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## Anti-terrorism Bill (No. 2) 2004

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Law and Bills Digest Section  
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# Anti-terrorism Bill (No. 2) 2004

**Date Introduced:** 17 June 2004

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** The Bill's formal provisions commence on Royal Assent. The five Schedules have a variety of commencement provisions. These are noted in the Main Provisions section of the Digest.

## Purpose

Major amendments proposed by the Bill:

- provide that a person can be required to surrender their foreign travel documents in certain circumstances—for instance, if they are the subject of an arrest warrant for an indictable offence or if they are likely to prejudice Australia's security
- create new offences relating to foreign travel documents. These offences carry penalties of up to 10 years imprisonment or 1000 penalty units<sup>1</sup>, or both
- provide that a person can be required to surrender their passport once the Director-General of ASIO has asked the Attorney-General for consent to apply for an ASIO warrant
- create an offence of associating with terrorist organisations, punishable by up to three years imprisonment
- establish a scheme for the transfer of prisoners within Australia if the Attorney-General believes that such transfers are necessary on security grounds, and
- enable the Minister to determine that Commonwealth, State and Territory officials can access the national DNA database for forensic purposes in the event of a mass casualty disaster occurring in Australia.

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## Background

Background information about each of the topics mentioned above is supplied either in this section or in the Main Provisions section of the Digest.

The Bill was referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 5 August 2004.

### ASIO questioning warrants

Under amendments made in 2003 to the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act), ASIO can obtain a warrant from an ‘issuing authority’<sup>2</sup> for the questioning of an adult when there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorist offence. This means that ASIO questioning warrants for adults can be issued for both suspects and non-suspects. ASIO warrants can also provide for a person’s detention—if there are reasonable grounds for believing that the person may alert someone involved in a terrorism offence, may not appear before a ‘prescribed authority’<sup>3</sup> or may destroy or damage evidence.

ASIO warrants for questioning and detention may also be issued in relation to children aged between 16 and 18 years but only if it is likely that the child will commit or has committed a terrorism offence.

In general, the subject of an ASIO warrant cannot be detained for more than 168 hours but once they have been questioned for a total of 24 hours, they must be released. Amendments made by the *ASIO Legislation Amendment Act 2003* extend the total questioning period to 48 hours if an interpreter is present at any time during a person’s questioning.

Obtaining an ASIO warrant is a four-stage process:

- the Director-General of Security first seeks the Attorney-General’s consent to request the issue of an ASIO warrant from an ‘issuing authority’<sup>4</sup>
- the Attorney-General may consent to the request being made if satisfied that the statutory grounds are made out. These include being satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorist offence<sup>5</sup>
- if the Minister consents to the request being made, then the Director-General can ask an issuing authority to issue a warrant<sup>6</sup>

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- the issuing authority may issue a warrant if the Director-General's request is in accordance with the statutory requirements and if the issuing authority is satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorist offence.<sup>7</sup>

The *ASIO Legislation Amendment Act 2003* amended the ASIO Act so that, once an ASIO warrant has been issued, the subject of the warrant must surrender their passport or passports (Australian and/or foreign) to someone exercising authority under the warrant.<sup>8</sup> Failure to do so is an offence punishable by up to 5 years imprisonment.<sup>9</sup> In contrast to these existing provisions, the amendments in **Schedule 2** of the Bill are designed to operate at the beginning of the warrant application process. The proposed amendments will mean that once the Director-General asks the Attorney-General to consent to an application being made to an issuing authority (ie before the Attorney-General consents and before an application is made to an issuing authority or a warrant is issued), a person can be required to surrender their passport/s.

## Associating with terrorist organisations

In March 2004, the Commonwealth Attorney-General said that the Government would look at introducing 'conorting with terrorist' offences as a logical extension of State laws against consorting with criminals.<sup>10</sup> The Attorney has said that the offence proposed by the Bill:

... 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.<sup>11</sup>

The Bill introduces an offence of 'associating with' terrorist organisations, punishable by up to three years imprisonment.

As the Attorney-General indicated, 'associating' or 'conorting' offences are not unknown in Australian law—first appearing in the *Vagrancy Act 1835* (NSW).<sup>12</sup> They are described in one criminal law text as '... one of Australia's dubious contributions to the criminal law.'<sup>13</sup>

Modern Australian consorting laws—introduced from the 1920s to the mid-1950s—were designed to curb the activities of criminal gangs.<sup>14</sup> They were and are the subject of some controversy. One legal academic has described the activities of the NSW Consorting Squad in the 1930s in the following way:

The role of the Consorting Squad was to coordinate enforcement of the consorting law. There is evidence that in the early years it was used quite aggressively. Police compiled dossiers on people discharged from gaols and used the threat of a consorting booking to extract information about others. The threat of a charge became the major use of the offence in later years. It allowed police to arrest most people they regularly dealt with if those people proved to be uncooperative. It fitted easily into the culture

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of discretion and power that produced systemic corruption. However, it did very little to counter serious or organised crime and would have required very high levels of police resources—particularly as the ‘bookings’ all had to be achieved within a six month period.<sup>15</sup>

On the other hand, NSW consorting laws and the early activities of the Consorting Squad have also been described in these terms:

This legislation was imperative at the time to combat the predatory activities of criminal gangs operating in the inner city precincts. To enforce the provisions of the new legislation, a Consorting Squad was formed within the Criminal Investigating Branch.

