Australian Government
Attorney-General's Department

Criminal Justice Division

30 July 2004

Mr Phillip Bailey
Acting Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT

Dear Mr Bailey

ANTI-TERRORISM BILLS (NO.2) AND (NO.3) 2004

The following is the Department's response to questions from the Committee and issues raised in submissions and at the public hearing of 26 July 2004 in relation to the Anti-terrorism Bills.

1. Proposed paragraph 102.8(4)(a) – 'close family members' exception

a) Why has this exception been limited to 'close family members' to the exclusion of other family members such as cousins, nieces, nephews, aunts, uncles, grandparents and in-laws?

b) Has the Department reviewed the drafting of this exception in light of evidence given by the Muslim Civil Rights Advocacy Network in its submission that:

> ***"… family is very important in almost all Arab and Islamic cultures, in particular extended family bonds (cousins, aunts, uncles, grandparents). It is not uncommon for several generations of families to be living in the same household; or for a group of related families to live on the same street. It is not unusual, for example, for cousins and uncles to meet each other on a daily basis and to share their experiences and problems. The current legislation would have a huge social impact if it were to sever forcibly the ties between cousins and uncles, for example, and effectively undermine and destroy one of the most important stabilising influences in many Muslims' lives."***

c) Could the exception be amended to include more family relationships?

Answers

The importance of extended families is not limited to Arab and Islamic cultures. It is common to cultures throughout the world, whether it be elsewhere in Asia and Africa, the Americas, much of Europe and in the Pacific. However, the exception is not unfair to any of these cultures.

The exception does not come into play until the prosecution can prove beyond reasonable doubt the stringent fault elements of the offence. Proposed section 102.8(4)(a) provides that to commit an offence the prosecution would need to prove that on 2 or more occasions:

i) the person intentionally associated with a person who is a member or who promotes or directs the activities of the organisation; **and**
ii) the person knew that the organisation was a terrorist organisation; **and**
iii) the association actually 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**
vi) the organisation is a listed terrorist organisation..

Even if the close relative was culpable on all those counts, there is an exception from the offence if the association relates to a matter of family or domestic concern. In practical terms a mother could know she is providing support to a terrorist organisation by providing food and lodging for her son for that reason as well as her love of the son. The Government has taken the view that it should not intrude on families to that extent. However, to extend the exception to the whole extended family would open a loop hole that would significantly reduce the effectiveness of the offence.

The New South Wales Government has used a similar definition in the exception to its non-association order offence under section 100A of the NSW *Crimes (Sentencing and Procedures) Act 1999* which has been operating amongst a wide range of cultures for several years. In that case the policy objective has been to break up street gangs. It would seem the policy objective of breaking up gangs of terrorists is even more worthy and much less likely to impact on families.

2. Proposed paragraph 102.8(4)(b) – religious exception

a) Why has this exception been limited to places being used for 'public' religious worship?

Answer

Public worship is intended to cover churches and places set aside for religious purposes; for example school halls, parks or stadiums. The intention of all the exemptions is to focus on the activities of the organisation. Exceptions based on location or residential contexts would provide a loophole that could quickly be abused by terrorists.

b) Has the Department reviewed the drafting of this exception in light of evidence given by the Muslim Civil Rights Advocacy Network in its submission that:

> ***"regular classes and Quar'an study groups are frequently conducted in people's homes …".***

Answer

The Department will provide advice to Government on this submission. While the exception could apply to these activities if the particular home is open to the public for worship, there will be other circumstances where it will not. However, if the classes and study groups are focused on religious worship it will be very unlikely that the prosecution would be able to prove that the association was intended to assist the terrorist organisation to exist or expand.

c) Would a study group or class conducted in a private home or other place not open to the public constitute 'public religious worship' within the meaning of those words in this exception?

Answer

No.

d) Could the exception be amended to include such religious practice?

Answer

An amendment of this nature would be a matter for Government. However, in some cases these type of activities could be a front for associations with members of terrorist organisations and a blanket exemption could undermine the objectives of the offence. It is not the intention of the legislation to prevent people practising religion in their own home. For such meetings to constitute an offence the prosecution would need to prove beyond reasonable doubt that such meetings involved associations with the intention of providing support to the organisation to continue to exist or expand.

e) Has the Department considered whether, if the exception were not so amended, proposed section 102.8(4)(b) would contravene section 116 of the Constitution which provides *"the Commonwealth shall not make any law … prohibiting the free exercise of any religion"*?

Answer

The Department is aware of Constitutional limitations and considered the effect of s116 of the Constitution when developing this exemption. It is not the purpose of the proposed offence to prohibit the free exercise of religion. The purpose of the offence is to prevent support that would assist terrorist organisations from continuing to exist or expand.

3. <u>Proposed paragraph 102.8(4)(d) – legal advice exception</u>

a) Why has this exception been limited to the types of proceedings listed?

Answer

The aim of the offence is to isolate terrorist organisations. To cut the access of these organisations to commercial and other freedoms that can be used to make an organisation prosper in a democratic society. Many commercial activities require the provision of legal advice, such as on conveyancing or drafting of contracts. Further, some lawyers in the past have used their professional status to involve themselves in organised crime. It is not inconceivable that the same could occur in the context of relationships with terrorist organisations. It was considered necessary to carefully circumscribe the exception in a way which would at the same time not impact on the ability of those accused of terrorist related activity from being able to defend themselves against those allegations.

b) Would this exception cover legal advice or legal representation in connection with the following types of legal matters?

i) Possible proceedings in the future relating to whether an organisation is a terrorist organisation?

Answer

The exemption is intended to cover advice and representation on the listing of a terrorist organisation. This would cover future proceedings.

ii) Legal matters connected with questioning warrants under the *Australian Security Intelligence Organisation Act 1979*?

Answer

This is not covered.

iii) Civil or administrative proceedings not related to present or possible future criminal proceedings, such as:

A) Legal matters connected with the use of telecommunications interception warrants, surveillance device warrants or search warrants?

Answer

This is covered by subparagraph 102.8(4)(d)(ii). They are proceedings related to criminal proceedings.

B) Legal matters connected with the surrender or cancellation of passports or travel documents?

Answer

This is not covered.

c) Could the exception be amended to provide an exception for the provision of legal advice or legal representation?

Answer

For the reasons given above, a blanket exemption would considerably reduce the effectiveness of the offence.

d) Would either this exception or the exception in proposed paragraph 102.8(4)(c) cover assistance in connection with a legal matter provided by a person not legally qualified (including but not limited to financial assistance with legal expenses, or secretarial support)?

No. However, for such support to be an offence the prosecution would have to prove beyond reasonable doubt that the service provider intended that the provision of their services would assist the terrorist organisation to expand or continue to exist.

4. Proposed paragraph 102.8(6) – political communication

a) Has the Department considered whether the proposed offence would impact on journalists reporting on news and current affairs relating to terrorist organisations?

The Department has considered this issue. This offence would not cover bona fide investigative journalists or the reporting of news and current affairs.

Proof of the knowledge requirements must occur for this activity to constitute an offence. Proposed section 102.8(4)(a) provides that to commit an offence the prosecution would need to prove that on 2 or more occasions:

vii) the person intentionally associated with a person who is a member or who promotes or directs the activities of the organisation; **and**
viii) the person knew that the organisation was a terrorist organisation; **and**
ix) the association actually provides support to the organisation; **and**
x) the person intends that the support assist the organisation to expand or to continue to exist; **and**
xi) the person **knows** that the other person is a member of or a person who promotes or directs the activities of, the organisation; **and**
xii) the organisation is a listed terrorist organisation..

