Response to Senate Standing Committee on Legal and Constitutional Affairs

National Security Legislation Amendment Bill 2010 and

Parliamentary Joint Committee on Law Enforcement Bill 2010

Response to recommendations of the Law Council of Australia

1. The Law Council submits that the sedition offences in subsection 80.2(1) and (3) of the Criminal Code are unnecessary and should be repealed rather than reformed. The type of conduct sought to be targeted is already adequately covered by the ancillary offences set out in Part 2.4, Division 11 of the Criminal Code which deals with inciting, conspiring, aiding, abetting, counselling and procuring an offence.

The sedition offences were reviewed by the Australian Law Reform Commission (ALRC) in 2006. As part of this review, the ALRC considered the issue that some thought it unnecessary to retain the sedition offences in the Criminal Code. The ALRC concluded that the offences should be retained and that governments have a right, and in many cases a duty, to legislate to protect the institutions of democracy, and the personal integrity of citizens, from attack by force or violence (paragraph 2.64 of the Report). The ALRC's recommendations were largely concerned with streamlining and altering the description of the sedition offences rather than significantly changing their substance. The Government accepted most of the ALRC's recommendations, and the proposed amendments to the sedition offences reflect many of the ALRC's recommendations. The ancillary offences dealing with complicity and common purpose (section 11.2 Criminal Code – includes aiding, abetting, counselling and procuring), incitement (section 11.4 Criminal Code), and conspiracy (section 11.5 Criminal Code) are offences in their own right and differ from the urging violence offences. They are not directed towards urging force or violence against a group (characterised by certain distinguishing factors). While there may be some overlap, the ancillary offences have different proof requirements and do not directly target the conduct covered by the urging violence offences.

Complicity and Common Purpose

This requires proof that an individual combined with another person to commit another offence. The urging violence offences do not require that the urging in fact aid, abet, counsel or procure the use of force or violence, and a person can be guilty of the offence even if the second person is not convinced that he or she should commit the violence.

Further, since accomplice liability is derivative rather than direct, the prosecution must prove commission of the offence by the other person. Though proof of guilt is necessary, *conviction* of the other person is not a prerequisite for conviction of the accomplice. The accomplice can be convicted though the other person is never brought to trial or gains an acquittal. In contrast, a person can be guilty of urging violence even if the second person does not in fact engage in the violence, whether this is because the person chooses not to or is prevented from doing so.

Finally, because complicity is not an independent offence, the accomplice will be convicted of the principal offence and be subject to the penalty for that offence. In the case of urging violence, the person will be convicted of the urging violence offence itself and be subject to the penalty specified in that offence provision.

Commission by proxy

A person who intentionally uses another person as his or her instrument to commit an offence, is guilty of commission by proxy. The prosecution must prove that the person procured the conduct of the other person and that the offence was committed. In contrast, the urging violence offences do not require a person to actually engage in the use of the force or violence. The offence of urging violence also has broader application because 'urging' another person is a wider concept than 'procuring the conduct' of another person.

A person found guilty of commission by proxy is taken to have committed the principal offence and be subject to the penalty for that offence. In the case of urging violence, the person will be convicted of the urging violence offence itself and be subject to the penalty specified in that offence provision.

Incitement

A person who urges another to commit an offence, with the intention that the offence be committed, is guilty of incitement. In such a case, it is necessary to prove that the person urging intended the other person to commit a specific offence. This differs from the urging violence offences which require proof that the person urging intends the other person to engage in force or conduct against a group etc as specified in the offence, without reference to any other offence.

A person convicted of incitement would be convicted of incitement to commit the principal offence. With the urging violence offence, the person would be convicted of the urging violence offence itself.

In addition, incitement is not punishable with the same severity as the principal offence that the person actually incited. Maximum penalties for incitement are determined by a statutory scale of lesser penalties. The urging violence offences specify the applicable maximum penalty.

Conspiring

The physical element of this offence is entry into an agreement – conduct which involves, of necessity, an intentional act. That act must be accompanied by an ulterior intention, shared by at least one other party to the agreement, that an offence will be committed pursuant to the agreement. There is no conspiracy if only one of those who enter an agreement to commit an offence intends that it will be committed. In contrast, the urging violence offences do not require an agreement by the parties, and it might be possible for the person who is ultimately urged to commit the violence to never communicate with the person who did the urging.

A person convicted of conspiring would be convicted of conspiring to commit the principal offence and be subject to the penalty for that offence. With the urging violence offence, the person would be convicted of the urging violence offence itself.

Urging violence

The urging violence offences target conduct that could be damaging to Australia and Australia's interests, including people trying to influence the naïve and impressionable to perform acts of violence. Such conduct can be extremely dangerous and should be prohibited

For a successful prosecution of the urging violence offences, it would be necessary to prove beyond a reasonable doubt that the person not only intentionally urged another person (by their words or conduct), but also intended for another person to actually engage in force or violence. In other words, it would be necessary to prove that the alleged offender meant to urge another person and also meant to bring about the force or violence.

In light of the ALRC report and the fact that the ancillary offences in the Criminal Code do not cover conduct proscribed by the existing sedition offences (or the proposed urging violence offences), the Government decided that the offences should be retained. Urging violence is repugnant to the way of life of Australians and contrary to the maintenance of a peaceful, free society. These offences provide scope to prosecute for serious acts, should they be committed, as well as a strong deterrent for individuals considering the type of behaviour made illegal by these offence provisions.

2. The Law Council submits that proposed subsections 80.2A(1)-(2) and 80.2B(1)-(2) should not be co-located in the Criminal Code with the treason and sedition offences. The Law Council submits that if these offences are to be included in the Criminal Code they should be in a separate Division dealing with anti vilification laws.

Although there is a connection between subsection 80.2(5) of the Criminal Code and the *Racial Discrimination Act 1975* (Cth), the ALRC recommended that the urging inter-group violence offence be retained in the Criminal Code as a public order offence. The proposed urging violence offences have a narrow application. They are focused on the urging of force or violence, not a more general offence of urging hatred or vilification. Although such conduct is related to anti-vilification laws, the ALRC considered that the offence was best characterised as a public order offence. In addition, the Government decided it is appropriate to retain serious criminal offences like subsection 80.2(5) in the Criminal Code rather than disparately include them in various pieces of legislation.

It would be inappropriate to categorise the urging violence offences within a separate Division in the Criminal Code dealing with anti-vilification. First, the concepts of vilification and urging violence are conceptually distinct. Vilification is concerned with public acts that incite, or intend to incite hatred, serious contempt or severe ridicule of a person on a specified ground. It is directed towards the protection of vulnerable religious or racial minority groups. In contrast, the proposed urging violence offences are concerned with urging force or violence. There are currently anti-vilification laws in Commonwealth, State and Territory legislation. Such laws, including the Racial Discrimination Act, have a strong conciliation and civil remedies basis. Accordingly, it may not be an appropriate location for serious criminal offences, even if they are based in part on racial or other discriminatory grounds.

While the offences in sections 80.2A and 80.2B, in effect, condemn ethno-racially or religiously motivated discrimination, their primary purpose is to criminalise the urging of force or violence as opposed to conduct which offends, humiliates, insults or ridicules a person on specified grounds. They are serious offences targeting conduct that has the potential to impact on the security of the Commonwealth. They are therefore appropriately located in Chapter 5 of the Criminal Code.

3. The Law Council submits that the proposal to allow for up to seven days dead time to be excluded from the calculation of the investigation period in terrorism cases is unjustified. The proposal could result in a possible period of detention without charge of up to eight days, possibly more. This is considerably longer than the period of pre-charge detention permitted under the Crimes Act in non terrorism cases. The Law Council submits that a cautious approach is warranted and that the dead time cap should be no more than 48 hours unless sufficient justification can be provided by relevant agencies for the cap to be longer. The Law Council further submits that it is preferable that the cap be set low and then reviewed by the Independent National Security Legislation Monitor, rather than being initially set at seven days.

