Human Rights and Human Security

Submission to the
Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the
National Security Legislation Amendment Bill 2010
and the
Parliamentary Joint Committee on Law Enforcement Bill 2010

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About Amnesty International Australia

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the *Universal Declaration of Human Rights* (UDHR) and other international instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights. Amnesty International is the world's largest independent human rights organisation, comprising more than 2.8 million supporters in more than150 countries and has over 100,000 supporters in Australia. Amnesty International is impartial and independent of any government, political persuasion or religious belief. Amnesty International Australia does not receive funding from governments or political parties.

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status

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1. Introduction

1. Amnesty International Australia (**Amnesty**) and the Human Rights Law Resource Centre (the **HRLRC**) welcome the inquiry by the Senate Standing Committee on Legal and Constitutional Affairs (the **Standing Committee**) into the National Security Legislation Amendment Bill 2010 (the **NSL Bill**) and the Parliamentary Joint Committee on Law Enforcement Bill 2010 (the **PJC Bill**) (the **Inquiry**).

2. On 12 August 2009 the Attorney-General published the *National Security Legislation Discussion Paper* (the **NSL review**), which set out the measures that the Government proposed to take in response to a number of recent reviews of counter-terrorism laws. The NSL review included an exposure draft of proposed amending legislation (**Exposure Draft**). The HRLRC and Amnesty made a submission on 1 October 2009 responding to the NSL review titled *Human Rights and Human Security: Joint Submission to the Commonwealth Attorney-General's Department regarding National Security Legislation* (**Joint Submission**).[1]

3. The Joint Submission recognised that some provisions of the Exposure Draft will enhance the protection of human rights while also responding more effectively to threats of terrorism. The Government is to be congratulated on these amendments.

4. However, the Joint Submission, together with a range of other submissions, raised a number of significant concerns with the Exposure Draft. Amnesty and the HRLRC are disappointed that the NSL Bill in its current form does not reflect any of the substantial amendments suggested in the Joint Submission. We hope that the Standing Committee will reconsider these concerns in the context of the Inquiry.

5. This submission sets out the broad human rights issues with Australia's national security legislation, and shows how a human rights-based approach is a means by which the community can be protected from terrorism whilst ensuring that people's human rights are not unduly limited.

6. This submission then sets out the human rights concerns that Amnesty and the HRLRC have with the amendments proposed in the NSL Bill and PJC Bill, in particular:

   (a) the offence of treason in the *Criminal Code Act 1995* (Cth) (the **Criminal Code**);

   (b) the offence of sedition in the Criminal Code;

   (c) the proscription of terrorist organisations under the Criminal Code;

[1] Available at http://www.hrlrc.org.au/content/topics/counter-terrorism/counter-terrorism-and-human-rights-submission-to-national-security-legislation-review-oct-2009/.

(d) the detention without charge regime under the *Crimes Act 1914* (Cth) (the **Crimes Act**);

(e) the powers to search premises under the Crimes Act;

(f) appealing decisions to grant or refuse bail under section 15AA of the Crimes Act;

(g) the review of listing in the *Charter of the United Nations Act 1945* (Cth) (**UN Charter Act**);

(h) the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the **NSI Act**); and

(i) the expansion of the oversight roles of the Inspector-General of Intelligence and Security (the **IGIS**) and the Parliamentary Joint Committee on the Australian Crime Commission (the **PJC-ACC**). The PJC-ACC is to be renamed the Parliamentary Joint Committee on Law Enforcement (the **PJC-LE**).

7. Finally, the submission briefly outlines some aspects of Australia's counter-terrorism laws that continue to raise serious human rights concerns and which require urgent attention, but which are not part of this review.

2. Executive Summary

8. Governments have a duty to protect the rights, lives and safety of people within their territory and perpetrators of violent or terrorist acts should be brought to justice. However, the measures put in place to bolster national security, protect lives and prevent terrorist attacks should not unduly infringe on people's human rights. Too often, debate on counter-terrorism laws and measures presupposes that national security and human rights are inherently in tension or even mutually exclusive. Fundamentally, however, human rights, human security and national security are closely associated and intertwined. The realisation of human rights creates the conditions necessary for human and national security, while national security is a necessary precondition to the realisation of human rights.

9. Under international law, Australia has committed to respect, protect and fulfil the fundamental human rights of all persons within its jurisdiction. A human rights law framework recognises and reflects the need for the State to protect national security and, in some circumstances, allows for limitations of human rights for the purpose of protecting public order and public safety. Limitation on rights will only be allowed where they are strictly necessary, justified by evidence and where the means used to protect security are proportionate and infringe human rights to the minimum extent possible.