If the prosecution is able to prove the above requirements then the journalist may be able to rely on the implied freedom of political communication exemption. The journalist bears the evidential but not the legal burden of proof in relation to whether the exemption applies. The defendant would have to point to some evidence to show that the exemption applies. However, it is then for the prosecution to prove beyond reasonable doubt it does not apply.

b) What assurances does the Government offer that journalists will not face prosecution merely for reporting on news and current affairs relating to terrorist organisations?

The offence does not cover reporting.

5. Interaction with *Anti-Terrorism Act 2004*

a) What are the legal implications for (a) investigations, (b) bail, and (c) sentencing if the offence in proposed section 102.8 is included within the definition of 'terrorism offence' contained in section 3(1) of the *Crimes Act 1914* (as amended by the *Anti-terrorism Act 2004*)?

Answer

The new rules on those topics would apply to the proposed offence.

b) Has the Department considered whether all of these legal implications are appropriate given the nature of the proposed offence? If so, what was the outcome of that consideration?

Answer

Yes. The investigation and sentencing reforms concern the subject matter of the offence, terrorism. They are to do with the special problems with investigating terrorism offences and the concern that those convicted of being involved with terrorism should be appropriately sentenced within the sentencing range set by the legislature. The proposed offence has the same investigative issues (which I should add are also relevant to the exoneration as well as charging of suspects) and the maximum penalty of 3 years imprisonment provides an appropriate sentencing range. The sentencing reforms are only concerned with ensuring the non-parole period is proportionate to the

maximum penalty. The bail reforms were in part justified by the seriousness of the offences, so there is some incongruity with applying them to this offence. However, it is open to conclude that the fact the offence is concerned with preventing terrorism is justification in itself for applying the bail reforms to this offence.

Other issues

There were a number of other issues raised in submissions and before the Committee. Our responses are attached.

Yours sincerely

Geoff McDonald
Assistant Secretary
Criminal Law Branch

Telephone: (02) 6250
Facsimile: (02) 6250
E-mail: geoff.a.mcdonald@ag.gov.au

ATTACHMENT

Anti-terrorism Bill (No.2)

Schedule 3 – Associating with a terrorist organisation

Elements of the offence

Proposed section 102.8(4)(a) provides that to commit an offence the prosecution would need to prove that on 2 or more occasions:

xiii) the person intentionally associated with a person who is a member or who promotes or directs the activities of the organisation; **and**

xiv) the person knew that the organisation was a terrorist organisation; **and**

xv) the association actually provides support to the organisation; **and**

xvi) the person intends that the support assist the organisation to expand or to continue to exist; **and**

xvii) the person **knows** that the other person is a member of or a person who promotes or directs the activities of, the organisation; **and**

xviii) the organisation is a listed terrorist organisation..

Strict liability applies to whether the organisation is a terrorist organisation specified in regulations. Consequently, the prosecution would not have to prove that the person was aware that the organisation is a terrorist organisation specified in regulations. However, as per the offence under section 102.5 of the Criminal Code, for providing training to or receiving training from a terrorist organisation, the mistake of fact defence and a recklessness exception apply.

The elements of the offence must be borne in mind in considering each set of circumstances where the offence may apply.

The need for the offence

In the aftermath of September 11 2001, a package of legislation to strengthen Australia's counter-terrorism laws was developed. Since that time the Government has continued to review, update and improve its counter-terrorism laws to ensure most appropriate legislative measures are in place. The intent of the anti-terrorism legislation is to deter, apprehend and punish the perpetrators of terrorism. The association offence is designed to meet that objective. It does so by focusing on the fact that these organisations are illegal and that less direct support for the continuing existence, or expansion, of such organisations can play a role in the horror and fear that they can bring to our community.

1. How do these proposed association offences differ from the existing offence targeting the provision of support to a terrorist organisation under 102.7? (Numerous submissions including HREOC)

The principal difference between the proposed offence and section 102.7 'Providing Support to a Terrorist Organisation' is the casual link to a 'terrorist act'. The offence at section 102.7 targets the provision of support or resources that would help the organisation prepare, plan, assist in or foster the doing of a *terrorist act*. This feature of the section 102.7 offence creates a significant burden for

the prosecution to bear.
If evidence cannot be adduced demonstrating a link to such a 'terrorist act' then the offence cannot be made out. The proposed association offence would target conduct that is more remote to the planning, preparing, assisting in or fostering the doing of a terrorist act. For example, the preliminary stages of recruiting a person into a terrorist organisation, or the lending of public support to a terrorist organisation in an effort to lend credibility to that organisation. Although more remote, such conduct can play an important part in the life and growth of terrorist organisations. In recognition of the fact that the relevant conduct is more remote, lower maximum penalties of imprisonment for 3 years apply.

2. Why wouldn't existing ancillary offences or State and Territory consorting offences be sufficient here?(Numerous including HREOC)

Ancillary Liability

Aiding and abetting (or, complicity) would not provide a prosecutorial avenue in the associate scenarios we are proposing to criminalise here. Complicity involves the prosecution proving beyond reasonable doubt that the person aided, abetted, counselled or procured the commission of an offence by another person.

The offence must have been committed by that other person (s.11.2 of the *Criminal Code*). Accessory requires proof of taking someone in or assisting them in the knowledge that the person is guilty of an offence in order to enable that person to escape punishment or dispose of the proceeds of the offence (s. 6 of the *Crimes Act*). But here the proposed associate offences do not require proof that the support actually assisted the organisation – it is the associate's intention that is key – or that the associate is somehow connected to another person having committed an offence. Incitement would not apply to many of these circumstances because it involves proving an intention that the offence incited be committed (s.11.4 of the *Criminal Code*).

Consorting offences

State and Territory consorting offences would not be applicable. These offences apply to persons who associate with other people who have been convicted of indictable State or Territory offences (eg, s.546A of the *Crimes Act 1900* (NSW)). No pre-existing conviction is required under the proposed association offences. State and Territory offences in this area vary, but are primarily aimed at property and street offences. The proposed associate offences draw upon consorting offences but update them in light of the contemporary terrorist threat and accepted limits for criminal law intervention.

Comparison with State Consorting Offences

3. State and territory consorting offences have been criticised. Why do these criticisms not apply to the association offence? (AMCRAN submission)

Criticisms of the offence of consorting as found in the State and Territory jurisdictions generally do not apply to the proposed association offence. The proposed association offence is designed to address activity where there is an intention to support a listed terrorist organisation to exist or expand. An important distinction between consorting offences and the association offences is the much higher level of culpability associated with the knowledge and intention elements of the association offence compared to the State and Territory consorting offences. For example the

prosecution does not have to prove that the defendant has consorted for an unlawful or criminal purpose (see *Johanson v Dixson* 1979 143 CLR 376 at 383). The nature of the association is also an important distinction. In some State and Territory jurisdictions (eg section 6 of the Victorian *Vagrancy Act 1966*) a person may be convicted for consorting with another person on the basis of the other person's reputation alone (consorting with reputed thieves). The maximum penalty for the proposed offence is higher (3 years – Victoria has 2 years) but the nature of the conduct required to be proved is more serious. The New Zealand offence has a maximum penalty of 3 years imprisonment. In France the maximum penalty for the equivalent offence is 10 years imprisonment.

