Submission to the Senate Legal and Constitutional Committee

Inquiry into the Anti-Terrorism Laws Reform Bill 2009

About AMCRAN

The Australian Muslim Civil Rights Advocacy Network (AMCRAN) is dedicated to preventing the erosion of the civil rights of all Australians, and, by drawing on the rich civil rights heritage of the Islamic faith, provides a Muslim perspective in the civil rights arena. It does this through political lobbying, contributions to legislative reform through submissions to government bodies, grassroots community education, and communication with and through the media. It actively collaborates with both Muslim and non-Muslim organisations to achieve its goals.

Since it was established in April 2004, AMCRAN has worked to raise community awareness about the anti-terrorism laws in a number of ways, including the production of a booklet Terrorism Laws: ASIO, the Police and You, which explains people's rights and responsibilities under these laws; the delivery of community education sessions; and active encouragement of public participation in the law making and review process. AMCRAN and its members have participated in a number of parliamentary inquiries with respect to anti-terrorism laws in Australia.

Acknowledgement

This submission has been prepared by Vicki Sentas, Ayishah Ansari and Agnes Chong with research assistance from Tanvir Ahmed, Figen Cingiloglu, Elfet Eid, Sabrina Khan, Mahmod Khwaja, Tanvir Uddin, and Meraj ul Islam.

Introduction

AMCRAN supports the *Anti-Terrorism Laws Reform Bill* 2009 ('the Bill') as it proposes a number of amendments that would improve the overall operation and application of the anti-terror laws.

This submission outlines our position in relation to the specific amendments, but we would also be pleased to appear before the Committee to assist with the Inquiry.

AMCRAN notes the release of the National Security Legislation Discussion Paper ('the Discussion Paper') by the Attorney-General, the Hon Robert McLelland on 12 August 2009 which received widespread media coverage. The Discussion Paper proposes to introduce a number of provisions including reforms to the sedition offences and the period of detention for terrorism suspects. The Discussion Paper assumes the current state of the laws without reference to the proposals that are contained in the Anti-Terrorism Laws Reform Bill which is the subject of this present Inquiry. Despite the comparatively little media attention that this Bill has received, AMCRAN submits that the Bill contains a number of important proposals, and they must be given due and serious consideration and not be overshadowed by the proposals in the Attorney-General's Discussion Paper.

Schedule 1 Criminal Code Act 1995

Items 1 and 2 – Repeal of Sedition offences

AMCRAN position: in full support

AMCRAN is in full support of the repeal of the sedition offences. We believe that the sedition offences as amended by the *Anti-Terrorism Laws Bill (No. 2)* 2005 seriously impinge on the freedom of speech while being unnecessary in both their definition and scope which increases the potential for discriminatory application.

There are serious concerns that the sedition offences have a significant impact on freedom of speech in Australia and are incompatible with article 19 of the ICCPR and freedom of speech provisions. The difficulty in drawing the line between 'robust debate' and 'seditious commentary' makes these laws potentially damaging. The history of such laws is that individuals and organisations err on the side of caution, and impose on themselves a form of self-censorship, which is not conducive to healthy and open discourse, an essential element of a democratic society.

The breadth of the offence of 'urging assistance to countries and groups opposed to Australia's military actions abroad' under s80.2(8) has the effect of curtailing freedom of speech and preventing criticism of the government's actions, and has a significant impact on the ability of the community to express its views. An example of this view is that "Iraqis have the right – indeed the duty – to resist the occupation of their country by Western forces." While unpalatable to some, such a statement falls within the meaning of a right recognised under international law. Resisting occupation for example by the Europeans against the German Occupation of their lands is applauded and celebrated in Australian history. This view is also part of a healthy debate on Australia's involvement in Iraq and should not be criminalised. The offences also have a particular effect on Muslim community groups who may wish to express solidarity with Muslims who live under oppressive regimes or various kinds of occupying forces. This is particularly the case as the law makes no distinction between legitimate liberation (recognised under international law), independence movements and terrorism.

In any case, existing laws already cover speech that oversteps the bounds and causes harm: if the urging is in the form of recruitment for an overseas organisation (be it state-based or terrorist in nature), then it is sufficiently covered by the *Crimes (Foreign Incursions and Recruitment Act) 1978* or the offence for recruiting for a terrorist organisation under s102.1 of the *Criminal Code.*

The offence of 'urging violence within the community' under s80.2(5) is a curious inclusion under sedition and it is unclear why it was introduced within the anti-terrorism framework. Connecting legislation against group violence (particularly ethnic types of group violence) with terrorism reinforces the stereotype that terrorism is an "ethnic" problem and not a criminal or more widely social one. While we accept that any speech inciting violence is indefensible, we note that laws already exist that make it an offence to incite violence. Indeed, it is already a terrorism-related offence, punishable by life imprisonment, to threaten politically motivated violence with the intention of intimidating a section of the public.[1] Any such conduct may also be covered by s 102.4 of the Criminal Code which makes

[1] Section 100.1, *Criminal Code Act 1995 (Cth).*

it an offence to recruit others to join a terrorist organisation. Further, existing provisions also prohibit incitement to commit a crime[2], and racial or religious vilification offences already exist in different jurisdictions that prohibit the incitement of violence or hatred against different groups of people.

We are concerned that the sedition offences are contributing to the normalisation of Islamaphobia in government policy and in the general community, and that any discretionary use of the legislation in targeting so called Muslim 'extremism' licenses the over-policing of Muslims. We are also concerned that the current climate of institutionalised Islamophobia, may lead to the criminalisation of statements made by Muslims as 'incitement' where there may otherwise be no evidence of violent acts which threaten the safety of the public.

The sedition offences also have a significant chilling effect on the Muslim community in expressing legitimate support for self-determination struggles around the world. It has been suggested that Muslims fear using "legitimate concepts and terminology" due to the anxiety of being misunderstood by authorities.[3] Some even engage in self-censorship of certain words or concepts, such as a religious lesson on "jihad"[4] for fear that it could easily be misunderstood as glorifying or encouraging terrorism. There are also concerns surrounding the "extremely thin line" between empathising with the Palestinian cause and justifying the actions of suicide bombers which could not be drawn with any legal certainty.

