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FACULTY OF LAW

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Committee Secretary  
Senate Legal and Constitutional Committee

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee Secretary,

**NATIONAL SECURITY LEGISLATION AMENDMENT BILL 2010**

Thank you for the opportunity to make a submission in relation to the National Security Legislation Amendment Bill 2010 ('the Bill'). We do not address the accompanying Bill, the Parliamentary Joint Committee on Law Enforcement Bill 2010, in this submission.

We make this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its content.

If you have any questions relating to this submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely,

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## RECOMMENDATIONS

### Recommendation 1

The offences in proposed subsections 80.2A(2) and 80.2B(2) should be recast as anti-vilification offences, and moved into legislation, such as the *Racial Discrimination Act 1975* (Cth), whose primary object is to promote human rights.

### Recommendation 2

Instead of amending the good faith defence in section 80.3 of the *Criminal Code*, as proposed in the Bill, we recommend that the defence be repealed and replaced with a provision along the lines of that proposed by the Australian Law Reform Commission.

### Recommendation 3

Paragraph (c) should be deleted from the definition of ‘advocacy’ in subsection 102.1(1A) of the *Criminal Code* and section 9A(2) of the Classification (Publications, Films and Computer Games) Act 1995.

### Recommendation 4

Recommendation 11 of the PJCIS 2006 report should be implemented through amendment of section 100.1 to recognise terrorist acts targeting international governmental organisations.

### **Recommendation 5**

Recommendation 6 of the Final Report of the Security Legislation Review Committee should be implemented by delimiting the form of ‘harm’ in the definition of ‘terrorist act’ in section 100.1.

### **Recommendation 6**

Recommendations 7 and 8 of the Sheller Committee and Recommendation 10 of the 2006 PJCIS report should be implemented by removing the ‘threat’ of terrorist violence from the definition of ‘terrorist act’ in section 100.1 and criminalising it as a separate offence.

### **Recommendation 7**

Recommendation 20 of the Sheller Committee and Recommendation 13 of the 2006 PJCIS report should be implemented by creating a terrorism specific hoax offence.

### **Recommendation 8**

Recommendation 18 of the 2006 PJCIS report should be implemented by insertion of the word ‘material’ before ‘support’ in section 102.7 of the *Criminal Code*.

We further recommend that consideration be given to implementing Recommendation 14 of the Sheller Committee that ‘material’ be defined as not including ‘the mere publication of views that appear to be favourable to an organisation or its objectives’.

**Recommendation 9**

Recommendation 5 of the Clarke Inquiry should be revisited and the clarification of the fault elements of section 102.7 as proposed by the Attorney-General's Department in its 2009 Discussion Paper be implemented.

**Recommendation 10**

The amendments recommended by the Sheller Committee and in the 2006 PJCIS report in respect of the full range of offences in Division 102 should be implemented.

**Recommendation 11**

We recommend that the cap on pre-charge detention should be in the order of 48 hours.

**Recommendation 12**

We do not support the introduction of a warrantless search power for the AFP as set out in proposed section 3UEA.

**Recommendation 13**

Any discussion of the introduction of a new warrantless search power for the AFP should be postponed until after the 2010 COAG review has been conducted. In the alternative, the introduction of such a power might be referred to COAG for consideration as part of its review.

#### **Recommendation 14**

If the warrantless search power is introduced, we recommend that the AFP:

- (a) be required to obtain an ex post facto search warrant from a magistrate or judge; and,
- (b) be required to report annually to the Commonwealth Parliament regarding the exercise of the warrantless search power.

#### **Recommendation 15**

We recommend that there be a wholesale review of the terms and operation of the *NSIA*. This should include an assessment of other available options to protect national security information. We do not believe that amendments to the *NSIA* along the lines of those in the Bill should be made until after such a review is conducted.

#### **Recommendation 16**

We do not support the proposal in the Bill to expand the notification obligation to the issue of subpoenas.

#### **Recommendation 17**

There should be a review of the definition of ‘national security’ in the *NSIA* with the aim of tightening the definition, and clarifying when a person will be committing an offence by failing to notify the Attorney-General or the courts of the potential disclosure of national security information.

#### **Recommendation 18**

The courts should have the *discretion* to close the court-room when considering what orders to make under section 31 of the *NSIA*.

#### **Recommendation 19**

We recommend that section 31(8) be repealed. This would reinstate the position prior to 2004, whereby it was left to the discretion of the courts to determine whether to give more weight to the prejudice to national security or the adverse effect on the defendant’s right to a fair trial.

In the alternative, we believe that the word ‘substantial’ should be removed from section 31(7)(b).

#### **Recommendation 20**

The Committee should consider the implications of the proposed amendments on human rights and civil liberties in detail. In particular, it is imperative that the proposed amendments in the Bill be examined for their compliance with international treaty law such as the ICCPR in light of relevant international case law.

## REVIEW PROCESS

### The Review Process

In August 2009, the Commonwealth Government released its National Security Legislation Discussion Paper. The Discussion Paper contained an Exposure Draft of the Bill (as well as an Exposure Draft of the Parliamentary Joint Committee on Law Enforcement Bill). We commend the Government for the transparent manner in which it approached the drafting of the Bill, and for inviting the public to make submissions in response to the Discussion Paper. A selection of these submissions (42) was published on the website of the Attorney-General's Department.<sup>1</sup> The total number of submissions made to the Department is unclear and, significantly, no submissions from the Australian Federal Police or any other Government agency is available on the website.

In the Second Reading Speech on the Bill, the Commonwealth Attorney-General, Robert McClelland, stated that '[t]he Government has taken into account some valuable suggestions made by those who provided feedback on the proposals'.<sup>2</sup> However, this statement is belied by a detailed comparison of the Exposure Draft against the Bill. We note that, in referring the Bill to the Senate Legal and Constitutional Committee, the Senate stated that:

The government's 448 page complex exposure draft of this legislation provoked expert response. A thorough examination is required of what adjustments have been made.<sup>3</sup>

Annexed to this submission is a table which sets out the specific amendments proposed in the Exposure Draft of the Bill and any changes made in the final version of the Bill. In brief, of the 267 amendments to Australia's anti-terrorism legislation proposed in the Bill, only 66 of these reflect changes made since the Exposure Draft.<sup>4</sup> As the table demonstrates, most of these 66 changes can be described as technical (as opposed to substantive) changes.

The minimalist nature of the changes made by the Commonwealth Government in response to the public submissions is disappointing. For example, 15 of the 42 submissions published on the

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<sup>1</sup> See, [http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews\\_Nationalsecuritylegislation-Publicconsultation\\_SubmissionstotheNationalSecurityLegislationPublicConsultation](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Nationalsecuritylegislation-Publicconsultation_SubmissionstotheNationalSecurityLegislationPublicConsultation).

<sup>2</sup> Parliament of Australia, House of Representatives, *Hansard*, 18 March 2010, 2921.

<sup>3</sup> Parliament of Australia, Senate, *Hansard*, 18 March 2010, 2287.

<sup>4</sup> This does not include Schedule 9 of the Bill, which introduces 50 amendments to the *Inspector-General of Intelligence and Security Act 1986*, none of which are included in the Exposure Drafts.



Attorney-General's Department website addressed the Government's proposal to introduce a 7 day cap on pre-charge detention. All of these submissions opposed the proposal, suggesting that a lower cap – somewhere between 24 and 72 hours – should be introduced. Moreover, *no* submission available on the Attorney-General's Department website expressed support for the Government's proposal. Similarly, 22 submissions addressed the Government's proposal to give the AFP a power to conduct warrantless searches in emergency situations. 18 of these submissions opposed the proposal outright. A further three submissions supported the proposal *only* if significant amendments were made. Only one submission supported the Government's proposal.

It is disappointing that the Government has chosen to ignore key arguments and suggestions put in the submissions in relation to fundamental aspects of the proposed legislative amendments. In particular, it is regrettable that it has done so without providing any explanation as to why the initially proposed (and highly problematic) amendments were retained. We feel that such explanations would have been necessary to allow for a meaningful engagement with experts and the community.

