

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
AUSTRALIAN HUMAN RIGHTS COMMISSION

Question No. 7

Senator Barnett asked the following question at the hearing on 19 October 2009:

Provide details on the aspects of Australia's anti-terrorism laws that the Commission believes do not adequately meet Australia's international obligations

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

The Commission has provided submissions to a number of committees and inquiries in relation to Australia's anti-terrorism laws. The answer to this question is drawn from those reviews. The Commission has not conducted an additional review of Australia's anti-terrorism laws for the purpose of answering this question.¹

Australia is under an obligation to take practical steps to prevent and combat terrorism.² As part of that obligation Australia must ensure that measures taken to combat terrorism comply with its other obligations under international law. Except in respect of non-derogable rights (such as the right of life, the right not to be subject to torture or to inhumane or degrading treatment or punishment and the right not to be held in slavery or servitude) these obligations allow States to take measures to limit or qualify internationally recognised human rights. However, these measures must, amongst other things, be prescribed by law, be necessary, and conform to the principle of proportionality.³ The critical element of the test as to whether the limitations are appropriate, is proportionality. The question is whether the action is proportionate to the aim it is to achieve. It will be proportionate if it is the least intrusive means of achieving the aim.

It is on the above basis that the Commission has given consideration to the anti-terrorism provisions identified below.

Australia's international obligations come from a number of sources. These include, most relevantly:

- *International Covenant on Civil and Political Rights (ICCPR)*
- *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*
- *Convention on the Rights of the Child (CRC)*.

The Commission's view is that some provisions of Australia's anti-terrorism laws do not adequately meet the obligations set out in these treaties, as set out in the table below.

¹ Attached as annexure A is a list of those submissions.

² *The United Nations Global Counter-Terrorism Strategy*, GA Resolution 60/288, UN Doc A/RES/60/288 (2006).

³ Office of the High Commissioner for Human Rights, *Proposals for "Further Guidance" for the submission of reports pursuant to paragraph 6 of the Security Council Resolution 1373(2001). Compliance with International Human Rights Standards*. At <http://www.un.org/sc/ctc/documents/ohchr2.htm>

Legislative provision	International obligation not being adequately met	Inadequacy
<i>Australian Security Intelligence Organisation Act 1979 (Cth)</i>		
<p>Division 3—Special powers relating to terrorism offences.</p> <p>ASIO powers of detention.</p> <p>Creates three kinds of warrants; Questioning Warrants, Detention Warrants and Children’s Warrants.</p>	<p>ICCPR</p> <p>Article 9(1) – the right to liberty and freedom from arbitrary detention</p> <p>Article 9(4) – the right to have the legality of ones’ detention determined by court without delay</p> <p>Article 14(3) – the privilege against self-incrimination</p> <p>Article 17 – the prohibition against arbitrary or unlawful interference with a person’s privacy</p> <p>CRC</p> <p>Article 3(1) – the requirement that best interests of a child be a primary concern</p> <p>Article 37(b) – the requirement that detention of a child is a last resort and for the shortest period of time</p>	<p>Provisions amount to arbitrary detention as they are not the least restrictive means to achieve the aim.</p> <p>Restrictions are placed on the extent to which a lawyer can be present and on their ability to advise their client.</p> <p>Specific exclusion of the privilege against self incrimination.</p> <p>Communications between a lawyer and his client are not permitted to be held in private.</p> <p>Permits the detention of children between the ages of 16 and 18 and makes no provision for the best interests of the child to be a primary consideration.</p> <p>Limited judicial review.⁴</p>
<i>Crimes Act 1914 (Cth)</i>		
<p>Division 3A—Powers to stop, question and search persons in relation to terrorist acts.</p> <p>Allows a police officer to:</p> <ul style="list-style-type: none"> • demand a person’s name, address, their reason be for being in the Commonwealth place and evidence identity • stop and detain a person for the purposes of carrying out a search for terrorism related items and to seize those things. 	<p>ICCPR</p> <p>Article 3 – the right to an effective remedy for violation of ICCPR rights</p> <p>Article 12 – the right to liberty of movement</p> <p>Article 17 – the prohibition against arbitrary or unlawful interference with a person’s privacy</p>	<p>Disproportionate response to the aim sought to be achieved and not the least restrictive means of doing so.</p> <p>Time for which the zone is prescribed is too long.</p> <p>Lack of judicial oversight.</p> <p>Lack of transparency of the process for prescribing the zone.</p> <p>No specified criteria to be considered by the Minister.</p> <p>Lack of requirement to notify the public of the prescription.⁵</p>

⁴ Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD: Review of Division 3 Part III of the ASIO Act 1979 (Cth)* (April 2005). At http://humanrights.gov.au/legal/submissions/asio_asis_dsd_review.html.

