

Human Rights and Terrorism:
Legislative and Policy Responses to Terrorism Post September 11 in Australia

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1. Introduction

1.1 As at September 11, 2001, there was in place a patchwork of some 35 pieces of Commonwealth legislation in Australia relating to terrorism, dealing with issues including air navigation, police powers, chemical and biological weapons, criminal offences, hostages, immigration, border protection, intelligence, nuclear non-proliferation, proceeds of crime, telecommunications, and weapons of mass destruction¹.

1.2 On 21 March 2002 the Australian government introduced a package of legislation designed to strengthen the government's response to the threat of terrorism². The most controversial Bills introduced were the *Security Legislation Amendment (Terrorism) Bill 2002*, which inserted into the *Commonwealth Criminal Code Act 1995* (the "*Criminal Code*") new terrorism offences, including those relating to terrorist organisations, and the *Australian Security Intelligence Organisation ("ASIO") Legislation Amendment Bill 2002*, which expanded the powers of Australia's domestic security organisation (ASIO) to detain and question people.

2. The New Terrorism Offences

2.2 The new definition of "terrorist act" contained in the *Criminal Code* draws on the *British Terrorism Act 2000*, and is as follows:

A terrorist act means an action or threat of action... done with the intention of advancing a political, religious, or ideological cause and with the intention of coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country, or intimidating the public or a section of the public (s.100.1(1)).

2.3 Engaging in a terrorist act is an offence, whether the act or its effect occurs in Australia. Examples of actions falling within the definition of "terrorist act" in the Act include actions that:

- cause serious physical harm to a person, serious damage to property or cause a person's death;
- endanger a person's life, other than the life of the person taking the action;
- create a serious risk to the health or safety of the public; or
- seriously interfere with, disrupt or destroy an electronic system including, but not limited to an information, telecommunications or financial system, or a system used for the delivery of government services, for an essential public utility, or for transport (s.101.1(2)).

2.4 Further offences relate to: providing or receiving training connected with terrorist acts (s.101.2); possessing things connected with terrorist acts (s.101.4); collecting or making documents likely to facilitate terrorist acts (s.101.5); and doing other acts in preparation for, or planning, terrorist acts (s.101.6).

2.5 Specifically excluded by the Act are actions which are defined as advocacy, protest, dissent or industrial action and which are not intended to cause serious physical harm to a person, to cause a person's death, to

¹ Australia is a federation in which powers to legislate in relation to crime is reserved, both by common law and statute, to the sovereign powers of the States, except for those powers specifically given by the Australian Constitution to the Commonwealth (see section 7, below). Each State's courts hear matters under legislation made by the Australian Parliament, referred to as "Commonwealth" statutes, which include now the Commonwealth legislation relating to terrorism. Like most common law systems, prosecutions are brought at State and Federal level by an independent Director of Public Prosecutions. Australia does not have investigative judges.

² These were: the *Australian Security Intelligence Organisation (ASIO) Legislation Amendment (Terrorism) Bill 2002*; the *Criminal Code Amendment (Anti-Hoax and Other Measures) Bill 2002*; the *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002*; the *Border Security Legislation Amendment Bill 2002*; the *Telecommunications Interception Legislation Amendment Bill 2002*; the *Security Legislation Amendment (Terrorism) Bill 2002*; and the *Suppression of the Financing of Terrorism Bill 2002*.

endanger the life of a person (other than the person taking the action), or create a serious risk to the health or safety of the public or a section of the public (s.100.1(3)).

2.6 Most of the offences carry penalties ranging from 10 to 25 years' imprisonment, with higher penalties assigned to offences committed where the person knows (as opposed to being "reckless" as to whether) the relevant act is done in connection with a terrorist act. Some of these penalties are heavier than penalties for similar criminal offences which are not "terrorist" offences. This can create scope for prosecutorial discretion in deciding with what offence to charge a person³. In light of the penalties, the expansive definition of "terrorist act", and the imprecise wording of some of the offences have also caused concerns among human rights lawyers who argue that offences must be defined more precisely so that a person can be expected to know that he or she is committing an offence⁴. The vaguely worded offence of doing "any act in preparation for, or planning a terrorist act", for example, carries a sentence of imprisonment for life (s101.6).

3. Terrorist Organisations

3.1 A terrorist organisation has been defined in the Act as an organisation that "*is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs), or one specified in the Regulations*" (s.102.1). Under the legislation, an organisation can be proscribed as a terrorist organisation only if it has been listed by the UN Security Council as such. That proscription process is subject to administrative review, and the listing of an organisation ceases after two years or if the UN Security Council removes the organisation from its list. There are currently 15 organisations that have been listed through this process in Australia⁵.

3.2 A number of ancillary offences have been created in relation to proscribed organisations, including:

- directing activities of an organisation (s.102.2);
- intentional membership of an organisation, including "informal membership" (which is not defined) (s.102.3);
- recruiting for an organisation (s.102.4);
- training an organisation or receiving training from an organisation (s.102.5);
- obtaining funds or giving funds to an organisation (s.102.6); and
- providing support for an organisation (s.102.7).

