



amnesty international australia

Submission to the

Senate Legal and Constitutional Legislation Committee

regarding the

INQUIRY INTO THE ANTI-TERRORISM BILL 2004

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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 to reduce the threat of terrorist attacks. 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.

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 four critical human rights concerns held by Amnesty International Australia towards the proposed *Anti-Terrorism Bill 2004* are:

- the unjustified extension of time of detention leading to possible arbitrary detention and other human rights violations
- the ambiguity regarding definitions and terminology with potentially very serious consequences
- the reversal of the onus of proof
- the “legitimation” of the USA Military Tribunals.

As the proposed legislative amendments stand, Amnesty International Australia holds that Australia may be in breach of several international human rights obligations.

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. In particular, the Committee process resulted in substantial amendments to the *Security Legislation Amendment (Terrorism) Bill 2002* [No. 2] and to the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*.

Amnesty International Australia is seriously concerned that the Australian Government is now seeking to undo these amendments. Of particular concern is the way in which the Government is seeking to reintroduce its original 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 proscription methods contained in *Criminal Code Amendment (Terrorist Organisations) Bill 2003* were almost identical to those proposed in the *Security Legislation Amendment (Terrorism) Bill 2002* [No. 2] introduced in 2002.

Similarly, the provisions in the *Anti-Terrorism Bill 2004* (hereon the Bill) on the reversal of the onus of proof are similar to those proposed in the *Security Legislation Amendment (Terrorism) Bill 2002* [No. 2]. Although the original bill provided for absolute liability, the substance of Amnesty International’s concern with the amendments before this Committee remains the same. Amnesty International is opposed to any reversal of the onus of proof, whether that reversal is achieved via

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*

strict or absolute liability. Amnesty International notes that the Government also introduced additional amendments to the *Australian Security Intelligence Organisation Act 1979* in late 2003. The substance of these amendments was new and had not been previously considered by Parliament.

3. Amnesty International's Concerns

3.1 Amendments to the Crimes Act 1914

Period of Detention

The *Crimes Act 1914* currently provides for detention without charge for the purpose of investigation for two hours for a person aged under 18 or an Aboriginal or Torres Strait Islander, or for four hours in any other case.⁴ These periods can be extended by a maximum of eight hours. Thus, a person aged 18 years or an Aboriginal or Torres Strait Islander could be detained for a total of 10 hours. Any other person could be detained for a total of 12 hours.⁵

The Bill proposes that the initial detention periods remain the same. However, the Bill proposes that the available extension period be lengthened for "terrorism offences" to a total of 20 additional hours.⁶ Thus, a person under 18 years or an Aboriginal or Torres Strait Islander could be detained for a total of 22 hours. Any other person could be detained for a total of 24 hours.

The Bill also proposes that there be an additional allowance for time to obtain relevant information from a place outside Australia in a different time zone.⁷ This time is called "dead time" and is to be capped at the amount of the time zone difference. This time is to be disregarded in ascertaining the total period of time that a person has been detained. The result of such a provision would be that if the official believed that it was necessary to obtain information from Hawaii⁸, a person could be detained

⁴ s. 23C(4) *Crimes Act 1914*

⁵ s. 23D *Crime Act 1914*

⁶ Proposed s. 23DA(7)

⁷ Proposed s. 23CA(8)(m)

⁸ A time difference of 20 hours when Australia is not on daylight saving time

for an initial period of 24 hours without being brought before a judicial officer. If the person is detained at 10am in Australia, this is 2pm in Hawaii. Realistically, the investigating official should be able to obtain any information that they would require at this time. An additional allowance is not necessary in this situation and the legislation should not allow for this to occur.

It is also important to note here that such an allowance could be sought numerous times for different time zones. There is no restriction in the Bill. For instance, if the investigating official wishes to obtain information from Hawaii (time difference of 20 hours) then New York (time difference of 14 hours) then Pakistan (time difference of 5 hours), the total allowance will be for 39 hours. Amnesty International notes that the prosecution needs to be able to prove that any such additional allowance was reasonable. However, Amnesty International remains concerned that even if the court assesses the additional allowance as being reasonable the availability of this additional allowance may create a significantly extended detention period.

