Submission to Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2004

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Introduction

The Australian Muslim Civil Rights Advocacy Network (AMCRAN) is an organisation dedicated to preventing the erosion of the civil rights of Australia's 300,000 Muslims, and providing 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 to increase awareness of civil rights issues, and communicating with and through the media. It actively collaborates with both Muslim and non-Muslim organisations within the community to achieve its goals.

We welcome the opportunity to make a submission in respect of the Bills, noting, however, the short time frame within which submissions are to be received. This submission, therefore, only addresses our main concerns with the Anti-Terrorism Bill (No. 2) ('the Bill') in the legal context, as well as some concerns that are particular to the Muslim community. We are, however, prepared to appear before the Committee to elaborate further if it would assist the Committee.

Legal Issues

AMCRAN is opposed to a number of provisions of the Bill. In particular, we are strongly opposed to the introduction of the offence of 'associating with terrorist organisations', and the proposed new power to seize a person's passports even before an ASIO warrant has been issued against them. We also object to amendments to exempt certain decisions from judicial review.

'Association' offence

Schedule 3 of the Bill amends Division 102 of the *Criminal Code* to introduce the offence of associating with terrorist organisations, with a maximum penalty of 3 years imprisonment. It provides that a person commits this offence where he or she intentionally associates with a person

who directs, promotes, or is a member of a terrorist organisation, providing support intended to assist the organisation to expand or to continue to exist, knowing that the organisation is a terrorist organisation.

There are a number of very serious problems with this proposed offence. This includes the fundamental flaws of 'association' or 'consorting' offences, the discretionary application of the legislation, the disproportionate penalty, the potential violation of International Treaties Australia is a signatory to, and finally the unexpected consequences of this legislation in combination with existing legislation.

Problems with 'consorting' offences

The Explanatory Memorandum for the Bill states that the provisions draw on concepts from the offence of consorting[1] and the use of non-association orders as part of sentencing in NSW[2]. The Explanatory Memorandum states that, 'Just as consorting offences can be used to break up criminal gangs, the proposed offence can be used to break up terrorist groups.'[3]

However, there is a myriad of problems in relation to the consorting offences under state legislation, and there is no evidence at all that these consorting laws have had any impact of breaking up criminal gangs.

For the sake of comparison and analysis, we examine the law of consorting under state law. In NSW, the offence of 'consorting with convicted persons' is contained in section 546A of the *Crimes Act* 1900 (NSW). It provides:

> **Any person who habitually consorts with persons who have been convicted of indictable offences, if he or she knows that the persons have been convicted of indictable offences, shall be liable on conviction before a Local Court to imprisonment for 6 months, or to a fine of 4 penalty units.**

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[1] *Crimes Act* 1900 (NSW) section 546A.

[2] *Crimes (Sentencing Procedure) Act* 1999 (NSW) No. 92.

[3] Explanatory Memorandum, pp. 3 – 4.

Steel, in a comprehensive analysis of the offence, finds that the offence is laden with problems[4]. Firstly, what the provision creates is more a general police power than a substantive offence because the elements are impossible to define[5], and further, the scope of the offence is so broad that it 'applies indiscriminately to large sections of the public without any clear justification'[6].

An argument has also been made that 'it is inconsistent with the principle of justice and fair punishment that a person who has served and completed the punishment for a crime imposed by a court should then be subject to further punishment'[7]. This proposed offence goes even further, in that the person does not even have to be convicted for the offence to apply. Mere membership of an organisation proscribed by the government as a terrorist organisation is sufficient for their punishment. This introduces an even more arbitrary aspect to the offence.

Further, the Law Reform Commission of Western Australia, in recommending repeal of the similar offence 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.[8]**

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;

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

[5] Steel, p. 570.

[6] Steel, p. 580.

[7] Steel, p. 579.