3.3 As the definition of "terrorist act" includes actions against foreign governments, the scope of these offences could extend to apply to activities such as meetings between human rights activists within Australia and representatives from Aceh in relation to Indonesia, for example, or from Tamil-controlled areas of Sri Lanka, in which problems in those particular areas are discussed.

3.4 The provisions in the Act relating to the giving of funds to an organisation provide that a person commits an offence if the person intentionally makes funds available to an organisation, the organisation is a terrorist organisation and the person knows, or the person is "reckless" as to whether the organisation is a terrorist organisation. There is an additional offence of "financing terrorism", for which the penalty is imprisonment for life, where a person provides or collects funds, and the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act (s.103.1). This is obviously problematic in that there is usually no possibility of ensuring that funds donated to particular groups for civilian/humanitarian purposes, for example, are in fact used for those purposes⁶.

3.5 Controversial new legislative proposals seek to create a new offence of "associating with a terrorist organisation" which imposes a penalty of three years' imprisonment if a person meets or communicates with another person on two or more occasions if:

- the other person is a member of or a person who promotes or directs the activities of an organisation; and

³ Hocking, Jenny. *Terror Laws: ASIO, Counterterrorism and the Threat to Democracy*, UNSW Press Ltd; UNSW Sydney 2004: 203.

⁴ Ibid, at 201.

⁵ Schedule 1 "Terrorist Organisations" *Criminal Code 2002 Regulations*.

⁶ An example would be contributing money to a Tamil fundraiser to purchase ambulances.

- the person knows that the organisation is a terrorist organisation; and
- the association provides support to the organisation; and
- the person intends that the support assist the organisation to expand or to continue to exist; and
- the person knows that the other person is a member of, or a person who promotes or directs the activities of the organisation⁷.

3.6 The safeguards contained in the Act, in terms of the proscription process, are feared to be largely illusory in light of subsequent developments which have evidenced the Australian government's desire to be able to legislate quickly to outlaw groups perceived as terrorist threats to the community⁸. On 29 May 2003 the *Criminal Code Amendment (Hizballah) Act 2003* was passed, allowing the listing of Hizballah as a terrorist organisation independently of the United Nations list. On 5 November 2003 Hamas and Lashkar-e-Tayyiba ("LET") were listed in a similar way.

3.7 Legislation currently before Parliament proposes to amend the offence of membership in a terrorist organisation by expanding the definition of "terrorist organisation". Currently it is an offence (in certain circumstances) to be a member of a terrorist organisation that is specified in the *Regulations*. Proposed amendments would make it an offence to be a member of a terrorist organisation that is "either specified in the *Regulations* or that is found by a court to be a terrorist organisation"⁹. This would specifically remove the requirement that an organisation must be specified in the *Regulations* as a terrorist organisation for offences relating to membership to apply. No criteria are specified to give guidance to a court in deciding what a terrorist organisation is under that definition.

4. Strengthening of Security Apparatus: Increased Investigative Powers – ASIO

4.1 Since the *Australian Security Intelligence Organisation ("ASIO") Act 1978* was amended on 22 July 2003, ASIO, Australia's domestic security organisation, has had unprecedented powers to question and detain persons in relation to terrorism offences¹⁰. A warrant to question and/or detain a person can be issued by a federal magistrate or a retired judge after the consent of the Minister responsible to apply for a warrant has been sought, and the Minister and the issuing authority are "satisfied that there are "reasonable grounds for believing that issuing the warrant... will substantially assist the collection of intelligence that is important in relation to a terrorism offence and that relying on other methods of collecting that intelligence would be ineffective" (s.34C(3)). This implies that even people who are not themselves suspected of an offence can be questioned and/or detained, if it is believed that it will substantially assist in the collection of intelligence.

4.2 Two types of warrants can be issued: one which specifies a time that a person must come in for questioning, and the other authorising a person to be taken immediately into custody for questioning. A person who is taken into custody must be brought immediately before a "prescribed authority" for questioning, who is a judge, retired judge or legally qualified member of the Administrative Appeals Tribunal ("AAT")" (s.34DA). Members of the AAT, a quasi-judicial body which does not have the traditional independence of the judiciary, are appointed by the government for fixed terms, usually of three years.

4.3 The main provisions of the Act in relation to persons questioned and/or detained are:

- **Period of Questioning:** The initial maximum period during which a person can be questioned under a warrant is 8 hours, which can be extended by application to the prescribed authority up to a maximum of 24 hours (s.34HB(6)). If, however, a person is questioned with the use of an interpreter, the maximum period extends to 48 hours (s.34HB(11)). Further warrants can be issued if the issuing authority is satisfied that it is justified by new information.
- **Detention:** If the prescribed authority is satisfied that the person may alert another person involved in a terrorism offence that the offence is being investigated, or may not appear before the prescribed authority,

⁷ Schedule 3, *Anti-terrorism Bill (No. 2) 2004* (introduced 17 June 2004, and still before the Australian Parliament).

