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27 August 2009

Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100 Parliament House
Canberra ACT 2600 Australia

Dear Committee Member

RE: SUBMISSION TO THE INQUIRY INTO THE ANTI-TERRORISM LAWS REFORM BILL 2009

Thank you for the opportunity to make submission to this Inquiry.

Russo Lawyers is a firm predominately practising in criminal defence. We represent clients in all types of criminal law proceedings.

Mr Peter Russo, Principal of Russo Lawyers, represented Doctor Mohamed Haneef in 2007 for allegations by the Australian Federal Police of involvement in terrorist activity. The charges were subsequently discontinued; however, much was learnt from this case and the Clarke Inquiry was instituted to examine and report on the investigation of this case. The Clarke Inquiry is largely the basis on which this submission compares the *Anti-Terrorism Laws Reform Bill 2009* (Cth) ('the bill').

We are committed to ensuring basic rights in our legal systems are enforced including the right of presumption of innocence unless proven guilty. Terrorism has been a threat especially after the bombings on the World Trade Centre on 11 September 2001 and it is rightly so that measures were immediately taken by the Government to make sure any persons who partake in such activity are held accountable. However, a balance needs to be struck between laws which ensure the security of the nation and laws which unduly impose on fundamental rights. This is the essence of our submission in examining whether the bill meets this balance or whether the laws are excessive in imposing breaches of an individual's fundamental rights.

We are available to further comment on any aspect of this submission. We thank you once again for this opportunity.

Yours faithfully
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1. INTRODUCTION

Anti-terrorism laws were enacted after the bombings on the World Trade Centre on 11 September 2001. Parts of it are irrelevant, ambiguous and oppressive. In the words of its creator, Phillip Ruddock, "Counter-terrorist laws [are] an unfinished canvas."

The main sources of anti-terrorism legislation in Australia are the *Criminal Code Act 1995* (Cth) ('the *Criminal Code Act*'), the *Crimes Act 1914* (Cth) ('the *Crimes Act*') and the *Australian Security Intelligence Organisation Act 1979* (Cth).

An application of these laws was seen in the case of Doctor Mohamed Haneef when investigations were made of his possible involvement in the terrorist incidents in the United Kingdom on 29 and 30 June 2007. Doctor Haneef was charged on 2 July 2007 despite misleading information forming part of the decision to prosecute and the lack of evidence. The charges were subsequently dropped.

On 13 March 2008, the Honourable Robert McClelland MP Attorney – General, announced the appointment of the Honourable John Clarke QC to undertake an inquiry into this case. The report of the Clarke Inquiry into the case of Dr Mohamed Haneef was presented on 21 November 2008.

The Clarke Inquiry examines and reports on the following:

1. The arrest, detention, charging, prosecution and release of Doctor Haneef, the cancellation of his Australian visa and issuing of a criminal justice stay certificate;

2. The administrative and operational procedures and arrangements of the Commonwealth and its agencies relevant to these matters;

3. The effectiveness of co-operation, co-ordination and interoperability between the Commonwealth agencies and with state law enforcement agencies relating to these matters; and

4. Having regard to (1), (2) and (3), any deficiencies in the relevant laws or administrative and operational procedures and arrangements of the Commonwealth and its agencies, including agency and interagency communication protocols and guidelines.

The Clarke Report included an in depth inquiry into how anti-terror laws operated in the Doctor Haneef Case. It recommended reforms to several parts of the legislation. The *Anti-Terrorism Laws Reform Bill 2009* (Cth) ('the Bill') implements parts of the recommendations.

This submission mainly focuses on the amendments proposed to the *Crimes Act* as provided for in Schedule 2 of the Bill. These amendments focus on Part IC of the *Crimes Act* titled 'Investigation of Commonwealth Offences'.

2. DETENTION OF PERSONS AFTER ARREST BUT BEFORE CHARGE

Doctor Haneef was arrested on 2 July 2007 under section 3W(1) of the *Crimes Act*.

