JOINT COMMITTEE ON HUMAN RIGHTS

Inquiry into the Government's Justice and Security Green Paper

Supplementary Written Evidence by: Dr Lawrence McNamara (University of Reading)

1. This supplementary written evidence provides further information and written clarification regarding two matters that arose in the oral evidence session on 7 February 2012.

Supplementary information on the Australian experience

2. Baroness Berridge asked questions at 15:32:55 of the oral hearing which related to the use of closed material procedures in Australia. In response I gave some estimates and impressions. I have looked into these matters and can provide the following details and information in the hope that it is of some assistance.

3. The statistics (in the next two paragraphs) on trials and the use of the NSI Act may be slightly imperfect, possibly due to categorisation issues, but the general picture seems clear and consistent with my oral evidence.

4. Number of Australian terrorism cases: In my oral evidence I mentioned that Australia has not had as many terrorism prosecutions as there have been in England and Wales and put the figure at between 10 and 20 trials, though with some involving as many as ten defendants. It appears that since September 2001 there have been 14 terrorism related prosecutions in Australia, involving a total of 41 defendants, with a range of outcomes.[1]

5. Use of the NSI Act: The best statistical data I can find regarding the use of proceedings under the National Security Information (Criminal and Civil Proceedings) Act 2004 (NSI Act) indicates that at July 2009 the Act had been invoked in proceedings involving 38 defendants as well as in one control order case.[2] Though it is not clear whether these uses corresponded to the terrorism prosecutions, given that the number of defendants in terrorism matters is similar, it appears likely the Act was invoked in a significant number (if not most or all) of the Australian terrorism prosecutions. In addition, other provisions of the criminal law are also available to the Courts when national security issues arise and are commonly used, though they do require the

[1] The best overall picture can be found in the 'Stocktake of Terrorism Prosecutions', Gilbert and Tobin Centre, University of New South Wales http://www.gtcentre.unsw.edu.au/resources/terrorism-and-law/stocktake-terrorism-prosecutions (8 February 2012). At 8 February 2012 this shows 13 prosecutions with 37 defendants. Personal communication with the Centre on 8/9 February 2012 indicates there has been one further prosecution with four defendants since that page was updated. The 'Stocktake' appears to tally with the Australian Commonwealth Director of Public Prosecution's Annual Reports. The 2010-11 Annual Report suggests that on top of the cases mentioned in the Stocktake at 8 February 2012, there are 5 individuals awaiting prosecution at the time that Report was published. though it is not clear whether those prosecutions would be heard as one or more cases, or whether they are connected.

[2] *National Security Legislation: Discussion Paper on Proposed Amendments*, Attorney-General's Department, Canberra, July 2009, 172. (http://www.ag.gov.au/Documents/SLB%20-%20National%20Security%20Discussion%20Paper.pdf) (8 February 2012)

courts to take into consideration open justice principles.[3]

6. The relationship between PII and the NSI Act in Australia: I have been unable to locate any statistical data on the extent to which PII is used in cases where the NSI Act may be applicable. However, my impression from informal inquiries confirms my oral evidence that PII is still relevant and is still used. A barrister practicing in the area provides a very good, short discussion of the relationship between PII and the NSI Act as he saw it in 2007.[4]

Recommendation on status and review of closed judgments

7. Lord Lester asked (at 15:39:48) about the recommendations I would make to ensure open justice was appropriately taken into account in any legislation. My response included a further recommendation (at 15:41:50 to 15:42:40) which was not in my written submission. I include it now as Recommendation H and put it in writing for clarity.

8. **Recommendation H**: To address the problem that the Green Paper does not provide for the possibility of closed judgments later being made open, my recommendation is that any legislation should require that closed judgments are accompanied by an open statement from the court that includes:
   (a) the reasons for closure; and
   (b) any factors which would be particularly relevant in determining whether all or part of the closed judgment could be made open at a later date; and
   (c) the date at which at the closed status of the judgment should be reviewed.
   I would also recommend that there be an automatic review of the status of a closed judgment every five years.

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[3] *R v Benbrika & Ors (Ruling No 1)* [2007] VSC 141, esp at [15], [17]-[18]. See also L McNamara, 'Closure, caution and the question of chilling: how have Australian counter-terrorism laws affected the media?' (2009) 14 *Media & Arts Law Review* 1 at 10-11.
[4] S Donoghue, 'Reconciling National Security and the Right to a Fair Trial: The National Security Information Act in Practice' in A Lynch & G Williams, *Law & Liberty in the War on Terror*, Federation Press, 2007, pp 87-95 esp at 89-91.