⁸ See, for example Attorney-General's Media Release "Criminal Code Amendment (Terrorist Organisations) Bill 2003; Criminal Code Amendment (Hizballah) Bill 2003", 2 June 2003.

⁹ Explanatory Memorandum *Anti-terrorism Bill 2004*, p 5.

¹⁰ The Act was amended by the *ASIO Legislation Amendment (Terrorism) Act 2003*.

or may destroy, damage or alter a record or thing the person has been requested or may be requested to produce, a direction can be given for the person to be detained. The maximum length of time that a person can be detained under a warrant is 168 hours from the time he or she is brought before the prescribed authority (s.34HC). This is in comparison to a maximum of 4 hours that a person charged with even the most serious criminal offence can currently be held before being brought before a judicial officer (see section 5.1 below).

- **No Right To Remain Silent:** The Act makes it an offence punishable by imprisonment for five years for failing to give any information requested in accordance with the warrant, and for making a statement which is false or “misleading in a material particular” (ss34G(3), 34G(5)).¹¹
- **Restrictions on Right To Choose Legal Representative:** The Act prima facie allows a person taken into detention to choose their legal representative, but their ability to do so is limited if an order is made by the prescribed authority that s/he is satisfied that, if permitted to contact the lawyer, a person involved in a terrorism offence may be alerted that the offence is being investigated, or that a record or thing that the person may be requested to produce may be destroyed, damaged or altered (s.34TA). The person may in that case contact another lawyer, who however may be subject to the same restriction. Any contact made between the lawyer and the person may be monitored (s.34U(2)). The lawyer may not intervene in the questioning or address the prescribed authority except to request clarification of an ambiguous question, and if the prescribed authority considers that the legal adviser’s conduct is unduly disruptive, the authority may direct that that lawyer be removed, in which case the person may contact another legal adviser (s.34U(5)). Section 34TB of the Act explicitly states, however, that “to avoid doubt, a person before a prescribed authority for questioning under a warrant... may be questioned in the absence of a lawyer of the person’s choice”.
- **Children:** Children aged 16 and over can be questioned and detained under the Act, if they are suspected, on reasonable grounds, of being likely to commit, are committing or have committed a terrorism offence (s34NA(4)). Questioning of the young person can only occur in the presence of a parent, guardian or other acceptable person and only for continuous periods of 2 hours or less, separated by breaks (s.34NA(6)). The young person can contact a lawyer of that person’s choice. If the conduct of a parent, guardian or other acceptable person is considered unduly disruptive, the person can be removed and another person contacted. However, questioning must not be done in the absence of such a person.
- **Safeguards:** When brought before the prescribed authority for questioning, the provisions of the warrant must be explained to the person, and the person must also be informed that he or she may seek a remedy from a federal court relating to the warrant or the treatment of the person in connection with the warrant. In addition, the person must be informed of their right to make a complaint to the Inspector-General of Intelligence and Security, or to the Ombudsman if the complaint is in relation to the Australian Federal Police. The person must be treated with humanity and respect for human dignity, and not be subjected to cruel, inhuman or degrading treatment (s34J). The questioning must be videotaped, and may be stopped if the Inspector-General has concerns about impropriety or illegality in the questioning of the person (s.34HA). A range of offences punishable by imprisonment for two years have been created in relation to persons who exercise authority improperly under the warrant.

4.4 The Act is subject to a ‘sunset clause’, which provides that the legislation expires after three years and must be then reviewed.

5. Strengthening of Security Apparatus - Increased Police Powers

5.1. The Australian Federal Police The *Anti-Terrorism Bill 2004*, which at time of writing is before Parliament, seeks to amend the *Commonwealth Crimes Act 1914* to extend the powers of the Australian Federal Police when questioning a suspect in relation to a federal terrorism offence, for the purposes of evidence gathering

¹¹ Although any information elicited from a person is not admissible in the prosecution of that person, the Australian Federal Police Commissioner has envisaged seeking further amendments to restrict the right to silence of accused persons, by allowing their failure to explain or respond a matter for comment to the jury.

(as opposed to the intelligence gathering function of AISO). The proposed changes would include the extension of the maximum period for initial investigation (before the person has to be brought before a judicial authority) from 4 hours to 24 hours if judicially authorized, subject to the existing procedural safeguards which include the right to communicate with a legal practitioner, friend or relative, an interpreter and a consular office, and the right to remain silent. Additional time where the “clock stops” would be permitted to allow authorities to reasonably suspend or delay questioning of a person arrested for a terrorism offence to make inquiries in overseas locations that are in different time zones to obtain information relevant to that terrorism investigation. This could theoretically extend the questioning period for up to a further 23 hours¹².

5.2. New South Wales In New South Wales¹³ the *Terrorism (Police Powers) Act 2004* came into effect on 5 December 2002 conferring special powers on police officers to deal with imminent threats of terrorist acts and to respond to terrorist acts. Under the Act, the Commissioner of Police or another senior officer may give an authorisation for the exercise of special powers for the purposes of finding a particular person or vehicle, or preventing or responding to a terrorist act in a particular area if satisfied that there is an imminent threat¹⁴ of a terrorist act or if one has been committed, and that the exercise of those powers will substantially assist in preventing the act or apprehending the persons responsible.