In light of these shortcomings, and despite the previous review process conducted by the Attorney-General's Department, the Senate Legal and Constitutional Committee has an important role to play in scrutinising the Bill and in examining whether its provisions are *necessary* and *proportionate*. The importance of a proportionality-based approach to legislative reform has been previously recognised by the Sheller Committee which considered it essential that any counter-terrorism measures enacted by the Commonwealth Parliament are a 'proportionate means of achieving the intended object of protecting the security of people living in Australia ..., including protecting them from threats to their lives.'<sup>5</sup> Likewise, the Inspector-General of Intelligence and Security has noted that there is 'a vital public interest in ensuring that any new measures to protect national security which have been implemented, or are presently being contemplated, should not be unduly corrosive of the values, individual liberties and mores on which our society is based.'<sup>6</sup>

### The Need for Proportionality

The proportionality principle is a well-recognised principle of law, public policy and good governance. In addition, the Commonwealth Government has an obligation under international law

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<sup>5</sup> Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 69-73 (Sheller Committee); PJCIS, *Review of Security and Counter Terrorism Legislation* (2006) 3 (PJCIS 2006 Report).

<sup>6</sup> Inspector General of Intelligence and Security, Annual Report 2004-2005 2.

to consider the proportionality principle when introducing measures that affect the rights of individuals. This obligation stems primarily from the International Covenant on Civil and Political Rights (ICCPR) to which Australia became a party in 1980. In the context of counter-terrorism, the obligation is further underlined by a range of United Nations Security Council resolutions that call on States to ensure that ‘any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.’<sup>7</sup> As noted by the United Nations Commissioner for Human Rights<sup>8</sup> as well as by the United Nations Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism,<sup>9</sup> when introducing new laws to combat terrorism, the Commonwealth Government is obliged to undertake an assessment of whether the proposed measures are necessary and proportionate to the threat that it seeks to counter. This obligation includes an assessment of whether the particular measure adopted is the least restrictive means of achieving a legitimate protective purpose, as well as an explanation of the importance of any individual right affected and the seriousness of the interference with the right.

A proportionality analysis usually consists of three main steps. The first step concerns suitability and is devoted to verification that, with respect to the measure in question, the means adopted by a government is rationally related to stated policy objectives. The requirement of suitability is usually very broadly defined and means that the government must only introduce legislative measures that are generally suitable to achieve the intended purpose. In fact, ‘suitability’ might be more precisely defined in negative terms that no completely unsuitable measure may be taken by a government.

The second step, necessity, has more bite. The core of necessity analysis is the deployment of a least-restrictive means test. This requires a government to ensure that the measure does not curtail individual rights and liberties any more than is necessary to achieve stated public policy goals. As such, the proportionality principle’s requirement of necessity relates to the scope of a government’s and to the question of whether the legislative measure under consideration is warranted by the exigencies of the situation. It means that a government must refrain from interfering with the human rights of its citizens if it can accomplish the same aim without interference with those rights at all,

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<sup>7</sup> See, for example, United Nations Security Council Resolution 1456 (2003) [6].

<sup>8</sup> Joint statement by the Director of the OSCE-ODIHR, the UN High Commissioner for Human Rights and the Secretary-General of the Council of Europe, 29 November 2001.

<sup>9</sup> Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism* (14 December 2006) A/HRC/4/26/Add.3.

or by resorting to a less drastic measure. If the measure in question fails the tests of suitability or necessity, the act is *per se* disproportionate.

The last step is the most complex. It requires an analysis of whether the measure is appropriate and strictly proportionate. The requirement of appropriateness means that legislative action by the government is unacceptable if the burden created thereby is disproportionate to the purpose of the measure. This is to ensure that the restriction does not jeopardise the right itself. The requirement of strict appropriateness also entails that the more the administrative action affects fundamental expressions of human freedom of action, the more carefully the reasons serving as its justification must be examined against the principal claim to liberty of the citizen.<sup>10</sup>

We feel that the Commonwealth Government has given inadequate consideration to the requirement of proportionality when drafting the proposed legislative amendments. In fact, a number of the proposed amendments contained in the Bill raise serious concerns in relation to their proportionality. For instance, it is questionable whether the Government's proposal to introduce a 7 day cap on pre-charge detention satisfies the proportionality test. Jurisprudence of international courts and tribunals such as the Human Rights Committee and the European Court of Human Rights has insisted upon strict (and much shorter) temporal limits on pre-charge detention, even in the counter-terrorism context. It is thus essential that the Senate Legal and Constitutional Committee scrutinises each of the Bill's provisions in relation to their necessity and proportionality.

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<sup>10</sup> See also, German Federal Constitutional Court, BVerfGE 17, 306 (1963).

Schedule 1 of the Bill proposes to amend the sedition offences and related provisions, currently set out in Part 5.1 of Division 80 of the *Criminal Code 1995* (Cth) (*'Criminal Code'*). This part of the *Criminal Code* was the subject of significant amendment in 2005. In 2006, the Australian Law Reform Commission ('ALRC') was given the task of recommending amendments to improve these laws. In particular, the ALRC considered whether these provisions 'effectively address the problem of urging the use of force or violence'.<sup>11</sup> The ALRC's final report, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104), made a number of recommendations for reform. The Explanatory Memorandum accompanying the Bill and the Discussion Paper both express the Commonwealth Government's support for ALRC 104. Subject to certain exceptions outlined in detail in this part of our submission, the reforms proposed in the Bill would implement the ALRC's recommendations.

There is a broader question as to whether it is necessary or desirable to retain 'urging force or violence' offences at all. Some argue persuasively that the ordinary criminal offence of incitement, in combination with other existing offences, is sufficient to deal with the criminality that these offences are designed to combat.<sup>12</sup> Without commenting on that broader question, this submission proceeds from the Commonwealth Government's assumption that there should to be more specific legislation criminalising the urging of force or violence in certain circumstances.

Generally speaking, we support the recommendations contained in ALRC 104, and the majority of the provisions in the Bill that would reform Commonwealth sedition law. In particular, we endorse the following changes that were originally proposed in the Discussion Paper, and are now set out in the Bill:

- The term 'sedition' should not be used in Australian criminal law (items 4, 5 and 17 of Schedule 1 to the Bill);
- The 'urging force or violence' offences should contain a clear intention element, with a clear onus on the prosecution (items 18 and 20 of Schedule 1 to the Bill);
- The 'urging force or violence' offences should apply to referenda as well as parliamentary elections (item 20 of Schedule 1 to the Bill);

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<sup>11</sup> Australian Law Reform Commission (ALRC), *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) 5.

<sup>12</sup> See, for example, *ibid* 169.

- The offences of ‘urging a person to assist’ an enemy of Australia, or those engaged in armed hostilities against the Australian Defence Force, in subsections 80.2(7) and (8) should be repealed (item 24 of Schedule 1 to the Bill); and
- The requirement to obtain the Attorney-General’s consent in respect of these offences should be repealed (item 30 of Schedule 1 to the Bill).

As outlined in greater detail below, we further recommend that the Bill be amended so as to produce the following results:

- The offences regarding urging violence within the community ought properly to be dealt with in anti-vilification legislation, rather than in national security legislation; and
- The ‘good faith’ defence in section 80.3 should be repealed and replaced with a different provision.

### Intercommunity Violence Offences

Item 35 of the Bill proposes to introduce new sections 80.2A and 80.2B, which contain two sets of offences. The first are ‘public order’ offences — that is, offences whose primary purpose is to protect the broader public, rather than simply any people who are specifically targeted by the criminal behaviour. Both proposed sections 80.2A(1) and 80.2B(1) are examples of this type of offence, because an element of the offence is that ‘the use of force or violence would threaten the peace, order and good government of the Commonwealth’. The second type of offence — as seen in proposed sections 80.2A(2) and 80.2B(2) — is directed at protecting individuals who might suffer harm from criminal behaviour. A defendant could be found guilty of such an offence even if their behaviour does *not* threaten the peace, order and good government of the Commonwealth.

As the ALRC accepted, there is a justification for including public order offences in this part of the *Criminal Code*. However, the offences in proposed sections 80.2A(2) and 80.2B(2) are, in essence, anti-vilification offences. There are considerable dangers in connecting the inter-group violence offences with Australia’s legislative response to terrorism. In particular, presenting such offences as counter-terrorism measures incorrectly categorises inter-group violence as akin to terrorism, and can serve to reinforce the stereotyping of certain ethnicities or religions as being terrorist producers.<sup>13</sup>

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<sup>13</sup> Ibid 209.

## Recommendation 1

The offences in proposed subsections 80.2A(2) and 80.2B(2) should be recast as anti-vilification offences, and moved into legislation, such as the *Racial Discrimination Act 1975* (Cth), whose primary object is to promote human rights.