In view of the impact on freedom of speech, their questionable necessity and the confusion which they have caused due to the poor drafting and lack of clarity, AMCRAN supports the repeal of the sedition offences.

[2] Section 101.4, *Criminal Code Act 1995 (Cth)*.

[3] Alan Travis and Patrick Wintour, "Terror bill chilling for Muslims, Blair warned". The Guardian, Friday 11 November 2005.

[4] "Jihad" is an Arabic word that means "struggle." In the Islamic context it is used to mean two different things: struggle to follow one's faith and to control one's worldly desires, and military struggle. For example, one might struggle against one's inclination to worldly entertainment to spend more time on worship. It can also mean military conflict against an oppressor, e.g. the fighters against Soviet occupation of Afghanistan in the 1980s were known as "mujahideen" (lit. *one who struggles*). Unfortunately, in the Western media, the term *jihad* has become synonymous with terrorism, but this is not its true meaning.

Items 3 and 4 – Definition of terrorist act

a. Removal of 'political, religious or ideological cause' from definition of 'terrorist act'

AMCRAN position: in full support

We strongly support the removal of the motive element from the definition of a terrorist act, i.e. the requirement that the act be advanced for a 'political, religious or ideological cause'.

A broad range of arguments have been made in support of the retention of motive in the definition of terrorist act. These arguments have been relied on and accepted by the Sheller review, and the PJCIS in its Review of Security Legislation. We argue in the following discussion that there are compelling reasons as to why it is appropriate that the motive requirement be removed.

The denunciatory function of the definition of terrorist act
It has been argued by proponents of the motive requirement that it is necessary in order to distinguish terrorism as a 'political' crime as distinct from other crimes, and that this makes terrorism the serious crime that it is.[5] These arguments rely on the idea that stigmatisation of terrorism should occur primarily by criminalising motives. Conceptually distinguishing terrorism from other violent crimes as morally reprehensible should not rely on criminalising the slippery and politicised concept of motive. We submit that terrorism should be primarily stigmatised by virtue of terrorist *actions* and not the ideologies or beliefs held by the persons who commit criminal acts. The denunciatory function of law should be based on acts and intention, not motive. Therefore it is our submission that the proposed subsection 100.1(2) provides an adequate basis for denouncing and criminalising terrorist acts. Terrorist crimes can be adequately distinguished from other crimes by requiring proof of an intention to intimidate the public or government.

The role of motive
In practice, the requirement to advance intention of a 'political, religious or ideological cause' is in fact a motive and not strictly an intention for the purposes of establishing guilt. Both motive and intention are combined in this definition. Theoretically, under this definition, guilt is determined if a person intentionally does an act because of a political religious or ideological motive. However, in traditional criminal law, intention and motive are different and separate concepts – intent is the deliberate mental contemplation of the act and motive is why someone did the act. Motive is traditionally a matter for sentencing and not an element of an offence.[6] There are good reasons why the distinction between intent and motive is made in the criminal law. Justice Robert McDougal has argued that 'motive should neither exclude nor create a crime', pointing out that motive does not increase criminality of an act nor its consequences.[7] We submit that there is no justifiable

[5] See for example, the following submissions to the Sheller Review: Gilbert + Tobin Centre for Public Law; the Human Rights and Equal Opportunity Commission.
[6] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (South Melbourne: Oxford University Press, 2004)
[7] Robert McDougal 'Law, Liberty and Terrorism', accessed at: http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/mcdougall0409.pdf/$file/mcdougall0409.pdf

public policy reason for deviating from this important principle, and every reason to ensure that it is preserved.

The current definition is discriminatory

AMCRAN submits that the requirement that the accused advance a 'political, religious, or ideological cause' allows individuals to be targeted and charged on the basis of their religious and or political beliefs rather than focusing on the acts they have committed. The current definition puts undue emphasis on who the accused is, and what they believe, rather than what they did. The definition is discriminatory as it punishes what Professor Bernadette McSherry has described as 'criminal types', not 'criminal conduct'.[8] McSherry has pointed out that criminalising motive introduces sociopolitical and cultural explanations for crime as evidence. We suggest that this aspect of the function of motive makes it inappropriate to remain in the definition of terrorist act.

In particular, we remain concerned that the motive requirement empowers law enforcement agencies to judge which ideologies are acceptable. In the course of our work with Muslim communities, the disputed idea that particular religious beliefs are more prone to violence has meant that literalist interpretations of Islam have been the disproportionate target of the authorities. The previous Liberal government's emphasis on preventing the rise of 'Islamist ideology' had some role in propounding the highly dubious idea that particular interpretations of Islam *cause* violence.

In arguing for the retention of motive in the definition of terrorist act, Dr Ben Saul states in response to the claim that motive facilitates discrimination of Muslims that:

> It is clear that by highlighting the political, religious or ideological reasons behind terrorism, a motive element necessarily draws more attention to those beliefs. But it must be emphasised that such attention is only triggered where such beliefs are connected with acts of, or threats or plans to commit, unlawful physical violence as enumerated in terrorism definitions – and which are already within the sights of the police. Peaceful politics, religions or ideologies are not at risk; and indeed efforts to focus on peaceful beliefs or expression would not be authorised by the law.[9]

The logic of Saul's argument highlights our key concerns with the importation of belief in establishing whether an act is terrorist. The decision as to which religious or political beliefs constitute a motive for violence, and, which beliefs are peaceful, are highly discretionary and politicised concepts with which to ground guilt.

Important developments about how counter-terrorism policing should function have been taken up by security and police agencies and by government. There appears to be a formative policy shift away from the concept that terrorism is wholly an ideological phenomenon, and a recognition that terrorism has complex, often irreducible social and political causes.[10] The idea that intent to commit violence flows inherently from religious or

[8] B.McSherry, "The Introduction of Terrorism-Related Offences in Australia: Comfort or Concern?" *Psychiatry, Psychology and Law* (2005): 279-288 at p. 282.