5.3 The new powers authorize police officers to enter and search, without warrant, any premises that he or she reasonably suspects contains a “target person or vehicle” or that are in the “target area” (s.19). These powers are criticized as being unnecessary and too extensive¹⁵. The legislation also authorizes police to strip search children between the ages of 10 and 18, and people with impaired intellectual functioning, “unless it is not reasonably practicable”, in the presence of a parent or guardian or person otherwise capable of representing the interests of the person being searched (Sch.1, cl.6). As with the new investigative powers of ASIO, the use of these powers is not limited to persons who are terrorist suspects.

5.4 The main concerns in relation to the Act are that there are no adequate checks and balances to guard against abuse and that the scrutiny of the courts is specifically exempted. Section 13 of the Act specifically prevents “*the validity of any authorization from being challenged in any court or legal proceedings, including an investigation into police or other conduct under any Act other than an investigation under the Police Integrity Commission Act 1986*”. The only safeguards in the Act are the requirement that a report be provided to the Attorney-General and the Police Commissioner as soon as practicable when the special powers are authorised, and the fact that the Act is subject to review after one year.

6. Protection of Sensitive Information in Court Proceedings

6.1 The issue of how to protect sensitive information from being disclosed during court cases involving classified or security sensitive material has been recently addressed by the Australian government in the form of the *National Security Information (Criminal Proceedings) Bill 2004*, introduced on 27 May 2004. The Bill is designed to overcome the procedural and evidentiary problems associated with prosecuting criminal offences involving such material. The proposed measures include enabling closed hearings on the use, relevance or admissibility of such material before it becomes an issue in open court; enabling the court to allow summaries or stipulations as to the facts to be substituted; requiring all persons to obey, under threat of criminal penalty, any court order or direction relating to handling and disclosure of information; and requiring legal representatives who require access to the information to be security cleared at the appropriate level¹⁶.

6.2 The Bill sets out new procedures for all stages of criminal proceedings for Commonwealth offences in federal jurisdictions. Under the proposals, if a prosecutor or defence counsel knows or believes that he or she, or a witness that is going to be called, will disclose information that relates to or affects “national security”, he or she must notify the Attorney-General. The court must then adjourn until the Attorney-General issues a certificate

¹² Senate Legal and Constitutional Legislation Committee Report on the *Anti-Terrorism Bill 2004*, May 11 2004; p.15.

¹³ New South Wales is the most populous state in Australia, with over half that population living in or around Sydney.

¹⁴ Legislation currently before the NSW Parliament contemplates amending this to replace “imminent threat” with “a threat of a terrorist act occurring in the near future (*Crimes Legislation Amendment (Terrorism) Bill 2004*).

¹⁵ “*Terrorism (Police Powers) Bill 2002*”, Media Release, Australian Section, International Commission of Jurists, 2 December 2002.

¹⁶ The Bill is based on the framework developed by the Australian Law Reform Commission, in its report *Keeping Secrets: The Protection of Classified and Security Sensitive Information (ALRC 98)*, tabled in Federal Parliament on June 24, 2004.

stating whether the information can be disclosed, based on whether it is “likely to prejudice national security”, and, if there are any restrictions on it, to what extent it can be disclosed (i.e. deleted, summarised or redacted) (cl.24).

6.3 If a certificate is issued in relation to a witness or certain information during the course of a hearing, the court must hold a closed hearing to decide whether to make an order. The court must first decide on the admissibility of the evidence, and then may make orders in relation to how the information is to be disclosed if at all, by taking into account factors including “whether, having regard to the Attorney-General’s certificate, there would be a risk of prejudice to national security if the information were disclosed... or witness called” (cl.29). The orders may be appealed.

6.4 Controversially, the Bill proposes that in any matter where counsel is notified by the Attorney-General’s Department that an issue is likely to arise relating to a disclosure of information likely to prejudice “national security”, defence counsel must apply for a security clearance by the Department within 14 days. This condition has applied for legal aid lawyers since last year, as a guideline. It is unspecified what criteria would form the basis of such an assessment. Uncleared defence counsel cannot receive information that relates to, or the disclosure of which may affect, national security¹⁷.

6.5 (See paragraph 8.6 below for similar provisions in Australian immigration law relating to information used in assessing visa applicants or visa holders under review.)

7. Reference of State Powers to Commonwealth

7.1 As part of the arrangement agreed between the States and the Commonwealth at Federation, the Australian Constitution designates specific matters on which the Commonwealth (as opposed to the States) can legislate. These include, among other things, trade and commerce with other countries and between States; taxation; immigration; naturalization and aliens; the influx of criminals; external affairs; and defence (s.51). The Constitution also permits the Commonwealth government to make laws in relation to any matters which may be referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State.