Is the offence discriminatory

4. Only Muslim organisations are listed, therefore the offence will only apply to Muslims (Numerous).

The offence is not directed at the Muslim population. There is a broad range of religious beliefs in Australia and the Government has said on many occasions it is committed to maintaining the Australian traditions of tolerance and respect, which are fundamental to a free and democratic society. There is a strong commitment in Australia to maintaining the right of people of all religions to practise their religion, within the scope of the law, without intimidation or harassment. In the recent report on national consultations with Arab and Muslim Australians, 'Ismaع – Listen', Dr William Jonas AM, the acting Race Discrimination Commissioner of the Human Rights and Equal Opportunity Commission (the Commission) refers to the need to confront negative stereotyping and misinformation about Arabs and Muslims. Australia's counter-terrorism laws are designed to protect all members of the community. The counter-terrorism laws target terrorists regardless of their religious, ideological or political motivation. Terrorist organisations listed for the purposes of the criminal law have been shown to be directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act and the Government's counter-terrorism laws target terrorists and those assisting them, not persons of a particular religious or racial persuasion.

Listing of organisations

The listing provisions for 'terrorist organisations' are contained in Division 102 of the *Criminal Code Act 1995* (the Criminal Code). Terrorist organisations are listed in the Criminal Code Regulations.

5. Could it be possible for people to be charges under section 102.8 for associating with a member of a trade union or with a member of a charitable organisation if such organisations were listed as terrorist organisations? (Referred to in the submission of Joo-Cheong Tham)

Charitable organisations

The Parliament has settled on a process for listing organisations and much care has been taken to provide for appropriate listings. It should be noted that the definition in section 102.1(1) of the Criminal Code is for the listing of the Hizballah External Security Organisation. Listing of this organisation would not occur if the "succour" did not include activity that did fostered acts of political violence.

Trade Unions

Subsection 100.1(3) of the Criminal Code provides an exemption to the definition of terrorist act where the action is for advocacy, protest, dissent or industrial action, and is not intended to cause serious physical harm, death or endangerment of another person's life, or to create a serious risk to the health or safety of the public or a section of the public.

An organisation that was a trade union organisation could only be listed if it satisfied the criteria laid out under section 102.1 of the Criminal Code; that is the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, whether or not the terrorist act has occurred or will occur.

The proposed offence focuses on assisting the expansion or existence of terrorist organisations.

6. Is the legislative regime for listing a terrorist organisation under Division 102 of the Criminal Code unconstitutional? Is the listing process a Bill of attainder? (Referred to in the submission of Joo-Cheong Tham)

The process of listing a terrorist organisation has been developed to ensure constitutional validity.

The High Court has said:

"Legislation will amount to a bill of attainder only where it is apparent that the legislature intended that the conviction of specific persons for conduct engaged in the past". (*Polyukhovich v The Commonwealth* 172 CLR 501 at 647).

"The particular objection to bills of attainder was…that they substituted the judgment of the legislature for that of a court." (*Polyukhovich v The Commonwealth* 172 CLR 501 at 646).

The new offence of association with a terrorist organisation does not apply to conduct ex post facto. A person only becomes susceptible to the application of the offence once an organisation has been listed in the Criminal Code Regulations as a terrorist organisation. The Director of Public Prosecutions is responsible for determining whether a person is to be charged with an offence under the new section 102.8. Neither the executive nor the legislature plays a role in this process. There is no mechanism for usurping the proper role of the judiciary or interference with the proper functioning and position of a Chapter III court.

7. This offence depends on the exercise of executive discretion in declaring an organisation to be a listed terrorist organisation. (Numerous including AMCRAN)

Organisations cannot be listed arbitrarily by the Australian Government. Strict legislative criteria must be met before an organisation may be listed in regulations as a terrorist organisation.

Clause 102.1(2) of the Criminal Code provides that before the Governor-General makes regulations specifying an organisation as a terrorist organisation, the Attorney-General must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, whether or not the terrorist act has occurred or will occur.

Section 102.1(17) allows for an affected person or organisation to apply to the Attorney-General to de-list an organisation. An application may be made on the grounds that there is no basis for the Minister to be satisfied that the listed organisation is directly or indirectly engaged in, preparing,

planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur). The Minister must consider the de-listing application.

It is a requirement under subsection 102.1(2A) of the Criminal Code that before the Governor-General makes a regulation specifying an organisation as a terrorist organisation arrangements must be made for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation.

The making of the regulations is subject to judicial review under either section 75(v) of the Constitution or section 39B of the Judiciary Act. The regulations are subject to review by the Parliamentary Joint Committee on ASIO, ASIS and DSD in addition to review by other committees such as the Senate Regulation and Ordinances Committee and may be disallowed by Parliament. The regulations will sunset two years after they are made unless the regulations are remade.

8. Can a person who supports any terrorist organisation such as a member of Fretlin, the PLO or the IRA be caught by the offence? (Numerous including Nowar SA)

No. Proposed s.102.8(1)(b) requires that the organisation must be a terrorist because of paragraph (b), (c), (d) or (e) of the definition of ***terrorist organisation*** in Division 102 of the Criminal Code (whether or not the organisation is a terrorist organisation because of paragraph (a) of that definition also). This means that the terrorist organisation must be one of the organisations that are listed in the *Criminal Code Regulations* (the Regulations). Fretlin, the PLO and the IRA are not listed as terrorist organisations in the Regulations and therefore the offence will not apply.

9. A person, telephones her uncle on two occasions to congratulate him on his work as a member of a charitable organisation. The organisation is a predominantly charitable organisation, which also provides succour to revolutionaries engaged in acts of political violence. Provided that the charitable organisation had been banned by the Minister, could this person be found liable for an offence? Would she be liable even if she encouraged her uncle to try and stop the organisation providing succour to revolutionaries? (Referred to in submission of Castan Centre for Human Rights (pg 9))

The Uncle is likely to be a member of a terrorist organisation if the organisation is listed. However for his niece to be guilty the prosecution would need to prove, beyond reasonable doubt that she knew that the organisation is a terrorist organisation and that she knew that her congratulation calls were providing support to the continued existence or expansion of the organisation itself and not just her uncle's religious convictions.

If the niece was encouraging her uncle to stop the organisation from helping revolutionaries, it is hard to understand how it could be proved that her communication was providing support to a listed terrorist organisation.

Meaning of "Support"; "Assist" and "Promote"

10. What does "support" mean? (Numerous including the Human Rights and Equal Opportunity Commission)

The concept of 'support' is taken from existing terrorism offences at section 102.7 of the Criminal Code (Providing Support to a Terrorist Organisation). While it has not been defined in this offence,

or for the purposes of section 102.7, it is not vague. It has an ordinary meaning capable of being understood by the community. The primary meaning here is to 'lend assistance and countenance; to back up' (see Macquarie Dictionary, 3rd Edition, p.2126). "Support' has an ordinary meaning that is well understood in the community. The meaning of the word is informed by the conduct, in this case communicating or meeting, and the purpose of the support, in this case assisting a terrorist organisation to expand or continue to exist.

