INTERNATIONAL
COMMISSION
OF JURISTS

ICJ AUSTRALIA

GPO Box 173
Sydney NSW 2001
Australia
☎ +61 (0)2 9266 0950
🖷 +61 (0)2 9266 0742
e✉ info@ICJ-Aust.org.au

WWW.ICJ-AUST.ORG.AU

18 September 2009

Committee Secretary
Senate Legal and Constitutional
Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary,

Re: Inquiry into the Anti- Terrorism Laws Reform Bill 2009

Please find enclosed submission by the International Commission of Jurists (Australia) to the Senate Legal and Constitutional Affairs Committee on the Anti- Terrorism Laws Reform Bill 2009.

We thank you for allowing additional time to submit this.

Yours faithfully,
ICJ AUSTRALIA

The Hon John Dowd AO QC
President

INTERNATIONAL COMMISSION OF JURISTS AUSTRALIA

SUBMISSION TO THE ANTI-TERRORISM LAWS REFORM BILL 2009

Preamble

The International Commission of Jurists (Australia) (ICJA) was established in 1958, under the chairmanship of the then Chief Justice of the High Court of Australia, Sir Owen Dixon, OM, GCMG. The International Commission of Jurists (ICJ), is based in Geneva and was established in 1952.

The current President of the ICJA is The Hon John Dowd AO QC. Justice Dowd is also Vice President of the Executive Committee of the ICJ in Geneva.

The ICJA was founded as an organisation through which the legal profession and others interested in human rights could protect and sustain the Rule of Law and promote the observance of human rights and fundamental freedoms.

The ICJA has been involved in supporting the rule of law domestically and internationally and scrutinising government action since its inception. Along with submissions to government the ICJA has been involved in international observer missions and legal development projects in the region and around the world.

The ICJA welcome the opportunity provided by the Senate Legal and Constitutional Affairs Committee to comment on the Anti-Terrorism Laws Reform Bill.

Background

The Anti-Terrorism Laws Reform Bill was introduced in the Senate by Senator Ludlam on 23 June 2009. It was referred to the Senate Legal and Constitutional Affairs -Committee on 25 June 2009. The Bill proposes to amend certain the terrorism provisions under the *Criminal Code Act 1995* (Cth), *Crimes Act 1914* (Cth) and *Australian Security Intelligence Organisation Act 1979* (Cth).

The ICJA notes that the purpose of the Bill, as identified by Senator Ludlam is to "identify those laws and provisions [of Australia's anti-terrorism laws] that are so extreme, so repugnant, redundant or otherwise inappropriate that they should be abolished and don't even deserve the dignity of being subject to review by the long-awaited independent reviewer of terrorism laws."

The ICJA commends the Bill. There is however a number of proposed amendments that do not appear to address some issues in the current scheme under the *Criminal Code Act 1995* (Cth), *Crimes Act 1914* (Cth) and *Australian Security Intelligence Organisation Act 1979* (Cth) of which the ICJA is concerned. This paper will set out and discuss these issues in detail. The ICJA is also concerned that the proposed amendments do not provide adequate safeguards to fundamental human rights as set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The approach of the ICJ to the issue of counter-terrorism legislation and human rights

On 16 February 2009, The International Commission of Jurists globally released the 'Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, "Assessing Damage, Urging Action" ("the EJP Report"). The EJP Report was the culmination of the efforts of The

Eminent Jurists Panel, who were tasked with conducting a detailed examination of the global impact of counter-terrorism measures on human rights. The Panel was comprised of some of the most prominent figures in international law. This included former Irish President and UN High Commissioner for Human Rights Mary Robinson and was chaired by Justice Arthur Chaskalson, former Chief Justice of South Africa. It was the first group to undertake an investigation of this scope, with sixteen hearings covering forty countries. Hearings were conducted in Australia and testimony was given by a wide range of government and non-government representatives concerning Australia's laws. There are several references made to Australian cases and laws in the report. The ICJA makes this submission against this background and asks that this submission be read in conjunction with the general principles raised and issues discussed in greater depth in that report. The executive summary and the report can be obtained electronically.[1]

Some Lessons from the EJP Report for Australia with regard to this inquiry

In its discussion of the listing of terrorist organisations, the EJP Report noted that:

> In Australia and the UK where there has been much debate about the ambit of listing which involves individuals or organisations that "glorify" or "advocate" terrorist acts (as in s102.1 of the *Criminal Code Act 1995*)… the risk is great that people who are doing nothing more than expressing unpopular opinions will be caught in the net of supposed supporters of terrorism.[2]

The current procedural safeguards were found to be inadequate.[3] This Bill goes some way to addressing those inadequacies.

