UNIVERSITY OF TASMANIA

Faculty of Law
Private Bag 89
Hobart Tasmania
Australia 7001
Telephone (03) 6226 2066
Facsimile (03) 6226 7623
http://www.law.utas.edu.au

The Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

9 July 2004

Dear Mr Bailey,

Re: Submission to Senate Legal and Constitutional Legislation Committee on *Anti-Terrorism Bill (No.2) 2004* (Cth)

Thank you for the information regarding submissions on this bill in our telephone conversation today. Further to that conversation, I provide the following submission for consideration by the Committee. I would appreciate if you would make copies of it available to Senators who are members of the Committee.

There are a number of significant concerns about this bill's application of a broad and vaguely defined association offence attaching to a Ministerial, as distinct from a Parliamentary or Judicial power of organisational proscription, in addition to the ancillary and incidental consequences under other legislative provisions of including this offence as a "terrorism offence" within the meaning of Part 5.3 of the *Criminal Code* (Cth).

This submission focuses specifically upon an aspect of Schedule 3 of the *Anti-Terrorism Bill (No.2) 2004*, namely Clause 102.8 "Associating with terrorist organisations" and in particular, clause 102.8 (4)(d). There are some serious drafting problems with this provision.

Clause 102.8 (4)(d) relates to a very narrow exemption for the provision of legal advice and legal representation:

s.102.8 (4) This section does not apply if:….

(d) the association is only for the purpose of providing legal advice or legal representation in connection with:

(i) criminal proceedings or proceedings related to criminal proceedings (including possible criminal proceedings in the future); or

(ii) proceedings relating to whether the organisation in question is a terrorist organisation

Section 14.1 of the *Criminal Code* (Cth) (standard geographical jurisdiction) applies to this clause, meaning that under s.14.1 (2) of the *Criminal Code* (Cth):

14.1 (2) If this section applies to a particular offence, a person does not commit the offence unless:

(a) the conduct constituting the alleged offence occurs:
  (i) wholly or partly in Australia; or
  (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
(b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:
  (i) wholly or partly in Australia; or
  (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
(c) all of the following conditions are satisfied:
  (i) the alleged offence is an ancillary offence;
  (ii) the conduct constituting the alleged offence occurs wholly outside Australia;
  (iii) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

- Importantly, “associate” in the bill is defined as:

associate: a person associates with another person if the person *meets or communicates* with the other person.

- **The bill potentially criminalises a broad range of the provision of legitimate legal advice and legal representation outside the narrowly confined exceptions of clause 102.8 (4)(d)(i) and (ii)**

- Accordingly, the present drafting and operation of Clause 102.8(4)(d) in conjunction with Clauses 102.8(1) and 102.8 (2) criminalises a broad range of the provision of legal advice or legal representation by either meeting with, or communicating with (for the purpose of providing legal advice or legal representation) a person who is a

member of a terrorist organisation or who promotes or directs the activities of a terrorist organisation, in circumstances outside the narrow exceptions of:

(i) criminal proceedings or proceedings related to criminal proceedings (including possible criminal proceedings in the future); or
(ii) proceedings relating to whether the organisation in question is a terrorist organisation

- Those narrow exceptions must in themselves be established by a defendant on an evidential burden ie under s.13.3 (6) of the *Criminal Code* (Cth), that "the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist".

- Clause 102.8 (4)(d) therefore fails to account for a range of other legitimate legal advice and representation matters of persons so described. It strips away basic and fundamental rights of legal advice and representation of persons so described, by criminalising that meeting and communication conduct by legal advisers and legal representatives.

- It is inappropriate and inadequate to try to explain away such criminalisation of the provision of legal advice and legal representation by pointing to the inclusion of the intention elements in Clauses 102.8(1) and 102.8(2) of "intentionally", "knows", "provides support" and "intends that the support assist" and "knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation" which might be argued to prevent application of the alleged offence. This is because of two major reasons:

(a) the scope of the existing association offence clause as it applies to legal advisers and representatives is wide open to be used to deter, coerce by influence or intimidate by the threat of criminal charges, the giving of legal advice and legal representation by legal advisers and representatives, to persons who are allegedly members of terrorist organisations or allegedly promoting or directing the activities of terrorist organisations.

(b) the narrow exceptions mean that there is a confusion and conflation of harmful association for terrorist purposes with critical rule of law issues of a person suspected of or charged with membership, promotion or direction of a terrorist organisation having the ability through legal advice and representation to test and challenge those claims in a variety of legal, administrative and international forums, as well as have legal advice and representation when questioned and/or detained for intelligence gathering purposes.

- Clause 102.8(4)(d) in conjunction with Clauses 102.8(1) and 102.8(2) potentially criminalises a broad range of situations of the provision of legal advice and legal representation, including, but not limited to:

- Access to legal representation under the s.34D questioning and detention warrants of the *ASIO Act 1979* (Cth). This legislation already imposes significant restrictions

upon role of lawyers during questioning and detention: see ss 34TA, 34TB and 34 U of the *ASIO Act 1979* (Cth)

- The present bill, in conjunction with particular characteristics of the *ASIO Act 1979* (Cth), is wide open to an interpretation which criminalises communication for the purpose of giving legal advice or legal representation in such circumstances.