We understand the reference to the proposed "dead time cap" of 48 hours is in relation to the period of time that can be specified by a magistrate and disregarded from the investigation period under proposed paragraph 23DB(9)(m) in the NSLA Bill. This is often referred to as 'specified disregarded time.' That is, the proposed cap would not apply to other kinds of time that may be disregarded from the investigation period under subsection 23DB(9), such as time for the arrested person to speak to a lawyer or to rest.

A cap on 'specified disregarded time' of 48 hours could hamper the ability of law enforcement agencies to investigate terrorism.

At the hearing, the AFP presented evidence that demonstrated an operational need for the specified disregarded time provisions to have a seven day cap. Terrorism presents a high risk to public safety and terrorism investigations are often undertaken with minimal lead-in time or prior knowledge. These investigations must be thorough and broad ranging and often involve multiple suspects, the execution of multiple search warrants, considerable forensic analysis of crime scenes and seized items and significant enquiries and liaison with overseas agencies. It is often necessary for significant elements of these activities to occur pre-charge to ensure the arrested person can be properly interviewed and charged, the public protected and terrorist acts prevented. For these reasons a 7 day cap is necessary, reasonable and appropriate.

There are also a range of safeguards in place in relation to specified disregarded time. These include that:

- the specified disregarded time must be approved by a magistrate
- the specified disregarded time must be reasonable, and
- the specified disregarded time must satisfy several stringent criteria including that the investigation is being conducted properly and without delay.

In addition, the proposed amendments in the NSLA Bill will enhance these safeguards by requiring an application for specified disregarded time to be in writing, approved by a senior member of the AFP or State or Territory police force, and given to the arrested person or their legal representative prior to a magistrate considering the application.

4. The Law Council submits that the proposed amendments which allow a suspect and his or her legal representative to be denied access to information on which an application for dead time or an extended investigation period is based are too broadly drafted and may render meaningless

the right to be heard and make submissions in opposition to the application. The Law Council submits that the relevant provisions should be redrafted to give the judicial officer the discretion to determine what information should be disclosed, to whom and in what form.

It is essential for police to be able to protect the operational integrity of an investigation and run it without risk that sensitive information could be disclosed. Police are in the best position to determine the sensitivity of the information in these applications as they have all the material in relation to the information's source and context. It is important to note that proceedings to extend the investigation period or for a magistrate to specify a period of time that is disregarded from the investigation period occur while the person is under arrest during the pre-charge phase of the investigation. The proceedings are unrelated to the trial of the person. Proposed subsections 23DC(8) and 23DE(7) specify that the person, or his or her legal representative, may make representations to the magistrate about the application. If a magistrate considers the information the police have redacted from the application should be disclosed to the arrested person, the magistrate may form the view that the person has not been given the opportunity to make adequate representations about the application and therefore reject the application. Accordingly, the magistrate retains the ultimate discretion as to how to deal with the redacted information.

5. The Law Council submits that an arrested person's release or appearance before a judicial officer should not be able to be delayed in order to facilitate the investigation of an offence that police merely suspect the person has committed.

Subsection 3W(1) provides that a constable may, without a warrant, arrest a person for an offence if the constable believes on reasonable grounds that the person has committed or is committing a Commonwealth offence (the 'arrest test'). If the constable in charge of the investigation no longer holds this belief, the person must be released.

If a person is arrested for a Commonwealth offence (other than a terrorism offence) proposed paragraph 23C(2)(a) will provide that the person may, while arrested for the Commonwealth offence, be detained for the purpose of investigating whether the person committed that offence. Proposed paragraph 23C(2)(b) will provide that the person may also be detained for the purpose of investigating whether the person committed another Commonwealth offence that an investigating official reasonably *suspects* the person has committed (the 'investigation test').

Similarly, if a person is arrested for a terrorism offence, paragraph 23DB(2)(a) will provide that the person may, while arrested for the terrorism offence, be detained for the purpose of investigating whether the person committed the offence. Proposed paragraph 23DB(2)(b) will provide that the person may, while arrested for the terrorism offence, be detained for the purpose of investigating whether the person committed another Commonwealth offence that an investigating official reasonably *suspects* the person has committed.

We understand the Law Council's submission to be that the relevant threshold in paragraphs 23C(2)(b) and 23DB(2)(b) should be 'belief' rather than 'suspects.' 'Reasonable grounds to believe' requires a higher degree of satisfaction of the facts than 'reasonable grounds to suspect.' The Law Council's recommendation would make the threshold of 'belief' apply to both the 'arrest' and

'investigation' tests. However, the different thresholds operate for different purposes under each test because the tests relate to different aspects of a person's arrest.

Paragraph 23C(2)(b) was originally inserted into Part 1C of the Crimes Act by the *Measures to Combat Serious and Organised Crime Act 2001*. Prior to this amendment, subsection 23C(2) enabled a person, who had been arrested for a Commonwealth offence, to be detained for the purpose of investigating whether the person committed the offence or any other Commonwealth offence. The purpose of the amendment was to create an additional safeguard by taking away an incentive to arrest a person for a certain offence, in the hope that questioning and further investigation will reveal that the person has committed other (more serious) offences for which there is presently no evidence.

If the threshold in paragraphs 23C(2)(b) and 23DB(2)(b) were raised to that of 'belief', then police investigators would be constrained in their ability to investigate the criminal activity associated with the arrested person. This would not adequately recognise the requirements of law enforcement.

6. The Law Council submits that section 15AA should not be amended to provide that a grant of bail may be stayed for up to three days pending appeal.

Section 15AA of the Crimes Act contains specific provisions relating to granting bail for persons charged with terrorism and national security offences. The proposed amendments in the NSLA Bill will provide a right of appeal for both the prosecution and defendant against such bail decisions. The proposed amendments include a provision that, if bail is granted, the order can be stayed for up to 3 days while the prosecution appeals that decision. A stay period of up to three days exists under various state bail laws. For example, section 25A of the *Bail Act 1978* (NSW) and section 16 of the *Bail* Act 1985 (SA).

Under proposed subsection 15AA(3C), if a bail authority decides to grant bail and the prosecution immediately notifies the bail authority that he or she intends to appeal the decision, the decision to grant bail will be stayed. A stay period is required to ensure there is sufficient time for the prosecution to appeal the decision to grant bail.

Proposed subsection 15AA(3D) provides that the stay will only last until a decision on the appeal is made, or the prosecution notifies the court they do not intend to pursue an appeal, or until 72 hours has passed – whichever is the least period of time. These restrictions are designed to ensure a person who has appropriately been granted bail is not unnecessarily held in custody.

Bail can be denied to protect the community, prevent the destruction of evidence and prevent the defendant from absconding. The community could be damaged, evidence lost and the defendant disappear should the defendant be released on bail before an appeal is heard.

7. The Law Council does not support the proposal to extend the notice provisions to cover the issue of subpoenas (proposed subsection 24(1)). The Law Council submits that this extension places a heavy burden on lawyers engaged in federal criminal proceedings for no obvious purpose. The production of information on subpoena is already covered by the NSI Act and the Law Council submits that this is sufficient.

Currently, section 24 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) imposes notice obligations on the prosecutor or defendant if he or she believes that:

- national security information will be disclosed during a proceeding, or
- a person whom he or she intends to call as a witness in a federal criminal proceeding will disclose national security information in giving evidence or by his or her mere presence.

The purpose of the notification requirements is so that the Attorney-General can determine whether he or she should issue a criminal non-disclosure or witness exclusion certificate under the NSI Act. If the Attorney-General issues a certificate, a closed hearing is held to determine how the information should be dealt with.

The proposed amendments to section 24 will make it clear that the notice obligations also apply if the prosecutor, defendant or defendant's legal representative has applied for and been granted a subpoena, and they know or believe that evidence to be produced or documents that are the subject of a subpoena will disclose national security information. For example, if a security or intelligence agency is subpoenaed for documents by the defendant's legal representative, where that defendant's legal representative knows or believes those documents contain national security information, the legal representative must notify the Attorney-General of that knowledge or belief.

If the notice obligations apply to a defendant's legal representative and that person intentionally does not comply with these obligations, reckless as to whether disclosure of information is likely to prejudice national security, they could be liable for an offence.