The *National Security Information (Criminal and Civil Proceedings) Act 2004* is referred to and was criticised for being excessively broad[4]. ICJA supports the Bill in seeking to repeal this Act.

The EJP Report discusses Australia's introduction of control orders and the cases of Joseph Thomas and David Hicks. It comments that the Panel 'were particularly concerned over the introduction of such legislation in Australia, where there is not even the equivalent safeguard to the UK's Human Rights Act' and there is no requirement for the AFP to review the person's conduct with a view to criminal prosecution as there is in the UK[5]. Control orders could give rise to a parallel legal system and undermine the rule of law; they must be exceptional measures and important safeguards identified in the report are not in place in Australia at present[6]. ICJA notes that these issues have not been addressed in the current Bill and that there is still much work to be done on this area of anti-terrorism law reform.

Concerning the definition of "a terrorist act" the Panel considered most definitions of terrorism to be too broad and vague. This represents a significant departure from the principle of legal certainty. The EJP Report did note however that the clauses contained in our legislation regarding advocacy and protest may provide some safeguard against misuse.[7]

[1] Available from http://www.icj.org
[2] 'Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, "Assessing Damage, Urging Action"', International Commission of Jurists, Geneva, 2009, p 115
[3] EJP Report, p121
[4] EJP Report, p152
[5] EJP Report, p112
[6] EJP Report, p121
[7] s100.1 of the *Criminal Code Act 1995 (Cth)* referred to in EJP Report, p127

Specific comments on the Bill

Amendments to the *Criminal Code Act 1995* (Cth)

1. Amendment – repeal of section 80.1

1.1 The ICJA notes that paragraph 1 repeals Section 80.2 of the *Criminal Code Act 1995 (Cth)* which deals with sedition. Section 80.2 sets out a number of offences including urging the overthrow of the government, interference with elections, violence within the community, and assistance of the enemy and people engaged in armed hostilities.

Comment

1.2 The ICJA notes that there has been considerable opposition to the provisions in relation to sedition. As Senator Ludlam notes, the Australian Law Reform Commission report, *Fighting Words: A Review of Sedition Laws in Australia* recommended 30 changes to the sedition laws in order to draw 'a bright line between freedom of expression – even when exercised in a challenging or unpopular manner – and the reach of the criminal law'. The Law Council of Australia has similarly recommended that the sedition laws be entirely repealed as they are unnecessary, lack clarity and precision, and have a 'chilling effect' on the freedoms of speech and expression. The ICJA shares similar concerns.

1.3 The ICJA agrees that if not repealed the sedition offences will continue to pose a significant threat to freedom of speech and expression, the right to which is set out in Article 19 of the International Covenant on Civil and Political Rights and Article 19 of the Universal Declaration of Human Rights. Australia is a party to both of these international instruments. The ICJA is also concerned that as presently worded the offences set out in section 80.2 can be recklessly committed even though there may be a lack of intention requisite for such an offence. This anomaly is problematic. Lastly, the ICJA submits that the offences of aid, abet, counsel or procure the commission of an offence are already adequately dealt with in Part 2.4 of the *Criminal Code Act 1995* (Cth) which deals with extensions of criminal responsibility.

1.4 The ICJA thus supports the repeal of section 80.2 .

2. Amendment – section 100.1(1)

2.1 Subsection 100.1(1) amends the definition of terrorist act such that 'threat' and 'threat of action' are removed. As a result a "terrorist act" is then defined as action done with the intention of coercing, or influencing by intimidation, the government, or intimidating the public or a section of the public.

Comment

2.2 The ICJA agrees that the words "threat"' and 'threat of action' should be removed. Their removal has the effect of narrowing the definition considerably so that it is more in line with the United Nation Security Council's proposed definition. United Nations Security Council Resolution 1566 (to which Australia was a party) requires members States to cooperate fully in the fight against terrorism and prevent and punish acts that are committed with the intention of causing death or serious bodily injury or the taking of hostages. The same requirement exists for acts with the purpose of provoking a state of terror in the general public or group of persons, intimidating a population or compelling a government or an international organisation to do or

to abstain from doing any act (irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature).