10. On 21 April 2010, the Australian Government announced, as part of its response to the *National Human Rights Consultation Report*, that it "will review legislation, policies and practices for compliance with the seven core UN human rights treaties to which Australia is a party".[2] The Government also announced that it would establish a Parliamentary Joint Committee on Human Rights to scrutinise bills and legislative instruments for consistency with international human rights obligations, and conduct inquiries into the compatibility of legislation with human rights and broader human rights issues.[3] Furthermore, the Government also promised to introduce statements of compatibility for new legislation, which will outline compatibility with human rights.[4] Through these measures, the Government can seek to identify where human rights are limited or restricted, and therefore seek to ensure that those limitations do not unnecessarily or disproportionately infringe upon the fundamental rights of people. These measures are welcomed by Amnesty and the HRLRC, however, it is disappointing that the bills or their explanatory memoranda do not expressly refer at all to a consideration of the human rights implications of the counter-terror laws.

11. In our view, the Government should prepare a detailed Statement of Compatibility in relation to each Bill which details whether and how the Bill is compatible with the seven core international human rights treaties to which Australia is party.

12. Amnesty and the HRLRC submit that many of Australia's counter-terror laws as amended by the Bills violate fundamental human rights. For example:

    (a) Some offences of urging group violence on the basis of race, religion or national origin in the Criminal Code may infringe the right to freedom of speech, whilst at the same time not adequately protecting against racial and religious vilification (see Part 5.5 below).

    (b) Some terror-related offences are defined so broadly that the law effectively criminalises thought and speech, such as the "praising" of a terrorist act (see Part 6 below). These laws operate in a manner that constitutes an impermissible violation of the right to freedom of expression.

    (c) Under changes proposed by the NSL Bill, persons suspected of terrorism offences can be detained for up to 8 days without charge. While this is an improvement on the current laws, which contain no cap on time spent in pre-charge detention, the detention of a person without charge for 8 days is very likely to breach the prohibition against arbitrary detention (see Part 7 below).

[2] *Australia's Human Rights Framework* (April 2010), p 9.

[3] *Australia's Human Rights Framework* (April 2010), p 8.

[4] *Australia's Human Rights Framework* (April 2010), p 8.

(d) New search powers allow the police broad discretion to enter private homes without a warrant if they suspect on reasonable grounds that a "thing" is on the premises that is relevant to a terrorist act (even one that has not occurred) and it is necessary to prevent the thing from being used in connection with a terrorist act. The lack of judicial oversight of police action, and the broad terms of the legislative power to enter premises, significantly limits the right to privacy (see Part 8.1 below).

The provisions of greatest concern to Amnesty and the HRLRC, and any human rights infringements related to them, are set out in detail below in this submission.

13. Finally, the Bills do not address some of the most controversial elements of Australia's counter-terror laws. Amnesty and the HRLRC call on the Australian Government to immediately take steps to review the human rights implications of the control order and preventative detention order schemes; the excessively broad powers of ASIO to detain and question people, including non-suspects; the offences of associating, supporting and training with a terrorist organisation; and the overly-broad definition of "terrorist act" in the Criminal Code.

14. Amnesty and the HRLRC make the following recommendations in relation to the bills.

2.1 List of Recommendations

Recommendation 1:

The Joint Committee should assess the NSL Bill and PJC Bill with reference to Australia's international human rights obligations. Further, the Government should prepare a detailed Statement of Compatibility in relation to each Bill which details whether and how the Bill is compatible with the seven core international human rights treaties to which Australia is party.

Recommendation 2:

Given that the current and proposed offences in section 80.2 of the Criminal Code infringe the right to freedom of expression, the Government should adduce evidence and demonstrably justify the inclusion of laws contained in section 80.2.

In the absence of an evidence-based justification from the Government of the need for the offences in section 80.2, the offences should be repealed.

Recommendation 3:

Assuming that the offences in section 80.2 of the Criminal Code are retained in the form proposed in the NSL Bill:

(a) the public order offences in sections 80.2A(1) and 80.2B(1) should include an express requirement that the urging of group violence was done with the intention of threatening the peace, order and good government of the Commonwealth;

(b) the inter-group violence offences should be removed from the *Security of the Commonwealth* provisions of the Criminal Code; and

(c) the Australian Government should introduce comprehensive anti-vilification laws to implement article 20 of the ICCPR, to address, among other things, the issue of race and religious motivated inter-group violence.