7.2 As the Commonwealth Parliament does not have a specific constitutional power to legislate for terrorism, the constitutional basis for the enactment of the new terrorism offences in the *Criminal Code* relied on a ‘patchwork’ of Constitutional powers. In order to avoid legal uncertainty, each State enacted legislation referring certain matters relating to terrorism to the Commonwealth Parliament, enabling the Commonwealth to legislate in relation to them¹⁸. Specifically, the reference of powers enables the Commonwealth to re-enact (in the same terms) the terrorism offences in the *Criminal Code* so that the offences will apply without the limitation to matters within current Commonwealth jurisdiction. The reference of powers also permits the Commonwealth to legislate to amend the terrorism offences, although the amendments need to be done with the majority of the States and Territories (with the agreement of at least 4 States).

7.3 This reflects the trend towards centralization of power in the Federal government, also evidenced, for example, in the proposals of the opposition Labor Party to create a Department of “Homeland Security” which would pull together under it the various federal intelligence and security agencies which are presently involved in the government response to terrorism.

8. Border Protection

8.1 New approaches to immigration law and policy since September 11 should be seen against the backdrop of the Australian government’s hardline approach to asylum seekers, and in particular seaborne asylum seekers, in recent years. Australia has traditionally been a longstanding responsible member state in its responsibilities towards refugees, having resettled 9,200 refugees in 2002, the third main country of resettlement after the US and Canada¹⁹. Despite the fact that most Australians come from migrant or refugee families, or are migrants themselves, in recent years there has been seen an increase in public intolerance and suspicion with regard to

¹⁷ Explanatory Memorandum, *National Security Information (Criminal Proceedings) Bill 2004*.

¹⁸ For example, New South Wales enacted the *Terrorism (Commonwealth Powers) Act 2002* on 5 December, 2002.

¹⁹ “Refugees by numbers”, UNHCR Report, 1 September 2003.

asylum seekers²⁰. After the “Tampa crisis” in August 2001, and the Bali bombings in October 2002, there is a fear that the issues of security and immigration are being confused, particularly in the media.

8.2 In addition to the far-reaching legislation relating to intelligence gathering and terrorism offences, steps that have been taken by Australia to exclude both illegal migrants and refugees include:

- stricter monitoring of the entry of people, with a renewed focus on illegal entrants and character issues in migration law;
- the increased use of ‘privative clauses’ in Australian legislation, exempting decisions made by civil servants from judicial review; and
- the affirmation of the policy to excise Australian islands from its ‘migration zone’.

More Stringent Application of “The Character Test”

8.3 The legislative basis for increased scrutiny of visa applicants and revocation of residence status on security grounds was expanded in November 1999 with the introduction of a broad ranging ‘character test’, and increased ministerial discretionary powers to cancel visas. Before September 11, therefore, the *Migration Act 1958* and *Migration Regulations* permitted applications to be refused, and visas to be cancelled, on the suspicion that the applicant had ‘associations’ with criminal organisations or that the person was ‘liable’ to become involved in ‘disruptive activities’. Accordingly, increased fears of terrorist activities have not resulted in further amendments to migration law, but there has however been a noticeable change in migration policy relating to security and character checking, and there is evidence that the effectively non-reviewable discretion vested in the Minister for Immigration has been increasingly used in recent times to refuse or cancel a visa.

8.4 Under the ‘character test’ provisions, an application can be refused if:

- a person has a substantial criminal record, or
- in the discretion of the Minister and or his/her delegate, is deemed not to be a person of good character having regard *inter alia* to the person’s past and present criminal conduct or general conduct;
- if the person has been associated with a criminal organisation (although ‘organisation’ is not defined, nor is the nature of the link required for ‘association’²¹);
- if there is a risk that the person “would represent a danger to the Australian community”. Examples of what might constitute “unacceptable conduct” include “the expression of extreme political views and threats”, which may amount to a refusal based on political opinion²².

8.5 When the Minister makes an adverse finding on the character requirement of an applicant, and is satisfied that the refusal or cancellation of a visa is in the “national interest”, the rules of natural justice, which provide legal protection in the nature of constitutional rights, have been statutorily excluded and do not apply. These include, for example, the opportunity to respond to adverse information. The guidelines for Departmental officers indicate that it is “open to the Minister” to decide what is the “national interest in relation to each case”²³. Such determinations are made under the Minister’s discretionary power, which is not open to merits or judicial review, and there is no requirement for a decision to include reasons for rejection.

8.6 The Departmental officer, in assessing visa applicants or reviewing visa holders, can have recourse to a range of information, including malicious or vexatious “dob-in” letters and newspaper articles, and the sources of information can be protected. Information which may be provided by law enforcement agencies, or intelligence agencies **must** not be divulged, even to the visa holder or the applicant (s. 503A). Even where the effect of the character test is to cancel a long-standing permanent residence visa, the visa-holder may not be afforded the opportunity to respond to the adverse information.