[9] B. Saul, "The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient - Or Criminalising Thought?" *Sydney Law School Research Paper No. 08/123*, 2008 at pp 6-7.

[10] For a discussion of how Victoria Police seek to approach radicalisation beyond the question of simply identifying 'Islamist ideology' see, Pickering, Sharon, David Wright-

political ideology, has been disputed by scholarship examining the causes of political violence.[11] Further, a recent trend in counter-terrorism in both the UK and Australia appears to be at least discursively focused away from an emphasis on protecting 'values' or attacking so called 'ideology' such as the concept of jihad.[12] These formative trends are partly a response to the growing recognition that essentialising ideological representations of Islam are discriminatory and stigmatising. Therefore, it seems highly undesirable that Australian law should seek to criminalise the slippery idea of ideology rather than violent acts.

We submit that the legal definition of terrorist act should therefore reflect the more nuanced understandings of the causes of violence which appear to be influencing security policy and practice. If the aim of government is to find effective means to avoid stigmatising Australian Muslims or to single out particular tenets of Islam, then it is imperative that 'ideological, religious and political cause' be removed from the definition of terrorist act.

We urge the committee to recognise that there is no universal consensus on the definition of terrorist act, with neither the United Nations, the United States, France or Sweden requiring the establishment of motive.

b. Removal of 'threat of action' and 'damage to property' from definition of 'terrorist act'

AMCRAN position: in full support

AMCRAN strongly supports the removal of 'threat of action' from the current definition of terrorist act. This amendment is necessary in order to limit the scope of the definition.

We submit that the reference to action which endangers a person's life, or causes serious risk to the health and safety of the public, adequately criminalises actions which do not actually result in death or harm.

We strongly support the removal of references to the damage of property and interference, disruption or destruction of information, public utility systems and the like, as action that may be considered terrorist. The offences which flow from the definition of terrorist act are the most serious in the *Criminal Code* and should be reserved as a matter of public policy for actions intended to cause death, endanger life or cause serious risk to the health and safety

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Neville, Jude McCulloch, and Pete Lentini. *Counter-Terrorism Policing and Culturally Diverse Communities: Final Report.* Monash University and Victoria Police, 2007.

[11] See for example, Tahir Abbas, "A Theory of Islamic Political Radicalism in Britain; Sociology, Theology and International Political Economy." *Contemporary Islam* 1 (2007): 109-22; Tahir Abbas (ed.) *Islamic Political Radicalism: A European Perspective*, Edinburgh: Edinburgh University Press, 2007. Quintan Wiktorowicz, "Anatomy of the Salafi Movement." *Studies in Conflict and Terrorism* 29 (2006): 207-39; Jonathan Githerns-Mazer, "Islamic Radicalisation among North Africans in Britain." *British Journal of Politics and International Relations* 10, no. 4 (2008): 550-70.

[12] See for example the recent strategy announced by the Commonwealth Attorney General 'The Lexicon of Terrorism Project', 6 July 2009, accessed at: http://www.robertmcclelland.alp.org.au/news/0709/06-01.php

of the public. The new proposed sections provide a clearer and proportionate public policy basis for the criminalisation and stigmatisation of terrorist actions.

Item 4 - Exclude 'armed conflict' from the definition of terrorist act

AMCRAN position: In full support

AMCRAN strongly supports the amendment to exclude 'armed conflicts' from the definition of terrorism. The current definition erodes the legal right under international humanitarian law to self-defence in furtherance of self-determination. The definition at law does not allow for self-determination movements to be supported in any way, even if they have legitimacy at international and legal levels. As Muslims feel it is part of their religious obligation to remove injustice and oppression around the world, many Muslims view it is part of their religious obligation to support many of these movements. This is by no means a uniquely Islamic position – it is one way that the Australian and United States Governments justified its military activities in Iraq, for instance.

The legal distinction between armed conflicts and terrorism is critical, and has been repeatedly pointed out by the PJCIS. The PJCIS reiterated in several listing review reports that while political violence is not an acceptable means of achieving a political end in a democracy:

> ..there are circumstances where groups are involved in armed conflict and where their activities are confined to that armed conflict, when designations of terrorism might not be the most applicable or useful way of approaching the problem. Under these circumstances - within an armed conflict - the targeting of civilians should be condemned, and strongly condemned, as violations of the Law of Armed Conflict and the Geneva Conventions. The distinction is important. All parties to an armed conflict are subject to this stricture. Moreover, these circumstances usually denote the breakdown of democratic processes and, with that, the impossibility of settling grievances by democratic means. Armed conflicts must be settled by peace processes. To this end, the banning of organisations by and in third countries may not be useful, unless financial and/or personnel support, which will prolong the conflict, is being provided from the third country. ASIO acknowledged this point to the Committee:
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> > [When] there is a peace process, you can unintentionally make things worse if you do not think through the implications of the listing.[13]

Despite the reiteration of this statement by the PJCIS in every subsequent review, no direct consideration has been given to whether a conflict is governed by the laws of armed conflict and if particular listings conflict with Australia's international legal obligations.

The Geneva Convention and international humanitarian law (IHL) should regulate breaches of the laws of war such as acts of terror against civilians. This was further recognised by the PJCIS in its recommendation that armed conflicts be excluded from the definition of terrorism.[14] We submit that Australia, as a signatory to the Geneva Convention, is obliged to give due legitimacy to the law of armed conflict.

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[13] Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004*, p 23.

[14] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, 2006, Recommendation 12, p 65.

We support the proposition that armed conflicts should be resolved through negotiation and diplomacy. We submit that the current blurring of armed conflicts as automatically terrorism is an impediment to the political resolution of such conflicts. That is, terrorism is an illegitimate strategy which targets the civilian population, not the correct characterisation of all military conflict. The criminalisation of armed conflicts, primarily that over the occupied territories of Palestine, has a devastating impact on the Muslim diaspora, and is a continuing source of legitimate grievance. Muslims are rightfully troubled by the double standards generated in the 'war on terror' - the terror of powerful states in targeting civilians is considered legitimate and neither a war crime nor terrorism, while non-state actors engaged militarily are designated 'terrorist'. We submit that the terrorist actions of non-state and state actors engaged in an armed conflict should be regulated by the law of armed conflict, and not domestic criminal law.