⁵ Australian Human Rights Commission, *Submission to the ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (March 2006)

Crimes Act 1914 (Cth)		
s 15AA Bail not to be granted in certain cases. Prohibits the grant of bail unless a person establishes 'exceptional circumstances' exist to justify bail.	Article 9(3) – the prohibition against a general rule that persons awaiting trial shall be detained in custody	Reversal of onus of proof in granting bail in terrorism matters; very high threshold for the defendant to meet.
Part IAE—Video link evidence in proceedings for terrorism and related offences etc. Requires that video evidence be given by witnesses in certain circumstances.	ICCPR Article 14(1) – the right to a fair hearing CAT Article 7 and 15 – the prohibition on the use of evidence obtained involuntarily	Different tests adopted for the prosecution and the defendant. Allows for video evidence from overseas to be admitted in circumstances where it may be obtained involuntarily.
Part 1C Div 2 Detention without charge A person arrested for a terrorism offence can be detained, without being charged, until the 'investigation period' expires. This period can be extended without limit.	Article 9(1) – the right to liberty and freedom from arbitrary detention Article 9(2) – the right to be informed, at the time of arrest, of the reasons for arrest and be promptly informed of any charges Article 9(3) – the right of person arrested or detained to be brought promptly before a judge Article 9(4) – the right to have the legality of ones' detention determined by court without delay	Unlimited period of detention. Delay in being promptly advised of charges. Delay in being brought promptly before a judge or other officer. ⁶
Criminal Code Act 1995 (Cth)		
S 100.1(2) Definition of 'terrorist act'	ICCPR – Article 15 – the duty on State parties to define precisely by law all criminal offences	The inclusion of 'threat of action' makes the definition unclear and imprecise.
S 102.1 Proscription of terrorist organisations. Establishes a process for the proscription of a	ICCPR – Article 19(3) – the right to freedom of expression The principle of proportionality – the least restrictive means of achieving the objective.	Not proportionate as a result of absolute nature of the Attorney-General's power. Lack of opportunity to oppose proscription. ⁷

⁶ Australian Human Rights Commission, *Submission to the Attorney General on the Discussion Paper on Proposed Amendments to National Security Legislation*, (9 October 2006). At http://humanrights.gov.au/legal/submissions/2009/20091009_national_security.html#Heading271.

⁷ Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Power to Proscribe Terrorist Organisations*, (February 2007). At http://humanrights.gov.au/legal/submissions/2007/proscription_powers_terrorist_org_feb2007.html.

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<i>Criminal Code Act 1995 (Cth)</i>		
<p>Offences relating to terrorist organisations:</p> <p>102.3 membership</p> <p>102.5 training or receiving training.</p> <p>102.7 providing support.</p> <p>102.8 associating with.</p>	<p>The principle of proportionality – the least restrictive means of achieving the objective.</p> <p>ICCPR</p> <p>Article 15 – the duty on State parties to define precisely by law all criminal offences</p> <p>Article 22 – the right to freedom of association</p> <p>Article 19(2) – the right to freedom of expression</p>	<p><u>Membership</u> – s 102.3 places excessive burden on the accused to prove that they took all reasonable steps to cease to be a member of the organisation.</p> <p><u>Training</u> – s 102.5 – extends to legitimate training in no way connected with terrorism</p> <p><u>Support</u> – s 102.7 – extends to both direct and indirect support and therefore legitimate conduct.</p> <p><u>Association</u> – s 102.8 – will extend to people who are associated in a very loose and indirect way.⁸</p>
<p>Division 104</p> <p>Control orders</p> <p>Allows for extraordinary obligations, prohibitions and restrictions to be imposed on people the subject of the orders</p>	<p>ICCPR</p> <p>Article 9 – the right to liberty and freedom from arbitrary detention</p> <p>Article 12 – the right to liberty of movement</p> <p>Article 14(1) – the right to a fair hearing</p> <p>Article 17 – the prohibition against arbitrary or unlawful interference with a person’s privacy</p> <p>Article 22 – the right to freedom of association</p> <p>Article 19(2) – the right to freedom of expression</p> <p>Principle of proportionality – the least restrictive means of achieving the objective</p> <p><i>International Covenant on Economic, Social and Cultural Rights</i></p> <p>Article 7 – the right to work</p>	<p>The restrictions that are imposed under the orders are exceedingly intrusive on the lives of those subject to them.</p> <p>No requirement for consideration as to whether measure or condition is the least restrictive means of achieving the aim.</p> <p>The interim hearing of the application for an order is <i>ex parte</i> and may therefore proceed in the absence of the subject.⁹</p>

⁸ Australian Human Rights Commission, *Submission to the Security Legislation Review* (January 2006). At http://humanrights.gov.au/legal/submissions/security_legislation_review.html. And Australian Human Rights Commission, *Submission to the Attorney General on the Discussion Paper on Proposed Amendments to National Security Legislation*, (9 October 2006). At http://humanrights.gov.au/legal/submissions/2009/20091009_national_security.html#Heading271.