This provides that a constable may arrest a person without a warrant for an offence under Commonwealth law if the section is satisfied. It requires that the constable must believe on reasonable grounds that the person has committed or is committing the offence, including the terrorism offences in Part 5.3 of the *Criminal Code Act* **and** proceedings by summons would not achieve one or more of the following purposes:

a. ensuring the appearance of the person before a court in respect of the offence;
b. preventing a repetition or continuation of the offence or the commission of another offence;
c. preventing the concealment, loss or destruction of evidence relating to the offence;
d. preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
e. preventing the fabrication of evidence in respect of the offence;
f. preserving the safety or welfare of the person.

Section 3W(2)(b)(i) of the *Crimes Act* then provides that if before a person is arrested for the offence in subsection (1) and before the person is charged, the constable in charge ceases to believe on reasonable grounds that the person committed **the** offence or holding the person does not achieve any of the above purposes, then the person **must** be released.

However, section 23CA of the *Crimes Act* specifically deals with the period of detention if a person is arrested for a terrorism offence. It provides that an arrested person may be detained for investigating either or both of whether the person committed **the** offence or **another** terrorism offence that an investigating official reasonably suspects the person to have committed.

The Clarke Inquiry rightly pointed out that these sections are in conflict.

For example, conflict arises when a police officer arrests a person under section 3W(1) of the *Crimes Act*, but no longer reasonably believes that they committed that offence, but reasonably suspects that they committed a different terrorism offence. It is unclear whether they should release the person as required by section 3W(2) of the *Crimes Act* or continue to detain them under section 23CA(2)(b) of the *Crimes Act*.

The Inquiry recommended ways to ensure that these sections operated harmoniously are as follows:

1. Make the requirement of release in section 3W(2) unequivocally subject to section 23CA(2) of the *Crimes Act*; or

2. Require the police officer to have a suspicion or belief that the person committed one or more terrorism offences that were not necessarily identified at the time of arrest and as long as they continue to suspect or believe that, there is no requirement to release the person. The need only arises if the officer ceases to suspect or believe that the person committed any terrorism offence;

3. Legislate for a code covering the field relating to terrorism offences and criminal procedure for such offences while removing the provisions relating to terrorism offences from both the *Crimes Act* and *Criminal Code Act*.

The Bill does amend provisions relating to detention of terrorism suspects but only in relation to the extent of the periods of detention and bail conditions. The Bill does not assist in resolving the conflict between sections 3W(2) and 23CA(2) of the *Crimes Act* as identified by the Inquiry.

We believe that this is an important point that should be addressed by reform of the law to clarify when a police officer may or may not continue to detain a person.

It is an accepted Australian standard that each person is able to move without restriction. At the core of this concept is for persons to be protected from arbitrary detention. This is not specifically enshrined in any legislation but case law has described it as arising from 'broad community standards including a predisposition against unnecessary or arbitrary detention in custody'.[1] Unfortunately, there is no such positive right stated in Australian law and the existence of such a right simply hinges on the Courts to enforce limits on the exercise of powers of arrest and detention.

Therefore, given that there is already no particular protection for a person from arbitrary detention, this is particularly more reason to ensure that drafted laws is clear. The laws should not grant police officers such broad powers resulting in almost an impossibility for the Courts to interpret favorably towards a person.

3. INFORMING ARRESTED PERSON OF THEIR RIGHTS

Another problem found by the Inquiry, was that Dr Haneef was unaware of his right to make representations in relation to an application for an extension of the investigation period by the police officer.[2]

He was also led to believe that he was not required or expected to attend or take part in the application. He was only advised that he could have a lawyer present at the application. The Inquiry found that this is different from being informed of the right to personally make representations or make representations through a lawyer.

The Inquiry noted that the police officers' view of the law was that there was no express requirement in the legislation requiring the person to be informed of that right unless it was an application made by telephone, telex, fax, or other electronic means.