Recommendation 4:

Rather than amend the good faith defence by the insertion of subsection 80.3(3) of the Criminal Code, the Government should implement ALRC Recommendation 12-2 and require the Court to consider the context in which conduct was engaged in as an element of the offence.

Recommendation 5:

Amnesty and the HRLRC support the Sheller Committee recommendation that paragraph 102.1(1A)(c) of the Criminal Code be deleted to remove praise of a terrorist act as a ground for proscribing an organisation.

Recommendation 6:

Amnesty and the HRLRC recommend that the Criminal Code be amended to allow decisions of the Attorney-General relating to listing or re-listing terrorist organisations to be subject to independent merits review by the Administrative Appeals Tribunal.

Recommendation 7:

Amnesty and the HRLRC recommend that applications for extensions of time for pre-charge detention for non-terrorism offences under the Crimes Act be required to be in writing and to have been authorised in writing by a senior officer.

Recommendation 8:

Amnesty and the HRLRC recommend that the reasonable dead time power under current section 23CA(8)(m) of the Crimes Act be repealed and a cap be placed on pre-charge detention of 48 hours.

Recommendation 9:

Amnesty and the HRLRC do not support the new emergency entry, search and seize power in proposed section 3UEA of the Crimes Act.

Recommendation 10:

The Government should provide adequate evidence to support its proposed extension of time to re-enter premises under search warrant under the Crimes Act. Otherwise, the proposed extension should not be adopted.

Recommendation 11:

Section 15AA of the Crimes Act, which sets a strong presumption against bail for terrorism offences, should be repealed.

Recommendation 12:

Given the serious criminal consequences and human rights concerns that arise from a listing under the UN Charter Act, the UN Charter Act should be amended to provide a right to seek external merits review in the Administrative Appeals Tribunal of any decision to list a person, entity or assets under section 15 of the UN Charter Act.

Recommendation 13:

The NSI Act should be repealed and the disclosure of national security information dealt with in accordance with the doctrine of public interest immunity. If it is to be retained, it requires urgent amendment to ensure that the provisions containing requirements for security clearances and allowing court hearings in the absence of the accused do not infringe the right of persons to a fair trial.

Recommendation 14:

The independent power of investigation of the IGIS under the IGIS Act should be extended further so that he or she is able to receive complaints about or independently investigate *any* government department or agency in relation to an intelligence or security matter.

Recommendation 15:

All Commonwealth counter-terrorism laws should be made subject to an immediate human rights audit and review as a matter of urgency, as was announced in the Government's response to the *National Human Rights Consultation Report*. . In particular the Government must urgently review:

(a) The regime for control orders and preventative detention orders that threatens freedom from arbitrary detention, the presumption of innocence and the right to a fair hearing.

(b) ASIO detention powers, pursuant to which a person may be held in detention indefinitely for rolling periods of seven days, without charge.

(c) The unclear and imprecise offences relating to association with a terrorist organisation, which directly limit freedom of association.

(d) The offences relating to 'supporting' a terrorist organisation which may disproportionately restrict the right to freedom of expression.

(e) The disproportionate penalty that applies for offences relating to training with a terrorist organisation.

(f) The overly broad definition of "terrorist act", from which a range of criminal sanctions flow, including those set out at (a) to (e) above.

3. Human Rights and Counter-Terrorism Laws

15. This section sets out:

(a) the human rights concerns posed by Australia's counter-terrorism laws;

(b) the way that human rights and counter-terrorism laws can be mutually reinforcing; and

(c) how a human rights framework, through a proportionality analysis, allows the government to protect the community from terrorism whilst also protecting human rights.

3.1 The Risks Raised by Australia's Counter-Terrorism Laws to Human Rights

16. Many aspects of Australia's counter-terrorism regime disproportionately and unnecessarily infringe basic human rights; rights that should be enjoyed by all Australians and which Australia has committed itself to protecting. The UN Human Rights Committee (**HRC**), in its 2009 review of Australia's performance of its international obligations under the *International Covenant on Civil and Political Rights* (**ICCPR**),[5] raised the following serious concerns with Australia's counter-terrorism laws:

(a) the vagueness of the definition of "terrorist act" under the Criminal Code;

(b) the reversal of the burden of proof in respect of bail, contrary to the right to be presumed innocent;

(c) the fact that "exceptional circumstances", to rebut the presumption of bail relating to terrorism offences, are not defined in the Crimes Act; and

(d) the expanded powers of the Australian Security Intelligence Organisation, including so far unused powers to detain persons without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods.

