The Senate

Legal and Constitutional Legislation Committee

Provisions of the Anti-terrorism Bill 2004

May 2004

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Recommendation 1

3.47 The Committee recommends that the Bill be amended such that the use of the 'dead time' provision contained in proposed paragraph 23CA(8)(m) only be available upon successful application to a judicial officer as defined under the *Crimes Act 1914,* and that in making such an application the investigating official be required to inform the judicial officer as to whether the suspect is a minor, an Aboriginal person or a Torres Strait Islander.

Recommendation 2

4.49 The Committee recommends that item 15 of the Bill be amended to identify the criteria by which organisations may be prescribed for the purposes of the definition of 'prescribed organisation' under proposed paragraph 6(7)(a) of the *Crimes (Foreign Incursions and Recruitment) Act 1978*.

Recommendation 3

4.50 The Committee further recommends that when organisations are prescribed in regulations under the proposed paragraph 6(7)(a) and section 12 of the *Crimes (Foreign Incursions and Recruitment) Act 1978*, those organisations should each be listed in an individual regulation in order to ensure that each organisation is separately disallowable.

Recommendation 4

4.51 Subject to the previous two recommendations, the Committee recommends that the amendments to the *Crimes (Foreign Incursions and Recruitment) Act 1978* in items 13-18 of the Bill proceed.

Recommendation 5

5.23 The Committee recommends that items 19 and 20 of the Bill proceed without amendment.

Recommendation 6

6.55 The Committee recommends that item 24 of the Bill be amended to remove the words 'or indirectly' in the amendments to paragraph 153(1)(a) of the *Proceeds of Crime Act 2002*.

Recommendation 7

6.56 The Committee recommends that the review of the operation of the *Proceeds of Crime Act 2002*, required under section 327 of that Act, considers the impact of the retrospective operation of the legislation, and whether the legislation has had any adverse effects on freedom of speech.

Recommendation 8

6.57 The Committee recommends that item 26 of the Bill be amended to omit proposed subsection 337A(3).

ABBREVIATIONS

ADF	Australian Defence Force
AFP	Australian Federal Police
APMC	Australasian Police Ministers' Council
ASIO	Australian Security Intelligence Organisation
Crimes Act	*Crimes Act 1914*
Criminal Code	*Criminal Code Act 1995*
Criminal Code Regulations	*Criminal Code Regulations 2002*
Foreign Incursions Act	*Crimes (Foreign Incursions and Recruitment) Act 1978*
MCI	Military Commission Instruction
POC Act	*Proceeds of Crime Act 2002*
US	United States of America

CHAPTER 1

INTRODUCTION

1.1 On 31 March 2004, the Senate referred the provisions of the Anti-terrorism Bill 2004 to the Legal and Constitutional Legislation Committee for inquiry and report by 11 May 2004.

Key provisions of the Bill

1.2 The Anti-terrorism Bill 2004 (the Bill) seeks to modify Australia's counter-terrorism legal framework by making amendments to:

- Part 1C of the *Crimes Act 1914* to extend the fixed investigation period applying to federal terrorism offences to a maximum of 20 hours if judicially authorised subject to all existing procedural safeguards in Part 1C, and to permit authorities to reasonably suspend or delay questioning of a person arrested for a terrorism offence to make inquiries in overseas locations that are in different time zones to obtain information relevant to that terrorism investigation;
- the *Crimes (Foreign Incursions and Recruitment) Act 1978* to enhance the foreign incursions offences, particularly in situations where terrorist organisations are operating as part of the armed forces of a state;
- the *Criminal Code Act 1995* to strengthen the counter-terrorism legislation relating to membership of terrorist organisations and the offence of providing training to or receiving training from a terrorist organisation; and
- the *Proceeds of Crime Act 2002* to improve restrictions on any commercial exploitation by a person who has committed foreign indictable offences.

Background to the Bill

1.3 The Bill is the latest in a series of legislation to strengthen Australia's counter-terrorism laws. This Committee has examined other recent anti-terrorism legislation, including the Security Legislation Amendment (Terrorism) Bill 2002[1] and the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.[2]

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1 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and Related Bills*, May 2002.

2 Senate Legal and Constitutional References Committee, *Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002.

Conduct of the inquiry

1.4 The Committee advertised the inquiry in *The Australian* newspaper on 7 April 2004, and invited submissions by 19 April 2004. The Committee also wrote to over 67 individuals and organisations. Details of the inquiry, the Bill and associated documents were also placed on the Committee's website.

1.5 The Committee received 28 submissions, including 4 supplementary submissions, and these are listed at Appendix 1. Submissions were placed on the Committee's website for ease of access by the public.

1.6 The Committee held one public hearing in Sydney on 30 April 2004. A list of witnesses who appeared at the hearing is at Appendix 2 and copies of the Hansard transcript are available through the internet at: http//aph.gov.au/hansard.

Acknowledgement

1.7 The Committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Notes on references

1.8 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

BACKGROUND TO THE BILL

2.1 This chapter briefly outlines the background and the main provisions of the Bill in relation to amendments to:

- Part 1C of the *Crimes Act 1914*;
- the *Crimes (Foreign Incursions and Recruitment) Act 1978*;
- the *Criminal Code Act 1995*; and
- the *Proceeds of Crime Act 2002*.

Amendments to the *Crimes Act 1914* (extended investigation periods)

Background

2.2 Part 1C of the *Crimes Act 1914* (Crimes Act) was added in 1991 to address the High Court's decision in *Williams v R*.[1] The Explanatory Memorandum to the Bill explains:

> In *Williams*, the High Court held that law enforcement agencies lacked the power to detain and question suspects, or to continue other investigations into a suspect's alleged involvement in criminal activity, prior to bringing an arrested person before a magistrate. Part 1C makes it clear that an arrested person may be detained for questioning, prior to being brought before a magistrate or other judicial officer, for the purpose of:
>
> > (i) investigating whether that person committed the offence for which they were arrested; and/or
> >
> > (ii) investigating whether the person committed another Commonwealth offence that an investigating official suspects them of committing.[2]

2.3 Part IC contains a number of safeguards, including the right to communicate with a legal practitioner, friend or relative,[3] an interpreter[4] and a consular office.[5] A suspect's right to remain silent is retained.[6] The tape recording of any admissions or

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1 [1987] HCA 36; (1986) 161 CLR 278.

2 *Explanatory Memorandum*, p. 2.

3 Crimes Act, section 23G.

4 ibid., section 23N.

5 ibid., section 23P.

6 ibid., section 23S.

confessions made by a suspect during questioning is a pre-requisite to establish the admissibility in evidence of any such admission or confession.[7]

2.4 Another important safeguard is the fixed time limit for detention which may only be extended if an application is made to a judicial officer (as defined in the Act).[8] Currently, the maximum investigation period for questioning an arrested suspect extends from the time of arrest for a 'reasonable time', having regard to all the circumstances.[9] A maximum initial investigation period of four hours is currently prescribed for all Commonwealth offences. For a person who is or who appears to be under 18, or is an Aboriginal person or a Torres Strait Islander, the maximum initial investigation period is two hours.[10] In relation to 'serious offences' (which currently includes terrorism offences),[11] a judicial officer[12] can grant an extension for up to eight hours, allowing for a maximum total investigation period of 12 hours (or 10 hours for a minor, an Aboriginal person or Torres Strait Islander).[13]

Proposed amendments

2.5 Proposed sections 23CA and 23DA amend the time limits for detention when a person is arrested for a 'terrorism offence'.[14] The investigatory framework for the terrorism offences would essentially be the same as that which currently applies to the investigation of all other federal offences.[15] In particular, these proposed provisions would be subject to all the other existing procedural safeguards in Part 1C of the Crimes Act. However, proposed sections 23CA and 23DA contain two key differences to the existing regime, as outlined below.

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7 ibid., section 23V; see also *Explanatory Memorandum*, p. 4.

8 ibid., sections 23C and 23D.

9 ibid., subsection 23C(4).

10 ibid., subsection 23C(4).

11 'Serious offence' is defined in subsection 23D(6) of the Crimes Act to mean a Commonwealth offence that is punishable by imprisonment for a period exceeding 12 months.

12 'Judicial officer' is defined in proposed subsection 23DA(2) to mean a magistrate, justice of the peace or bail justice. This is consistent with the definition in the existing section 23D(2).

13 Crimes Act, section 23D; *Explanatory Memorandum*, p. 15.

14 Note that 'terrorism offence' will be defined to mean only those offence contained in Division 72 and Part 5.3 of the Criminal Code. Division 72 of the Criminal Code contains offences targeting international terrorist activities using explosive or lethal devices. Part 5.3 of the Criminal Code contains federal terrorism offences, including offences targeting persons engaging in terrorist acts, providing or receiving training connected with terrorist acts, and directing the activities of a terrorist organisation. See also *Explanatory Memorandum*, p. 9.

15 Under sections 23C and 23D of the Crimes Act.

Extension of investigation period

2.6 Proposed section 23DA sets out a mechanism for extending the initial investigation period of 4 hours (or 2 hours for children and Aboriginal and Torres Strait Islanders) for investigations in relation to terrorism offences.[16] This mechanism is similar to the current mechanism for extensions of the investigation period for serious offences in the existing section 23D. In particular, the extension will still require judicial authorisation.[17] However, the existing subsection 23D(5) provides that the investigation period can only be extended *once* for a maximum of *eight* hours. Proposed subsection 23DA(7), in contrast, allows the period for investigations into terrorism offences to be extended any number of times, until the total aggregate time of the extensions reaches 20 hours. Therefore, in cases where extensions up to the maximum time allowed for questioning are necessary and authorised, the total investigation period for investigations of terrorism offences would be 24 hours – not including 'dead time' ('dead time' is discussed further below).[18]

Suspension of investigation period for overseas inquiries

2.7 An extra 'dead time' provision has also been included to account for time lost due to obtaining information from overseas locations in different time zones. Proposed subsection 23CA(8) mirrors the existing subsection 23C(7) in prescribing specific situations that may occur after arrest during which the 'clock stops' for the purposes of the time limits on investigation periods. The time it takes for these situations to occur is known as 'dead time' and questioning cannot occur during these periods. Proposed subsection 23CA(8) contains the same list of 'dead time' provisions as existing subsection 23C(7), such as the time taken to convey the person from the place of arrest to the place where questioning is to occur; the time taken for a legal practitioner to arrive at the place of questioning; and the time taken for a person to receive medical attention.

2.8 However, proposed paragraph 23CA(8)(m) contains a new aspect, which allows authorities to reasonably suspend or delay questioning of a person arrested for a terrorism offence, to make inquiries in overseas locations that are in different time zones to obtain information relevant to that terrorism investigation. In other words, the time taken to obtain that information from a country that is in a different time zone will be counted as 'dead time'. This new 'dead time' provision applies only where a person has been arrested for a terrorism offence.[19]

2.9 Proposed paragraph 23CA(8)(m) contains two important qualifiers:

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16 Note that the related offences of attempt, incitement and conspiracy, as well as complicity, common purpose and innocent agency provisions would also be covered by this proposed investigatory framework for terrorism offences: *Explanatory Memorandum*, pp. 9-10.

17 Proposed subsection 23DA(2).

18 *Explanatory Memorandum*, p. 3.

19 ibid., p. 13.

- any suspension or delay of questioning to receive information from an overseas location in a different time zone must be *reasonable*; and
- the period for which questioning is suspended or delayed must also be *reasonable* and is capped so that the dead time cannot exceed the difference in time zones between the place of the investigation and the relevant overseas location.[20]

Amendments to the *Crimes (Foreign Incursions and Recruitment) Act 1978*

2.10 Section 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Foreign Incursions Act) is designed to prohibit Australian citizens and residents from engaging in hostile activities in a foreign state. For the purposes of the Foreign Incursions Act, hostile activities include, among other things, acting to overthrow the government of a foreign state and engaging in armed hostilities in a foreign state.[21]

Paragraph 6(4)(a) defence (serving in foreign armed forces)

2.11 Under paragraph 6(4)(a) of the Foreign Incursions Act, a person does not commit an offence under the Act if they were serving 'in any capacity in or with' the armed forces of a government of a foreign state.

2.12 The Bill amends section 6 so that this exemption does not apply to persons who engage in hostile activities in a foreign state while in or with a 'prescribed organisation'. Under proposed subsection 6(7), a 'prescribed organisation' means an organisation that is:

(a) prescribed in regulations made under the Foreign Incursions Act; or

(b) specified as a 'terrorist organisation' under the *Criminal Code Regulations 2002* (Criminal Code Regulations).

2.13 Proposed section 12 then provides for regulations to be made under the Foreign Incursions Act for the purposes of proposed paragraph 6(7)(a).

Increased penalty

2.14 Proposed amendments to subsection 6(1) raise the maximum penalty for an offence against section 6 of the Act from 14 to 20 years imprisonment.

Ministerial certificate

2.15 Proposed subsection 11(3) would enable the Minister to issue an evidentiary certificate attesting to the fact that a group or organisation was not part of the armed forces of a foreign State at any one time.

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20 *Explanatory Memorandum*, p. 14.

21 Foreign Incursions Act, subsection 6(3).

One year presence requirement

2.16 Currently, a person does not commit an offence against the Foreign Incursions Act unless they were an Australian citizen, ordinarily resident in Australia or were in Australia *within a one year period* preceding the act constituting an offence (and the person's presence in Australia was connected with that act).[22] Proposed amendments to paragraphs 6(2)(b) and 7(2)(b) remove this one year presence requirement for non-citizens and non-residents. Rather, a person who was present in Australia for a purpose connected with the doing of an act constituting an offence *at any time before* that act can be prosecuted for an offence under the Act.[23]

Amendments to the *Criminal Code Act 1995*

2.17 The Bill also seeks to amend two terrorism offences introduced to the *Criminal Code Act 1995* (Criminal Code) by the *Security Legislation Amendment (Terrorism) Act 2002*.