The activities of this new [*sic*] formed squad were largely responsible for the suppression of these organised criminal groups and the total extinction of the 'razor gang' adherents.

...

The Consorting Squad was considered the best training ground of all for aspiring young Detectives to acquire knowledge of the 'under-world' and the criminal element generally.<sup>16</sup>

Most Australian jurisdictions continue to have consorting offences on their statute books.<sup>17</sup> In brief, the offences are generally found in summary offences, police offences or vagrancy statutes and make it an offence to do things such as:

- habitually consort with reputed thieves
- habitually consort with persons who have been convicted of indictable offences
- habitually consort with reputed thieves, prostitutes or persons without lawful visible means of support
- habitually consort with reputed criminals or known prostitutes or persons who have been convicted of having no visible lawful means of support
- be in a place in the company of reputed thieves.

In some jurisdictions, the person has an excuse if they can give a ‘good account’ of their consorting. Custodial penalties range from 3 months imprisonment to 12 months imprisonment for a first offence and 2 years imprisonment for a second offence.

Although traditional consorting offences remain on the statute books of the States and the Northern Territory they appear to generate few prosecutions and there have been some calls for their repeal.<sup>18</sup> For instance, the Western Australian Law Reform Commission commented in 1992 that it is:

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... inconsistent with the principles of the criminal law to make it an offence to associate with particular people. Offences should proscribe conduct thought deserving of punishment. Merely associating with people, whether they are known to be in a particular category or are merely reputed to be in a particular category, should not be criminal.<sup>19</sup>

In 2001, the Scrutiny of Acts and Regulations Committee of the Victorian Parliament commented on the Victorian consorting offence in the following terms:

It seems unlikely ... that the consorting offence would have great utility as a measure to prevent persons with extensive criminal records from meeting to plan further crimes, in part because such meetings must be 'habitual' in nature and documented by police on numerous occasions to constitute an actionable offence.

In addition, police evidence suggested that the consorting provisions were generally used to respond to consorting in public, and it appears likely to the Committee that groups of persons planning criminal activities could avoid being observed consorting by simply choosing to meet in private.

The Committee is concerned that consorting provisions may be used to put pressure on individuals and groups which the police want to 'move along', rather than as a tool for preventing the planning of serious crimes.<sup>20</sup>

Support for the retention of State consorting laws has come from the police. For instance, in evidence given to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament, the Victoria Police and the Police Association 'strongly disagreed' with the Committee's view that consorting offences should be repealed and argued that consorting offences were a useful 'strategic' tool for crime prevention.<sup>21</sup> And recently Australian Federal Police Commissioner, Mick Keelty said:

We have seen the offence of consorting all but disappear from our statutes.

But with terrorism, it is vital that we disrupt and prevent the crime at the earliest intervention point.

This often requires action by law enforcement agencies at the preparation or planning stage...when there is limited evidence of more substantive changes.

My view is "so be it".

We are not the only state grappling with this problem. I have had discussions with our counterparts in the UK and the US on this very point.

But...you only have to have walked through the devastating crime scenes of the Bali bombings to understand why this is so important.

Consorting can - and is - being undertaken on the internet and as a society we need to recognise this and look for better ways to deal with it and I am pleased to say that the government and the Parliament appear to understand the dilemma.<sup>22</sup>

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A modern variation on traditional consorting laws is found in section 17A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which deals with non-association and place restriction orders. One of the differences between the proposed association offence and section 17A is that the latter operates where a person has been convicted of an offence<sup>23</sup> and a court is satisfied that it is reasonably necessary to make such an order to ensure that the offender does not commit any further offences. In addition, the exceptions for non-association or place restriction orders<sup>24</sup> differ from the exceptions for the proposed association offence. Under section 100A, a court cannot make a non-association order or place restriction order in relation to:

- the offender's place of residence or the place of residence of any member of the offender's close family,<sup>25</sup> or
- any place of work at which the offender is regularly employed, or
- any educational institution at which the offender is enrolled, or
- any place of worship where the offender regularly attends.<sup>26</sup>

The Explanatory Memorandum explains that:

Exceptions under the NSW law relating to education, employment and residence are not included [in the Bill] because of the potential for misuse of these kinds of exception by those with links to a terrorist organisation.<sup>27</sup>

## Transfer of prisoners

The *Transfer of Prisoners Act 1983* (Cwlth) affects prisoners serving sentences for offences against federal, ACT, Norfolk Island, Christmas Island and Cocos (Keeling) Island laws. State and Northern Territory laws deal with the transfer of prisoners who are serving sentences for offences against State and Northern Territory laws.

The Transfer of Prisoners Act is the result of an agreement by the Standing Committee of Attorneys-General. It enables the prisoners covered by it to be transferred between all Australian jurisdictions for trial or for welfare purposes. The purpose of the legislation is explained in the second reading speech for the Transfer of Prisoners Bill 1983:

The transfer of prisoners for welfare purposes will assist the rehabilitation of prisoners and minimise the hardships caused to the families of prisoners. ...