8.7 It is difficult to ascertain how often the discretionary power to refuse or cancel a visa on national security grounds has been used, as there are no appeal rights and the affected persons may be reluctant to publicize the

²⁰ Bitel, David, “Whither Democracy: Australian Immigration Law Since September 11”, paper presented at Law Librarians Joint Study Institute, 22 February 2004, Sydney Australia.

²¹ It is accepted that a person may fail the character test, on the basis of family ties with members of an unacceptable organisation (Department of Immigration and Multicultural and Indigenous Affairs, Migration Series Instruction no. 254, para 10.2.2).

²² See s 501(6) *Migration Act 1958*

²³ Department of Immigration and Multicultural and Indigenous Affairs, Migration Series Instruction No. 254, para 10.2.2.

refusal. However, the ASICJ has been told that members of a specific religious community in Sydney have been threatened by officers and at least one visa has been cancelled.

Increased Security Checks

8.8 Security has been tightened at ports of entry, particularly at airports, with new checking systems in place in relation to immigration clearances for international passengers as well crew members of non-military ships. Members of the Australian Federal Police are now stationed at several Southeast Asian ports of entry.

8.9 There have been significant changes to immigration forms and questioning, to specifically elicit information in relation to a person's activities which could be of terrorist concern. If a person fails to disclose information honestly, the strict powers contained in the cancellation process would then be implemented. There is also an increased scrutiny of applications for temporary visas to determine a person's previous history, which coupled with the risk factor process in determining such applications enables the easier exclusion of persons considered to be undesirable on security grounds. Increased security checks have also led to delays in the processing of refugee visa applications. Where previously a visa would be granted approximately one to two months after health, police and security checks, currently there may be a delay of six to eight months, with some applicants waiting for over a year before there is a final decision. There is anecdotal evidence that male applicants from specific ethnic or religious groups are more likely to experience these delays.

Collection of Personal Identifiers from Non-Citizens

8.10 Amendments to the *Migration Act* (which are not yet in force) propose to allow personal identifiers to be taken from non-citizens, for the purposes of (among others): authenticating the identity of non-citizens; identifying non-citizens who have a criminal history, who are of character concern or who are of national security concern; and combating document and identity fraud (Sch.1, cl.11)²⁴. Personal identifiers can be collected from visa applicants, persons entering Australia, persons in immigration detention, and non-citizens within Australia whilst checking compliance with visa conditions.

8.11 Examples of personal identifiers which can be collected include fingerprints, handprints, photographs or other images of the face and shoulders, weight and height measurements, audio and video recordings, signatures, and iris scans. A personal identifier that involves the use of an intimate forensic procedure such as blood tests or hair samples is prohibited from collection.

8.12 The legislation raises issues relating to privacy and specific concerns relating to the safeguards that are in place. Under the legislation, a personal identifier can be taken without consent (the Act authorizes officers to use reasonable force to obtain an identifier in certain circumstances). Identifiers can also be taken from people with mental illness and from children over the age of 15, subject to certain safeguards (Sch.1, cl. 32).

Judicial Review of Adverse Decisions - Privative Clauses

8.13 In October 2001 the Australian government introduced ss486A and 474 of the *Migration Act*, placing a strict time limit on applications to the High Court for judicial review of adverse decisions by the Department of Immigration and Indigenous Affairs (DIMIA), and specifically restricting so-called "privative" clause decisions from being challenged in court.

8.14 Currently, applicants can seek review of adverse decisions in various administrative tribunals, such as the Migration Review Tribunal, Refugee Review Tribunal, or Administrative Appeals Tribunal, which are constituted by members who do not necessarily have legal training and who are appointed by the government for a limited tenure. In the MRT, the right to legal representation is severely limited.

8.15 The validity of these provisions was challenged in the High Court and on 4 February 2003 the High Court held that where a jurisdictional error exists in an administrative decision, no actual decision has been made, and accordingly, the privative clause would not be applicable to preclude judicial review, which once again gives applicants the right to apply to the courts for scrutiny of legal errors²⁵.

²⁴ *Migration Legislation Amendment (Identification and Authentication) Act (No.2) 2004*.

²⁵ *Plaintiff S157 of 2002 v Commonwealth of Australia* (2003) 195 ALR 24, [2003] HCA 2

“Fortress Australia”: The Excision of Islands from Migration Zones/ Interdiction Policies

8.16 In September 2001, the Australian government took the step of legislating to exclude certain islands in its territory from the ‘migration zone’, in breach of its obligations under the *Convention Relating to the Status of Refugees*, in order to prevent unauthorized boat arrivals on Australian territories from making valid visa applications or seeking protection as refugees in Australia. As part of its recent security legislation initiatives the government introduced the *Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*, expanding the definition of “excised offshore places” to include additional islands in the Coral Sea, and islands off Western Australia, Queensland and the Northern Territory, in addition to groups of islands far off the Australian mainland.