2.3 The ICJA submits that the removal of the phrase 'intention of advancing a political, religious or ideological cause' from the definition, may reduce the possibility of a particular political, religious or ideological group being particularly targeted by the police, media and the public, however terrorism will always have a political and ideological character. . The ICJA suggests that perhaps merely the removal of 'religious' would be a more positive amendment.

2.4 Terrorism should not be considered a 'normal' crime, like assault or robbery. It is most serious and its political nature makes it stand apart from other crimes. The removal of this subsection further broadens the offence and could result in innocent people being charged.

2.5 The ICJA submits that the definition of a terrorist act is of paramount importance; the application of its definition is the first element that needs to be established to make any terrorist charge. In its present form it remains broad and ambiguous and does not evoke a clear meaning.

3. Amendment – subsections 100.1(2) and (3)

3.1 Subsections 100.1(2) and (3) are repealed and substituted with new Subsections.

3.2 Subsection 100.1(2) outlines the action that falls within the definition of terrorist act. The substituted paragraphs include action that causes a person's death, endangers a person's life, causes serious physical harm to a person, takes a person hostage or creates a serious risk to the health and safety of the public.

3.3 Subsection 100.1(3) outlines the action that falls outside of the definition of terrorist act. The substituted paragraphs include action that is advocacy, protest, dissent or industrial action and is not intended to cause serious physical harm to a person, a person's death, endanger a person's life or take a person hostage.

Comment

3.4 The only action that falls outside of 'terrorist act' here is 'advocacy, protest, dissent or industrial action' – this is problematic and could be an infringement of ICCPR Articles 21 and 22 and UDHR Article 20.

4. Amendment – section 102.1

4.1 Section 102.1 omits 'fostering' from the definition of terrorist organisation.

Comment

4.2 The ICJA notes that whilst "'Fostering' is omitted from the legislation, 'assisting' remains. The ICJ agrees that "fostering" should be removed from the legislation but is concerned that "assisting" will contain to remain. The ICJA's concern about "assisting" is that it is not defined in the legislation and could thus be subject to wide interpretation. . The ICJA notes that the potential for a wide interpretation was the reason why 'fostering' was removed because of the potential problematic wide interpretation but the same could occur in the case of 'assisting'.

4.2 The ICJA submits that the word "assisting" should be defined.

5. Amendment – section 101.4

5.1 Section 101.4 is repealed. This Section made possession of a thing connected with terrorist acts an offence.

Comments

5.2 While 'possessing things connected with terrorist acts' is repealed and the scope of offences of a preparatory nature, is narrowed, the ICJA is concerned that preparatory acts continue to remain criminal offences. As the Chief Justice of the Supreme Court, Jim Spigelman has stated:

> 'Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier state than is usually the case for other kinds of criminal conduct' (*Lodhi v The Queen* [2006] NSWCCA 121 at [66]

5.3 The ICJA is also concerned that the offences in Sections 101.2 and 101.5 which remain unamended are so broad that they apply even where a terrorist act does not ever occur, the offences are not done in connection with a specific terrorist act, or in connection with more than one terrorist attack. For example, section 101.5 'Collecting or making documents likely to facilitate terrorist acts' remains unamended. 'Document' is not defined and if it is construed by consultation with the *Uniform Evidence Act 1995,* for example, its meaning will be so wide that it includes any record of information (*Evidence Act 1995* (Cth) s 3). It is unclear whether the offences in these sections are effectively targeted at determining threats of terrorism as for example, a journalist or other researcher downloading a document about a possible terrorist act may be deemed connected to that act even though they are not involved in it.

5.4 The ICJA is also concerned that "advocates" in section 101.2(1A) has not be amended. As it presently stands the section is so broad that it could infringe the freedom of expression, the right to which is stipulated in Article 19 of the International Covenant on Civil and Political Rights. The ICJA submits that the way in which the statement must be made is not clear and needs to be clarified. And raises such questions as - does it make a difference if the statements are made publicly or privately? Which member of the organisation needs to have made the statement in order for it to be 'advocacy' – does it need to be the leader? Does the statement need to have the support of a majority of members? Are all members liable for the advocacy of some members?