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

- may require an inappropriate allocation of police resources to enforce;
- very rarely forms the basis of a charge;
- may unfairly discriminate against certain already marginalised individuals, in that the provisions are most likely to be used against young persons and petty criminals that are forced to congregate in public spaces where they may be observed to be 'consorting'; and
- is based on spurious logic that is generally at odds with contemporary principles of jurisprudence and criminal justice.[9]

Given that the states offences upon which the proposed offence is largely based are ineffectively and are ripe for repeal, it is unjustifiable for the federal government to now introduce this offence. This is particularly so given the more restrictive nature of the offence being introduced (2 occasions), the much harsher penalty (3 years imprisonment rather than 6 months imprisonment or 4 penalty points), and the fact that there is no requirement of a prior conviction – mere membership of an organisation is sufficient.

In essence, therefore, what this new provision does is take laws that have been shown to be unjust, discretionary, and ineffective in no less than three states over a period of more than a century and made them even more unjust and discretionary. If there were some salient evidence or solid reasoning that indicated some overriding reason why these provisions could be expected to be effective in reducing terrorism, perhaps these laws would be necessary; however, this is not the case, and the Second Reading speech is notable for its lack of reasoning in this regard.

Broad executive discretion

The 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 which itself is based upon the overly broad existing definition of terrorism. Under the existing *Criminal Code,* there is provision for the Attorney-General to proscribe organisations as terrorist organisations if he or she is satisfied on reasonable grounds that the organisation is 'directly or indirectly engaged in,

[9] Steel, p. 601.

preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)'.[10] In practice, this process has been criticised as highly subjective and political[11]. While the Attorney-General's decision is subject to judicial review,[12] the factual correctness of the decision itself *per se* is not reviewable (as to whether the organisation is or is not a terrorist organisation), but only the legality of the Attorney-General's decision.

The main problem with this broad executive discretion is that it is subject to political manipulation and application. Almost any organisation could be labelled a 'terrorist organisation', for example trade unions, and consequently any association could lead to up to 3 years imprisonment. Since the capacity for judicial review of proscriptions is so limited, there is a question of whether this particular provision could be considered a Bill of Attainder. In this respect we have had the benefit of reading the submission of Mr Joo Cheong Tham and we support his analysis.

Violation of International Treaties

The provisions as they currently stand unduly infringe the freedom of association, a freedom that is guaranteed by the International Covenant on Civil and Political Rights (ICCPR). Australia has been a signatory to ICCPR since 1980[13]. Article 22(1-2) of the ICCPR states:

> 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
>
> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

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[10] *Criminal Code Act* s 102.1(2).

[11] *The Politics of Proscription,* Research Note No. 63, 21 June 2004, Parliamentary Library.

[12] *Administrative Decisions (Judicial Review) Act 1977* (Cth) and section 75(v) of the *Constitution.*

[13] With the exception of Article 41, which covers disputes between different states, which it became a signatory to in 1993.

It is not clear that this proposed offence adds any further substantial measure in the interest of national security, since any provision of material support to a terrorist act or a terrorist organisation is already covered thoroughly and comprehensively by existing anti-terrorism legislation, such as penalties for providing support or resources to a terrorist organisation[14]. Further, there is insufficient evidence to justify the 'necessity' of these measures. What the amendments would effectively prevent is communication or association, and no evidence has been produced to show any nexus between the type of association to be prohibited under the proposed offence, and the commission of terrorist acts. Consequently, it is arguable that by introducing this legislation, Australia will be violating its obligations under the ICCPR.

In addition, although the offence is drafted in neutral terms, there is a possibility that the new offence and the associated concerns generated by the introduction of the offence may lead to the shunning of Muslims, who may be more easily perceived as being linked to terrorist acts in some way. The recently released *Isma* report produced by the Human Rights and Equal Opportunity Commission documents a significant increase of discrimination and vilification against Arabs and Muslims since September 11. AMCRAN is concerned that this offence will likely create further tension between the Muslim and non-Muslim parts of the community, increasing instances of impermissible discrimination as under the International Covenant of Civil and Political Rights, the Committee on the Elimination of Racial Discrimination, as well as Australia's *Racial Discrimination Act* 1975.

