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Committee Secretary
Senate Legal and Constitutional Committee
Parliament House
Canberra ACT 2600

By email: Peter.Hallahan@aph.gov.au

Dear Secretary

Inquiry into the Anti-Terrorism Laws Reform Bill 2009

1. The Human Rights Law Resource Centre (**HRLRC**) welcomes the invitation to make a submission to the Committee's inquiry into the Anti-Terrorism Laws Reform Bill 2009 (the **Bill**).
2. Since the events of 11 September 2001, the Australian Government has introduced 44 pieces of 'anti terrorism' legislation. In the absence of a federal charter of rights, these laws have not been adequately assessed against, or counterbalanced by, human rights considerations and obligations.
3. It is important that, in establishing a legislative framework that seeks to ensure the security of individuals, the State does not legislate or exercise powers in a manner that unnecessarily or disproportionately infringes upon fundamental human rights.

Human rights issues in Australia's counter-terrorism laws

4. There are insufficient safeguards in Australia's counter-terrorism laws to ensure compliance with international human rights law, in particular, the International Covenant on Civil and Political Rights (**ICCPR**).¹ The HRLRC's human rights concerns with Australia's counter-terrorism regime include, but are not limited to, the following:
 - a. The exceptionally broad definition of 'terrorist act' in section 100.1 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) goes beyond internationally accepted characteristics of

¹ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

terrorism. The HRLRC notes these concerns are shared by the United Nations Human Rights Committee (**HRC**)² and the United Nations Special Rapporteur on Human Rights and Counter-Terrorism.³

- b. The Attorney General's wide discretion to proscribe terrorist organisations under the *Crimes Act 1914* (Cth) (**Crimes Act**) may lead to arbitrary, disproportionate and politicised decision-making. The process contains minimal human rights safeguards and may infringe the right to freedom from discrimination⁴ and minority rights.⁵ This is particularly troublesome given the limits imposed on the right to freedom of expression⁶ and the right to freedom of association⁷ once an organisation is proscribed.
- c. The breadth of the offence of associating with a terrorist organisation under section 102.8 of the Criminal Code disproportionately infringes the right to freedom of association.
- d. Investigative 'dead time' under section 23CA(8)(m) of the Crimes Act contains no limit on the period of time that can be disregarded. The danger of this unlimited power was illustrated in the case of Dr Haneef who was detained for 12 days without charge and infringes the freedom from arbitrary detention.⁸
- e. ASIO's detention and questioning powers under the *Australian Security Intelligence Organisation Act 1979* (**ASIO Act**) provides for detention of people who have not been charged (including those who may not even be suspects), for up to seven days which may amount to arbitrary detention. Similarly, the HRLRC are concerned with the procedures provided for under the Act for detaining and questioning individuals with restricted access to legal counsel and with limited protections. In relation to the secrecy provisions⁹ under the ASIO Act, the HRLRC share the concerns of Amnesty International Australia who have noted, '[t]he level of secrecy and lack of public scrutiny provided for by this Bill has the potential to allow human rights violations to go unnoticed in a climate of impunity.'¹⁰ The Human Rights Committee recommended that Australia should 'abrogate provisions providing Australian Security Intelligence Organisation (ASIO) the power to detain people without access to a lawyer and in conditions of secrecy for up to seven-day renewable

² Human Rights Committee, Concluding Observations: Australia, [11], UN Doc CCPR/C/AUS/CO/5, 2 April 2009.

³ Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism*, [15], UN Doc A/HRC/4/26/Add.3 (2006).

⁴ ICCPR, art. 2 and 26.

⁵ ICCPR, art. 27.

⁶ ICCPR, art. 19.

⁷ ICCPR, art. 22.

⁸ ICCPR, art. 9.

⁹ *Australian Security Intelligence Organisation Act 1979* sections 34K(10), 34ZP, 34ZT, 34ZS(2), 34ZR, and 34S.