## Good Faith Defence

The Bill follows the path foreshadowed in the Discussion Paper in relation to the good faith defence in section 80.3. That is, item 28 of Schedule 1 to the Bill would retain this defence but add a number of contextual factors that the trier of fact should take into account in considering this defence. The Explanatory Memorandum refers briefly to the ALRC's recommendation in relation to the good faith defence, perhaps giving the impression that the Bill adopts the ALRC's recommendation.<sup>14</sup> This is not the case. The ALRC in fact recommended repealing the 'good faith' defence in section 80.3, instead providing that, in determining whether a defendant exhibited the element of intention required by the section 80.2 offences, the court should be required to consider

the context in which the conduct occurred, including (where applicable) whether the conduct was 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 connection with an industrial dispute or an industrial matter; or
- (d) in the dissemination of news or current affairs.<sup>15</sup>

The Discussion Paper and the Bill both depart from the ALRC's approach, with the Bill proposing the insertion of an additional subsection that expressly allows a court to consider such matters in determining whether the defence in section 80.3 has been made out. While the Explanatory

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<sup>14</sup> Explanatory Memorandum to the National Security Legislation Amendment Bill 2010 (Cth), 10.

<sup>15</sup> ALRC, above n 11, Recommendation 12-2.

Memorandum does not account for the difference between the ALRC's recommendation and the Bill, the Discussion Paper states that while the Government 'supports in principle' the ALRC's recommendation, it believes that the ALRC's approach would 'overly complicate the newly drafted urging violence offences'.<sup>16</sup>

In other words, in drafting the Bill, there seems to have been agreement with the sentiment behind the ALRC's recommendation, but not with its proposed method of execution. Therefore, the disagreement is not really one of policy (what the law should attempt to do), but rather how best to translate the agreed policy into law.

In practice, the solution proposed in the Bill would be problematic. It is logically difficult to conceive of a situation where a trier of fact is convinced that the elements of an urging force or violence offence in section 80.2 are satisfied, but nevertheless the defendant has carried out this behaviour in 'good faith'. As the ALRC observed, the notion of 'good faith' is difficult to square with offences of this nature.<sup>17</sup> One can readily imagine situations in which a person urges the overthrow of the Constitution (cf. section 80.2(1) of the *Criminal Code*) in good faith — for example, because the person believes that the current Constitution should be peacefully and democratically replaced with another Constitution. Equally, one can imagine how a person might urge the overthrow of the Constitution in bad faith — for instance, if the person wanted to carry out a coup d'état and install himself or herself as dictator. However, it is almost impossible to conceive of a situation where a person *intentionally urges force or violence* to overthrow the Constitution, but does so in good faith. This is because urging force or violence, if it is to have the meaning intended by the Bill, must involve an element of malice or *bad* faith.

The defence in section 80.3, and the ALRC's recommendations, are both designed to prevent a trier of fact from concluding that a person intentionally urges force or violence in circumstances where the person's behaviour is essentially innocuous. They are designed to prevent these offences from inhibiting free expression such as genuine media reportage, public comment and academic debate. However, the defence as proposed in the Bill would be practically very difficult to rely on. This is because it is only of assistance to a defendant where the other elements of the offence have been satisfied. But by that point, the defence becomes logically difficult, if not impossible, for a defendant (who would bear the evidential onus of proof)<sup>18</sup> to make out. In practice, one would hope

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<sup>16</sup> Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 29.

<sup>17</sup> ALRC, above n 11, 244-246.

<sup>18</sup> See, note accompanying section 80.3 of the *Criminal Code*.

that a court would take this into account in interpreting section 80.3, allowing it to have an operation that is more in keeping with the intention manifested in the Discussion Paper. However, this would involve an interpretation of the provision that goes well beyond its natural and ordinary meaning, and would seem an unnecessary risk to run that, in any event, could chill freedom of expression.

## **Recommendation 2**

Instead of amending the good faith defence in section 80.3 of the *Criminal Code*, as proposed in the Bill, we recommend that the defence be repealed and replaced with a provision along the lines of that proposed by the Australian Law Reform Commission.



## SCHEDULE 2 OF THE BILL:      TERRORISM

### Definition of ‘Advocates’

Items 1-2 of Schedule 2 to the Bill amend the definition of ‘advocates’ in section 9A(2) of the *Classification (Publications, Films and Computer Games) Act 1995* and section 102.1(1A) of the *Criminal Code* in respect of a ‘terrorist act’. The definition in both provisions is identical, with that found in the *Classification Act* having been modelled directly on the section 102.1(1A) of the Code. While on an earlier occasion, some of the authors of this submission argued against the inclusion of section 9A(2) in its entirety,<sup>19</sup> for present purposes we accept that amendment of these identical provisions should be simultaneous for the sake of consistency. The following remarks are directed, however, to the definition in section 102.1(1A), which serves a rather different purpose from the operation of the same text at section 9A(2).

Under Division 102 of the *Criminal Code*, the Governor-General may make regulations proscribing an organisation as a ‘terrorist organisation’ if the Attorney-General is satisfied on reasonable grounds that the organisation ‘advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)’ (paragraph 102.1(2)(b)). Currently, paragraph 102.1(1A)(c) provides that an organisation ‘advocates’ the doing of a terrorist act if ‘the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act’.

A number of inquiries examining the operation of the proscription provisions have criticised the existing advocacy provisions as too broad-reaching, expansive, ambiguous and imprecise, as well as posing a threat to freedom of expression.<sup>20</sup> Conceivably, the current definition of ‘advocacy’ may result in the proscription of an organisation (which may be a company, club or church group) even where:

- The person who praised the terrorist act is not the leader of the group;
- The statement is not on official material distributed by the organisation;

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<sup>19</sup> A Lynch, E MacDonald and G Williams, Submission to Inquiry into the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007 (10 July 2007).

<sup>20</sup> Sheller Committee, above n 5, 69-73; PJCIS 2006 Report, above n 5, 68-71.

- The statement is not accepted (and perhaps even rejected) by other members as representing the views of the group;
- The organisation has no other involvement in terrorism; or
- The person praising terrorism did not intend for a terrorist act to be committed.

Furthermore, the definition is not limited to circumstances where a terrorist act has actually occurred, and captures statements and conduct in support of previous and prospective terrorist acts.

The listing of an organisation has serious criminal consequences for any individual connected to a proscribed organisation. First, a person who is merely a member or associate of such an organisation may have committed a criminal offence. The membership and association offences carry terms of imprisonment ranging from 3 to 10 years. Second, for the purposes of the prosecution of an individual for a terrorism offence in Division 102, the proscription of the organisation furnishes conclusive proof that the organisation is a terrorist organisation. There is no means available to the defendant to challenge that categorisation of the organisation.<sup>21</sup>

The effect of Item 2 of Schedule 2 to the Bill is to insert the word ‘substantial’ before ‘risk’ in section 102.1(1A)(c), which accords with the recommendation contained in the Parliamentary Joint Committee on Intelligence and Security (PJCIS) *Review of Security and Counter Terrorism Legislation* in December 2006 (‘2006 PJCIS report’).<sup>22</sup> According to the Discussion Paper, this amendment raises the threshold from a ‘mere’ risk that praise might have the effect of leading another person to engage in a terrorist act to a ‘heightened’ risk that is ‘real and apparent on the evidence presented’.<sup>23</sup> The 2006 PJCIS report noted that such ‘a small and essentially technical amendment to clarify that ‘substantial risk’ is the intended threshold, would provide some improvement in certainty and proportionality’.<sup>24</sup>

This addition was supported by the Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) (‘Sheller Committee’). The primary recommendation of the Sheller Committee, however, was that paragraph 102.1(1A)(c) be deleted in its entirety.<sup>25</sup>

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<sup>21</sup> Ibid 70.

<sup>22</sup> Ibid 71.

<sup>23</sup> Attorney-General’s Department, above n 16, 57.

<sup>24</sup> PJCIS 2006 Report, above n 5, 71.

<sup>25</sup> Sheller Committee, above n 5, 73.

We believe that it is important to clarify and tighten the risk threshold necessary to ground the advocating of a terrorist act. While the amendment in items 1 and 2 of Schedule 2 to the Bill is preferable to the status quo, we support the bolder change proposed by the Sheller Committee. That is, we believe that paragraph 102.1(1A)(c) should be deleted in its entirety. Paragraph (c) is an extraordinary extension of the power of proscription and of criminal liability, since it collectively punishes members of groups for the speech of their associates beyond their control.

