SAFEGUARDING THE NATION AS WELL AS HUMAN RIGHTS: SUBMISSION REGARDING THE NATIONAL SECURITY LEGISLATION AMENDMENT BILL 2010

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To Whom It May Concern,

Submission to the Senate Inquiry into the National Security Legislation Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010

We appreciate the opportunity to comment on the *National Security Legislation Amendment Bill 2009* (Cth) ('*NSLA Bill*').

We are a group of seven law students and recent law graduates concerned by the implications for human rights protection in Australia posed by the *NSLA Bill.*

Introduction of the *NSLA Bill* reveals that Australia is at a crossroads. While we applaud changes under the *NSLA Bill* that scale back worrying national security legislative reforms introduced by the previous government, there remain serious human rights concerns in the proposed legislative amendments. The *NSLA Bill* also misses crucial opportunities to safeguard human rights in Australia for the future.

We acknowledge that Governments have a duty to protect the rights and lives of those living within its borders and as such certain measures need to be put in place to safeguard against violent or terrorist acts, particularly on a large scale. However, the need to protect the nation from such acts is no excuse for unjustified encroachments on human rights. National security and human rights need to and can co-exist. It is with this in mind that we put forward our views on the *NSLA Bill*.

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DETENTION WITHOUT CHARGE

We submit that the *NSLA Bill* does not sufficiently recognise the rights of persons detained for suspected acts of terror. The tension between the need to address the threat of terror whilst simultaneously preserving Australia's political and social values is embodied in the proposed amendments to the Crimes Act in the *NSLA Bill.*

The main issue that emerges with regard to detention without charge is the amount of 'dead time' that can be used for further investigative activities once a suspect has been detained but not charged in relation to terrorist activities. The proposed amendments in the *NSLA Bill* repeal s 23CA of the Crimes Act regarding detention for a terrorist act with a charge and replace it with s23DB. S23DB(11) places a cap of seven days on the amount of 'dead time'. The previous incarnation of this law had imposed no time constraints on the amount of 'dead time' that could be added to an investigation once a suspect had been detained but not charged. Thus, while these provisions represent a greater form of recognition of the rights of terror suspects, we submit that the seven day period is still an unacceptable period of time and should be reduced to avoid arbitrary detention.

We acknowledge that the threat of terror is real and the law must adjust to address the uncertain circumstances in which terrorist acts can arise. However we do not believe that combatting this threat requires Australia to compromise its liberal democratic traditions. We submit that these proposed amendments would too greatly sacrifice basic standards of rights in the name of combatting terror. The *NSLA Bill* would breach standards of procedural fairness for persons detained under suspicion of terrorist acts and could potentially expose persons detained under the new *NSLA Bill* to arbitrary detention.

The potential danger of the current laws was demonstrated in the case of Dr Mohammed Haneef who, through an extension of the investigation period though 'dead time', was detained for 12 days without charge in relation to the Glasgow Airport Attack. This period of detention without charge was unacceptable and unjustified. In our view the proposed amendments are not sufficiently distinguished from the current law. The new provisions should represent a marked shift away from the demonstrated potential for arbitrary detention and should be informed by a greater consciousness of the rights of suspects to procedural fairness.

Initiating a cap of 48 hours between the time wherein a suspect is detained and subsequently charged would be an appropriate recognition of the rights of suspects whilst simultaneously acknowledging the complexity involved in the investigation of terrorism offences. This would strike an appropriate balance of acknowledging the special nature of terrorism investigations while maintaining consistency with standards of procedural fairness within Australian law.

POWERS TO SEARCH PREMISES IN RELATION TO TERRORISM OFFENCES

Schedule 4 of the *NSLA Bill* is designed to amend Division 3A of the *Crimes Act 1914* (Cth). Specifically, it is conceived to increase the powers of the police to search premises suspected of being used in relation to terrorism offences. We submit that the proposed powers given to police extend further than required to achieve the objectives of the Act.

The proposed section 3UEA gives powers to the police that enables them to search premises that are suspected of being used in relation to a terrorism offence, and if it is necessary because there is a serious and imminent threat to a person's life, liberty and safety.

We do not support extending police powers to search premises in this way, because:

1. There has been no actual example given of why such a power need be granted;
2. There are no specific provisions in the amendments that regulate or limit the power, bar the ambiguous requirement of the suspicion being on 'reasonable grounds';
3. Sections 3UEA(3) and (5) allow the police to seize any object that may be used in **any** indictable offence or if the police officer suspects that it is necessary to protect a person's life, liberty or safety – powers which are absurdly broad and outside of the purported objectives of Division 3A of the Act;
4. Currently, a search warrant is very easy to get – typically a simple phone call to a magistrate will suffice. Curtailing liberties this far is clearly inappropriate given the convenience of applying for a search warrant;
5. There are no provisions for challenging such a search, due mainly to the covert nature of terrorism investigations.

