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Discussion Paper – National Security Legislation  
Assistant Secretary, Security Law Branch  
Commonwealth Attorney-General's Department  
By email: CTconsultation@ag.gov.au

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Dear Assistant Secretary

**RE: SUBMISSION TO THE DISCUSSION PAPER ON PROPOSED AMENDMENTS TO NATIONAL SECURITY LEGISLATION**

Please accept this short submission on the above Discussion Paper. My comments are supplementary to the comprehensive submission of the Sydney Centre for International Law, with which I agree and commend to you. Please accept my apology for the lateness of this submission, as I am on sabbatical in Oxford and have only recently become aware of the DP.

**1. Urging violence offences in Division 80 of the Criminal Code**

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**RECOMMENDATION:** *The urging violence offences should include an additional element that there must be a substantial risk that violence will occur as a result of the urging.*

Given the paramount importance of freedom of expression in maintaining democracy and enabling individual liberty, any restrictions on freedom of expression require strong and careful justification. In my view, holding a person criminally liable for urging violence, in circumstances where there may not necessarily be any likelihood or probability of imminent violence actually occurring as a result, is not a justifiable restriction on free expression.

While the right of free speech is not absolute and may be limited to prevent serious harms, it cannot be restricted because of mere speculation that it leads to terrorism. Only incitements which have a direct and close or proximate connection to the commission of a specific crime are justifiable restrictions on speech. This view is reflected in United States constitutional jurisprudence. In *Brandenburg v Ohio*, 395 US 444 (1969), the Supreme Court found that the First Amendment to the *US Constitution* did not 'permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'.

The twin requirements of the imminence and likelihood (or probability) of crime ensure that speech is not prematurely restricted; there must be a sufficiently proximate connection or causal link between the advocacy and the eventuality of crime.

The Australian Government has not presented any cogent explanation for why the freedom of expression of Australians should be more limited than that enjoyed by Americans, particularly in circumstances where it is well accepted that the US is at greater risk of international terrorism than Australia, such that security justifications for restrictions on speech would appear to be stronger in the US than in Australia.

In addition, as I have previously argued, it is not appropriate for the offence of urging inter-group violence to be included within a package of anti-terrorism laws: Ben Saul, 'Speaking of Terror: Criminalizing Incitement to Violence' (2005) 28 *UNSW Law Journal* 868-886. Such an offence should properly be reconstituted, broadened, and characterised as a new offence within federal anti-vilification law, without the limitations in scope on the current offence, and without tainting religious and racial groups with an implication of terrorist behaviour.

## **2. Terrorist act definition and offences in Division 100 and 101**

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**RECOMMENDATION:** *Acts committed by armed forces during or in connection with an armed conflict should be excluded from the definition of 'terrorist act' in the Criminal Code.*

Australia's definition of terrorism in the Criminal Code does not currently carve out any conduct whatsoever committed in the course of an international or non-international armed conflict. The lack of an exception is problematic for a number of reasons.

First, the definition of terrorism criminalises conduct which is lawful under the international law of armed conflict, in particular, conduct committed by authorised combatants in an international armed conflict. Under international humanitarian law, combatants (including State armed forces and irregular forces under article 4 of the Third Geneva Convention 1949) are entitled to combatant immunity for hostile acts that are lawful in armed conflict. It is a lawful purpose of State armed forces to use violence to coerce a foreign government for political purposes, which is the essence of the Australian definition of terrorism. The definition of terrorism not only criminalised foreign States' armed forces engaged in military conflict with other States or with Australia, but it also necessarily criminalises Australia's own armed forces when engaged in combat against foreign States. Such criminalisation is not consistent with Australia's obligations under the international law of armed conflict.

Secondly, Australia's definition of terrorism criminalises certain conduct in armed conflict which is not authorised by international law but which is also not criminal. In particular, definition of terrorism criminalises the participation of non-State armed forces in hostilities in any civil war or other non-international armed conflict, in circumstances where such violence is solely directed towards other "combatants" in internal conflicts. The participation of rebel, guerrilla or insurgent forces in military hostilities non-international armed conflict is not regarded as terrorism by international law. Australia's criminalisation of such conduct, even where it is targeted at opposing military forces and otherwise complies with humanitarian law, removes any incentive for non-State forces to comply with humanitarian law, if they can be prosecuted for military acts.