It is not hard to imagine that bodies which refer approvingly to the activities of the leaders of national liberation movements, including Nelson Mandela or Mahatma Gandhi, could conceivably fall foul of Australia's counter-terrorism laws. Many other hypothetical examples come to mind, such as where someone praises past liberation struggles in East Timor or against a colonial power, or current battles in West Papua, the Middle East and parts of Africa. The very real difficulty in attaching consequences through the criminal justice system by reference to 'terrorist organisations' was recently demonstrated by the prosecution of three men for financing the LTTE (Tamil Tigers) in the Victorian Supreme Court. In sentencing jail terms but then releasing all three men on \$1000 good behaviour bonds, Justice Coghlan accepted they knew of the LTTE's reputation as a terrorist organisation but also that they personally considered it to be a legitimate separatist group.

Regardless of the merits of specific resistance movements, the inclusion of 'praise' in the Australian definition of 'advocacy' renders it so broad as to attach legal consequences to speech about participants in the many ongoing armed struggles around the world.

### **Recommendation 3**

Paragraph (c) should be deleted from the definition of 'advocacy' in subsection 102.1(1A) of the *Criminal Code* and section 9A(2) of the Classification (Publications, Films and Computer Games) Act 1995.

### Expiration Time for Regulations

A regulation listing a terrorist organisation automatically ceases to have effect two years after it is made (subsection 102.1(3) of the *Criminal Code*). According to the Parliamentary Joint Committee

of Intelligence and Security, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995* (2007) ('2007 PJCIS report'), the purpose of this provision is to require the Attorney-General to consider afresh all relevant information in order to be satisfied that a sufficient factual basis exists to justify the proscription of an organisation for a further period.<sup>26</sup> As that Report states:

The automatic cessation of a listing has been effective in institutionalising the review and ensuring that any changes in circumstances have been taken into account, for example, the renouncement of violence, entry into a peace process, and so forth.<sup>27</sup>

Item 3 of Schedule 2 to the Bill would amend the period of automatic expiration in subsection 102.1(3) by increasing it from two years to three years. Regardless of whether a regulation ceases to have effect after two or three years, we emphasise the importance of there being a meaningful process of review of regulations. We note the important role played by the PJCIS in reviewing both the listing and the re-listing of a group as a terrorist organisation. The PJCIS should be given sufficient notice of the making of a new regulation, as well as updated information about the particular organisation, to enable it to carry out its review function.

### Miscellaneous

The remaining amendments in Schedule 2 of the Bill to the *Criminal Code* (items 4-24) are either the removal of expired transitional provisions or changes to definitions of 'family member' or 'close family member' to ensure consistency with broader legislative changes in the recognition of same-sex relationships. We view all these items as unobjectionable.

### Amendments Not Found in the Bill

Although we appreciate that the Bill is a standalone legislative instrument, some comment must be made on its silence as to many of the proposals put forward by the Attorney-General's Department in its *National Security Legislation Discussion Paper* in late 2009. While certainly not without major limitations, the Discussion Paper raised the prospect of far more substantive changes to Part 5.3 of the *Criminal Code* than those which have survived for inclusion in Schedule 2 of this Bill. As many of those discarded initiatives had their roots in the major reviews of the PJCIS, the Sheller

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<sup>26</sup> PJCIS, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007) 50.

<sup>27</sup> PJCIS, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007) 51.

Committee and the Clarke Inquiry into the Case of Dr Mohamed Haneef ('Clarke Inquiry'), this Committee may wish to consider recommending their reinstatement.

In the Second Reading Speech in relation to the Bill, the Commonwealth Attorney-General, Robert McClelland, justified the failure to make any substantial amendment of the core provisions of Divisions 101 and 102 of the *Criminal Code* on the ground that the States must first amend the referring legislation by which they enlivened the topic of 'terrorist acts' for Commonwealth legislative power.<sup>28</sup> This is not correct. Clause 3 of the *Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisdictional Crime*, 5 April 2002, provides that any amendment based on the referred power simply requires prior 'consultation with and agreement of States and Territories'. The referral legislation itself provides the Commonwealth with capacity to make 'express amendments' to the initial text-based referral and, under section 100.8(2) of the Code, use of that power requires only approval of the amendments in question by '(a) a majority of the group consisting of the States, the Australian Capital Territory and the Northern Territory; and (b) at least 4 States'. State legislative activity is not a precondition to Commonwealth amendment of the law.

Further, the States' referring legislation recognises that the Commonwealth may also make amendments to the initial text using those legislative powers it holds aside from the State references. Following the decision of the High Court in *Thomas v Mowbray*<sup>29</sup> the breadth of the Commonwealth's defence power under section 5(vi) of the Constitution must be appreciated as the primary source of the legal validity of Part 5.3 of the Code. It independently provides the Commonwealth with power to make the amendments not carried forward from the Discussion Paper.

(a) Section 100.1 – Definition of a 'Terrorist Act'

The Discussion Paper proposed a number of changes to the definition of a 'terrorist act' in section 100.1 of the *Criminal Code*:<sup>30</sup>

*Recognising International Bodies as Targets of Terrorism*

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<sup>28</sup> It is not explained why Item 2 of Schedule 2 (which inserts 'substantial' before 'risk' in paragraph 102.1(1A)(c)) is not subject to this requirement.

<sup>29</sup> (2007) 233 CLR 307.

<sup>30</sup> Attorney-General's Department, above n 16, 43-49.

The Discussion Paper proposed the addition of section 100.1(1)(c)(ia) in order to recognise an action or threat of action as a ‘terrorist act’ when made with the intention of ‘coercing, or influencing by intimidation, the United Nations, a body of the United Nations or a specialised agency of the United Nations’.

This proposed amendment responded directly to Recommendation 11 of the 2006 PJCIS report.<sup>31</sup> We support it.

#### **Recommendation 4**

Recommendation 11 of the PJCIS 2006 report should be implemented through amendment of section 100.1 to recognise terrorist acts targeting international governmental organisations.

#### *Broadening ‘Harm’*

The Discussion Paper proposed the removal from the definition of ‘terrorist act’ the words ‘that is physical harm’ at paragraphs 100.1(2)(a) and (3)(b)(i). This would mean simply that the definition of ‘harm’ in the Dictionary to the *Criminal Code* would apply. Therefore provisions which rely on the definition of ‘terrorist act’ would now extend to cover those situations where serious harm to a person’s mental health caused by an actual or threatened terrorist attack. This change was recommended by the Sheller Committee.<sup>32</sup> The PJCIS, in its 2006 report, did not share this view,<sup>33</sup> however, it was prepared for the Commonwealth Government to consult with the States and Territories for their thoughts on this issue.

While we acknowledge that the Attorney-General’s Department received submissions which opposed this change, we continue to favour including damage in all the forms which the law recognises more generally when criminalising terrorism. Apart from the attraction of simple consistency on this score, the primary aim of terrorist groups is to instil fear in the community – and in that sense, we are all intended victims. Usually the lives of some individuals are used by

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<sup>31</sup> PJCIS 2006 Report, above n 5.

<sup>32</sup> Sheller Committee, above n 5, Recommendation 6.

<sup>33</sup> PJCIS 2006 Report, above n 5, Recommendation 9 (PJCIS 2007 Report).

extremists to this end, but it is appropriate that the law recognise the wider harm intended and inflicted by those who peddle political violence.

As a matter of practical application, perhaps little is likely to turn on the expansion of the harm element of the definition of ‘terrorist act’ since ideally plots will be foiled and charges laid in connection with the preparatory stages of a terrorist plan. This has been the actual operation of the laws to date and prosecutions have been successful even though the ‘harm’ has not come to fruition. Were a plot to progress to execution, it would seem very likely that some physical harm (bear in mind the definition currently includes property damage absent any casualties) would result. However, it is not totally inconceivable that an act of terrorism could occur without physical victims – a thwarted hostage-taking for example.

#### **Recommendation 5**

Recommendation 6 of the Final Report of the Security Legislation Review Committee should be implemented by delimiting the form of ‘harm’ in the definition of ‘terrorist act’ in section 100.1.

