



amnesty international australia

Submission to the

Senate Legal and Constitutional Legislation Committee

regarding the

INQUIRY INTO THE ANTI-TERRORISM BILL (NO 2) 2004

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Submitted by

Amnesty International Australia

Locked Bag 23
Broadway NSW 2007

Phone: Suzanne Clark (02) 9217 7640

Fax: (02) 9217 7663

The global defender of human rights

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1. Introduction

Since the tragic events of 11 September 2001 in the United States of America, many States have enacted measures and amended legislation regarding national security. As an independent and impartial global human rights organisation, Amnesty International is monitoring the enactment of such legislation and its impact on human rights.

Amnesty International Australia continues to closely monitor legislation introduced in Australia since September 2001 to counter “terrorism”. Amnesty International Australia made submissions to and appeared before this Committee in May 2002 during its inquiry into the *Security Legislation Amendment (Terrorism) Bill 2002* [No. 2]. Submissions were also made to the review of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* to the Parliamentary Joint Committee on ASIO, ASIS and DSD and to the Senate Legal and Constitutional References Committee in 2002. Amnesty International Australia also recently made submissions to this Committee for the inquiries into the *Anti-Terrorism Bill 2004* and the *National Security Information (Criminal Proceedings) Bill 2004* and the *National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004*.

It is important to note that Amnesty International does not use the term “terrorism”; there is no universally accepted definition applied within international relations or international law. Amnesty International focuses on the acts of violence perpetrated and the human rights violations committed instead of labelling acts as “terrorism”. Governments and other actors may use “terrorism” to describe and condemn what they consider to be the unlawful or illegitimate use of violence for political purposes - usually by non-state actors. However, States may disagree as to the circumstances in which the use of violence may be considered unlawful. The use of the term often correlates to one’s attitude towards a certain act of violence.

Amnesty International’s mission is to promote and defend all the human rights enshrined in the *Universal Declaration of Human Rights* and other international standards. Amnesty International is the world’s largest independent human rights organisation, comprising more than 1.5 million members and supporters in over 150 countries and territories. Amnesty International is impartial and independent of any government, political persuasion or religious belief.

2. Summary

The critical human rights concern held by Amnesty International Australia towards the proposed *Anti-Terrorism Bill (No 2)* 2004 relates to the proposed amendment to create an offence of association with someone who is a member of a “terrorist” organisation.

Amnesty International Australia’s main concerns are that:

- the proposed amendment may breach the right to freedom of association.
- there are already provisions in existing legislation that cover providing an organisation with support to conduct a terrorist act. The enactment of the proposed provisions cover conduct that is not directly associated with a “terrorist” act and may punish association for peaceful means.
- the definition of being a “member” of a terrorist organisation is too broad and vague, and that this vagueness is then compounded by provisions to cover the act of associating with a “member”.

Amnesty International acknowledges the duty of governments to protect the rights and safety of people within their territory. At the same time, Amnesty International recognises that with this duty comes an obligation of the State to undertake such protection within a human rights framework. Protecting the rights and safety of its citizens must not be at the cost of fundamental human rights and civil liberties.

Amnesty International Australia reminds the Australian Government that measures taken to address issues of national security must be congruent with its obligations under international law.

Fundamental human rights and civil liberties represent the minimum international standards States must adhere to in order to protect the safety and integrity of individuals from the risk of abuse. Amnesty International endorses the United Nations Security Council’s reaffirmation that:

“...States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law”.¹

¹ *United Nations Security Council Resolution 1456 (2003). Para. 6*

As stated by the late United Nations High Commissioner of Human Rights, Mr Sergio Vieira de Mello, in an address to the United Nations Counter-Terrorism Committee in October 2002:

“the best - the only - strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law”.

The measures adopted by the Australian Government post-September 2001 in relation to anti-“terrorism” laws, and the subsequent threat and/or erosion of civil liberties and human rights are of serious concern to Amnesty International Australia. The Australian Government first announced its intention to introduce anti-“terrorism” legislation in October 2001. Five bills were introduced on 12 March 2002² and a sixth bill was introduced on 21 March 2002.³ After various Committee inquiries and parliamentary debate, all bills were amended and passed in Parliament.