The transfer of prisoners for the purposes of trial will remedy a deficiency in Australian law which prevents a prisoner being moved from one jurisdiction to another to stand trial until he has served his prison term in the first jurisdiction. If the prison term in the first jurisdiction is a lengthy one there are obvious difficulties for the prosecution. Such transfers will accordingly benefit the administration of justice

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within Australia. It will also be of benefit to prisoners who are anxious to have all outstanding charges in different jurisdictions dealt with rather than serve a sentence in one jurisdiction and thereafter be extradited to another jurisdiction.<sup>28</sup>

The amendments in **Schedule 4** of the Bill create an additional circumstance in which prisoners can be transferred between jurisdictions—where the Attorney-General considers the transfer necessary on security grounds. This new regime will apply not only to federal and territory prisoners but also to State prisoners.<sup>29</sup>

## Main Provisions

### Schedule 1—Amendments of the *Passports Act 1938*

Amendments of the Passports Act commence on the 28<sup>th</sup> day after the day on which the Act receives Royal Assent (**clause 2**).

#### Surrender of foreign travel documents

As things stand, subsection 9(1A) of the Passports Act enables Customs officers, police officers and authorised persons to order a person to deliver up their Australian or foreign passport in certain circumstances—for example, where the officer believes that the passport has been falsely obtained.

As a result of the amendments, subsection 9(1A) will apply only to Australian passports (see **items 13 and 14**). A new regime will apply to the surrender of foreign travel documents (**new sections 13-17**). A ‘foreign travel document’ is a foreign passport or an identity document issued by a foreign government (**item 7**).

Under the new regime, if a ‘competent authority’ believes on reasonable grounds that a person is:

- subject to an Australian arrest warrant for an indictable offence or prevented from travelling internationally by an Australian court order or Australian law, or
- subject to a foreign arrest warrant for a serious foreign offence or prevented from travelling internationally by a foreign court order or foreign law

then the competent authority can ask the Minister to order the person to surrender their foreign travel documents (**new sections 13 and 14**). A ‘competent authority’ includes a person specified in a Ministerial determination.<sup>30</sup>

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An application for a Ministerial surrender order can also be made by a competent authority who suspects on reasonable grounds that unless the person's foreign travel documents are surrendered, the person is likely to engage in conduct that:

- might prejudice the security of Australia or a foreign country
- might endanger physical health or safety in Australia or a foreign country
- might interfere with the rights and freedoms of others set out in the International Covenant on Civil and Political Rights
- might constitute an indictable offence against the Passports Act, or
- might constitute an indictable offence against a Commonwealth law specified in a Ministerial determination [**new paragraph 15(1)(a)**].<sup>31</sup>

The competent authority must also suspect on reasonable grounds that the person should be required to surrender their passport in order to prevent them engaging in that conduct [**new paragraph 15(1)(b)**].

The grounds set out in **new paragraphs 15(1)(a) and (b)** generally replicate provisions in subsection 8(1B) of the Passports Act,<sup>32</sup> which deals with the cancellation of Australian passports. However, **new paragraph 15(1)(a)** contains two additional grounds. The first of these is that the person's behaviour might constitute an indictable offence against the Passports Act. The second is that the person's behaviour might constitute an offence against a Commonwealth law specified in a Ministerial determination.

If the Minister makes a surrender order, it is an offence for a person not to surrender their foreign travel documents (**new section 16**).<sup>33</sup> The maximum penalty is imprisonment for 1 year or 20 penalty units, or both. Documents that are not surrendered can be seized by an 'enforcement officer' (ie a Customs officer, a police officer or a person authorised to act as an enforcement officer).<sup>34</sup>

Foreign travel documents that have been surrendered as a result of a Ministerial order can be retained for so long as a competent authority believes on reasonable grounds that the circumstances on which the surrender application was based still exist. However, a foreign travel document must be returned if so ordered by the Administrative Appeals Tribunal (AAT) [**new subsection 16(7)**].

Rules governing the AAT's review of a Ministerial surrender order are set out in **new section 23**. In brief, they provide that:

- only the person whose foreign travel documents are subject to a surrender order has standing to challenge the Minister's order

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- if a Ministerial surrender order is made in response to a section 15 request (the potential for harmful conduct provision), then the Minister can certify that the decision involved matters of international relations or criminal intelligence. If the Minister issues such a certificate then the AAT can only affirm the Minister's decision or remit it to the Minister for reconsideration. In other words, it cannot quash the Minister's decision.

The amendments also provide that an 'enforcement officer' can demand that a person surrender a suspicious foreign travel document<sup>35</sup> [**new section 17(1)**]. A person who fails to surrender such a document commits an offence punishable by up to one year's imprisonment or a fine of 20 penalty units, or both [**new subsection 17(2)**].

### **Offences relating to foreign travel documents**

As presently framed, section 9A of the Passports Act contains offences relating to the improper possession of Australian and foreign passports and section 9B contains offences relating to the falsification of foreign passports within Australia.

The amendments to the Passports Act remove offences relating to foreign passports from sections 9A and 9B (**items 18 and 19**) and create **new Part 3** of the Passports Act. **New Part 3** will deal only with offences relating to foreign travel documents. Offences relating to Australian passports will be located in **new Part 1A** of the Passports Act.

**New Part 3** provides that it will be an offence to:

- make a false or misleading statement in an application for a foreign travel document (**new section 18**)
- give false or misleading information in an application for a foreign travel document (**new section 19**)
- produce a false or misleading document in relation to an application for a foreign travel document (**new section 20**)
- improperly use or possess a foreign travel document (for example, using or possessing a cancelled foreign travel document) (**new section 21**), or
- possess, make or provide a false foreign travel document (**new section 22**).<sup>36</sup> The expression 'false foreign travel document' is defined to include a passport or identity document that purports to be an official document but is not.

