

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE ON THE PROVISIONS OF THE ANTI-TERRORISM BILL (No. 2) 2004

Introduction

1. The Human Rights and Equal Opportunity Commission ('the Commission') is established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). It is Australia's national human rights institution.
2. The Commission's relevant functions are set out in s.11 of the *Human Rights and Equal Opportunity Commission Act 1986* ('HREOC Act') and include the power to promote an understanding and acceptance, and the public discussion, of human rights in Australia.¹

The Anti-Terrorism Bill (No. 2) 2004

3. The Anti-Terrorism Bill (No. 2) 2004 ('Anti-Terrorism Bill') contains amendments to the *Passports Act 1938*, the *Australian Intelligence Security Act 1979*, the *Criminal Code Act 1995*, the *Administrative Decisions (Judicial Review) Act 1977*, the *Transfer of Prisoners Act 1983* and the *Crimes Act 1914*. The stated aim of the Bill is to 'improve Australia's counter-terrorism legal framework'.² The amendments are said to build upon the suite of terrorism legislation enacted since September 11 2001 that 'allows us to more effectively provide for the safety of all Australians...in so far as legislation can achieve that end'.³
4. The Commission's overwhelming concern is to ensure that the new laws aimed at protecting national security do not, of themselves, breach human rights standards and do not allow for the breach of human rights standards. The human rights standards which the Commission wishes to apply to the Anti-Terrorism Bill are contained within the International Covenant on Civil and Political Rights ('ICCPR').⁴ Australia has acceded to the ICCPR and its terms are binding upon it.⁵ Australia has also ratified the Optional Protocol, which provides an international complaint mechanism for individuals, including in relation to legislative measures which operate to infringe their rights under the ICCPR.
5. The Commission's submissions will focus on the amendments to the *Transfer of Prisoners Act 1983* ('Transfer of Prisoners Act'), the *Criminal Code Act 1995* ('Criminal Code') and the *Administrative Decisions (Judicial Review) Act 1977* ('ADJR Act').

¹ Section 11(1)(g) of the HREOC Act.

² Explanatory Memorandum to the Anti-Terrorism Bill (No 2) 2004; Anti-Terrorism Bill (No 2) 2004 Second Reading Speech, Hansard, 17 June 2004, p30712.

³ Anti-Terrorism Bill (No 2) 2004 Second Reading Speech, Hansard, 17 June 2004, p30712.

⁴ Schedule 2 to the HREOC Act.

⁵ Opened for signature 16 December 1966 and entered into force on 23 March 1976.

National Security Concerns - Striking a Balance

6. The Commission is concerned that the Anti-Terrorism Bill strikes an appropriate balance between the protection of individual rights and national security. Human rights law has sought to strike a fair balance between legitimate national security concerns and the protection of fundamental freedoms. It acknowledges that States must address serious and genuine security concerns, including terrorism. The balance is reflected in human rights instruments such as the ICCPR.
7. The drafters of the ICCPR envisaged that there would be occasions when human rights as set out in the Covenant would be justifiably infringed by States in times of public emergency. A procedure for the derogation from such rights was prescribed in article 4 of the ICCPR which provides for derogation from human rights protections 'in times of public emergency which threatens the life of the nation'. That power of derogation is carefully circumscribed so as to avoid the arbitrary disregard for human rights.⁶ Australia has not sought to invoke that procedure and may not at present derogate from any of its obligations under the ICCPR in any new measures which are introduced to protect national security.
8. A number of safeguards have been put forward by the United Nations Human Rights Committee (and the European Court of Human Rights) to minimise the impact of incursions on human rights by public security issues, amongst other things. Those safeguards include; that the restrictions must be prescribed by law; they must be necessary in a democratic society; they must accord with the principle of proportionality (between the right to be protected and the general interest); the restriction should not limit the human right more than is necessary to achieve the aim; and the means chosen should be appropriate to achieve the aim.
9. On 27 February 2002, the United Nations High Commissioner for Human Rights issued a statement of criteria for protecting human rights while States implement measures against terrorism. The statement was issued in light of *UN Security Resolution 1373* (28 September 2001) which calls on States to bring to justice those involved in terrorist acts and to establish such acts as serious criminal offences. The criteria set out in the statement by the United Nations High Commissioner replicate many of the safeguards for the protection of

⁶ In order for States to derogate from their obligations under article 4 of the ICCPR in times of public emergency, article 4(1) provides that; the public emergency must threaten the life of the nation; the public emergency must be publicly proclaimed; the measures must be strictly required by the exigencies of the situation; the measures cannot be inconsistent with other requirements of international law; and the measures must not involve discrimination solely on the grounds of race, sex, colour, language, religion or social origin.