Amnesty International Australia is seriously concerned that the Australian Government is introducing provisions in a piece-meal fashion, as evident in the introduction and passage of the *Criminal Code Amendment (Terrorist Organisations) Bill* 2003 earlier this year, the introduction of the *Anti-Terrorism Bill* 2004, the introduction of the *National Security Information (Criminal Proceedings) Bill* 2004 and the *National Security Information (Criminal Proceedings)(Consequential Amendments) Bill* 2004, the introduction of the *Anti-Terrorism Bill (No 2)* 2004 and also the introduction of the *Anti-Terrorism Bill (No 3)* 2004. This ongoing process places a great strain upon organisations and individuals who wish to participate in the democratic process by preparing submissions. It also makes it extremely difficult to maintain a complete awareness and understanding of all of the legislation.

3. Amnesty International’s Concerns

3.1 Amendments to the Criminal Code Act 1995: Associating Offence

The *Anti-Terrorism Bill (No 2)* 2004 seeks to create a new offence of associating with “terrorist” organisations. To quote the Attorney-General in his second reading

² *Security Legislation Amendment (Terrorism) Bill; Suppression of the Financing of Terrorism Bill; Border Security Protection Amendment; Criminal Code Amendment (Suppression of Terrorist Bombing) Bill; Telecommunications Interception Legislation Amendment Bill*

³ *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill* 2002

speech, “[t]he amendments make it an offence to intentionally associate with a person who is a member or who promotes or directs the activities of a listed terrorist organisation where that association provides support that would help the terrorist organisation to continue to exist or to expand”.⁴

It is important to note that “this offence does not require proof of a connection with a terrorist act”.⁵

The Bill provides for a range of exceptions. These exceptions are:

- An association with close family members if the association “relates only to a matter that could reasonably be regarded (taking into account the person’s cultural background) as a matter of family or domestic concern”⁶;
- An association in a place being used for public religious worship and occurs during practising a religion⁷;
- An association for the purpose of providing humanitarian aid⁸; or
- An association for the purpose of providing legal advice or legal representation in connection with criminal proceedings or proceedings relating to whether the organisation in question is a “terrorist” organisation.⁹

Amnesty International Australia is concerned that this provision may breach the right to freedom of association.¹⁰ The provision is broadly drafted and followed by a list of exceptions. It is the position of Amnesty International Australia that such a provision is too broad in its scope and may cover many types of acts and associations outside the intended purview of the provision. The section only states that the person must know that the organisation is a “terrorist” organisation and must intend that the support that the person gives assist the organisation to expand or to continue to exist.¹¹ A person would not need to actually be involved in planning or carrying out a “terrorist” act to commit an offence under this section. Their actions may well have no

⁴ Commonwealth, *Parliamentary Debate*, House of Representatives, 17 June 2004, p. 30712, Attorney General.

⁵ Commonwealth, *Parliamentary Debate*, House of Representatives, 17 June 2004, p. 30712, Attorney General

⁶ Proposed s. 102.8(4)(a) to amend the *Criminal Code Act 1995*

⁷ Proposed s. 102.8(4)(b) to amend the *Criminal Code Act 1995*

⁸ Proposed s. 102.8(4)(c) to amend the *Criminal Code Act 1995*

⁹ Proposed s. 102.8(4)(d) to amend the *Criminal Code Act 1995*

¹⁰ Article 22, *International Covenant on Civil and Political Rights*

¹¹ Proposed s. 102.8(1)(a) to amend the *Criminal Code Act 1995*

violent or dangerous consequences. All that the person does is to arrange to meet with another person on two or more occasions with the knowledge that they are providing support to a “terrorist” organisation that will assist the organisation to expand or continue to exist. Helping an organisation to expand or continue to exist does not mean that the person is involved with “terrorism” or the commission of a “terrorist” act. The connection with the planning or commission of an actual “terrorist” act is lacking.

There are numerous instances where a completely innocent person may inadvertently commit an offence under the proposed section. For instance, a person may simply be organising a peaceful meeting to discuss a political or legal issue. Such a person should not be punished as they have not engaged in any type of violent or dangerous activity. Further, the organisation may have several functions - some legal and some illegal. The defendant may be involved in the provision of welfare and the meeting may be for the purpose of assisting the organisation with that aspect of the organisation’s operations. While there is an exception for an association for the purpose of providing aid of a humanitarian nature, this does not necessarily extend to the organisation of a meeting to discuss the provision of welfare or the sourcing of welfare. “Humanitarian aid” is not defined. Alternatively, the meeting may be for the purpose of fundraising to assist the organisation appeal its listing as a “terrorist” organisation. While the *Anti-Terrorism Bill (No 2) 2004* provides for an exception for association for the purpose of providing legal advice or representation, this does not extend to permitting an association for the purpose of fundraising to assist with the legal proceedings.

