

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S PORTFOLIO

Program: Australian Human Rights Commission

Question No. SBE16/037

Senator McKim asked the following question at the hearing on 18 October 2016:

Senator McKIM: Professor Triggs, this will be my last group of questions. It has been a reasonably long day already, and I do not wish to make it unnecessarily longer. The first matter I would seek your advice on is whether the commission or you are aware of the legislation that has been tabled by the government to provide for post-sentence detention of certain categories of people—in broad terms, those who have been convicted of offences against national security. Firstly, are you aware of that? Secondly, was the commission consulted during the drafting of that legislation?

Prof. Triggs: We are certainly very well aware of it. We have made a submission in relation to it.

...

Senator McKIM: But we all understand the legislation, and Professor Triggs has confirmed that she understands the legislation that I am referring to. Forgive me, Professor Triggs, is your submission a public document?

Prof. Triggs: Yes, it is.

Senator McKIM: Yes, and I apologise—

Prof. Triggs: I should correct myself. It is possibly not on the web yet.

Senator McKIM: I think someone is nodding behind you.

Prof. Triggs: It is on the web.

Senator McKIM: It is? My apologies. I was not aware of that, and I have not read your submission.

CHAIR: You have not read something!

Senator McKIM: No, I have not.

CHAIR: How awful!

Senator McKIM: Chair, I know the point you are making.

CHAIR: I am not making any point.

Senator McKIM: My view on these matters is that if I have not read something I should be clear about that and explain the reasons why, which I have done, and I have apologised to Professor Triggs for not reading it. However, just in very broad terms, could you categorise your concerns, if any, with this legislation or can any of the other commissioners?

Prof. Triggs: Senator McKim, I really would prefer to take that on notice.

Senator McKIM: Okay.

Prof. Triggs: As you know, I did the work on this before Christmas last year. The Attorney could correct me, but I have done the work on it and was prepared to make an oral submission in relation to it. But I really would need to refresh my memory before I speak in particular on it. May I say one thing, and I believe that this is accurate: I was very pleased indeed to see that there is judicial supervision of this proposal, and one of the things that I have spoken about before at the Joint Committee on Intelligence and Security—and it has been a longstanding concern to me and others at the commission—is that some of the counterterrorism legislation has not had judicial supervision. I notice that, with regard to this, judicial supervision has been included, and that we are very pleased indeed to see because the concept is so important as a matter of principle. If that is now understood as a critical part of legislation that quite properly protects Australia's national interest, then we at the commission feel that there has been a step forward.

Senator McKIM: Yes, I certainly agree. If we are going to go down this path, it would be better done with judicial oversight. Thank you for taking that question on notice.

Senator Brandis: Thank you for that, Professor Triggs. Might I say, by the way, as the person who was effectively the author of this bill, it was never my intention to approach it otherwise than through a judicial process.

Senator McKIM: It seems that, as Professor Triggs has just said, there have been a number of pieces of national security legislation in the past that have not contained provisions for judicial oversight.

Senator Brandis: That is true, but the bills to which you refer actually were not my bills. But, in relation to this one, there was never any question in my mind that the appropriate authority before whom an application for the extension of a period of detention should be brought was a judge.

Senator McKIM: Thank you, Attorney. I appreciate that clarification. Professor, before we leave that subject, in your response on notice I would be very grateful if you could consider, if it is not contained in your submission, the burden of proof—I guess that is the correct usage—that will need to be cleared before post-sentence detention can be actioned under this legislation. I will leave it at that for now.

Prof. Triggs: Thank you, Senator McKim. You raise an important question, again, because in general we have been very concerned at the shifting of the burden of proof, whether it is evidentiary or persuasive. I will look at this in particular, and we will get back to you on that particular point.

The answer to the honourable senator's question is as follows:

The Commission is aware of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth). The Commission was not consulted during the drafting of that Bill, although it is not usual for the Commission to be consulted on drafts of proposed criminal justice legislation prior to them being made public.

On 12 October 2016, the Commission made a submission to the Parliamentary Joint Committee on Intelligence and Security in relation to its inquiry into the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth).¹

The Human Rights Commissioner appeared before the Committee on 14 October 2016 to give evidence in person.²

¹ Australian Human Rights Commission, submission to the Parliamentary Joint Committee on Intelligence and Security in relation to its inquiry into the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth). At <http://www.aph.gov.au/DocumentStore.ashx?id=32397a66-a179-4a07-a5fb-ab60b776676f&subId=414693> (viewed 1 November 2016).

² Evidence to Parliamentary Joint Committee on Intelligence and Security, Canberra, 14 October 2016. At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommjnt%2Fc4fa0987-d442-43b7-8b7d-be54754573d9%2F0002;query=Id%3A%22committees%2Fcommjnt%2Fc4fa0987-d442-43b7-8b7d-be54754573d9%2F0000%22> (viewed 1 November 2016).