The word has been used in legislation before and in each case it has not been defined. This occurred recently with section 102.7 of the Criminal Code (providing support to a terrorist organisation) and has been in the Crimes (Foreign Incursions and Recruitment) Act 1978 since it was first enacted (section 7). Other examples are section 71.23 of the Criminal Code, sections 13 and 101B of the Fisheries Management Act 1991, section 29 of the Repatriation Legislation Amendment Act 1982, section 184A of the Customs Act 1901 and section 38CA of the Great Barrier Reef Marine Park Act 1975. The context of each of these examples is different, but the meaning of the word 'support' adapts to the particular provision.

11. What does assist mean? (Numerous including the Human Rights and Equal Opportunity Commission)

The word assist has also not been defined in this offence or other terrorism offences. It too has an ordinary meaning capable of being understood by the community. The primary meaning here is to provide help to the organisation.

12. The term "promote" is not defined. It is not an offence to promote a terrorist organisation, so why is it an offence to associate with a promoter? (HREOC)

It is an offence to recruit (s.102.4), to train (s.102.5) and to raise funds for terrorist organisations (s.102.6). These are activities that involve promotion.

Burden of Proof

13. Who bears the burden of proof in relation to support? (Numerous)

The prosecution bears the legal burden and must prove beyond reasonable doubt that the person intends the support assist the organisation to continue to exist or expand.

14. What does the evidential burden mean? (Numerous)

The defendant bears the evidential burden in relation to the exemptions at ss.102.8(4) and 102.8(6). This means that if the defendant can point to evidence suggesting a reasonable possibility that the exception applies, then it is for the prosecution to prove beyond reasonable doubt that the exception has no application. The defendant also bears the evidential burden if he or she is seeking invoke the recklessness defence at 102.8(5). The offences in section 102.8(1) will not apply if the person is not reckless as to whether the organisation is a terrorist organisation specified in regulations. If the defendant can point to evidence suggesting a reasonable possibility that the recklessness exception applies, then it is for the prosecution to prove beyond reasonable doubt that the exception has no application.

Supporting Non-violent activities

The offence does not differentiate between the types of activities that are supported. If a person supports an organisation that they know to be a terrorist organisation, and their support is intended to assist the terrorist organisation to continue to exist or expand, then it does not matter whether that support is directed at non-violent activities. Non-violent activities are often a front for such organisations and exclusion of organisations who are undertaking non-violent types of activities would provide a significant loophole. It must again be borne in mind that the offence applies to listed terrorist organisations. In order to be listed as a terrorist organisation, the Attorney-General must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act.

15. A journalist writes in support of non-violent activities of an organisation that he knows is a proscribed organisation. The journalist intends that his support will assist the organisation to continue to exist or expand. (NSW Council for Civil Liberties Inc)

a) Is this journalist guilty of an offence?

b) If an ordinary member of the public communicates twice with the journalist about the article and expresses agreement with the journalists views, providing support to the organisations activities, can that person be found guilty of associating with a terrorist organisation?

c) Will this offence inhibit investigative journalism?

The proposed offence focuses on associating with members, promoters or directors of the activities of terrorist organisations. Writing an article in a newspaper does not amount to meeting or communicating with such people. However, existing offences may be applicable. If the article was written with the intention of recruiting a person to participate in the activities of a terrorist organisation section 102.4 might be applicable. There is no exemption from the offences on the basis of occupation.

However, in preparing the article the journalist may associate (communicate or meet) such people on 2 or more occasions intending that his or her support will assist the organisation to expand or continue to exist activities. If that occurs, and the communication goes beyond what is protected as political communication by the Constitution, he or she may be guilty of an offence.

b) The member of the public is associating with a person who promotes the activities of the organisation by communicating with the journalist. In order to commit an offence, the prosecution would have to prove that by communicating his or her support to the journalist he or she is intending to assist the organisation to continue to exist or expand. If this is his or her intention, then this is the type of behaviour that the offence is trying to cover. The offence does not distinguish between people who have different occupations.

c) This offence is not intended to inhibit investigative journalists. The knowledge requirements must be met in order for this activity to constitute an offence. That is:

- The journalist must intentionally associate with a person who is a member or who promotes or directs the activities of the organisation.
- The journalist must know that the associate is a member or promotes or directs the activities of the organisation;
- The journalist must know that the organisation is a terrorist organisation; and

- The journalist must intends that the support assist the organisation to expand or to continue to exist.

If these knowledge requirements are met then the journalist has committed an offence. It does not matter what type of activities the journalist supports. Support of non-violent activities is still the provision of support to an organisation which is intended to assist it in continuing to exist or expand.

16. A community leader who has considerable status, appears at a meeting next to a terrorist leader in a gesture designed to garner support for the terrorist organisation. The person may not have in mind helping the organisation engage in a terrorist act. The person may be supporting the organisation for other reasons (for example, political reasons or because the organisation has been generous to the poor). The appearance would be intended to be support to assist the organisation to expand or continue to exist.

The intention of the legislation is to make the conduct of the community leader, in such an example above, an offence. The knowledge requirements are important. If by appearing with the terrorist leader, the community leader is intending to assist the organisation to continue to exist or expand, then the community leader is committing an offence if he or she does so on 2 or more occasions.

Supporting the de-listing of an organisation

17. A member of a proscribed organisation writes to a newspaper condemning the proscription of the organisation as undemocratic. The member is responded to twice in the newspapers columns by a member of the public who agrees with the letter writer and advocates the proscription be removed.

a) Is the member of the public communicating with a proscribed terrorist organisation.

b) Is the member of the public providing support to the organisation because the writer wants the organisation to be un-proscribed?

It would be difficult to prove beyond reasonable doubt that by writing to a newspaper the person is communicating with the first person. The person is communicating with the newspaper. What the newspaper does with the letter is another matter.

Even if the communication element could be satisfied, a prosecution is unlikely because there would be concern that it might infringe the doctrine of implied political communication. Proposed ss.102.8(6) has been included to ensure prosecutors take into account that consideration.

Providing services to a terrorist organisation

18. Is a school teacher, social worker, lawyer, caterer or the person who rents the hall to a member of a terrorist organisation, all of whom may have multiple contacts with a member, director, or promoter but have no intention of furthering a terrorist act or any illegal activity guilty of an offence? (Numerous)

Proposed section 102.8(4)(a) provides that to commit an offence the prosecution would need to prove that on 2 or more occasions:

xix) the person intentionally associated with a person who is a member or who promotes or directs the activities of the organisation; **and**
xx) the person knew that the organisation was a terrorist organisation; **and**
xxi) the association actually provides support to the organisation; **and**
xxii) the person intends that the support assist the organisation to expand or to continue to exist; **and**
xxiii) the person **knows** that the other person is a member of or a person who promotes or directs the activities of, the organisation; **and**
xxiv) the organisation is a listed terrorist organisation..

The prosecution would not have to prove that the person intended to further a terrorist act or do something else illegal. If that were the case, the person would have committed a much more serious offence such as supporting a terrorist organisation in ways that would help the organisation engage in terrorist activities (section 102.7 of the Criminal Code).

There is no need to exempt people based on their occupation, such as school teachers, social workers. The exemptions focuses on activities. Teaching religion at a place of public religious worship is exempted. The Parliament did not see fit to provide exemptions on the basis of occupation when it enacted the offence of providing training to a terrorist organisation (section 102.5 of the Criminal Code). A school teacher, caterer, social worker or renter who intends that their support will assist a terrorist organisation to expand or continue to exist will be caught by the offence. To do otherwise would nullify the effectiveness of the offence.