The amendments will also make it clear when notice is not required to be given to the Attorney-General. For example, if notice has already been given by someone else or there is already an agreement between the parties about how national security information should be dealt with.

It has been common practice for parties to enter such arrangements. Accordingly, in the majority of circumstances this notice obligation, and therefore the offence, will not apply. However, if the notice obligation does apply, it would not be difficult to discharge. It is simply an equivalent obligation to that which already applies to expected disclosure of security sensitive information via witness testimony or documentary evidence that is disclosed during a proceeding.

8. The Law Council submits that this balancing exercise (in proposed subsections (8) and (9) of the PJC-LE Bill) is not one which can be undertaken by the agency heads from whom information is requested.

We consider that Agency Heads will be in a good position to assess whether the public interest in providing sensitive information to the Committee is outweighed by the prejudicial consequences that might result. The suggestion that such a decision only be made by the responsible Minister would be less flexible and efficient, and could result in more matters being referred to the Minister, impeding the Committee's ability to obtain information.

The decision not to provide information to the Committee has a high threshold. Furthermore, consistent with powers and procedures of Parliamentary committees, it would be open to agencies to negotiate alternative arrangements with the Committee, such as providing sensitive information

in private hearings or in a confidential submission. In the rare event where an agency may contemplate not disclosing information due to the prejudicial consequences, it will likely be more expedient for the decision to be referred to the Agency Head (who may indeed be present at the hearing) rather than the Minister in the first instance.

If the decision were a matter for the Minister only, this could potentially result in the unintentional consequence of the Committee being provided with less information at hearings, as officers may be inclined to take a more cautious approach and refer requests for sensitive information to the Minister for decision. The means to protect sensitive information should involve as minimal as possible disruption to normal Committee practice and procedure, and should, as far as possible, facilitate the Committee being provided with the information it needs to perform its functions in an efficient manner. The mechanism proposed in the PJCLE Bill is consistent with the current mechanism in section 59(6B) of the *Australian Crime Commission Act 2002*, and the Department is not aware of this having been an unworkable framework for the PJC on the Australian Crime Commission.

Response to recommendations of the Australian Human Rights Commission (AHRC)

Recommendation 1:

- **Repeal proposed ss 23DB(9)(m) and as a consequence, also repeal ss23DB(11), 23DC and 23DD;**
- **Repeal proposed s 23DB(9)(f), (g), (h), (i) and (k); and**
- **Amend proposed s 23DF(7) so that the maximum time an investigation can be extended by is four days subject to any further time as required by the court to dispose of an application under ss 23DE, 23WU or 23XB.**

Generally, the purpose of disregarded time is to ensure that a proper pre-charge interview can take place. It recognises there needs to be some flexibility in the maximum time limit for the investigation period to balance two competing considerations – the reasonable requirements of law enforcement and the protection of civil liberties of people who have been arrested for, but not yet charged with, a criminal offence. The time that can be disregarded from the investigation period when a person is arrested for a terrorism offence fall into three general categories.

The first category is where questioning of the person is suspended or delayed because it cannot occur, or should not occur, for the benefit of the suspect. For example, a person must not be questioned during a forensic procedure. This time is excluded from the investigation period to prevent a situation where a forensic procedure is conducted early in the investigation period and the investigators lose all of their remaining questioning time. Questioning also cannot occur for a reasonable time if the arrested person has requested and arranged for a legal practitioner to attend, but the legal practitioner has not yet arrived at the place of questioning. Questioning of a suspect may also be suspended or delayed to allow for the suspect to rest, recuperate or receive medical attention. This takes away any incentive for investigating officials to rush the suspect in exercising these rights if they were not excluded from the investigation period.

The second category relates to complying with requirements of the legislation or procedural aspects of the investigation. For example, the time taken to make an application to extend the investigation period can be excluded from the investigation period. This is intended to prevent a situation where the investigation period runs out while a judicial officer is considering whether to grant an extension of the investigation period. There may also be situations where it is impractical to question a person when dealing with the logistical or procedural aspects of the investigation. For example, the time that is spent arranging and conducting an identification parade, or the time that is reasonably required to transport the suspect from the place they are arrested to the place where they are questioned. If these events affect the ability to properly question a person, it would be unfair if the investigation period were to include the time it took for these events to occur.

The third category of disregarded time that applies specifically to the terrorism provisions enables an investigating official to apply to a magistrate under proposed section 23DC to specify an amount of time that can then be disregarded from the investigation period under proposed paragraph 23DB(9)(m) (specified disregarded time). The investigating official must tell the magistrate why the time should be disregarded and the magistrate can only specify the time if he or she considers it appropriate. The reasons an investigating official may give a magistrate are unlimited, but could include the time needed to collate information from an overseas country before presenting it to a suspect during questioning, or waiting for overseas jurisdictions to respond to requests for critical

information from the Australian Federal Police. The rationale for the category of disregarded time that is specified by a magistrate is that it is not always possible to predict the circumstances where time should be disregarded from the investigation period to enable a proper pre-charge interview to take place. This ambiguity is balanced by requiring these periods of time to be authorised by a magistrate. Any time that is specified by a magistrate must be reasonable for it to be disregarded from the investigation period.

Overall, the fixed investigation period, coupled with the time that can be excluded from that period, provides a statutory framework for what is reasonable conduct in the course of investigating a person for a Commonwealth offence.

The AHRC recommended there should be no provision for specified disregarded time on the basis that it overlaps with the mechanism to extend the investigation period and that there should be a single mechanism to extend the investigation period. However, this does not recognise the character and rationale for specified disregarded time. Specified disregarded time is time that is to be disregarded from the investigation period, rather than part of the investigation period itself. Therefore, it is appropriate to retain separate application processes. Furthermore, the specified disregarded time provisions link the time that is sought to a particular purpose, providing a greater degree of accountability and transparency about how the time is being used.

The AHRC also recommended the following events should not be disregarded from the investigation period:

- allowing an identification parade to be arranged and conducted (paragraph 23DB(9)(f))
- time to make an application under section 3ZQB or the carrying out of a prescribed procedure to determine a person's age (paragraph 23DB(9)(g))
- time to allow a constable to inform the person of information relevant to consent to a forensic procedure by order of a magistrate (paragraph 23DB(9)(i))
- time to allow a forensic procedure to be carried out on the person (paragraph 23DB(9)(k)).

Although these events are closely related to the investigation, paragraphs 23DB(9)(g), 23DB(9)(i) and 23DB(9)(k) are associated with the arrested person's rights and removing these categories from the disregarded time provisions could be detrimental to the arrested person.

To complement amendments to the disregarded time provisions, the AHRC recommend the investigation period could be extended by 4 days. However, a total investigation period of 4 days and four hours is likely to be too restrictive for law enforcement in terrorism cases.

Recommendation 2: Alternatively, if the Committee recommends that s 23DB(9)(m) be repealed but s 23DB(9)(f), (g), (h), (i) and (k) be retained, the maximum time for an extension of the investigation period under proposed s 23DF(7) should be no more than three days.

This would effectively allow two days for what is currently specified disregarded time. This is likely to be too restrictive. See our response to Recommendation 3 of the Law Council of Australia.

Recommendation 3: Alternatively, if proposed s 23DB(9)(m) is retained, it should be capped under proposed s 23DB(11) at no more than 48 hours.

Please see our response to Recommendation 3 of the Law Council of Australia.

Recommendation 4: Amend proposed ss 23DC(4) or 23DE(3) to include as a requirement that an investigating official include a statement about the steps taken to progress the investigation.

Proposed subsection 23DC(4) sets out the statements that must be included in an application for specified disregarded time, and proposed subsection 23DE(3) sets out the statements that must be included in an application to extend the investigation period for a terrorism offence. For example, the applications must include the reasons why the investigating official believes the period should be specified or why the investigation period should be extended. Practice to date has been that magistrates have expected, and been provided with, information on progress of the investigation.