Membership of a terrorist organisation

2.18 Section 102.3 of the Criminal Code provides that it is an offence (in certain circumstances) to be a member of a terrorist organisation that is specified in the regulations. Proposed amendments to paragraph 102.3(1)(b) would make it an offence to be a member of a terrorist organisation that is either specified in the regulations *or* that is found by a court to be a terrorist organisation. According to the Explanatory Memorandum, this would make the membership offence consistent with other terrorism offence provisions in Division 102 of the Criminal Code.[24]

Training a terrorist organisation or receiving training from a terrorist organisation

2.19 The Bill replaces section 102.5 of the Criminal Code with modified offences of providing training to, or receiving training from, a terrorist organisation. Currently, section 102.5 provides two offences:

- if a person intentionally provides training to, or receives training from, a terrorist organisation and that person *knows* the organisation is a terrorist organisation (with a penalty of up to 25 years imprisonment); and
- if a person intentionally provides training to, or receives training from, a terrorist organisation and that person is *reckless* as to whether the organisation is a terrorist organisation (with a penalty of up to 15 years imprisonment).

2.20 The Bill proposes two revised offences. Proposed subsection 102.5(1) would make it an offence for a person to intentionally provide training to, or receive training

22 See paragraphs 6(2)(b) and 7(2)(b); *Explanatory Memorandum*, p. 17.

23 *Explanatory Memorandum*, p. 17.

24 *Explanatory Memorandum,* p. 5, 19-20.

from, a terrorist organisation where that person is *reckless* as to whether the organisation is a terrorist organisation. This offence would cover the full definition of 'terrorist organisation' – including those prescribed by the regulations and where a court finds that organisation to be a terrorist organisation. This offence also covers the situation where a person *knows* the organisation is a terrorist organisation.[25] The proposed penalty for this offence (including in the situation of recklessness) would be up to 25 years imprisonment.

Strict liability offence

2.21 Proposed subsections 102.5(2) – 102.5(4) introduce an offence with a strict liability component. Under this offence, the prosecution would still have to prove that the person intentionally provided training to, or intentionally received training from, a terrorist organisation. Unlike proposed subsection 102.5(1), this offence would only apply where a terrorist organisation has been specified by regulations under the Criminal Code.[26] Strict liability would apply to the element in paragraph 102.5(2)(b) (that the organisation is a terrorist organisation specified by regulations). That is, the prosecution would not have to prove that the person was aware that it was a specified terrorist organisation. Two defences would be available:

- mistake of fact;[27] and
- the person is not reckless as to the organisation being a specified terrorist organisation.[28]

2.22 The defendant bears the evidential burden in relation to both these matters.[29]

Amendments to the *Proceeds of Crime Act 2002*

2.23 The *Proceeds of Crime Act 2002*[30] (POC Act) establishes a scheme to confiscate the proceeds of crime. One of the objects of the POC Act is to deprive persons of literary proceeds derived from the commercial exploitation of their notoriety from having committed offences.[31] Among other things, the POC Act allows for literary proceeds orders where a court is satisfied that a person has:

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25 *Explanatory Memorandum*, p. 20. Subsection 5.4(4) of the Criminal Code provides that if recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy the fault element.

26 Proposed subsection 102.5(b).

27 See Criminal Code, paragraph 6.1(2)(b) and section 9.2; and also *Explanatory Memorandum*, p. 21.

28 Proposed subsection 102.5(4).

29 *Explanatory Memorandum,* p. 21.

30 This legislation was considered by the Committee: Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, April 2002.

31 See section 5(b).

- committed an indictable offence and derived literary proceeds from that offence; or
- committed a *foreign* indictable offence and that person has derived *in Australia* literary proceeds from the offence.[32]

Definition of 'literary proceeds'

2.24 'Literary proceeds' is currently defined broadly in the POC Act to include any benefit that a person derives from the commercial exploitation of the person's notoriety resulting from the person committing an indictable offence or foreign indictable offence.[33] Note that a person need only have *committed* an offence under these provisions, they do not need to have been *convicted* of the offence.[34]

2.25 The Bill proposes two main amendments to the definition of 'literary proceeds'. First, proposed subsection 153(3A) extends the operation of the POC Act for foreign indictable offences beyond literary proceeds derived in Australia. It will now also cover literary proceeds that have been derived elsewhere and then subsequently transferred to Australia.

2.26 Second, the words 'directly or indirectly' would be added to paragraph 153(1)(a). As a result, proposed paragraph 153(1)(a) would provide that 'literary proceeds' are any benefit a person derives from the commercial exploitation of (among other things) the 'person's notoriety resulting *directly or indirectly* from the person committing an indictable offence or a foreign indictable offence'. The Explanatory Memorandum states that this would cover circumstances, for example, where 'notoriety could flow from where the person was detained rather than from the commission of the offence'.[35]

Definition of 'foreign indictable offence'

2.27 'Foreign indictable offence' is currently defined under section 338 of the POC Act as:

> an offence against a law of a foreign country constituted by conduct that would have constituted an offence against a law of the Commonwealth, a State or Territory punishable by at least 12 months imprisonment if it had occurred in Australia.

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32 POC Act, section 20.

33 POC Act, subsection 153(1)(a). Note that 'commercial exploitation' is defined in subsection 153(2) to including publishing any material in written or electronic form; or any use of media from which visual images, words or sounds can be produced, or any live entertainment, representation or interview.

34 See for example POC Act, subsection 153(1) and section 20.

35 *Explanatory Memorandum*, p. 22.

2.28 Proposed section 337A replaces this definition with a more complex definition, which contains two key changes.[36] First, where a person commits an offence against a foreign law, the conduct will be treated as a 'foreign indictable offence' if it is an offence against Australian law *at the time of the application* for a restraining or confiscation order (not for example, at the time when the foreign offence was committed).

2.29 Second, the definition refers to an 'offence against a law of a foreign country'. Proposed subsection 337A(3) then defines 'offence against a law of a foreign country' to include:

> an offence triable by a military commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America and entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism".

36 Note that this definition is applicable not just to the literary proceeds scheme, but also to other aspects of the POC Act.

CHAPTER 3

AMENDMENTS TO THE *CRIMES ACT 1914*

3.1 This chapter discusses concerns raised in submissions and evidence in relation to the amendments to the Crimes Act, particularly in relation to:

- opposition to the provisions;
- the broad reach of 'terrorism' offences;
- extending investigation periods;
- the necessity for the provisions in light of the Australian Security Intelligence Organisation's (ASIO) extensive powers;
- the need for an absolute limit on the amount of disregarded or 'dead' time;
- the detention of minors and Aboriginal and Torres Strait Islander people; and
- a suggested requirement that applications for extended periods of investigation have to be made before a magistrate.

Opposition to the provisions

3.2 The Law Council of Australia was not opposed to the amendments to Part 1C of the Crimes Act, provided the existing and intended safeguards in Part 1C remain in place.[1]

3.3 All other submissions that commented on these provisions expressed opposition. These are discussed below.

Broad reach of 'terrorism' offences

3.4 A common argument in submissions was that 'terrorism' offences cover a broad area, and extend beyond crimes such as hijackings and bombings, and could cover some forms of picketing.[2]

3.5 The Castan Centre for Human Rights Law pointed out that, under subsection 100.1(1) of the Criminal Code, it is a terrorist act to intentionally create a serious risk to the health and safety of a section of the public, that is intended to intimidate a section of the public, in order to advance a political cause. It argued that this could

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1 *Submission 27*, p. 2.

2 Mr Denis Hay, *Submission 1*, p. 1; Ms Judy Pine, *Submission 2*, p. 1; Ms Ruth E Russell, *Submission 3*, p. 1; Ms Valerie Thompson, *Submission 4*, p. 1; Women's International League for Peace and Freedom, *Submission 5*, p. 2; Mr Eric Miller, *Submission 6*, p. 1; Search Foundation, *Submission 8*, p. 1; Ms Kristina Schmah, *Submission 10*, p. 1; Mr Tom Bertuleit, *Submission 19*, p. 1; Canberra Islamic Centre, *Submission 15*, p. 1.

mean that certain sorts of industrial action, such as pickets by nurses of public hospitals, could constitute a terrorist act.[3]

3.6 The Women's International League for Peace and Freedom expressed concern that activists in its own organisation and others who take part in rallies and marches, may be considered to be committing a 'terrorist act' under the Bill.[4]

3.7 The Canberra Islamic Centre noted that the broad definition of terrorism is essentially political. It noted that people like Nelson Mandela and Xanana Gusmao were once 'terrorists', but are now welcome at Buckingham Palace and the Lodge, which highlights the transitory nature of such definitions.[5]

3.8 In relation to the concern that certain sorts of industrial action could be covered by the Bill, the Attorney-General's Department explained:

> The provisions apply only where the person is suspected of committing a terrorism offence (see the definition of 'terrorism offence' at item 2 of Schedule 1 of the Bill). The exceptions and qualifications that are included in the definition of 'terrorist act' in Part 5.3 of the *Criminal Code* carry through to the definition of 'terrorism offence' in this Bill. A 'terrorist act' excludes 'advocacy, protest, dissent or industrial action' that is not intended to cause serious harm to a person, death or endangerment (see subsection 100.1(3) of the *Criminal Code*).[6]

Extending investigation periods

3.9 Another commonly raised issue was that the current time limits on the holding of suspects accord with the fundamental principle that any deprivation of liberty should be kept to a minimum, and that in light of this the Bill does not offer sufficient justification for the extensive increase in holding times contained in the Bill.[7]

3.10 The Castan Centre for Human Rights Law argued in its submission that there is no evidence offered to support the need for a doubling of the total permitted time of detention from 12 to 24 hours. It argued that there appears to be no reasons as to why a terrorist event would be more complex to investigate than a narcotics importation or white collar crime.[8]

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3 Castan Centre for Human Rights Law, *Submission 18*, p. 2.

4 Women's International League for Peace and Freedom, *Submission 5*, p. 2.

5 Canberra Islamic Centre, *Submission 15*, p. 1.

6 Attorney-General's Department, *Submission 28*, p. 1.

7 Mr Denis Hay, *Submission 1*, p. 1; Ms Judy Pine, *Submission 2*, p. 1; Ms Ruth E Russell, *Submission 3*, p. 1; Ms Valerie Thompson, *Submission 4*, p. 1; Women's International League for Peace and Freedom, *Submission 5*, p. 2; Mr Eric Miller, *Submission 6*, p. 1; Search Foundation, *Submission 8*, p. 1; Ms Kristina Schmah, *Submission 10*, p. 1; Mr Tom Bertuleit, *Submission 19*, p. 1; Uniting Church in Australia, *Submission 23*, p. 1.

8 Castan Centre for Human Rights Law, *Submission 18*, p. 3.

3.11 The Australian Federal Police (AFP) explained in evidence at the public hearing that in the case of terrorist offences, the likely involvement of multiple jurisdictions, both domestic and foreign, make it essential for the investigating official to have flexibility to seek additional investigation time:

> The AFP considers that the existing investigation period provisions provided for under part 1C work well for the effective investigation of most Commonwealth indictable offences. However, the AFP's experience is that in complex matters such as the investigation of terrorism offences where it requires access to suspects, witnesses and information across multiple jurisdictions, both domestic and foreign, and in the event that a four-hour investigation period proves insufficient, it is then essential for the investigating official to have the flexibility to seek additional investigation time. The AFP considers that judicial oversight ensures an appropriate balance between the requirements of law enforcement and rights of the individuals.[9]

Necessity for the provisions in light of ASIO's extensive powers

3.12 Submissions argued that there was little justification of the need for the extensive increase in the holding period, given the wide powers already available to ASIO. Submissions noted that ASIO, in conjunction with the AFP, can already detain and compulsorily question persons suspected of having information related to a terrorism offence for rolling periods of seven days under the *Australian Security Intelligence Organisation Act 1979*.[10]

3.13 It was noted that under current law, if there was a Madrid style bombing in Australia, ASIO with the AFP could detain persons not suspected of any criminal wrongdoing and interrogate them for at least 24 hours.[11]

3.14 The Castan Centre for Human Rights Law argued that given the extensive powers already granted to ASIO under the *Australian Security Intelligence Organisation Act 1979*, there is insufficient justification for granting wider powers to the AFP.[12]

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9 *Committee Hansard*, 30 April 2004, p. 2.

10 Mr Denis Hay, *Submission 1*, p.1; Ms Judy Pine, *Submission 2*, p. 1; Ms Ruth E Russell, *Submission 3*, p. 1; Ms Valerie Thompson, *Submission 4*, p. 1; Women's International League for Peace and Freedom, *Submission 5*, p. 2; Mr Eric Miller, *Submission 6*, p. 1; Search Foundation, *Submission 8*, p. 1; Ms Kristina Schmah, *Submission 10*, p. 1; Mr Tom Bertuleit, *Submission 19*, p. 1; Canberra Islamic Centre, *Submission 15*, p. 2; Amnesty International Australia, *Submission 13*, p. 7; Mr Joo-Cheong Tham, *Submission 9*, p. 7.

11 Mr Denis Hay, *Submission 1*, pp. 1-2; Ms Judy Pine, *Submission 2*, p. 1; Ms Ruth E Russell, *Submission 3*, p. 1; Ms Valerie Thompson, *Submission 4*, pp. 1-2; Search Foundation, *Submission 8*, pp. 1-2; Ms Kristina Schmah, *Submission 10*, p. 1; Mr Tom Bertuleit, *Submission 19*, p. 2; Mr Joo-Cheong Tham, *Submission 9*, p. 7.