Disproportionate Penalty

The penalty for this crime seems wildly disproportionate for this offence. In his second reading speech the Hon Philip Ruddock stated that they are modelled on state non-consorting laws as mentioned above. However, the maximum penalty for the NSW offence is 6 months or 4 penalty units. It is incongruous and unjustifiable that the penalty for this offence is 5 times as long.

[14] *Criminal Code Act* s 102.7.

Interaction with existing legislation

The new bill interacts with existing legislation in a number of ways that make the legislation far more dangerous than it may at first appear. In this section, we give two examples of such interactions.

i. Bail under exceptional circumstances

The Anti-Terrorism Bill 2004 recently inserted a new section 15AA into the *Criminal Code* which provides that a person charged with or convicted of a terrorism offence under Part 5.3 of the *Code* will only be granted bail in exceptional circumstances. The proposed association offence will also be included within Part 5.3, which means that, according to the letter of the law, a person could be kept in gaol unless there are exceptional circumstances, simply for greeting someone on two occasions and saying some words of encouragement. Article 9 of the International Covenant on Civil and Political Rights states that it shall not be a general rule that persons awaiting trial shall be detained in custody. The proposed offence combined with the bail provisions no doubt constitutes an unacceptable infringement of a person's civil liberties in view of the objective seriousness of the offence. Because of the general nature and wide scope of the offence, it is relatively easy to charge a person with this offence, and it effectively means the person could be incarcerated for up to 18 months before potentially being found innocent.

ii. Surveillance

It is difficult to see how this new offence will be enforced without stringent surveillance. How will enforcement officers investigate people for this offence unless they monitor not only the fact of association, but also the words and effect of the person's conversations, in order to ascertain whether or not the association is to encourage that person in his or her activities, and that it would support the existence or expansion of that organisation?

In fact, the Bill, as currently drafted, would expand the already considerable powers of surveillance available to ASIO and law enforcement agencies. For example, the *Telecommunications (Interception) Act* 1979 allows for the interception of communication if the agency has a

Telecommunications Interception warrant (a 'TI' warrant)[15]. In deciding whether or not to grant a TI warrant, the issuing authority is to take into account certain criteria, depending on whether or not the suspected criminal activity falls into Class 1 or Class 2 offences category as defined by the Act. Currently, Class 1 offences are defined as including murder or equivalent, kidnapping, narcotics offences, and terrorism offences[16], while Class 2 offences are generally offences which are punishment by a maximum of at least seven years imprisonment, and involve serious risk of loss of life, serious personal injury, serious fraud and so forth[17].

Since the proposed association offence would be inserted under Division 102 of the Criminal Code, it would be classified as a Class 1 offence. The ramifications of this is enormous. It means that a person suspected on reasonable grounds of being likely to commit the offence[18] could have a warrant issued against them without the issuing authority having to consider such factors as the privacy of any person or persons likely to be interfered with[19], the gravity of the conduct[20], and how much the information would be likely to assist in connection with the investigation of the offence[21], which are factors to be taken into account when the offence to be investigated are Class 2 offences. This is all the more incongruous since Class 2 offences are punishable by at least seven years imprisonment, a penalty which is proportionally higher than that of the proposed offence.

Furthermore, the process is beyond scrutiny and review, and since applications for TI warrants are not made public, there is minimal ability to monitor the application of the legislation. There is already evidence that, per capita, Australians are monitored 27 times as much as their United States counterparts[22], and this new offence would expand these powers even more greatly.

This would expand the surveillance powers of ASIO and the police subtly, but also immensely, since the scope for this particular crime is much greater than that of any of the other terrorism-related crimes and carries a much lower barrier for suspicion. This would effectively give the police

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[15] *Telecommunications (Interception) Act* 1979, Part VI.

[16] *Telecommunications (Interception) Act* 1979, section 5.

[17] *Telecommunications (Interception) Act* 1979, section 5D.

[18] *Telecommunications (Interception) Act* 1979, section 6F(2).

[19] *Telecommunications (Interception) Act* 1979, section 46A(2)(a).

[20] *Telecommunications (Interception) Act* 1979, section 46A(2)(b).

[21] *Telecommunications (Interception) Act* 1979, section 46A(2)(c).