In our view this is a critically important reform which has the clearest potential to ameliorate the stigmatising and potentially radicalising impact of foreign policy on the Muslim diaspora. This reform presents a vital opportunity to calibrate law with a counter-terrorism strategy which seeks to mitigate, not escalate the complex causes of political violence.

Item 5 – Repeal of offence of 'possessing things' in relation to terror acts

AMCRAN position: in full support.

In practice the offence has been used to criminalise conduct which is far removed from any intent to commit a violent act.

AMCRAN strongly supports the repeal of the possession offence under section 101.4. The offence criminalises possession of a thing through the device of a 'connection' to a terrorist act. The act of possession does not need to be connected to a specific terrorist act. The fault element of this offence, either recklessness or knowledge of a connection between the act of possession, and its connection to a terrorist act, does not require that the person possessing the thing have an intention to commit an actual or eventual act of violence, only the intention to possess the thing itself. Traditional notions of guilt require that conduct be more than merely preparatory.[15] However, with the possession offence, criminal responsibility arises well in advance of an intention to commit a specific violent act.

Further, the intention that the thing possessed is connected to a terrorist act is not an element of the offence which the prosecution must establish. Rather the defendant bears the evidential burden to establish that their possession of a thing was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act. The offence is far too expansive in its departure from the norms of criminal responsibility to legitimately remain in the *Criminal Code*.

[15] B. McSherry, "The Introduction of Terrorism-Related Offences in Australia: Comfort or Concern?", *Psychiatry, Psychology and Law* (2005): 279-288 at p.283.

Items 6, 7, 8, 9 - Various safeguards and requirements for notice and consultation with regard to the process of listing Terrorist organisations

AMCRAN position: It is AMCRAN's position that proscription is an inherently anti-democratic and draconian measure and we oppose the proscription regime in its entirety. However, we support the amendments in principle as they provide greater safeguards to the proscription process (including an independent advisory committee, notification to the organisation being listed, a means to be heard before being proscribed, consultation).

Item 7 – Removing 'fostering' from the definition of 'terrorist organisations'

We support the amendment to the definition of terrorist organisations to remove the reference to 'fostering the doing of' a terrorist act. Applying the ordinary English meaning of 'fostering' would mean that a terrorist organisation is one which directly or indirectly promotes the growth or development of a terrorist act, or directly or indirectly furthers or encourages a terrorist act. In the context of the definition, and the preceding criteria of preparing, planning or assisting the doing of a terrorist act, the concept of 'fostering' is unduly ambiguous. While a reasonably clearer meaning may be given to the concept of preparing, planning and assisting, fostering is far too expansive. Fostering lends itself to being understood as passive support, encouragement, praise, or any number of positions and relationships. It should not be criminal justice policy to criminalise organisations on such a subjective and vague ground incapable of clear definition. Given the serious legal offences which are triggered by the definition, it is appropriate that 'fostering' be removed from the definition.

Items 6, 8 and 9 – changes to terrorist organisation proscription and establishment of Advisory Committee

We address the specific proposals in the Bill to reform proscription below. Firstly, we reiterate our position in previous submissions, that the proscription regime should be repealed in its entirety as a matter of urgency. Proscription allows for the criminalisation of individuals for their political associations or support for listed organisations in the absence of any actual or threatened acts of violence by that individual. Criminal liability in a democracy should retain a nexus between an individual's actions and the offence.

As a result of the lack of a nexus between an individual and a terrorist act, proscription of Muslim organisations generates a collective punishment for the Muslim diaspora. Attempting to quash support for organisations such as Hamas and Hizbollah, for example, which are widely supported as legitimate liberation movements, should not be a legitimate objective of the criminal law. Rather, political conflicts should be resolved through political means, the use of diplomacy and real incentives and solutions to long standing grievances.

In the current political climate, the proscription regime has had the effect of repressing the aspirations and activities of local organisations and affiliations between individual Muslims in Australia. In our communications with many Muslim individuals and organisations, it is clear that in 'blacklisting' predominantly militant Muslim organisations, proscription has had the effect of criminalising the ideas, beliefs and political aspirations which are legitimately held by many Muslims, and who have no connection to committing acts of political violence.

As we have argued previously, proscription is a discriminatory regime which has no place in a multicultural democracy.

The amendments outlined in this Bill do not remedy the problems endemic to the proscription regime and the inherently anti-democratic nature of the proscription regime. The reforms concerned with procedural fairness mask the inherent problems with proscription, as we will elaborate below.

However, as the Bill does not propose to repeal proscription, we are broadly in support of the reforms where such reforms provide greater accountability to the process. We remain concerned that these reforms do little to alleviate the criminalisation of individuals for their relationship to listed organisations within the logic of proscription.

According, we provide in principle support for the following provisions in the Bill, including:

- The provision of notification to the organisation proposed to be listed, before the listing occurs.

- Establishment of an independent advisory committee.

  We welcome the establishment of the advisory committee in order to provide a degree of accountability to the highly politicised nature of executive proscription. However, a number of fundamental questions require consideration if the committee is to be an improvement on the current process. The proscription decision-making process has been wisely critiqued, including by the PJCIS, for relying on the vague non-statutory criteria as developed by ASIO. The PJCIS has recommended in previous reviews that in determining which organisations are to be proscribed, ASIO and the Attorney-General should specifically address each of the following six additional factors:

  - the organisation's engagement in terrorism;
  - the ideology of the organisation, and its links to other terrorist groups or networks;
  - the organisation's links to Australia;
  - the threat posed by the organisation to Australian interests;
  - the proscription of the organisation by the United Nations or by likeminded countries;
  - whether or not the organisation is engaged in a peace or mediation process.[16]

  However, the criteria have been subject to extensive criticism by the PJCIS and others. We do not reiterate these arguments here, suffice to say It has been noted that it is unclear what some of the criteria mean, and the criteria have not been applied in a systematic fashion (for example, many organisation being listed without having links to Australia nor posing direct threats to Australia's interests.)

