the defence that would be created in relation to the provision of legal advice and legal representation is too narrow. For example, just to indicate two non-criminal proceedings that are not covered by the defence:

- it does not include legal advice or representation in relation to an application, pursuant to section 17 of the *Charter of the United Nations Act 1945*, to have a listing under that Act revoked;
- it does not include legal advice or representation in relation to an ASIO warrant.

Schedule 3 of the Bill ought therefore to be opposed.

⁴⁴ As amended by the *Anti-Terrorism Act 2004* (Cth),

⁴⁵ *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34C, 34D.