In each case, the maximum penalty is 10 years imprisonment or 1,000 penalty units (currently \$110,000), or both. These penalties represent a substantial increase on the penalties which currently apply to similar offences under the Passports Act. For instance,

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the existing offence of possessing a falsified foreign passport attracts a maximum penalty of \$5000 or 2 years imprisonment.<sup>37</sup>

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

The amendments in **Schedule 2** commence on the 28<sup>th</sup> day after the day on which the Act receives Royal Assent (**clause 2**).

The effect of **Schedule 2** will be that once the Director-General of ASIO has asked for the Attorney-General's consent to request an issuing authority to issue a questioning warrant, the person who is the subject of that request may be required to deliver their passport/s to an enforcement officer<sup>38</sup> [**new subsection 34JBA(1)**]. Failure to do so is an offence punishable by up to 5 years imprisonment.

**New subsection 34JBA(2)** requires the passport to be returned as soon as practicable if the issuing authority refuses to issue the warrant, the Minister refuses to consent to an application being made to the issuing authority or the warrant expires. The Director-General may return the passport earlier than this.

Under **new subsection 34JBB(1)** it is an offence for a person to leave Australia without permission once the Director-General of ASIO has asked the Minister to request a questioning warrant from an issuing authority and the person has been informed of the effect of **new subsection 34JBB(1)**. The maximum penalty is 5 years imprisonment. Permission to leave Australia can be obtained from the Director-General and can be made subject to conditions. The permission can also be varied or revoked.

## Schedule 3—Associating with terrorist organisations

The amendments in **Schedule 3** commence the day after the Act receives Royal Assent (**clause 2**).

**Item 3** of **Schedule 3** inserts **new subsection 102.8(1)** into the Criminal Code. This is an offence of 'associating' with a member, promoter or director of a proscribed terrorist organisation.<sup>39</sup> 'Associating' means 'meeting or communicating' (**item 1 of Schedule 3**). In order to commit an offence against **new subsection 102.8(1)**, a person must on two or more occasions:

- intentionally associate with a member, promoter or director of an organisation
- the person must know that the organisation is a terrorist organisation
- their association must support the organisation

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- they must intend their support to assist the organisation to expand or survive (in this context, a person has ‘intention’ if he or she means to bring about the result or is aware that it will occur in the ordinary course of events),<sup>40</sup> and
- they must know that the person with whom they are associating is a member, promoter or director of the organisation.

The maximum penalty for this offence is imprisonment for 3 years.

**New subsection 102.8(2)** provides that once a person has a prior conviction of associating with a terrorist organisation, any further association<sup>41</sup> with a proscribed organisation (even on a single occasion and not necessarily with the same organisation) will mean that they commit an offence. Once again, the penalty is three years imprisonment.

In the case of each offence, strict liability applies to the fact that the organisation is a proscribed organisation. This means that the prosecution need not prove that the accused person was aware that the organisation was a proscribed organisation [**new paragraphs 102.8(1)(b) and (2)(g); new subsection 102.8(3)**]. However, the accused person can raise a defence of mistake of fact (see below).

A number of defences are provided:

- close family member association [**new paragraph 102.8(4)(a)**]. This defence will apply to people defined as close family members so long as the association only relates to something that can be reasonably regarded as a matter of family or domestic concern. The expression, ‘close family member’, means the person’s spouse, de facto spouse, same sex spouse, parent, step-parent, grandparent, child, step-child, grandchild, brother, sister, step-brother, step-sister, guardian or carer<sup>42</sup>
- religious practice [**new paragraph 102.8(4)(b)**]. This defence applies if the association is in a place used for public religious worship during religious practice
- humanitarian aid [**new paragraph 102.8(4)(c)**]. This defence applies if the association is only for the purpose of providing humanitarian aid
- legal advice or legal representation [**new paragraph 102.8(4)(d)**]. This defence applies if the association is only for the purpose of providing legal advice or legal representation connected with proceedings relating to whether the organisation is a terrorist organisation or with existing or possible criminal proceedings
- implied freedom of political communication [**new subsection 102.8(6)**]. Section 102.8 does not apply to the extent that it would infringe any constitutional doctrine of implied freedom of political communication

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There are also defences that specifically relate to the element in each offence that the organisation is a proscribed organisation. These defences are:

- mistake of fact [**new subsection 102.8(3)**].<sup>43</sup> A defendant can raise a mistake of fact defence. This places an evidential burden on a defendant to show, first, that he or she considered whether or not the organisation was proscribed and was under a reasonable but mistaken belief about the situation and, second, that if he or she had been right, no offence would have been committed.<sup>44</sup> Once the defendant raises evidence pointing to a reasonable possibility, the onus shifts to the prosecution to rebut that evidence beyond reasonable doubt
- not reckless [**new subsection 102.8(5)**]. Here the defendant must raise evidence pointing to a reasonable possibility that he or she was not reckless that the organisation is a proscribed organisation.<sup>45</sup>

**New subsection 102.8(7)** provides that where a person is convicted of an offence under **new subsection 102.8(1)**, they cannot be punished for an offence under that section for other conduct occurring at the same time as that conduct or within 7 days before or after that conduct occurs. Presumably, however, this will not stop a person being prosecuted for a **new section 108.1(2)** offence.

