

National Human Rights Consultation Submission

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NATIONAL HUMAN RIGHTS CONSULTATION

Submission on
National Security and Terrorism
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1. INTRODUCTION

1.1 For over 50 years, the international community of States has developed a set of conventions and protocols specially designed to combat various forms of terrorist activities. From the outset, the conventions contained provisions on human rights granted to the suspect or accused of a terrorist act. Over time, these provisions were extended, from the requirement of fair treatment at all stages of proceedings to the larger respect of international human rights.

1.2 Since Australia is a Party to these treaties, it must ensure their correct implementation in the whole territory of the Commonwealth.

The best way to ensure that the conventional provisions are applied correctly is to grant the person suspected of involvement in a terrorist act the right to refer the matter to a competent judicial authority to contest the said implementation.

1.3 Certain rights related to penal proceedings contribute in ensuring an effective repression of terrorism. The perspective developed is that of penal justice. Taking into account the seriousness of terrorism, it is mandatory that the persons involved in the commission of terrorist acts be arrested and judged. Any miscarriage of justice leaves the real author at large and society vulnerable to more attacks. It is submitted that the implementation and enforcement of human rights can be an effective tool to prevent this happening.

1.4 In order to strengthen its international commitments and to offer a better human right protection to its residents, it would be most desirable that Australia adopt a charter of human rights.

1.5 This submission does not provide for an exhaustive list of rights to be included in the Human Right Act; rather, it point out to some fundamental rights that should be contained in such a document.

1.6 To insure a correct enforcement of human rights, Australia should set up a Federal Court for Human rights, competent to review the implementation of human rights in every state and territory, on the model of the European Court of Human Rights, in Strasbourg.

2. THE INTERNATIONAL CONVENTIONS AND PROTOCOLS ON TERRORISM,

a. Principle

2.1 The underlying principle in the terrorism conventions and protocols is that a terrorist suspect or a person accused of terrorism should not suffer more restrictions or enjoy less rights than any other ordinary person suspected or accused of a serious crime of similar nature.

2.2 The importance of this principle must be underlined since after the attacks in the United States in September 2001 some States have justified a different treatment to terrorist suspects on account of the seriousness or horrendous crimes of which they are accused.

Recommendation 1

A Human Right Act should be introduced.

It should contain specific provisions regarding the rights of people suspected of terrorist activity.

There should be no discrimination based on race, nationality, ethnicity, religion.

There shall be no discriminatory procedural treatment based on the nature of the offences investigated whether the person is suspected or accused of an ordinary crime or a terrorist act.

The person should be treated the same way as any other person suspected or accused of an offence of a grave nature.

b. Fundamental rights

2.3 The most recent terrorism conventions state that “nothing [in these Conventions] shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law”. We therefore infer that

- the conventions provide for no exception to the observance of international law
- were terrorists acts as those defined by the terrorism conventions committed in warfare, the Geneva Conventions would be applicable.

2.4 A person suspected of terrorist activities in peace time should at least enjoy the rights defined by the international humanitarian law. The rights that are considered inalienable in time of public emergency must be upheld even more in time of peace.

2.5 The obligations under international law include the provisions contained in the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and their additional protocols, and the Geneva Conventions and Protocols, - all treaties to which Australia is a Party.

2.6 The ICCPR states a number of rights from which there can be no derogation. They must be respected in any given circumstance. The United Nations Committee on Human Rights is of the opinion that a number of other rights are also non-derogable, even though they are not part of the list. It is submitted that the Human Right Act should at least include those.

Recommendation 2

The Human Right Act should contain provisions regarding criminal law, including some procedural guarantees, such as

- the presumption of innocence,
- the non-retroactivity of penal law,
- the principle of individual penal responsibility,
- the independence and impartiality of the judiciary,
- the prohibition of trial in absentia, and
- the principle of fair trial
- the right of judicial guarantees
- the recognition of everyone as a person before the law
- the principles of legality and the rule of law
- the right of non-discrimination against persons belonging to minorities
- the prohibition of arbitrary deprivation of liberty
- the right to all person deprived of their liberty to be treated with humanity and respect
- prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent
- the prohibition of taking hostages,
- the prohibition of abductions or unacknowledged detention,
- prohibition of slavery, slave-trade and servitude,
- prohibition of imprisonment because of inability to fulfil a contractual obligation,
- the freedom of thought, conscience and religion
- right to life.