Thirdly, in addition, Australia's definition of terrorism also criminalises unauthorised civilian participation in hostilities in armed conflict (see Protocol I 1977, article 51, reflecting customary law). While civilian participation in hostilities is not permitted by international humanitarian law, it is not criminalized as a war crime. If Australia wishes to criminalise civilian participation in hostilities (which it is entitled to do), then it is possible to do so without also criminalising lawful military hostilities by lawful combatants as set out above. Fourthly, Australia's definition of terrorism criminalises acts of violence (whether suicide bombings or other violence) committed against civilians in armed conflict. Two issues are raised here. First, lawful combatants in armed conflict may sometimes "intend", in the relevant criminal law sense, that civilians are incidentally or collaterally killed as part of an attack on a military objective, in circumstances where such killings are lawful under the international law of armed conflict. Australia's definition of terrorism criminalises such conduct and makes it criminal for a soldier to ever harm any civilian. Again, such acts should be carved out of the Australian definition so as not to criminalise conduct that is necessarily lawful under the law of armed conflict, if conflicts are to be allowed to be fought at all.

The other issue here is that otherwise *unlawful* attacks on civilians in armed conflict are already criminalised by the law of armed conflict. Numerous war crimes exist which protect civilians in armed conflict from violence, including wilful killing, spreading terror among a civilian population, and so on. There is no purpose in the Australian terrorism offence additionally criminalizing them, when Australia already has comprehensive war crimes legislation in place in (under both the Geneva Conventions Act 1957 and under the 2002 amendments to the Criminal Code to implement the Rome Statute of the International Criminal Court). While in my view nothing is gained by additional criminalisation of the same conduct under anti-terrorism law, if Australia wishes to preserve such duplication, then the definition of terrorism still ought to carve out lawful acts of combatancy as set out above.

Fifthly, the definition of terrorism also criminalises certain acts of violence committed against civilians in a territory experiencing armed conflict, in circumstances where such acts *are not connected* to the armed conflict but occur alongside it. Such acts of ordinary crime are appropriately criminalised by the extraterritorial Australian offence of terrorism. The criminalisation of such acts would not be affected by a provision carving out lawful (or indeed any) acts committed in connection with an armed conflict, such nexus already forming part of the jurisprudence on when a violent act can be characterised as a war crime due to its connection with conflict.

Australia has previously rejected the recommendation of the Parliamentary Joint Committee on Intelligence and Security (in its *Review of Security and Counter-Terrorism Legislation, 4 December 2006*, Recommendation 12), that the terrorism definition exclude conduct regulated by the law of armed conflict: Australian Government, *Response to PJCIS Review of Security and Counter-Terrorism Legislation*, December 2008, stating as follows:

Acts of terrorism may still occur during armed conflict; therefore the unqualified exclusion of armed conflict will encourage misapplication of the principles of public international law. The express exclusion of conduct regulated by the law of armed conflict from the definition of terrorist act would neither add to nor detract from Australia's international obligations and is unlikely to add clarity to the operation of relevant Criminal Code provisions.

An “unqualified exclusion” of armed conflict is *not* the only option available. The response above is regrettably blunt, misunderstands the precise impacts of Australia’s definition of terrorism on international law, and does not distinguish between the variety of different circumstances criminalised by the definition as set out above. It is also inconsistent with Australia’s obligations under international anti-terrorism treaties. For example:

- The Terrorist Financing Convention 1999 does not apply to violence against any person taking an active part in hostilities (thus excluding military targeting of lawful and unlawful combatants) (article 2(1)(b));
- The Terrorist Bombings Convention 1997 excludes the “activities of armed forces during an armed conflict” from that Convention” (article 19(2); and
- The Nuclear Terrorism Convention 2005 also excludes the “activities of armed forces during an armed conflict” from that Convention” (article 4).

