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SUBMISSION TO THE JOINT PARLIAMENTARY COMMITTEE ON ASIO, ASIS, AND DSD: REVIEW OF DIVISION 3 OF PART 3 OF THE ASIO ACT 1979 (CTH)

International Commission of Jurists (Australian Section)

CONTENTS

A Recent Context of Counter-terrorism in Australia

The recent Federal elections were, in the words of both the Prime Minister John Howard and Mark Latham, the Leader of the Opposition, a "victory for democracy" in Australia. This is certainly true. At the same time, however, the comment hides the fact that all is not well in our democracy. In the last three years, unprecedented new laws enacted in the so-called "war against terrorism" have begun to erode the building blocks of democracy in Australia. They have opened the door to arbitrary detention, searches without warrants, and departures from established fair trial procedures so that it is the situation today, in

Australia, that an accused could conceivably be charged and tried without knowing what evidence is against him, or without having a lawyer of his choice present to defend him. The International Commission of Jurists ("ICJ") is concerned about what effect does this have on Australia's sense of identity as a "fair-go" society.

The ICJ is also concerned about human rights and the rule of law under attack. It is clear that our perception of the world has changed since September 11, 2001. The Bali bombings in 2002 made the threat of terrorism real to us, as did the attack outside the Jakarta embassy last month. The conviction of Jack Roche earlier this year for conspiring to bomb the Israeli embassy here in Canberra suggests that there are individuals out there who are capable of committing a terrorist act on Australian soil.

B Legal Context

Governments, morally as well as under international law have a duty to protect persons in their jurisdiction who are threatened by terrorism. The United Nations Human Rights Commission, for example, has said that:

> *"No one doubts that States have legitimate and urgent reasons to take all due measures to eliminate terrorism. Acts and strategies of terrorism aim at the destruction of human rights, democracy, and the rule of law. They destabilise governments and undermine civil society. Governments therefore have not only the right, but also the duty, to protect their nationals and others against terrorist attacks and to bring the perpetrators of such acts to justice."*

However, governments also have a duty to ensure that protecting security does not undermine other fundamental rights. At a time when the world confronted with the daily occurrences of bombings, kidnappings, and killings in the news, it is easy for governments to give in to the temptation to introduce tough security measures in an attempt to alleviate the anxiety of the public, and to win votes. This is what we are witnessing today here in Australia, as elsewhere, in the so-called "war on terrorism".

We have seen a new discourse emerge, in which "the interest of national security" has become of paramount importance, and governments have taken an essentially *carte blanche* approach to enacting tighter and tighter security laws, with less and less regard to the established core principles of criminal law and fair trial procedures. Laws which once would have been considered unthinkable are now being presented by Western democratic governments such as our own as the norm. These include holding people in indefinite detention, without charge and with no right to communicate with their family; the presumption of being innocent before proven guilty has been seriously challenged; and fundamental rights of defence, such as the right to test evidence, the right to legal counsel, and the right to be tried by an independent and impartial tribunal are under threat of disappearing. We have even seen attempts to justify the use of torture against terror suspects, in the name of national security.

C Upholding Human Rights and the Rule of Law in Combating Terrorism

In his opening speech to the International Commission of Jurists' Biennial Conference on Human Rights and Counter-terrorism held recently in Berlin, Nicholas Howen, the Secretary General of the ICJ, characterised counter-terrorism responses such as these in the following way:

> *"it sometimes seems that governments have collectively declared a global state of emergency".*

He said:

> *"We have seen the return of a disturbing rhetoric [in the war on terrorism]… [It is a security dominated discourse which] says that rights and freedoms interfere with security of state. It*

> *pushes aside the usual laws and norms because they seem to constrain the unfettered discretion of the executive to take any action it thinks necessary".*

We are reminded, however, that:

> *"If [this is] so… any state of emergency must be an* ***extension*** *of the rule of law, not an abrogation of it."*

The International Commission of Jurists was founded in Berlin 52 years ago, and is an organisation dedicated to the protection and promotion of human rights through the rule of law. The ICJ believes that there is no essential conflict between the duty of a State to protect against terrorism, and the State's responsibility to protect other fundamental rights. The ICJ believes that international human rights and humanitarian laws allow States a reasonably wide margin of flexibility to combat terrorism without contravening basic human rights obligations.