Requiring the applications to also include a statement about the steps taken to progress the investigation would be too prescriptive. The magistrate determining the applications must be satisfied that the investigation into the offence is being conducted properly and without delay. If the magistrate believes it is necessary to hear about the steps taken to progress the investigation, then the magistrate could request this information from the investigating officer making the application.

Recommendation 5: Delete proposed ss 23DC(5) and 23DE(4). The Commission notes that to address any national security concerns, a Magistrate could have the discretion to withhold any sensitive information identified in these provisions from a detainee and their legal representative.

Please see our response to Recommendation 4 of the Law Council of Australia.

Recommendation 6: Delete proposed s 23DC(4)(e)(i) of the Crimes Act 1914 (Cth).

Under proposed paragraph 23DC(4)(e)(i) an investigating official may apply for a specified period of time to be disregarded from the investigation period if the official believes the time should be disregarded because of the need to collate and analyse information relevant to the investigation from sources other than the questioning of the person (including, for example, information obtained from a place outside Australia). This provision is based on existing paragraph 23CB(5)(c)(i). The provision acknowledges that counter-terrorism investigations are often heavily reliant on information from overseas sources and the receipt of this information can significantly influence the direction and outcomes of the investigation. Difficulties are commonly encountered in securing important and accurate information expediently from overseas. Such difficulties include delays associated with time zone differences. It also acknowledges that large volumes of complex information may need to be collated, processed and analysed before an interview is able to be effectively conducted with a suspect and charging decisions made. Accordingly, subparagraph 23DC(4)(e)(i) should remain in the Bill.

Recommendation 7: Amend s 23DB(2)(b) to refer to a 'belief on reasonable grounds' and insert a clause that amends s 23C(2)(b) to also refer to 'belief on reasonable grounds'.

Please see our response to Recommendation 5 of the Law Council of Australia.

Recommendation 8: Repeal s 15AA of the Crimes Act 1914 (Cth) or define 'exceptional circumstances'.

Section 15AA was inserted into the Crimes Act by the *Anti-Terrorism Act 2004* (Cth). Section 15AA contains specific provisions relating to granting bail for persons charged with terrorism and national security offences. Previously, to determine bail in Commonwealth criminal matters, reliance needed to be placed on state and territory bail legislation through the application of section 68(1) of the *Judiciary Act 1903* (Cth). The inclusion of a federal bail provision ensured a consistent approach to bail proceedings across Australian jurisdictions for serious national security offences.

Section 15AA provides the bail authority with the discretion to consider whether there are exceptional circumstances to justify granting bail.

'Exceptional circumstances' was deliberately not defined in s 15AA. Bail is a complex area where courts have traditionally had considerable discretion. The States and Territories, which play a primary role in bail proceedings, have also not defined exceptional circumstances in their respective bail legislation, resisting the temptation to become too prescriptive and override judicial discretion in this area. Section 15AA similarly preserves judicial discretion by leaving it to the courts to determine what exceptional circumstances mean on a case by case basis.

'Exceptional circumstances' is a phrase that is most appropriately determined by the courts. Given the variable circumstances which may militate against or support the granting of bail, it would impose practical constraints if 'exceptional circumstances' was defined. Firstly, the term is not easily subject to general definition as circumstances may exist as a result of the interaction of a variety of factors which, of themselves, may not be special or exceptional, but taken cumulatively, may meet this threshold. Second, a list of factors said to constitute 'exceptional circumstances', even if stated in broad terms, will have the tendency to restrict rather than expand the factors which might satisfy the requirements for 'exceptional circumstances'.

Recommendation 9: Amend proposed s 3UEA of the Crimes Act 1914 (Cth) as follows:

- **Change 'suspects' in sub-s (1) to 'believes';**
- **Delete sub-ss (3) and (4); and**
- **In sub-s (5):**
    - **Change 'suspects' to 'believes';**
    - **Insert the words 'reasonably necessary' after 'anything'; and**
    - **Amend (a) to read 'in order to protect a person from a serious and imminent threat to a person's life, health and safety'.**

Proposed subsection 3UEA(1) will enable a police officer to enter a premises without a warrant, but only if strict criteria are met. The police officer must suspect on reasonable grounds that it is necessary to use specified powers to prevent a thing that is on the premises from being used in connection with a terrorism offence and it is necessary to exercise this power without the authority of a warrant because there is a serious and imminent threat to a person's life, health or safety. The threshold of suspicion is appropriate because of the significant nature of the risk that is being addressed. The power can only be used in limited circumstances, is subject to specific limitations and is not a power for general evidence collection.

It is appropriate to retain subsections 3UEA(3) and (4). If, in the course of searching the premises for the thing, the police officer finds another thing they reasonably suspect is relevant to an indictable or summary offence, the police officer will be able to secure the premises for a period that is reasonably necessary so that they can make an application for a search warrant over the premises. The police officer will not be able to seize material without the authority of a warrant. The premises will not be able to be secured for longer than is reasonably necessary to obtain the warrant. If a warrant is not authorised the premises would be handed over to the occupier.

Proposed subsection 3UEA(5) provides that in the course of searching for the thing, the police officer may seize another thing, or do anything to make the premises safe, if the police officer suspects on reasonable grounds that it is necessary to do so:

- to protect a person's life, health or safety and
- without the authority of a search warrant because the circumstances are serious and urgent.

The threshold of suspicion is appropriate for the same reasons it is appropriate in relation to subsection 3UEA(1).

A police officer would not be able to do anything that was 'unreasonable' to make the premises safe. The concept of reasonableness is already captured at the beginning of subsection 3UEA(5) in that the officer must suspect on reasonable grounds that it is necessary to do anything to make the premises safe to protect life, health or safety in serious and urgent circumstances. Accordingly, it is unnecessary to insert the words 'reasonably necessary' after 'anything.'

It is not necessary to amend paragraph 3UEA(5)(a) to include the words 'serious and imminent threat' because paragraph 3UEA(5)(b) already requires the circumstances to be serious and urgent.

Recommendation 10: Include an ex post facto warrant procedure in proposed s3UEA of the Crimes Act 1914 (Cth).

We understand this recommendation arises out of a concern that police officers may not be held accountable for their actions. We consider an ex post facto warrant procedure is unnecessary to address this concern. The power cannot be exercised covertly and a seizure notice is required to be given to the owner of anything that is taken from the premises (in accordance with existing section 3UF, which will be amended by the NSLA Bill to also apply to the proposed new section 3UEA). It is important to note that this power is not for general evidence gathering and if, in the course of searching the premises for the thing, the police officer finds evidential material that does not

present a serious and imminent threat to life, the police officer must secure the premises and obtain a search warrant in order to seize it.

The use of the power will be scrutinised by the courts if criminal proceedings are initiated. Furthermore, if a person is concerned the power was not exercised correctly, they could lodge a complaint either directly with the AFP or with the Australian Commission for Law Enforcement Integrity (ACLEI) or the Commonwealth Ombudsman who could investigate the complaint. Furthermore, the newly established Independent National Security Legislation Monitor, once appointed, will be able to review the use or purported use of this provision in accordance with its functions.

Recommendation 11: Amend s 3UF(3) of the Crimes Act 1914 (Cth) to ensure a seizure receipt includes a description of any items taken from the premises (rather than from a person) or destroyed or damaged on the premises where relevant to a particular search.

Under subsection 3UF(1) notice is required to be given to either the owner of the thing or, if the owner of the thing cannot be identified after reasonable inquiries, the person from whom the thing was seized. This adequately covers items taken from the premises.

The purpose behind the notice provisions is to ensure the person knows what has been taken from the premises and so that they can request its return. If a thing is damaged on the premises, it will be obvious to the person that the thing has been damaged and so notice is not required. If a thing is damaged and removed from the premises, the thing would be seized, and accordingly the person would be notified under subsection 3UF(1). Accordingly, there is no need to amend subsection 3UF(3).

Recommendation 12: Amend proposed s 3UEA of the Crimes Act 1914 (Cth) to include a system of authorisation and supervision by police officers with the rank of Superintendent or above.

