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

0. Introduction

This supplementary submission relates to the Committee's current inquiry into the Anti-Terrorism Bill (No 2) 2004 ('the Bill'). Having read the transcript of the hearing held by the Committee on 26 July 2004, I would like to make a supplementary submission to the Committee's inquiry. This supplementary submission elaborates upon XX issues raised by witnesses who appeared at the Committee's hearing.

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

The question was raised by Senator Ludwig whether proposed sections 21 and 22 of the *Passport Act* would interfere with Australia's international legal obligations to asylum seekers under the 1951 *Convention Relating to the Status of Refugees*.[1] Article 31 of that convention obliges Australia

> not [to] impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

As I noted in my evidence to the Committee, the answer to Senator Ludwig's question will depend upon the meaning to be given to 'reasonable excuse', which is a defence under both sections.[2] The Bill does not define 'reasonable excuse'. At a minimum, the Bill ought to be amended to bring the *Passport Act* provisions into clear compliance with Australia's international obligations, by stating that the concept of 'reasonable excuse' includes any belief, by an alleged offender, that his or her safety and well-being, or that of his or her family, depended upon the use or possession of the false or cancelled travel documents in question.

---

[1] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, pp 11, 30.

[2] Proposed sections 21(5) and 22(3) of the *Passport Act*.

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

In its evidence to the Committee, ASIO suggested that

> 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'.[3]

In fact the *Australian Security Intelligence Organisation Act 1979* (Cth) does not impose any such obligation on the Director-General of Intelligence. The relevant sections of the Act read

> (1) The Director-General may seek the Minister's consent to request the issue of a warrant under section 34D in relation to a person.
>
> …
>
> (2) In seeking the Minister's consent, the Director-General must give
>
> the Minister a draft request that includes:
>
> (a) a draft of the warrant to be requested; and
>
> (b) a statement of the facts and other grounds on which the Director-General considers it necessary that the warrant should be issued; and
>
> (c) a statement of the particulars and outcomes of all previous requests for the issue of a warrant under section 34D relating to the person; and
>
> (d) if one or more warrants were issued under section 34D as a result of the previous requests—a statement of:
>
> (i) the period for which the person has been questioned under each of those warrants before the draft request is given to the Minister; and
>
> (ii) if any of those warrants authorised the detention of the person—the period for which the person has been detained in connection with each such warrant before the draft request is given to the Minister.

The obligation to form a belief upon reasonable grounds only applies to the Minister,[4] and to the Issuing Authority.[5]

ASIO also submitted that

> There are ample checks and balances in the legislation or in the whole regime…[6]

---

[3] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, p 39 (Mr Neely).

[4] *Australian Security Intelligence Organisation Act 1979* (Cth), s 34C(3)(a).

[5] *Australian Security Intelligence Organisation Act 1979* (Cth), s 34D(1)(b).

[6] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, p 38 (Mr Neely).

However, these 'checks and balances' do not apply to the request for a warrant. As the Attorney-General's Department recognised, if a request for a warrant has been made, the Director-General

> has activated a system which will provide for accountability; a system that has been carefully developed by the parliament and is, by any standard, subject to a very large set of accountability mechanisms.[7]

That is, the request *activates a system* that provides for accountability – it is not itself subject to those accountability mechanisms.

The Attorney-General's Department suggested that it is 'unbelievable' that there should be any abuse by the Director-General of this power, given the number of oversight bodies.[8] However, the threat of administrative sanctions being applied to a recalcitrant public officer will provide little comfort to an individual whose freedom of movement has been curtailed as a result of the issuing of serial requests for warrant, or the issuing of requests for which there are no genuine grounds.

Furthermore, the proposed amendments would be objectionable even if there were no deliberate abuse. The evidence given by ASIO appeared to contemplate that the issuing of a warrant, once the Director-General has made a request, is a mere formality:

> The power kicks in only once the director-general has requested the issuing of a warrant, and as a matter of practical reality, once that request is made, the Attorney in the ordinary course would consent to the issuing of a warrant very quickly, normally within the space of a day. Then, if the Attorney consents, that would be communicated to the issuing authority equally as quickly.[9]
>
> It is possible that in the short space of time between the director-general making his request – notifying the person, which would then trigger the requirement that the person is required to hand up his or her passports—and the warrant being issued …[10]

However, the *Australian Security Intelligence Organisation Act* deliberately, and in the interests of protecting the liberty of those who are neither suspected nor convicted of any criminal conduct, vests an independent discretion in both the Attorney-General, and the Issuing Authority. It is entirely inappropriate to give the power to circumvent those

---

[7] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, p 38 (Mr McDonald).

[8] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, p 40 (Mr McDonald).

[9] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, p 39 (Mr Neely).