**New section 102.8** amends Part 5.3 of the Commonwealth Criminal Code—the part of the Criminal Code containing terrorism offences. The Commonwealth has no head of constitutional power over criminal law or terrorism. Thus, in 2002 and 2003 all States made text referrals to the Commonwealth in the same terms as Part 5.3.<sup>46</sup> The purpose of the text referrals is to cover any potential legislative gaps in Commonwealth power—for instance, in the case of entirely state-based terrorist activity which does not contain any Commonwealth or foreign element.<sup>47</sup> To guard against any deficits in the Commonwealth's constitutional power to enact an 'associating' with terrorist organisations offence, the States, the ACT and the Northern Territory will need to agree to the proposed amendment to Part 5.3. To be precise, an express amendment to Part 5.3 needs the agreement of a majority of States, the ACT and the Northern Territory and the agreement of at least four States.<sup>48</sup>

## Schedule 4—Transfer of prisoners

The amendments in Schedule 4 commence on the day the Act receives Royal Assent (**clause 2**).

The main purpose of **Schedule 4** is to amend the *Transfer of Prisoners Act 1983* to deal with the transfer of prisoners on security grounds (**new Part IV**). The word 'security' is defined in **item 5** of **Schedule 4** and includes the protection of the Commonwealth, the States and Territories and their people from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system or acts

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of foreign interference. It does not matter whether such activities are directed from or committed within or outside Australia. The definition of 'security' replicates that in section 4 of the ASIO Act.<sup>49</sup>

**New section 16B** deals with transfers on security grounds. It enables the Attorney-General to order that a prisoner or remand prisoner be transferred from a prison in one State or Territory to a prison in another State or Territory if he or she believes on reasonable grounds that it is necessary in the interests of security. Such an order can only be made with the written consent of the 'appropriate Minister' in the originating State or Territory and the 'appropriate Minister' in the destination State or Territory. This order is called a 'security transfer order'.

**New section 16C** deals with the return of prisoners who have been transferred on security grounds. It enables the Attorney-General to order the return of such a prisoner if he or she reviews an order and believes on reasonable grounds that circumstances have changed. This order is called a 'return transfer order'. Once again the consent of the appropriate State or Territory Ministers is required.

Security transfer orders and return transfer orders must be reviewed by the Attorney-General within three months of being made or last reviewed [**new subsection 16C(2)**].

**New section 16D** deals with transfers so that a prisoner can take part in court proceedings. With the consent of the appropriate State and Territory Ministers, the Attorney-General can make an order transferring a prisoner or remand prisoner who is subject to a security transfer order or a return transfer order to another State or Territory to appear in court proceedings (the Attorney-General may then order the prisoner to be transferred back once their appearance is concluded) [**new subsection 16D(1)**]. Written consents from the appropriate State and Territory Ministers are required.

**New section 16E** deals with the transfer of a remand prisoner for trial purposes. Where a remand prisoner who is subject to a security transfer order or return transfer order is required to stand trial, the Attorney-General must order that he or she be transferred to the jurisdiction where the trial is being conducted (and then transferred back as soon as practicable after their appearance concluded). However, the Attorney-General need not make such an order if he or she believes on reasonable grounds that it is essential in the interests of security that the transfer not occur and the court that ordered the person's remand in custody orders that the remand can continue [**new subsection 16E(2)**].

When considering whether to make a security transfer order, a return transfer order, or a transfer order relating to legal proceedings, the Attorney-General must consider '... all matters that he or she considers relevant ...' including the administration of justice and the welfare of the prisoner or remand prisoner [**new subsections 16B(2), 16C(3) and 16D(3)**]. However, these matters need not be considered by the Attorney-General when he or she is making a decision about the transfer of a remand prisoner for trial under **new section 16E**.

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**New section 16F** deals with the interaction of federal and State prisoner transfer laws. It provides that where a security order or a return transfer order has been made by the Attorney-General:

- an application cannot be made under a State transfer law for that person to be transferred to another State or Territory, and
- a court cannot order a transfer under a State transfer law.

Finally, Ministerial decisions under the Transfer of Prisoners Act that are made on security grounds are not subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (**item 1** of **Schedule 4**). Such decisions include decisions made under **new Part IV** and refusals to transfer Commonwealth prisoners under Part II (transfers on welfare grounds) and Part III (transfers so a person can stand trial for an offence against Commonwealth or Territory law).

### Schedule 5—Forensic procedures

**Items 1-5** of **Schedule 5** commence on Royal Assent (**clause 2**). **Item 6**<sup>50</sup> commences either on the start of the day on which the Act receives Royal Assent or on 22 December 2004<sup>51</sup>—whichever occurs later (**clause 2**).

**Schedule 5** amends Division 11A of the *Crimes Act 1914*. Amendments made to Division 11A in 2002<sup>52</sup> added to the circumstances in which Commonwealth, State and Territory officials can access the national DNA database. As a result of the 2002 amendments, access for forensic purposes—such as victim identification or criminal investigation—is allowed in relation to:

- the Bali Bombings on 12 October 2002; and
- any incident occurring outside Australia and Norfolk Island that the Minister determines<sup>53</sup> to be an incident to which Division 11A applies.