17. The adverse impact of counter-terrorism laws on human rights was recognised in the *National Human Rights Consultation Report*. Submissions to that consultation repeatedly raised concerns that the current national security legislation reflects "an improper balance between the need to protect the community from harm and the need to safeguard individual liberties".[6] In response, the report recommended that, as a matter of priority, the Commonwealth Government conduct an audit of Australia's national security legislation to bring it into compliance with human rights standards.[7]

18. Amnesty and the HRLRC are concerned that Australia's counter-terrorism laws violate Australia's international law obligations to respect, protect and fulfil human rights, in particular

[5] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

[6] *National Human Rights Consultation Report*, p 162.

[7] *National Human Rights Consultation Report*, recommendation 4.

the rights set out in the ICCPR. The counter-terrorism regime as it currently exists, and also as it is proposed to be amended, limits the following rights in the ICCPR:

(a) freedom from arbitrary detention (article 9);

(b) right to privacy (article 17);

(c) right to a fair trial (article 14);

(d) freedom of religion (article 18);

(e) freedom of association (article 22);

(f) freedom of opinion and expression (article 19);

(g) equality and non-discrimination (articles 2(1) and 26);

(h) freedom of movement (article 12); and

(i) minority rights (article 27).

19. In its response to the *National Human Rights Consultation Report*, *Australia's Human Rights Framework*, the Government agreed to:

(a) assess new bills for their compatibility with international human rights standards through statements of compatibility and a new Parliamentary Joint Committee on Human Rights; and

(b) review legislation, policies and practices to ensure that they appropriately reflect human rights.[8]

20. The Government also stated that views expressed by UN human rights bodies will be taken into account in identifying areas for review. In accordance with this framework, the Standing Committee should assess the NSL Bill and PJC Bill in accordance with human rights standards. This submission provides guidance on how such an analysis could be done.

Recommendation 1:

The Joint Committee should assess the NSL Bill and PJC Bill with reference to Australia's international human rights obligations. Further, the Government should prepare a detailed Statement of Compatibility in relation to each Bill which details whether and how the Bill is compatible with the seven core international human rights treaties to which Australia is party.

[8] *Australia's Human Rights Framework* (April 2010), p 8-9.

3.2 Community Protection and Human Rights: The Same Goals

21. Amnesty and the HRLRC recognise that the Commonwealth Government has an imperative to protect its citizens from terrorist and other threats and violence. Australian law enforcement and intelligence agencies should be given sufficient powers to investigate, prevent and prosecute terrorist acts and those engaged in terrorist activities. However, the object of protection of human rights, such as those protected in the ICCPR and set out above, is not inconsistent with the object of community protection from terrorism. Both objects are fundamentally concerned with protecting the community and individuals from harm.

22. Although human rights might need to be restricted to some extent for the purpose of law enforcement, this should only take place if it is absolutely necessary and only to the extent that the limitation on rights is proportionate and rationally connected to the threat of terrorism. A human rights approach explicitly takes the balancing of competing concerns into account. It does so through a proportionality test, which is discussed in detail in part 3.3 below.

3.3 Permissible Limits on Human Rights: The "Proportionality Test"

23. The proportionality test for limitation of ICCPR rights can be stated in general terms (although strictly speaking under the ICCPR each of these rights is limited by words contained within the articulation of the right itself).[9]

24. Put broadly, general provisions setting out a proportionality analysis require that any limitation of rights be reasonable and demonstrably justified in a free and democratic society.[10] This is a two stage process.

25. First, the purpose of the limitation on the right must be of sufficient importance to a free and democratic society to justify limiting the right.[11] This might also be described as requiring a "pressing and substantial" objective,[12] reflecting a need to balance the interests of society with those of individuals and groups. Examples of purposes for limitations that might accord with a free and democratic society include protection of public security, public order, public safety or public health.[13]

26. Secondly, the means used by the State to limit rights must be proportionate to the purpose of the limitation. The most widely accepted test of proportionality is derived from the Canadian

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[9] As Bell J stated in *Kracke v Mental Health Review Board* [2009] VCAT 646, [105], the internal limitations provisions in ICCPR rights "call up a proportionality analysis in various ways".

[10] Words to this effect are used in section 7 of the *Victorian Charter of Human Rights and Responsibilities Act*, section 1 of the *Canadian Charter of Rights and Freedoms*, section 5 of the *New Zealand Bill of Rights Act* and section 36 of the *South African Constitution*.

[11] *R v Oakes* [1986] 1 SCR 103, [69]-[71] (Dickson CJ).