The definition of these rights should not be narrower than the understanding of the United Nations Committee on Human Rights.

3. SPECIFIC ISSUES

a. The prohibition of torture

3.1 The Human Right Act should clearly prohibit the use of torture and other cruel, inhuman or degrading treatment. To enforce this

fundamental rule, the Act should provide that it applies to everyone, even to state agents in the exercise of their official duties.

3.2 Terrorist cases have frequently been marred by the use of torture or coercion. There have been cases when a person subjected to torture confessed participation in a terrorist act, even if he or she was innocent, and there have been cases of false confession without torture. The particular nature of terrorism must be taken into account. Terrorists, by opposition to other criminals, act under an ideological or religious motivation. They are usually very ready to confess in court their grievances and the purpose of their actions. Any person sharing their ideology can pretend to have committed the act incriminated, thus gaining an aura among his or her peers.

3.3 For a confession to be considered as evidence, it should be substantiated by other convincing factual elements. If not, there is no assurance that the accused is indeed the author of the crime.

Recommendation 3

The Human Right Act should clearly prohibit the use of torture and other cruel, inhuman or degrading treatment. To enforce this fundamental prohibition, the Act should provide that this rule applies to everyone, even to agents of the state in the exercise of their official duties.

Confession obtained by torture or other coercive means should never be admissible, whether it was obtained in Australia or overseas. It is not reliable.

In terrorist matters, confession should not be considered as a sufficient evidence to secure a conviction.

b. Collection and transmission of data

3.4 Since terrorist acts can be so devastating, preventing their commission is essential. Prevention has many aspects. Some of them relate to technical matters, to the exchange of information, or to the use of such information. Most terrorist investigations start with information made available to law enforcement units. The issue of quality of information is therefore crucial and must not be underestimated: efficient preventive measures are dependant on such quality information. The community bears the costs of investigation unduly opened or closed or not properly carried out, whether through financing the work of the police, the judiciary and the prison administration, by paying compensation in case of miscarriages or by suffering the consequences of criminal being still at large (which is a violation of the right to security) or when a criminal offence, especially a terrorist attack, has not been prevented.

3.5 Since the end of the last decade, the terrorism conventions have contained provisions requiring quality information exchanges: The information is to be accurate and verified; the exchange subject to the conditions set forth by the domestic legislation. It is therefore appropriate that the Human Right Act contain principles regarding such information.

3.6 The CAT provides that statements made under torture must not be used as an evidence during proceedings, in other words must not be produced in courts. The CAT does not prevent the use of such information by law enforcement agencies during an investigation procedure, for instance, and some national authorities may feel they can base their preventive action on such statements, thus indirectly encouraging the use of torture and running the risk of using false information.

Recommendation 4

The Human Right Act should contain principles regarding information used by law enforcement and intelligence agencies.

The collection of data must comply with the human right standards as defined in the CAT.

Every effort must be made to ensure the information is correct and reliable, especially those data which could lead to measures infringing on human rights.

Incorrect or obsolete data should be withdrawn without delay.

The right of a person to be informed about a decision that concerns him or her and to appeal against it should be granted each time it infringes on one of his or her fundamental rights.

c. Freedom of movement

3.7 Since the abolition of the death penalty, restricting someone's freedom of movement is perhaps the most serious constraint on human rights that can be imposed. Such a limitation should not be ordered before careful examination of its pertinence. The decision to detain a person should rest on convincing factual elements, not mere suspicion.

3.8 Preventive detention is necessary to prevent the imminent commission of a serious offence, to save and preserve evidence, to avoid collusion, and prevent a person from escaping justice.