⁹ Australian Human Rights Commission, *Submission to the ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (March 2006)

<i>Criminal Code Act 1995 (Cth)</i>		
<p>Division 105</p> <p>Preventative detention orders</p> <p>Allows for the arrest and detention of people for the prevention of a terrorist act and the protection of evidence</p>	<p>ICCPR</p> <p>Article 9 – the right to liberty and freedom from arbitrary detention</p> <p>Article 9(4) – the right to have the legality of ones’ detention determined by court without delay</p> <p>Article 14(1) – the ability to contest all the arguments and evidence adduced by the other party.¹⁰</p> <p>Article 12 – the right to liberty of movement</p> <p>Article 17 – the prohibition against arbitrary or unlawful interference with a person’s privacy</p> <p>Article 22 – the right to freedom of association</p> <p>Article 19(2) – the right to freedom of expression</p> <p>Article 10(1) – the right to be treated with humanity when detained</p> <p><i>International Covenant on Economic, Social and Cultural Rights</i></p> <p>Article 7 – the right to work</p> <p>CRC</p> <p>Article 3(1) – the requirement that the best interests of a child be a primary concern</p> <p>Article 37(b) – the requirement that the detention of a child is a last resort and for the shortest period of time.</p>	<p>No requirement for consideration as to whether measure or condition is the least restrictive means of achieving the aim.</p> <p>The restrictions that are imposed under the orders may be exceedingly intrusive on the lives of those subject to them.</p> <p>Person in detention is unable to access the courts to have the validity of the detention tested during the period of detention.</p> <p>Rights of review under the ADJR are removed.</p> <p><i>Ex parte</i> nature of the issuing, revocation and extension applications may prevent a person from presenting and or contesting evidence at a hearing.</p> <p>Prohibition on contact with anyone, including family and employer is excessive.</p> <p>Communications between a lawyer and his client are not permitted to be held in private.</p> <p>Limitations placed on the role which a lawyer can play and the nature of the advice they can give their client.</p> <p>Permits the detention of children between the ages of 16 and 18 and makes no provision for the best interests of the child to be a primary consideration.¹¹</p>

¹⁰ *Äärelä v Finland* Communication No 779/1997 CCPR/C/73/D/779/1997 at 7.4

¹¹ Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Bill (No 2) 2005* (11 November 2005). At http://humanrights.gov.au/legal/submissions/terrorism_sub_12-11-2005.html.

<i>National Security Information (Civil and Criminal Proceedings) Act 2004 (Cth)</i>		
<p>Establishes a scheme to prevent the disclosure of national security information in certain civil and criminal proceedings where disclosure is likely to prejudice national security</p>	<p>ICCPR Article 14(3) – the right to ‘equality of arms’, to know the case against you and to have counsel or legal assistance of your own choosing Article 2(3) – the right to an effective remedy for violation of ICCPR rights</p>	<p>Holding of closed hearings denies the accused the right of being present at his or her own hearing.</p> <p>The requirement for a legal practitioner to have security clearance may prevent a person from having the lawyer of his choosing in circumstances where the chosen lawyer poses no risk to national security.</p> <p>Operates so as to unduly restrict the ability of Courts to provide remedies for the potential human rights violations in breach of article 2(3) by limiting access to information.¹²</p>

¹² Australian Human Rights Commission, *Submission To The Senate Legal And Constitutional Legislation Committee On The National Security Legislation Amendment Bill 2005* (6 April 2005). At http://humanrights.gov.au/legal/submissions/nat_secure_2005.html.

Submissions in relation to national security legislation

	SUBMISSIONS	Date
1.	Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002	23 May 2002
2.	Submission Of The Human Rights And Equal Opportunity Commission To The Australian Law Reform Commission In Response To Background Paper 8: Protecting Classified And Security Sensitive Information	September 2003
3.	Submission Of The Human Rights And Equal Opportunity Commission To The Australian Law Reform Commission In Response To Background Paper 8: Protecting Classified And Security Sensitive Information	March 2004
4.	An Inquiry into provisions of the National Security Information (Criminal Proceedings) Bill 2004 and National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004	2 June 2004
5.	Provisions of the Anti-Terrorism Bill (No. 2) 2004	8 July 2004
6.	Response to questions on notice arising from the National Security Legislation Amendment Bill 2005	April 2005
7.	Review of Division 3 Part III of the <i>ASIO Act 1979</i> (Cth)	4 April 2005
8.	National Security Legislation Amendment Bill 2005	6 April 2005
9.	Law and Justice Legislation Amendment (Video Evidence and Other Measures) Bill 2005	17 October 2005
10.	Anti-Terrorism Bill (No.2) 2005	11 November 2005
11.	Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005	January 2006
12.	Security Legislation Amendment (Terrorism) Act 2002 (Cth) and Criminal Code Amendment (Terrorism) Act 2003 (Cth)	January 2006
13.	Comments on the Anti-Money Laundering and Terrorism Financing Bill 2006 and draft consolidated AML/TF Rules	August 2006
14.	Anti-Money Laundering and CounterTerrorism Financing Bill 2006	20 November 2006
15.	Review of the power to proscribe terrorist organisations	February 2007
16.	Submission to the Clarke Inquiry on the Case of Dr Mohamed Haneef	May 2008
17.	Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No.2]	12 September 2008
18.	Inquiry into the National Security Legislation Monitor Bill 2009	27 July 2009
19.	National Security Legislation Proposed Amendments	9 October 2009