Article 4(2) of the ICCPR mandates that certain rights are not subject to suspension under any circumstances. The list of non-derogable rights includes the right to life (article 6); freedom of thought, conscience and religion (article 18); freedom from torture or cruel, inhuman or degrading punishment or treatment (article 7); the right to recognition everywhere as a person before the law (article 16) and the principles of precision and non-retroactivity of criminal law (article 15).

The Human Rights Committee has developed a list of elements that, in addition to the rights specified in article 4(2), cannot be subject to lawful derogation (Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, 31 August 2001).

human rights set out above, and require that any restrictions for public security purposes shall:

- (a) be prescribed by law;
 - (b) be necessary for public security or public order;
 - (c) not impair the essence of the right;
 - (d) be necessary in a democratic society;
 - (e) conform to the principle of proportionality;
 - (f) be appropriate to achieve their aim;
 - (g) be the least intrusive means to achieve the aim of the measures;
 - (h) respect the principle of non-discrimination; and
 - (i) not be arbitrarily applied.
10. The United Nations General Assembly adopted resolutions on 18 December 2002 (57/219) and 22 December 2003 (58/187) specifically focusing on the need to protect human rights and fundamental freedoms while countering terrorism. The resolutions affirm that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law. A resolution with a similar approach was adopted on 25 April 2003 by the Commission on human rights at its 59th session (2003/68).
11. It is with these principles in mind that the Commission provides the following comments on the Anti-Terrorism Bill.

Amendments to the Transfer of Prisoners Act

12. The Anti-Terrorism Bill introduces a new Part IV into the Transfer of Prisoners Act which provides a legislative basis for the transfer of prisoners to another part of Australia on security grounds. The new s.16B provides that the Attorney-General may make an order for the transfer of:
- (a) a prisoner serving a federal, state or territory sentence of imprisonment in a prison of a state or territory; or
 - (b) a prisoner charged with an offence and remanded in custody in a prison of a state or territory;

to another state or territory if the Attorney-General believes on reasonable grounds that it is necessary in the interests of security. An order under the new s.16B is described as a 'security transfer order'.

13. Currently, s.16 of the Transfer of Prisoners Act enables the court to order that a person who is undergoing a sentence be brought before the court for certain purposes (for example, an appeal) where the person was transferred to another state or territory pursuant to a transfer order. The new s.16(1) provides that the court cannot make such an order if the transfer order is a security transfer order.
14. Rather, the new s.16D provides that the Attorney-General may in certain circumstances make an order for the transfer of a prisoner who is subject to a security transfer order to a state or territory to attend court proceedings. Further, new s.16D(2) prescribes the situations where it would be inappropriate to make such an order, for example, if the Attorney-General believes on reasonable grounds that it would be contrary to the interests of national security.
15. The new s.16E seeks to regulate the transfer of remand prisoners for trial purposes. It provides that the Attorney-General must make an order for the transfer of a remand prisoner to attend court where (a) that person is subject to a security transfer order, and (b) the remand prisoner is required to appear in court for proceedings for an offence for which they have been remanded in custody. However, s.16E(2) provides the Attorney with a discretion not to make an order under s.16E(1) if the Attorney believes on reasonable grounds that it is essential in the interests of security that the order not be made and the court that remanded the prisoner orders the continued detention of the remand prisoner.
16. The Anti-Terrorism Bill also amends the ADJR Act to exclude the decisions of the Attorney under Part IV of the Transfer of Prisoners Act from that Act.

Entitlement to a trial within a reasonable period of time

17. The Commission is concerned that the new s.16E creates the possibility for delay in bringing a remand prisoner to trial and accordingly, the possibility for prolonged pre-trial detention for remand prisoners.
18. Article 9(3) of the ICCPR states that ‘[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and **shall be entitled to trial within a reasonable time or to release.**’ The Human Rights Committee has stated that pre-trial detention should be an exception and as short as possible.⁷ Article 9(3) overlaps with article 14(3)(c) of the ICCPR which guarantees that a person’s criminal trial will be held within a reasonable period of time after one’s charge. That is, article 14(3) regulates the actual time between charge and trial, regardless of whether one is detained or not.
19. The European Court of Human Rights has in a number of decisions analysed the concept of reasonable time and decided that the reasonableness of the time in which a proceeding takes place must be assessed in light of the particular circumstances of the case and having regard to the following criteria: (a) the