Amnesty International is concerned by any proposal to extend the detention period. Any extension of time runs the risk of being arbitrary detention and contrary to Article 9 of the *International Covenant on Civil and Political Rights (ICCPR)*.⁹ Further, Principle 11 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* provides that it is essential that a person be brought promptly before a judicial officer to ensure that their rights are protected. Amnesty International is concerned that the proposals in the Bill may breach Australia's international obligations, particularly given that the Government has not demonstrated why such extensions are necessary.

There is already provision under the *Australian Security Intelligence Organisation Act 1979* (hereon the *ASIO Act*) to detain a person for questioning for a period of seven days, with a maximum 24 hours period for questioning.¹⁰ The Government has failed to make clear why it is necessary to extend the questioning time under the *Crimes Act 1914* when such an extended questioning period is already available under the *ASIO Act*.

⁹ Article 9, International Covenant on Civil and Political Rights:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. ..

¹⁰ s. 34HC

Amnesty International is particularly concerned that the Bill's proposal would extend the period of detention for minors. Such an extension also runs 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. Any detention should only be used as a measure of last resort and for the shortest appropriate period of time.

The Committee on the Rights of the Child has previously expressed concern about provisions in Spain which lengthen the detention time for children:

[The Committee on the Rights of the Child] notes with concern that the Organizational Act 7/2000 on terrorism increases the period of police custody ... for children accused of terrorism'¹¹.

3.2 Amendments to the Criminal Code Act 1995

Vagueness of Terms

The *Criminal Code Act 1995* currently 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".¹²

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

The Bill proposes an amendment to this offence. Specifically, a person will commit an offence if the person is:

- a. intentionally a member of an organisation; and
- b. that organisation "is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)"; and
- c. the person knows that the organisation is a "terrorist organisation".¹³

¹¹ CRC/C/15/Add.185, paras 53- 54 (2002)

¹² Section 102.3(1) *Criminal Code Act 1995*

¹³ *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".

Thus the individual would presumably need to know that the organisation “is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act”. The penalty is imprisonment for 10 years.

The definition of “member” includes “a person who is an informal member” and “a person who has taken steps to become a member”.¹⁴ These terms are not defined in the legislation. The definition of “member” will not be changed under the Bill.

Amnesty International Australia restates its concern about the definition of “member”, arising from the first draft of 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.

Amnesty International Australia argues 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.

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?

The vagueness of the definition of “member” is of particular concern when coupled with the removal of certainty regarding the definition of a “terrorist organisation”. An

¹⁴ Section 102.1(1) *Criminal Code Act* 1995

individual may intentionally yet innocently attend a meeting of an organisation that “is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act” where issues related to “terrorism” are not the primary focus of the meeting. The individual may know that the organisation is involved in a “terrorist” act but may be interested in other information provided at the meeting. Such an individual would be committing an offence and would be liable to 10 years imprisonment.

This would be the case even if the individual took no further steps to associate themselves with the organisation or to formalise their support of the organisation. It would be a defence if the person showed that they took “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”.¹⁵ However, if one is an “informal member” because of their attendance at a meeting, it is unclear how one takes any steps to cease to be a member. Further, the individual may not know that they would be considered to be an “informal member” even though they intentionally attended the meeting and so would presumably fulfil the elements of the offence.

Reverse Onus of Proof

Amnesty International Australia notes with serious concern that the onus of proof as to recklessness is reversed in proposed section 102.5(3) of the *Anti-Terrorism Bill* with the imposition of strict liability. The legislation currently provides for two offences:

1. the offence of intentionally providing training to or receiving training from an organisation that is a terrorist organisation and the person knows it is a terrorist organisation¹⁶; and
2. the offence of intentionally providing training to or receiving training from an organisation that is a terrorist organisation and the person is reckless as to whether it is a terrorist organisation.¹⁷

The first is subject to a penalty of 25 years imprisonment. The second to a penalty of 15 years imprisonment.

¹⁵ Section 102.3(2) *Criminal Code Act 1995*

¹⁶ s. 102.5(1) of the *Criminal Code 1995*

¹⁷ s. 102.5(2) of the *Criminal Code 1995*

The Bill proposes removing the first offence and increasing the penalty of the second offence to 25 years imprisonment. It also provides for an additional offence of intentionally providing training to or receiving training from an organisation that is a terrorist organisation by proscription.¹⁸ The proposed penalty is 25 years imprisonment. Strict liability applies to the proscription, that is, the prosecution does not need to prove that the person knew that the organisation had been proscribed. The burden shifts immediately to the accused to show that they were not reckless as to the fact that the organisation was a proscribed “terrorist organisation”. The accused bears the evidential burden.