¹⁰ Amnesty International Australia, *Concerns Regarding the ASIO Legislation Amendment Bill 2003* (2003).

periods.’¹¹ Similarly, the Committee Against Torture expressed concerns that the ASIO detention powers were not in compliance with the right to a fair trial and the right to take proceedings to a court to determine the lawfulness of detention.¹²

The Anti-Terrorism Laws Reform Bill 2009

5. The HRLRC strongly welcomes the introduction of the Bill. The Bill contains the most progressive amendments of Australian counter-terror laws to date, removing or ameliorating many of the most draconian aspects of Australia’s counter-terrorism legislative framework. The HRLRC congratulates the Greens for incorporating a number of recommendations adopted by recent review committees, in particular the Security Legislation Review Committee (**Sheller Committee**)¹³ in the Bill.
6. In summary, the HRLRC welcomes:
 - a. Amendments to the definition of terrorist act in section 100.1 of the Criminal Code which would:
 - o reflect the cumulative characteristics espoused by the UN Security Council¹⁴and;
 - o remove references to ‘threat of action’.
 - b. Removal of the term ‘fostering’ from the definition of terrorist organisation under section 102.1 of the Criminal Code, which makes the definition excessively broad.
 - c. Repeal of the offence of possessing things connected with terrorist acts under section 101.4 of the Criminal Code, which make the offence excessively broad and vague.
 - d. Amendments to the proscription process under Division 102 of the Criminal Code. The HRLRC considers the raft of amendments will assist in improving transparency of the proscription process as well as ensuring that procedural fairness is accorded to organisations affected; for example by requiring that an organisation be notified if they are listed and also by providing for review in the Administrative Appeals Tribunal.¹⁵

¹¹ UN Human Rights Committee, Concluding Observations: Australia, UN Doc CCPR/C/AUS/CO/5 (2009), [11.]

¹² UN Committee Against Torture, Concluding Observations of the Committee Against Torture: Australia, UN Doc CAT/C/AUS/CO/1 (2008), [10].

¹³ Security Legislation Review Committee, *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and the *Criminal Code Act 1995* (Cth), *Report of the Security Legislation Review Committee* (2006), 8.

¹⁴ Security Council resolution 1566 (2004) calls upon States to cooperate fully to prevent and punish acts that have the following 3 cumulative characteristics: a) Acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages; and b) Irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; and c) Such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

¹⁵ See new subsection 102.1(2AB) and 102.1AA.

- e. Amendment to the offence of training a terrorist organisation or receiving training from a terrorist organisation under section 102.5(1) of the Criminal Code. The amendment requires a person to have *knowledge* that the organisation is a terrorist organisation, replacing the requirement the person is *reckless* as to whether the organisation is a terrorist organisation.
- f. Amendments to the offence of providing support to terrorist organisation under section 102.7 of the Criminal Code. The proposed amendments replace the term 'support' with 'material support' and exclude the mere publication of views that appear to be favourable to an organisation or its objectives.
- g. Repeal of section 15AA of the Crimes Act which effectively provides for a presumption against bail in terrorism offences. Such restrictions imposed on the grant of bail arguably violate the right to freedom from arbitrary detention and have recently been critiqued by the HRC.
- h. Repeal of investigative 'dead time' under section 23CA(8)(m) of the Crimes Act. The HRLRC considers the removal of investigative 'dead time' would avoid prolonged pre-charge detention exemplified in the Dr Haneef case and make the laws more consistent with the freedom from arbitrary detention.
- i. Repeal of the offence of associating with a terrorist organisation under section 102.8 of the Criminal Code.
- j. Amendments to the Crimes Act that require investigators to inform a person who is detained of his or her rights.
- k. Repeal of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). The HRLRC considers that the issues of disclosure of national security information are adequately addressed by the common law and that repealing the entirety of this Act is consistent with the fundamental right to a fair trial. The HRLRC considers that public interest immunity can adequately govern the disclosure of national security information.
- l. Amendments to ASIO's detention and questioning powers under the ASIO Act. In particular:
 - o Reduction of the maximum period of time a person may be detained from 168 hours to 24 hours under section 34S of the ASIO Act.
 - o Amendment to sections 34F(6) and 34G(2) of the ASIO Act to prevent detention periods being extended indefinitely through 'rolling warrants'.
 - o Repeal of many of the secrecy provisions in the ASIO Act; for example, sections 34K(1), 34ZP, 34ZT, 34ZS(2), 34ZR, 34S.
- m. Amendments to the Criminal Code that would repeal the offences of sedition currently contained in section 80.2. The sedition offences impact on freedom of speech and freedom of association. Moreover, the government has not established that there is a