5.5 The ICJA notes that the Security Law Review Committee Report of 2006 recommended the removal of paragraph (c) from the definition of 'advocates' in subsection 102.1(1A). For an organisation to be proscribed for directly or indirectly praising terrorism, and the praise does not result in a terrorist act, it was not intended that a terrorist act occur, and the organisation cannot be found to be actually involved in terrorism, is not justified.

5.6 Article 14 of the ICCPR and Article 11 of the UDHR state that an accused person 'charged with a criminal offence shall have the right to be presumed innocent until proved guilty'. This is not reflected in the current drafting of sections 101.4(5) and (5). As presently drafted the accused bears the evidential burden to disprove or put forward evidence that tends to disprove an element of the offence. This is in direct conflict with Australia's obligations under international law and with our own notions of the presumption of innocence and procedural fairness at common law.

5.7 The ICJA thus recommends the offences set out in sections 101.2 and 101.5 should be subject to review.

6. Amendment – section 102.1(2)

6.1 Subsection 102.1(2) outlines the procedure for proscription of a terrorist organisation. It is repealed and a reformed procedure is substituted. Proscription will occur by regulation by the Governor-General but the organisation will be informed of its proposed listing and have the opportunity to oppose it.

6.2 An Advisory Committee is to be established comprised of people with experience in human or civil rights, security analysis, public affairs, public administration or legal practice. The Governor-General must seek their advice and take their recommendations into account when making the regulation.

6.3 If the Governor-General makes a regulation, a notice should be published on the internet, in a daily newspaper and in the Gazette.

6.4 Proscription of an organisation can be reviewed by the Administrative Appeals Tribunal.

Comment

6.5 The ICJA notes that a terrorist organisation is currently proscribed by regulation of the Governor-General on the advice of the Attorney-General. The ICJA is concerned that the Attorney-General's discretion remains wide and his powers of proscription unguided despite the amendment. As Senator Ludlam notes, 'the process [of proscription of a terrorist organisation] should be made more transparent and should provide organisations, and other persons affected, with notification'.

6.6 The ICJA is also concerned by the provision in relation to the Minister. This provision states that the Minister must be satisfied on reasonable grounds that the organisation is either directly or indirectly engaged in, preparing, planning or assisting in a terrorist act, whether or not it has or will occur. The ICJA submits that the use of 'indirectly' makes the Minister's power so broad that it is difficult to know what the organisation would be involved in for it to be proscribed.

6.7 The ICJA is also concerned about the provisions relating to the review of proscription of terrorist organisations by the Administrative Appeals Tribunal is inappropriate. The ICJA submits that while it is commendable that the government is seeking to heighten its accountability, the power to proscribe organisations should remain in the hands of the Governor-General rather than tribunals and courts as it is a most serious task. Merits review would likely not achieve a result better than advice from the Listing Advisory Committee. As Lord Nicholls of Birkenhead stated in *A v Secretary of State for the Home Department* [2004] UKHL 56:

> All courts are very much aware of the heavy burden, resting on the elected government and not the judiciary, to protect the security of this country and all who live here. All courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility.

6.8 Despite these concerns the ICJA does support the proposed provisions for notification. In particular the ICJA supports the establishment of an Advisory Committee. The Advisory

Committee will comprise those with expertise in security analysis, public affairs, public administration and legal practice. The ICJA notes that while proscription will still be undertaken by the executive, there will be independent public consultation. The ICJA supports the establishment of an Advisory Committee. The ICJA submits that an Advisory Committee will further improve the proscription process as it will enable the organisation to understand the reasons for its proscription. If the public and the media are given the opportunity to participate in the proscription process, the end result would be that the Attorney-General's accountability could be more easily and readily scrutinised by an educated and informed community.

6.9 The ICJA recognises that the proposed amendments do improve Section 102 by requiring the relevant organisation and its members being notified prior to the regulation being made. The members of the listed group are then to be notified on regulation, as is the wider community by general published notification. The ICJA agrees that the notification process will make proscription more transparent in accordance with the aims outlined by Senator Ludlam.

7. Amendment – section 102.7(1) and (2)

7.1 Section 102.7(1) and (2) outline the support offences. The amendments substitute 'material support' where 'support' is currently. A person can also be reckless as to whether the material support or resources provided will be used in terrorist activity. Material support does not include the mere publication of views that appear to be favourable to an organisation or its objectives.