[22] "ASIO spying on the increase", Shelley Hodgson, *Sunday Herald Sun*, 29 June 2003

a license to put anyone who had even a chance encounter with a person accused of being a terrorist under surveillance, since they could be committing this offence.

Adequacy of existing legislation

AMCRAN is of the view that existing 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 proposed to be prohibited by the introduction of the association offence. The government tries to justify the introduction of the offence by stating that these existing offences are more difficult to prove because they contain a causal element that is linked to the commission of a terrorist act[23], whereas the proposed offence will be much easier to prove. This justification defies logic. Since the introduction of the terrorism offences under Part 5.3 of the *Criminal Code*, not one person has been charged, successfully or otherwise, with aiding and abetting, counselling, or procuring the commissions of a terrorist act. Hence there is no evidence to suggest that the existing ancillary offences are inadequate in any way such as to justify the introduction of the new association offence.

Passport Issues

Schedule 2 of the Bill proposes to give ASIO the power to demand a person to surrender his or her Australian and foreign passports if s/he is subject to a request for a warrant for questioning under section 34D of the Australian Security Intelligence Organisation Act 1979 (NSW) ('the ASIO Act').

AMCRAN is of the opinion that this Schedule must also be rejected. In effect, the proposed amendment allows ASIO to prevent a person from leaving this country, even before a warrant has been issued against them.

[23] Explanatory Memorandum, p. 33.

Firstly, we argue that this should be rejected 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'[24]. The amendments would effectively allow ASIO to infringe the rights of individuals to free movement etc 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.

Judicial Review

We are opposed to Schedule 4 clause 1 of the Bill which amends the *Administrative Decisions (Judicial Review) Act* 1977 such that the Minister's decisions to transfer prisoners under the *Transfer of Prisoners Act* 1983 are not open to judicial review. We also oppose the proposed insertion of Part 4 clause 23 into the *Passports Act* 1938 which places limits upon the Administrative Appeals Tribunal to review decisions of the Minister if he or she issues a certificate in relation to a decision to seize a person's passports. Fundamental to the concept of responsible government is the fact that all administrative decisions must be reviewable in order to instil and ensure public confidence. No sufficient justification has been given to support these provisions.

[24] Australian Security Intelligence Organisation Act 1979, section 34D (1)(b).

Issues of concern to the Muslim community

In addition to the legal issues that concern every Australian, there are particular provisions in the legislation that have an undue impact on the Muslim community. So far, all four people charged with terrorism-related offences have been Muslims. In addition, all proscribed organisations have some link to Muslims. This proscription should not be interpreted as an indication that all terrorist acts are committed by Muslims; as already mentioned the process of proscription has been shown to be subjective and political[25]. Nonetheless, for whatever reasons, all proscribed organisations are Muslim organisations, hence, the 'associating with terrorist organisations' offence at the current time applies to associating exclusively with Muslims. For these reasons, the impact of this legislation on the Muslim community must be considered.

The Muslim community has, as a result of terrorist acts committed by those who claim to be Muslim, compounded by the anti-terrorism legislation, and the "Be Alert, but not Alarmed" campaign, suffered unprecedented levels of racism and discrimination[26]. One of the main effects of this Bill is that it will create two further levels of isolation: it will create isolation between the Muslim community and the wider Australian community, since non-Muslim Australians will fear, rationally or irrationally, that they may be talking to a member of a terrorist organisation and will thus shun Muslims, and likewise within the Muslim community, it will lead to people not wanting to talk to one another, again, for fear of falling foul of this legislation. This is at a time when both Muslim and non-Muslim Australians need to work together closely to prevent terrorism.

The main problem as far as the Muslim community is concerned are that the exemptions in the Bill are inadequate.

Inadequate Exemptions in an Islamic Context

The current legislation allows for certain exemptions to the charge of association. These are:

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[25] *The Politics of Proscription,* Research Note No. 63, 21 June 2004, Parliamentary Library.

[26] HREOC, *Isma Listen:National Consultations on eliminating prejudice against Arab and Muslim Australians*, 2004.