Before making a determination, the Minister must be satisfied that one or more Australian citizens or residents have died as a result of the incident and that it is appropriate for Division 11A to apply to the incident.

The 2002 amendments also provided that the Minister must establish an independent review of the operation of Division 11A. The Explanatory Memorandum states:

The review is being undertaken at the time of these amendments. The Chair of the review committee has written to the Minister for Justice and Customs advising that existing forensics legislation may be inadequate to facilitate effective disaster victim identification if a mass casualty incident were to occur within Australia.<sup>54</sup>

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The amendments in **Schedule 5** respond to these concerns.

The Bill amends Division 11A so that a Ministerial determination can be made irrespective of whether an incident occurs inside or outside Australia. However, the Minister will not be able to make a determination in relation to an incident occurring wholly inside Australia or Norfolk Island unless:

- the Minister suspects on reasonable grounds that the incident involves the commission of a Commonwealth or Territory offence or a State offence with a federal aspect<sup>55</sup>
- the Minister suspects on reasonable grounds that victims of the incident are persons who fall within the ambit of Commonwealth constitutional power (for example, ‘aliens’ or Australian Defence Force members),<sup>56</sup> or
- the Minister is satisfied that the incident is or has created a national emergency [**new subsection 23YUF(2A)**].

## Concluding Comments

### Surrender of passports and ASIO questioning warrants

Under the ASIO Act as it presently stands a person, including a person who is not suspected of committing any criminal offence, must surrender their passport/s once they are the subject of an ASIO questioning warrant that has been issued by an issuing authority.

Amendments proposed by the Bill will mean that a person can be required to surrender their passport/s once authority to request a warrant has been sought from the Attorney-General by the Director-General of Security. Parliament may wish to consider whether the proposed provisions strike an appropriate balance between national security and the right of an individual not to have their freedom of movement unreasonably restricted.

### Associating with terrorist organisations

The proposed associating with terrorist organisations offences are more sophisticated than the State consorting offences on which they are based. For instance, unlike State consorting offences, which generally contain few defences<sup>57</sup>, the Bill proposes a number of defences—such as association because a person is a close family member or because a person is providing certain legal advice or assistance. Further, unlike State consorting offences, which criminalise habitual association irrespective of motive or purpose, the Bill stipulates that an accused person’s association must provide support to a proscribed

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organisation and that their support must be intended to assist the organisation to expand or survive.

These things aside, the association offences raise questions relating to:

- whether it is appropriate to criminalise behaviour that is not connected with a terrorist act
- the ‘close family member’ exception in **new paragraph 102.8(4)(a)**. The definition of ‘close family member’ does not include relatives like uncles, aunts, cousins or relatives by marriage (such as fathers or mothers-in-law; sons or daughters-in-law)—that is, people who in some cultures are part of the ‘immediate family’. Nor is it clear how a close family member will be able to avail themselves of a defence that requires their association to relate only to a matter of family or domestic concern
- the legal advice or legal representation exception in **new subparagraph 102.8(4)(d)(ii)**. One of the exceptions in this category relates to the provision of legal advice or legal representation in connection with ‘proceedings relating to whether the organisation in question is a terrorist organisation.’ This would include proceedings under the *Administrative Decisions (Judicial Review) Act 1977* challenging the Minister’s decision to proscribe an organisation under subsection 102.1(2) of the Criminal Code. However, the exceptions do not cover legal advice or representation provided in connection with a delisting application to the Attorney-General.<sup>58</sup> They do not cover legal advice or representation that is provided in relation to civil proceedings. Nor do they seem to cover possible future proceedings relating to whether the organisation is a terrorist organisation<sup>59</sup>
- the exceptions in **new paragraphs 102.8(4)(a), (c) and (d)**, which require the association to be ‘only’ for the excepted purpose—for instance, ‘only for the purpose of providing aid of a humanitarian nature’. How likely it is that a defendant will be able to successfully rely on such defences is unclear given that human contact is rarely for one purpose only. Would a dominant purpose test be more appropriate?
- the types of behaviour that may be caught by the offence. For instance, should a person’s conduct be criminalised if their ‘association’ with a proscribed organisation is for the purpose of persuading the organisation to change its goals?<sup>60</sup> What if their association with an organisation has occurred because they do not believe that the organisation should be a proscribed organisation? What if a person’s association with a proscribed organisation is designed to support its charitable activities rather than its terrorist activities? The offence does not recognise that proscribed organisations may have a range of purposes. What if the association is for the purpose of supporting a member of a proscribed organisation who has been charged with a terrorism offence—for instance, by accompanying a defendant to court? Arguably, all these associations may be intended<sup>61</sup> to support the organisation to expand or survive and may amount to an offence<sup>62</sup>

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- the necessity for and effect of criminalising association with a person who is a ‘promoter’ of a proscribed organisation. What is a ‘promoter’ in this context? And it is important to note that it is not an offence under Part 5.3 of the Criminal Code to be a promoter of a terrorist organisation<sup>63</sup>
- the requirement for an association to occur on two or more occasions. The decided cases suggest that for consorting to occur under State law two meetings can indicate habitual consorting, depending on the circumstances.<sup>64</sup> However, in evidence to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament, the Victoria Police said that people are only charged with consorting if ‘formally reported on numerous occasions within a defined time-limit.’<sup>65</sup> Should an offence be triggered by associations on two occasions—given that a person need not associate with the same proscribed organisation for an association offence to occur and given that there is no defined time-limit in which the associations must occur<sup>66</sup>
- in what circumstances will a person be able to rely on an implied freedom of political communication defence?
- does the offence raises issues about an implied constitutional freedom of association?