demonstrated need for the criminalisation of the ‘seditious’ conduct in section 80.2. A range of inquiries have recommended amendment or repeal of the sedition offences, including the Australian Law Reform Commission in its extensive report.¹⁶ Given that the sedition provisions clearly limit human rights, it is for the government to justify the need for the laws. To date, the government has not discharged the burden of demonstrably justifying that the provisions are reasonable, necessary and proportionate and, on that basis, we support repeal of the offences.

Recommendation 1:

The HRLRC supports amendments in the Bill that would improve human rights protection, namely:

- Repeal of sedition offences in the Criminal Code. (Items 1 and 2 of Schedule 1)
 - Removal of the term ‘fostering’ from the definition of terrorist organisation in section 102.1 of the Criminal Code. (Item 7 of Schedule 1)
 - Repeal of the offence of possessing things connected with terrorist acts under section 101.4 of the Criminal Code. (Item 5 of Schedule 1)
 - Amendments to the proscription process under Division 102 of the Criminal Code. (Items 6, 8 and 10 of Schedule 1)
 - Amendment to the offence of training a terrorist organisation or receiving training from a terrorist organisation. (Item 10 of Schedule 1)
 - Amendments to the offence of providing support to terrorist organisation under section 102.7 of the Criminal Code. (Items 11 to 15 of Schedule 1)
 - Repeal of the offence of associating with terrorist organisations under section 102.8 of the Criminal Code. (Item 16 of Schedule 1)
 - Repeal of the presumption against bail under section 15AA of the Crimes Act. (Item 1 of Schedule 2)
- Amendment to powers of detention of persons suspected of terrorism offences under the Crimes Act. (Items 2 to 7 of Schedule 2)
- Repeal of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (Item 1 of Schedule 4)
 - The following amendments to the ASIO Act (Items 1 to 11 of Schedule 3)
 - o Amendment to the maximum period of time a person may be detained under section 34S the ASIO Act.
 - o Amendment to sections 34F(6) and 34G(2) of the ASIO Act to prevent detention periods being extended indefinitely through ‘rolling warrants’.
 - o Repeal of secrecy provisions in the ASIO Act.

¹⁶ ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006).

One concern with the Anti-Terrorism Laws Reform Bill 2009

7. A concern the HRLRC has with the Bill is the removal of paragraph (b) of the definition of 'terrorist act' in section 100.1 of the Criminal Code which requires that the action is done with the 'intention of advancing a political, religious or ideological cause'. The Sheller Committee considered the retention of paragraph (b) and found that "it emphasises a publicly understood quality of terrorism, and for that reason should remain as part of the definition of 'terrorist act'".¹⁷
8. The legislative purpose behind the removal of paragraph (b) is unclear from the explanatory memorandum or the Second Reading Speech. Given the procedural and substantive consequences of characterising conduct as a 'terrorist act', the HRLRC considers it imperative for the definition of 'terrorist act' to have characteristics to make it uniquely connected to terrorism rather than ordinary criminal conduct. The HRLRC supports the retention of paragraph (b), as to remove it may unnecessarily broaden the definition of terrorist act, thereby resulting in the use of the terror-related procedures more broadly and a greater limitation on the rights guaranteed by the ICCPR.

Recommendation 2:

The HRLRC does not support the amendment to the definition of terrorist act in section 100.1 of the Criminal Code that would remove the requirement that the action is done with the 'intention of advancing a political, religious or ideological cause'.

Conclusion

9. The HRLRC strongly supports and encourages legislative amendment of counter-terror legislation in accordance with human rights principles. In many ways the Bill seeks to overcome some of the major human rights concerns with the current counter-terror regime and to that extent it should be applauded.

Yours sincerely



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¹⁷ Sheller Committee Report, above n 13, 57.