#### *Threat*

The Discussion Paper acknowledged that there was clear consensus in earlier inquiries<sup>34</sup> that criminalisation of the making of a threat of terrorist violence would be better dealt with through a separate offence rather than retention in the definition of ‘terrorist act’ itself. The Discussion Paper rejected these calls saying that ‘to remove the ‘threat of action’ from the definition of terrorist act dilutes the policy focus of criminalising ‘threat of action’ within the offences in Division 101 of the *Criminal Code*’.<sup>35</sup> We found that position to be an insufficient justification of the status quo given the conceptual difficulty and lack of clarity to which the inclusion of ‘threat’ in the definition of ‘terrorist act’ gives rise. Additionally, we were opposed to the government’s proposed solution to better accommodate ‘threat’ within the definition by loosening the causal requirements of harm.

<sup>34</sup> Sheller Committee, above n 5, Recommendations 7 and 8; PJCIS 2006 Report, above n 5, Recommendation 10.

<sup>35</sup> Attorney-General’s Department, above n 16, 49.

### **Recommendation 6**

Recommendations 7 and 8 of the Sheller Committee and Recommendation 10 of the 2006 PJCIS report should be implemented by removing the ‘threat’ of terrorist violence from the definition of ‘terrorist act’ in section 100.1 and criminalising it as a separate offence.

#### **(b) New Section 101.7 – Terrorism Hoax**

The Discussion Paper proposed the insertion of a new section 101.7 which would criminalise the making of terrorism hoaxes. This also had been the subject of recommendations by both the Sheller Committee and in the 2006 PJCIS report.

### **Recommendation 7**

Recommendation 20 of the Sheller Committee and Recommendation 13 of the 2006 PJCIS report should be implemented by creating a terrorism specific hoax offence.

#### **(c) Section 102.7 – Offence of Providing Support to a Terrorist Organisation**

Pursuant to Division 102.7 of the *Criminal Code*, it is an offence for a person to intentionally provide support or resources to an organisation that would help the organisation engage in preparing, planning or assistance in or fostering the doing of a terrorist act, providing that the person either knows that, or is aware of a substantial risk that, the organisation to which they are providing support or resources is a terrorist organisation.

We accept that it is appropriate to criminalise the provision of certain types of support to a terrorist organisation.

The Discussion Paper proposed two amendments to section 102.7:



- The word ‘material’ be inserted before ‘support’, so as to require a person to intentionally provide ‘material support’ to an organisation rather than mere ‘support’; and
- The fault elements in relation to the physical elements of the offence are clarified, so that a person must provide resources or material support to an organisation *with the intention* of helping the organisation engage in terrorist activity.<sup>36</sup>

### *Material Support*

Both the Sheller Committee and the 2006 PJCIS Report took the view that ‘support’ in the context of section 102.7 should be refined to mean ‘material support’. This is because the rationale for the offence is to target the provision of support (and resources) that helps a terrorist organisation to *engage in terrorist activity*.<sup>37</sup> Therefore, to the extent that the Discussion Paper proposes to include the word ‘material’ in section 102.7, it is for the purposes of clarification only.

The real problem, as identified by the Sheller Committee, is that ‘support’ is not defined in the *Criminal Code*. It ‘could be regarded as support that directly or indirectly helps a terrorist organisation engage in a terrorist act’ and may even ‘extend to the publication of views that appear to be favourable to a proscribed organisation and its stated purpose’.<sup>38</sup> The charging of Dr Mohamed Haneef under section 102.7 highlighted the very indeterminate meaning of ‘support’. Dr Haneef had simply provided a partially used SIM card to a relative in England before he left that country.

We support the addition of the word ‘material’ before ‘support’ as a means of limiting the scope for judicial interpretation of section 102.7. However, we further recommend that the word ‘material’ be defined in the *Criminal Code*. A model for this type of approach can be found in the United States offence of ‘providing material support to terrorists’. This offence contains an extended definition of ‘material support or resources’.<sup>39</sup> We believe that, in the context of section 102.7, ‘material’ should be defined as not including ‘the mere publication of views that appear to be favourable to an

<sup>36</sup> Attorney-General’s Department, above n 16, 62-65 (emphasis added).

<sup>37</sup> Sheller Committee, above n 5, 121; PJCIS 2006 Report, above n 5, 78 (emphasis added).

<sup>38</sup> Sheller Committee, above n 5, 121

<sup>39</sup> ALRC, above n 11, [11.32].

organisation or its objectives’.<sup>40</sup> We believe that this potential additional amendment would appropriately limit the scope of section 102.7 and minimise its impact on the freedom of expression.

### **Recommendation 8**

Recommendation 18 of the 2006 PJCIS report should be implemented by insertion of the word ‘material’ before ‘support’ in section 102.7 of the *Criminal Code*.

We further recommend that consideration be given to implementing Recommendation 14 of the Sheller Committee that ‘material’ be defined as not including ‘the mere publication of views that appear to be favourable to an organisation or its objectives’.

### *Fault Elements*

The report of the Clarke Inquiry noted that there was considerable confusion about the elements of paragraph 102.7(2)(a). That is, whether it is sufficient for the prosecution to prove that the defendant intentionally provided support or resources to an organisation *and* also intended that the support or resources would help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act. Or, alternatively, whether the prosecution must also establish that the defendant intended the resources to, or was reckless as to whether they would, help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act. Given this confusion, it was recommended that there be ‘a reconsideration of the wording of the offence’.<sup>41</sup>

The Discussion Paper accepted the need for clarification of the fault elements of section 102.7. Under its proposed amendment, for an offence to be committed under either subsection 102.7(1) or (2) it would be necessary to establish two fault elements, namely, that the person intentionally

<sup>40</sup> Suggested in the *Anti-Terrorism Laws Reform Bill 2009* (Cth) Item 15. See also Sheller Committee, above n 5, 13 (Recommendation 14).

<sup>41</sup> The Hon. John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008) 256-260 (Clarke Report).

provides resources or material support to an organisation and that this is done with the intention of helping that organisation engage in terrorist activity.<sup>42</sup>

## **Recommendation 9**

Recommendation 5 of the Clarke Inquiry should be revisited and the clarification of the fault elements of section 102.7 as proposed by the Attorney-General's Department in its 2009 Discussion Paper be implemented.

### **(d) Other Offences**

No other offences in Division 102 were the subject of proposed amendment by the Discussion Paper, even though earlier reviews had made numerous suggestions to improve the Division 102 offences. These included:

- Replacing the membership offence of section 102.3 with an offence of participation in a terrorist organisation and expressly linking 'participation' to the purpose of furthering the terrorist aims of the organisation;<sup>43</sup>
- That section 102.5, dealing with training in respect of a terrorist organisation be redrafted 'as a matter of urgency', to define more clearly the type of training targeted – namely that which could reasonably prepare the trainees to commit a terrorist act;<sup>44</sup>
- Changing the legal burden to an evidential one in section 102.6, as well as providing an exemption to that offence for funds received solely for the purpose of providing legal representation;<sup>45</sup> and
- Whole or partial repeal of the section 102.8 offence of association with member of a terrorist organisation.<sup>46</sup>

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<sup>42</sup> Attorney-General's Department, above n 16, 62-65.

<sup>43</sup> PJCIS 2006 Report, above n 5, Recommendation 15.

<sup>44</sup> Sheller Committee, above n 5, Recommendation 12; PJCIS 2006 Report, above n 5, Recommendation 16.

<sup>45</sup> Sheller Committee, above n 5, Recommendation 13; PJCIS 2006 Report, above n 5, Recommendation 17.

<sup>46</sup> Sheller Committee, above n 5, Recommendation 15.

The Discussion Paper contained no statement explaining the omission of any of the above offences. Unsurprisingly, the Explanatory Memorandum confines its comments to the content of the present Bill.

**Recommendation 10**

The amendments recommended by the Sheller Committee and in the 2006 PJCIS report in respect of the full range of offences in Division 102 should be implemented.

Part 1C of the *Crimes Act 1914* (Cth) (*Crimes Act*) enables a terrorism suspect to be questioned without charge for up to 24 hours.<sup>47</sup> However, it also provides for the recognition of ‘dead time’ so that this period of questioning can be spread over an undefined number of days. This new pre-charge regime for terrorism offences was brought about by the *Anti-Terrorism Act 2004*. Its object was to provide for a longer, and more flexible investigation period for terrorism offences. However, the resulting legislation achieved this in an inadequate and flawed manner.