For example, under international law it is recognised that States may suspend certain rights during a state of emergency which threatens the life of the nation . At the same time, however, states of emergency are bound by strict rules to prevent violations of rights. Under Article 4 of the International Covenant on Civil and Political Rights, these include the requirement that any suspension of rights must be necessary and proportionate; that they cannot discriminate against people because of their race or similar grounds; and that they must respect the principle of legality. Some rights can never be derogated from, such as the prohibition on torture, and cruel, inhuman or degrading treatment.

Recognising that a balance must be found between protecting security and human rights, the International Commission of Jurists has set out, in a Declaration adopted at its Biennial Conference in August of this year, a list of eleven fundamental guiding principles of criminal and international law, which we believe that all States should have regard to in implementing counter-terrorism measures. The Berlin Declaration, which is attached to this paper, is a reminder that first, it is possible for States to combat terrorism and protect human rights at the same time; and second, that States have an obligation to do so.

Without such restraints, the potential for abuse is high. Unfortunately, in the fight against terrorism, these well-established principles are now under threat, and counter-terrorism measures are being implemented by countries all over the world without proper regard for the protection of basic human rights.

The US of course has its base on Guantanamo Bay, where currently over 500 detainees are being held in a sort of legal black hole, with few rights. They are 'unclassified': that is, they are classified neither as combatants, which would entitle them to prisoner of war status and to the protections under the Geneva Conventions. Nor are they classified as criminal suspects, in which case they would be entitled to the protections of the US criminal justice system or would fall under the auspices of the International Covenant on Civil and Political Rights which offers similar protections to the liberty and security of civilians in prison as to those held as prisoners of war under the Geneva Conventions.

Instead, they are caught up in a complex and disorienting landscape of new policies, in which executive power appears paramount, and, without adequate judicial oversight, the potential for abuse is extremely high. Many of those detained at the base have been there for over three years, still with no charge, and no access to justice. The military commissions which have been set up to try some of the detainees, including David Hicks - and which the Australian Government is now looking to introduce here - have been condemned by even US military prosecutors as incapable of giving even the slightest chance of a fair trial to those brought before it.

Great Britain has gone one step further and has legislated to allow persons subject to immigration control to be detained indefinitely inside the UK if certified by the Home Secretary as being suspected of involvement in international terrorism. In doing this, the UK became the only country in the European Union to opt out of the European Convention on Human Rights, by derogating from Article 5 of that

Convention, which says that "everyone has the right to liberty and security of person". Like at Guantanamo Bay, there are people being detained in the UK who have been there for three years without knowing why, or whether they will ever be released. The legislation, which has been labelled "unnecessary, draconian and, ultimately unsustainable" , is currently being challenged in the House of Lords.

Terrorism laws in the US and UK now arguably go further in curtailing basic rights in this way than, for example, Egypt, where terrorist suspects can be detained without charge for a maximum of 45 days, and even Pakistan, which now allows the detention of terrorist suspects for up to three years without charge.

D Security in Australia: The Erosion of Fundamental Freedoms and the Rule of Law

In Australia the dominance of the security discourse has also taken root. Since September 11, 2001 the Australian Government has introduced a raft of measures to strengthen security, in areas ranging from the financing of terrorism to border security. Many of these are arguably necessary, because as we know from Bali and Jakarta, the possibility of a terrorist act being committed in Australia is not remote.

However, while recognising the need to be prepared for and to protect against terrorism, The ICJ submits that it is essential that the Government's approach be balanced with the need to protect other fundamental rights. Instead, there is a contradiction in the Government's position on terrorism and counter-terrorism. It says that we must protect against those who would threaten our way of life, but at the same time, it has been silent on the treatment of the two Australians being held in Guantanamo Bay, and has participated in an illegal, unsanctioned war in Iraq, where ironically, it's stated purpose is to bring about democracy and respect for the rule of law. It has also echoed the US in lending support to the policy of pre-emptive strike - that is, an attack against a sovereign nation not in response to a prior act of aggression – a policy which flies in the face of accepted international legal principles.

The same contradiction appears in the nature of the security legislation which has been put in place in the past three years in Australia. While the Government asserts on one hand that it is committed to defending our democratic way of life, on the other hand, it has enacted laws which, more than at any other time in our history, attack the same values and principles which make Australia one of the most free societies in the world.

