

Review Some Provisions In Security Offences Bill

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By Lim Chee Wee

The Malaysian Bar commends the Honourable Prime Minister for fulfilling the promise he made on 15 September 2011 to abolish the Internal Security Act 1960 ("ISA"). Since its enactment more than fifty-one years ago, this piece of oppressive legislation enabling preventive detention without trial has been extensively condemned for being a gross violation of human rights, and for the cruel and indiscriminate abuse resulting from its use.

The Malaysian Bar is fully supportive of the Government's aim to combat terrorism, which represents an extraordinary threat to international and domestic peace and security. The Government's counter-terrorism policy and actions must strike a delicate balance between collective security and individual liberties, and be consistent with the rule of law.

In its Memorandum dated 19 July 2010 ("Memorandum")[i], the Malaysian Bar expressed its view that there is adequate legislation to combat terrorism and, where necessary, the existing legislation could be strengthened alongside improved safeguards and oversight mechanisms. Nonetheless, the Bar acknowledges that the replacement legislation - the Security Offences (Special Measures) Bill 2012 ("Bill" - and the amendments to the Penal Code, Evidence Act 1950 and Criminal Procedure Code ("Amendments") allow for the right to trial, and contain some provisions found in the laws of other jurisdictions[ii]. Furthermore, the maximum period of detention of twenty-eight days, after the arrest and detention period of twenty-four hours, is consistent with the Bar's position in its Memorandum.

Bar Council was invited by the Honourable Attorney General to provide its comments - although within a short period of time prior to this legislation being tabled in Parliament - and two meetings were held to discuss the Bill. We welcome the open-minded and frank dialogue with the Attorney General's Chambers, and note that some of our suggestions were accepted. Whilst we appreciate the Government's desire for quick action and the hard work of the Attorney General's Chambers in its study, and drafting, of the Bill and the Amendments, we urge that in future the consultation process be more extensive, and more time be provided for it.

The Bill vests extraordinary and wide-ranging powers in the Government. The Bar expresses its concerns regarding, inter alia, the following issues[iii], which deserve further study and debate.

(a) Preamble - the validity of the Bill is not dependent on the invocation of Article 149 so long as it contains safeguards consistent with fundamental liberties.

(b) Section 3 (Interpretation) — the definition of "security offences" includes an act that is prejudicial to national security or public safety.[iv] Such a definition is too wide. Instead, a more precise, and better, definition can be found in the United Nations Convention for the Suppression of the Financing of Terrorism:

Any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing an act.

(c) Section 4 (Power of arrest and detention) — the extension of the period of detention for a duration of not more than twenty-eight days should be subject to judicial oversight, instead of by way of decision of a police officer of or above the rank of Superintendent.

(d) Section 6 (Power to intercept communication) — this power should be exercised by a judge, and

solicitor-client communications must be protected.

(e) Parts IV (Special Procedures Relating to Sensitive Information) and VII (Evidence) — it is here that the Malaysian Bar has its greatest concerns, and where there are radical departures from the current rules of evidence. The use of a summary of the evidence (as opposed to the evidence itself) and the lowering of the admissibility threshold will pose a serious impediment to a fair trial.

In particular, the radical departure from the ordinary rules of evidence may negatively impact on the accused's right to a fair trial. Counter-terrorism laws, policies and decisions must not usurp the very rights and freedoms that the terrorists themselves are threatening.

We appreciate the assurance of the Attorney General that there will be continuous study and review of the Bill and the Amendments, and that the Malaysian Bar's contribution will be welcomed.

Apart from the ISA, the other legislation that now remains for the Honourable Prime Minister to consider amending - to rid our statute books of all arbitrary detention laws - are the Dangerous Drugs (Special Preventive Measures) Act 1985 and Prevention of Crime Act 1959, on the assumption that there will be no re-introduction of the Emergency (Public Order and Prevention of Crime) Ordinance 1969.

The Malaysian Bar encourages and supports the Prime Minister to continue on a path of law reform that is consonant with international human rights norms.

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[i] The Memorandum is accessible at the Malaysian Bar website

[ii] One example is the Canadian Anti-Terrorism Act Bill C-36.

[iii] The Bar would require some time to prepare and submit a memorandum to address more comprehensively the issues raised by the Bill and Amendments.

[iv] The First Schedule of the Bill refers to Chapters VI and VIA of the Penal Code, where section 130B(2) defines "terrorist act".

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