TREASON AND URGING VIOLENCE

Treason

We support the proposed repeal of the 'unlawful associations' provisions (section 3, *NSLA Bill*) that have been "superseded" by other laws concerning terrorist organisations.

We support the proposed amendment to sections 80.1(e) and (f) of the *Criminal Code Act 1995* in section 9 of the *NSLA Bill*. The Bill proposes to include a requirement that the person "intended" the relevant conduct to have the relevant outcome. We submit that this appropriately narrows the offence, particularly an offence and a penalty of such weight.

The Bill proposes to repeal s 80.1(h) of the *Criminal Code Act 1995* which sets out that a person commits an offence if they form "an intention to do any act" in s 80.1 manifested by an "overt act." We submit that, with regard to the magnitude of the crime and the penalty, that this is an appropriate narrowing of the offence to actual substantive treason.

In line with the ALRC Report on the issue, and with regard to the magnitude of the offence in question, this submission supports the removal of the words "by any means whatsoever" from the equivalent offences of sections 80.1(e) and (f) of the *Criminal Code Act 1995* (Cth).

Urging Violence

We support the view that sedition is unnecessary in light of more modern offences, such as incitement, and that in modern liberal democracies it may function as an inappropriate intrusion into the right of citizens to criticise the government. This is in light of the proposals made by law reform commissions in Canada, Ireland and England and Wales.[1]

If the sedition offences (now renamed as 'urging violence' offences) are retained, we welcome the additional intention requirements of sections 80.2(1) and 80.2(3) in the *NSLA Bill* for the same reasons espoused above in relation to treason.

Again, we welcome the proposed amendment of section 80.3(3) that allows the Court to have regard to matters regarding artistic work, public interest and the dissemination of news or current affairs. However, this submission asserts that the need for these additional defences to sedition (now 'urging violence') manifest the proposition that sedition (even in its new form) is an unnecessary encroachment into the ability to criticise the government.

The introduction of offences against groups or members of groups is again welcomed, particularly in light of recent events in Australia. However, we question the omission of sexual orientation as a possible "targeted group."

[1] Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), 45; Law Reform Commission (Ireland), *Report on the Crime of Libel*, LRC 41–1991 (1991), 10; Law Commission of England and Wales, *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), 48.

THE LISTING OF TERRORIST ORGANISATIONS

The *NSLA Bill* fails to rectify issues in relation to the listing of terrorist organisations, persons and entities under the *Charter of the United Nations Act 1945* (Cth) (‘*UN Charter Act’*) and the *Criminal Code Act 1995* (Cth). The absence of merits review for such proscriptions is the key concern.

UN Charter Act
Under s 15 *UN Charter Act* the Minister for Foreign Affairs can list a person or entity, asset or class of assets connected with terrorist acts. The practical effect of this is that assets listed or associated with the proscribed person or entity are frozen and it becomes illegal to deal with these assets.

Encouragingly, the *NSLA Bill* requires the Minister to have ‘reasonable grounds’ before making such a listing. The *NSLA Bill* also requires the listing to be reviewed after 3 years. However, the *NSLA Bill* fails to provide recourse to merits review of a decision to list. Due to the human rights and criminal implications of such listings, it is crucial that impartial merits review at the Administrative Appeals Tribunal be available to persons and entities listed under the s 15 *UN Charter Act.*

Criminal Code
Under Division 102 *Criminal Code* the Attorney General, through a regulation, can proscribe an organisation as a ‘terrorist organisation’ for directly, or indirectly, engaging in, assisting, preparing, planning or fostering acts or threats of violence or on the basis that they directly advocate terrorist acts. The extent of the Attorney General’s power to make a proscription is evident in the definition of ‘advocate,’ which includes praising a terrorist act, in circumstances where there is a *substantial* risk that such praise may lead a person to engage in a terrorist act.

The proscription of an organisation has serious implications for the listed organisations members rights to association and freedom of expression, that are protected under the International Covenant on Civil and Political Rights. These rights should only be limited in necessary circumstances and with proportionate action. As the Attorney General has a broad discretion to proscribe organisations - a decision that infringes human rights - it is crucial that merits review be available organisations that are listed. The Administrative Appeals Tribunal is the obvious forum for review of the factual basis of a proscription.

The *NSL Bill* also extends the period that terrorist organisations are listed before a listing needs to be renewed to 3 years, from 2 years. Further to the lack of procedural fairness under Division 102 *Criminal Code*, this relaxation of the review period exacerbates the human rights infringements arising from proscription.