12 Castan Centre for Human Rights Law, *Submission 18*, p. 6.

3.15 At the hearing, Commissioner Keelty from the AFP explained that the Bill is directed at police investigations as opposed to ASIO investigations:

> Under the ASIO Act, ASIO officers can question persons specifically in relation to terrorism, but the ASIO powers are directed at a very different outcome—that is, the prevention of a terrorist act. In other words, the ASIO powers can be exercised to collect intelligence so as to prevent a terrorist attack; they are not a legislative tool for collecting evidence, which is the difference between these provisions applying to the AFP and those applying to ASIO.[13]

3.16 Commissioner Keelty further distinguished between the evidence gathering purposes of the Bill, and the intelligence gathering purposes of the ASIO powers:

> The investigative powers in the Crimes Act and this bill are directed at questioning suspects in the aftermath of a terrorist attack or attempted attack. They are crucial to enforcing the terrorism offences created under the law. If an investigating official questioning a suspect under part 1C forms the impression that a suspect may be able to assist in the collection of intelligence in relation to terrorist activities, ASIO can seek a warrant to question that person separately under their own act, and the two questioning regimes under the ASIO Act and the Crimes Act are complementary.[14]

3.17 The Commissioner also explained that information gathered by questioning under the ASIO powers is not admissible as evidence:

> …under the ASIO Act the witness is compelled to respond to the questions. We cannot then turn that around as admissible evidence. We have to then separately interview the person under the provisions of part 1C.[15]

3.18 In a supplementary submission, the AFP further detailed this distinction between the intelligence gathering purposes of the ASIO powers and the evidence gathering purposes of the Bill:

> Whilst the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP) both play a role in ensuring Australia's national security, the two agencies have distinctly different roles. ASIO's primary role is to gather information and produce intelligence that will enable it to warn the government about activities or situations that might endanger Australia's national security. The AFP's primary role is to enforce Commonwealth criminal law, and to secure evidence which will be used in criminal prosecutions.
>
> In most instances, both the AFP and ASIO will be interested in a person for similar reasons, however, the processes employed when collecting information are necessarily separated, as these are subject to different legal

13 *Committee Hansard*, 30 April 2004, p. 2.

14 ibid.

15 ibid., p. 3.

accountabilities, thresholds for further use and collection and collation standards.[16]

Disregarded time – need for an absolute limit

3.19 The Castan Centre for Human Rights Law noted that the time taken to apply for an extension in the investigation period under section 23D of the Crimes Act does not count against the investigation period (paragraph 23C(7)(g)). Currently only one such application can be made, whereas under the Bill multiple applications are possible; hence this could substantially add to the time a suspect may be held.[17]

3.20 Australian Lawyers for Human Rights argued against the Bill's extension of the investigation period, although it argued that if the Bill were to proceed, at the very least there needs to be additional safeguards. These include making provision for toilet breaks, sleep and sustenance of suspects.[18] It also suggested a limit to continuous questioning of two hours without a rest break, and that there should be an absolute limit on the time of questioning.[19]

3.21 Professor George Williams also argued that in proposed subsection 23CA(8) of the Bill, there should be an absolute limit upon the period of detention. Otherwise, the detention could be expanded for indefinite periods.[20] He noted that although the period of 'dead time' that is accorded for time differences must not exceed the amount of the time difference, this alone could add an extra 23 hours.[21]

3.22 In evidence, Professor Williams noted that the Bill is unclear as to how many different places or time zones could be accounted for as 'dead time':

> I think there is a genuine ambiguity in the provision at the moment. It does not say one particular period of dead time for one country; it simply refers to a reasonable period in which you allow the investigating official to obtain information from a place outside of Australia, but ultimately that could be a number of places. It is possible it could be a single extension of dead time; it could be multiple. My argument is it should be clarified. If it is going to be multiple time zones—which it may reasonably be; for a particular person you may need information from three or four places—that could be met by having an absolute cap on the time and giving the people the capacity to get what information they need reasonably within that time, but not enabling this to be extended over what might be a number of days if

16 AFP, *Submission 26A*, p. 1.

17 Castan Centre for Human Rights Law, *Submission 18*, p. 5.

18 Australian Lawyers for Human Rights, *Submission 14*, p. 5.

19 ibid., pp. 5-6.

20 Professor George Williams, *Submission 7*, p. 1; this was also noted by Public Interest Advocacy Centre, *Submission 17*, p. 3.

21 ibid.

> indeed it could be read in the multiple application way, which I think it could potentially be.[22]

3.23 In terms of setting such an absolute limit, Professor Williams suggested 36 or 48 hours, and noted that the total investigation period should be proportionate to the questioning period:

> We have a 24-hour questioning regime. I would favour 36 or 48 hours. Forty-eight hours is probably more reasonable given the amount of questioning we are looking at, but I think it is not reasonable to extend it much beyond that because otherwise it looks like a regime where somebody is being held for long periods with questioning that is not in kilter of that. I recognise the ASIO legislation has 24-hours questioning with seven days detention, but that always struck me as completely out of kilter. I think that should have been 24 hours over three days. I think this equally might be 24 hours over two or at most three days.[23]

3.24 The AFP argued in the hearing that the 'dead time' powers granted under proposed paragraph 23CA(8)(m) are necessary due to international time differences. They argued that the use of this provision would be regulated by the requirement that the reasons for the seeking of information under the provision must be reasonable, and the time period taken must also be reasonable:

> Without the dead time mechanism, investigators may not have time to obtain the information from overseas. The only limit is that it be a reasonable time. The safeguard for that is, firstly, that any suspension or delay of questioning to receive information from an overseas location in a different time zone has to be reasonable. A suspension or delay would be unreasonable if, for example, the information could be obtained from an overseas location without delay regardless of any time zone differences or if the same information that is sought from overseas could be obtained from within Australia. A suspension or delay may also be unreasonable if the information to be obtained from overseas has little relevance to the questioning of the suspect. Secondly, the period for which the questioning is suspended or delayed must also be reasonable. The period is capped as reasonable so that the dead time cannot exceed the difference in time zones between places of investigation in Australia and relevant overseas locations. We have tried to put forward a bill that reflects the reality of the experience but is also subject to the test of reasonableness in the down time period.[24]

3.25 A representative of the Attorney-General's Department argued that it did not agree with the concerns expressed by Professor Williams in regards to the 'dead time' provisions, and argued it was unlikely that these provisions would result in suspects being held for extended periods of time:

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22 *Committee Hansard*, 30 April 2004, p. 23.

23 ibid.

24 ibid., p. 5.

> I would be extraordinarily surprised if the dead time, for example, in relation to the time zones would get anything like the sorts of time periods that were being suggested by Professor Williams. I have spoken to the Victorians about cases in Victoria concerning reasonable time and what the court has considered to be reasonable time, and the court has considered periods like 16 hours to be reasonable. So in terms of the time zone issue, if a country was many hours different in time but it was during business hours, then the argument for saying that the time zone difference was a reasonable consideration would be diminished enormously.[25]

3.26 It was pointed out to the Attorney-General's Department that whether the court would consider the period to be reasonable was irrelevant if the 'dead time' could be invoked without an application to a judicial officer.[26] A representative of the Department responded that the question of reasonableness would go to the admissibility of evidence obtained.[27]

3.27 The Department was asked whether it would be workable to require the use of dead time under proposed paragraph 23CA(8)(m) (that is, 'dead time' for the purposes of international inquiries), to be subject to an application to a judicial officer. A representative from the Department responded:

> I do not think it would be unworkable. Clearly we go to a judicial officer to get the extensions for the overall time.[28]

3.28 The Attorney-General's Department acknowledged that requiring judicial authorisation for certain 'dead time' items would be consistent with the scheme in Part 1C:

> The Government could consider requiring judicial authorisation as a pre-requisite for certain 'dead time' items as this would appear consistent with the scheme in Part 1C.[29]

3.29 Professor Williams also noted that the extended length of time for which a terrorism suspect may be held means that new issues arise that were not necessary to deal with under the existing detention without charge regime for criminal suspects. He suggested that protocols and other protections should be considered, like those inserted into the *Australian Security Intelligence Organisation Act 1979*, in regard to the detention of non-suspects. He suggested that matters to be dealt with might include ensuring that suspects are given sufficient opportunity for sleep.[30]

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25 ibid., p. 27.

26 ibid.

27 ibid.

28 ibid.

29 Attorney-General's Department, *Submission 28*, p. 2.

30 Professor George Williams, *Submission 7*, pp. 1-2.

3.30 In its submission, the AFP argued that concerns over the extended periods of investigation and new 'dead time' provisions of the Bill were unfounded because of the existing safeguards in Part 1C of the Crimes Act and the additional safeguards set out in the Australasian Police Ministers' Council (APMC) Standard Guidelines for Police Custodial Facilities.[31]

3.31 In the hearing, Professor Williams was asked for his views on the APMC Guidelines. In a supplementary submission to the Committee he stated that whilst he thought they appeared to set out an appropriate and detailed set of standards that could apply to the increased period of detention proposed by the Bill, he thought that:

> … such Guidelines should be incorporated into the legislation, such as through the making of protocols or the like, so that they form part of the legal regime itself. It is not sufficient that they suggest a code of conduct that might be followed.[32]

3.32 The Attorney-General's Department addressed the question of whether such guidelines should be incorporated into Part 1C of the Crimes Act in similar fashion to the protections and protocols that were incorporated into the ASIO regime, and explained:

> Part 1C, with its suite of safeguards and protections, has been in operation for approximately 13 years. The scheme works well and represents a high benchmark in protecting the rights of suspects while providing investigating officials with the operational flexibility they need to fairly obtain reliable and credible evidence for use in court. In this light, it is important to acknowledge that there are two important distinctions between the rationale for the Part 1C safeguards and the protections in the ASIO Act:
>
> (i) While persons detained under the ASIO Act are *non-suspects*, persons arrested and detained for questioning under Part 1C are *suspects* – they are suspected of committing an actual offence.
>
> (ii) The aim of the questioning regimes under the ASIO Act and Part 1C are also very different. The ASIO powers are directed at prevention – that is, obtaining intelligence to prevent a terrorist attack. Unlike the Part 1C powers, they are not a legislative tool for collecting evidence against a suspect. This distinction is crucial. Because investigating officials need to conduct their questioning so as to obtain admissible evidence against the suspect, there is a compelling incentive for them to treat suspects fairly and, among other things, in line with the APMC Standard Guidelines. Failure to do so may seriously undermine subsequent attempts to prosecute. ASIO officers questioning a non-suspect under the ASIO Act do not have the same incentive.

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31 AFP, *Submission 26*, p. 8.

32 Professor George Williams, *Submission 7A*, p. 1.

> These two distinctions suggest that while it was important to legislatively entrench protections and protocols in the ASIO Act, the same pressures are not evident in the Part 1C context.
>
> Prior to Parliament's consideration of the *Measures to Combat Organised and Serious Crime Bill 2002* ('the Organised Crime Bill'), the Department conducted an exhaustive review of Part 1C, which obtained input from a range of groups including judicial officers, civil liberties organisations, legal professional bodies and law enforcement (including the AFP) and prosecution agencies. Following the review it was concluded that the current approach of using non-statutory guidelines was adequate. [33]

Detention of minors and Aboriginal and Torres Strait Islander people

3.33 The Public Interest Advocacy Centre recommended that, in line with the recommendations in the Royal Inquiry into Aboriginal Deaths in Custody, the current maximum extended investigation period of 8 hours should be maintained for people under 18 years of age and Aboriginal and Torres Strait Islander people.[34]

3.34 Amnesty International Australia also expressed concern that the Bill would extend the possible period of detention for children, and argued that this ran the risk of breaching Article 37 of the *Convention on the Rights of the Child,* which provides that no child should be deprived of his or her liberty arbitrarily.[35]

3.35 At the hearing, Commissioner Keelty from the AFP noted that the current reduced initial investigation period of 2 hours for minors and Aboriginal and Torres Strait Islander people would not be affected by the Bill:

> It is important to note that nothing in the bill undermines the existing initial investigation period for terrorism offences—four hours, or two hours for Aboriginal and Torres Strait Islanders. The standard part 1C safeguards will continue to apply for terrorism investigations.[36]

3.36 While the initial reduced two hour investigation period (as opposed to four for other persons) will continue to apply to minors and Aboriginal and Torres Strait Islander people, the Bill's extensive 'dead time' provisions granted by proposed paragraph 23CA(8)(m), will mean that such persons may be held for over 20 hours depending on the time zone difference of the country to which inquiries are made. Such persons will also be subject to the extended investigation period of 20 hours under the Bill. The Attorney-General's Department did not clarify this matter at the hearing, although in later correspondence with the Committee, it explained:

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33 Attorney-General's Department, *Submission 28*, pp. 5-6.

34 Public Interest Advocacy Centre, *Submission 17*, p. 4.

35 Amnesty International Australia, *Submission 13*, p. 8.

36 *Committee Hansard*, 30 April 2004, p. 2.

> The initial maximum holding period detailed at proposed subsection 23CA(4) would remain unchanged. However, as is the case now, the extension of this period is available if the judicial officer is satisfied it is necessary under the criteria detailed at proposed subsection 23DA(4). The extensions cannot be more than 20 hours (proposed subsection 23DA(7)). In making the decision about the extension the judicial officer is likely under proposed paragraph 23DA(4)(c) to take into account the youth, culture and incapability of the individual in determining whether the investigation was being conducted properly. Proposed subsection 23CA(4) sends a very strong message that these are important considerations. There would of course be circumstances where an extension could be justified. For example, in some places terrorists have used the young and the incapable to carry out, or attempt, suicide bombings.[37]

Application for extensions of holding period to be made before magistrates only

3.37 The Civil Rights Network argued that under the Bill (and this is the case under the Crimes Act currently), applications to extend the holding period of a suspect can be made before a magistrate, a Justice of the Peace, or a person authorised to grant bail. It noted that, due to the extended period of detention available under the Bill, such applications should only be allowed to be made before a magistrate.[38]

The Committee's view

3.38 The Committee appreciates that in order to effectively investigate terrorist offences, with the often complex and international nature of such matters, law enforcement needs to have flexibility in its powers of detention.

3.39 The Committee is also very aware of concern expressed in submissions, that excessive powers not be granted to law enforcement as a reflex to recent concern over terrorism.

3.40 The Committee notes the common question raised in submissions as to why the AFP needs extended investigation powers in light of the extensive powers that have been granted to ASIO. The Committee regards it as important to highlight the clear distinction between the intelligence gathering powers granted to ASIO, as opposed to the investigative or evidence gathering powers that would be the purpose of the current Bill.