When the Anti-Terrorism Bill was debated in the Commonwealth Parliament in 2004, Professor Williams argued in a written submission and in oral evidence before the Senate Legal and Constitutional Legislation Committee for a maximum of two days detention without charge.<sup>48</sup> This was to overcome the possibility of significant periods of ‘dead time’ causing over-lengthy detention. The Attorney-General’s Department rejected the need for such a cap, with a senior official saying: ‘I would be extraordinarily surprised if the dead time, for example, in relation to the time zones would get anything like the sorts of time periods that were being suggested by Professor Williams.’<sup>49</sup>

Despite the apparent problem of having an unrestricted period of ‘dead time’ for questioning, no cap was then put on those provisions. The consequences of this flaw were explored in detail in the report by the Hon John Clarke QC into the case of Dr Mohamed Haneef<sup>50</sup> (it will be recalled that Dr Haneef was detained for 12 days, not two). This material is well reflected in the Discussion Paper.<sup>51</sup>

We do not support the proposal in the Bill to repeal current section 23DB of the *Crimes Act*, replacing it with a new provision that permits up to seven days of detention to be deemed ‘dead time’, and thus disregarded, during the pre-charge detention of a terrorism suspect (item 16 of

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<sup>47</sup> This include four hours of initial questioning (section 23 CA(4)) and up to 20 additional hours if allowed by a Magistrate or Justice of the Peace (section 23DA(7)).

<sup>48</sup> George Williams, Submission No. 7, 1, Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Anti-Terrorism Bill 2004* (May 2004).

<sup>49</sup> Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill 2004* (2004) [3.25].

<sup>50</sup> Clarke Report, above n 41.

<sup>51</sup> The amendments to Part 1C of the *Crimes Act 1914* (Cth) (and the recommendations of the Clarke Inquiry into the Case of Dr Mohamed Haneef) are discussed in: Attorney-General’s Department, above n 16, 87-144.

Schedule 3 to the Bill).<sup>52</sup> In proposing a seven day cap, the law would permit a maximum possible period of detention of up to eight days.<sup>53</sup> This is an enormous increase on the pre-charge detention time in the *Crimes Act* of 12 hours for non-terrorist suspects.<sup>54</sup>

The seven day cap is proposed in this Bill, as it was in the Discussion Paper, without first conducting the review of this area of law recommended by the Clarke Inquiry.<sup>55</sup> In the absence of such a review, insufficient evidence has been provided to support why a seven day cap is needed. Allowing pre-charge detention of up to eight days (or sixteen times the normal maximum period of 12 hours detention for non-terrorism offences) could only be justified by compelling evidence and clear reasoning. In the absence of such an inquiry, or of such material being set out in the Explanatory Memorandum accompanying the Bill or the Discussion Paper, there is insufficient justification for this proposal.

Support from the Clarke Inquiry for a seven day cap is weak at best. The inquiry recommended a review and not a specific cap. After a discussion over several paragraphs that noted varying periods of pre-charge detention, Mr Clarke concluded only by stating ‘I would tend to say that the cap should be *no more* than seven days’ (emphasis added).<sup>56</sup> Hence, the Clarke Inquiry only found that the cap should be seven days or less.

The maximum period of pre-charge detention for terrorism offences should be based upon clear evidence both as to the operational needs of investigating authorities and the impact of an extended period of time on the liberties of the detainee. Any increase in pre-charge detention over the normal maximum period for non-terrorism offences should be fully justified. We do not reach a final view as to the maximum period of pre-charge detention – in light of such evidence not yet having been produced – but put forward the proposal that the cap should be in the order of 48 hours.

## **Recommendation 11**

We recommend that the cap on pre-charge detention should be in the order of 48 hours.

<sup>52</sup> That proposal also reflects the policy position adopted in Attorney-General’s Department, above n 16, 126-127.

<sup>53</sup> Up to 24 hours of questioning plus up to seven days of ‘dead time’.

<sup>54</sup> *Crimes Act 1914* (Cth) s 23D.

<sup>55</sup> Clarke Report, above n 41, Recommendation 3.

<sup>56</sup> Ibid 249.



## **SCHEDULE 4 OF THE BILL:**

## **POWERS TO SEARCH PREMISES IN RELATION TO TERRORISM OFFENCES**

### Power to Enter and Search Premises Without a Warrant

Proposed section 3UEA (item 4 of Schedule 4 to the Bill) would allow a member of the AFP to enter premises without a warrant where he or she reasonably suspects that:

- (a) it is necessary to exercise this power in order to prevent a thing that is on the premises from being used in connection with a terrorism offence; and
- (b) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.

The purpose of entry is to search the premises and seize the particular thing. If the member of the AFP finds any other thing relevant to an indictable or summary offence, he or she must secure the premises and then obtain a search warrant. In relation to this, the Commonwealth Attorney-General, Robert McClelland MP, stated:

The safeguard is that [the AFP] are not permitted, as a result of that entry without a warrant, to undertake law enforcement, evidence gathering tasks. They have to seal the premises and they have to go away to obtain a warrant. The whole thrust and intent is to enable police to render a premises safe and specifically to address some explosive device or material or another dangerous substance such as a dangerous chemical.<sup>57</sup>

Not only is it doubtful that such a clear line can be drawn between searches for the purpose of seizing a particular item and general searches undertaken as part of a criminal investigation, but the Attorney-General's statement also fails to appreciate the underlying rationale for search warrants. Searches of private property – regardless of their purpose – violate the rights to home and privacy. For this reason, and in order to limit the potential for misuse of power by the police during the course of a search, it is important that searches be overseen by a magistrate or judge. In each case, it is for a magistrate or judge to weigh any evidence of a criminal offence and determine whether that evidence is sufficiently strong to justify a violation of the rights to home and privacy by the police.

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<sup>57</sup> 7:30 Report, Australian Broadcasting Corporation, 12 August 2009  
<[http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Transcripts\\_2009\\_ThirdQuarter\\_12August2009-Interview-ABC7.30ReportwithKerryOBrien](http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Transcripts_2009_ThirdQuarter_12August2009-Interview-ABC7.30ReportwithKerryOBrien)> (18 September 2009).



A compelling justification should be demonstrated before the police are permitted to conduct searches of private property without judicial supervision. The most detailed (albeit still vague) explanation of the need for warrantless searches was set out by the Commonwealth Government in the Discussion Paper:

- The power is ‘intended to address *operational issues* that have emerged in law enforcement operations’;<sup>58</sup> and
- ‘The availability to the AFP of wider emergency powers has become *increasingly necessary* particularly in the area of counter-terrorism operations. An emergency entry power is necessary to supplement existing search, entry and seizure powers which only give police partial coverage for emergency situations’.<sup>59</sup>

The Commonwealth Attorney-General, Robert McClelland, has also stated that there will be some circumstances in which the police do not have the time to obtain a warrant from a magistrate or judge.<sup>60</sup> In our opinion, the AFP should only be given the power to conduct warrantless searches as a last resort. We note that the police are already able to obtain a search warrant by a variety of means (including phone and fax) at short notice. Another option that might be explored is the establishment of a duty judge system whereby applications for search warrants could be received and considered on an expedited basis. There is no evidence that such a system would be insufficient to respond to the concerns expressed by the Attorney-General.

Notably, the AFP does not appear to have sought the power to conduct warrantless searches. The Chief Executive of the AFP Association, Jim Torr, has said that his members prefer the transparency and accountability that the warrant system provides, describing the removal of the requirement for a warrant as ‘alien to 100 years of policing’.<sup>61</sup> It is incongruous that the proposal to give the AFP a power to conduct warrantless searches came only a couple of weeks after successful raids were conducted in Melbourne in early August 2009, and which resulted in the arrest and charging of five Somali-born men with terrorism offences. There was no suggestion during the

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<sup>58</sup> Attorney-General’s Department, above n 16, 147.

<sup>59</sup> Attorney-General’s Department, above n 16, 151.

<sup>60</sup> 7:30 Report, Australian Broadcasting Corporation, 12 August 2009  
<[http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Transcripts\\_2009\\_ThirdQuarter\\_12August2009-Interview-ABC7.30ReportwithKerryOBrien](http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Transcripts_2009_ThirdQuarter_12August2009-Interview-ABC7.30ReportwithKerryOBrien)> (18 September 2009).

<sup>61</sup> Sally Neighbour, ‘Haunted by Haneef’, *The Australian*, 17 August 2009.

course of the investigation into the activities of these men that the AFP was hampered by the requirement to obtain a search warrant.