- The legislative drafting of the relevant provisions of the *ASIO Act 1979* (Cth) creates no explicit and unambiguous right for a lawyer to be present at all times during detention and questioning. Instead, the legislation consistently refers to "contact" with a lawyer: see s.34C (3B), 34D (4) and (4A), 34TA(1), (2) and (4) and 34U (1) and (2) of the *ASIO Act 1979* (Cth). Significantly, s.34TB (1) of the *ASIO Act 1979* (Cth) states "To avoid doubt, a person before a prescribed authority for questioning under a warrant issued under section 34D may be questioned under the warrant in the absence of a lawyer of the person's choice". (See also Hocking, J *Terror Laws ASIO Counter-Terrorism and The Threat To Democracy* Sydney: UNSW Press, 2004, 229)

- Accordingly, "associates" in the present bill -ie meeting or communicating with – stands at odds with the concept of "contact" in the *ASIO Act 1979* (Cth). The broader prohibition against meeting and communicating, contained in a later piece of legislation (the present bill), might be seen as (a) impliedly repealing the earlier enacted right to "contact" with a lawyer, as such contact would necessarily involve meeting and/or communicating contrary to the later criminal prohibition in the present bill or (b) in some manner further qualifying or restricting the nature of permissible "contact" with a lawyer, perhaps derived or imputed from the qualifiers of "intentionally associates", "knows", "provides supports", "intends that the support assist" or "knows that the other person is a member of, or a person who promotes or directs the activities of a terrorist organisation", in clauses 102.8(1) and 102.8(2) ie now restricting such "contact" to situations clearly outside of those phrases identifying the intentional elements of the crime of associating with a terrorist organisation.

Long experience confirms that the guaranteed presence of and access to an independent legal representative for a detainee is a vital safeguard against abuses of human rights. The present bill potentially undermines the statutory provisions of access to legal contact in the *ASIO Act 1979* (Cth).

- The present bill's narrow clause 102.8 4(d) exemption is strikingly at odds with the implicit aspects of communication essential for communicating with a lawyer and defined as a "permitted disclosure" under s.34VAA 5 (c) of the *ASIO Act 1979* (Cth) for the purpose of "(i) obtaining legal advice in connection with a warrant issued under section 34D; or (ii) obtaining representation in legal proceedings seeking a remedy relating to such a warrant or the treatment of a person in connection with such a warrant" and under s.34VAA 5(d) of the *ASIO Act 1979* (Cth) for "the purpose of the initiation, conduct or conclusion (by judgment or settlement) of legal proceedings relating to such a remedy".

• Further *examples* of the criminalisation of the provision of legal advice and legal representation under the clauses 102.8 (1) and (2) association with terrorist organisations, (given the narrow exemption of legal advice and representation in clause 102.8 (4)(d)) are listed immediately below. Taking into account the international dimension of some of these communications, it should be recalled that the conduct constituting the alleged offence need occur only partly in Australia (see s.14 (2) of the *Criminal Code* (Cth) included above):

• Civil proceedings within Australia or criminal proceedings within Australia in relation to the prosecution of a person other than the person who is a member of, or a person who promotes or directs the activities of a terrorist organisation.

• Administrative review proceedings under clause 23 Schedule 1 of the *Anti-Terrorism Bill (No.3) 2004* (Cth) (formerly in Schedule 1 of the *Anti-Terrorism Bill (No.3) 2004* (Cth) before the AAT for review of a Ministerial decision to order the surrender of a person's foreign travel documents

• Communications from Australia to overseas for the purpose of providing legal advice or legal representation (as these are not contemplated within the meaning of "criminal proceedings or "proceedings related to criminal proceedings" in clause 102.8 (4)(d) of the present bill. These two phrases are not defined in the *Criminal Code Dictionary* so would be given their ordinary meaning):

(a) in relation to proceedings before US military commissions (as these are not contemplated within the meaning of "criminal proceedings or proceedings related to criminal proceedings" in clause 102.8 (4)(d))

(b) in relation to proceedings before US courts to test the legality of detention and military commission trials following the recent US Supreme Court decisions in *Hamdi* and *Padilla*

(c) in relation to other proceedings, civil and criminal, in other foreign (ie non-US) courts or tribunals

(d) communications relating to exploring possible invocation of proceedings by the Office of the Prosecutor of the International Criminal Court in relation to war crimes or crimes against humanity arising from detention overseas or in a failure or unwillingness to domestically invoke the relevant ICC provisions in the *Criminal Code* (Cth) (Chapter 8, Subdivision C and Subdivision D) for alleged offences committed overseas or in Australia but within the jurisdictional ambit of the Australian statute

(e) individual communications (complaints) under the optional protocol processes before the United Nations treaty system committees, that is, the Human Rights Committee (ICCPR), CERD Committee and CAT Committee.

Other examples of criminalized or potentially criminalized associations - ie meetings or communications – for the purpose of providing legal advice or legal representation in these and other forums, will doubtless exist.

- **Amendments relating to Clause 102.8 (4)(d) of the bill**

Accordingly, the bill should be substantially amended to reflect the legitimate circumstances of meeting and communication for the purpose of providing legal advice and/or legal representation in connection with the specific matters in the *examples* mentioned above.

The bill should *also* be amended to provide a broad *general* exemption from the Clause 102.8 offence of associating with terrorist organisations to cover situations of the provision of legal advice and\or legal representation made in good faith in other, but unspecified and unanticipated, legitimate circumstances, in a way that maintains consistency with accountability and rule of law issues.

I trust these observations will be of some assistance to the Committee in its deliberations on the bill. I would be pleased to provide any further assistance to the Committee.

Yours faithfully,

(Dr) Greg Carne

Faculty of Law