19. A person who provides professional services to a group which he or she knew openly and positively promoted to members the religious objectives of a terrorist group, but not necessarily their terrorist activities.(Law Council of Australia (pg5)

It would have to be proven that the religious group is a promoter of a listed terrorist organisation.

If so then the service provider is communicating with a promoter of a terrorist organisation.

The service provider must intend that the provision of their services to the promoter of the terrorist organisation is to assist the terrorist organisation to exist or expand. It does not matter what is behind the support – if the organisation is listed the offence will apply. There is no basis for exempting professional services unless they concern certain legal advice or humanitarian aid.

Exemptions - "humanitarian aid"

20. Organisation of a meeting to discuss the provision of welfare or the sourcing of welfare to an organisation Referred to in submission of Amnesty International (pp 7,8)

A one off meeting would not fall within the provisions of the offence. However if the organisation of a meeting, involved 2 or more communications with members, promoters or directors of an organisation, the meeting organiser only commits an offence if it can be proved:

- the meeting organiser(s) knew the organisation was a terrorist organisation and that the person they are communicating with is a member, promoter or director of the organisation;
- that the communications with the terrorist organisation to set up the meeting provides support to the organisation; and

- the meeting organiser(s) intends that the support will assist the organisation to continue to exist or expand.

The same steps would apply to communicating at the actual meeting itself.

Welfare is a fairly loose term and the provision or sourcing or welfare for the organisation may be considered to be assisting the organisation to continue to exist or expand. However, it is likely that the exception for the purpose of providing humanitarian aid would apply in the circumstances described. Aid cannot be provided if no inquiries are made to determine what is required.

21. Provision of "emotional support" to a member for the purpose of providing solace to that member (Referred to in submission of Joo-Cheong Tham p3)

The issue here is whether the association provides support to the organisation and that the support is intended to assist the expansion or existence of the organisation. Much would depend on the importance of the person to the organisation and how much that person relied on that emotional support. Depending on the circumstances, emotional support to someone like Usama Bin Laden could be caught because of his likely critical role in the continued existence of a listed terrorist organisation. Emotional support for a suicide bomber designed to motivate that person to go through with an attack that is itself critical to maintaining support for a terrorist organisation would be caught. However, for many of those involved it would be hard to show that mere emotional support for it would have an impact on the continuing existence or expansion of a terrorist organisation.

22. Association for the purposes of providing aid of a humanitarian nature. Excludes those who are not directly involved in the delivery of aid and excludes those communicating about the welfare needs of particular populations?

The intention of the legislation is to cover circumstances such as the delivery of medical or food aid to a person and would include all persons involved in the humanitarian task not just the person directly administering the aid. Proposed section 102.8(4)(c) provides that the association must be for the purpose of providing aid. Often finding out the welfare needs is necessary to provide the appropriate aid.

Exemptions - legal advice or representation

23. Fundraising to assist in legal proceedings (Referred to in submission of Amnesty International (pg 7)

The prosecution would need to prove that the purpose of the fundraising was intended to assist the organisation to continue to exist or expand, not just to save the hide of an individual. An exemption of this type could be abused. It has been suggested in the past in the context of Proceeds of Crime legislation that extravagant estimates of legal fees have been used to shield the siphoning off of money for other purposes.

24. Representing someone who is being detained under an ASIO warrant or someone who is subject to search under an ASIO warrant. (Referred to in submission of Amnesty International (pg 8)) (referred to in submission of Dr Greg Carne Uni of Tasmania p3-6)

It is not clear whether this is covered..

25. Representation for the purposes of challenging the listing of an organisation under the Charter of United Nations Act 1945 (Referred to in submission of Amnesty International (pg 8) and submission of Joo-Cheong Tham (pg 5))

The intention of s.102.8(4)(d)(ii) was to cover this circumstance.

26. Representation in relation to proceedings before US Military commissions; other foreign courts, ICC, complaints to UN treaty process (referred to in submission of Dr Greg Carne Uni of Tasmania p3-6)

S.102.8(4)(d)(ii) may not cover the US Military Commission and UN complaints. Foreign court and ICC proceedings are covered.

27. A lawyer associating with and advising a person about civil proceedings (referred to in submission of Dr Greg Carne Uni of Tasmania p3-6)

Exempting civil proceedings may make the exemption too wide and allow terrorist organisations to receive advice on business or property matters. However, as mentioned before, for the offence to apply, it would have to be proven that the lawyer intended to provide support to assist the organisation to continue to exist or expand.

28. Non-lawyers discussing criminal proceedings

It would depend on the content of the discussion. For someone involved in the discussion to commit an offence, the prosecution would need to prove that the discussions actually provided support and was intended to support the organisation to continue to exist or expand.

29. The exemption appears not to extend to legal representation to the minister to de-proscribe an organisation.

The exemption at 102.8(4)(d)(ii) covers an association for the purpose of legal representation in connection with "proceedings relating to whether the organisation in question is a terrorist organisation". This is covered by the exemption.

Exemptions – implied freedom of political communication

30. What is the scope and meaning of the implied freedom of political communication exemption? It is not absolute so how would a person ascertain whether their activities would be protected by this exemption. (HREOC)

The defendant bears the evidential but not the legal burden of proof in relation to whether the implied freedom of political communication applies. The defendant would have to point to some evidence to show that the exemption may be applicable. It would then be for the prosecution to prove beyond reasonable doubt that it does not apply. In any case, the prosecution must first prove the person intended that the support provided by the communication would assist the organisation to continue to exist or expand. Those who are contemplating associating with people of the type covered by the offence would be expected to exercise caution and obtain private legal advice. A more specific exemption would be likely produce anomalies.

Exemptions - Close family member

31. The definition does not include uncles, aunts, cousins, nieces, nephews, parent-in-law and is far too narrow for some cultures Referred to in submission of Amnesty International (pg 7); submission of Public Interest Advocacy Centre pp9; Referred to in submission of Castan Centre for Human Rights (pg 9))

These family members are not exempted as they do not fall within the definition of close family. The current exemption is generous when consideration is given to the knowledge requirements that must be met before a person can commit an offence. It is consistent with the definition of close family under section 100A of the NSW Crimes (Sentencing and Procedures) Act 1999.

32. If the wife drives the husband to the court if he is on trial for a terrorist offence, is that a family or domestic concern or a culpable association

This is a circumstance that would fall into a domestic matter. In any event, it would be difficult to see how in driving her husband to the court, a wife is supporting the organisation with the intention that it continue to exist or expand. The prosecution would have to prove this beyond reasonable doubt.

33. Is the wife guilty of association if her husband even discusses the organisation with her?

This would depend on the content of the discussion. If the discussion is about ways of making the organisation more effective and the wife knowingly provides input that provides assistance to its expansion, it may be caught. However, mere mention of what the organisation is doing or what he thinks about the organisation would not be a sufficient basis for a prosecution.

34. Does the bill make it a crime to communicate about a family and domestic concerns if you cannot come within the definition of a close family member?

In the vast majority of cases inquires of this nature could not be shown to be intended as support that would assist the organisation to continue to exist or expand.

Exemptions - Public religious worship

35. Are social meetings before or after religious worship or meeting associated with programs that the religious group may run such as education or counselling services covered? (Referred to in submission of Amnesty International (pg 7)

It would not appear to be covered by the religious worship exemption. However, the prosecution would need to prove that such meetings involved associations with the intention of providing support to the organisation to continue to exist or expand. Depending on the content of the counselling, in some cases it may be exempted as humanitarian aid. In some cases these activities could be a front and a blanket exemption could undermine the objectives of the offence.

