



Law Council  
OF AUSTRALIA

Ref: PJW:CK:kc

15 July 2004

Mr Phillip Bailey  
Acting Secretary  
Senate Legal and Constitutional Committee  
Parliament House  
CANBERRA ACT 2600

Dear Mr Bailey

I refer to your correspondence of 24 June 2004 inviting the Law Council of Australia to comment upon the Senate Legal and Constitutional Committee's inquiry into the *Anti-Terrorism Bill (No. 2) 2004*.

As you may be aware, the Law Council of Australia ("the Law Council") is the peak national representative body of the Australian legal profession. It is the federal organisation representing approximately 40,000 Australian lawyers, through their representative Bar Associations and Law Societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- The Northern Territory Bar Association;
- Queensland Law Society;
- the Western Australia Bar Association; and
- the Victorian Bar.

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The Law Council notes that in relation to this matter separate submissions may be lodged by some of these bodies.

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council of Australia welcomes the opportunity to comment upon this important piece of legislation.

The Law Council notes that since the Senate referred this matter to the Committee for inquiry, the Bill has been significantly amended and another Bill (the *Anti Terrorism Bill (No. 3) 2004*) introduced into the Parliament by the Attorney-General. As the Attorney-General explained in his second reading speech in relation to the *Anti Terrorism Bill (No. 3) 2004*:

*"Since the introduction of [the Anti-Terrorism Bill (No. 2) 2004], the shadow minister for homeland security has written to me offering to facilitate passage of schedule 5 of the Anti-Terrorism Bill (No. 2) which deals with disaster victim identification and criminal investigation following a domestic mass-casualty incident.....*

*In the spirit of cooperation I have agreed to excise schedule 5 from the Anti-Terrorism Bill (No. 2) and progress it in a separate bill, the Anti-Terrorism Bill (No. 3), in recognition of the importance of this measure and its relatively non-controversial status.*

*I will be moving amendments to remove schedule 5 from the Anti-Terrorism Bill (No. 2)."*

The Attorney-General further noted that Schedule 1 (dealing with amendments to the *Passports Act 1938*) and Schedule 2 (dealing with amendments to the *Australian Security Intelligence Organisation Act 1979*) would also be removed from Bill No. 2 and replaced in Bill No. 3.

Within this context, the Law Council wishes only to comment upon aspects of Bill No. 2 as it stands after the amendments.

This should not be interpreted as indicative of the Law Council's tacit support for the provisions of the *Anti-Terrorism Bill (No.3) 2004*. Indeed the Law Council remains very concerned by the scope of the new powers proposed by the amendments to the *Passports Act* and the *ASIO Act*. We would strongly urge the Senate to consider the provisions of Bill No. 3 in a separate inquiry process.

In relation to *Anti-Terrorism Bill (No. 2) 2004* the Law Council wishes to make the following comments:

### Amendments to Division 102 of the Criminal Code

The Law Council is concerned by provisions within the *Anti Terrorism Bill (No.2) 2004* ("the Bill") which will create a new offence for associating with a member, promoter or director of a banned terrorist organisation, pursuant to the *Criminal Code Act 1995 (Cth)* ("the Criminal Code").

Pursuant to Item 1 of Schedule 3 of the Bill, an "associate" will be defined as follows: "a person associates with another person if the person meets or communicates with the other person".

Item 3 of Schedule 3 of the Bill proposes to insert a new section 102.8 into the *Criminal Code Act 1995 (Cth)* as follows:

Associating with terrorist organisations:

1. A person commits an offence if:
  - (a) on 2 or more occasions:
    - (i) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and
    - (ii) the person knows that the organisation is a terrorist organisation; and
    - (iii) the association provides support to the organisation; and
    - (iv) the person intends that the support assist the organisation to expand or to continue to exist; and
    - (v) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation; and
  - (b) the organisation is a terrorist organisation because of paragraph (b), (c), (d) or (e) of the definition of terrorist organisation in this Division (whether or not the organisation is a terrorist organisation because of paragraph (a) of that definition also).

Penalty: Imprisonment for 3 years.

A "terrorist organization" is currently defined in s 102.1 of the *Criminal Code Act 1995* as:

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or

- (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)); or
- (c) a Hizballah organisation, if that organisation is specified by the regulations for the purposes of this paragraph (see subsections (7), (8) and (9)); or
- (d) a Hamas organisation, if that organisation is specified by the regulations for the purposes of this paragraph (see subsections (7), (8) and (10A)); or
- (e) a Lashkar-e-Tayyiba organisation, if that organisation is specified by the regulations for the purposes of this paragraph (see subsections (7), (8) and (10C)).