  Both ASIO and the advisory committee should consider the same criteria as the basis for listing in making their advice to the AG. We recommend that a set of coherent

[16] Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisations*, 2005, para 2.3.

published criteria guide the advisory committee and ASIO and that the advice of both in relation to the aforementioned criteria be made publically available. We support the criteria developed by Dr Patrick Emerton in his submission to the PJCIS.[17]

- The rights for persons and organisations to be heard when proscription is considered.

- Consultations with the public to assist the committee

  We submit that while the right to be heard, and for the broader affected public to make submissions are in line with administrative law, their effectiveness within the proscription process is limited. Muslim individuals and organisations likely to be affected by individual listings will be very unlikely to put themselves forward to oppose a listing. This has been borne in the very few numbers of public submissions by Islamic organisations to individual listing to date. In our experience of working with Muslim communities, making submissions to the PJCIS regarding individual listings has not been taken up precisely because of a fear of being linked to listed organisations. The process and logic of proscription stigmatises Muslim communities in Australia. It is commonly understood that oppositional voices are simply making themselves targets for policing and increased surveillance. Far from being a mistaken belief held by Muslim organisations 'unaware' of the precise terms of the law, we believe these fears are largely well-founded and are precisely the effect of the proscription regime.

- Review of the listing decision by the Administrative Appeals Tribunal.

  We submit it is critical that review of the merits of listing be made available as a matter of urgency. The fact that no challenge to a listing decision has been brought reflects an appreciation of the limitations afforded under judicial review. Recourse to appeal on the merits of the decision would provide a basis to test the Attorney General's reasons for decision. It would also provide a mechanism for public information and debate on the efficacy of listing.

[17] P. Emerton, 'Submission to the Parliamentary Joint Committee on Intelligence and Security's Review of the Listing Provision of the Criminal Code Act 1995', 2007, at pp 10-12.

Item 10 – Training a terrorist organisation or receiving training from a terrorist organisation

AMCRAN position: partial support.

AMCRAN supports the removal of strict liability, but we do not support the proposed s102.5(2) which provides a person commits the offence where he or she is reckless as to whether the organisation is a terrorist organisation.

In addition, AMCRAN recommends that the definition of training needs to be amended so that it is limited to military training.

AMCRAN supports the removal of strict liability in relation to training offences under s102.5 of the Criminal Code. AMCRAN is of the view that the strict liability element of the offence is unnecessarily complicated and confusing, and allows for a very broad application of this offence. This was also recommended by the Sheller review, which stated that applying strict liability to offences affects its proportionality, especially where the offence carries imprisonment.

AMCRAN however does *not* support the proposed offence of recklessness as to whether the organisation is a terrorist organisation, punishable by up to 15 years. This offence has a potentially very wide application as the definition of terrorist organisation is very broad. In essence, the effect of the offence is to place an onus on individuals to ensure that they are not involved in training activities with a terrorist organisation. While it may be acceptable that in some circumstances, a person may be aware of the context of the training, it is unreasonable for there to be a similar expectation in all instances of training. AMCRAN is of the view that the onus placed on the individual presents a burden that is far too great to justify the offence.

Limit definition of 'training'

In addition to the proposed amendments in the Bill, AMCRAN submits that the definition of 'training' needs to be qualified. Both the Sheller and the PJCIS reviews recommended that the scope of training be limited such that there was a clear nexus between the training and a terrorist act.

The Sheller review recommended that the training should be defined as being connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act.[18] This position was also supported by the PJCIS review, which stated that innocent training or mere teaching of people who may be members of a terrorist organisation should be avoided by the laws.[19]

Conceivably, the current definition of training may cover a range of activities, including those that may be humanitarian, or otherwise innocuous, in nature. AMCRAN is of the view that the Sheller and PJCIS recommendations must be taken into account in order to narrow the scope of the offence, and we submit that it would be appropriate to limit the offence.

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[18] Report of the Security Legislation Review Committee (Sheller report), June 2006, p.117.

[19] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, 2006, Recommendation 12, p. 75.

This would therefore explicitly exclude other sorts of training, for example, humanitarian training, or other activities that are not related to any terrorist act in nature.

Items 11 to 15 – Providing support to a terrorist organisation

AMCRAN position: partial support.

We provide in principle support to the proposed amendments, however, we have a number of concerns in relation to the offence such that our preference is for it to be repealed altogether.

Items 11-15 Changing 'support' to 'material support'
AMCRAN is of the view that the 'support' offence should be repealed altogether.

The PJCIS Review argued that it is the context of words 'material support' which should be considered, and not mere words themselves. The Committee therefore recommended amendments to be made to s 102.7, so that it is limited to material support and resources and not just the meaning of the words.[20] In Recommendation 18, the Committee recommended amending the definition to remove the 'ambiguity' associated with the offence. AMCRAN is of the view that this would assist in narrowing the broad nature of the support offence, but it still does not address the inherent problems with this offence.

We do not believe that amending the offence to read 'material support' will adequately limit the broad scope of the offence. As we saw in the case of Dr. Haneef, the offence was so loosely defined such that he was charged with recklessly providing support to a terrorist organisation by merely giving a SIM card to his cousin. The wording change from 'support' to 'material support' does not increase the certainty of the offence but only adds the requirement of a subjective assessment of the type of support provided.

Secondly, the proposed amendments would still criminalise the provision of humanitarian aid to a 'terrorist organisation', in spite of the provision that the aid must be to help a terrorist organisation engage in a terrorist act. This is particularly the case for s102.7(2) where the person is merely reckless as to whether the support will be used to engage in a terrorist act. It is arguable that the provision of medical supplies to an organisation that is intended to provide medical assistance to its members be regarded or interpreted as aiding that organisation to engage in its other activities, including any possible terrorist activities. It would be inappropriate to criminalise such behaviour where there was no requisite intention to provide support to terrorist activities, and we submit that s102.7(2) should be repealed altogether.