*As explained above, with an appropriately drafted exception clause, it is entirely possible for the Australian definition to:*

- *properly criminalise* (a) unlawful violence against civilians in armed conflict (even if duplicating war crimes law), (b) unlawful civilian participation in hostilities, and (c) violence against civilians not connected to armed conflict in the territory;
- *while at the same time excluding* acts committed by combatants or members of armed forces under the law of armed conflict.

That end could be accomplished by inserting a simple exclusion clause in the Criminal Code definition of terrorism to this effect: *acts committed by members of armed forces during (or in connection with) an armed conflict are not terrorist acts.*

### **3. Terrorist organisation listing provisions and offences in Div. 102**

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**RECOMMENDATION:** The power to proscribe a terrorist organisation should be exercised by the judiciary, affording procedural fairness, rather than the executive.

**RECOMMENDATION:** Where an organisation is proscribed for advocating terrorism, the law should clarify the circumstances in which the views of an individual member (such as a senior leader) are to be taken as representative of the organisation as a whole.

### **4. Investigation regime for terrorism offences in Part 1C of the Crimes Act 1914**

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The improvements to Part 1C are welcome, in light of the experience of Dr Haneef. In my view, the ‘dead time’ provisions in ss 23CA and 23CB of the *Crimes Act 1914* (Cth) infringe the right to freedom from arbitrary detention recognised in international human rights law under article 9 of the International Covenant on Civil and Political Rights. The European Court of Human Rights has found that detention is arbitrary if it is *unpredictable* its duration; a law must *clearly* define the conditions for deprivation of liberty and be *foreseeable* and *certain* in its application in order to safeguard this freedom: *Melnikova v Russia* [2007] ECHR Application No 24552/02 (21 June 2007).

Sections 23CA and 23CB of the *Crimes Act 1914* (Cth) do not meet this test. The lack of a *maximum* limit on the allowable period of dead time, and the fact that the grounds for dead time applications are so numerous, variable and unpredictable in their duration in effect provides for an indefinite period of arbitrary detention without charge for suspects in terrorism cases. Administrative convenience in facilitating ongoing investigations is not a sufficiently strong basis on which to deprive liberty.

In Dr Haneef's case, 12 days of detention still used only half of the allowable 24 hour period of active questioning time, indicating that the authorities are able to extend the investigation period over a number of weeks through 'dead time' provisions. Suspects are thus unable to know with any certainty the length of their detention, an outcome clearly inconsistent with article 9 of the ICCPR, as well as the fundamental general principles of legal certainty and protection from arbitrary executive power central to the common law. Freedom from arbitrary detention assumes particular importance in any police investigative phase prior to a full criminal hearing and adjudication of guilt leading to imprisonment.

The role of a judicial officer under s 23D in determining what is 'reasonable' dead time does not remove this arbitrariness, since the quality of the hearing is deficient. This is in part due to the difficulties suspects face in seeking to be heard fully before a court. For example, the fact that the time taken to make and dispose of a dead time application automatically extends that dead time may deter suspects from challenging evidence or raising points of law for fear of delaying the judicial officer's verdict on the application.

Further, the suspect may not be able to fully defend themselves in the application process on a practical level; for instance in Dr Haneef's case his legal representative was not permitted to hear evidence presented by police in support of their s 23CB application, prohibiting an effective response on his behalf. The judicial supervision provisions are also ineffective in removing the arbitrariness of the proceedings because of the low threshold test required to establish the reasonableness of the period of dead time sought, which under s 23CB(5) enables police to cite even routine investigation activities as supporting a need for dead time.

It is recommended that s 23CA be amended to impose a maximum cap on the allowable amount of dead time, either for all dead time activities or specifically for activities under s 23CA(8)(m). Alternatively, it is recommended that an absolute maximum period of detention be provided for, which encompasses both any questioning time and any time out periods which may be granted. My own view is that the proposed 7 day maximum of dead time is rather too long; perhaps 3 days would be sufficient; but I defer to the government's judgment on the necessity of that period.