36. What is the restraint on "public religious worship"? Does this indicate that there are places of private worship which do not fall within the exemption? (Numerous)

Yes. A person can privately worship anywhere. Public worship would include churches and places set aside for religious purposes (for example worship in a park on a particular day).

Exemptions - Exemptions that deal with the location or context of the association including education, employment and residence

37. Bill does not include exceptions similar to those found in the NSW legislation (submission of Public Interest Advocacy Centre pp.9)

The exceptions used are drawn from the NSW law. However, the NSW law is mainly concerned with ordinary property offenders. Locational, educational, employment or residential contexts would provide a loophole that could quickly be abused by terrorist organisations.

Anti-terrorism Bill (No.2) - Schedule 4 – Transfer of Prisoners

The Anti-terrorism Bill (No. 2) 2004 proposes to amend the *Transfer of Prisoners Act 1983* to enable transfers between jurisdictions in the interests of security.

38. Consultation on amendments (NSW Minister for Justice)

The transfer of prisoners on security grounds was raised at a meeting convened by the Australian Government in December 2003. It was agreed that all jurisdictions would continue to participate in discussions on the issues raised and to meet again under NSW chairmanship to discuss the issue. Attempts were made by Australian Government officials to discuss the issue with NSW on 5 occasions during subsequent months and no information was forthcoming.

As acknowledged by the submission of the NSW Minister for Justice (paragraph 2.5), the Australian Government was responding to the States' request for changes to prisoner transfer laws to allow transfer on national security grounds.

The Government had a legislative vehicle available but including the provisions in the Bill did not allow time for consultation. The amendments were included in the Anti-terrorism Bill (No. 2) 2004 which was introduced on 17 June 2004. States and Territories were consulted promptly following introduction of the Bill. On 18 June 2004 the Minister for Justice and Customs wrote to State and Territory Police and Corrections Ministers advising them of the amendments about transfer of prisoners. The Attorney-General also wrote to all State and Territory Attorneys-General advising them of the Bill.

In the public hearing the NSW Minister for Justice noted that he had written to the Australian Government Attorney-General in a letter of 23 June 2004 about the Bill. The Minister for Justice and Customs responded to the issues raised in that letter at the Corrective Services Ministers' Conference on 29 June 2004. Minister Hatzistergos was present at that conference.

39. Operational security - (submission by NSW Minister for Justice)

The submission by the NSW Minister for Justice was concerned that the proposed amendments fail to provide for the transfer of prisoners on the basis of 'operational security'. It recommends that the definition of security should be amended to include matters significant to the operational security of correctional systems including where authorities learned that a terrorist inmate was planning, or was the subject of a planned escape or break-out, attack on a correctional centre, threat or intimidation against prison officers, or attempt to organise a disturbance or other crime within a correctional centre.

The definition of 'security' used in the amendments is directed at national security and is consistent with the *Australian Security Intelligence Organisation Act 1979*.

The circumstances which justify a security transfer order will need to be considered on a case by case basis. However, it is envisaged that such transfers could be ordered where the prisoner is a terrorist and is trying to escape from custody or there is a threat to a prisoner or remand prisoner, (for example the prisoner may be intending to give evidence in proceedings against a person alleged to have been involved in terrorist acts and his or her safety may be threatened because of that). Those circumstances would clearly fall within the definition of 'security' in the Bill.

The focus of the Australian Government's amendments is national security. The amendments are not designed to merely enable the transfer of a 'difficult' prisoner who may pose normal operational security risks. Such matters should continue to be dealt with in the same manner as currently dealt with by the prisons. There is no need for the Australian Attorney-General to be involved in such matters unless it concerns a federal prisoner.

Whether a matter raises national security or normal operational security issues will depend on the circumstances. There will of course be cases where an operational security issue also raises national security issues (for example, a prisoner charged with or convicted of a terrorism offence who is planning to escape).

Possible amendments to transfer of prisoner legislation to deal with transfers on the basis of operational security issues are on the agenda of relevant ministerial councils and is scheduled to be dealt with at a later date.

40. Bureaucracy slows urgent transfers – (submission by NSW Minister for Justice)

The submission of the NSW Minister for Justice raises concerns about the requirement that the Australian Government Attorney-General give approval prior to transfer. He suggests that the requirement imposes an unnecessary extra layer of bureaucracy which will delay transfers. He recommends that the interstate transfer of an inmate on security grounds should be able to take place following the verbal approval of the two State ministers involved and that the Australian Government Attorney-General should be informed afterwards.

The NSW Minister's submission suggests that the interstate transfer of terrorist inmates should be likened to the intrastate transfers of regular inmates. These amendments are not dealing with regular inmates. They are aimed at prisoners who pose a risk to the national security of Australia and consequently enable the transfer of those prisoners between jurisdictions without their consent. For this reason the amendments specify that written consent is required from the Australian

Government Attorney-General, and the relevant Ministers in the sending and receiving jurisdictions (except where a remand prisoner is being transferred for trial).

Due to the impact these orders can have on a prisoner, it is appropriate that the decisions be recorded for accountability purposes. The timeliness of the approval process can be addressed through the development of effective administrative procedures in consultation with the States and Territories.

From a security perspective informing the Attorney-General of a transfer after the event will be too late. He could be aware of additional information or have a different perspective about the same information because of national rather than local interest considerations.

41. Requirement for involvement by Australian Attorney-General - (submission by NSW Minister for Justice)

The amendments cover prisoners or remand prisoners who have been convicted or charged with Commonwealth, State or Territory offences.

It is appropriate that the Australian Government be involved in the transfer of prisoners on national security grounds, even if the transfer relates to a prisoner convicted or charged with State offences. National security is the responsibility of the Australian Government and State and Territory Governments working collaboratively. If there is a national security risk the Australian Government should know. The Australian community would expect the Australian Government to be involved in national security issues, to be providing relevant information and to be involved in making decisions. Agencies such as the Australian Federal Police and the Australian Security Intelligence Organisation may have intelligence that could directly or indirectly affect the proposed transfer. Such information may not be known by State authorities. A transfer between Australian states on security grounds relying on intelligence from correctional sources only could in fact raise more security concerns than it resolves.

42. No power for States to initiate transfers – (NSW Minister for Justice)

The submission of the NSW Minister for Justice recommends that State ministers should have the power to initiate as well as reject an interstate transfer under the proposed legislation. The proposed amendments do not prevent this. The provisions require the Attorney-General to consent to a transfer, but they do not prevent State and Territory ministers from requesting or initiating a transfer. State and Territory Ministers can reject an interstate transfer on security grounds. Proposed subsection 16B(3) of the Transfer of Prisoners Act provides that the Attorney-General cannot make a security transfer order unless the appropriate Ministers, in the sending and receiving jurisdictions, have consented in writing to the transfer.

43. Jurisdictional and responsibility issues – (submission from NSW Minister for Justice and Lovett & De Saxe (No51))

The submission of the NSW Minister for Justice states that the Bill will result in the States losing control of vital tools for managing inmates, namely transfer and placement. This is not correct. The amendments provide that the sending and receiving jurisdictions will have the ability to consent to or reject a transfer. Where a transfer is required, the Australian Government and State and Territory Governments will consult to determine the most appropriate placement for the inmate.