3.41 The Committee accepts the arguments made by the AFP, which seek to point out this distinction, and notes that information gained under the ASIO powers of detention is not admissible as evidence, and as a consequence it would not be

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37 Attorney-General's Department, *Submission 28*, p. 1.

38 Civil Rights Network, *Submission 16*, p. 2.

appropriate for the AFP to rely on ASIO's intelligence gathering powers, to investigate potential or actual terrorism offences.

3.42 The Committee accepts that the Bill's increase of maximum investigation periods that can be granted by a judicial officer from 8 to 20 hours is justified.

3.43 The Committee is concerned, however, that the 'dead time' provisions contained in proposed paragraph 23CA(8)(m) may result in suspects being held for periods of over 20 hours before the investigating officers are required to apply for an extension to the investigation period. The Committee is particularly concerned about this in the case of minors and Aboriginal and Torres Strait Islander people. The Committee appreciates that there are provisions for 'dead time' under section 23C of the Crimes Act, although these are generally for events that are of limited time. However allowing for large time differences could lead to the reasonable use of dead time well in excess of 20 hours.

3.44 The Committee believes that to balance the extended investigation period available in the Bill, the use of the 'dead time' provisions of proposed paragraph 23CA(8)(m), should require application to a judicial officer as defined under the Crimes Act. The Committee notes that in requiring an application to a judicial officer for approval of the use of such 'dead time', the investigating official should be required to inform the judicial officer as to whether the suspect is a minor or an Aboriginal person or a Torres Strait Islander.

3.45 The Committee notes that the Attorney-General's Department considered that such a requirement would not be unworkable. The Committee believes that if such a condition was added to the Bill, then the need for an absolute limit on the period of questioning as proposed by some submitters and witnesses would not be necessary, as each extension and use of 'dead time' would have been deemed reasonable by a judicial officer.

3.46 In regards to the possibility of incorporating guidelines similar to the APMC Standard Guidelines for Police Custodial Facilities to ensure there are sufficient custodial protections for suspects, the Committee is satisfied with the Attorney-General's Department's response that there are significant differences between the intelligence gathering functions of the ASIO regime and the evidence gathering functions of the current Bill. The Committee is satisfied that the practice of relying on non-statutory guidelines as is currently the case under Part 1C of the Crimes Act will continue to provide adequate safeguards for the treatment of suspects if the Bill is passed.

Recommendation 1

3.47 The Committee recommends that the Bill be amended such that the use of the 'dead time' provision contained in proposed paragraph 23CA(8)(m) only be available upon successful application to a judicial officer as defined under the *Crimes Act 1914,* and that in making such an application the investigating official

be required to inform the judicial officer as to whether the suspect is a minor, an Aboriginal person or a Torres Strait Islander.

CHAPTER 4

AMENDMENTS TO THE *CRIMES (FOREIGN INCURSIONS AND RECRUITMENT) ACT 1978*

4.1 This chapter discusses concerns raised in submissions and evidence in relation to the amendments to the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Foreign Incursions Act), and in particular in relation to:

- the need for the amendments; and
- the provisions in relation to 'prescribed organisations'.

4.2 This chapter then briefly discusses other issues, including ministerial certificates and the penalty increases.

Need for the amendments

4.3 A number of submissions were concerned with the proposed amendments to section 6, which would provide that the exemption in paragraph 6(4)(a) does not apply to persons who engage in hostile activities in a foreign state while in or with a 'prescribed organisation'.[1]

4.4 The Castan Centre for Human Rights Law and Mr Joo-Cheong Tham argued that these amendments to the Foreign Incursions Act were unnecessary because existing criminal law already adequately covers the situation the amendments are designed to address.[2] They pointed in particular to a number of existing offences in the Criminal Code, including the:

- offence of treason, which would cover a person engaging in armed hostilities against the Australian Defence Force (ADF), whether or not as part of a terrorist organisation (section 80.1);
- offences for engaging in conduct overseas that harms Australians (including ADF members) in Division 104; and
- 'terrorist act' and 'terrorist organisation' offences in Divisions 101 and 102.[3]

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1 Proposed subsection 6(6). Note that proposed subsection 6(5) will also cover persons who enter a foreign State with intent to engage in a hostile activity in that foreign State while in or with a prescribed organisation.

2 Mr Joo-Cheong Tham, *Submission 9*, p. 10; Castan Centre for Human Rights Law, *Submission 18*, pp. 8-9.

3 ibid.

4.5 The Castan Centre for Human Rights Law argued that section 6 of the Foreign Incursions Act was 'largely redundant' as a result of the offences in the Criminal Code:[4]

> … the Government already has the power, under subsections 102.1 (1) and (2) of the Criminal Code, to proscribe any armed force that is engaged in hostilities. Such proscription enlivens the various offences mentioned above, to which service in an armed force is no defence. Therefore, if the intention of the Parliament is to give the government the power to proscribe armed forces, thereby criminalising service with those armed forces, there is no need for new laws. No new conduct is criminalised by exposing individuals serving in proscribed organisations to liability under the Crimes (Foreign Incursions and Recruitment) Act 1978.[5]

4.6 However, the Justice and International Unit of the Uniting Church in Australia supported these amendments, arguing that:

> It is appropriate to deter Australians from being party to armed conflicts overseas, especially as part of terrorist organisations.[6]

4.7 The Explanatory Memorandum explained that the amendments are required to ensure that the defence in paragraph 6(4)(a) is not available in certain circumstances:

> As events in Afghanistan demonstrate, in today's security environment terrorist organisations may be fighting as part of or alongside the armed forces of a foreign state. In some cases, those foreign forces may even be fighting against our own Defence Forces. In those circumstances, it is not appropriate that the 6(4)(a) defence be available to excuse people from the reach of the Foreign Incursions Act.[7]

4.8 The Committee sought further clarification in relation to the need for the amendments from the Attorney-General's Department. In its response, the Department acknowledged that there would be some overlap with other criminal laws. However, the Department pointed out that:

> This is not unusual. For example, a person who kills civilians by detonating a bomb could be charged with committing a terrorist act or murder.[8]

4.9 The Department further argued that:

> The Foreign Incursions Act criminalises engagement in hostile activities in a foreign state even if that state is not involved in armed conflict against Australian defence forces and even if the organisation involved is not a terrorist organisation. Therefore, although there is some overlap with

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4 Castan Centre for Human Rights Law, *Submission 18*, p. 10.

5 ibid., p. 11.

6 Justice and International Unit of the Uniting Church in Australia, *Submission 23*, p. 2.

7 *Explanatory Memorandum*, p. 4.

8 Attorney-General's Department, *Submission 28*, p. 2.

> treason and terrorism offences, the Foreign Incursions Act covers activity that will not necessarily be covered by those offences.[9]

4.10 Finally, the Department responded that:

> Without the proposed amendments, the Government will be unable to prosecute Australians who have engaged, or are preparing to engage, in hostile activities in foreign states as part of their service in or with the armed forces of a foreign state. As a result, the Government is powerless to stop Australians who join an armed force that is committing gross human rights violations or is engaged in hostilities against Australia's allies.[10]

Provisions in relation to 'prescribed organisations'

4.11 Concerns were also raised in relation to the definition of 'prescribed organisation' under proposed subsection 6(7). Under this subsection, a 'prescribed organisation' means an organisation that is:

- prescribed in regulations made under the Foreign Incursions Act (proposed paragraph 6(7)(a)); or
- specified as a 'terrorist organisation' under the Criminal Code Regulations (proposed paragraph 6(7)(b)).

4.12 Proposed section 12 then provides for regulations to be made under the Foreign Incursions Act for the purposes of paragraph 6(7)(a).

4.13 The Committee received submissions that were concerned about the use of existing powers to specify terrorist organisations under the Criminal Code Regulations; and also the proposed new power to prescribe organisations in regulations under the Foreign Incursions Act.

Terrorist organisations under the Criminal Code Regulations

4.14 In relation to the use of existing powers to prescribe terrorist organisations under the Criminal Code Regulations, a number of submissions argued that, given the broad criteria and definition of 'terrorist act' in the Criminal Code, almost any armed force or associated organisation could be involved in 'terrorist acts' and declared a terrorist organisation.[11]

4.15 For example, the Public Interest Advocacy Centre argued that:

> … the legality of Australians serving with organisations working with the armed forces of foreign countries risks being subject to the political whims of subsequent Australian governments .... If such legislation had previously

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9 ibid.

10 ibid.

11 See for example, Castan Centre for Human Rights Law, *Submission 18*, p. 10; Public Interest Advocacy Centre, *Submission 17*, p. 6.

> existed, it is possible that Australians involved in liberation movements such as the African National Congress could have faced imprisonment for their actions.[12]

4.16 The Committee notes that the proscription powers under Division 102 of the Criminal Code were previously considered by this Committee in the context of the *Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]*.[13] The Committee acknowledges the concerns raised in relation to the proscription powers under the Criminal Code, but considers that these provisions are outside the scope of this Bill.

Prescribed organisations under the Foreign Incursions Regulations

4.17 Concerns were also raised in relation to the proposed new power to prescribe organisations using regulations under the Foreign Incursions Act. The Explanatory Memorandum states in relation to this power that:

> By providing power to make regulations to list prohibited groups from time to time, the Foreign Incursions Act will outlaw participation with new and emerging terrorist groups from the moment it becomes evident that they pose a threat to Australia's security.[14]

4.18 However, the Castan Centre for Human Rights Law argued strongly that these amendments:

> … would further entrench an already disturbing feature of Australian anti-terrorism legislation, namely, criminal liability that results from the unfavourable exercise of discretion directed at particular organisations, rather than from the legislative prohibition of conduct.[15]

4.19 The Castan Centre for Human Rights Law further argued that the additional prescription power under the Foreign Incursions Act was unnecessary, given the existing power under the Criminal Code to list organisations as terrorist organisations.[16]

4.20 The Committee sought further clarification from the Attorney-General's Department on the need for an additional prescription power under the Foreign Incursions Act. The Department responded:

> The prescription powers in the Criminal Code only enable the Government to prescribe organisations if the Minister is satisfied on reasonable grounds

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12 Public Interest Advocacy Centre, *Submission 17*, p. 6.

13 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and Related Bills*, May 2002.

14 *Explanatory Memorandum*, p. 18.

15 Castan Centre for Human Rights Law, *Submission 18*, p. 10.

16 ibid., p. 11; see also the Civil Rights Network, *Submission 16*, p. 2.

> that the organisation is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act.[17]

4.21 The Department continued:

> Without the additional power to prescribe organisations found in proposed sub-section 6(7)(a), Australian citizens may engage in hostile activities with any organisation constituting part of the armed forces of the government of a state. This means that Australians cannot be prosecuted under the Act for taking part in an armed conflict against Australia's allies or taking part in gross violations of human rights so long as those acts are committed while the person is serving in or with a state's armed forces.[18]

Lack of criteria

4.22 A key concern was the lack of criteria for prescribing organisations under the Foreign Incursions Act.[19] In the hearing, the Castan Centre for Human Rights Law argued:

> … it seems to be a power at large to prescribe foreign armed forces. There is nothing in the rest of the structure of the act which suggests implicitly any constraints on that regulatory power.[20]

4.23 The Explanatory Memorandum appeared to justify the lack of criteria on the basis that:

> Providing for the prescription of organisations and groups by regulation also means that cases for listing can be considered on an individual basis rather than trying to fit an organisation or group into a legislative definition which may over time prove inadequate as international relations and the security environment change.[21]

4.24 During the hearing, the Committee sought reasons from the Attorney-General's Department for the lack of criteria for prescribing organisations under the Foreign Incursions Act. A representative from the Department responded:

> … [Paragraph] 7(a) is much broader because, unlike the listing of an organisation for the purposes of the Criminal Code, being merely a member of an organisation listed under 7(a) is not an offence under the foreign incursions act; you have to engage in a hostile activity with an organisation that has been listed. The extra protections or criteria for listing for the

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17 Attorney-General's Department, *Submission 28*, p. 3.

18 ibid.

19 Castan Centre for Human Rights Law, *Submission 18*, p. 10; Mr Joo-Cheong Tham, *Submission 9*, p. 10; the Civil Rights Network, *Submission 16*, p. 2.

20 Mr Patrick Emerton, Castan Centre for Human Rights Law, *Committee Hansard*, 30 April 2004, p. 14.

21 *Explanatory Memorandum*, p. 18.

> purposes of the Criminal Code were not felt to be necessary for the purposes of listing organisations for the purposes of 7(a) here.[22]

4.25 However, as a result of this lack of criteria, there was some uncertainty as to the organisations that might be covered by this amendment. During the hearing, the Attorney-General's Department pointed out that organisations may not need to be terrorist organisations to be prescribed under the Foreign Incursions Act:

> … under the prescription powers we can list terrorist organisations through the Criminal Code, but we can also list organisations under 7(a) that are not terrorist organisations … They may be paramilitary forces; for example, the Bosnian Serb forces during the conflict in Bosnia could be listed. Even the armed forces, for example, of the Taliban at the time could have been listed.[23]

4.26 The Law Council of Australia also sought confirmation that the amendments to the Foreign Incursions Act would not apply to Australian people who work in communities in which terrorist organisations operate to provide medical or community aid assistance.[24] The Committee sought confirmation from the Department on this issue. The Department responded that Australians providing medical or community aid assistance would not commit an offence under the Foreign Incursions Act:

> So long as a person does not commit a 'hostile activity' the person is not liable for an offence against section 6 of the Act. To commit a hostile activity, a person must do an act with the intention of achieving the objectives listed in sub-section 6(3). Those objectives include, for example, the overthrow by force or violence of the government of a foreign state, engaging in armed hostilities, and causing by force or violence the public in a foreign state to be in fear of suffering death or personal injury.[25]

4.27 During the hearing, a representative from the Attorney-General's Department also explained that:

> … the mere listing will not create an offence. It is having the listing and then you as an individual engaging in a hostile activity with a listed organisation. You could list the Boy Scouts but it would not be an offence unless the Boy Scouts went out and invaded Columbia, for example.[26]

4.28 The Committee expressed concern during the hearing that such benign organisations could be listed. In response, a representative from the Attorney-General's Department pointed out that the regulations under the Foreign Incursions

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22 *Committee Hansard*, 30 April 2004, p. 29.