8.17 The government’s policies of diverting asylum seekers to detention centres in Nauru and Manus Island, and to a lesser extent its policy of excising islands from the migration zone, have been particularly effective in deterring the problem of people smuggling into Australia. Largely as a result, unauthorised boat arrivals have virtually ceased since the first half of 2002, compared to 54 unauthorised boat arrivals carrying 4,141 people during the 2000-2001 financial year²⁶. However, these policies have also had the effect of preventing persons on unauthorized boat arrivals from making valid visa applications or seeking protection as refugees in Australia proper. This then precludes the applicants, the majority of whom come via Indonesia, from being lawfully entitled to remain in Australia until the application is finalized.

8.18 The process reached its peak with the effectively retrospective excision of Melville Island in October 2003, and the subsequent refolement of Kurdish Turks who had sought the protection of Australia to Indonesia, from whence they were returned to Turkey. This incident so concerned the UNHCR that it issued an unprecedented statement critical of Australia’s interdiction policies²⁷.

9. Latest Arrests: Innocent Until Proven Guilty?

9.1 There have been several arrests in relation to terrorism offences in Australia since 2001, each of which has been marked by extensive media coverage and publicity. They have also elicited responses from the government evidencing its desire to appear ‘tough on terrorism’, and criticism by both the media and government of decisions by courts which are perceived to be too ‘lenient’ in their treatment of ‘terror suspects’. In addition, they raise concerns that persons charged with a terrorism offence may be treated more harshly within the penal system than persons charged with other serious criminal offences. This is particularly of concern in light of the vague and ill-defined wording of some of the new terrorism offences and the especially problematic offences relating to membership, etc of terrorist organisations (see sections 2 and 3 above).

9.2 The first Australian to be charged and convicted in connection with a terrorist offence was Jack Roche, who admitted guilt during his trial in Perth for conspiring to bomb the Israeli embassy in Canberra. Roche, a member of Jemaah Islamiyah, was recruited to set up a ‘cell’ in Australia and conduct surveillance on the embassy in 2000. In an apparent change of heart, Roche attempted three times to contact authorities, but was unable to arrange a meeting. On June 1, 2004 he was sentenced to nine years’ imprisonment with a non-parole period of four and a half years, which was backdated to the time of his arrest in November 2002 (the maximum penalty for this offence, which was sought by the prosecution, is 25 years’ imprisonment). This decision was criticized by the NSW Premier Bob Carr as “an example of a court failing to acknowledge that [it is] dealing with a new type of threat and a new type of offence”²⁸. Although Roche was convicted under previously existing laws, his case highlights the lack of sentencing guidance available to courts in relation to the new wide-ranging and high penalty terrorism offences.

9.3 On 2 June 2004, another ‘terror suspect’, Bilal Khazal, was granted bail by a court in Sydney, charged with “collecting or making documents likely to facilitate terrorist acts”. It was alleged that he compiled a book on jihad, which he posted on the internet and distributed to Al-Qaida members in Europe. Two days after this decision, amid much adverse publicity, the NSW Parliament amended the *NSW Bail Act 1978*, (which applies to Commonwealth and State offences, both of which are prosecuted before State courts), bringing terrorism offences into the category of offences for which there is a presumption against bail, alongside other serious offences involving drugs, weapons and violence. Khazal is still on bail.

²⁶ DIMIA Factsheet No. 73 “People Smuggling” (<http://www.immi.gov.au/facts/73smuggling.htm>)

²⁷ UNHCR, ‘UNHCR criticises Australia for turning boat people away’, Press Release, 11 November 2003.

²⁸ “*Khazal’s Bail Must Be Appealed*”, Sydney Morning Herald, 3 June 2004

9.4 The sensational and widespread publicity surrounding the arrests raises the real question of whether it is possible for those charged with terrorism offences to receive a fair trial. This argument will be used by defence counsel for Faheem Lodhi, arrested in Sydney in April for offences including: attempting to recruit for a terrorist organisation, being reckless as to whether LET was a terrorist organisation, committing an act in preparation for a terrorist attack, and making documents to facilitate a terrorist act. It is alleged that Lodhi was part of a group led by Willy Brigitte (now in custody in France) which planned to bomb Australia's national electricity grid. The argument was used in a recent high profile case in which the conviction of one of five people for charges relating to a gang-rape was set aside and a re-trial ordered by the NSW Court of Criminal Appeal, on the basis of concerns that the person was unfairly convicted because of prejudicial media publicity surrounding the conviction of the co-offenders²⁹. If argued successfully, there is some possibility that Lodhi's case could be permanently stayed.

9.5 The arrest and detention of Izhar Ul-Haque, a 21 year old Pakistani student, raised concerns surrounding the treatment of persons charged under terrorist offences within the penal system. Ul-Haque spent six weeks in solitary confinement at a maximum security prison until granted bail by the NSW Supreme Court on the basis that he was not a threat to Australian society. It is concerning to note that although security risk assessments of prisoners usually take at least one week to be made, Ul-Haque was transferred quite outside the usually complex prisoner classification control system, to solitary confinement the day after his arrest³⁰. At the bail hearing, the Crown conceded that his case may not be one which in fact would result in a custodial sentence. Ul-Haque is charged with training with a terrorist organisation, LET, while in Pakistan in January and February of 2003, a charge which carries a maximum penalty of 25 years' imprisonment. LET was not a proscribed organisation under Australian law at that time.