The purpose of this power is to provide police with a clear legislative framework in which to enter a premises without warrant to prevent a terrorism offence in circumstances where there is a serious and imminent threat to a person's life, health or safety.

This power is an emergency power like the existing power in section 3T of the *Crimes Act 1914* which allows the emergency search and seizure of things in relation to conveyances.

Given the imminent threat, it would be impractical to seek senior executive authorisation prior to the officer entering the premises. Please see our response to Recommendation 10 for information about oversight of the use of this power.

Recommendation 13: Amend sch 5 of the Bill as follows:

- **Delete proposed s 3J(2)(aa) of the Bill.**
- **In proposed s 3JA(c), change '12 hour period mentioned in paragraph 3J(2)(aa)' to 'one hour period mentioned in 3J(2)(a)'.**

- **Amend proposed s 3JA(3) so that it reads:**

> **(3) If an application mentioned in subsection (1) has been made, an issuing officer may extend the period during which the executing officer and constables assisting may be away from the premises**
>
> > **(a) for not more than 12 hours if there is an emergency situation and an issuing officer is satisfied by information on oath or affirmation that because of the emergency situation, the constables assisting will not be able to return to the premises within 1 hour; or**
> >
> > **(b), a period longer than 12 hours if there is an emergency situation and an issuing officer is satisfied by information on oath or affirmation, that there are exceptional circumstances that justify a period longer than 12 hours.**
>
> **(4) an issuing officer can grant more than one application to extend the period during which the executing officer and constables assisting may be away from the premises under subsection (3) provided any one extension would not result in the period ending after the expiry of the warrant.**

Currently, paragraph 3J(2)(a) allows police to re-enter a premises under a search warrant within one hour of leaving the premises. This time limitation does not provide sufficient scope for police if they need to evacuate the premises because they have discovered a threat which could endanger the safety of police officers or the public. For example, under the current section 3J, if a police officer, upon executing a search warrant in the investigation of a Commonwealth offence, discovered a large stockpile of volatile chemicals on the premises requiring the immediate evacuation of all persons from the premises, the police officer would not have enough time to secure the premises and mobilise the necessary resources to render the chemicals safe before re-entering to commence a search in accordance with the search warrant.

It is important to note that the exercise of this power would occur in circumstances where police have a valid right to be on the premises through the warrant and have only left due to an emergency situation beyond their control. In these circumstances it is appropriate for police to be provided a reasonable period in which to deal with the threat and return to the premises to re-commence the execution of the search warrant.

Proposed paragraph 3J(2)(aa) will provide that, if there is an emergency situation, the executing officer and the constables assisting may resume executing the warrant after they have temporarily ceased its execution and left the premises for no more than 12 hours or, where authorised by an issuing officer, a longer time not exceeding the life of the warrant.

The AHRC recommend that the executing officer or constables assisting should apply to an issuing officer if they will not be able to return to the premises within one hour rather than 12 hours. This recommendation would make the proposed provisions unworkable. One hour would be insufficient time to apply and obtain an extension as well as deal with the emergency situation at hand, potentially putting public safety at risk.

Recommendation 14: Applications to the issuing officer under proposed s 3JA(3) of the Crimes Act 1914 (Cth) should be kept in a register and made available for inspection to the proposed Parliamentary Joint Committee on Law Enforcement.

The Parliamentary Joint Committee on Law Enforcement's proposed role is to review the performance of the agencies of their functions. The PJCLE's role is a broad role, and responsibility for inspection and review of individual operational decisions is more appropriately a matter for bodies such as the Commonwealth Ombudsman.

The use of the power will be scrutinised by the courts if criminal proceedings are initiated. Furthermore, if a person is concerned the power was not exercised correctly, they could lodge a complaint either directly with the AFP or with the Australian Commission for Law Enforcement Integrity (ACLEI) or the Commonwealth Ombudsman who could investigate the complaint. Furthermore, the newly established Independent National Security Legislation Monitor, once appointed, will be able to review the use or purported use of this provision in accordance with its functions.

Recommendation 15: Insert a provision into the Bill or the Parliamentary Joint Committee on Law Enforcement Bill 2010, which provides the Parliamentary Joint Committee on Law Enforcement with a specific function to review and report on the exercise of police powers under proposed ss 3UEA, 3J(2)(a) and 3JA of the Crimes Act 1914 (Cth).

As noted above, the responsibility for monitoring operational matters is more appropriate for bodies such as the Commonwealth Ombudsman rather than the PJCLE. The PJCLE's functions are not to review particular operational matters, but to review, more broadly, the performance by the agencies of their functions. It is not considered appropriate to single out particular police powers for review by the PJCLE. Doing so could have the unintentional consequence of suggesting that the PJCLE is only able to consider information about the specified police powers set out in its legislation and is not to be concerned with information about other police powers.

The use of the power will be scrutinised by the courts if criminal proceedings are initiated. Furthermore, if a person is concerned the power was not exercised correctly, they could lodge a complaint either directly with the AFP or with the Australian Commission for Law Enforcement Integrity (ACLEI) or the Commonwealth Ombudsman who could investigate the complaint. Furthermore, the newly established Independent National Security Legislation Monitor, once appointed, will be able to review the use or purported use of this provision in accordance with its functions.

Recommendation 16: Insert a clause similar to proposed s 80.1AA(1)(f) and (4)(e) into s 80.1 of the Criminal Code.

The treason offences in proposed sections 80.1AA(1)(f) and (4)(e) (materially assisting enemies at war with the Commonwealth and assisting countries or organisations engaged in armed hostilities against the Australian Defence Force) will only apply to persons who are:

- Australian citizens; or

- residents of Australia; or
- voluntarily under the protection of Australia; or
- bodies corporate incorporated under a law of the Commonwealth or a State and Territory.

The person must therefore "intend" either (i) to be an Australian citizen, (ii) to be a resident of Australia, (iii) to have voluntarily put himself or herself under the protection of the Commonwealth, or (iv) to be a body corporate incorporated in Australia. A person has "intention" within the meaning in the Criminal Code if he or she has belief with respect to the matter. Accordingly, it would be necessary to prove beyond a reasonable doubt that the person believes he or she is a citizen or a resident or is under the protection of the Commonwealth, or that their company was incorporated in Australia.

These proposed amendments address the core concern identified by both the PJCIS and the ALRC which related to the extra-territorial application of the treason offences. The implications of extra-territorial application (where the offences could apply to persons overseas with no link to Australia) were regarded as most problematic in the assisting an enemy context because that assistance is likely to occur in another country. There are not the same practical problems for the remaining offences in section 80.1 (which relate to causing death or harm to the Sovereign, the Governor-General or the Prime Minister) because those offences are more likely to occur in Australia and are directed at high level office holders and key organs of the Australian democracy.

Recommendation 17: Insert a new sub-s (2A) into s 80.1AA of the Criminal Code (Cth) that requires an announcement in all national media outlets that a proclamation referred to in s 80.1AA(2) has been made as soon as reasonably practicable after a proclamation has been made.

In the event Australia is at war with another country, it will be appropriate and necessary to:

- make a Proclamation to that effect; and
- ensure the public is aware of the Proclamation; and
- ensure a person who materially assists an enemy in the early stages of such a war could be punished.

However, legislating a requirement for Proclamation in all national media outlets in a subsection is not practical. In the event Australia was at war, the means by which the Government was able to promulgate that information would depend on a number of factors, including whether certain types of communications had been compromised. If section 80.1AA specified the means by which the information was required to be publicised, and those specific means of communication were compromised, the Government would use alternative means to communicate that information. Under those circumstances, it would not be possible to prosecute a person who acted in clear contravention of the offence.

Further, not specifying the means by which the information is to be promulgated also allows for changes in technology that might allow for more effective communication of such information in the future.

Finally, allowing flexibility in the way the Government announces this information also helps ensure that the Proclamation is as effective as it can be in the particular circumstances.

Accordingly, it is not practical or preferable to specify the precise means by which the Proclamation is to be publicised.

Recommendation 18: Relocate proposed ss 80.2A(2) and 80.2B(2) into ch 9 of the Criminal Code, entitled 'Dangers to the Community'.