23 ibid., p. 29.

24 Law Council of Australia, *Submission 27*, p. 3.

25 Attorney-General's Department, *Submission 28*, p. 4. In relation to offences against section 7 of the Act (Preparations for incursions into foreign states for purposes of engaging in hostile activities), see subsection 7(1B).

26 *Committee Hansard*, 30 April 2004, p. 29.

Act would be disallowable.[27] However, the Castan Centre for Human Rights Law argued that the regulations could have a significant effect during the period they are in force.[28]

4.29 The Committee sought further clarification from the Attorney-General's Department in relation to the purpose of the regulation-making power. The Department indicated that it could be used to prescribed armed forces committing gross violations of human rights, or engaged in hostilities against Australia's allies.[29] The Attorney-General's Department also responded that:

> The decision to prescribe an organisation under proposed sub-section 6(7)(a) would be made in consultation with relevant Ministers and on the basis of relevant information available to the Government. Importantly, any listings made in the regulations will be subject to disallowance and will not have retrospective operation.[30]

4.30 The Committee notes the view of the Senate Standing Committee on Regulations and Ordinances that where the Executive is given power to make administrative decisions affecting the rights and livelihood of individuals:

> … criteria should be expressly set out to inform the decision-maker and the citizen of the nature and scope of their respective responsibilities.[31]

4.31 As the Standing Committee explained:

> … objective criteria provide a safeguard against arbitrary or unjustly discriminatory decisions.[32]

4.32 At the hearing, in response to questioning from the Committee, a representative from the Attorney-General's Department indicated that it would be possible to include criteria in the Bill:

> We could do that. For example, one of the criteria that could be listed already exists in another section of the foreign incursions act, which, I believe, is 9(2). Section 9(2), in effect, gives the minister the power to declare an organisation to be an organisation which, in effect, an Australian could take part in hostilities with, and that would be a lawful undertaking of hostilities. The criteria in that section, were the minister to declare an organisation, are that it be in the interests of the defence or international

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27 *Committee Hansard,* 30 April 2004, p. 29.

28 Castan Centre for Human Rights Law, *Submission 18*, p. 10.

29 Attorney-General's Department, *Submission 28*, p. 3.

30 ibid., p. 3.

31 Senate Standing Committee on Regulations and Ordinances, *110th Report Annual Report 2000-2001*, March 2002, pp. 15-16.

32 ibid.

> relations of the Commonwealth. So you are correct; we could look at restricting the prescription power.[33]

4.33 However, another representative of the Department also indicated that this would be a policy issue.[34]

Uncertainty

4.34 Another issue raised was where a person leaves Australia to join another country's armed force knowing that it is not a prescribed organisation, and the armed force is later prescribed under the proposed provisions. It was pointed out that this may create problems for a defendant who is abroad when the organisation is prescribed, and unaware of that prescription.[35]

4.35 A representative from the Attorney-General's Department pointed out during the hearing that in relation to the 'entry offence' in subsection 6(5), the organisation must be a prescribed organisation at the time of entry into a foreign state.[36] However, under subsection 6(4), where a person actually engages in hostile activity in a foreign State, the organisation need only be a prescribed organisation at the time when the person engages in that hostile activity. However, the Committee notes that, again, a person would actually have to be engaged in 'hostile activity' for the offences under section 6 to apply.

Other issues

Ministerial certificates

4.36 In relation to proposed subsection 11(3A), which would allow Ministerial certificates attesting to the fact that a group was not part of the armed forces of a state at any one time, the Law Council of Australia stated that it was:

> … opposed in principle to the use of conclusive ministerial certificates … wherever possible and lawful, the crown should ensure it presents all available evidence in relation to the alleged activities of terrorist groups to a court to allow it to make considered determinations.[37]

4.37 The Bills Digest also pointed out that:

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33 *Committee Hansard,* 30 April 2004, p. 29.

34 ibid.

35 Civil Rights Network, *Submission 16*, p. 3. See also Department of Parliamentary Services, *Anti-terrorism Bill 2004*, Bills Digest No.120 2003-04, p. 10.

36 *Committee Hansard*, 30 April 2004, p. 29.

37 Law Council of Australia, *Submission 27*, p. 4.

> One of the reasons for relying on ministerial certificates is that a matter is difficult to prove. However, it may also be difficult in practice for a defendant to rebut the facts contained in the certificate.[38]

4.38 The Law Council further argued that:

> … the gravity of the penalty for the offence, which is to be increased to 20 years imprisonment under this Bill, provides further reason for careful court scrutiny of such matters.[39]

4.39 The Committee heard no further evidence on this issue. However, the Explanatory Memorandum pointed out that section 11 of the Foreign Incursions Act already enables ministerial certificates to be issued in relation to:

> … facts that are difficult to prove or that may have implications for Australia's international relations because of the political nature of the facts (for example, whether a place or an area is or is in an independent sovereign state, whether a person was acting in the course of his duty to the Commonwealth, or whether an authority was in effective governmental control of a state or part of a state).[40]

4.40 The Explanatory Memorandum continued:

> Proving whether a group or organisation is part of the armed forces of a state is similarly difficult to prove and may also have implications for Australia's international relations.[41]

Penalty increase

4.41 The Civil Rights Network questioned whether the penalty increase for an offence against section 6 of the Act from 14 to 20 years imprisonment would have any 'real deterrent effect'.[42] The Committee received no further evidence on this issue. However, the Explanatory Memorandum pointed out that:

> Offences constituted by acts similar to those constituting an offence under the Foreign Incursions Act include war crimes, terrorism offences and treason. Those offences carry penalties ranging from 20 years to life imprisonment.[43]

4.42 According to the Explanatory Memorandum, the increased penalty was also justified because it:

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38 Department of Parliamentary Services, *Anti-terrorism Bill 2004*, Bills Digest No.120 2003-04, p. 10.

39 Law Council of Australia, *Submission 27*, p. 4.

40 *Explanatory Memorandum*, p. 19.

41 ibid.

42 The Civil Rights Network, *Submission 16*, p. 2.

43 *Explanatory Memorandum*, p. 17.

> … reflects the fact that in today's international security environment it is more likely than when the Foreign Incursions Act was first developed that Australian citizens may fight with groups that are in armed opposition to Australian forces. Twenty years is an appropriate penalty, capturing both the very serious hostile acts listed in section 6 of the Foreign Incursions Act and providing a real disincentive to commit the less serious hostile acts.[44]

The Committee's view

4.43 The Committee is satisfied by the Attorney-General's Department's explanation of the need for the amendments to the offences under the Foreign Incursions Act, which should be available in addition to existing criminal law offences. In particular, the Committee agrees that it is not appropriate that the defence under paragraph 6(4)(a) of the Foreign Incursions Act be available to Australians who join an armed force or a terrorist organisation that is engaged in hostilities against our own defence forces or Australia's allies.

4.44 The Committee also acknowledges the justification in the Explanatory Memorandum for the use of Ministerial certificates under proposed subsection 11(3A); and the penalty increase from 14 to 20 years imprisonment.

4.45 In relation to the proposed new regulation-making power which would allow organisations to be prescribed under the Foreign Incursions Act, the Committee is concerned that the Bill identifies no criteria for the use of this power.

4.46 The Committee notes the advice from the Attorney-General's Department that the mere listing of an organisation will not create an offence, but that the offence also requires engagement in hostile activities, or intent to engage in hostile activities, with that organisation. The Committee also notes the advice from the Attorney-General's Department that relevant Ministers would be consulted and that the regulations listing organisations would be disallowable. However, in the absence of any criteria, it is difficult for Parliament to determine whether the power has been exercised properly, in accordance with its purpose.

4.47 The Committee considers that it would be desirable to amend the Bill to include objective criteria to guide the exercise and scrutiny of the regulation-making power. From examples given by the Department, the Committee surmises that the power might be used to prescribe organisations that, while not meeting the definition of terrorist organisation in the Criminal Code, are undertaking hostile activity against Australia's allies, or in gross violation of international human rights instruments or international instruments setting out the laws of war. The Committee does not see any impediment to formulating criteria which implement this purpose.

4.48 The Committee notes that, while the regulations prescribing organisations will be disallowable, the format of regulations may present an inseparable package or

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44 ibid.

group of organisations for consideration under the powers. As a matter of procedure, the Committee recommends that when organisations are prescribed in regulations under the proposed paragraph 6(7)(a) of the Foreign Incursions Act, those organisations should each be listed in an individual regulation in order to ensure that each organisation is separately disallowable.

Recommendation 2

4.49 The Committee recommends that item 15 of the Bill be amended to identify the criteria by which organisations may be prescribed for the purposes of the definition of 'prescribed organisation' under proposed paragraph 6(7)(a) of the *Crimes (Foreign Incursions and Recruitment) Act 1978*.

Recommendation 3

4.50 The Committee further recommends that when organisations are prescribed in regulations under the proposed paragraph 6(7)(a) and section 12 of the *Crimes (Foreign Incursions and Recruitment) Act 1978*, those organisations should each be listed in an individual regulation in order to ensure that each organisation is separately disallowable.

Recommendation 4

4.51 Subject to the previous two recommendations, the Committee recommends that the amendments to the *Crimes (Foreign Incursions and Recruitment) Act 1978* in items 13-18 of the Bill proceed.

CHAPTER 5

AMENDMENTS TO THE *CRIMINAL CODE ACT 1995*

5.1 This chapter discusses concerns raised in submissions and evidence in relation to the amendments to the *Criminal Code Act 1995*, and in particular in relation to:

- the amendments to 'membership of a terrorist organisation' offence under section 102.3 of the Criminal Code; and
- proposed section 102.5 – training a terrorist organisation.

Item 19 - amendment to 'membership of a terrorist organisation' offence under section 102.3 of the Criminal Code

5.2 The Castan Centre for Human Rights Law noted that the Bill would make it an offence to be a member of a terrorist organisation, even if that organisation has not been proscribed, with the onus being on the prosecution to prove beyond reasonable doubt that the organisation was one that was 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)'.[1] It argued that this could mean that a trade union offering advice to nurses as to how they might go about establishing a picket of a public hospital might be considered a terrorist organisation, as it might be indirectly engaged in assisting the doing of a terrorist act.[2]

5.3 The Centre further argued that this could cover any organisation providing assistance to an overseas resistance movement, as any resistance movement is necessarily engaged in politically motivated violence intended to intimidate government.[3]

5.4 It noted that the only justification for the amendment given by the Attorney-General in his second reading speech, was that it would produce uniformity across the offences in Division 102 of the Criminal Code.[4]

5.5 Amnesty International Australia criticised item 19 of the Bill, on the grounds that terms such as 'member' and in particular 'informal member' are too vague. It gave the example that if a person attends a meeting of an organisation, they may be considered an 'informal member'. It also criticised the vague nature of the term 'taken steps to become a member'.[5]

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1 Castan Centre for Human Rights Law, *Submission 18*, p. 12.

2 ibid.

3 ibid., p. 13.

4 ibid.

5 Amnesty International Australia, *Submission 13*, p. 10.

5.6 It also noted that whilst the Criminal Code offers the defence for a person who has fallen within the coverage of those provisions, of taking 'all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation', this may be difficult for those who are 'informal members'.[6]

5.7 The Law Council of Australia did not oppose this amendment, but wanted to record its:

> … opposition to the recent legislative changes which provide the Federal Government with a largely unfettered executive power to proscribe terrorist organisations.[7]

Item 20 - proposed section 102.5 – training a terrorist organisation

5.8 The Committee received comment on two main aspects of proposed section 102.5 of the Bill (amending the Criminal Code). The first related to the strict liability or 'reverse onus recklessness' aspect of the provision. The second related to the vague meaning of 'training', and the fact that such training does not have to be for the purpose of violence or destruction.

5.9 Amnesty International Australia expressed concern about the strict liability aspect to proposed section 102.5 of the Bill:

> Amnesty International Australia strongly criticises the proposed Bill's amendments seeking to remove the right to be presumed innocent and to reintroduce a reversal of onus provision. …a TAFE trainer may provide training to an organisation, or member of an organisation, without knowing that the organisation is specified by regulation as a 'terrorist organisation'. Strict liability would apply as to the trainer's knowledge of this specification unless the trainer can show he or she was not reckless as to the organisation being a 'terrorist organisation'. This application of strict liability and the reversal of the onus of proof is of serious concern, particularly given that the penalty is imprisonment for 25 years.[8]

5.10 Mr Patrick Emerton of the Castan Centre for Human Rights Law referred to the strict liability aspect of the proposed section as introducing a 'reverse onus recklessness offence':

> The reason that I describe it as a 'reverse onus recklessness offence' is that my interpretation of the way the provision is structured is that there is no need for the accused, in order to be guilty of that offence, to have any state of mind as to the nature of the organisation with which the accused is training. They need have no state of mind. However, section 102.5—I think, clause 4—would allow it to be a defence to show that you were not

6 ibid., p. 10.

7 *Submission 27*, p. 4.