NATIONAL SECURITY INFORMATION (CRIMINAL AND CIVIL PROCEEDINGS) ACT 2004

The amendments proposed in the *NSLA Bill* do not address some of the most

controversial aspects of the *National Security Information (Criminal and Civil Proceedings)* Act 2004 (NSI Act), namely, the requirement for a defendant's lawyer to have security clearance and closed trials. Without amendment the legislation as it stands infringes the right to a fair trial and breaches Australia's international obligations under the *International Covenant on Civil and Political Rights* (ICCPR).

1. Security Clearance

The NSI Act requires a Defendant's lawyer to undergo a security clearance before certain evidence is disclosed to counsel that might contain certain national security information.[2] If a lawyer isn't given such a clearance they will potentially be denied access to evidence that will be used against their client. This raises alarming concerns about the right to a fair trial. Lawyers already have to undergo vigorous character clearance to practice and therefore are competent to be privy to national security information. If disclosure of certain information should truly jeopardise national security, then the prosecution should not proceed with the criminal conviction. There may very well be a need to protect certain national security information but this should not be at the expense of everyone's right to a fair trial.

2.Closed hearing.

The NSI Act also gives the Attorney-General the power to prevent certain information from being disclosed to the accused or their legal counsel (if they have failed security clearance) if disclosure 'would be likely to prejudice national security, the court may order that the defendant, the legal representative or the court official is not entitled to be present during any part of the hearing.'[3]

Both the security clearance requirement and closed hearings clearly breaches Article 14 (3)(d) of the ICCPR that states everyone is 'To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing'.[4] Further, the denial of a fair trial may also be unconstitutional. The right to a fair trial is also constitutionally protected as stated by Deane J in *Dietrich v R*, 'The fundamental prescript of the common law of this country is that no person shall be convicted of a crime except after a fair trial according to law.'[5]

MATTERS NOT ADDRESSED IN THE *NSLA BILL*

We are concerned that the proposed amendments in the *NSLA Bill* fail to address key elements of the anti-terror laws that pose a grave risk to human rights, including control orders, preventative detention orders, and ASIO detention powers.

We note that the Parliamentary Joint Committee on Intelligence and Security in its 'Review of Security and Counter-Terrorism Legislation' highlighted the importance of ensuring:

> "that the departure from traditional criminal law principles, adopted on an

[2] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 39.
[3] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 29(3).
[4] *International Covenant on Civil and Political Rights*, U.N. Doc A/6136 (1966).
[5] *Dietrich v The Queen (1992) 177 CLR 292*, 362–364.

> exceptional basis to aid the fight against terrorism, does not become normalised. There is a real risk that the terrorism law regime may, overtime, influence legal policy more generally with potentially detrimental impacts on the rule of law."

We therefore urge a review of, and amendment to the following anti-terror measures.

Control Orders and Preventative Detention Orders
Control orders and preventative detention orders were authorised under the 2005 amendments to the *Criminal Code Act 1995* (Cth). Both regimes operate to severely restrict an individual's liberty where that person has not be convicted of or charged with any criminal offence, including where there is insufficient evidence to justify a formal charge. These measures are at odds with fundamental criminal law rights of freedom from arbitrary detention, the presumption of innocence, and the right to a fair hearing.

Control orders can be enforced for up to 12 months, with the possibility of extension. Preventative detention can be for up to 48 hours, and an individual commits an offence if that person discloses the fact that the preventative detention order has been made, or the fact or period of detention. These measures represent a significant curtailment of an individual's liberty. Restriction of liberty outside the criminal justice system should only be justified in extraordinary cases, such as threats to public health, cases of clear mental illness, or in times of declared war.

We believe that control orders are not a reasonably proportionate means of protecting Australia's security interests, because there are inadequate safeguards to the imposition of both control orders and preventative detention orders. We believe that terrorism concerns are more appropriately dealt with under the normal criminal law regime, which is subject to checks and balances so that civil liberties are not unnecessarily deprived.

ASIO Detention Powers
An ASIO warrant under the current anti-terror laws allows the detention of a person, including a non-suspect for up to 168 hours (7 days) without charge. Provisions for extension mean that a person can be held in detention indefinitely for successive 7 day periods, without any requirement of criminal charges. A detainee is not allowed to consult a lawyer of their choice.

These powers infringe upon the principle of freedom from arbitrary detention, especially given that non-suspects can be detained in this manner. They also infringe upon an individual's right to take proceeding to court to determine the lawfulness of their detention. We do not believe that the government has adequately explained that they are necessary in addition to normal existing law enforcement measures, and we do not believe that the detention powers are reasonable, legitimate, or proportionate limitations of the rights in question.

CONCLUSION

The recent decision of the government not to enact a constitutional or legislative human rights charter is proof that fundamental human rights are precariously protected under

Safeguarding the nation as well as human rights domestic law. The absence of overarching human rights protection at the Commonwealth level makes it even more important that legislative reforms conform with international human rights norms.

Thank you for considering our submission.

Yours sincerely,

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