AMCRAN reiterates its view that the support offence be repealed. If the recommendation is not accepted, then AMCRAN supports the proposed amendments, except for those in relation to s102.7(2) which in our view should be repealed.

[20] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, 2006, Recommendation 12, p. 78.

Item 16 – Associating with a terrorist organisation

AMCRAN position: in full support

AMCRAN has been opposed to the association offence since its introduction and strongly supports its repeal. Section 102.8 of the Criminal Code currently provides for the offence of associating with a terrorist organisation. AMCRAN is of the view this section has the potential to disproportionately infringe basic civil liberties by imposing guilt by association. Ancillary offences such as aiding and abetting, counselling, procuring or facilitating the commission of an offence under the Criminal Code are more than sufficient to cover the type of behaviour that is prohibited by the association offence. Unlike the consorting offence which is very similar in nature, the association offence is extremely wide in its application as there is no requirement of a prior conviction and mere association is sufficient to be committing an offence. It also has a disproportionately high penalty (3 years imprisonment rather than 6 months imprisonment or 4 penalty points).

The Law Reform Commission of Western Australia, in recommending repeal of the similar offence of consorting in WA, stated that it is,

> inconsistent with the principles of the criminal law to make it an offence to associate with particular people. Offences should proscribe conduct thought deserving of punishment. Merely associating with people, whether they are known to be in a particular category or are reputed to be in a particular category, should not be criminal.[21]

Furthermore, Steel, in a comprehensive analysis of a similar consorting offence, finds the offence to be laden with problems.[22] Steel argues that such an offence creates more general police power than a substantive offence because the elements are impossible to define,[23] and further, the scope of the offence is so broad that it applies indiscriminately to large sections of the public without any clear justification.[24]

In 2002, Victorian Scrutiny of Acts and Regulations Committee similarly recommended repeal of the Victorian offence in the *Vagrancy Act* 1966 (VIC). It concluded the problems with the offence were that it:

- is predicated on the principle of guilt by association
- confers an undesirably wide power to charge individuals in the absence of a substantive offence;

These laws have been shown to be unjust, discretionary, and ineffective in no less than three states over a period of more than a century.

Furthermore, this offence depends upon the exercise of executive discretion in declaring an organisation to be a terrorist organisation under the Criminal Code, an exercise of discretion

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[21] Law Reform Commission of Western Australia, Report on Police Act Offences, Project No 85 (1992) 41-42.

[22] Alex Steel, "Consorting in New South Wales: Substantive Offence or Police Power?" (2003) 26(3) *University of New South Wales Law Journal* 567.

[23] Steel, p. 570.

[24] Steel, p. 580.

which itself is based upon the overly broad existing definition of terrorism. The main problem with this broad executive discretion is that it is subject to political manipulation and application.[25]

AMCRAN has long since raised concerns about this offence and its potential to create further tension between the Muslim and non-Muslim parts of the community. The association offence increases the risk of non-Muslim and Muslim Australians not wanting to associate with other Muslims for fear that they may be talking to a member of a terrorist organisation. This effectively has the potential of shunning Muslims in the community by creating barriers and tension. This is at a time when both Muslim and non-Muslim Australians need to work together closely to prevent terrorism.

From the perspective of the Islamic community, the offence captures legitimate associations and activities and social contact but which are not exempted by the defences offered. While s102.8(4) exempts associations with close family members, it does not cover extended families which are a very important element in all Arab and Islamic cultures.[26]

[25] See discussion above in relation to the proscription regime.

[26] Farhat Moazam, Family, Patients, and Physicians in Medical Decision-Making: A Pakistani Perspective. The Hastings Center Report, Nov 2000 v30 issue 6 p. 28; Carolan, M, T., Bagherinia, G., Juhari, R., Himelright, J., & Mounton-Sanders, M. (2000). Contemporary Muslim families: research and practice. Contemporary Family Therapy, 22, 1, 67-79. One quote from the above document reads: .A qualitative research analysis of contemporary Muslim families showed that extended families were viewed beyond the normal family support systems, i.e in terms of marriage selection and decison-making, there is an "expressed trust and respect for the choices and influence of elders in the form of parents, aunts and uncles".

Schedule 2 – Amendments to the Crimes Act 1914

The Muslim community has long felt targeted by the application of the anti-terrorism laws voicing fears of being marginalised and unjustified targets of the law. Certain sections of the Crimes Act 1914 particularly sections regarding bail and Commonwealth powers of detention have also contributed to increased fear and insecurity, particularly in the aftermath of Dr Haneef's case.

Items 1 – Repeal presumption against bail

AMCRAN position: in full support

Section 15AA of the *Crimes Act 1914* provides for a presumption against bail for certain offences including a terrorism offence requiring exceptional circumstances to exist to justify bail. AMCRAN supports the repeal of this section. AMCRAN is of the opinion that this section is unnecessary, and has the potential to be used by Federal Police as a delay tactic to increase detention and buy more investigative time. Only recently this section was used in the Haneef case where Dr Haneef was remanded in custody for a longer period whilst waiting for the determination of whether the prosecution's inherently weak case against him was enough to constitute an 'exceptional circumstance' to justify his bail.

Items 2 Detained person to be informed of their rights

AMCRAN position: in partial support

This Bill introduces a new s 23BA which provides detained persons the 'right to be informed of their rights'. Although AMCRAN commends the attempt to provide more rights to detainees with the inclusion of s 23BA by entrenching the rights to be informed about rights, AMCRAN finds that this section is too vague, particularly in subsection (2) in stating that 'it is sufficient if the person is informed of the substance of his rights, and it is not necessary that this be done in language of a precise or technical nature.' AMCRAN believes that there needs to be substantive laws entrenching detainees to be informed of their rights similar to those rights specified in s 23F of the *Crimes Act 1914*.