The presumption of innocence is an important tenet in Australian criminal law. Amnesty International Australia is concerned that this presumption will be affected by the reversal of the usual onus of proof in criminal matters.

The right to be presumed innocent is a foundation of the criminal justice system in Australia and is consistent with Article 14(2) of the *ICCPR* and Article 11 of the *Universal Declaration of Human Rights*. The right of anyone charged with a criminal offence to be presumed innocent until proven guilty according to law is a non-derogable right.

Amnesty International Australia argues that the Bill’s proposed reverse onus of proof is unacceptable and in contravention of internationally-accepted human rights standards. Specifically, by removing the requirement for the prosecution to build a *prima facie* case against the defendant and shifting the burden of proof onto the accused, the ‘reverse onus’ violates the principle of the right to be presumed innocent until proven guilty and the right to a fair trial.

It is noted that the Government’s original Bill unsuccessfully sought to apply absolute liability to an element of this offence. A number of submissions received by the Senate Legal and Constitutional Legislation Committee in 2002 expressed concern about the imposition of absolute liability. Various specific examples were given, such as that of TAFE teachers who instruct mining personnel in the use of explosives and who cannot know how the knowledge is going to be used.¹⁹ The obligation of the

¹⁸ Proscribed under paragraphs (b), (c), (d) or (e) of the definition of “terrorist organisation” in s. 102.1(1) of the *Criminal Code* 1995

¹⁹ Legal and Constitutional Legislation Committee *Hansard*, 17 April 2002, p. 49.

Government to protect the rights and liberties of all individuals and the use of absolute liability was acknowledged by the Senate Legal and Constitutional Legislation Committee in 2002:

“In Australia’s system of law, it is not the practice to create strict or absolute liability offences other than for regulatory or minor offences. Such a departure from fundamental principles of criminal law needs to be justified. While the Committee acknowledges that the nature of terrorist offences is very serious and that the safety and interests of the Australian population must be protected, the rights and liberties of individuals, including those charged with criminal offences, must also be safeguarded”.²⁰

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. The above cited example mentioned is still applicable; 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.

In addition to Article 14 of the *ICCPR*, the *Rome Statute of the International Criminal Court* (“*Rome Statute*”) and the statutes of the International Criminal Tribunal for the former Yugoslavia and for Rwanda provide important benchmarks regarding the presumption of innocence and other rights of the accused²¹ and the rights of any person providing information during an investigation.²² This is an indication of the recognised importance of the fundamental right to a presumption of innocence that even those charged with some of the most heinous crimes- crimes against humanity, war crimes and genocide- are guaranteed a right to the presumption of innocence.

²⁰ Report of the Senate Legal and Constitutional Legislation Committee: Consideration of Legislation Referred to the Committee May 2002 p. 44

²¹ See for example Articles 66 and 67 of the *Rome Statute*.

²² See Article 55 of the *Rome Statute*.

3.3 Amendments to the Proceeds of Crime Act 2002

Legitimation of United States Military Tribunals

Amnesty International Australia notes the Bill's proposed s. 337A(3) that extends the definition of "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 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".

Amnesty International Australia has serious reservations about such a provision that in effect legitimises the military tribunals. Amnesty International consistently objects to the military tribunals as established under the Military Order referred to in the Bill. Amnesty International maintains that the tribunals are in breach of fundamental international standards. The tribunals:

- lack independence from the executive;
- do not provide for a right of appeal to an independent and impartial court
- apply only to non-US nationals; and,
- severely restricts the defendant's right to counsel of choice and to an effective defence

Further the tribunals will allow a lower standard of evidence than would otherwise be admissible and will have the power to hand down death sentences.

An individual named under the Military Order "shall not be privileged to seek any remedy or maintain any proceeding" in any court anywhere in the world. This would cover any remedy sought for any human rights violation that may have occurred at the time of arrest, during detention or during trial by military commission. Even if acquitted by a commission, the prisoners would not necessarily be released until the end of the "war on terrorism", which on 3 July 2003 a senior defense official said is "open-ended".

Amnesty International Australia opposes any provision which legitimises these tribunals and calls on the Committee to reject the extension of this definition.

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.

Amnesty International Australia fears that legislation such as the Bill 2004 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.