For example, new powers have been given to Federal and State Police to investigate suspected terrorism offences, including 'special powers', in the case of the NSW Police, to deal with imminent threats and respond to terrorist acts. These include the power to search any home without a warrant, and to conduct searches, including strip searches of people as young as 10 years of age.

New offences have been created relating to the commission of terrorist acts. The basic principle of *nullum crimen sine lege* - no crime without law – says that persons should only be charged with crimes that are strictly defined by law. These offences, however, are based on a nebulous definition of terrorism which is imprecise and wide-ranging, and is particularly dangerous to civil liberties because of the heavy penalties they carry. There is, for example, an offence of "doing any act in preparation for, or planning a terrorist act", which carries a sentence of life imprisonment. It is also now an offence to "associate" with a "terrorist organisation".

E Division 3, Part 3 of the ASIO Act 1979 (Cth)

Most concerning of all is the ASIO legislation. The extraordinary amount of power which has been given to ASIO, and which is not open to the scrutiny of the courts, poses a very serious threat to our system of government and to the fundamental freedoms of Australian citizens. The ASIO laws permit arbitrary detention of people - including children aged 16 and over – in order to collect intelligence in relation to terrorist offences. The Government has now said that it is considering reducing that age to 12 – a move

previously blocked by the Senate. A person does not have to be suspected of being a terrorist, or of being involved in a terrorism offence, but can still be held for questioning for 48 hours, and/or detained, *without charge*, for a period of 7 days. Amazingly, there is *no right to silence*, as failing to give particular information or giving a false or misleading statement has been made an offence punishable by imprisonment for five years.

The legislation specifies that a judicial officer is required to be present during interrogation. This officer can be a judge, retired judge or legally qualified member of the Administrative Appeals Tribunal. The practicality of requiring a Supreme Court or Federal Court judge to be prepared to sit in on an interrogation for up to a week, with no role to play but that of an observer, must be questioned, and particularly so if the interrogation is to be held in a regional or remote area. Members of the AAT are appointed by the Government for fixed terms, usually of three years in duration, which brings up additional concerns in relation to the pressure a member may fear they are under when being considered for re-appointment.

A person detained under the legislation does not have a right to contact anyone, and there is no clear right to have a lawyer of choice present during questioning. If a lawyer is allowed, there are strict rules about what that lawyer can and cannot do. For example, the lawyer cannot say anything during the interrogation, except to ask that a question be clarified; any communication between the lawyer and client will be monitored; and if it is considered that the lawyer is being disruptive, the lawyer will be ejected from the proceedings.

The effect of the ASIO legislation is that any Australian citizen – whether a doctor, lawyer, journalist, religious leader, community worker, health worker, friend or relative - can be whisked off for questioning on the belief or allegation that they may have evidence or information obtained in their professional or personal lives in relation to a suspected terrorist act, without a lawyer, with no notice to friends or family, and can effectively disappear for seven days.

There is a two year ban on detainees and their lawyers which prevents them from talking about what goes on during questioning and detention. Because of this, there is little public scrutiny of the operation of the questioning powers. We have really no way of knowing what is going on. In this way, Australia's laws are even more oppressive than those in the US and the UK.

While giving evidence before the Parliamentary Joint Committee on ASIO, ASIS and DSD on the ASIO Bill in May 2002, it was put to the ICJ by the Committee that in light of the real concerns about terrorism, "Isn't it necessary, to some extent, that we abrogate human rights, the rule of law, and the civil liberties of Australians?" Our position was that while some practical, and even stern, methods may be necessary, it is neither necessary nor appropriate to abrogate the basic principles on which our law, culture and way of life is established: a balance needs to be found. The legislation enacted, in our view, does not find this balance.

Disproportionately harsh security legislation threatens the basic rights and fundamental freedoms of every Australian citizen. That threat, however, is most visible to those in our society who are, by practical application, most affected by the legislation: our Muslim community. Many of us may feel that we don't have to ask ourselves the question, "What would I do if ASIO or the AFP knock on my door?", but Australian Muslims have to. Notwithstanding the fact that many Muslim leaders in our community have come out strongly against terrorism and have declared that such acts have no place in Islam, many Muslims feel shock and fear at the way they are portrayed in the media, and feel they bear the brunt of this legislation.

