AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

Submissions to the Senate Legal and Constitutional Committee

Anti-Terrorism Bill 2004

19 April 2004

Introduction

1. Australian Lawyers for Human Rights ("ALHR") is Australia's largest association of lawyers established for the purpose of maintaining and defending human rights laws and principles in Australia.

2. ALHR promotes the practice of human rights law in Australia through training, publications and advocacy, and works with Australian and international human rights organisations to achieve this aim. ALHR is nationally based with a number of state committees.

3. ALHR regularly makes submissions to Senate, House and Joint Standing Committees established by the Commonwealth Parliament. It made submissions in relation to the *ASIO Legislation Amendment (Terrorism) Bill 2002* and commented widely to the media in the debate about terrorism laws in 2002-2003.

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

5. The *Anti-Terrorism Bill 2004* makes amendments to four pieces of legislation:

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

6. Each piece of legislation will be dealt with in turn.

Crimes Act Amendments

7. The ALHR's position is derived from a desire to protect the right to liberty of suspects (Article 9, *International Covenant on Civil and Political Rights*).

8. The proposed addition of s.23CA to the *Crimes Act 1914* creates a separate power pursuant to which a police officer may detain a person suspected of having committed a terrorism offence for the purpose of investigating either that offence or another terrorism offence. The power is separate from the power provided by s.23C which is available with respect to persons suspected of having committed a Commonwealth offence.

9. Proposed ss.23CA and 23DA adopts the same structure as ss.23C and 23D and repeats many of the same provisions for the setting and extending of time limits for the detention of terrorism suspects as for those suspected of having committed a Commonwealth offence. Section 23C provides for a way in which to calculate the investigation period which effectively extends it beyond the set period of 4 hours (s.23C(7)). It is only *after* that period of 4 hours (plus extensions) has ended that an investigating officer needs to bring the suspect before a judicial officer to have the period of investigation extended (s.23D(1)). Proposed ss.23CA and 23DA repeat this structure.

10. Notably, at s.23CA(8)(m) it is proposed that in calculating the time during which a suspect may be detained (minimum 4 hours) the period during which information is obtained from a place in a different time zone is to be disregarded. The period to be disregarded may be as much as the difference between the two time zones. That is, where the non-Australian time zone is the USA, for example, then that time period could be extended by 16-20 hours depending on the location in the USA.

11. The effect of s.23CA(8)(m) is that a person may be detained for a substantial period additional to the initial period of 4 hours. It is important to note that this may be done *without* any application to a judicial officer as envisaged by s.23D and proposed s.23DA.

12. The power available in s.23CA(8)(m) to effectively extend the period of detention for questioning is not one which a judicial officer grants or even oversees. It is a power available to those obtaining the information from overseas, namely the investigating officers concerned.

13. One can easily envisage that a terrorism suspect could be detained without being brought before a judicial officer for a period in excess of 20 hours once one adds the following periods together:

- Conveyance to an investigating official (s.23CA(8)(a)):
- Consultation by the suspect with a lawyer and family and suspension of the questioning before that can occur (s.23CA(8)(b), (c)):
- Reasonable time for the person to rest or recuperate (s.23CA(8)(j));
- Obtaining of information from overseas (s.23CA(8)(m)); and
- Forensic procedures, identity parades, medical attention (s.23CA(8)(d), (f)-(i)):

14. It would appear reasonable that if additional time is needed to obtain information from overseas then an application could be made to a judicial officer as is envisaged by s.23DA(1). ALHR is concerned that in keeping with Article 9(3) of the *International Covenant on Civil and Political Rights* suspects be brought before a judicial officer as quickly as possible. The proposed s.23CA(8)(m) provides a way in which that can be delayed. There is no separate need for s.23CA(8)(m) as the issue may be dealt with through an application to a judicial officer for an extension of the investigating period under.s23DA(1). The obtaining of evidence from overseas is a legitimate ground for a judicial officer to grant an extension under s.23DA(4)(b). Paragraph 23CA(8)(m) should be omitted.

15. On top of the extensions to the period of detention under s.23CA(8) the Government proposes a power to extend the period of investigation by applying to a judicial officer. Proposed s.23DA generally mirrors the power under s.23D of a judicial officer to extend, on application, the investigation period in relation to Commonwealth offences. For Commonwealth offences that period may be extended from 4 hours for a further 8 hours. In relation to terrorism offences, under proposed s.23DA(7), the judicial officer may extend the investigation period of 4 hours for up to 20 hours more.

16. It is clear from the above analysis that if there are legitimate extensions of the investigation period under s.23CA(8) then, potentially, the total time a terrorism suspect could be detained could be as much as 40 hours. Legislators should be aware of that available interpretation of the legislation and not be misled by assertions that the total period of detention (as opposed to "investigation") is 24 hours prior to charge or release.

17. In considering whether an extension of the investigation period for up to 24 hours is legitimate it is worth considering the other offences

covered by the detention provisions at s.23C. That section covers all Commonwealth offences which include such serious offences as treachery (s.24AA), sabotage (s.24AB), inciting mutiny (s.25) and assisting prisoners of war to escape (s.26). All of those offences are punishable by imprisonment for life and are at the most serious end of the scale.

18. It is not apparent why there should be special powers to extend periods of detention for terrorism offences when the legislature clearly did not consider such extraordinary powers were necessary in relation to the serious and extraordinary offences under ss.24AA, 24AB, 25 and 26 mentioned above.