Under the amendments the Australian Government's involvement is to consent to the transfer, review the detention within three months of the order being made and to make subsequent transfers for court purposes or to return the prisoner back to the original jurisdiction.

The Department agrees with the NSW submission that the States' correctional authorities have the experience and knowledge about effectively managing corrections system. Responsibility for the day to day management of prisoners be retained by the State authorities. This Bill does not alter this.

44. Federal Constitutional powers (NSW Minister for Justice)

The Department has been careful to draft a Bill that is within Constitutional limitations. The amendments to the *Transfer of Prisoners Act 1983* are directed at the protection of security (as defined in the *Australian Security Intelligence Organisation Act 1979*).

The NSW submission states that 'once an inmate has been transferred the Commonwealth Attorney-General may refuse to allow them to return. The power extends to override state laws and may even prevent them from returning for court proceedings'.

By applying the amendments to all prisoners (State and federal), the Bill ensures that there is a nationally consistent approach to national security transfers and is more likely to achieve fully informed decisions that are in the national interest. Further it will ensure that the procedures are put in place quickly. State and Territory Governments are uneven in their commitment to expeditious enactment of legislation that is consistent with national models.

It is not the case that prisoners need always be brought to a court. The court can be given access by other means. Jurisdictions now have access to video and other communications technology which enable hearings to occur where there are reasons such as security risks. There is no intention to interfere with the proper operation of the courts. In the event that security concerns mean no transfer for court proceedings is possible the court will be consulted. The proposed provisions leave the court in control of its proceedings. There is an incentive to consult because ultimately the court can discontinue the proceedings.

45. National Guidelines for Interstate Transfer of Inmates – National Security

The States have developed a set of draft 'National Guidelines for Interstate Transfer of Inmates - National Security'. The Australian Government Attorney-General's Department was not invited to participate in the development of those guidelines. The Department was given a draft on 29 June 2004. Consistent with the Bill, that draft of the guidelines anticipates a central role for the Australian Government Attorney-General and that he would make a written order before the security transfer took place. The guidelines given to the Committee on 26 July 2004 have been amended from the version given to the Department on 29 June 2004.

The Guidelines state that escort costs will be met by the Australian Government. There has been no discussion of this matter between the Australian Government and the States and Territories.

46. Exclusion of application of Administrative Decisions (Judicial Review) Act 1977 – (submissions by Law Council of Australia, AMCRAN, HREOC and members of the public)

It is inappropriate for the decisions of the Australian Government Attorney-General about transfers on security grounds to be subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The decisions by the Attorney-General will require consideration of national security issues and are likely to be of a sensitive nature. The threat to 'security' may arise not from the prisoner or remand prisoner but from someone who wishes to harm that prisoner or remand prisoner (eg. because they are going to give certain evidence in court). Disclosure of such information in proceedings may alert suspects to necessarily covert activities of investigative authorities.

Exclusion of decisions of this type from ADJR review is consistent with the exemption in Schedule 1 of the ADJR Act of other decisions involving national security considerations (for example, decisions made by the Attorney-General under the ASIO Act, the *Intelligence Services Act 2001* and the *Telecommunications (Interception) Act 1979*).

The power of the Attorney-General to make decisions of this nature cannot be delegated. Similarly, the power of State and Territory Ministers to make decisions under the Act cannot be delegated either. Before making a transfer order, the Attorney-General must believe on reasonable grounds that it is necessary in the interests of security. The Attorney-General must not make the order unless the appropriate Ministers in the sending and receiving jurisdictions have consented to the transfer in writing. The Attorney-General must also review the order within 3 months of the day on which it was made or last reviewed in order to ensure the appropriateness of the order continuing. Decisions of the Attorney-General to make a security transfer order are reviewable under section 39B of the *Judiciary Act 1903*.

The submission of the NSW Minister for Justice states that the interstate transfer of an inmate on security grounds should be able to occur following the verbal approval of the two State Ministers. This process contrasts starkly with the criticisms from those who do not think that review of the Attorney-General's decisions under the ADJR Act should be excluded. A balance needs to be struck between the need for speed and accountability. The Bill attempts to strike this balance.

47. Impact on remand prisoners – (Law Council of Australia and HREOC)

Some submissions raised concerns about the impact of security transfers orders on a remand prisoner's right to a fair trial. Under the proposed amendments a remand prisoner must be transferred back to a jurisdiction for court proceedings for the offence for which he or she has been charged. This is not limited to trial proceedings and would include committal proceedings.

The Attorney-General is not required to make the order for transfer if he or she believes on reasonable grounds that it is essential in the interests of security that the order transferring the prisoner not be made. This is a high test and could only be met in exceptional circumstances. The provisions also require the agreement of the court that remanded the prisoner in custody to the prisoner's continued detention (proposed s.16E(2)(a)(ii)).

Access to legal counsel, family and friends will be in accordance with corrective service administration arrangements in the State or Territory in which the prisoner is held. The draft National Custodial Management Guidelines address some of these issues. Access to legal counsel would need to be facilitated to allow the remand prisoner to adequately prepare for proceedings

relating to the remand offence. These issues require balancing the interests of the administration of justice and the prisoner's welfare against the interests of security.

48. ICCPR issues (HREOC)

HREOC expressed concerns that proposed section 16E could create the possibility for delay in bringing a remand prisoner to trial (dealt with above) and cites Articles 9(3) and 14(3) of the International Covenant on Civil and Political Rights (ICCPR)

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The Australian Government takes its human rights obligations under the ICCPR seriously.

Articles 9 and 14 of the ICCPR ensure the right to be tried 'within a reasonable time' and 'without undue delay'.

Article 9(3) of the ICCPR provides that:

> ..anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasions arise, for execution of the judgement.

Article 14(3) of the ICCPR provides that:

> In determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equity:
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
> (c) To be tried without undue delay;
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing: to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, to any case where the interests of justice so require, and without payment to him in any such case if he does not have sufficient means to pay for it;
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
> (g) Not to be compelled to testify against himself or to confess guilt.

The Australian Government recognises that international human rights such as these should be taken into account in the administration of section 16E on a case by case basis.

What is a trial within a 'reasonable period of time' can only be determined on the circumstances of the particular case. For example, in the case of *Glenroy Francis Neville Glaude and Keith George v Trinidad and Tobago,* Communication No 899/1999, the United Nations Human Rights Committee said that:

> ..in cases involving serious charges such as homicide or murder, and where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible… In the present case, where the factual evidence was straightforward and apparently required little police investigation, the Committee considers that very exceptional reasons must be shown to justify delays for four years and three months, and three years and five months, respectively, until trial.

The Human Rights Committee has not placed any limitations on what exceptional reasons may be.

Anti-terrorism Bill (No.3) - Schedule 1 – Foreign Travel documents

49. Safeguards (various submissions)

The Public Interest Advocacy Centre (submission no. 89) consider there are insufficient safeguards incorporated into the process before an order for the seizure of a foreign passport is made. The submission from the Castan Centre for Human Rights Law (submission no. 79) expressed concern that foreign countries with unjust legal systems and unreasonable law could compel Australian authorities to order the surrender of an individual's foreign passport.