There was recommendation made in the Report of the Inquiry into the Case of Dr Mohamed Haneef where MJ Clarke notes that most of the main problems of the application of the *Crimes Act 1914* in Dr Haneef's case arose with regard to issues of procedural fairness. In the Haneef case the AFP did not provide Dr Haneef or his lawyers a copy of the written applications that were provided to the Magistrate on 3, 5 and 9 July. Clarke recommends that 'there should be express provisions requiring that an application be made in writing, that it specifies the grounds on which it is made, states the time at which it will be heard, and expressly states that the person has a right to be heard, to make representations and to have legal representation.'[27] AMCRAN supports Clarke's recommendation of increased detainee rights and express provisions of procedural fairness.

[27] The Report of the Inquiry into the Case of Dr Mohamed Haneef – The Clarke Review, November 2008. Available online: http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Home

Items 3 to 7 – 'Investigative Dead Time'

AMCRAN position: in full support.

AMCRAN supports the repeal of sections 23CA(8)(m) and 23CB of the *Crimes Act* 1914 specifying time during which suspension or delay of questioning may be disregarded. There have been increased fears with the way 'dead time' is used to unreasonably extend questioning and detention. AMCRAN has raised concerns particularly with the Haneef case where even after holding Dr Haneef in detention for five days, a Brisbane Magistrate granted police an extra 48 hours to 'consider the evidence already gathered'. This was after 12 hours of questioning and five days of detention.[28] This case fuelled fears in the Muslim community about Commonwealth powers of detention and sparked serious concerns about fundamental violations of civil liberties in the extended deprivation of liberty.

President of the Law Council of Australia Tim Bugg criticised the practice of dead time, and suggests that a cap should be introduced to avoid situations such as where Dr Haneef was detained for 12 days before being charged.[29] The Clarke Review also states that the 'concept of uncapped detention time is unacceptable to the majority of the community and involves far too great an intrusion on the liberty of citizens and non-citizens alike.' [30] For these reasons, AMCRAN supports the repeal of the dead time provisions to ensure the rights of persons detained are not unduly infringed and secondly to alleviate some of the fears within the Muslim community about the unfair operation of dead time.

[28] BBC news, *Australia extends Haneef Inquiry,* 9 July 2007. Available online: http://news.bbc.co.uk/2/hi/asiapacific/6283058.stm

[29] Tim Bugg, interview on Meet the Press, 22 July 2007.

[30] The Report of the Inquiry into the Case of Dr Mohamed Haneef – The Clarke Review, November 2008. Available online: http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Home

Schedule 3 – Amendments to the Australian Security Intelligence Organisation Act 1979 (ASIO Act)

AMCRAN position: in partial support

AMCRAN submits that ASIO's detention powers are inherently problematic because their scope extends beyond investigation purposes and covers law enforcement purposes. This is contrary to ASIO's charter as defined in the *ASIO Act 1979* (Cth).[31] Moreover, the criteria for issuing detention warrants in section 34C(3)(c) of the *ASIO Act* allow people to be detained under an unduly broad array of circumstances. In many cases a detention warrant could be issued where a person is not actually suspected of having committed a terrorist offence. A warrant could also be issued to allow for detention of a person without charge on the mere basis that they "may" commit an offence in the future.

Of particular concern to AMCRAN is the fact that ASIO has in the past used the threat of a warrant as a means of coercion. AMCRAN has been contacted by members of the Muslim community who have apparently been coerced into cooperating with ASIO officers under the threat of being detained under a warrant. More than once, we have heard reports of people being told by ASIO officers, "We can do this the easy way (without a warrant) or the hard way (with a warrant)."

We also draw the Committee's attention to the findings of the Inspector General of Intelligence and Security, in his April 2008 report on ASIO's conduct in the Ul Haque case. Although the Inspector did not recommend any legal or disciplinary proceedings against the relevant ASIO agents, he acknowledged that their conduct may have been such as to cause an apprehension of coercion on the part of Mr Ul Haque.[32] Justice Adams of the NSW Supreme Court had earlier found that certain evidence obtained from Mr Ul Haque was inadmissible due to ASIO's coercive conduct which exceeded the bounds of the law. AMCRAN submits that such examples of ASIO's behaviour provide further reasons for curtailing, or repealing, ASIO's detention powers.

For the reasons outlined in this section, AMCRAN recommends the repeal of the ASIO questioning and detention regime altogether. However, should the powers remain, AMCRAN supports the proposed amendments in Schedule 3 of the Bill. We believe the proposed amendments improve the safeguards and offer more protection to the rights of the person who is the subject of a questioning or detention warrant.

Items 1 to 4 – Questioning and detention warrants

These amendments would help to avoid situations where a person could be subjected to rolling questioning warrants without proper justification and would ensure that the person is not subjected to questioning about the same matters.

[31] *ASIO Act* 1979, section 17(2).

[32] Report of Inquiry into the actions taken by ASIO in 2003 in respect of Mr Izhar Ul-Haque and related matters, Inspector-General of Intelligence and Security, p. 46.

Item 6 – Directions by prescribed authority

AMCRAN supports this amendment. Item 6 repeals subsection 34K(10) of the *ASIO Act*. This removes the prohibition on a person who has been taken into custody or detained under Division 3 of Part III of the *ASIO Act* from contacting anyone while in custody or detention.

As a consequence of s34K(10) being repealed, references to the subsection, particularly in s34K(11) should also be amended.

Items 5 and 7 – Persons not to be detained for more than 24 hours

AMCRAN supports the maximum period of time for detention to be 24 hours instead of the original 168 hours. As a comparison, where the AFP reasonably suspects someone of having committed a crime under federal law, they may detain that person for a maximum of 12 hours without charge[33] or for 24 hours in terrorism-related cases.[34]

However, AMCRAN submits that the operation of this amendment would create an anomaly for those being questioned in the presence of an interpreter. Subsections 34R(8) to (12) allow for a person being questioned in the presence of an interpreter under either s34M or s34N to be questioned for a maximum period of 48 hours instead of 24. This means that a person questioned under a questioning warrant could potentially be detained longer than the maximum period allowed by a detention warrant. We submit that subsections 34R(8) to (12) should be repealed such as all persons being questioned under a questioning warrant can only be questioned for a maximum of 24 hours.