The amendments proposed by this Bill intend to make associating with promoters, directors or known members of a terrorist organisation an offence, out of concerns that people who act in such a manner are circumventing current Commonwealth criminal laws. During debate in the House of Representatives on this issue, the Attorney-General advanced the following argument in support of the Bill:

*"It is a question of whether or not people coming together and associating with organisations that are involved in those sorts of activities are giving succour and support to them—helping them to grow—so that they can further their aims."*

The Law Council is not convinced of the need for this legislation. Indeed in our submission the new laws have the potential to operate harshly and will unfairly target members of minority groups, especially those of the Islamic faith.

The Law Council considers that current measures adequately cater for situations in which people support, even covertly, banned terrorist groups to achieve acts of actual terrorism or violence within our community. For example, authorities presently have the power under the *Criminal Code Act 1995 (Cth)* to charge people for:

- Providing support to a terrorist organisation (under section 102.7); or
- Getting funds to or from a terrorist organisation (under section 102.6); or
- Receiving training with a terrorist organisation (under section 102.5).

The distinction between these existing offences and those proposed by this Bill are that they cater for associations which actually assist in the organisation of a harmful act of terrorism against Australia, as described in paragraph (a) of the definition of terrorist organisation which is noted above.

It is the Law Council's concern that the new laws will mean that a person who simply "associates, meets or communicates" with a "member, director or promoter" of a terrorist organisation may be liable for criminal prosecution and imprisonment for up to three years.

The offence would be constituted wherever a person intended the association to support an organisation to expand or exist. But the association does not necessarily need to relate to a specific act of terrorism or any other criminal act for that matter.

The Law Council notes that exceptions have been made for close family, associations formed in the course of practising religion where this occurs in a place of worship, legal advice in relation to criminal proceedings, or where the association was for the purpose of providing humanitarian aid. However, in our view this will not provide sufficient safeguard.

It is easy to foresee legitimate associations arising outside of these situations. For example, the Law Council questions how the new laws might relate to an accountant or lawyer who provided professional services other than those connected with a criminal legal proceeding (such as tax advice, conveyancing etc...) to a religious group which he or she knew openly and positively promoted to members the religious objectives of LeT or Al Qaida, but not necessarily their terrorist activities?

Moreover, the new laws cannot be compared with State and Territory consorting offences, as is done in the Explanatory Memorandum<sup>1</sup>. Consorting offences are primarily summary offences carrying small fines or imprisonment of no more than six months, and have been repealed in some jurisdictions.

In the Law Council's view the provisions of this Bill have the potential to operate harshly and will discriminate against members of some minority groups. On this basis, the Bill is not supported.

### **Transfer of Prisoners Act**

The Law Council notes that the Bill further seeks to amend the *Transfer of Prisoners Act 1983* to include security as a third ground for transfer between State or Territory prisoners for Federal, State and Territory Prisoners, as well as for persons charged with and remanded in custody for an offence.


The Law Council is generally concerned by recent developments which have seen the presumption in favour of bail for terrorism related offences reversed (in the original *Anti-Terrorism Bill 2004*). Furthermore, we are concerned at provisions within this legislation which will allow for the transfer of remand prisoners without notice and without regard for the personal circumstances of the detainee, including their prospective distance from family or other support networks as a result of a decision of the Attorney-General under this legislation. Moreover, any transfer based on "security grounds" may in itself jeopardise a remand prisoner's right to a fair trial unless news of the transfer is in some way suppressed (an unlikely prospect). In our view, such decision in respect of remanded detainees should require the approval of a court.

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<sup>1</sup> *Anti-Terrorism Bill (No2) 2004*, Explanatory Memorandum, page 3.

In relation to the provisions relating to the transfer of prisoners and remanded detainees generally, the Law Council is also concerned that decisions of the Attorney-General under these new provisions will not be subject to judicial review (pursuant to Item 1 of Schedule 4 of the Bill). This will mean that there is no opportunity for detainees or prisoners to request a court to examine the security grounds upon which a decision of the Attorney-General is based. This is part of a recent trend by the Federal Government toward exempting judicial review in sensitive administrative areas, which is of great concern to the Law Council.

Yours faithfully

  
Peter Webb  
Secretary-General