The amendments include appropriate safeguards and limitations to ensure the powers are used appropriately. For example, it would not be feasible for a foreign Government to compel Australian authorities to order the surrender of a passport because the independent decision about the passport is reviewable. The amendments specify the circumstances where a competent authority can apply for an order. These safeguards complement existing safeguards in other legislation. Under the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), if an order is made on the basis of advice of an adverse ASIO assessment, that person must be given a copy of the assessment (section 38). The person may also apply to the Administrative Appeals Tribunal for a review of ASIO's security assessment (ASIO Act, section 54). In addition, new subsection 23(1) provides for appeals against decisions under section 16 to order the surrender of a foreign passport.

50. Ownership of foreign passports

Some submissions (eg, Public Interest Advocacy Centre (submission no. 89) and New South Wales Council for Civil Liberties (submission no. 76)) point out those foreign passports belongs to the foreign Government that issued them.

While the amendments allow the Australian Government to seize foreign passports, those documents will remain the property of the foreign Government that issued them. The amendments do not prevent a foreign Government from requesting the return of the foreign passports or other travel documents that have been surrendered to Australian authorities.

51. Penalties

The Castan Centre for Human Rights Law (submission no. 79) expressed concern about the level of penalties imposed for the foreign passports offences.

The penalties for the new offences reflect the seriousness of those offences. They have been set at a level that will help deter identity document fraud, which has been identified as a serious national and international problem. The penalties are also consistent with penalties for like offences under other Commonwealth legislation, including offences in the *Passports Act 1938* (Passports Act) relating to Australian passports, as well as existing offences in the *Criminal Code Act 1995* and the *Migration Act 1958*.

52. Why is confiscation necessary if the person is under arrest?

The Public Interest Advocacy Centre (submission no. 89) queried why it would be necessary to confiscate a persons' passport where that person was the subject of an arrest warrant.

Under the Bill, an 'enforcement officer' may demand the surrender of a person's foreign passport where that person is the subject of an arrest warrant. The 'enforcement officer' may not have authority to make an arrest in the circumstances. Accordingly, the enforcement officer must have the power to seize the passport to prevent the person from leaving Australia.

53. 'Competent authority'

The Public Interest Advocacy Centre (submission no. 89) considers the Bill's definition of 'competent authority' is not sufficiently clear.

The definition of 'competent authority' in the Bill is limited to ensure suitable authorities are authorised to make requests. Only an approved representative, an agency or an employee of the Australian Government of a class specified in a Minister's determination can be a competent authority.

The Public Interest Advocacy Centre (submission no. 89) also queried whether the decision to make an order requiring the surrender of a foreign passport should be a decision for the executive government.

The new foreign passport provisions will enable competent authorities to seek an order from the Minister for Foreign Affairs requiring a person to surrender the person's foreign passports. The circumstances and process for ordering the seizure of a person's foreign passport are comparable with those for cancelling and not issuing an Australian passport under the Passports Act.

54. Review

The Public Interest Advocacy Centre (submission no. 89) and Andre Leslie (submission no. 29) are concerned that the mechanism of review of the Minister's decision to order the surrender of a foreign passport are inappropriately limited.

The amendments provide that a person can apply to the Administrative Appeals Tribunal for review of a decision by the Minister to order the surrender of foreign travel documents. The Minister will be able to certify that a decision made in response to a request relating to potential for harmful conduct involves matters of international relations or criminal intelligence. Only where the Minister has certified that a decision involves matters of international relations will provide the Tribunal be

restricted to affirming the decision or remitting it to the Minister for consideration. This is both appropriate and consistent with the regime for review of decisions not to issue or to cancel an Australian travel document.

Anti-terrorism Bill (No.3) - Schedule 2 – Persons in relation to whom ASIO questioning warrants are being sought

55. Accountability

A number of submissions recommended that the ASIO Act amendments be rejected on the grounds that ASIO's functions and operations are not open to scrutiny (eg, Castan Centre for Human Rights Law (submission no. 79), Australian Muslim Civil Rights Advocacy Network (submission no. 84), and Anna Samson (submission no. 82)). Some of the submissions also expressed concern about the length of time a person's passports could be held by ASIO before a decision about the issue of a questioning warrant is made (eg, Public Interest Advocacy Centre (submission no. 89), Sateen Taw heed (submission no. 20), and Andre Leslie (submission no. 29)).

Where the Director-General makes a request to the Attorney-General, the person's passports can only be retained until the Attorney-General refuses consent to apply for a questioning warrant, an issuing authority refuses to issue a questioning warrant, or, if a questioning warrant is issued, until the time specified in the warrant ends. Once the Director-General commences the process for obtaining a questioning warrant, the process is conducted as expeditiously as possible for operational reasons.

In addition, to ensure the conduct of ASIO is appropriate in this and other aspects of its operations, there are a range of significant accountability mechanisms and other safeguards designed to avoid abuses of power. These include internal evaluations, audit and fraud control measures. In addition, ASIO is subject to considerable external scrutiny, including oversight by the Attorney-General, the Inspector-General of Security and Intelligence (IGIS), and a Joint Committee on ASIO, ASIS and DSD. All ASIO operational activity must also comply with the Attorney-General's *Guidelines for the Collection of Intelligence*, which requires the use of methods commensurate with the assessed risk. ASIO is also subject to judicial and administrative review of its decisions.

56. Need for the powers

A further concern about the proposed new ASIO power (eg, Marlene Marquez-Ogled (submission no. 42)) is that ASIO already has powers to seize Australian passports.

The amendments were considered necessary because, although the Australian Government can cancel a person's Australian passport and other Australian travel documents, Australian legislation does not prevent a person suspected of a serious offence or harmful conduct, including a suspected terrorist, leaving Australia on a foreign passport. The amendments will mean that where a person's Australian passport has been cancelled, that person should not be able to leave Australia on a foreign passport. Specifically, the amendments to the Passports Act will ensure that those subject to a warrant for an indictable offence or serious foreign offence, or those prevented from travelling internationally by force of an order of a court, a law of the Commonwealth or a condition of parole, or those suspected of being likely to engage in harmful conduct (such as terrorist activities), are prevented from leaving Australia on a foreign passport.

Anti-terrorism Bill (No.3) - Schedule 3 – Forensic procedures

57. Privacy

Four of the submissions comment on the amendments to forensic procedure laws in the Crimes Act 1914. Submissions 21, 41 and 91, from Mr Keaney, Ms Blazey and Mr Millar, express the view that the amendments to the forensic procedure laws "intrude into the privacy of citizens". However, submission 80, from the Office of the Federal Privacy Commissioner, supports those amendments. It notes that the amendments were recommended by an independent review committee on which the Federal Privacy Commissioner was represented, and that they are considered by the committee to be "important and urgent, particularly in light of the recent bombing incident in Madrid". The letter from the review committee to the Minister for Justice and Customs in April 2004, highlighting the need for these amendments, is attached for this Committee's consideration.

58. Safeguards

The amendments simply extend the coverage of existing forensic procedure laws in Division 11A of Part 1D of the Crimes Act 1914 so that they can apply if a mass-casualty disaster occurs within Australia. The legislative safeguards that applied to the Bali disaster victim identification processes remain unchanged and will apply to the new range of incidents falling within Division 11A. Those safeguards appropriately constrain the way that information held on the national DNA database can be accessed, used and disclosed. The amended Division 11A would only permit the national DNA database to be accessed and used for the purpose of identifying victims of the mass-casualty incident, or conducting a criminal investigation into the incident. Information obtained from the database for those purposes could only be disclosed to a limited range of people, including the relatives of a victim who has been identified, or to law enforcement bodies that are involved in the criminal investigation.