### Transfer of prisoners

**New section 16E** of the Transfer of Prisoners Act provides that the Attorney-General is not obliged to make an order returning a transferred prisoner to another jurisdiction for trial if he or she believes on reasonable grounds that it is essential on security grounds that the order not be made and the court that remanded the person in custody orders that the detention may continue. The Minister need not take account of other considerations—such as the welfare of the prisoner or the administration of justice. Nor are there requirements for periodic review of the Minister’s decision and it is clear how long a person might be remanded in custody without a trial and without being able to test the prosecution case against them.

Under the Transfer of Prisoners Act as it presently stands, the Minister’s transfer powers relate to Commonwealth and Territory prisoners and have clear constitutional bases. The Bill extends the Minister’s transfer powers to State prisoners. The constitutional bases for these amendments are less clear-cut.<sup>67</sup>

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## Endnotes

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- 1 A penalty unit is \$110—see subsection 4AA(1), *Crimes Act 1914* (Cwlth).
- 2 ‘Issuing authorities’ are Federal judges and magistrates who have consented to the Minister appointing them as issuing authorities. Other persons in a specified class can be prescribed by regulation as issuing authorities. See section 34AB, ASIO Act.
- 3 The Minister may appoint former superior court judges as ‘prescribed authorities’. If sufficient numbers of former superior court judges cannot be found then the Minister can appoint serving State or Territory Supreme Court or District Court judges. If there are still insufficient numbers, the Minister can appoint certain AAT Presidents and Deputy Presidents. See section 34B, ASIO Act.
- 4 See subsections 34C(1) & (2), ASIO Act.
- 5 See subsection 34C(3)-(3D), ASIO Act.
- 6 See subsection 34C(4), ASIO Act.
- 7 See section 34D, ASIO Act. Additional considerations apply if a person has already been detained under earlier warrants.
- 8 Section 34JC, ASIO Act.
- 9 Unless a confiscated passport has been cancelled, it must be returned ‘as soon as practicable’ after the warrant has expired but can be returned earlier. A person’s passport must be surrendered again if they are subject to another ASIO warrant. Amendments made by the *ASIO Legislation Amendment Act 2003* also made it an offence for a person to leave Australia without the Attorney-General’s permission while an ASIO warrant is in force—once they are told that a warrant has been issued and that they are forbidden from leaving Australia. The maximum penalty for this offence is 5 years imprisonment. See section 34JA, ASIO Act.
- 10 See Attorney-General, ‘Opening and welcome address. Security in Government Conference 2004’, 17 March 2004; ‘New laws target terrorist allies’, *Sunday Mail*, 14 March 2004; ‘Tighter defence against terror’, *Sydney Morning Herald*, 16 March 2004; ‘New law to fight terror’, *Herald Sun*, 18 March 2004. And see the statistics for NSW in Alex Steel, ‘Consorting offences in New South Wales: Substantive offence or police power?’, 26(3) (2003) *UNSWLJ* 567-602, p. 581.
- 11 Attorney-General, Second Reading Speech, Anti-terrorism Bill (No. 2) 2004, House of Representatives, *Hansard*, 17 June 2004, p. 30712.
- 12 The Act made it an offence for any person who was not a ‘black native or the child of any black native’ to be ‘wandering’ in the company of ‘black natives’. It was also an offence to be found in a house in the company of reputed thieves or persons with no lawful means of support—unless the defendant could prove that they were there ‘on some lawful occasion’.
- 13 David Brown et al, *Brown, Farrier, Neal and Weisbrot’s Criminal Laws. Materials and Commentary on Criminal Law and Process in New South Wales*, Federation Press, 2001, p. 997.
- 14 For a detailed account see Steel, *op. cit.*

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- 15 *ibid.*, pp. 590–1.
- 16 <http://www.policensw.com/info/history/h10a11.html>
- 17 See section 546A, *Crimes Act 1900* (NSW); section 6, *Vagrancy Act 1966* (Vic); section 13, *Summary Offences Act 1953* (SA); section 6, *Police Offences Act 1935* (Tas); section 65, *Police Act 1892*; section 4, *Vagrants, Gaming and other Offences Act 1931*; and sections 56 and 57, *Summary Offences Act* (NT).
- 18 Although from time to time there are reports that police are considering using consorting laws—see ‘Criminals warned’, *Manly Daily*, 1 February 2002; ‘Town angry after gang camps at hotel’, *The Australian*, 30 May 2002. Recommendations for the repeal of consorting laws have been made by the Law Reform Commission of Western Australia, *Report on Police Act Offences*, Project No. 85 (1992) and by the Scrutiny of Acts and Regulations Committee of the Victorian Parliament, *Final Report. Inquiry into the Vagrancy Act 1966*, September 2002.
- 19 Law Reform Commission of Western Australia, *op. cit.*, pp. 41–2.
- 20 Scrutiny of Acts and Regulations Committee, *op. cit.*, p. 13.
- 21 *ibid.*
- 22 Commissioner Mick Keelty AM, *Address to the National Press Club*, ‘The AFP - 25 years and beyond’, 7 July 2004.
- 23 The offence must be punishable by at least six months imprisonment.
- 24 Under section 100A, *Crimes (Sentencing Procedure) Act 1999* (NSW).
- 25 The definition of ‘close family member’ in the Bill replicates the definition of ‘close family’ in section 100A(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
- 26 Subsections 100A(1) and (2), *Crimes (Sentencing Procedure) Act 1999* (NSW).
- 27 Explanatory Memorandum, p. 31.
- 28 Lionel Bowen MP, Second Reading Speech, Transfer of Prisoners Bill 1983, House of Representatives, *Hansard*, 19 October 1983, p. 1897.
- 29 Transfers of State offenders are contingent on the consent of the relevant State.
- 30 The expression, ‘competent authority’, is defined in new sections 13, 14 and 15.
- 31 The Explanatory Memorandum foreshadows the type of offences that may be specified—many of the offences in the Criminal Code that have extended geographical jurisdiction (such as terrorism and people smuggling offences and crimes against humanity). See p. 25.
- 32 Although there are no ‘reasonable grounds’ requirement in existing section 8 of the Passports Act.
- 33 The person must be notified of the surrender order and of the matters contained in new subsection 16(5).
- 34 See the definition of ‘enforcement officer’ in item 5 of Schedule 1.
- 35 That is, where the officer suspects that the document has been falsely obtained.