12 The Supreme Court in *Canada (Attorney-General) v Hislop* [2007] 1 SCR 429, [44]. See also *R v Oakes* [1986] 1 SCR 103, cited with approval in *Kracke v Mental Health Review Board* [2009] VCAT 646, [145] and in *R v Momcilovic* [2010] VSCA 50.

[13] The Hon Rob Hulls MP, Victoria, Parliamentary Debates, *Legislative Assembly*, 4 May 2006, 1291 (Rob Hulls).

case *R v Oakes.*[14] In that case the Supreme Court of Canada set out the three components of a proportionality test:

> There are three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance.[15]

27. The onus of establishing that a limitation is reasonable and demonstrably justified rests on the party seeking to rely on the limitation, which will usually be the government.[16] The standard of proof is generally the balance of probabilities, although it may change in given circumstances, requiring "a degree of probability which is commensurate with the occasion".[17] That is, the more serious the infringement of rights, the more important the objective of the limitation of those rights must be to a free and democratic society, and the higher the standard of proof will be for the State.[18] This approach has been approved in the recent Victorian Court of Appeal decision of *R v Momcilovic*,[19] in which the Court endorsed the *R v Oakes* requirement for clear, cogent and persuasive evidence in order to demonstrably justify a human rights infringement.[20] The Court went on to add:

> There may be circumstances where the justification for interfering with a human right – and for doing so by the particular means chosen – is self-evident, but they are likely to be exceptional. The government party seeking to make good a justification case […] will ordinarily be expected to demonstrate, by evidence, how the public interest is served by the rights-infringing provision. The nature and extent of the infringement of rights sought to be justified will usually determine how much evidence needs to be led, and of what kind(s).[21]

28. Finally, the state may only take measures that derogate (or suspend) the enjoyment of these particular rights in times of a public emergency which threatens the life of the nation, and in those circumstances only to the extent strictly required by the exigencies of the situation.[22]

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[14] [1986] 1 SCR 103.

[15] [1986] 1 SCR 103, 43.

[16] [1986] 1 SCR 103, 66. *Kracke v Mental Health Review Board* [2009] VCAT 646, 108.

[17] See Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009), [147] citing *Bater v Bater* [1950] 2 All ER 458, 459 (Lord Denning).

[18] See See Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009), [150].

[19] [2010] VSCA 50 (17 March 2010).

[20] *R v Momcilovic* [2010] VSCA 50 (17 March 2010), [143] (Maxwell P and Ashley and Neave JJA).

[21] *R v Momcilovic* [2010] VSCA 50 (17 March 2010), [146] (Maxwell P and Ashley and Neave JJA).

[22] Article 4, ICCPR.

4. Treason Offences

4.1 The Amendments Proposed

29. Schedule 1 of the NSL Bill proposes to repeal the treason offences as contained in current section 80.1 of the Criminal Code and replace them with revised treason offences in proposed section 80.1AA. The main amendments are that:

(a) the offences will now require an allegiance or duty requirement (ie, a person charged must be a citizen or resident of Australia, or has voluntarily placed him or herself under the protection of the Commonwealth);[23] and

(b) the requirement of providing assistance to the enemy is tightened so that the offences will only apply when a person provides *material* assistance to the enemy, as opposed to merely providing assistance.[24]

4.2 Human Rights Impact and Recommendations

30. Amnesty and the HRLRC support these amendments as they raise the threshold requirements of these serious offences. The proposed changes restrict the classes of people who can be charged with an offence, and reduce the potential scope of what actions could be caught.

31. Amnesty and the HRLRC make no further submissions on the amendments.

5. Sedition Offences

5.1 The Amendments Proposed

32. Schedule 1 of the NSL Bill proposes the following key amendments relating to the current sedition offences:

(a) The repeal and replacement of the "sedition" offences contained in current subsections 80.2(1) and 80.2(3) of the Criminal Code. The two new offences will be "Urging the overthrow of the Constitution or Government by force or violence" (proposed section 80.2(1)) and "Urging interference in Parliamentary elections or constitutional referenda" (section 80.2(3)). Both offences no longer contain the word "sedition". The new offences are committed if a person intentionally urges another to overthrow by force or violence the Government or Constitution (or elections or referenda), with the intention that the force or violence will occur.

(b) The repeal of current subsections 80.2(7) to (9), which contain offences relating to the urging of a person to assist an organisation or country engaged in armed hostilities with Australia, and the removal of the requirement that proceedings for an offence

[23] Proposed *Criminal Code Act 1995* (Cth) s 80.1AA(1)(f) and (4)(e).