It is correct (as noted in the Discussion Paper<sup>62</sup>) that the States and Territories have legislation enabling their police to conduct warrantless searches in certain circumstances. However, this is not sufficient to justify the introduction of warrantless searches at the Commonwealth level for the AFP. Each expansion of police powers must be considered on its own merits. Furthermore, in our opinion, the new section 3UEA would give a broader discretion to the AFP than the State and Territory police forces have. For example, under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), the only circumstances in which the police are permitted to enter premises without a warrant are where they reasonably *believe* (not merely *suspect*, as the Bill proposes) that:

- (a) a breach of the peace is being or is likely to be committed and it is necessary to enter the premises immediately to end or prevent the breach of the peace; or
- (b) a person has suffered significant physical injury or there is imminent danger of significant person and it is necessary to enter the premises immediately to prevent further significant physical injury or significant physical injury to a person.

In the absence of a compelling justification being demonstrated, we oppose the proposal to give the AFP the power to conduct warrantless searches.

## **Recommendation 12**

We do not support the introduction of a warrantless search power for the AFP as set out in proposed section 3UEA.

### Timing of the Amendments

We further believe that it is inappropriate for new AFP powers to be introduced prior to the Council of Australian Governments (COAG) review due to commence in late 2010. Amongst other things,

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<sup>62</sup> Attorney-General's Department, above n 16, 151.

this review will consider Division 3A of the *Crimes Act*, which was enacted in 2005 and gives the AFP powers to stop, search and question persons in relation to terrorist acts. The COAG review may, for example, recommend the repeal of even the existing powers on the basis that they are either ineffective or no longer necessary. Perhaps the introduction of a warrantless search power for the AFP could be referred to COAG to consider as part of its review.

### **Recommendation 13**

Any discussion of the introduction of a new warrantless search power for the AFP should be postponed until after the 2010 COAG review has been conducted. In the alternative, the introduction of such a power might be referred to COAG for consideration as part of its review.

### Safeguards on the Exercise of the Power

We note that the Bill significantly improves upon the Exposure Draft in one respect. New section 3UEA(7) provides that a police officer must notify the occupier of premises of entry within 24 hours or otherwise leave a written notice of entry at the premises. This accords with the recommendation made by the Law Institute Victoria in its submission in response to the Discussion Paper.<sup>63</sup>

However, we believe that, if such a power is to be established, two other important safeguards should be attached to its exercise by the AFP. First, that the AFP member who conducts the search is required to go before a magistrate or judge after the search has been conducted to obtain an ex post facto search warrant. Such a warrant would be issued on the basis that there were reasonable grounds for the member to suspect that:

- (a) it is necessary to exercise this power in order to prevent a thing that is on the premises from being used in connection with a terrorism offence; and
- (b) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.

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<sup>63</sup> Law Institute Victoria, Submission to the Attorney-General's Department, *National Security Legislation: Discussion Paper on Proposed Amendments* (2 October 2009), 8.

If an ex post facto search warrant is not granted, this should have the consequence that any evidence identified by the member of the AFP during the course of the search should not be admissible in court proceedings.

Second, the exercise of this power by the AFP should also be reported on annually to the Commonwealth Parliament. In particular, reports should be made of any instances in which an ex post facto search warrant has not been granted.

#### **Recommendation 14**

If the warrantless search power is introduced, we recommend that the AFP:

- (a) be required to obtain an ex post facto search warrant from a magistrate or judge; and,
- (b) be required to report annually to the Commonwealth Parliament regarding the exercise of the warrantless search power.

## **SCHEDULE 8 OF THE BILL:**

## **AMENDMENTS RELATING TO THE DISCLOSURE OF NATIONAL SECURITY INFORMATION IN CRIMINAL AND CIVIL PROCEEDINGS**

The vast majority of the amendments made to the *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) (*NSIA*) by the Bill are clarifications rather than substantive amendments. Included in this category are amendments that recognise the role and obligations of the defendant's legal representative, including the duty on him or her to give notice to the Commonwealth Attorney-General about the potential disclosure of national security information. We accept the statement made in the Discussion Paper that '[t]hese proposed amendments do not impose further obligations on defence representatives'.<sup>64</sup> Other amendments that fall into this category include: clarification of what aspects of criminal and civil proceedings the *NSIA* applies to; definitions of 'court official' and 'national security information'; and, a range of consequential amendments. We do not propose to deal with these particular amendments in any detail.

There are, however, a number of substantial amendments that are made to the *NSIA*. We refer in our discussion of these amendments to the proposed sections dealing with federal *criminal* proceedings.<sup>65</sup>

### Streamlining of the *NSIA*

One of the primary criticisms of the *NSIA* (especially from legal practitioners and judicial officers) relates to its impact on the efficient running of a criminal trial. Of particular concern are: the requirement to notify the Commonwealth Attorney-General of information which relates to or may affect national security; the delay whilst the Commonwealth Attorney-General considers whether to issue a non-disclosure certificate; the need to hold a closed hearing to consider what orders should be made in relation to the information; and, finally, the various avenues for appeal after orders have been made.<sup>66</sup> We believe that the Bill should be commended for the various proposals which it

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<sup>64</sup> Attorney-General's Department, above n 16, 174.

<sup>65</sup> The *NSIA* also deals with *all* (that is, not only federal) civil proceedings. The procedures for the protection of national security information in civil proceedings are, for the most part, identical to those for criminal proceedings.

<sup>66</sup> The Hon. Justice Anthony Whealy, 'The Impact of Terrorism Related Laws on Judges Conducting Criminal Trials' (2007) 8 *The Judicial Review* 353, 363. See also Phillip Boulten, 'Preserving National Security in the Courtroom: A New Battleground' in Andrew Lynch, Edwina MacDonald and George Williams, *Law and Liberty in the War on Terror* (2007) 96-105.

makes aimed at streamlining the procedures in the *NSIA* so as to reduce the potential for delay and disruption to proceedings.

First, amended sections 24(1A) and 25(2A) (items 26 and 30 of Schedule 8 to the Bill) narrow the circumstances in which the Commonwealth Attorney-General and the courts must be notified of the potential disclosure of national security information.

Second, the court will no longer be required to adjourn the whole proceeding once notification has been given to the Commonwealth Attorney-General of the potential disclosure of national security information. Instead, the court need only adjourn ‘so much of the proceeding as is necessary to ensure that the information is not disclosed’ (amended section 24(5), item 27 of Schedule 8 to the Bill). We believe that discussion of the workability of this section is best left to practitioners experienced in the conduct of civil and criminal proceedings involving national security information. However, we have some doubts about whether the courts will be able to clearly segregate that part of the proceedings affected by the national security information from that part which is able to continue. Furthermore, the defence case may be undermined by being forced by the court to alter the order in which it has chosen to call witnesses or present evidence in order to enable the proceedings to continue expeditiously.

Third, the court is no longer immediately required to adjourn the proceedings and hold a closed hearing when it is notified of the potential disclosure of national security information by a witness in answer to a question. Instead, amendments to section 25 require that the witness give the court a written answer to the question, which is then shown to the prosecutor and, if present, the Attorney-General or his or her representative (item 31 of Schedule 8 to the Bill). It is only if the prosecutor or the Commonwealth Attorney-General’s representative believes that the information in the witness’ answer is national security information, that the court will be required to adjourn the proceedings (in whole or in part) to enable the Commonwealth Attorney-General to decide whether to issue a non-disclosure certificate. This brings the procedures for criminal proceedings in line with the existing procedure for civil proceedings in section 38E.

Finally, the court may at any time during the course of a proceeding, on the application of the Commonwealth Attorney-General or his or her legal representative, the prosecutor or the defendant or his or her legal representative, hold a hearing to consider issues relating to the disclosure,

protection, storage, handling or destruction of national security information (amended section 21, item 21 of Schedule 8 to the Bill).

Whilst, as discussed above, we appreciate the efforts made by the Commonwealth Government to stream-line the procedures in the *NSIA*, we do not believe that the amendments are sufficient to respond to the concerns of practitioners and judicial officers.