10. Australians in Detention at Guantanamo Bay, Cuba

10.1 Two Australians, David Hicks and Mamdouh Habib, have been held by the US in its "war" on terrorism since October 2001, one month after the 11 September, 2001 terrorist attacks on Washington and New York.

10.2 David Hicks was captured by the Northern Alliance in Afghanistan, where he was training as a member of the Taliban armed forces. He was handed over to US military custody and transported to the US Naval Base at Guantanamo Bay for indefinite interrogation and detention. The ASICJ regards Hicks to be a prisoner of war entitled to the protections of the *Geneva Convention relative to the Treatment of Prisoners of War (the Third Geneva Convention)*. After 20 months in custody, on June 10, 2004 Hicks was charged with three alleged offences under US law: conspiracy to commit war crimes, attempted murder by an "unprivileged belligerent", and aiding the enemy. It is proposed that his case will be heard in the military commissions at Guantanamo Bay established under President's Bush's decree of 13 November 2001, not even by a civil court or a court marshal.

10.3 Also in October 2001, Mamdouh Habib was arrested by Pakistani authorities in collaboration with the US in its "war" on terrorism. Presumably Habib was suspected (perhaps merely speculatively) of association with terrorists or otherwise having information regarding terrorist activity. Habib was handed over to US authorities who transported him to Egypt. He was interrogated there and was later moved to Afghanistan, and ultimately to Guantanamo Bay in May 2002. There are recent allegations that he was tortured after being handed over to Egyptian authorities. The Australian government appears to have little concern about this. Habib has now been designated for trial before a military tribunal, although at the time of writing he has yet to be charged with any offence. Habib is not a POW. His family claims that he was visiting Pakistan merely to find work and a good school for his children. Habib has had no access to lawyers, and reports have emerged that he is suffering from a serious psychiatric condition that has developed since his detention.

10.4 Habib's wife brought an habeas corpus application in the US District of Columbia Circuit Court, but lost on the basis that US Courts did not have jurisdiction to hear the application. On 28 June 2004, the US Supreme Court found on appeal that US Courts do have the required jurisdiction, and at the time of writing, it remains to be seen what the next move Habib's lawyers will make to test the lawfulness of his detention. Hicks, too, may be able to challenge his detention, or the outcome of his trial.

²⁹ *R v T.S.* [2004] NSWCCA 38, 05/03/2004

³⁰ "Court Grants Bail to Izhar Ul-Haque", PM, Australian Broadcasting Corporation, Thursday 27 May (<http://www.abc.net.au/pm/content/2004/s1117499.htm>)

10.5 Both Australians have been held in solitary confinement, with little or no contact with the outside world, and in conditions that fail to comply with minimum standards required by international law, including the *Third Geneva Convention*, and the *International Covenant on Civil and Political Rights* (“ICCPR”). There is widespread concern that during interrogation, both have been subjected to physical and mental pain and suffering inflicted by their captors, amounting to torture under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

10.6 In addition to the conditions at Guantanamo, the detention itself is unlawful under international law. Indefinite detention without charge and with no prospects of release in the foreseeable future is in clear violation of the ICCPR. Article 9 provides that “*anyone 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.*” That has clearly not happened for Habib, and it took 20 months to charge Hicks.

10.7 The procedures and structure of the Guantanamo Bay military commissions can in no way provide prisoners there with a fair trial. Accused persons cannot cross-examine witnesses against them such as their fellow detainees or others deemed security sensitive. Prisoners cannot choose their own lawyer, and the Counsel appointed cannot confer with their client without being monitored, and without undertaking to hand over any information that may be regarded as useful in the US “war” on terrorism. The commissions are not bound by well-established rules of evidence. The commission member presiding over the case also approved the charges being laid at first instance, and the appeals process lies with US Secretary of Defence (currently Donald Rumsfeld), and ultimately with the President of the United States. Neither men currently occupying those positions has sought to hide their pre-judgments of the cases. The commissions can be barely said to be independent of their commanding officers.

10.8 Through all of this, the Australian government, loathe to criticize its US military partner, has consistently failed to take active steps to protect the rights of Hicks and Habib. It has made the occasional diplomatic request for assurances, and has periodically sent consular officials to visit the prisoners, but unlike the United Kingdom, Australia has made no request for Hicks or Habib to be repatriated and, if appropriate, tried in Australian courts. Article 15(2) of the ICCPR clearly enables Australia to do so. The ASICJ has been highly critical of the Australian government’s inaction. The Australian government has consistently accepted at face value US assurances that Hicks and Habib are being treated humanely, but in formulating its approach to the matter, the Australian government has not taken the required steps to form its own independent view about the matter. The Attorney-General of Australia, unlike his counterpart in the UK, endorsed the military commissions as a fair system that would provide a fair trial, and has made public pre-emptive remarks about the alleged actions, motives and character of the accused Hicks, as if the allegations were already credibly proven.

Australian Section
International Commission of Jurists
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