[10] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, p 39 (Mr Neely).

discretions to the head of a covert security and intelligence body. Vesting such power in such an office would be more apt in a national security or police state, than in a liberal democracy.

In his questioning, Senator Ludwig raised the possibility of a request being issued by the Director-General, and then withdrawn before it has been considered by the Attorney-General.[11] As drafted, the amendments do not unambiguously oblige the Director-General to ensure the return of a confiscated passport under such circumstances, and nor do they unambiguously lift the obligation on the person to seek the permission of the Director-General to leave Australia.

Finally, although both ASIO and the Attorney-General's Department testified that a request for a warrant would be dealt with expeditiously,[12] there is no statutory requirement that this be the case. Nor is there any requirement that, if the Attorney-General does consent to the request, that the matter must be taken expeditiously to an issuing authority. The act merely states that

> If the Minister has consented under subsection (3), the Director-General may request the warrant by giving an issuing authority.[13]

This again creates the possibility for abuse – as the obligation to return any confiscated passports, under the proposed legislation, would not arise in such a case until refusal by the issuing authority – and is also subject to doubt, of the sort raised by Senator Ludwig, as to what happens if the request is simply allowed to lapse at that point.

For the reasons given above, as well as those provided in my original submission, and in my testimony to the Committee, I therefore urge that Schedule 2 of the Bill be opposed.

---

[11] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, p 39.

[12] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, pp 38, 39 (Mr Neely), p 38 (Mr McDonald).

[13] *Australian Security Intelligence Organisation Act 1979* (Cth), s 34C(4).

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

The Committee heard a large volume of testimony on the potential consequences of the introduction of the offence of associating with terrorist organisations, including its potential to adversely affect family life, religious and community life, and he provision of legal and other sorts of professional assistance, as well as the threat it poses to legitimate political discourse, not all of which is protected by the Australian Constitution (as it may not concern the election, by Australians, of their parliamentary representatives).

These reasons, on their own, are sufficient grounds for rejecting Schedule 3 of the Bill. In this supplementary submission, I wish to make only two points.

First, Senator Brandis noted that the definition of 'terrorist act' in Australian law extends to all political violence, including the conduct of a just war.[14] To this could be added such political violence as civilian resistance to police in the course of democratic struggle, or various sorts of robust industrial action[15] intended to intimidate a government employer. It is this breadth of the definition of 'terrorist act', and the consequent breadth of the definition of 'terrorist organisation', which makes the proposed offence so objectionable. This is particularly so when the mens rea of the offence would not require any knowledge that the organisation was proscribed;[16] this requirement would be limited to the actus reus, and would be made subject to strict liability (with provision for a defence of absence of recklessness).[17]

The attempt of the Attorney-General's Department to rebut such concerns, by emphasising that the offence would apply only to association with proscribed organisations,[18] simply serves to highlight the arbitrary character of criminal liability which turns upon the exercise of discretion by the political arms of government. This 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 organisations which have been proscribed.

---

[14] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, pp 19, 25.

[15] Which, on account of the threat they pose to safety, do not enjoy the protection of paragraph (3)(a) in the definition of 'terrorist act' in section 100.1 of the *Criminal Code*.

[16] Proposed sections 102.8(1)(a)(ii), (2)(c) in Schedule 3 of the Bill.

[17] Proposed sections 102.8(1)(b), (2)(g), (3), (5) in Schedule 3 of the Bill.

[18] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, p 43 (Mr McDonald).

Second, even if one puts aside concerns about the scope of the definition of 'terrorism' in Australian law, the offence would not require any intention that the association support the organisation in the pursuit of terrorist activity – contrary to the suggestion made by Commissioner Keelty.[19] It therefore would criminalise the conduct of those who have no genuinely criminal intention, and even are opposed to the undertaking of terrorist activity, if those individuals nevertheless associate with a proscribed organisation.

It is important to emphasise this point, 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)o – contrary to the remarks made by the Attorney-General's Department in its opening statement.[20] 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.

For this reason, the examples offered by the Australian Federal Police[21] are in many ways beside the point – the provision of facilities for meetings to be held, or for websites to be hosted, so that a criminal gang can plot acts of political violence, would appear to fall within the scope of existing section 102.7 of the *Criminal Code*, being

- the intentional provision to an organisation of support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of ***terrorist organisation***, ie an activity of directly or indirectly engaging in, preparing, planning, assisting in or fostering the doing of a terrorist act; where,
- the organisation is a terrorist organisation; and,
- the providers of support know of, or are reckless as to, the status of the organisation as a terrorist organisation.

There is no need for new legislation to prosecute those guilty of such conduct.

---

[19] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, p 52 (Commissioner Keelty).

[20] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, p 37 (Mr McDonald).

[21] Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 5 July 2004, pp 51-2 (Federal Agent Ashton).