Chapter 9 of the Criminal Code contains serious drugs offences, including offences relating to the import and export of serious drugs, drug offences involving children, dangerous weapons offences, and offences relating to the contamination of goods.

The urging violence offences in subsections 80.2A(2) and 80.2B(2) are serious offences that target conduct that has the potential to impact the security of the Commonwealth in addition to harming particular groups in society. It is appropriate to retain these offences in Chapter 5 of the Criminal Code.

Please also see our response to Recommendation 2 of the Law Council of Australia.

Recommendation 19: Replace the term 'urges' in proposed ss 80.2A(2) and 80.2B(2) of the Criminal Code (Cth) with 'incites'.

The ancillary offence of "incitement" at section 11.4 of the Criminal Code provides that the offence is made out if the person "urges" the commission of an offence. It is desirable to use the same terminology in the urging violence offences as is used in the incitement offence. The incitement offence was developed by the Model Criminal Code Officers Committee. The Committee, which consisted of lawyers from all jurisdictions and also consulted broadly on the content of the provisions, agreed that "urging" was the appropriate term.

Further, the Criminal Code does not define urging or inciting. The meaning of the expression "urging" would be a matter for the courts when considering both the incitement and urging violence offences.

Recommendation 20: Amend ss 80.2A(2) and 80.2B(2) of the Criminal Code (Cth) to replace the element that 'the first person does so intending that force or violence will occur' with the element 'that the force or violence is reasonably likely in the circumstances'.

The Commission notes that this recommendation could be applied to s 80.2 as well as proposed ss 80.2A(1) and 80.2B(1).

The proposed offences at sections 80.2A(2) and 80.2B(2) and 80.2A(1) and 80.2B(1) are drafted with reference to the intention of the person alleged to have committed the offence. That is, for a successful prosecution, it would be necessary to prove beyond a reasonable doubt that the alleged offender not only intentionally urged another person (by their words or conduct), but also intended for another person to actually engage in force or violence. In other words, it would be necessary to prove that the alleged offender meant to urge another person and also meant to bring about the ensuing force or violence. The inclusion of this element in the offence is a direct response to an ALRC recommendation.

Whether or not the force or violence is reasonably likely to occur is not something within the control of the alleged offender. The substitution of the suggested wording would lower the threshold for the offence and could therefore capture less serious conduct. Lowering the threshold for the offence would be contrary to the seriousness of the offence.

Recommendation 21: Implement recommendation 12-2 of the ALRC Report by either:

a) inserting new ss 80.2A(6) and 80.2B(4A) into the Criminal Code (Cth) as follows:

> **When determining whether a person intentionally urges another person or group to use force or violence against a group, the court may have regard to any relevant matter, including whether the acts were done**
>
> **(a) in the development, performance, exhibition or distribution of an artistic work; or**
>
> **(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or**
>
> **(c) in the dissemination of news or current affairs.**

The Commission notes that the same provision could be used for determining whether a person 'intends force or violence to occur'.

b) Alternatively, if the Committee recommends including an element that 'the force or violence is reasonably likely to occur in the circumstances' in ss 80.2A and 80.2B of the Criminal Code, then including the following paragraph:

> **These circumstances may include:**
>
> **(a) whether the acts were done in the development, performance, exhibition or distribution of an artistic work; or**
>
> **(b) whether the acts were done in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or**
>
> **(c) whether the acts were done in the dissemination of news or current affairs.**

These recommendations could also be applied to s 80.2 as well as proposed ss 80.2A(1) and 80.2B(1).

As indicated in its response to the ALRC Report, the Government supports ALRC recommendation 12-2 in principle. However, the Government decided to implement it in a manner different to that proposed by the ALRC to avoid misapprehension about what the offence covers.

The principles of recommendation 12-2 have been adopted by expanding the existing good faith defence in section 80.3 of the Criminal Code so that a court may have regard to the conduct listed in recommendation 12-2 of the ALRC report such as the performance of artistic or satirical work.

From a drafting and criminal law perspective, and to avoid misapprehension about what the offence covers, it was considered that the outcome sought by the ALRC would be best achieved by retaining and expanding the good faith defence rather than repealing it.

The proposed expanded good faith defence explicitly recognises the work of artists, academics and journalists and ensures that legitimate expression is not captured under the offence.

The matters for a Court to take into consideration listed in AHRC recommendation 21(a) are implemented word-for-word in proposed section 80.3(3).

For these reasons, it is not necessary to insert clauses along the lines suggested into the offence provisions themselves.

It is not appropriate to accept recommendation 21(b) for the reasons outlined in response to recommendation 20, above.

Recommendation 22: If Recommendation 21 is accepted, proposed s 80.3(3) of the Criminal Code (Cth) should not apply to proposed ss 80.2, 80.2A and 80.2B of the Criminal Code.

The words proposed in Recommendation 21(a) have been added as extra matters for a Court to take into account when considering these offences. The addition of these words provides additional protection. Accordingly, the Government decided not to repeal the good faith defence in section 80.3.

Recommendation 23: Delete proposed ss 80.2A(1) and 80.2B(1) of the Criminal Code (Cth).

The AHRC questions the necessity of the urging violence offences in sections 80.2A(1) and 80.2B(1) in addition to the offences in sections 80.2A(2) and 80.2B(2). The only difference is that the offences in sections 80.2A(1) and 80.2B(b) contain an extra limb requiring the use of the force or violence to threaten the peace, order and good government of the Commonwealth, and a higher penalty (maximum of 7, instead of 5, years imprisonment). It is considered appropriate to retain the separate offences as they are directed at more serious inter-group conduct with a more significant impact on the broader community.

Recommendation 24: Remove from the Bill proposed s 102.1.3 of the Criminal Code (Cth) and s 15A of the Charter of the United Nations Act 1945 (Cth). Allow both of these decisions to be reviewable under the Administrative Appeals Tribunal Act 1975 (Cth).

Subsection 102.1(3) of the Criminal Code and section 15A of the Charter of the United Nations Act provide for the expiry of listings under these regimes after 3 years. In the case of the Criminal Code, this amendment increases the period in which listings have effect from 2 to 3 years. In the case of the Charter of the United Nations Act, this amendment provides for an automatic expiry. We assume that the Australian Human Rights Commission is not opposed to the automatic expiry of the listing regulations or declarations under either of these Acts, but rather is suggesting that the decision to list a terrorist organisation under either regime, and the reviews as to whether the organisation should continue to be listed, should be subject to merits review by the Administrative Appeals Tribunal.

The issue of whether decisions to proscribe terrorist organisations under the Criminal Code should be subject to merits review was considered in detail by the Parliamentary Joint Committee on Intelligence and Security in its *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (tabled in 2007). Paragraph 5.28 of the Committee's report states:

> the Committee does not believe there is a case for adopting merit review of proscription by extending the jurisdiction of the Security Appeals Division of the AAT. Such a process would revisit factual material already considered by the Government, in consultation with the States and Territories, which underpins a regulation that has already commenced operation with the concurrence of the Federal Parliament.

The PJCIS report recognised that the current model provides strong safeguards against the arbitrary use of the proscription power. For the reasons stated in the PJCIS's report, it is not considered necessary or appropriate for the decision to proscribe an organisation under the Criminal Code to be subject to merits review. The ability to make a de-listing application to the Minister or to seek judicial review of the decision under the Administrative Decisions (Judicial Review) Act, provide sufficient avenues for appeal and review of the decision. In addition, all regulations listing terrorist organisations may be reviewed by the PJCIS and are subject to disallowance.

The Minister for Foreign Affairs' decision to proscribe a person or entity under section 15 of Charter of the United Nations Act 1945 (Cth) is an international obligation, including an obligation to do so at the request of other Governments, arising from decisions of the United Nations Security Council found in sub-paragraphs 1(c) and (d) of its resolution 1373 (2001). Such decisions are necessarily based on potentially highly sensitive and classified information, including information provided by foreign governments under strict conditions of confidentiality. It would be inconsistent with this obligation to allow the Minister's decision on the merits to be substituted by a tribunal.