8 Amnesty International Australia, *Submission 13*, p. 12.

> reckless. Defences under the Commonwealth Criminal Code place an evidential burden on the accused to enliven the defence. If they discharge the evidential burden, the onus of rebutting the offence is shifted to the Crown and at that point it becomes a question of proof beyond reasonable doubt.[9]

5.11 Mr Emerton went on to explain:

> On any occasion it can be very difficult to lead evidence to prove that one lacked a certain state of mind. Particularly if these individuals are not keeping diaries—and many of them may not be keeping diaries of the sort that other people keep—then you would want to be calling witnesses, and in practice the witnesses may be very difficult to get hold of.[10]

5.12 On this issue, a representative of the Attorney-General's Department pointed out that the evidential burden requires the defendant to 'point to' evidence of a reasonable probability:

> … the evidential burden talks about pointing to evidence of a reasonable possibility. So as soon as they point to a witness who can assist them in that case, in the example that was used, then it is for the prosecution to prove beyond reasonable doubt that there is no substance to that particular point. The evidential burden is quite an important aspect. Legally, it is not requiring the accused to prove anything; it is requiring them to point to evidence and the burden of proof still lies with the prosecution.[11]

5.13 Mr Simon Rice from Australian Lawyers for Human Rights argued in evidence that the provision should require an intention, as opposed to recklessness, in relation to receiving or providing training to a terrorist organisation:

> We have sympathy with what the legislation is designed to address but it is a question of balancing these competing rights. That is why we are here. We are concerned that there be an explicit connection where we know that the legislation—and there is a question of proof for the DPP—is intended to get to people who knowingly or intentionally engage in these acts. As drafted, the legislation picks up people who engage in these acts unwittingly—and reckless is not a sufficient safeguard for unwitting. If we had intent there would be no argument. You would establish the causal nexus—end of story.[12]

5.14 The second aspect of proposed section 102.5 of the Bill which received comment, related to the vague meaning of 'training'. The Australian Institute of Criminology noted that conceivably this could entail a wide range of activities from teaching a terrorist to fly a plane, to drive a truck or to operate complex financial

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9 *Committee Hansard*, 30 April 2004, p. 15.

10 ibid.

11 *Committee Hansard*, 30 April 2004, p. 26.

12 *Committee Hansard*, 30 April 2004, p. 19.

accounts. It noted that many objectively innocuous types of training, for example university studies on terrorism or organised crime, might lead directly or indirectly to the perpetration of a future terrorist act.[13]

5.15 Australian Lawyers for Human Rights argued that the wide application of proposed section 102.5 could apply to many innocuous acts of training:

> One could envisage a circumstance where a person who services photocopiers is called to an unnamed organisation to sell it a photocopier and train the organisation's employees. While there he sees a number of photographs of imams and a number of booklets with the words 'jihad' and 'Hamas' on them. He fits the photocopier, trains the staff, issues an invoice and leaves. He does not follow the media and does not know that Hamas is a 'terrorist organisation' under the [Criminal Code]. Unbeknownst to him he has visited the office of Hamas in Australia. Although acting entirely innocently, such a person could conceivably (and unfairly) be caught by the provisions of s.102.5(1) or (2).[14]

5.16 The Public Interest Advocacy Centre expressed concern that proposed section 102.5 of the Bill could apply to those who provide or receive training to or from an organisation that is primarily involved in charity work, but which in the past has engaged in an act of so called 'terrorism'. In such a case a person could be subject to 25 years prison. This could be despite the fact that such training could be unrelated to the promotion of terrorism and could even be related to the promotion of peace and reconciliation.[15] It suggested that if the Bill is to proceed, proposed section 102.5 should be limited in its application to organisations whose primary activities are the promotion of or engagement in extreme acts of ideological violence, and to training that involves the promotion of and engagement in extreme acts of violence.[16]

The Committee's view

5.17 In relation to proposed section 102.3 in item 19 of the Bill, the Committee notes that the effect of the proposed section is to allow section 102.3 to apply where a court has found an organisation to be a terrorist organisation (whereas currently the terrorist organisation must be one that has been specified by regulation).

5.18 Section 102.3 of the Criminal Code would apply to those who are members of a terrorist organisation that is specified by regulation, but also includes those who are members of 'an organisation that is directly or indirectly engaged in, preparing,

13 Australian Institute of Criminology, *Submission 11*, p. 1.

14 Australian Lawyers for Human Rights, *Submission 14*, p. 7.

15 Public Interest Advocacy Centre, *Submission 17*, p. 6.

16 ibid.

planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)'.[17]

5.19 Whilst the Committee acknowledges that this would have the effect that section 102.3 would apply not only to those organisations specified in regulations, but also to those found by a court to be a terrorist organisation, the section also requires that the defendant knew the organisation was a terrorist organisation,[18] and this has to be proven beyond a reasonable doubt.

5.20 In relation to proposed section 102.5 in item 20 of the Bill, the Committee acknowledges the concern that was raised in relation to the strict liability nature of the proposed section. The Committee recognises the serious nature of strict liability offences, particularly where the penalties are a substantial term of imprisonment. The Committee also notes the appropriateness of strict liability provisions where a defendant is better placed to adduce evidence as to a state of mind.

5.21 The Committee notes the evidence given by the Attorney-General's Department, that under proposed section 102.5 a defendant would not be required to adduce evidence proving their state of mind, but rather the burden of proof requires them to point to evidence of a reasonable possibility.[19] The burden then moves to the prosecution to prove beyond a reasonable doubt that they were reckless as to whether the organisation was a terrorist organisation.

5.22 The Committee is satisfied that proposed sections 102.3 and 102.5 in items 19 and 20 of the Bill are warranted and appropriate for their purposes.

Recommendation 5

5.23 The Committee recommends that items 19 and 20 of the Bill proceed without amendment.

17 Section 102.1(1) *Criminal Code.*

18 Section 102.3(1)(c) *Criminal Code.*

19 *Committee Hansard*, 30 April 2004, p. 26.

CHAPTER 6

AMENDMENTS TO THE *PROCEEDS OF CRIME ACT 2002*

6.1 This chapter discusses concerns raised in submissions and evidence in relation to the amendments to the *Proceeds of Crime Act 2002* (POC Act), particularly in relation to the:

- retrospective application of the amendments;
- amended definition of 'literary proceeds'; and
- recognition of military commissions of the United States of America (US).

Retrospective application

6.2 Clause 4 of the Bill provides that the amendments to the POC Act apply to any application made after the commencement of the amendments proposed by the Bill for conduct that occurred, or proceeds derived, realised or transferred to Australia, before the commencement of those amendments. In addition, proposed section 337A provides that where a person commits an offence against a foreign law, the conduct will be treated as a 'foreign indictable offence' if it is an offence against Australian law at the time of the application for a restraining or confiscation order (not, for example, at the time when the foreign offence was committed).

6.3 However, the Explanatory Memorandum to the Bill states that 'none of these amendments are intended to operate retrospectively'.[1]

6.4 A number of submissions were concerned that the amendments to the POC Act would operate retrospectively, and that the Explanatory Memorandum is misleading.[2] In particular, the Castan Centre for Human Rights Law argued that the amendments were actually retrospective in two respects.[3] Mr Patrick Emerton from the Castan Centre for Human Rights Law explained that the first retrospective aspect would result because:

> … if you have committed an offence abroad and that conduct was lawful in Australia at the time you committed the offence, you are nevertheless liable

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1 *Explanatory Memorandum*, p. 1.

2 See for example, Professor George Williams and Mr Michael Walton, *Submission 7*, p. 2; Mr Joo-Cheong Tham, *Submission 9*, p. 15; Civil Rights Network, *Submission 16*, p. 4; Public Interest Advocacy Centre, *Submission 17*, p. 6; Castan Centre for Human Rights Law, *Submission 18*, p. 19; NSW Council for Civil Liberties, *Submission 20*, p. 2. See also Department of Parliamentary Services, *Anti-terrorism Bill 2004*, Bills Digest No.120 2003-04, p. 12.

3 Mr Patrick Emerton, Castan Centre for Human Rights Law, *Submission 18*, p. 21.

> to confiscation if subsequently the law in Australia changes to make what you did overseas then an offence in Australian law now … because the time for testing whether you have committed a confiscable offence is the time the confiscation request is made, not the time when the alleged overseas wrong was done.[4]

6.5 The second retrospective aspect, according to the Castan Centre for Human Rights Law would result because '… the amendment would permit the imposition of such liability in respect of conduct that has already taken place'.[5]

6.6 Professor George Williams also argued that the amendments are retrospective:

> It is not a criminal offence, so it does not raise the most severe problems of retrospectivity. On the other hand, it means that conduct that was undertaken at a time when it was not an offence might have a consequence fixed upon it—in this case, relating to literary proceeds—that means you could not have anticipated that would have been the outcome … I think that that provision should be removed, if only to make it consistent with the explanatory memorandum.[6]

6.7 The Public Interest Advocacy Centre argued that this retrospectivity was of particular concern due to the potential implications for freedom of speech:

> The general rule is that laws should not be given retrospective operation. Arguments for a serious deviation from such a fundamental principle should be carefully considered, particularly in an area such as this that relates to freedom of speech.[7]

6.8 However, a representative from the Attorney General's Department argued that the amendments were *not* retrospective:

> It is not retrospective, because it does not apply until this legislation is enacted. If someone decides, after the date it is enacted, that they are going to sell their story then they know when they sell that story that this law exists. That is what we mean when we say that it is not retrospective. I appreciate the points that are being made in relation to the fact that, if something is an offence in another country and then subsequently becomes an offence here, this law would come into play. However, if that occurs after this law is in place then the person knows that if they commit offences in other countries, there is a chance that the literary proceeds can be taken. The message in it is: don't commit offences in other countries.[8]

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4 *Committee Hansard*, 30 April 2004, p. 16.

5 Castan Centre for Human Rights Law, *Submission 18*, p. 21.

6 *Committee Hansard*, 30 April 2004, p. 21.

7 Public Interest Advocacy Centre, *Submission 17*, p. 4. Freedom of speech issues are discussed further at paragraphs 6.15-6.19 below.

8 *Committee Hansard*, 30 April 2004, p. 26.

6.9 Subsequent to the hearing, the Committee sought further clarification in relation to this issue. The Attorney-General's Department responded:

> There is no retrospective criminal liability. It was suggested at the hearing that the legislation would only apply to deals which occurred after the commencement of the proposed legislation. On reflection, this is not correct. Clause 4 of the Bill applies the provision to conduct that occurred before the commencement of the legislation. The rationale for the application of the scheme in those circumstances is that the person committed a serious criminal offence at the time. It is extremely unlikely the person would have changed their course of action if they knew that at some time they would not be able to benefit from literary proceeds … There is no convincing reason for not applying the legislation in the way proposed in clause 4.[9]

6.10 The Committee also notes that this retrospectivity is consistent with section 14 of the POC Act, which provides that the POC Act applies in relation to an offence committed at any time, and a person's conviction at any time, whether the offence or conviction occurred before or after the commencement of the POC Act.

Definition of 'literary proceeds'

6.11 Some submissions raised concerns in relation to proposed amendments to paragraph 153(1)(a) of the POC Act, which seek to clarify that the literary proceeds scheme extends to notoriety that is only *indirectly* linked to an offence.[10] The Explanatory Memorandum states:

> The amendment makes it clear that the notoriety need only be indirectly linked to the offence and that this will be sufficient to fall within the definition of literary proceeds. For example, this amendment is intended to vitiate a claim that a person's notoriety stems from circumstances related to their commission of an offence, such as their place of incarceration, and not from the actual commission of the offence.[11]

6.12 During the hearing, Professor George Williams commented that the use of the word 'indirectly' could lead to 'uncertainty rather than to further certainty'.[12]

6.13 A representative from the Attorney-General's Department explained:

> The word 'indirectly' was in recognition of the fact that there might be an argument that the notoriety came about not just because of the conviction but because of where they were detained or something like that.[13]

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9 Attorney-General's Department, *Submission 28*, pp. 5-6.

10 *Explanatory Memorandum*, p. 22; See, for example, Castan Centre for Human Rights Law, *Submission 18*, pp.21-22; Mr Joo-Cheong Tham, *Submission 9*, pp. 13-14.

11 p. 22.

12 *Committee Hansard*, 30 April 2004, pp. 22-23.

13 ibid., p. 30.

6.14 Subsequent to the hearing, the Committee sought further clarification from the Attorney-General's Department on the meaning of the word 'indirectly', and why this particular amendment was required. The Department reiterated the explanation in the Explanatory Memorandum:

> 'Indirectly' used in this way will mean that, for instance, a claim that a person's notoriety stems from their place of incarceration and not their commission of an offence, could be denied.[14]

Freedom of speech

6.15 The Committee also heard arguments that this amendment would inhibit the publication of information that was of public interest, such as the experiences of those who have been detained and have suffered as a result of their imprisonment.[15] For example, the Castan Centre for Human Rights Law contended that the amendment:

> … would also vitiate a claim that a person's notoriety stemmed not from the actual commission of the offence, but from the brutality or injustice with which they were treated by the police or legal system as a result of being charged with or convicted of the offence.[16]

6.16 The Castan Centre for Human Rights Law continued:

> Imagine an individual who is arrested for an indictable offence, and in the process of being convicted and serving their sentence is subject to racist treatment by police or prison officers … if, as a result of that experience, the individual acquired notoriety, that notoriety would be an indirect result of their commission of the offence. Therefore, any income the individual earned from writing about his or her experience with the law, from producing music and songs that related that experience, or from a speaking tour dealing with that experience, would be liable to confiscation under a literary proceeds order.[17]

6.17 Australian Lawyers for Human Rights also argued:

> While [Australian Lawyers for Human Rights] agrees that it is abhorrent to allow a person to profit from committing a serious offence there is a public interest to be served in having a first hand account available for open and public discussion. The availability of such accounts is important for public debate about the motivations behind such heinous acts as terrorism … there is a legitimate interest in having such publications available to inform and provoke public debate.[18]

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14 Attorney-General's Department, *Submission 28*, p. 5.

15 Mr Joo-Cheong Tham, *Submission 9*, p. 14; Australian Lawyers for Human Rights, *Submission* 14, p. 8; Civil Rights Network, *Submission 16*, p. 4; Castan Centre for Human Rights Law, Monash University, *Submission 18*, p. 22.

16 Castan Centre for Human Rights Law, *Submission 18*, p. 22.

17 ibid.