⁷ Human Rights Committee, *General Comment No. 8: Right to liberty and security of persons (Article 9)*, 30 June 1982.

complexity of the case; (b) the procedural activity of the interested party; and (c) the conduct of the judicial authorities.⁸

20. The Commission submits that issues of national security should not be decisive in determining the length of time a person charged with a criminal offence must await trial. Rather, a person should be brought to trial as soon as is reasonably practicable having regard to the criteria set out by the European Court of Human Rights. The amendments to the Transfer of Prisoners Act create the risk that security transfer orders could operate so as to delay trials in a manner which would breach international standards.
21. The Commission notes that prolonged pre-trial detention increases the risk of inverting the presumption of innocence.⁹ The guarantee of the presumption of innocence becomes increasingly empty when the severe penalty of deprivation of liberty is visited upon someone who is, until and if convicted by the courts, innocent. The right to a defence¹⁰ is also threatened by prolonged pre-trial detention because in some cases it increases the defendant's difficulty in mounting a defence. The possibility to convene witnesses diminishes as well as the strength of any counterarguments.¹¹

Transfer of power from the judiciary to the executive

22. The Commission submits that the power to order a prisoner or a remand prisoner to be brought before the court should remain with the judiciary. New s.16D and s.16E transfer that power to the executive. Some measure of judicial control is retained within s.16E(2)(a)(ii) in respect of remand prisoners.
23. The Commission also submits that the decisions of the Attorney-General under Part IV of the Transfer of Prisoners Act should be subject to judicial review. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the courts must be able to react in cases where invoking that concept has no reasonable basis or reveals an interpretation of 'national security' that is unlawful or arbitrary.¹²

Communication with family, legal advisors

24. Finally, the Commission submits that a prisoner or remand prisoner transferred to another state or territory pursuant to a security transfer order must be allowed regular communication, including contact, with their:

⁸ *Barattelli v Italy* (38567/97) ECHR 4 July 2002; *Motta v Italy* (11557/85) ECHR 19 February 1991; *Ruiz-Mateos v Spain* (12952/87) ECHR 23 June 1993; *Pelissier and Sassi v France* (25444/94) ECHR 25 March 1999; *Philis v Greece* (19773/92) ECHR 27 June 1997.

⁹ Article 14(2) of the ICCPR provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.

¹⁰ Article 14(3) of the ICCPR.

¹¹ *Gimenez v. Argentina*, Case 11.245, Inter-Am C.H.R., (1996) cited in the Annual Report of the Inter-American Court of Human Rights 1995 at paras 78-81.

¹² *Al Nashif v Bulgaria*, ECHR, 20 June 2002, paras 94, 123-124. See also Article 9 of the ICCPR in relation to unlawful or arbitrary detention.

- (a) family, and
 - (b) legal advisors.
25. Communication and contact with legal advisors must extend to obtaining legal advice and representation in relation to any matter, including the lawfulness of their detention.¹³
26. The proposed amendments are silent on these matters. The Commission suggests that it should be clearly provided that such communication and/or contact may take place and that the appropriate authorities must facilitate it.

Amendments to the Criminal Code

27. The Anti-Terrorism Bill introduces a new s.102.8 into the Criminal Code to extend the application of offence provisions to people whose associations with a listed terrorist organisation, or with a person who is a member or who promotes or directs the activities of such an organisation, assists the organisation to expand or continue to exist. The elements of the new offence are as follows:
- (a) the person intentionally associates with a person who is a member of, or a person who promotes or directs the activities of, an organisation;
 - (b) the person knows that the organisation is a terrorist organisation;
 - (c) the association provides support to the organisation;
 - (d) the person intends that the support assist the organisation to expand or to continue to exist;
 - (e) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation; and
 - (f) the organisation is a terrorist organisation under the *Criminal Code Regulations 2002*.
28. There are a number of exemptions to the new offence prescribed at s.102.8(4). These include, relevantly for the purposes of this submission, that the section does not apply:
- (a) when the association is with a close family member and relates only to a matter that could reasonably be regarded as a matter of family or domestic concern;
 - (b) when the association is only for the purpose of providing legal advice or legal representation in connection with criminal proceedings; or proceedings relating to whether the organisation is a terrorist organisation;

¹³ Article 9(4) of the ICCPR; Article 14(3) of the ICCPR.

- (c) to the extent that it would infringe any constitutional doctrine of implied freedom of political communication.