Comments

7.2 The ICJA submits that the substitution of 'material support' in Section 102.7 would assist in ensuring that there is a requisite connection between material support and a terrorist act, and that mere words are not caught by the provision. The new section would lessen the possibility that a person's freedom of expression could be infringed.

7.3 It is important to note however that a person can be guilty of the offence if they are reckless as to whether the organisation is a terrorist organisation, or whether the material support or resources provided will be used in such an activity.

7.4 The ICJA therefore submits that the person should have actual knowledge in order to be able to provide 'material support' and the section should be amended accordingly.

8. Amendment – section 102.8

8.1 Section 102.8 provided it was an offence to knowingly associate on more than two occasions with a member of a listed terrorist organisation, or a person who directs or promotes the activities of a listed terrorist organisation, with the intention of providing support that would assist the organisation to expand or continue to exist.

Comments

8.2 The ICJA notes that the section as currently worded is extremely broad and that the SLRC has recommended that this offence be repealed The ICJA agrees with the SLRC's recommendation that:

"The breadth of the offence, its lack of detail and certainty, along with the narrowness of its exemptions, has led the SLRC to conclude that considerable difficulties surround its practical application. Some of these difficulties include the offences' potential capture of a wide-range of

legitimate activities, such as some social and religious festivals and gatherings and the provision of legal advice and legal representation. Further, the section is likely to result in significant prosecutorial complications."

8.3 The ICJA submits that the offence interferes with the freedoms of speech and association out of proportion to the protection of the community from the threat of terrorism. Section 102.8 does not actually deal with the conduct which the Division of the Act is aimed at preventing and punishing. If the provision of support to a listed terrorist organisation is criminalised (as it is in Section 102.8), a person's association with a member of that organisation is not necessary to be noted as a separate crime.

8.4 The ICJA thus supports the repeal of Section 102.8.

9. Further comments and recommendations

9.1 Division 104.

9.2 Division 104 concerns control orders and is not addressed in the Bill. The Division grants power to Federal Courts to make control orders in response to a request from the Australian Federal Police 'to allow obligations, prohibitions and restrictions to be imposed on a person for the purpose of protecting the public from a terrorist act'. An interim control order can be issued if a senior AFP officer considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act or suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation. The requirements are unsuitably broad, out of proportion to the substance of the obligations, prohibitions and restrictions the court can impose.

9.3 The ICJA has some concern about the powers granted to the Federal Court in Division 104. The ICJA submits that the obligations, prohibitions and restrictions the Federal Court can impose affect a person being at specified areas or places, leaving Australia, remaining at specified premises, wearing a tracking device, communicating with specified individuals, undertaking specified activities and so on. The ICJA submits that the obligations, prohibitions and restrictions will have a significant impact on an individual's rights to liberty, privacy, freedom of association, freedom of expression and freedom of movement (ICCPR Articles 9, 12, 19, 22 and UDHR Articles 3, 12, 13, 18, 19, 20).

9.3 The ICJ is also concerned that interim control orders are made on an ex parte basis. The ICJA notes that the Federal Court must be satisfied on the balance of probabilities that making the order would substantially assist in preventing a terrorist act or the person has provided training to, or received training from a listed terrorist organisation. The Court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions is reasonably necessary for the purpose of protecting the public from a terrorist act.

9.4 The ICJA submits that obtaining an interim control order on an ex parte basis may infringe the individual's right to a fair trial as the obligations, prohibitions and restrictions placed on them are serious and made without any opportunity for excuse, explanation or defence. This provision is in breach of ICCPR Article 14 and UDHR Articles 10 and 11.

9.5 The ICJA is also concerned interim control orders do not have to be served on the person if disclosure of the information is 'likely to prejudice national security', put at risk ongoing operations by relevant agencies or the safety of the community or agency officers.

9.6 Whilst appreciative of the sensitive nature of such security operations and the time pressures that may be involved, the ICJA submits that the exemption categories within which the AFP is not required to serve the individual with notification of their order and relevant information are broad and undefined and leave open the possibility that they may be inappropriately relied on for expediency or political reasons. Importantly, the individual is then in a situation in which they are not aware of the evidence which may be used against them and the possibility of a fair trial is impossible. The ICJA submits that this provision is in breach of ICCPR Article 14 and UDHR Articles 10 and 11.