[24] Proposed *Criminal Code Act 1995* (Cth) s 80.1AA(1)(d) and (e), and (4)(c) and (d).

under Division 80 (this includes the offences in sections 80.1AA and 80.2) have the Attorney-General's consent.[25]

(c) The repeal of the current offence of urging a group to use force or violence against another group which would threaten the peace, order and good government of the Commonwealth (section 80.2(5)). It is proposed that this offence be replaced by two offences: an offence of urging violence against groups (proposed section 80.2A), and an offence of urging violence against members of groups (proposed section 80.2B) (the ***urging group violence provisions***). Proposed features of the new offences are as follows:

(i) Each of the offences will require the accused to intentionally urge the use of force of violence, with the intention that the force or violence occur (proposed subsections 80.2A(1) and 80.2B(1)), and that the use of force or violence would threaten the peace, order and good government of the Commonwealth.

(ii) Each of the offences contains an expanded list of the characteristics of the target group to include the characteristic of national origin (only race, religion, nationality and political opinion were previously included).

(iii) Each of the offences states that the fault element is recklessness for the targeting of groups, so that a person need only be reckless as to whether a person or group actually has one of the characteristics.

(iv) Each of the offences includes a secondary offence where the urging of force or violence occurs, but a threat to the peace order and good governance is not made out (with a lesser sentence of only 5 years attached).

(d) Amending the defence of "good faith" in section 80.3. This section provides a full defence to the offences in section 80.2 on the basis that the person was acting in good faith in engaging in the impugned conduct. It is proposed that section 80.3 be amended to allow the court, when considering a defence, to consider "any relevant matter", including whether acts done were in connection with artistic works, in the course of debate or academic or scientific work, or in the dissemination of news or current affairs.

5.2 Human Rights Impact

33. Generally, the amendments to the sedition provisions are welcome in so far as they implement the recommendations of the Australian Law Reform Commission (**ALRC**) in its 2006 *Fighting Words* report to:[26]

(a) remove the terminology of "sedition" from the Criminal Code;

[25] *Criminal Code Act 1995* (Cth) s 80.5.

[26] ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) available at www.austlii.edu.au/au/other/alrc/publications/reports/104/. These amendments also implement the *Australian Government response to ALRC Review of sedition laws in Australia*, December 2008, available at

(b) include the fault element of intention in each of the offences in section 80.2; and

(c) repeal the outdated association offences in subsections 80.2(7) and 80.2(8) of the Criminal Code and Part IIA of the *Crimes Act*.

34. However, even with the proposed amendments, there are still significant problems with the offences contained in proposed sections 80.2 and 80.2A and 80.2B. The following parts set out some of Amnesty's and the HRLRC's concerns, namely:

(a) the limitations that section 80.2 continues to impose on human rights, particularly the right to freedom of expression;

(b) the absence of an adequate evidence-based justification by the government for the limitation on human rights imposed by the offences in section 80.2;

(c) the need for the urging group violence provisions to be dealt with in an anti-vilification framework, rather than in national security provisions; and

(d) the utility of the "good faith" defence provision.

35. Each of these issues is discussed further below.

5.3 The Section 80.2 Offences Diminish the Right to Freedom of Expression

36. Each of the offences in proposed amended section 80.2 are offences of unlawful *communications* that lead to force or violence, rather than offences relating to the commission of unlawful or violent acts themselves.

(a) The implied freedom of political communication

37. Although some of the provisions in section 80.2 relate to speech on political matters, they probably do not burden the implied constitutional freedom of communication on government or political matters.[27] The constitutional freedom protects public criticism of the government or government action.[28] The implied freedom of political communication is also not absolute.[29] In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***), the High Court formulated a two stage test to determine the constitutional validity of a law:

www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoALRCReviewofseditionlawsinAustralia-December2008.

[27] The implied constitutional freedom of political communication, protects "that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors". This right precludes the curtailment of the protected freedom by the exercise of legislative or executive power: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

[28] See *Nationwide News v Wills* 91992) 177 CLR 1, 75; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 138-139; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 130.

[29] It is a right at common law only and is treated as an important public interest in the absence of any rule, statute or regulation to the contrary: George Williams, 'Civil Liberties & the Constitution - A Question of Interpretation' *Public Law Review* (1994) 5 PLR 82, p 83.

(a) Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? If so:

(b) Is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?[30]

38. In *Fighting Words*, the ALRC stated that sedition offences (as they currently exist) probably do not infringe the constitutional freedom to engage in public criticism of the government or government action, particularly given that an essential element of the offences is that the seditious communication urges force or violence.[31] On this basis, the ALRC stated that the provisions probably do not capture "mere criticism" of government action.[32]

(b) The right to freedom of expression

39. As stated above, the ICCPR protects and limits the right to freedom of expression under articles 19 and 20. Although the constitutional freedom of political communication may not be infringed, the broader right to freedom of expression in international law is certainly engaged.