- Where the association is with a close family member and communication relates only to a matter that could reasonably be regarded (taking into account the person's cultural background) as a matter of family or domestic concern;
- the association is at a place being used for public religious worship and takes place in the course of practising a religion
- association is only for the purpose of providing humanitarian aid
- association is for providing legal advice or legal representation in connection with criminal proceedings or related proceedings, or proceedings relating to whether the organisation is a terrorist organisation.

From the Muslim perspective, these defences are totally inadequate, the main reason being that Muslim communities, like many ethnic communities, are tightly knit. The defences are inadequate in that they do not cover many of the usual activities that would occur within the Muslim community.

Firstly, with respect to the first exemption, family is very important in almost all Arab and Islamic cultures, in particular extended family bonds (cousins, aunts, uncles, grandparents). It is not uncommon for several generations of families to be living in the same household[27]; or for a group of related families to live on the same street. It is not unusual, for example, for cousins and uncles to meet each other on a daily basis and to share their experiences and problems[28].

The current legislation would have a huge social impact if it were to sever forcibly the ties between cousins and uncles, for example, and effectively undermine and destroy one of the most important stabilising influences in many Muslims' lives.

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[27] Farhat Moazam, *Family, Patients, and Physicians in Medical Decision-Making,: A Pakistani Perspective.* The Hastings Center Report, Nov 2000 v30 issue 6 p. 28.

[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 qualititative 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 decion-making, there is an "expressed trust and respect for the choices and influence of elders in the form of parents, aunts and uncles".'

Secondly, with respect to the exemption that the meeting occur within a place of worship, this too is inadequate. Here are some typical examples of interactions within the Muslim community that would not be covered by the exemption solely for places of worship.

- The Muslim community has two large religious festivals a year, called *Eids*. The tradition is a prayer is performed at an outdoor venue, rather than a traditional place of worship such as a mosque, though for practical reasons in Australia this is not always adhered to. One typical outdoor prayer such as this took place in Bicentennial Park, Homebush, Sydney, in 2002. It was attended by approximately 2,000 people. Since a park where such a prayer is held would not be considered a typical "place of worship" meeting people at such a location for the purpose of worship would not be covered.
- Regular classes and Qur'an study groups are frequently conducted in people's homes, or sometimes in hired schools and venues. These venues are also not covered.
- Two celebrations very important both religiously and socially are the celebration of a marriage (a *walimah*) and a celebration of the birth of a new child (an *aqiqah*). Both of these events occur typically in a public place, e.g. a hall, or occasionally a park (with a barbeque). It is considered extremely rude, and indeed anti-social to refuse an invitation to either of these two events.

In his second reading speech, the Hon Philip Ruddock said that the Bill sets out parameters 'without unnecessarily encroaching upon individual rights and freedoms'[29]. However, in all of the above cases, individuals would have no defence under the current legislation. The proposed offence would effectively control such simple acts as social engagements as illustrated above.

Recommendations

AMCRAN's position is that many provisions of the Bill as discussed are flawed, and should be rejected. However, in the event that the Committee is not in a position to reject the Bill, we make the following recommendations.

[29] Second Reading Speech, p.3.

1. That the 'associating with a terrorist organisation' offence be removed. However, if the Committee does not see fit to remove the association offence, we would strongly recommend the following modifications at the very least,
    a. That it should model the NSW 'non-association' rules in the context of sentencing, which are designed to be very specific and prevent particular people from talking to other well-specified people only if the person has been convicted.
    b. That there should be a presumption *for* bail for the association offence.
    c. That the association offence be considered neither a Class 1 nor Class 2 Offence for the purposes of the *Telecommunications (Interception) Act 1979.*
    d. That the penalty for association be reduced from 3 years to 6 months.
    e. That the defences available for association be extended namely:
        i. That family be expanded to include 'extended family'.
        ii. That the provisions for 'places of worship' be extended to cover any cultural or religious activity whether or not it occurs at a place of worship.
2. That the Minister's decision to transfer prisoners under the *Transfer of Prisoners Act* 1983 be subject to judicial review.
3. That the power to remove any person's foreign passports be exercisable from the time a warrant is granted.

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