The proportionality of the response

29. The Commission is concerned that the new offence lacks precision and is wide ranging in terms of the types of activities or persons who might be subject to it.
30. The stated intention of the amendment is that the offence apply in relation to the provision of support to a terrorist organisation as an entity, rather than with respect to the activities of the organisation. The offence is designed to address what is said to be the fundamental unacceptability of the organisation itself by making associating with the organisation in a manner which assists the continued existence or the expansion of the organisation illegal.¹⁴
31. The offence potentially infringes the rights prescribed in article 19 (freedom of expression) and article 22 (freedom of association) of the ICCPR. As noted above, such infringements will only be permissible if the proposed amendments conform to the principle of proportionality and are the least intrusive means to achieve the stated aim. The Commission is concerned that, particularly in view of the width of the offence and lack of precision of its terms, these requirements are not met. The Commission's concerns are set out below and are highlighted by way of examples, where possible.
32. The amendment provides that it is an offence to intentionally associate with a member of, or a person who promotes or directs the activities of, a terrorist organisation. Although it is an offence under the Criminal Code to be a member of, or to direct the activities of, a terrorist organisation - it is not an offence in itself to 'promote' the activities of a terrorist organisation. The term 'promotes' is not defined within the Criminal Code. Accordingly, if, for example, a journalist writes an article in support of the non-violent activities of a proscribed terrorist organisation and intends that this support will assist the organisation to continue, the journalist in 'promoting' the activities of the organisation is not guilty of an offence. If, however, a member of the public communicates twice with the journalist and expresses agreement with the journalist's views, thereby providing support to the continued existence of the organisation, the person could potentially be found guilty of the new offence of association.¹⁵
33. The amendment also provides that the person's association must provide support to the organisation and the person must intend that the support 'assist' the organisation to expand or to continue to exist. The Commission is concerned with the width of the term 'assist' and the range of activities that may fall within it.¹⁶ For example, would writing articles or opinion pieces against the Attorney-

¹⁴ Explanatory Memorandum to the Anti-Terrorism Bill (No 2) 2004.

¹⁵ See the comments of the Honourable P.Georgiou MP, Proof Hansard, 24 June 2004, p 30717.

¹⁶ The Commission notes that concerns with the width of the term 'assist' in the context of s102.4(1)(e) of the Security Legislation Amendment (Terrorism) Bill 2002 (No. 2) which proscribed 'assisting a proscribed organisation' were canvassed in the Senate Legal and Constitutional Legislation Committee Inquiry into that Bill. The concerns were also referred to in the May 2002 Senate Legal and

General's decision to proscribe a particular organisation fall within the meaning of providing support to an organisation and intending that the support 'assist' the organisation to continue to exist?¹⁷ If so, then an author who communicates twice with a member of a terrorist organisation solely for the purposes of preparing such an article may be found guilty of an offence under proposed s.102.8.

34. The Commission submits that in order to conform with the principle of proportionality the offence must be defined with precision in order to identify the nature and extent of the risk that the offence is intended to address.¹⁸ The Commission submits that the term could be defined with reference to particular examples. In the United States, for example, the legislation lists specific examples including, the provision of financial services, weapons, expert advice, safe houses, false documentation, or personnel.¹⁹
35. The Commission, however, notes with concern that it appears to be the very intention of the amendment that the term 'assist' be wide ranging. It is stated in the Explanatory Memorandum that 'the amendment is by necessity wide-ranging in terms of the types of activities or persons who might be subject to it.' The Commission questions the necessity for such a wide ranging provision. This is particularly the case when a range of activities that could fall within its scope are already proscribed under the Criminal Code. For example, the Criminal Code proscribes intentionally receiving funds from or making funds available to a terrorist organisation (s.102.6); directing the activities of a terrorist organisation (s.102.2); recruiting for a terrorist organisation (s.102.4); membership (including informal membership) of a terrorist organisation (s.102.3); and training or receiving training from a terrorist organisation (s.102.5). Providing an organisation with support or resources that would help the organisation directly or indirectly engage in preparing, planning, assisting or fostering the doing of a terrorist act is also proscribed (s.102.7).
36. The Commission's concerns in relation to proportionality are not allayed by the proposed exemptions. As presently drafted, the exemptions do not provide adequate protection for lawyers, journalists and close family members.
37. Section 102.8(4)(d) provides an exemption when the association is only for the purpose of providing legal advice or legal representation in connection with criminal proceedings or proceedings relating to whether the organisation is a terrorist organisation. The Commission is concerned that this exemption has been drafted too narrowly, particularly in light of the width of the offence. The exemption as currently drafted requires proceedings to be on foot. Accordingly, for example, once an organisation has been proscribed, a lawyer providing legal advice to the organisation to have its declaration revoked, in the absence of any

Constitutional Legislation Committee Report at pp53-54. The offence of 'assisting a proscribed organisation' was not included in the final form of the Bill.