9.7 In *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28 the House of Lords held that unless a suspect was given sufficient information about the allegations against them, their right to a fair trial would be breached. Per Lord Hope of Craighead, 'The slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the case must stand by principle. It must insist that the person affected be told what is alleged against him'.

9.8 The implications of this case in Australia are as yet unknown, but to date the High Court has held that the admission of evidence by the AFP and security agencies unseen by the individual the subject of the hearing is permitted.

9.9 The ICJA submits that Division 104 should be subject to independent review and amended to ensure its accordance with the ICCPR and UDHR.

Amendments to the Crimes Act 1914

10. Amendment – section 15AA

10.1 Section 15AA is to be repealed. The Section provides that bail is not granted in relation to any terrorism offence unless the bail authority is satisfied of exceptional circumstances to justify bail.

Comment

10.2 The ICJA submits that the non-granting of bail in certain circumstances, in particular for any terrorism offence is contra to the principle that a person should not be deprived of their liberty unless convicted of an offence. The ICJA further submits that the onus on the defendant to prove their exceptional circumstances in order to have bail granted undermines the presumption of innocence (ICCPR Article 14).

10.3 The ICJA notes that according to Section 15AA, almost all terrorism offences are of such seriousness so as to reverse the bail presumption. The ICJA submits that whilst this may be correct in relation to some terrorist offences, for example, engaging in a terrorist act as in Section 101.1, providing support to a listed terrorist group, on the other hand, is far less serious an offence. Further, a person charged with a terrorist offence is not necessarily at higher risk of their fleeing the country, destroying evidence or causing further danger to the community than a person charged with another offence of similar seriousness.

10.4 The ICJA notes that section 15AA was criticised by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism who stated:

> '[T]he classification of an act as a terrorist offence in domestic law should not result in automatic denial of bail, nor the reversal of onus. Each case must be assessed on its merits, with the burden

upon the State for establishing reasons for detention'.

10.5 Furthermore, it must be remembered that such decisions are best made by the presiding judicial officer, who always has discretion as to the granting of bail or otherwise, as they will have all the circumstances of the particular case upon which to base their decision. The seriousness of the alleged offence is one of a number of issues that will always be weighed up by the bench in making such a decision.

10.6 The ICJA thus supports the repeal of Section 15AA.

11. Amendment – Division 2

11.1 Division 2 is entitled 'Powers of Detention'. Section 23BA is to be inserted before Section 23C in that Division and provides that a person must be informed of their rights at all material times.

11.2 Section 23CA concerns the calculation of the period of arrest for terrorism offences. Paragraph 23CA(8)(m) is to be repealed; it provides that a person can be detained for any reasonable time in which questioning is reasonably suspended or delayed.

Comments

11.3 The ICJ submits that when a person is being questioned regarding an offence, there will always be periods of time which should reasonably not be included in the actual questioning time as actual questioning is not taking place. For example, when the person is consulting a legal practitioner or receiving medical attention, delay is justified.

11.4 The ICJA submits that it is dangerous not to set limits on this so-called 'dead time' however. Paragraph 23CA(8)(m) effectively provides that a person can be detained for any reasonable time in which questioning is reasonably suspended or delayed. There is no cap on this time period; a person could therefore potentially be detained without charge indefinitely.

Recommendation

11.5 The ICJA thus submits that paragraph 23CA(8)(m) should be repealed.

12. Amendment – section 23CB

12.1 Section 23CB is to be repealed. It provides that a specified time period during which suspension or delay of questioning may be disregarded – 'dead time'. This can occur if a magistrate or justice of the peace is satisfied that it is appropriate to do so, that the offence is a terrorism offence, detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence, the investigation is being conducted properly and without delay and the accused has been given an opportunity to make representations.

Comment

12.2 The ICJA submits that the 'dead time' provisions place an accused at risk of being subject to arbitrary detention, contrary to Australia's obligations under UDHR Article 9.

12.3 The ICJA thus recommends that in order to protect the right to liberty of those accused of terrorist offences, Section 23CB should be repealed.

13. Amendment

13.1 A judicial officer currently includes a magistrate, justice of the peace and judge of the Federal Court. The amendment changes the definition of judicial officer to be only a judge of the Federal Court.

Comments

13.2 The ICJA submits that rather than a magistrate or a justice of the peace, a judge of the Federal Court is the appropriate judicial officer to oversee the extension of periods of investigation for terrorism offences. The ICJA further submits that a cap of 20 hours is appropriate.