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- 36 Standard geographical jurisdiction applies to these offences (section 14.1, Criminal Code). This means, for example, that a person will not commit an offence under new Part 3 unless the conduct consisting of the alleged offence occurs wholly or partly in Australia or wholly or partly on board an Australian ship or aircraft.
- 37 Paragraph 9A(1)(f), Passports Act.
- 38 The term, ‘enforcement officer’, is defined to mean a Commonwealth, State or Territory police officer or a Customs officer—new subsection 34JBA(5).
- 39 In other words, an organisation that is a terrorist organisation because of paragraph (b), (c), (d) or (e) of the definition of terrorist organisation in the Criminal Code.
- 40 See subsection 5.2(3), Criminal Code.
- 41 The association must satisfy the requirements of new section 102.8(2).
- 42 Item 2 of Schedule 3.
- 43 The defence of mistake of fact is applied to elements of strict liability by subsection 6.1(2) of the Criminal Code.
- 44 See section 9.2, Criminal Code.
- 45 That is, the defendant has an evidential burden.
- 46 A text referral contains the terms of a reference in the form of a Bill. It can be contrasted with a reference of subject-matter.
- 47 Attorney-General, ‘Doorstop, Fremantle’, *Transcript*, 8 November 2002.
- 48 Section 100.8, Criminal Code.
- 49 However, the component parts of the definition (terms like ‘politically motivated violence’ and ‘promotion of communal violence’) are not defined. They are defined in the ASIO Act.
- 50 Repealing subsection 23YUF(2C) of the Crimes Act.
- 51 Immediately after the commencement of Schedule 3 to the *Australian Federal Police and Other Legislation Amendment Act 2004*. However, if this does not occur, item 6 of Schedule 5 does not come into effect.
- 52 *Crimes Amendment Act 2002*.
- 53 A Ministerial determination is a disallowable instrument under section 46A of the *Acts Interpretation Act 1901*.
- 54 Explanatory Memorandum, p. 5. The review is expected to be completed in July 2004.
- 55 The term ‘State offence with a federal aspect’ is defined in new subsection 23YUF(2C).
- 56 Other examples are provided in new subsection 23YUF(2B).
- 57 In some jurisdictions, being able to give a ‘good account’ of the association is an excuse.
- 58 Section 102.1(17) of the Criminal Code enables an individual or organisation to ask the Minister to de-list (de-proscribe) a listed (proscribed) organisation.

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- 59 Unlike the exception in proposed subparagraph 102.8(4)(d)(i) which provides an exception in relation to legal advice or representation connected with ‘criminal proceedings or proceedings related to criminal proceedings (including possible criminal proceedings in the future) ...’
- 60 Arguably, changing an organisation’s goals might lead to a successful de-listing application and to the organisation surviving or thriving.
- 61 As stated earlier, ‘intention’ for these purposes involves meaning to bring about the result or being aware that it will occur in the ordinary course of events. Subsection 5.2(3), Criminal Code.
- 62 Assuming that the other physical and fault elements are made out.
- 63 It is an offence to direct, be a member of or recruit for a terrorist organisation. It is an offence to receive from or give training to a terrorist organisation. It is also an offence to give funds to or receive funds from a terrorist organisation or to provide support to a terrorist organisation. See sections 102.2-102.7, Criminal Code.
- 64 Steel, *op. cit*; Explanatory Memorandum, p. 29.
- 65 Scrutiny of Acts and Regulations Committee, *op. cit*, p. 11.
- 66 Steel, *op. cit*, comments, ‘Despite the fact that the courts have held that two or more instances of consorting could be sufficient, the enforcement of the offence has been significantly restricted by the need for police to make their ‘bookings’ within the six month period required by the relevant criminal procedure legislation. Currently, the requirement is contained in s 179 of the *Criminal Procedure Act 1986* (NSW).’ p. 573.
- 67 Possible constitutional sources of power might include the Commonwealth’s executive power to protect the nation combined with the express incidental power; the implied nationhood power; and the defence power.

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