A person whose assets are frozen under Part 4 of the Charter of the United Nations Act has the ability to seek a review of the Minister's decision at least once every twelve months (or more frequently with the Minister's consent). The general operation of administrative law would require the Minister to provide reasons for listing to a listed person who applies for a review of the listing. The decision of the Minister as to whether he or she is 'satisfied on reasonable grounds' that the person, entity, asset or class of assets falls within the scope of resolution 1373 is subject to judicial review on grounds such as denial of natural justice, failure to take into account relevant considerations, taking into account irrelevant considerations, improper purpose and error of law.

Recommendation 25: Remove the term 'indirectly' from s 102.1(1A)(a) and (b) of the Criminal Code.

This would mean that an organisation would not be able to be listed if it indirectly counsels or urges the doing of a terrorist act or the organisation indirectly provides instruction on the doing of a terrorist act. This would create a gap in the counter-terrorism framework, which could enable organisations to engage in conduct that advocates the doing of a terrorist act. For example, an organisation could indirectly provide instruction on the doing of a terrorist act by simply referring its members to material provided by another person or organisation that provides instruction on the doing of a terrorist act. This gap in the framework would substantially weaken the listing provisions and enable an organisation to avoid listing by arranging its activities to ensure it only indirectly counsels or urges or provides instructions on doing a terrorist act.

Recommendation 26: Insert a definition into the Criminal Code (Cth) that defines when an organisation and not just one of its members is 'advocating'.

This is a question of fact, which is appropriately determined on a case by case basis. An organisation may be listed on the basis that the organisation advocates the doing of a terrorist act, not that 'a member of the organisation' advocates the doing of a terrorist act. The fact that one member of an organisation advocates the doing of a terrorist act would not, on its own, be sufficient to determine that the organisation as a whole advocates the doing of a terrorist act. The advocacy of a member or members might be attributed to the organisation if the member was in a leadership role or the organisation as a whole endorses the advocacy. It would likely be challenging to attempt to set out exhaustively all the circumstances where a member's advocacy is taken to be that of the organisation, and doing so could potentially create loopholes that could be exploited by organisations. The various consultation and review mechanisms provide sufficient safeguards to ensure that an organisation is only listed where the organisation itself meets the appropriate legislative test, and is not listed on the basis of the actions of one of its members when this is not representative of the organisation itself.

Recommendation 27: Insert a subsection that states an organisation advocates the doing of a terrorist act only if it does one of the acts in s 102.1(1A) (a) or (b) intending its advocacy to persuade others to do terrorist acts.

It is unnecessary to include a subsection of this nature in the legislation. There would be practical difficulties in determining the intention of an organisation. The provisions are intended to prevent organisations from counselling or urging the doing of a terrorist act or providing instructions on the doing of a terrorist act, since such conduct is inherently dangerous. It would be highly problematic to suggest that an organisation could urge people to commit terrorist acts or provide instructions on how to commit a terrorist act, but then argue that the organisation did not intend anyone to act upon this.

Recommendation 28: Repeal s 102.1(1A)(c) of the Criminal Code.

Repealing this paragraph would create a gap in the legislative framework and would enable an organisation to directly praise the doing of a terrorist act in circumstances that might lead a person to engage in terrorism. The amendment proposed in the Bill to tighten the threshold to require that there be a 'substantial risk' that the praise might lead to a person engaging in a terrorist act is appropriate.

Recommendation 29: Remove the term 'indirectly' from s 9A(2) and repeal s 9A(2)(c) from the Classification (Publications, Films and Computer Games) Act 1995 (Cth).

It is intended that the meaning of the term 'advocate' in the *Classification (Publications, Film and Computer Games) Act 1995* remain consistent with the meaning in the Criminal Code when applied to a publication, film or computer game.

`Advocate' covers direct or indirect advocacy, in the form of counselling, urging or providing instruction on the doing of a terrorist act. Removing 'indirectly' from these paragraphs would create a gap in the legislative framework. Section 9A recognises that some communications about doing a terrorist act are inherently dangerous because they could inspire a person to cause harm to the community. This could be the case where it may not be possible to show a person had any intention that a specific terrorism offence be committed or to communicate the material to any particular person.

Paragraph 9A(2)(c) covers direct praise of a terrorist act where there is a risk that such praise might lead a person (regardless of his or her age or any mental impairment) to engage in a terrorist act. This is intended to capture material that has the capacity to lead the impressionable to engage in a terrorist act. The advocacy would need to be about doing a terrorist act, not merely expressing generalised support for a cause. Including the word 'substantial' before 'risk' in paragraph 9A(2)(c) (consistent with the amendment to the Criminal Code) clarifies the intention that the risk must be real and apparent on the evidence presented.

Recommendation 30: Remove 'threat of action' from the definition of 'terrorist act' in s 100.1 of the Criminal Code.

The current definition of 'terrorist act' in section 100.1 of the Criminal Code refers to an 'action' or 'threat of action'. It was considered appropriate for such threats to form part of the definition as most of the offences in Division 101 criminalise conduct preparatory to an actual terrorist act occurring.

The Sheller Committee identified that an unintended interpretation of the definition might be that it requires the threat of action to actually result in serious harm to a person or other harm as is defined in subsection 100.1(2) of the Criminal Code.

To overcome this problem, the Sheller Committee recommended that the reference to 'threat of action' and other references to 'threat' be removed from the definition of 'terrorist act' in section 100.1(1) of the Criminal Code. Further, the Sheller Committee recommended that an offence of 'threat of action' or 'threat to commit a terrorist act' be included in Division 101 of the Criminal Code.

The Government is consulting with the States and Territories on how the definition of terrorist act can be further refined. Proposed amendments will be designed to improve the application of the definition and will take into account the recommendations made by the Sheller Committee.

Recommendation 31:

(a) Scrutinise the Government's position in relation to not being able to amend s102.7 of the Criminal Code (Cth) without the States amending their referral legislation;

(b) If the Committee is satisfied that an amendment to the States referral legislation is not required, the Committee recommend that s 102.7 of the Criminal Code (Cth) be amended as follows:

• Clarify that the support provided must be 'material' and that the material support must be provided by the person with the 'intention that the support helps the organisation engage in a terrorist act'.

• Define the term 'support' to exclude the publication of views that appear to be favourable to a terrorist organisation and its stated objectives.

The Government's position was never that the amendments to section 102.7 of the Criminal Code could not be undertaken due to the need for corresponding changes to be made to State referencing legislation. On the contrary, the Government's view is that these amendments would be constitutionally supported by the existing referral of power. However, the proposed amendments to section 102.7 require majority State and Territory endorsement in accordance with the Inter-Governmental Agreement on Counter-Terrorism Laws. The amendments were not progressed as part of the National Security Legislation Amendment Bill because States requested further time to comprehensively consider the amendments.

Recommendation 32: Amend s 102.5 of the Criminal Code (Cth) in accordance with the recommendations of the Sheller Committee and the PJCIS Review:

• Define 'training' to mean training that is connected with a terrorist act or that training that could reasonably prepare the organisation or person receiving the training, to engage in, or assist with, a terrorist act; and

It would undermine the policy intention of the training offence and limit the form and type of training which could be captured if the term 'training' was qualified in this way.

The purpose of the terrorist organisation offences is to ensure that terrorist organisations are disbanded. To achieve this, it is appropriate that providing training to, or receiving training from, such organisations is an offence without the training itself having to be connected to a terrorist act.

As the events of September 11 2001 demonstrate, training that is seemingly innocuous, such as learning to fly a plane, can lead to disastrous outcomes if undertaken for terrorist purposes.

• Repeal the element of strict liability in sub-s (3).

For the purposes of the training offence in subsection 102.5(2), subsection 102.5(3) only attaches strict liability to the question of whether the relevant organisation has been listed as a terrorist organisation. This means the prosecution is not required to prove that the person was aware that it was a listed terrorist organisation. However, subsection 102.5(4) is a recklessness exception so that the offence does not apply unless the person is reckless as to the organisation being a listed terrorist organisation. The defendant bears the evidential burden of pointing to evidence to suggest a reasonable possibility that the person was not reckless as to the organisation being a listed terrorist organisation. The prosecution would then be required to refute the defence beyond reasonable doubt.