However, before signing such an instrument, the Magistrate or Justice of the Peace must be satisfied that the person or his legal representative has been given the opportunity to make representations about the application.[3] Therefore, the Clarke Inquiry found that it was implicit that the person must be made aware of the nature of the statutory entitlement.

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[1] *Holt v Hogan* (No 1) (1993) 44 FCR 572; 117 ALR 378.
[2] *Crimes Act 1914* (Cth) section 23CB.
[3] *Crimes Act 1914* (Cth) section 23 CB(7)(e) and 2DA (4)(d).

The Bill broadly implements measures to meet the Clarke Inquiry's concern on this point by expressly providing that a person must be informed of his or her rights. Item 2 of Schedule 2 of the Bill provides that a person detained under Division 2 of Part IC of the *Crimes Act* must be informed of their rights.

However, subsection (2) provides that it is sufficient if the person is informed of the substance of his or her rights, and it is not necessary that this be done in language of a precise or technical nature.

This is concerning as there is scope that this defeats the purpose of subsection (1). The Bill provides that a person must be informed of his or her rights but then says that they do not need to be informed precisely or technically.

We accept that it may not be necessary for technical language to be incorporated as long as the person is still informed of the right, but it is peculiar that legislation would state that 'it is not necessary for this to be done in a language of a precise... nature'.

Does this mean that rights can be given to a person 'imprecisely'? Perhaps this is supposed to mean that a specific blurb is not legislated for in reading these rights to a person and so the words spoken do not need to 'precisely' or 'technically' meet any such blurb.

If the former interpretation was taken, it could be argued that Doctor Haneef in the above example was informed of his rights as required by the new section, but it simply was not done in a language of 'precise or technical' nature, which if the former interpretation is taken, is acceptable under the law.

This is an appalling result as it would lead to greater uncertainty and ambiguity when deciding whether a person has in fact been informed of their rights.

Other obligations of investigators provided for in Division 3 of Part IC of the *Crimes Act* include:

1. Section 23F caution the person that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence;

2. Section 23G right to communicate with friend, relative and legal practitioner;

3. Section 23H, rights of Aboriginal persons and Torres Strait Islanders;

4. Section 23N right to interpreter; and

5. Section 23P right of non-Australian nationals to communicate with consular office

Overall, legislation expressly providing that a person must be informed of their rights is a welcomed change.

However, what is concerning is subsection (2). It does not provide for how the rights may be given and whether it needs to be electronically recorded. It in fact provides that the right need not be given in language which is precise and technical. This is opened to police officer's informing a person of their rights but doing it in a vague manner.

It will then cause argument in Court as to whether a person has actually been informed of their rights as required by subsection (1). Therefore, subsection (2) perhaps should be revised to clarify the manner in which the right needs to be given.

At the minimum, the legislation should not provide that the right may be given in a language which is not precise.

4. INVESTIGATIVE DEAD TIME

Item 3, 4, 5, 6 of Schedule 2 of the Bill repeals provisions specifying time during which suspension or delay of questioning can be disregarded. Section 23CA of the *Crimes Act* provides that a person must not be detained after arrest for a terrorism offence for the purpose of investigation after the end of the investigation period, which is 2 hours if a person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander, or in any other case, 4 hours unless extended under section 23DA but the extension cannot be for more than 20 hours.

Therefore, repealing section 23CA(8)(l) of the *Crimes Act* means that any time the police officer reasonably suspends or delays questioning, is counted towards the 2 hour or 4 hour time period.

The Bill provides that the police officer can no longer can make an application before a Magistrate or Justice of the Peace to 'stop the clock' where questioning is reasonably suspended or delayed. Of course 'dead time' can still be claimed in other provisions of section 23CA (8), such as when a forensic procedure is carried out on a person or when

an identification parade is arranged and conduct, but the removal of section 23CA (8)(m) at least restricts allowable 'dead time' and removes the broad power of the police in making such an application in front of a Magistrate or Justice of the Peace for 'dead time'.