3.9 Preventive detention measures may have been largely justified in previous centuries when modern means of surveillance and intelligence available today did not exist, hence alternative means of control must be taken into account before choosing to detain a person. It is submitted that other means of control should always be seriously examined before detaining an individual. In particular, it must be ascertained that the purpose of the incarceration cannot be achieved by other less restricting means. These considerations should be made in writing and kept. It should always be permitted to challenge a detention order in an independent court.

3.10 Since it is not unlikely that suspects, whether or not suffering from emotional problems, or psychological disorder, can be pressurised by prolonged detention to make statement, preventive detention should not be used to extract confessions since they may not be reliable. The longer a person is detained for investigation purposes, the greater the risk of a miscarriage of justice.

3.11 To strengthen a terrorist case, it is suggested that it is far better to monitor closely the suspect's contacts and activities, hence finding relevant and convincing information and subsequent evidence to secure a conviction. The use of surveillance devices not only allows the gathering of information that can be used in court as evidence, it also helps to avoid detaining an innocent person on the basis of mere suspicion.

3.12 Having already convincing factual elements before detaining a person allows the case to be brought to court without undue delay - which is a requirement set up by the terrorism conventions, humanitarian law and the International Covenant on Civil and Political Rights.

3.13 The conventions set forth the principle of speciality, by which an investigation and detention focus only on the crimes for which the extradition has been granted. On the domestic level, such a requirement would mean that detention ordered on the basis of one crime should not be prolonged under the pretext of investigating another crime for which there are not sufficient elements to warrant detention.

Recommendation 5

The Human Right Act should provide that

- preventive detention can only be imposed when it is necessary to prevent

the imminent commission of a serious offence, to save and preserve evidence, to avoid collusion, and prevent a person from escaping justice;

- when the detention is no more necessary, the person must be released;
- the principle of proportionality should be applied when deciding to apply preventive detention;
- a person should not be detained without substantiated elements;
- the right to challenge a detention order in an independent court should be guaranteed. That court should decide without delay.

d. Fair trial

3.14 Terrorism is a violation of the right to life and the right to liberty and security. Law enforcement and judicial authorities have the mandate to arrest and punish offenders. This mandate is part of the wider mission to protect social life and individual life.

3.15 One can distinguish two types of miscarriages of justice. The first one is to find guilty an innocent person. When this happens, the judicial system has failed twice: firstly, it has not been able to punish the true offender and thus to protect society against a subsequent offence; secondly, it has violated the duty to protect an innocent person. The condemnation of an innocent person is the complete failure of the mission of justice. It is intolerable. Appropriate means must be put in place to avoid it.

3.16 The second type is the absence of sanction against the offender. In this case, the justice system has failed in its duty to protect society. It is therefore important to put into place a system by which reliable evidence is collected to ensure an appropriate sentence.

3.17 It turns out that the miscarriages of justice are mainly due to

- false confessions, usually obtained under excessive pressures or coercion, and
- police misconduct, including fabricated evidence,
- poor investigation conducted by the police
- non-disclosure of evidence to the defence.

3.18 It appears that it is firstly during the investigation period that the cause of most miscarriages can be found, secondly during court proceedings. These shortcomings can be avoided if human rights are correctly implemented. This submission therefore suggests the introduction of rights and dissuasive means specifically designed to prevent these occurrences in these two periods. They would ensure fair trial.

3.19 Those involved in penal proceedings and decisions must keep in mind the requirement of veracity, coupled with the reality of a possible miscarriage of justice, particularly in matters of terrorism, since miscarriages of justice cannot unfortunately always be excluded, whether they are caused by an exaggerated emphasis on result – for political reasons or personal prestige – by oversight, incompetence, even malevolence and corruption. It is therefore important to set up a system which minimises the possibility of a mistake. Fighting terrorism cannot depart from this for the seriousness of the offences concerned amplify the requirement to protect society and thus the call for truth. Experience shows that this truth is unlikely to manifest itself with the use of torture, in secret or in camera proceedings, through curtailed or inexistent course of appeal. On the other hand, it is more likely to come to light when adequate measures of control are put into place in the various stages of legal proceedings, from the investigation to the final judgement. A correct implementation of the human rights governing penal proceeding reduces the risk of mistakes and shortcomings, and thus ensures a better repression of terrorist acts.