The exceptions themselves are extremely limited in their application. The first exception is for an association with a “close family member”.¹² “Close family member” is defined in the Bill. However the definition does not include uncles, aunts, cousins, nieces, nephews, parents-in law. The second exception is for an association in a place being used for public religious worship which takes place in the course of practising a religion.¹³ This may not include social meetings before or after religious worship or meeting associated with programs that the religious group may run such as education or counselling services. The third exception is for an association for the

¹² Proposed s. 102.8(4)(a) and s. 102.1(1) to amend the *Criminal Code Act 1995*

¹³ Proposed s. 102.8(4)(b) to amend the *Criminal Code Act 1995*

purpose of providing aid of a humanitarian nature.¹⁴ As discussed above, this does not appear to extend to people meeting to discuss welfare needs of a community or to discuss how to source humanitarian aid. The Explanatory Memorandum states that the exception “is intended to apply to persons undertaking humanitarian aid”.¹⁵ The final exception is an association for the purpose of providing legal advice or representation in connection with criminal proceedings or proceedings relating to whether the organisation in question is a “terrorist” organisation.¹⁶ As discussed above, this does not cover an association for the purpose of fundraising to pay for legal representation. It also does not cover legal representation in connection with proceedings that are not criminal proceedings, such as representing someone who is being detained under an ASIO warrant or someone who is subject to search under an ASIO warrant. It also does not cover representation to assist with appealing to the United Nations that an organisation be delisted.

Amnesty International Australia is concerned that the breadth of this provision would cause many otherwise innocent people to be caught. This proposed section is an unacceptable incursion on the right to freedom of association.

3.2 Existing Legislation

It is important to note that there are already provisions in the legislation that could cover similar situations as this Bill. For example, section 102.7 of the *Criminal Code Act 1995* entitled “Providing support to a terrorist organisation” states;

- (1) A person commits an offence if:
 - (a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of *terrorist organisation* in this Division; and
 - (b) the organisation is a terrorist organisation; and
 - (c) the person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.

- (2) A person commits an offence if:
 - (a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of *terrorist organisation* in this Division; and

¹⁴ Proposed s. 102.8(4)(c) to amend the *Criminal Code Act 1995*

¹⁵ *Anti-Terrorism Bill [No 2] 2004 Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, House of Representatives p. 33

¹⁶ Proposed s. 102.8(4)(d) to amend the *Criminal Code Act 1995*

- (b) the organisation is a terrorist organisation; and
- (c) the person is reckless as to whether the organisation is a terrorist organisation.

Penalty: Imprisonment for 15 years.

The enactment of the provisions proposed under the *Anti-Terrorism Bill (No 2) 2004* would unacceptably extend the class of people that could be charged. Section 102.7 has the aim of preventing assistance that would help the organisation engage in, prepare, plan, assist or foster the doing of a “terrorist” act. Proposed section 102.8 of the *Anti-Terrorism Bill (No 2) 2004* intends to cover support given with the intention of assisting the organisation to expand or continue to exist. Amnesty International Australia is concerned that proposed section 102.8 may cover conduct that is not directly associated with a “terrorist” act. Section 102.7 already deals with assistance provided to help the organisation commit a “terrorist” act. Although Amnesty International Australia does not endorse section 102.7, it does appear that conduct directly associated with a “terrorist” act is already covered under section 102.7. It is the position of Amnesty International Australia that an association for peaceful means should not be punished and that is exactly what proposed section 102.8 in the *Anti-Terrorism Bill (No 2) 2004* will accomplish.

3.3 Vagueness of Terms in the Criminal Code Act 1995

The *Criminal Code Act 1995*¹⁷ provides that membership of a “terrorist” organisation is an offence. Specifically a person commits an offence if the person is:

- a. intentionally a member of an organisation; and
- b. that organisation has been specified as a “terrorist organisation” by regulation; and
- c. the person knows that the organisation is a “terrorist organisation”.¹⁸

Thus to commit the offence, the individual would have to know that the organisation had been specified by regulation as a “terrorist organisation”.