13.3 The ICJA thus recommends that neither a magistrate nor a justice of the peace are appropriate people for this responsibility; the definition should be changed for the purposes of this section.

Amendments to the Australian Security Intelligence Organisation Act 1979

14. Amendment – paragraph 34G(4)(c) and 34S

14.1 Paragraph 34G(4)(c) and Section 34S are amended, altering the period in which a person can be detained from 168 hours to 24 hours.

Comment

14.2 The ICJA notes that Senator Ludlam has commented that the questioning and detention provisions under the Act are not in accordance with conventional criminal procedure and are contrary to ICCPR Article 9. For a person to be detained without charge for up to 168 hours or 7 days, even when they are not a suspect, is abhorrently unjustifiable.

14.3The ICJA submits that while the amended period of time is substantially reduced, it remains longer than that under any other Act.

15. Amendment – subsection 34K

15.1 Subsection 34K(10) allowed a person to be prohibited and prevented from contacting anyone at any time while in custody.

Comment

15.2 The ICJA submits that this subsection is not in accordance with conventional criminal procedure and is contrary to ICCPR Article 9.

15.3 The ICJA submits that the ramifications of this provision have the potential to represent a serious infringement upon the rights of an innocent person; it should be repealed.

16. Amendment – section 34ZP

16.1 Section 34ZP provision allowed a person to be questioned in the absence of a

lawyer. This is contrary to international human rights norms.

16.2 The ICJA recommends that section 34ZP should be repealed.

17. Amendment – section 34ZR

17.1 Section 34ZR relates to the conduct of the parents of the detained person during questioning, allowing them to be removed from the room where the questioning is taking place. Again this is contrary to international human rights norms.

Recommendation

17.2 The ICJA submits that section 34ZR should therefore be repealed.

18. Amendment – section 34ZS(2)

18.1 Subsection 34ZS(2) provides that a person, including the accused, their lawyer, parent or guardian, is subject to five years imprisonment if they disclose any information regarding the warrant or the questioning that took place within 2 years after the detention.

Comment

18.2 The ICJA submits that this is a secrecy provision that prevents any interested or concerned person or group from being able to monitor ASIO actions. It represents an unacceptable restriction upon the public's right to know and the citizenry's right to hold the executive to account through proper scrutiny of administrative actions.

18.3 The ICJA notes that section 34ZS(1) remains unamended. It imposes a five year penalty on an accused, their lawyer or parent or guardian who, before the expiry of a warrant, discloses information indicating a warrant was issued, a fact relating to the warrant's content, or to the questioning or detention of the person in conjunction with the warrant, unless the disclosure is a protected disclosure.

18.4 The ICJA submits that subsections 34ZS(1) and (2) should therefore be repealed.

19. Amendment – section 34ZT

19.1 Section 34ZT permits the denial of access to information regarding the reasons for the person's detention, the conditions of detention and treatment of the person to their lawyer. Again this is contrary to international human rights norms.

Comment

19.2 The ICJA submits that such a provision prevents the proper and efficient administration of justice since professionals such as lawyers or others who may become involved are best placed to bring to light improper exercises of powers under such legislation.

Recommendation

19.3 The ICJA submits that section 34ZT should thus be repealed.

20. Repeal of the National Security Information (Criminal and Civil Proceedings) Act 2004

20.1 The ICJA notes that Senator Ludlam has described this Act as 'problematic in the extreme'. As the Law Council submitted in 2006, the Act tilts too far in favour of the interests of protecting national security at the expense of the rights of the accused. As stated in the Act's Object (Section 3):

> 'The object of this Act is to prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice'.

20.2 The ICJA submits that the closed court proceedings, designation of evidence as secret and requirement of security clearance for lawyers is unjustified.

20.3 The Act also restricts the court's discretion to determine whether or not certain evidence should be disclosed to the accused and their lawyers. The right to a fair trial (ICCPR Article 14, UDHR Articles 10 and 11) is compromised. In *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28 the House of Lords held that unless a suspect was given sufficient information about the allegations against them, their right to a fair trial would be breached. Per Lord Hope of Craighead, 'The slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the case must stand by principle. It must insist that the person affected be told what is alleged against him'.

20.4 The ICJA submits that the Act should be repealed.