¹⁷ J.Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy*, (Australia: 2004), p210.

¹⁸ *Kim v Republic of Korea* (1998) Human Rights Committee Communication No. 574/94, at paras 12.4-12.5.

¹⁹ *Patriot Act 2001* (USA).

proceedings, would fall outside the exemption and be guilty of an offence of association under new s.102.8 of the Criminal Code.

38. Section 102.8(6) provides that the offence does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication. The Commission is concerned that the scope and meaning of this exemption is not clear. The Commission notes that although the High Court in *Lange v Australian Broadcasting Corporation*²⁰ set out the test for determining whether a law has breached the implied freedom of political communication, the ambit of 'political communication' was not clearly defined. It is, for example, unclear as to what extent it applies to matters of public concern that are not also issues of current political debate.²¹ Further, the question of *how much* protection such communication receives from the freedom has not been clearly answered. That is, although at times the High Court appears to have settled on a proportionality test, at other times some members of the High Court have departed from this test and have held that a stricter standard of review should apply to certain categories of cases.²² Suffice to say, the exemption as drafted does not provide any certainty for journalists or other political commentators as to whether their opinion pieces on proscribed organisations or interviews with members of proscribed organisations would fall within the ambit of the implied freedom of political communication. The Commission also notes with concern that the exemption carries a reverse onus and requires the defendant to establish the evidential burden.
39. Finally, the Commission notes its concern with the exemption at 102.8(4)(a) for close family members. The exemption applies only to specific family members listed in the Bill and accordingly, cousins, aunts, uncles, nieces and nephews are provided with no protection. Further, it applies only when the association relates to a matter that could be reasonably regarded as 'a matter of family or domestic concern'. Accordingly, if a wife drives her husband to court if he is on trial for his membership of a terrorist organisation, is that a family or domestic concern or a culpable association? Moreover, would the wife be guilty of association if her husband discusses the proscribed terrorist organisation with her.²³ The Commission is concerned that this is a heavily qualified exemption and submits that it should be extended both in relation to the family members that are afforded protection and in relation to the types of association that are protected.

²⁰ (1997) 189 CLR 520.

²¹ In *Lange v Australian Broadcasting Corporation* the Court did not address the issue except to say that the implied freedom extends beyond election periods. See also *Kruger v Commonwealth* (1997) 190 CLR 1 at 118 per Gaudron J: 'Freedom of political communication is a freedom which extends to all matters which may fall for consideration in the political process.' See also *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104 at 124 per Mason CJ, Toohey and Gaudron JJ where political communication was widely defined.

²² A.Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication', [1999] MULR 26.

²³ See the comments of the Honourable P.Georgiou MP, Proof Hansard, 24 June 2004 at 30718.

Conclusion

40. The Commission is concerned that certain provisions of the Anti-Terrorism Bill fail to strike an appropriate balance between the protection of individual rights and national security and may allow for the breach of human rights standards.
41. The Commission's principal concern in respect of the amendments to the Transfer of Prisoners Act is that the new s.16E creates the possibility for delay in bringing a remand prisoner to trial and accordingly, the possibility for prolonged pre-trial detention. The Commission submits that the Attorney-General should not be allowed a discretion not to make an order for the transfer of a remand prisoner to attend court to appear in proceedings for an offence for which they have been remanded in custody. Rather, a prisoner should be entitled to a trial within a reasonable time in accordance with article 9 of the ICCPR having regard to the criteria set out by the European Court of Human Rights. The Commission further submits that any decisions of the Attorney under the new provisions of this Act should be subject to judicial review.
42. The Commission's principal concern in respect of the amendments to the Criminal Code is that in view of the width of the offence of 'association' and the lack of precision in certain of its terms, the amendment does not conform to the principle of proportionality and nor does it appear to be the least intrusive means to achieve the stated aim. The essence of the Commission's concern is with the width of the term 'assist' and the range of activities that may fall within it. The Commission submits that the term must be defined in order to identify the nature of the risk that the offence is intended to address. The Commission submits that the term could be defined with reference to specific examples in accordance with the American model. Finally, the Commission submits that in view of the reach of the new offence, the exemptions as presently drafted do not contain adequate carve outs for lawyers, journalists and family members.

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