18 Australian Lawyers for Human Rights, *Submission 14*, p. 9.

6.18 Australian Lawyers for Human Rights further argued:

> Finally, the proposed s.337A(3) is clearly aimed at preventing the Guantanamo Bay detainees, including Mr Hicks and Mr Habib, from publishing their own accounts of what occurred not just in Afghanistan but at Guantanamo Bay. There exists intense public interest in Australia about what has happened to these two individuals and the legality and legitimacy of their detention. It would foster that debate to allow them to publish their own accounts.[19]

6.19 The Committee notes that section 154 of the POC Act sets out the matters which a court must take into account in deciding whether to make a 'literary proceeds order'. Those matters include, for example, the social, cultural or educational value of the product or activity[20] and whether supplying the product or carrying out the activity was in the public interest.[21] However, Australian Lawyers for Human Rights argued:

> One could not be confident that a Court would safeguard that interest in applying s.154 given varying opinions about what constitutes the public interest.[22]

Prohibition v profit

6.20 During the hearing, the Committee inquired as to why freedom of speech was of such concern when the POC Act does not prevent publication, but rather targets profits. For example, the Explanatory Memorandum states that:

> ... a person will, for instance, still be able to publish material or give media interviews about their experiences but they will not be able to profit from such in Australia.[23]

6.21 Australian Lawyers for Human Rights acknowledged during the hearing that the amendments would not *prevent* publication, but nevertheless argued that the amendments would preclude access to a 'significant' forum including commercial news media and print publications.[24] Professor George Williams also argued that:

> … you can still publish the book, but you would have to recognise that there is often a link between a desire to write a book and a desire to make some monetary gain out of it.[25]

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19 Australian Lawyers for Human Rights, *Submission 14*, pp. 9-10.

20 POC Act, para 154(a)(iii).

21 POC Act, para 154(a)(ii).

22 Australian Lawyers for Human Rights, *Submission 14*, p. 9.

23 *Explanatory Memorandum*, p. 6.

24 Mr Simon Rice, Australian Lawyers for Human Rights, *Committee Hansard*, 30 April 2004, p. 18.

25 *Committee Hansard*, 30 April 2004, p.23.

Persons covered by the amendments

6.22 During the hearing, the Committee also inquired as to whether relatives of people who had committed an offence would be covered by the amendments. A representative from the Attorney-General's Department responded that the 'legislation focuses on the person who has committed the offence profiting from it'.[26]

6.23 However, the Committee notes that subsection 153(4) of the POC Act provides that, in determining whether a person has derived literary proceeds, or the value of literary proceeds that a person has derived, a court may treat as property of the person any property that:

- is subject to the person's effective control; or
- was not received by the person, but was transferred to, or paid to, another person at the person's direction.

6.24 During the hearing, concerns were also raised in relation to some specific examples. For example, Mr Rodney Lewis from the Public Interest Advocacy Centre asked:

> … what if Xanana Gusmao were to write a book about his experiences? He was not charged with subversion when he was put on trial but he had some very serious offences on which he was found guilty. If he then wrote a book and sold it in Australia would the proceeds of that book be available under this law? Likewise for the Dalai Lama, just to give two of many examples.[27]

6.25 Similarly, during the hearing, Mr Simon Rice from Australian Lawyers for Human Rights raised another specific example:

> There is an example that illustrates just how broad this is—the Nelson Mandela example. Nelson Mandela has published and profits from his book, which reflects on his time having been incarcerated for the very serious charge of sabotage. He might well be caught by this legislation for income earned on that book.[28]

6.26 After the hearing, the Committee sought clarification from the Attorney-General's Department in relation to these examples. The Department pointed to section 154 of the POC Act:

> The legislation requires (section 154) a court to consider whether supplying a product was in the public interest and it may, at its discretion, decide not to make a literary proceeds order on this ground. Other factors which a court must consider before making an order include the social, cultural or educational value of the product or activity and how long ago the offence

26 *Committee Hansard*, 30 April 2004, p. 31.

27 ibid., p. 9.

28 ibid., p. 19.

> was committed. These considerations would make it very unlikely that these authors would be affected by these provisions.[29]

Conviction v commission

6.27 Mr Joo-Cheong Tham argued that several features of the literary proceeds scheme mean that 'any proposal to expand its ambit should be carefully scrutinised'.[30] In particular, he pointed out that:

> First, if an order is made, it will impose a penalty upon a convicted person additional to the sentence served. Second, while the court must be satisfied that a person has committed an indictable offence, the person does not have to be convicted of such an offence. Indeed, an acquittal does not affect the court's power to make a 'literary proceeds' order. Thirdly, the effect of an order is not merely to make writing books unprofitable. The breadth of the term, 'literary proceeds', mean[s] that an order can have a profound impact upon a person's earning capacity.[31]

6.28 Indeed, many of the freedom of speech concerns outlined above appear to be compounded by the fact that it is not necessary under the POC Act for a person to be *convicted* of an indictable offence or foreign indictable offence.[32] For example, subsection 153(1) simply refers to the person 'committing' the relevant offence. Similarly, proposed paragraph 20(1)(d) allows a court to make a literary proceeds order where it considers there are reasonable grounds to suspect that a person has *committed* an indictable offence or a foreign indictable offence, and that the person has derived literary proceeds in relation to the offence.

6.29 The Law Council of Australia suggested that the amendments to the POC Act should apply only to people actually *convicted* of an offence:

> While we accept the Government's intention is to ensure those who involve themselves in terrorist activity do no benefit commercially from any notoriety, we believe it would be unjust to extend the provision to those who were not convicted of an offence in a properly constituted criminal trial setting.[33]

6.30 In response, the Attorney-General's Department pointed out that the amendments were consistent with the civil forfeiture regime under the POC Act,

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29 Attorney-General's Department, *Submission 28*, p. 6.

30 Mr Joo-Cheong Tham, *Submission 9*, p. 13.

31 ibid.

32 See, for example, Australian Lawyers for Human Rights, *Submission 14*, p. 8-9; Mr Joo-Cheong Tham, *Submission 9*, p. 13; Law Council of Australia, *Submission 27*, p. 5.

33 Law Council of Australia, *Submission 27*, p. 5.

which means that a person does not need to have been convicted of an offence.[34] A representative of the Attorney-General's Department also argued that:

> If the person got off, it would be unlikely in the extreme that this legislation would apply … they get off for a reason and, in looking at this, our prosecutors would take that into account …[35]

Recognition of United States military commissions

6.31 As outlined in chapter 2, proposed section 337A in item 26 of the Bill contains an amended definition of 'foreign indictable offence'. This definition refers to an 'offence against a law of a foreign country', which is then defined to include:

> an offence triable by a military commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America and entitled 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism'.[36]

6.32 Many submissions criticised this amendment because it would impliedly endorse and legitimise US military commissions in Australian law.[37] This recognition was criticised on a number of grounds, which are discussed below.

Lack of procedural fairness

6.33 The Committee received many submissions which argued that the recognition of US military commissions was inappropriate due to the lack of procedural fairness

34 *Committee Hansard*, 30 April 2004, p. 30.

35 ibid.

36 Proposed subsection 337A(3).

37 Mr Hay, *Submission 1*, p. 2; Ms Pine, *Submission 2*, p. 2; Ms Russell, *Submission 3*, p. 2; Ms Thompson, *Submission 4*, p. 2; Women's International League for Peace and Freedom, *Submission 5*, p. 3; Mr Miller, *Submission 6*, p. 2; Professor George Williams and Mr Michael Walton, *Submission 7*, p. 2; Search Foundation, *Submission 8*, p. 2; Mr Joo-Cheong Tham, *Submission 9*, p. 16; Ms Schmah, *Submission 10*, p. 2; Amnesty International, *Submission 13*, p. 13; Canberra Islamic Centre, *Submissions 15 and 15A*; Civil Rights Network, *Submission 16*, p. 4; Public Interest Advocacy Centre, *Submission 17*, p. 5; Mr Bertuleit, *Submission 19*, pp. 2-3; New South Wales Council for Civil Liberties, *Submission 20*, p. 2; Justice and International Mission Unit, Uniting Church in Australia, *Submission 23*, p. 2; Law Council of Australia, *Submission 27*, p. 5.

involved in those US military commissions.[38] For example, Amnesty International Australia were concerned that the military commissions 'are in breach of fundamental international standards'.[39]

6.34 Professor George Williams commented further during the hearing:

> … I have strong concerns about recognising the military tribunal process in the United States relating to the Guantanamo Bay detainees. It legitimises that process in our law, I think in a very unfortunate way. It is primarily a symbolic recognition, you might say, but I think that is inappropriate given the nature of that process, the lack of basic rule of law protections and the lack of access to civilian courts.[40]

6.35 The Public Interest Advocacy Centre also stated:

> It seems clear that this aspect of the definition of 'foreign indictable offence' would effectively single out David Hicks and Mamdouh Habib, Australian citizens both currently detained in Guantanamo Bay. This is particularly concerning given that they have both been denied access to natural justice and their rights under the rule of law, particularly their right to be brought before a civilian court and to have access to legal representation of their choice. It would be a grave mistake to endorse such human rights breaches in Australian law.[41]

6.36 The Attorney-General's Department pointed out that US military commissions have already been recognised in Australian legislation in the *International Transfer of Prisoners Amendment Act 2004*, which recognises US military commissions for the purposes of the international transfer of prisoners regime.[42]

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38 Mr Hay, *Submission 1*, p. 2; Ms Pine, *Submission 2*, p. 2; Ms Russell, *Submission 3*, p. 2; Ms Thompson, *Submission 4*, p. 2; Women's International League for Peace and Freedom, *Submission 5*, p. 3; Mr Miller, *Submission 6*, p. 2; Professor George Williams and Mr Michael Walton, *Submission 7*, p. 2; Search Foundation, *Submission 8*, p. 2; Mr Joo-Cheong Tham, *Submission 9*, p. 16; Ms Schmah, *Submission 10*, p. 2; Amnesty International, *Submission 13*, p. 13; Canberra Islamic Centre, *Submissions 15 and 15A*; Civil Rights Network, *Submission 16*, p. 4; Public Interest Advocacy Centre, *Submission 17*, p. 5; Mr Bertuleit, *Submission 19*, pp. 2-3; New South Wales Council for Civil Liberties, *Submission 20*, p. 2; Justice and International Mission Unit, Uniting Church in Australia, *Submission 23*, p. 2; Law Council of Australia, *Submission 27*, p. 5.

39 Amnesty International Australia, *Submission 13*, p. 13.

40 *Committee Hansard*, 30 April 2004, p. 22.

41 Public Interest Advocacy Centre, *Submission 17*, p. 5.

42 Attorney-General's Department, *Submission 28*, p. 5. See also *International Transfer of Prisoners Act 1997*, section 4A.

Constitutional law issues

Bill of attainder

6.37 Professor George Williams and Mr Joo-Cheong Tham pointed out that the proposed amendments could be problematic constitutionally because they appear to be specifically directed at two specific individuals: David Hicks and Mamdouh Habib.[43] Professor George Williams and Mr Michael Walton argued that, as a result, this gave the Bill 'some of the features of a Bill of Attainder'.[44]

6.38 Professor George Williams explained further during the hearing:

> By 'bill of attainder' I am referring to a piece of legislation that directly or indirectly targets someone in a way that ultimately affixes a consequence upon them. It is not a law of general application, in other words. I was careful in the language I used in my submission in that I did not say, 'This is a bill of attainder,' and I do not think it is because it does not affix any form of criminal guilt. My concern is that, because it applies only in terms of a particular extension to two Australians who are being held in Guantanamo Bay, it has the appearance of something that is directed at them and I think that is very unfortunate … It is just so specific in its targeting that it suggests itself as a law that ought not be passed because of the way it is directed at two individuals as opposed to dealing with the general problem.[45]

6.39 In response to criticism that the Bill was aimed only at two specific people, a representative from the Attorney General's Department replied:

> I think it would lack credibility for us to say that the experience of that case might have inspired us to think about these issues, but the US military commission is a reality. It belongs to a country that has great resources and a great capacity to apprehend terrorists ... There may be a situation where they manage to get the person before we do. It seems unreasonable for the literary proceeds to be confiscable if we happen to get the people and deal with them under our law but if Joe Bloggs gets caught by the Americans and dealt with under the military commission, he gets off and does not have the proceeds taken. It is about dealing with the future crime and it does extend to other crimes as well.[46]

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43 Professor George Williams and Mr Michael Walton, *Submission 7*, p. 2; Mr Joo-Cheong Tham, *Submission 9*, pp. 15-16.

44 Professor George Williams and Mr Michael Walton, *Submission 7*, p. 2.

45 *Committee Hansard*, 30 April 2004, p. 23.

46 ibid., p. 26.

Separation of powers

6.40 Many submissions were also concerned about the implications of Australia recognising an executive order of a single foreign country (the United States).[47] Professor George Williams argued that the Bill could be contrary to the principle of the separation of powers by recognising offences that are the creations of the executive arm of government:

> I have a number of concerns about [the recognition of military tribunals]. One is a basic separation of powers concern. I do not think that Australian legislation should recognise something that is essentially an executive or non-judicial process. I think that it is appropriate to recognise judicial processes overseas, but I do not think we should ever give a judicial type investigation the same level of recognition as we do in this legislation.[48]

6.41 The Attorney-General's Department responded to this argument:

> Recognising an executive order of a foreign state does not violate the separation of powers doctrine. The Bill, if passed, will be passed by the Australian Parliament. The Executive and judicial branches of the Australian Government are not interfering in the process and are not exercising a power outside of that granted to them by the Australian Constitution.[49]

Lack of certainty

Pending US Supreme Court decision

6.42 A number of submissions also pointed out that the legality of the detention of some detainees at Guantanamo Bay (including Australians David Hicks and Mamdouh Habib) is soon to be decided by the Supreme Court of the United States.[50] Professor Williams and Mr Michael Walton submitted:

> Whether the detention of David Hicks and Mamdouh Habib is lawful and whether the President of the United States has the power to deny them access to civilian courts is soon to be decided by the Supreme Court of the United States. Until this has been determined, it is inappropriate to enact legislation that increases the impact of the military process referred to in the Bill. Otherwise, if Parliament enacts this definition of 'foreign indictable offence', Australia may find itself in the near future with a law that

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47 Professor George Williams and Mr Michael Walton, *Submission 7*, p. 2; Public Interest Advocacy Centre, *Submission 17*, p. 5; New South Wales Council for Civil Liberties, *Submission 20*, p. 2; Dr Omar, *Submission 21*, pp. 3-4.