Due to the secrecy provisions, there is not a lot that we know about what has happened under the legislation. But there are some effects that we *can* see. One is the reluctance of some members of the Muslim community to speak out for fear of drawing attention to themselves. When Izhar Ul-Haque, a medical student from Pakistan, was charged with training with a terrorist organisation, a young Muslim

student who spoke in his defence, and whose name was published in a newspaper, was rebuked by his father for drawing attention to himself.

This goes straight to the heart of many of the core values which we take pride in as Australians: to our concept of ourselves as tolerant and inclusive; to our love of free speech, which we generally take for granted; to our egalitarian, "fair-go" mentality; and to our belief in the principle that a person is presumed innocent until proven guilty, which is one of the foundations of our legal system.

It may also have a tangible effect on our ability to deal with the threat of terrorism. The ASIO laws are designed to assist authorities to gather intelligence, which is arguably one of the strongest defences against terrorism. However, by alienating members of our Muslim community, the laws may actually be working against that purpose.

At a time when we should be striving to understand the reasons for the increase in terrorism around the world, and addressing the social and economic causes of it, these effects could result in counter-terrorism laws actually working against us, by denying members of our community the fundamental right of freedom from arbitrary detention.

F Conclusion

The Australian Government has said that in this so-called "war on terrorism", because our adversaries do not believe in the Geneva Conventions and the rule of law, we can justifiably depart from them in our response. But how much of our belief in the rule of law and in human rights, how much of our culture, are we prepared to abandon in this fight? If the only way to fight terrorists is to become like them, then what will ultimately remain of that image of Australia as a tolerant, egalitarian, "fair-go" society?

Australia is one of the oldest democracies in the world, having been established in 1901. The historical origins of our democracy, however, stretch back centuries and can be traced back to 1215, to the signing of the Magna Carta, the first document which limited the power of the English King from absolute rule. The Magna Carta forced the King to accept that his will could be bound by law, and was also the first document which set out a mechanism to resolve warfare by means other than violence. It was the first step in a long historical process leading to the rule of constitutional law, the development of parliamentary democracy, and it is the source of tradition for our system of government.

Since Federation, the history of Australia has been one of the building up of democracy and the promotion and protection of individual rights. Great strides have been made since 1901 to bring us to where we are now, such as the abolition of the White Australia Policy, and the according of the vote to women and Aborigines.

In the way that our Government has introduced legislation which attacks the very foundations of our system of government – the separation of powers, and the rule of law - in the name of fighting this so-called "war on terrorism", we believe that we are now reversing this trend, retreating back even to before the signing of the Magna Carta in 1215. Our coalition partner, the United States, presently the only superpower in the world, seems to take the view that force is not only legitimate, but perhaps is the only mechanism that can be used to resolve international conflict. In that regard, it seems to have ignored all major developments on governance, human rights, and the rule of law since that Charter of 1215.

Since 2000, there have been a number of high profile arrests of terrorist suspects in countries such as the Netherlands, Italy, Japan, and Germany. In Australia, the spate of arrests of terrorist suspects earlier this year led to criticisms against courts for being "too lenient" in granting bail and in setting sentences, and a growing groundswell in public opinion that they are being 'soft' on terrorism. The Government has responded by implementing tougher and tougher laws, and the public, through the ballot box could be said to have given it a mandate to do so. The causes of terrorism are complex, however, and while terrorist acts can never be condoned, the complexity of the causes should be mirrored by possibly

complex, but suitable responses that do not just tackle the symptoms. What may be short-term or "band-aid" solutions, may actually cause lasting damage to our culture.

In trying to find the balance between protecting security and human rights, the test lies in the nature of culture and identity: we have to ask, what do we believe in, and what are we willing to give up? If we agree that we value our identity as a tolerant, egalitarian, "fair-go" society, then we can use this image of ourselves to anchor our response to terrorism. In this light, respecting the rule of law, by, for example, affording even terrorist suspects full fair trial guarantees, is not evidence of weakness, but is a sign of strength of character, culture and identity. If, on the other hand, we take away those rights to an extent that our basic beliefs and principles are compromised, then, in fighting this war on terrorism, we are at a risk of losing the rule of law which underpins democratic society.

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