19. While the ALHR understands that there may be a need for extended periods of time for questioning of terrorism suspects prior to charge it is not satisfied that a reasonable case has been made out by the Government to justify s.23DA(7). The current provisions of s.23D already provide for extensions of time to gather additional evidence. Once the period of *actual time* in detention and investigation (s.23C(7)) is added to the period for which an the investigation period may be extended (s.23D(5)) there should be sufficient time to obtain that evidence. There is no bar to charging the person *without* the information or re-arresting the person once the information is to hand.

20. Should the Committee not accept the above submissions then ALHR submits that there should be additional safeguards. Although the Attorney-General mentions a number of *existing* safeguards in the *Crimes Act 1914* no provision is made for suspects to have sufficient breaks in questioning or to limit questioning. At present, questioning could continue throughout the investigation period for a lengthy time. There are no protections for breaks for toileting, sleep or sustenance. In addition it would appear reasonable to limit continuous questioning

to no more than 2 hours without a rest break. A total limit on the amount of questioning should be imposed.

Crimes (Foreign Incursions and Recruitment) Act Amendments

21. ALHR does not propose to comment on the proposed amendments to the *Crimes (Foreign Incursions and Recruitment) Act 1978.*

Criminal Code Act Amendments

22. The Bill proposes to add a revised version of s.102.5 to the *Criminal Code 1995*. The revised section suffers from the same problem as the current version of s.102.5. That is, the terms "training" and "organisation" are not defined and there is no requirement for the act to have any connection with a "terrorist act".

23. Section 102.5 is to be contrasted with s.101.2 which is as follows:

> *"Section 101.2 Providing or receiving training connected with terrorist acts*
>
> *(1) A person commits an offence if:*
>
> *(a) the person provides or receives training; and*
> *(b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and*
> *(c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).*
>
> *Penalty: Imprisonment for 25 years.*
>
> *(2) A person commits an offence if:*
>
> *(a) the person provides or receives training; and*
> *(b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and*
> *(c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).*
>
> *Penalty: Imprisonment for 15 years."*

24. As "training" is not defined the amended s.102.5 has the potential to cover any form of training at all. For example, a person who provides training in how to use a photocopier or a computer to a terrorist organisation would be caught by the term "training" in s.102.5(1) and (2).

25. The *Code* is also imprecise as to how a person provides training "to an organisation". One could easily envisage how one might provide training to a member (a defined term in the Code) of an organisation but not to an organisation as a whole unless there was, for example, some written contractual evidence. Such imprecision is dangerous given the seriousness of the offences and the prescribed penalties.

26. Section 102.5 also suffers from the absence of connection with a terrorist act spelt out in s.101.2(1)(b) and (c) and (2)(b) and (c). That is, there is no requirement that the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act *and* that the trainer (or trainee) has knowledge of the connection (or is reckless as to its existence).

27. 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 *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).

28. The provisions of s.102.5 need to be redrafted to reduce their breadth, add precision and fairness to those who may be unwittingly caught by the section.

Proceeds of Crime Act Amendments

29. The amendments to the *Proceeds of Crime Act 2002* in the *Anti-Terrorism Bill 2004* have implications for free speech in Australia (see Article 19 *International Covenant on Civil and Political Rights*). The amendments attempt to curtail publication by persons who have committed a "foreign indictable offence", publish their account and derive proceeds from such publication whether in Australia or overseas. The definition of foreign indictable offence is drafted widely to include both a terrorism offence and any major offence which if it had been committed in Australia would be punishable by at least 12 months imprisonment: s. 337A(1).

30. The *Proceeds of Crime Act 2002* allows for a restraining order to be granted by a Court to stop the disposal of monies derived from literary proceeds by a person who is *suspected* of having committed an indictable or foreign indictable offence (s.20(1)). The provision (items 21 and 22) appears to be aimed at those suspected of a terrorism offence but the amendments have wider application (as mentioned above).

31. There is no requirement (in relation to a restraining order) that a person has been actually convicted whether in Australia or overseas. There need only be a suspicion, and "reasonable grounds" for that suspicion, attested to by an authorized officer (see s.20(3)). That is clearly a low hurdle for the DPP in applying for a restraining order.

32. Literary proceeds derived by a person from any publication in relation to the committing of an indictable or foreign indictable offence may

also be required to be paid to the Commonwealth (s.152). They are known as "literary proceeds orders".

33. The availability of restraining and literary proceeds orders effectively prevent a person who has committed an act of terrorism from publishing his or her own account of what occurred. The provision does not effect a third person publishing that person's account except insofar as the person who has been committed of the offence could not be paid for his or her story.

34. While ALHR 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. It assists in public understanding of why such acts have occurred and allows for a broad range of people to debate how such acts may be prevented in the future. The committal of terrorist offences are in a different category to a serious offence motivated by self interest.

35. The definition of "literary proceeds" is so wide as to include any benefit derived from the "commercial exploitation of … the person's notoriety resulting from the person committing a foreign indictable offence" (s.153(1)). One could legitimately conclude that Hitler's *Mein Kampf* or VI Lenin's *What is to be Done?* could be caught by the amendments to the *Proceeds of Crime Act 2002*. There is a legitimate interest in having such publications available to inform and provoke public debate. 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.

36. 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.

37. The amendments to the *Proceeds of Crime Act 2002* should be adandoned.

Oral Hearing

38. ALHR would welcome the opportunity to address the Committee orally with respect to the above submissions.

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