40. Article 19 of the ICCPR establishes the right to seek, receive and impart information and ideas of all kinds, whether orally, in writing, in print, through art or any other media of choice.

41. The rights to freedom of opinion and expression are particularly important in areas of political communication, journalism and the media, demonstrations, industrial activity and "whistleblowing". Political expression, subjected to limitations, has been recognized by courts in various instances[33] as a form of expression protected by the rights under article 19.

42. The ICCPR recognises the potentially destructive nature of certain types of expression and, in article 2.0 provides for mandatory limitations to freedom of expression. In view of this, states parties are obliged to adopt necessary legislative measures to prohibit actions giving rise to any propaganda for war, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[34] It is unlikely, however, that limitations are permissible on the communication of information or ideas which merely "offend, shock or disturb", because "such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society".[35]

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[30] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-8.

[31] ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006), [7.15].

[32] ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006), [7.20].

[33] See *Mpandanjila et al v Zaire* (138/83); *Kalenga v Zambia* (326/88); *Kivenmaa v Finland* (412/90).

[34] HRC, *General Comment No 11: Prohibition of Propaganda for War and Advocacy of Hatred* (1983), [1], available from http://www2.ohchr.org/english/bodies/hrc/comments.htm.

[35] *Handyside v United Kingdom* [1976] 1 EHRR 737 commenting on the right to freedom of opinion and expression under article 10 of the *European Convention on Human Rights*. See also *Arbeiter v Austria* [2007 ECHR Application No 3138/04 (25 January 2007); *Livingstone v The Adjudication Panel for England* [2006] EWHC 2533 (Admin), [36].

43. The HRC has noted that any state-imposed restrictions on the exercise of freedom of expression must be examined with particular care and scrutiny[36], and must not put the right itself in jeopardy.[37]

44. The ALRC acknowledged that human rights, including the right to freedom of expression in the ICCPR, are valuable measures by which to analyse sedition laws in Australia, particularly in the absence of comprehensive federal legislative protection of rights.[38] The ALRC confirmed that the sedition offences in section 80.2 undoubtedly involve some limitation of the right to freedom of expression.[39]

45. In the context of sedition laws, the Supreme Court of Canada has said that freedom of expression protects any activity or communication that conveys a meaning so long as it does so in a non-violent manner.[40] Courts in England and Canada have considered the interaction of sedition laws with the right to freedom of expression. In *Boucher v R*,[41] Rand J of the Supreme Court of Canada rejected the validity of a sedition prosecution based on allegations that the relevant conduct created hostility, ill-will and hatred towards the government. His Honour stated:

> constitutional concepts of a different order have necessitated a modification of the legal view of public criticism; and the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties accountably to the public.

46. At common law, the UK and Canadian courts have found that "sedition" is not appropriate to use in violence against or between groups, unless there is an intention to incite resistance or violence for the purpose of disturbing constituted authority.[42]

5.4 The Need for the Section 80.2 Offences must be Articulated

47. Article 19(3) of the ICCPR states that the right to freedom of expression can be subject to certain restrictions, but these "shall only be such as are provided by law and are necessary… (b) for the protection of national security or of public order, or of public health or morals".

48. Given that the offences contained in section 80.2 impose a limitation on freedom of expression, the government must articulate an evidence-based justification for restricting the freedom. The government must prove that the law is necessary. As the party seeking to uphold the limitation, the government should demonstrably justify the limitation with cogent

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[36] *Vereinigung Bildender v Kunstler v Austria,* Application No 68354/01 (25 January 2007).

[37] HRC, *General Comment No 11: Prohibition of Propaganda for War and Advocacy of Hatred* (1983), [4].

[38] ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006), [7.66].

[39] ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006), [7.67].

[40] *Irwin Toy v Quebec (AG)* [1989] 1 SCR 927.

[41] [1951] SCR 265, 288 (the first trial).

and persuasive evidence.[43] The measures adopted to justify the limitation should be for the protection of national security, public order, public health or morals.

49. In the view of Amnesty and the HRLRC, given that:

(a) Australian democratic institutions are well established, robust and strong;

(b) our society is multicultural and increasingly tolerant of difference;

(c) there has been no successful prosecution of sedition offences in decades;

(d) the right to freedom of speech is now acknowledged as being fundamental to our system of representative democracy (see *Lange* discussed above); and

(e) the sedition laws impose a burden on free speech and the right to non-discrimination,

it is not clear that there is a compelling need for the offences in section 80.2 at all.