The *Anti-Terrorism Act 2004* amended this offence. Specifically, a person now commits an offence if the person is:

- a. intentionally a member of an organisation; and

¹⁷ Prior to amendment by the *Anti-Terrorism Act 2004*.

¹⁸ Section 102.3(1) *Criminal Code Act 1995*

- b. that organisation is a terrorist organisation (whether it is a terrorist organisation because it “is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)” or because it has been listed in regulation); and
- c. the person knows that the organisation is a “terrorist organisation”.¹⁹

The penalty is imprisonment for 10 years. This amendment broadens the class of people who may be subject to prosecution under this section.

In the *Criminal Code Act 1995* the definition of “member” includes “a person who is an informal member” and “a person who has taken steps to become a member”.²⁰ These terms are not defined in the legislation. The definition of “member” is not changed under the *Anti-Terrorism Act 2004*.

Amnesty International Australia restates its concern about the definition of “member” as first expressed in Amnesty International Australia’s submission on the *Security Legislation Amendment (Terrorism) Bill 2002* [No. 2]. Amnesty International Australia emphasises the importance that there be certainty in the law and that all criminal offences be defined precisely so that individuals can know whether their conduct constitutes an offence. This is particularly the case in relation to indictable offences with penalties of imprisonment.

It is the position of Amnesty International Australia that the definition is too broad and vague. The phrase “informal member” is of particular concern as this removes any readily discernible means of determining whether someone is or is not a member of the organisation in question. The boundaries of the class of informal members are unclear. For example, if a person attends a meeting of an organisation, would this make them an “informal member”? If they received email updates on forthcoming events? If they subscribed to a magazine produced by an organisation? Or, if they volunteer their time to assist the organisation with research? It is not possible to know whether one would be considered an “informal member” by engaging in any of the above acts.

¹⁹ *Anti-Terrorism Bill* s. 19 which proposes repealing s. 102.3(1)(b) of the *Criminal Code Act 1995* and inserting “(b) the organisation is a terrorist organisation”.

²⁰ Section 102.1(1) *Criminal Code Act 1995*

The meaning of “taken steps to become a member” is also unclear. Will this, for example, include individuals who for whatever reason made initial enquiries about a particular group and chose not to pursue their enquiries? Could both an “informal member” and “a person who has taken steps to become a member” include individuals who attend political meetings where broad political aims of organisations in question are raised?

These concerns are all relevant to the association offence proposed in the *Anti-Terrorism Bill (No 2) 2004*. Under this section, a person commits an offence if the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of a “terrorist” organisation and the person knows that the other person is a member.²¹ The vagueness in the meaning of “member” will cause difficulties as a person may not know themselves that they would come under the definition of “member” of a “terrorist” organisation, let alone the defendant meeting with them knowing that that person is a “member”. The defendant may, however, be aware that the other person has attended meetings of a “terrorist” organisation but may not know that means the person is a “member” under the *Criminal Code Act 1995*. The other person may not engage in any promotion or direction of the organisation so they come under the proposed legislation only because their acts constitute membership under the *Criminal Code Act 1995*. As illustrated, the term “member” is so open and vague that it makes it very difficult to know if someone is a member. Hence it would be difficult to know if one were breaching the proposed section of associating with “terrorist” organisations by meeting with someone.

4. Conclusion

While recognising that the need to balance individual freedoms against anticipated threats to the general community is a complex process, Amnesty International Australia recommends that extreme caution be taken before the rights of individuals protected under Australia law are diminished. Amnesty International Australia is concerned that the proposed legislation breaches Australia’s obligation to ensure that any measures taken in the interest of national security include safeguards for the protection of fundamental non-derogable human rights.

²¹ Proposed s. 102.8(1) to amend the *Criminal Code Act 1995*

Amnesty International Australia fears that legislation such as the Bill threatens the protection of human rights. It is imperative that the legislature is scrupulous in its adherence to such principles during such challenging times. Amnesty International is concerned that the Bill could be used to give legislative legitimacy to what would otherwise be a contravention of international human rights standards.