The unworkability of the *NSIA* in practice is demonstrated by the frequent use of section 22 orders in terrorism trials, especially in the Victorian Supreme Court. Under section 22, the prosecutor and defendant may agree to an arrangement about any disclosure, in the proceeding, of information that relates to national security or may affect national security. The August 2009 Discussion Paper itself states that ‘the policy intention behind the Act is that, if possible, it is preferable that the parties agree to an arrangement under section 22’.<sup>67</sup>

We accept, as the ALRC recommended in 2004,<sup>68</sup> that there is a need for a legislative regime to protect national security information, beyond the protection available at common law and under the *Evidence Act 1995* (Cth). However, the frequent use of section 22 orders demonstrates that there needs to be a wholesale review of the operation of the *NSIA*, and an assessment of other available options to protect national security information,<sup>69</sup> rather than merely tinkering around the edges and making largely technical changes as the Bill does. We draw the Committee’s attention to the comment of Justice Whealy in 2007 that the *NSIA* ‘gives the appearance of having been drafted by persons who have little knowledge of the function and processes of a criminal trial’.<sup>70</sup>

## Recommendation 15

We recommend that there be a wholesale review of the terms and operation of the *NSIA*. This should include an assessment of other available options to protect national security information. We

<sup>67</sup> Attorney-General’s Department, above n 16, 209.

<sup>68</sup> See Australian Law Reform Commission, Media Release, ‘Justice system must adapt to meet terror challenges: ALRC’, 23 June 2004 <<http://www.alrc.gov.au/media/2004/mr2306.html>> (11 September 2009); Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (June 2004) Recommendation 11-1.

<sup>69</sup> One such option may be the introduction of a special advocates system like that which exists in the United Kingdom, Canada and New Zealand.

<sup>70</sup> Justice A G Whealy, ‘Difficulty in obtaining a fair trial in terrorism cases’ (2007) 81 *Australian Law Journal* 743, 745.

do not believe that amendments to the *NSIA* along the lines of those in the Bill should be made until after such a review is conducted.

### Expanded Obligation to Notify the Attorney-General

Item 26 of Schedule 8 to the Bill also proposes to require the prosecution and defence to notify the Attorney-General of the potential disclosure of national security information in response to a subpoena. In our opinion, this would place too onerous a burden on the prosecution and defence. This is because of:

- the extremely vague definition of ‘national security’ (discussed below);
- the typically broad terms in which subpoenas are expressed (often capturing unexpected information); and,
- the serious criminal consequences of failing to comply with the notification requirement, namely, up to two years’ imprisonment.<sup>71</sup>

### **Recommendation 17**

We do not support the proposal in the Bill to expand the notification obligation to the issue of subpoenas.

### Other Issues Not Addressed in the Bill

There are a number of important issues which are not addressed in the Bill.

First, the definition of ‘national security’ in the *NSIA* is extremely broad. It means ‘Australia’s defence, security, international relations or law enforcement interests’.<sup>72</sup> The parties in civil proceedings and the prosecution and defence in criminal proceedings are required by the *NSIA* to notify the Commonwealth Attorney-General and/or the courts of the potential disclosure of any

<sup>71</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 42.

<sup>72</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 8.



information that either ‘relates to’ or ‘may affect’ national security. In our opinion, this burden is an overly onerous one. For example, as noted by Stephen Donaghue, all information presented during the course of a trial for a terrorism offence may fall within the definition of ‘national security’.<sup>73</sup> Therefore, the prosecution and/or defence would technically be committing an offence if they failed to notify the Attorney-General of *every* piece of information to be presented at trial.

### **Recommendation 18**

There should be a review of the definition of ‘national security’ in the *NSIA* with the aim of tightening the definition, and clarifying when a person will be committing an offence by failing to notify the Attorney-General or the courts of the potential disclosure of national security information.

Second, when a non-disclosure or criminal exclusion certificate has been issued by the Attorney-General, we believe that it should be up to the discretion of the court to decide whether a closed hearing should be held to determine what orders to make in relation to the particular information. This would accord with the recommendations of the ALRC in 2004<sup>74</sup> and the Senate Legal and Constitutional Legislation Committee in 2004.<sup>75</sup> It would also recognise the importance of the principle of open justice, and that all possible steps should be taken to ensure that court proceedings are held in public (for example, handing up documents to the court but not reading them into the public record). Instead, currently, there is an automatic rule that the courts *must* hold a closed hearing to decide what orders to make.

### **Recommendation 19**

<sup>73</sup> Stephen Donaghue, ‘Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice’ in Andrew Lynch, Edwina MacDonald and George Williams, *Law and Liberty in the War on Terror* (2007) 88. ‘Security’ is defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) as including the protection of Australians from ‘politically motivated violence’ which, in turn, is defined as including ‘terrorism offences’.

<sup>74</sup> Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (June 2004) 351-352.

<sup>75</sup> Senate Legal and Constitutional Legislation Committee: *Inquiry into the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (August 2004) Recommendation 1.

The courts should have the *discretion* to close the court-room when considering what orders to make under section 31 of the *NSIA*.

Finally, and most importantly, we are concerned about the impact of section 31(8) on the ability of a defendant to receive a fair trial. Section 31(7) specifies a number of matters that the court must take into account in deciding what order to make in relation to the disclosure of information. These include: (a) whether there would be a risk of prejudice to national security if the information was disclosed; and (b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence. Section 31(8) then goes on to limit the discretion of the court by requiring it to give greatest weight to (a). Whilst a constitutional challenge to section 31(8) failed,<sup>76</sup> former judge of the High Court, the Hon. Michael McHugh AC QC has observed:

It is no doubt true that in theory the *National Security Information Act (Criminal and Civil Proceedings) Act* does not direct the court to make the order which the Attorney-General wants. But it goes as close as it thinks it can. It weights the exercise of the discretion in favour of the Attorney-General and in a practical sense directs the outcome of the closed hearing. How can a court make an order in favour of a fair trial when in exercising its discretion, it must give the issue of fair trial less weight than the Attorney-General's certificate.<sup>77</sup>

## **Recommendation 20**

We recommend that section 31(8) be repealed. This would reinstate the position prior to 2004, whereby it was left to the discretion of the courts to determine whether to give more weight to the prejudice to national security or the adverse effect on the defendant's right to a fair trial.

In the alternative, we believe that the word 'substantial' should be removed from section 31(7)(b).

<sup>76</sup> *Lodhi v The Queen* (2007) 179 A Crim R 470.

<sup>77</sup> The Hon. Michael McHugh AC QC, 'Terrorism Legislation and the Constitution' (2006) 28 *Australian Bar Review* 117. See also Anthony Gray, 'Alert and Alarmed: *The National Security Information Act* (Cth) (2004)' (2005) 24(2) *University of Tasmania Law Review* 91.

## INSUFFICIENT CONSIDERATION OF CIVIL LIBERTIES AND OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

The proposed amendments in the Bill raise serious concerns in relation to Australia's legally binding obligations under international treaty law including commitments under the International Covenant on Civil and Political Rights (ICCPR). In this context we would like to draw attention to the detailed international human rights law analysis provided by the Sydney Centre for International Law in its submission on the National Security Legislation Discussion Paper.<sup>78</sup>

We urge the Committee to consider relevant jurisprudence by international courts and tribunals. For example, in relation to the proposed changes to provisions concerning pre-charge detention, the case law of the European Court of Human Rights is highly instructive as it is commonly referred to in the context of interpreting obligations under the ICCPR to which Australia became a party in 1980. This case law confirms that there is a presumption that detainees should be brought before a court promptly. In the case of *Brogan and others v United Kingdom*, it was held that to detain somebody for *four days and six hours* before bringing them before the competent legal authority was too long, even where national security and suspected terrorist activity were involved.<sup>79</sup> This case concerned a terrorism emergency in Northern Ireland which was arguably much more immediate than the current threat of terrorism in Australia. The Commonwealth Government thus needs to explain clearly why it proposes to introduce a 7 day cap on pre-charge detention and how this temporal limit meets the requirements of proportionality.

### Recommendation 21

The Committee should consider the implications of the proposed amendments on human rights and civil liberties in detail. In particular, it is imperative that the proposed amendments in the Bill be examined for their compliance with international treaty law such as the ICCPR in light of relevant international case law.

<sup>78</sup> [http://www.law.usyd.edu.au/scil/documents/2009/Submission\\_National\\_Security\\_Legislation\\_joint.pdf](http://www.law.usyd.edu.au/scil/documents/2009/Submission_National_Security_Legislation_joint.pdf)

<sup>79</sup> ECtHR, *Brogan and Others v. UK*, Applications nos. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, para. 62.