However, the bill does not include a cap on the dead time allowed in those other provisions, as recommended by the Inquiry. Senator Ludlam in the second reading speech stated that this is because he wished to wait for the outcome of a review of Part 1C. The Bill should include a cap to ensure that investigations are carried out promptly and that no abuse of the dead time provisions occurs.

The Clarke Inquiry commented on this provision noting it as a deficiency in Part 1C of the *Crimes Act*, being an absence of a cap on, or limit to, the amount of dead time that may be specified. In the case of Doctor Haneef, he was detained for more than 11 days before he was charged.

The Government has accepted this recommendation from the Clarke Inquiry which has been revealed in the Bill.

The reasoning by the Government as stated by Senator Lublam in the second reading speech on 23 June 2009, is that the maximum allowable length of an investigation period for terrorism offence is 24 hours, compared to 12 hours permitted for all other offences anyway and so this additional period negates the need for additional inclusion of 'investigative dead time' provisions.

Overall, this amendment provides more certainty for the person as to their period of detention. It avoids lengthy restriction on the liberty of a person without charge which is not seen in investigations of other offences.

5. APPLICATION FOR EXTENSION OF INVESTIGATIVE PERIOD TO BE MADE TO A FEDERAL COURT JUDGE

The Bill does follow the recommendation of the Inquiry to change section 23DA of the *Crimes Act* to require applications for extension of an investigative period be made to a Federal Court Judge only as opposed to a Magistrate or Justice of the Peace.

Item 7 of the Bill repeals and replaces subsection 23DA(2) to require an application for the extension of an investigative period to be made to a judge of the federal court who is a judicial officer.

The applications are very important and often complex. This change emphasises the seriousness and significant consequences to a person's liberty of these applications and that they should not be applied for lightly and granted freely.

6. INDEPENDENT REVIEWER OF ANTI-TERRORISM LAWS

Recommendation 4 of the Clarke Report recommended that consideration be given to the appointment of an independent reviewer of Commonwealth anti-terrorism laws.

However, the Bill does not have any provision to this effect. In the United Kingdom, there is such an independent reviewer appointed under section 36 of the *Terrorism Act 2006* (UK).

The Bill should mirror the United Kingdom legislation and implement a similar provision given that anti-terrorism laws are very much a work-in-progress and an independent reviewer would help to quickly identify any issues with its operation.

7. OFFENCE OF SUPPORTING A TERRORIST ORGANISATION

Section 102.7 of the *Criminal Code Act* creates the offence of supporting a terrorist organisation. Under that section, a person commits an offence if:

- 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
- the organisation is a terrorist organisation; and
- the person is reckless as to whether the organisation is a terrorist organisation.

Recommendation 5 from the Clarke Inquiry provides that the wording of section 102.7(2) should be simplified due to its confusing and circular nature, which was likely to cause judicial error. According to the Clarke Inquiry, the following elements must be satisfied for the offence:

- The defendant intentionally provided the resource to an organisation.
- The defendant was **reckless** as to whether the resource would help the organisation in preparing, planning, assisting in or fostering the commission of a terrorist act.
- To be satisfied as to recklessness, the jury must further be satisfied that the defendant was aware of a substantial risk that the resource would help the organisation engage in, for example, fostering the commission of a terrorist act and that, having regard to circumstances known to the defendant, it was unjustifiable for the defendant to take that risk.
- The organisation was a terrorist organisation.
- The defendant was aware that there was a substantial risk that the organisation was a terrorist organisation or was to become one, and it was unjustifiable for the defendant to take that risk.

Items 11-15 in schedule 1 of the Bill reworded section 102.7 of the Criminal Code. These changes help clarify the section, by requiring "material support" instead of just "support" be given.

But the problem remains that "recklessness" has a very broad meaning. A "reckless" person is defined in the Oxford English Dictionary as "heedless of the consequences of one's actions or of danger; incautious, rash," also as "negligent in one's duties, inattentive" and also as "inconsiderate of oneself or another." A "reckless" act is defined in the Oxford English Dictionary as "characterised by heedlessness or rashness, incautious, careless".