Recommendation 33: Repeal ss 102.5(1)(c) and (4) of the Criminal Code (Cth) and replace them with the following:

At the time of providing the training:

o the person has knowledge that the organisation is a terrorist organisation; and

o either the person providing the training intends that the person receiving the training will commit a terrorist act; or the person receiving the training intends to commit a terrorist act.

Recklessness is the default fault element for a result or circumstance under subsection 5.6(2) of the Criminal Code. The higher threshold of knowledge would be inconsistent with criminal law policy and unduly circumscribe the offence.

The purpose of the terrorist organisation offences is to ensure that terrorist organisations are disbanded. To achieve this, it is appropriate that providing training to, or receiving training from, such organisations is an offence without the training itself having to be connected to a terrorist act.

Recommendation 34: Refer the offences of membership, funding and financing of terrorist organisations to the Legislation Monitor for review as a matter of urgency.

These offences are already within the matters that the Monitor may review (of his or her own motion or referred by the Prime Minister) in accordance with its functions as set out in the *Independent National Security Legislation Monitor Act 2010*. Once a Monitor is appointed, the Government will give consideration to whether any specific matters should be referred to the Monitor for review, having regard to any own-motion reviews that the Monitor may wish to conduct once appointed.

Recommendation 35: Amend proposed s 7 of the Parliamentary Joint Committee on Law Enforcement Bill 2010 to include the specific function of monitoring and reporting on how the exercise of any national security legislation powers interferes with human rights.

The PJCLE's role is to review the performance by the AFP and ACC of their functions. The PJCLE would be able to consider, as part of this function, where the performance by the agencies interferes with relevant human rights. It is not considered to be necessary to include a specific function as the AHRC has recommended. It would be odd to single out the use of national security legislation powers from other powers that may be exercised by the police. Furthermore, this would substantially duplicate the functions of the Independent National Security Legislation Monitor, as the Monitor's role specifically includes consideration of human rights issues in its review of national security legislation. In addition, the Government has announced its intention to establish a parliamentary committee on human rights as part of its National Human Rights Framework.

Recommendation 36: Repeal ss 8(2)-(6) and 9(2)-(6) of the Parliamentary Joint Committee on Law Enforcement Bill 2010 and replace with provisions that penalise members and staff of the PJC Committee for disclosing any sensitive information.

It is considered that this approach, which would place committee members at risk of committing a criminal offence if they disclosed sensitive information, is not appropriate in the circumstances. The PJCLE's role is to report to Parliament on the performance by the AFP and ACC of their functions, and this could be impeded if unnecessary secrecy obligations were imposed on the Committee. The

mechanisms set out in subsection 8(2)-(6) and 9(2)-(6) provide an appropriate mechanism to protect information that could have prejudicial consequences if disclosed and the Committee's ability to perform its important functions. Given that it would be open to the Committee, in accordance with Committee powers and procedures, to hear evidence in camera or be provided with information on a confidential basis, it is expected that reliance on the mechanisms in sections 8 and 9 not to provide information will be relied upon very rarely.

Recommendation 37: Remove subs-s (h) and (k) from the definition of 'sensitive information' in proposed s 3 of the Parliamentary Joint Committee on Law Enforcement Bill 2010.

Paragraph (h) of the definition of sensitive information covers information that could prejudice a person's reputation. Paragraph (k) covers information that would unreasonably disclose confidential commercial information. It is appropriate to include both types of information within the definition of sensitive information, in light of the type of information that law enforcement agencies may have available to them. The fact that information is sensitive information is not, of itself, sufficient reason for it not to be disclosed to the PJCLE. In addition to being sensitive information, the prejudicial consequences of disclosure would need to be of such magnitude that they outweigh the public interest in providing the information to the Committee (noting that the information could be provided in camera or on a confidential basis). Therefore, there would be a high threshold required to refuse disclosure on the basis of damage to reputation. However, we consider that paragraph (h) should be retained, as a criminal intelligence agency such as the ACC would be likely to hold information that could be highly prejudicial to the reputations of persons, and care does need to be taken to ensure that any disclosure of such information is appropriate and handled with care. Similar considerations apply to the 'unreasonable' disclosure of confidential commercial information.

Recommendation 38: Insert a provision into the Bill that refers the below provisions to the Legislation Monitor for review:

- **Preventative detention orders – proposed to be reviewed by the Council of Australian Governments (COAG);**
- **Control orders - proposed to be reviewed by COAG;**
- **Police powers to stop, search and seize in 'prescribed security zones' and Commonwealth places - proposed to be reviewed by COAG; and**
- **Proscription of terrorist organisations – proposed to be reviewed by COAG.**

These matters are already within the matters that the Monitor may review (of his or her own motion or referred by the Prime Minister) in accordance with its functions as set out in the *Independent National Security Legislation Monitor Act 2010*. Once a Monitor is appointed, the Government will give consideration to the specific matters that should be referred to the Monitor for review, having regard to any own-motion reviews that the Monitor may wish to conduct once appointed.

Given that all the above matters are to be considered in the forthcoming review by the Council of Australian Governments, which will commence towards the end of 2010, it is unnecessary and would

be duplicative to include a specific provision in the Bill requiring the Monitor to also review these matters.

Questions from Senator Ludlam

What is the definition of 'terrorist organisations'? Are there any current or proposed plans to amend this definition?

The definition of terrorist organisation is contained in section 102.1 of the Criminal Code.

'Terrorist organisation' is defined as:

(a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or

(b) an organisation that is specified by the regulations for the purposes of this paragraph (subsections (2), (3) and (4)).

There are two ways for an organisation to be identified as a 'terrorist organisation'. Either an organisation may be found to be 'a terrorist organisation' by a court as part of the prosecution for a terrorist offence, or it may be specified (listed) in the Criminal Code Regulations 2002 (Cth). Subsections 102.1(2)-(18) set out the process by which an organisation may be specified (listed) in the Regulations.

While there are no current or proposed plans to amend the definition of 'terrorist organisation' proper, proposed changes to the definition of 'advocates' in subsection 102.1(1A) (which will apply to the definition of terrorist organisation by virtue of paragraph 102.1(2)(b)) will clarify the risk threshold associated with an organisation directly praising the doing of a terrorist act as one of 'substantial' risk. This will provide reassurance that the level of risk associated with 'advocacy' (for the purposes of the proscription regime and in determining whether an organisation is a 'terrorist organisation' as defined) is not mere risk and accordingly must be real and apparent on the evidence presented. The Independent National Security Monitor would not be precluded from reviewing the definition of terrorist organisation more broadly in the future.

Why is there a presumption against bail in respect of terrorism offences?

The presumption against bail was inserted by the *Anti-Terrorism Act 2004* (Cth). Section 15AA provides that bail should not be granted to persons charged with, or convicted of, offences covered by subsection 15AA(2) unless the court is satisfied that exceptional circumstances exist to justify bail.

Presumptions against bail currently apply to certain serious offences in most State and Territory jurisdictions. For example, murder, serious drug offences and certain offences under the Customs Act 1901.

It is appropriate that terrorism offences fall within the class of serious offences where the presumption against bail applies. Given the gravity of terrorism offences and the likelihood that the suspect may be part of a wider criminal network with extra-jurisdictional connections, there is a strong incentive for persons who are suspected of committing terrorism offences to abscond from the jurisdiction. There is also greater propensity for them to orchestrate or engage in further criminal activity if released due to the potential existence of affiliate networks and terrorist cells associated with terrorist related plans or activities.

Importantly, s 15AA does not abolish the power to grant bail, it merely regulates the granting of bail for persons charged with, or convicted of, very serious federal offences. A magistrate has the

discretion to determine whether it is appropriate for a person who has been charged with a terrorism offence to be released on bail in the individual circumstances of each case. In practice, defendants have been released on bail under these provisions.