Items 8, 9, 11 – Repeal of other provisions

AMCRAN supports Items 8 and 11. We support the repeal of the provision for a person to be questioned in the absence of their lawyer under s34ZP and the denial of access to information by a person's representative. However, we also urge the Committee to repeal s34ZQ(2) which provides that the communication between the person and their lawyer must be made in a way that can be monitored by a person exercising authority under the warrant.

Item 10 – Secrecy provisions

AMCRAN supports the repeal of s34ZS(2) which provides for an offence where a person discloses operational information.

The secrecy provisions pose a grave threat to civil society. We submit that the wide coverage of these provisions as well as the vagueness of some of the terms such as "operational information" are likely to lead to overestimation of the reach of the laws. This in turn has a significant impact on the public discussion of these powers thus clouding issues of accountability and transparency.

There is already a great deal of secrecy surrounding the operation of ASIO's activities, and given the concerns about the breadth of these powers, it is important that their exercise are

[33] See *Crimes Act* 1914 (Cth) ss 23C and 23D(5).

[34] See *Crimes Act* 1914 (Cth) ss 23CA and 23DA.

open to public scrutiny. Further, we are concerned that the secrecy provisions are likely to have an impact on the services that welfare organizations are able to provide to those who have been affected by these laws. The destabilizing effect of arbitrary detention on the person as well as the person's family cannot be underestimated, but the secrecy provisions will effectively prohibit the person from approaching organisations or even religious leaders who are usually in a position to provide counseling or other support and assistance.

Other recommended amendments not covered in the Bill

Even though not contemplated by the Bill, AMCRAN submits that sections 34W and 34X of the *ASIO Act* should be repealed. Section 34W provides that a person must surrender his or her Australian passport or any other passport as soon as he or she is notified that the Director-General has sought the Minister's consent to request a warrant. Section 34X provides that a person in relation to whom a warrant is sought commits an offence if he or she leaves Australia after being notified that the DG has sought the Minister's consent. The maximum penalty under these sections is 5 years imprisonment.

Similar provisions require the surrender of a passport of a person who is subject to a questioning or detention warrant. However, it goes too far to require this of a person who is not yet the subject of an issued warrant but for whom the D-G has only sought the Minister's consent to request a warrant.

Such a person has committed no crime and it is an extremely broad power that may be invoked by ASIO to confiscate not only the person's Australian passport but also any other passport in their name. Furthermore, procedural rights and grounds of appeal against the withdrawal of a passport are undear in the legislation.

In effect, the proposed amendment allows ASIO to prevent a person from leaving the country, even though no warrant has officially been issued against them. Firstly, we argue that this should be repealed because of its disregard to due process – the requirements within section 34D of the *ASIO Act* exist for a purpose, i.e. for the protection of citizens from unlawful interference or inquiry by requiring that the issuing authority only issue a warrant if it is 'satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence'. The amendments would effectively allow ASIO to infringe the rights of individuals to free movement before the issuing authority has had the chance to satisfy himself or herself of the above.

Secondly, it is unbefitting for ASIO, which is an intelligence-gathering agency, to have the power to prevent a person from leaving the country simply by making a request for a warrant to be issued for that person's questioning or detention.

Thirdly, ASIO's functions and operation are not easily open to scrutiny, which makes the vesting in ASIO of this sort of power particularly dangerous and open to abuse.

Accordingly we submit that the power to confiscate a person's passport under s 34W and 34X should be removed from the *ASIO Act*.

Schedule 4 – National Security Information (Criminal and Civil Proceedings) Act 2004

Item 1 – Repeal the National Security information (Criminal and Civil Proceedings) Act 2004

AMCRAN position: in full support

AMCRAN supports the repeal of the *National Security Information (Criminal and Civil Proceedings) Act* 2004 as we believe it is premised on broad, subjective and discretionary provisions, and infringes long-standing legal principles, including the right to fair trial and the separation of powers.

Attorney-General's certificate – broad, subjective and discretionary
The Act allows for the Attorney-General to issue a certificate to exclude evidence from the accused where there would be a risk of prejudice to national security. 'National security' is defined as 'Australia's defence, security, international relations, law enforcement interests or national interests.' This broad definition results in a very broad coverage of circumstances, allowing the government to have wide discretionary powers over which cases or what evidence to exclude.

Separation of executive and judicial arms of government
The concept of separation of powers of the government is fundamental to the foundations of democracy. However under the Act, the Attorney General issues a certificate designating particular material 'national security' material. AMCRAN objects to this as it infringes the separation of powers by usurping the supervisory function of the courts.

Right to fair trial
Closed hearing or the exclusion of evidence from the defendant and their legal representative prevents a defendant from being present as his own trial and removes his opportunity to see the evidence that is being used against them and the right to respond to that evidence. However, the Act goes further as it permits the exclusion of the defendant and their legal representative from a hearing about the admissibility of the evidence, and removes their right to respond or argue against the disclosure or otherwise of the disputed information. The exclusion of the defendant in these circumstances is highly likely to prejudice transparency in the criminal process, and the defendant's right to a fair trial.

Security clearance for lawyers
A defendant should have the freedom to choose the best available legal counsel for his defence. However the Act requires security clearance for lawyers according to criteria contained in the secretive Australian Government Protective Security Manual ('PSM'), which is only available to government departments and agencies and not to the general public. The PSM is constantly being reviewed and changed and the terms used in the PSM are vague and subjective. The requirement for security clearance could easily be used to undermine the independence of the limited pool of lawyers with sufficient experience and expertise on anti-terror legislation.

The combination of the above reasons tips the scales unreasonably against the defendant in proceedings and accordingly we support the repeal of the *National Security information (Criminal and Civil Proceedings) Act*.