## **5. National Security Information (Criminal and Civil Proceedings) Act 2004**

The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) is unsatisfactory for a number of additional reasons not contemplated by the Discussion Paper.

First, the definition of 'national security' in section 8 and its sibling definitions (of Australia's defence, security, international relations or law enforcement interests, as defined in ss. 9-11 of the Act and in related legislation such as the ASIO Act 1979) are cast so widely and ambiguously so as to potentially enable the non-disclosure of a wide range of innocuous or non-sensitive information which has no material bearing on Australia's national security.

In consequence, an affected person could be prevented from knowing and challenging the full circumstances of the case alleged against them, or from accessing exonerating or exculpatory information. The Australian Senate Legal and Constitutional Affairs Committee has described the definition as 'broad in the extreme', 'unhelpful or unworkable' for an affected person, and susceptible to abuse by the authorities: *Report of Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004*, 19 August 2004, at paras. 3.20 and 3.22.

Secondly, the Act protects national security information through the use of closed hearings, ministerial certificates and security clearances. However, as the Australian Law Reform Commission noted in its report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (which led to the proposal of the legislation), other measures are available to achieve the same objective of protecting sensitive information (see ALRC recommendation 11-10). In particular, measures that interfere less in the ordinary conduct of civil proceedings should be considered before resorting to the more intrusive measures.

Thirdly, the Act requires certain proceedings to be held in closed session, rather than leaving the courts with the discretion whether to close the court (as the ALRC recommended), which would be an approach more capable of balancing the right to a fair hearing with national security interests in particular cases: Australian Human Rights Commission, *Submission to the Australian Senate Legal and Constitutional Committee Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004*, 2 June 2004, at pp. 5-6.

Fourthly, the Act regards a disclosure as 'likely to prejudice national security' where 'there is a real, and not merely a remote, possibility that the disclosure will prejudice national security' (s. 17). However, a more appropriate standard for ensuring the fairness of the hearing would be to require a showing of a *probability* or *likelihood* of prejudice, rather than the much lower standard of a 'real possibility'.

Fifthly, the Act permits the court to exclude a party and their legal representative from a closed hearing to determine whether to order the non-disclosure of information, where the person lacks the required security clearance: s. 381(3). However, the judicial discretion to exclude a person is not accompanied by a requirement on the court to equally consider the adverse impact of the exclusion upon an affected person's right to a fair hearing: Australian Human Rights Commission, *Submission to the Australian Senate Legal and Constitutional Committee Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004*, 2 June 2004, at p. 7; see also Australian Senate Legal and Constitutional Affairs Committee, *Report into the provisions of the National Security Information Legislation Amendment Bill 2005*, 11 May 2005, Recommendation 9. The provision is accordingly likely to undermine the principle of equality of arms in the proceeding, to the detriment of a person seeking to contest a control order.

Sixthly, the Act's requirement that counsel be security cleared is not compatible with the rights under 14(3)(b) and (d) of the ICCPR to communicate with a counsel of one's own choosing and to defend oneself through legal assistance of one's own choosing, particularly as the court has no discretion whether to permit access to non-cleared lawyers: Australian Human Rights Commission, *Submission to the Australian Senate Legal and Constitutional Committee Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004*, 2 June 2004, at p. 5.

Seventh, in deciding to make an order of non-disclosure under the Act, the court is directed to consider whether an order would have a substantial adverse effect on the substantive hearing in the proceeding (s. 38L(7)(b)), but is also directed to 'give greatest weight' to the likelihood of prejudice to national security (s. 38L(8)). A general direction to prioritise the protection of national security over the protection of the right to a fair hearing, regardless of the context and individual circumstances, is not compatible with article 14 of the ICCPR.

Eighth, the Act imposes strict criminal liability for a failure to notify the Attorney-General of the existence of information potentially prejudicial to national security, regardless of whether a party unintentionally, inadvertently or mistakenly failed to so notify, and in circumstances where the definition of 'national security' information is so broad as to make it impossible for any person to know what information they are supposed to legally disclose.

Yours sincerely

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