3.20 In this context, the legal means guaranteeing a correct implementation of human rights in penal proceedings are not in

contradiction with, nor even complementary to the fight against terrorism. Human rights are essential to ensure an effective repression of terrorism.

3.21 Elements proving the innocence must be sought and collected. This will ensure that the suspect is indeed the author of the crime.

3.22 The complete investigation file must be transmitted to the prosecution and to the defence. Each must be allowed to choose, on the basis of his own competence, what evidence will support or undermine a case. Furthermore, if one of them finds the investigation incomplete, each should have the right to require and obtain a complementary investigation before the actual trial. The disclosure, in due course, of the evidence to the suspect and his right to question it should ensure that they can stand the proof of trial.

Recommendation 6

A Human Right Act should provide that

- during a criminal investigation elements proving the innocence must be sought and collected;
- every person has the right to obtain the complete investigation file regarding the offences of which he or she is accused;
- the accused has the right to require and obtain a complementary investigation before the actual trial.

e. Extradition

3.23 Regarding extradition of terrorists, some States grant extradition on the ground that they have received assurances from the requesting State that the person extradited would not suffer any discrimination. The High Commissioner of Human Rights have expressed very strong reservations about this practice, claiming that diplomatic assurances do not work since they do not provide adequate protection against torture and ill treatment, nor do they nullify the obligation of non-refoulement.

3.24 According to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), "no State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture". It also prohibits during any proceedings the use of statements marred by torture.

3.25 The terrorism conventions recognise the right of a State not to fulfil its extradition obligation in case of discrimination or other violation of human rights in the requesting State, but they do not require that extradition must not take place if the risk of these violations is substantiated. If Australia refuses the extradition, it would be responsible to prosecute the suspect or accused according to the provisions set in the international terrorism conventions.

3.26 Australia should demonstrate its commitment to due process of law in terrorism matters by becoming a party to the International Convention for the Protection of All Persons from Enforced Disappearance.

Recommendation 7

A Human Right Act should make it mandatory to refuse extradition when the human rights of the extraditable person are not guaranteed in the requested State.

A Human Right Act should grant the extraditable person the right to appeal against his or her extradition on the grounds of substantiated risk of human rights violations - such as a substantiated risk of torture, in case of ill health or if the death penalty is likely to be pronounced in the requesting State - and when human rights cannot be guaranteed by the requesting State.

It should forbid the practice of extraordinary rendition.

f. The independence and impartiality of the judiciary and the right of judicial guaranties

3.27 The respect of the right of judicial guaranties is necessary to ensure that fundamental rights are respected. It is the keystone of the whole system of human right enforcement.

3.28 In its 2002 report, the Policy Working Group of the United Nations and Terrorism emphasises that "key human rights must always be protected and may never be derogated from. The independence of the judiciary and the existence of legal remedies are essential elements of the protection of fundamental human rights in all situations involving counter-terrorism measures". This principle has also been reiterated by the Security Council in 2003 when States were told to ensure that any measure taken to combat terrorism complied with all their obligations under international law, and that they should adopt such measures in accordance with international law, in particular human rights, refugee and humanitarian law.

Recommendation 7

The Human Right Act should provide that

- administrative decisions restraining key human rights should be reviewed in full by an independent judicial body without restriction on the scope of the review;
- the right to question the implementation of decisions and regulations must be at least granted to the person concerned each time a decision infringes on one of his or her fundamental rights;
- Australia should set up a Federal Court for Human rights, competent to review the implementation of human rights in every state and territory, on the model of the European Court of Human Rights, in Strasbourg.

4. SUMMARY OF RECOMMENDATIONS

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- the prohibition of arbitrary deprivation of liberty
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- the prohibition of taking hostages,
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- the right to life.

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