48 *Committee Hansard*, 30 April 2004, p. 21.

49 Attorney-General's Department, *Submission 28*, p. 4.

50 Professor George Williams and Mr Michael Walton, *Submission 7*, p. 2; Mr Lewis, Public Interest Advocacy Centre, *Committee Hansard*, 30 April 2004, p. 9; New South Wales Council for Civil Liberties, *Submission 20*, p. 2.

> recognises an executive order of the United States that has been held to be unconstitutional.[51]

6.43 Professor George Williams commented further during the hearing:

> I think it would be somewhat embarrassing to legitimise that process or recognise it in any way when indeed it may well be found to be unconstitutional by the court of that nation.[52]

6.44 The Committee sought clarification from the Attorney-General's Department as to whether the pending US Supreme Court case could be problematic. The Department responded:

> The US Supreme Court is not considering the legality of the US Government's intentions to use military commissions to try Guantanamo Bay detainees. The only question before the US Supreme Court is whether US courts have jurisdiction to hear habeas corpus applications brought on behalf of the Guantanamo Bay detainees … In any case, the legitimacy of criminal or other courts is something which is always being challenged in different countries but the fact of a challenge is not a reason in itself to withhold recognition.[53]

6.45 However, Professor Williams argued that, setting aside the US Supreme Court case, 'the underlying arguments would suggest that [the US military tribunal process] should not be recognised'.[54]

Meaning of 'offences triable'

6.46 There also appeared to be considerable uncertainty as to the exact offences that would be triable under the Military Order referred to in proposed subsection 337A(3). The Committee inquired during the hearing as to content of the Military Order, and the source of the 'offences triable' under that Order.[55] In answers to questions on notice, the Attorney General's Department responded:

> The offences that are triable by military commission can be found in Military Commission Instruction No. 2 (MCI No. 2) issued by the Chief General Counsel of the United States Department of Defense. However, MCI No. 2 is not an exhaustive statement of the jurisdiction of United States military commissions. The additional offences can usually be ascertained by reference to the laws of war (contained in documents such as the Geneva Conventions and the Rome Statute of the International Criminal

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51 Professor George Williams and Mr Michael Walton, *Submission 7*, p. 2.

52 *Committee Hansard*, 30 April 2004, p. 21; see also Mr Rodney Lewis, Public Interest Advocacy Centre, *Committee Hansard*, 30 April 2004, pp. 9 and 11.

53 Attorney-General's Department, *Submission 28*, pp. 4-5.

54 *Committee Hansard*, 30 April 2004, p. 22; see also Mr Rodney Lewis, Public Interest Advocacy Centre, *Committee Hansard*, 30 April 2004, pp. 9 and 11.

55 *Committee Hansard*, 30 April 2004, pp. 32-33.

> Court). These offences will be more accessible than details of many offences in other countries (for example, they will be translated into different languages).[56]

6.47 In response to the Committee's queries as to whether it would be more appropriate to refer to the Military Commission Instruction itself, the Attorney-General's Department responded:

> Identifying MCI No. 2 as the source of jurisdiction would not provide greater certainty. That military commission instruction is not exhaustive and expressly states as much. For the purpose of literary proceeds we do not limit the foreign indictable offences to those found in any one piece of legislation. Recognising the source of a body's jurisdiction is different than recognising particular offences. To recognise only specific offences would run counter to the nature of the literary proceeds legislation.[57]

The Committee's view

6.48 The Committee considers that the amendments to the POC Act would have a retrospective operation. However, the Committee notes that this retrospectivity is consistent with the current application of the POC Act, which applies in relation to offences or convictions which occurred before the commencement of the POC Act.

6.49 However, the Committee considers that there is insufficient justification provided for the use of the words 'or indirectly' in proposed paragraph 153(1)(a) in item 24 of the Bill. The literary proceeds regime in the POC Act should be restricted to commercial exploitation of criminal notoriety and not situations where notoriety is *indirectly* related to the commission of an offence. The Committee considers that the amendments to the definition of 'literary proceeds' in paragraph 153(1)(a) should delete the words 'or indirectly'.

6.50 The Committee acknowledges the concerns in relation to freedom of speech, but considers that the Committee's proposed amendment above should alleviate those concerns. In addition, the Committee notes that the POC Act does not *prevent* publication, but rather targets profits received from those publications. In this context, the Committee also notes that section 154 of the POC Act allows a court to consider the social, cultural or educational value of the product or activity, and whether supplying the product or carrying out the activity is in the public interest.

6.51 The Committee notes the concerns raised in relation to the civil forfeiture regime under the POC Act, and that a person does not need to have been *convicted* of an offence. However, similar concerns were raised during the Committee's previous inquiry into the *Proceeds of Crime Bill 2002* and related legislation. In that instance,

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56 Attorney-General's Department, *Submission 28*, p. 7.

57 Attorney-General's Department, *Submission 28*, p. 7.

the Committee was persuaded by the arguments supporting the introduction of a Commonwealth civil forfeiture regime.[58]

6.52 The Committee also recognises that there is a requirement under section 327 of the POC Act for the operation of the Act to be reviewed as soon as practicable after the third anniversary of commencement of the POC Act. The Committee suggests that this review consider the impact of the retrospective operation of the legislation; and whether the legislation has had any adverse effects on freedom of speech.

6.53 Finally, the Committee agrees that the recognition of an executive order of a single foreign country in the definition of 'foreign indictable offence' in item 26 of the Bill is inappropriate, particularly in light of the uncertainty surrounding that particular order. The Committee acknowledges that US military commissions have already been recognised in Australian legislation, but considers that the context of that recognition was very different. The Committee notes that the *International Transfer of Prisoners Amendment Act 2004* recognises US military commissions as a US court or tribunal for the purpose of facilitating the movement of prisoners between countries. The Committee considers that, in contrast, these amendments are effectively endorsing the US military commission process by affixing adverse consequences in Australian law upon persons convicted under that process.

6.54 The Committee therefore recommends that item 26 of the Bill be amended to omit proposed subsection 337A(3).

Recommendation 6

6.55 The Committee recommends that item 24 of the Bill be amended to remove the words 'or indirectly' in the amendments to paragraph 153(1)(a) of the *Proceeds of Crime Act 2002*.

Recommendation 7

6.56 The Committee recommends that the review of the operation of the *Proceeds of Crime Act 2002*, required under section 327 of that Act, considers the impact of the retrospective operation of the legislation, and whether the legislation has had any adverse effects on freedom of speech.

58 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, April 2002, pp.41-42.

Recommendation 8

6.57 The Committee recommends that item 26 of the Bill be amended to omit proposed subsection 337A(3).

Senator Marise Payne

Chair

DISSENTING REPORT BY AUSTRALIAN DEMOCRATS

1.1 The Australian Democrats oppose the vast majority of the measures proposed by this Bill.

1.2 We take the view that the Bill, in its current form, is so fundamentally flawed that it should be opposed in its entirety. However, we welcome a number of the constructive recommendations made by the Committee, some of which incorporate proposed amendments to the Bill.

1.3 In particular, the Democrats support the recommendations made in paragraphs 3.47, 4.49, 4.50, 6.55, 6.56 and 6.57. We do not support the recommendations made in paragraphs 4.51 or 5.23.

1.4 Many of the Democrats' concerns with this Bill have been canvassed at length in the Committee Report. The purpose of this report is to provide a summary of our primary concerns – that is, those which are fatal to our support of the Bill.

Amendments to the Crimes Act 1914

1.5 There is a lack of any compelling justification for an extension of the investigation period in relation to terrorism offences, particularly since no such extension has been considered necessary in relation to other complex, multi-jurisdictional offences.

1.6 We question the necessity of increasing the investigation period for terrorism offences when ASIO already has extensive detention and questioning powers in relation to terrorism. During debate on the ASIO powers, the Democrats noted that there was some ambiguity as to whether the underlying purpose of the powers was intelligence-gathering or criminal investigation. Despite the Democrats attempts to resolve this ambiguity by way of amendment, it is now enshrined in the legislation. For this reason, we find the AFP's argument that the respective regimes have different underlying purposes and safeguards unconvincing.

1.7 Once again, the Democrats express our concern regarding the broad definition of a terrorist act under Commonwealth anti-terrorism legislation and the potential that this creates for individuals who are not terrorists to be charged with terrorism offences.

1.8 We are deeply concerned that the Bill permits the extended detention of children and Aboriginal and Torres Strait Islanders for more than 20 hours and we note the concerns expressed by Amnesty International that this may breach Article 37 of the *Convention on the Rights of the Child.*

1.9 The Democrats believe that the power to grant an extension of time for the investigation period should be restricted to magistrates and should not be vested in justices of the peace, or persons authorised to grant bail.

1.10 We are concerned by the potential for unlimited "dead time" during the investigation period and believe that the Bill should set out a maximum period of detention, including dead time.

Amendments to the Crimes (Foreign Incursions and Recruitment) Act

1.11 The Democrats are yet to be convinced that the proposed amendments to the Foreign Incursions legislation are necessary, given the Government already has powers to proscribe armed forces engaged in hostilities under the Criminal Code.

1.12 The Democrats take this opportunity to reiterate our strong opposition to the proscription regime. Whilst the Government must be legislatively equipped to combat the threat of terrorism, we believe that it should target criminal behaviour, not thought or association.

1.13 We are deeply concerned by the lack of criteria for prescribing organisations under the proposed amendments to the Foreign Incursions legislation and were amazed to hear the Attorney-General's Department concede that the amendments would enable the Government to prescribe the Boy Scouts if it wished. We support the Committee's recommendation in paragraph 4.49 that the Bill be amended to include criteria for prescribing organisations under the Foreign Incursions legislation.

1.14 Like many of the submissions to the Committee, the Democrats have concerns regarding the use of Ministerial certificates. Given the heavy penalties which apply to offences under the Foreign Incursions legislation (which are increased by this Bill), the Democrats believe that , in any given case, the prosecution should be required to present compelling evidence to establish each of the elements the offence.

Amendments to the Criminal Code Act

1.15 The Democrats primary concerns in relation to these amendments relate to broad and imprecise definitions. In particular, we are concerned by scope of the definition of a terrorist organisation and the potential for this definition to incorporate legitimate resistance movements. It is also unclear what it means to be a "member" of an organisation or to have received "training" from an organisation. For example, would a person be classified as a member of an organisation by virtue of having attended a meeting of the organisation? Unless these terms are more tightly defined, there is a real risk that the legislation will capture individuals who are not in any way associated with terrorism.

1.16 The Democrats oppose the strict liability provision in section 102.5 of the Bill. This provision will essentially reverse the onus of proof for recklessness, thereby compromising the presumption of innocence until proven guilty.

Amendments to the Proceeds of Crime Act

1.17 The Democrats have a long-record of opposing retrospective legislation. We take the view that one of the functions of the law is to provide certainty to individuals in the ordering of their affairs and the decisions they make. Retrospective changes to the law compromise the ability of individuals to make informed choices about how they live their lives, as they can never be certain that a particular act, which is legal at the time, will not subsequently be made illegal. Although the changes to the Proceeds of Crime Act do not give rise to retrospective criminal liability, they do have the potential to detrimentally affect the rights of individuals. .

1.18 The Democrats share the Committee's concerns regarding the problems associated indirect notoriety as the result of an indictable offence. We support the Committee's recommendation in paragraph 6.55 to remove indirect notoriety from the Bill.

1.19 The Democrats are concerned that the test relating to literary proceeds does not require a person to have been convicted of an indictable offence – the court simply needs to be satisfied that they have committed such an offence. The Democrats do not see how a court could properly establish that a person has committed an indictable offence other than after a trial in which all the relevant evidence has been presented to the Court.

1.20 For the reasons outlined by the Committee, the Democrats strongly oppose any recognition of United States Military Commissions. We support the Committee's recommendation in paragraph 6.57.

1.21 The Democrats firmly believe that the Anti-Terrorism Bill 2004 should be opposed and, in the absence of wide-ranging amendments, we will be voting against it.

Senator Brian Greig

APPENDIX 1

ORGANISATIONS AND INDIVIDUALS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

01 Mr Denis Hay

02 Ms Judy Pine

03 Ms Ruth E. Russell

04 Ms Valerie Thompson

05 Women's International League for Peace and Freedom

06 Mr Eric Miller

07 Professor George Williams and Mr Michael Walton

07A Professor George Williams

08 Search Foundation

09 Mr Joo-Cheong Tham

10 Ms Kristina Schmah

11 Australian Institute of Criminology

12 Mr John Poppins

13 Amnesty International Australia

14 Australian Lawyers for Human Rights

15 Canberra Islamic Centre

15A Canberra Islamic Centre

16 The Civil Rights Network

17 Public Interest Advocacy Centre

17A Public Interest Advocacy Centre

18 Castan Centre for Human Rights Law, Monash University

19 Mr Tom Bertuleit

20 New South Wales Council of Civil Liberties

21 Dr Imtiaz Omar

22 Victoria Police

23 Justice and International Mission Unit, Uniting Church in Australia

24 Law Institute of Victoria

25 Tasmania Police

26 Australian Federal Police

26A Australian Federal Police

27 Law Council of Australia

28 Attorney-General's Department

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Friday 30 April 2004

Australian Federal Police

Commissioner Michael Keelty

Federal Agent Nicholas Anticich, National Manager Counter Terrorism

Federal Agent David Batch, Senior Legislation Officer

Public Interest Advocacy Centre

Mr Rodney Lewis, Board Member

Ms Annie Pettitt, Policy Officer

Castan Centre for Human Rights Law, Faculty of Law, Monash University

Mr Patrick Emerton, Member

Australian Lawyers for Human Rights

Mr Simon James Rice, President

Mr Simeon Beckett, Spokesperson

Professor George Williams (Private capacity)

Attorney-General's Department

Mr Geoffrey McDonald, Assistant Secretary, Criminal Law Branch

Mr Marc Hess, Senior Legal Officer, Security Law and Justice Branch