Therefore, the law should be redrafted to not only include 'recklessness' as an element, but also include the Clarke Inquiry's recommendation that the jury must further be satisfied that the person was aware of a substantial risk that the resource would help the organisation engage in, for example, fostering the commission of a terrorist act and that, having regard to circumstances known to the defendant, it was unjustifiable for the defendant to take that risk.

In this sense, the law could not punish a simply 'rash' or 'careless' person (which would equate to 'recklessness') but could only punish a person if it could be proven that the person had the higher requisite knowledge.

8. CONCLUSION AND RECOMMENDATIONS

The Bill implements some of the recommendations of the Clarke Report. However, some recommendations have been dealt with inadequately or ignored. We understand that this is probably due to the legislation being still a work-in-progress.

Overall, the Bill does attempt to strike a better balance between national security and the rights of individual persons.

It enshrines into the legislation that persons must be informed of their rights. However, even though this is legislated, it does not provide a way the rights should be given and whether it needs to be electronically recorded.

It in fact goes on to provide that the right need not be given in a language which is precise and technical. We submit that this is opened to a person being informed of their rights but in a vague manner which then makes it questionable as to whether the person was actually 'informed'.

This is particularly concerning when dealing with persons to who English is a second language. The Bill should be more specific as to how the rights should be given and perhaps include that it should be electronically recorded if practicable.

There needs to be some measure to ensure the person actually understands the rights instead of allowing the giving of the rights to be viewed as some sort of formality only.

Furthermore, the Bill does not assist in clarifying when a police officer must release a person from detention for investigation purposes given the conflict found in section 3W(2) and section 23CA(2)(B) of the *Crimes Act*.

Another problem is that the Bill does not implement the Clarke Inquiry's recommendation of defining what amounts to 'recklessness' in providing resources in support of a terrorist organisation under section 102.7 of the *Criminal Code Act*. It also does not provide for an independent reviewer of the anti-terrorism laws.

Without the further clarification that recklessness is only to be satisfied if the defendant was aware of the substantial risk that the resource would help the organisation engage in the terrorist activity and that it was unjustifiable for the defendant to take that risk, many people who may simply have been 'rash' or 'careless' as to whether the organisation was a terrorist organisation, would be unfairly caught by the legislation.

However, the Bill provides for a positive change in giving the person more certainty regarding their period of detention under section 23CA of the *Crimes Act* by repealing legislation allowing a police officer to make an application before a Magistrate to have time reasonably suspended and questioning reasonably delayed not counted towards the period of detention. It reduces lengthy restriction on the liberty of a person without charge which is not seen in investigations of other offences.

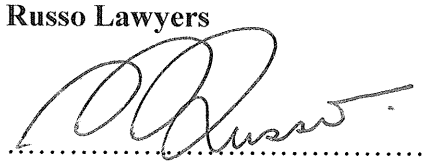
Also positive is the change requiring an application for extension of an investigative period to be made to a Judge of the Federal Court and not before the Magistrates Court. The applications are very important and often complex and this change emphasises the seriousness and significant consequences to a person's liberty of these applications and that they should not be applied for lightly and granted freely.

Overall, we understand that this legislation is still new and is a work-in-progress. We are excited that efforts are being made to strike the balance between ensuring security of the nation and the fundamental rights of a person. Some positive changes have been seen in the Bill but undoubtedly there is still further work to be done. We look forward to being a part of this growth and seeing a safe nation on one hand but also ensuring that fundamental rights and freedom continue in Australia.

9. CLOSING NOTES

We would like to thank a group of research students from the Queensland University of Technology who assisted in preparing this submission. Our thanks go out to Tim Dalla-Costa, Stephanie Brown, and Jim Armstrong. We are glad to find students with an interest in research of the law and particularly those with interest in reform of the law when there are concerning gaps or inconsistencies. Amy Soong, solicitor of Russo Lawyers, also assisted in bringing together this submission.

With thanks
Russo Lawyers



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