(a) Sedition laws are no longer necessary or relevant

50. Although the word "sedition" is being removed from the legislation, the substance of these laws continues to be to criminalise and punish sedition. Good arguments are made for abolishing sedition laws on the basis that the laws are outdated and respond to anachronistic notions of governmental institutions being embodiments of the sovereign. Further, there is very little evidence of the need for the laws.[44] The last successful prosecution for sedition in England was in 1909,[45] and it has been recommended to be repealed or significantly scaled back in a range of comparable jurisdictions given the limitations that such laws pose on freedom of expression.[46]

51. There has been no successful federal prosecution of sedition in Australia since the prosecution of members of the Australian Communist Party in the late 1940s.[47] Further, the convictions in the Communist Party cases were for words that expressed disloyalty to the sovereign and Australia, but fell short of actually inciting violence or public disorder.[48] It is almost certain that words that merely express a disloyalty to the Australian state would not be

[42] *Boucher v The King* [1951] 2 DLR 369.

[43] See UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985). See also *Kracke v Mental Health Review Board* [2009] VCAT 646, [108] cited with approval by Warren CJ in *DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381, [147].

[44] See Graham McBain, 'Abolishing the crime of sedition: Part 2' (2009) 83 *ALJ* 449, from 473.

[45] Graham McBain, 'Abolishing the crime of sedition: Part 1' (2008) 82 *ALJ* 543, 545.

[46] See Graham McBain, 'Abolishing the crime of sedition: Part 2' (2009) 83 *ALJ* 449, 477.

[47] *Burns v Ramsley* (1949) 79 CLR 101 and the latest case was *R v Sharkey* (1949) 79 CLR 121.

[48] For example in Burns the sedition words were in relation to a question about what the Communist Party would do if Australia was involved in a war with the Soviet Union, the response to which was "We would oppose the war, we would fight on the side of Soviet Russia".

considered a punishable offence now, as reflected in the amendment of the offences when included in legislation to include the element of incitement to violence or public disorder.

52. As the democracy in which we live in changes and adapts, our laws must adapt to reflect those changes. As McBain states, the nature of sedition at common law has always changed with the changing democracy in which we live:

> With a growth in free speech, a more tolerant society and greater democracy it became more possible to criticise Church and state more freely, without committing sedition.[49]

53. In 1986, the Law Reform Commission of Canada released a Working Paper that declared that the offence of sedition was outdated and unprincipled. In it's view:

> It is essential to the health of a parliamentary democracy such as Canada that citizens have the right to criticize, debate and discuss political, economic and social matters in the freest possible manner.[50]

(b) Are the offences in proposed amended section 80.2 duplicative of other laws?

54. If the offences duplicate other laws, this would support an argument that the laws are unnecessary. It may be that the offence of sedition is already covered by other laws, and the offence of incitement.[51] It is argued that sedition offences can largely be prosecuted by applying criminal incitement to existing federal offences, such as treason or treachery.[52] In short, McBain says:

> …the offence of sedition used to punish criticism of (and, later, the incitement of violence against) various state institutions [and] has been superseded by other offences, by a greater toleration of criticism of state institutions and by the realisation that, in a democratic system, criticism of government is both healthy and essential.[53]

55. Although there is, on one level, nothing objectionable about prohibiting urging of violence *per se*, these offences overlap with other offences in the criminal law, including incitement to violence offences.

56. Whilst the HRLRC and Amnesty acknowledge that freedom of speech is not an absolute right, any restrictions on the right must be demonstrably justified in a free and democratic society. In the absence of an evidence-based justification from the government of the need for the section 80.2 offences, even as amended, the offences should be repealed.

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[49] Graham McBain, 'Abolishing the crime of sedition: Part 1' (2008) 82 *ALJ* 543, 544.

[50] Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), p 35.

[51] This is said to be the case in the UK. See Graham McBain, 'Abolishing the crime of sedition: Part 2' (2009) 83 *ALJ* 449, 474.

[52] Ben Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28(3) *UNSW Law Journal* 868, 872-3.

[53] Graham McBain, 'Abolishing the crime of sedition: Part 2' (2009) 83 *ALJ* 449, 477.

Recommendation 2:

Given that the current and proposed offences in section 80.2 of the Criminal Code infringe the right to freedom of expression, the Government should adduce evidence and demonstrably justify the inclusion of laws contained in section 80.2.

In the absence of an evidence-based justification from the Government of the need for the offences in section 80.2, the offences should be repealed.

5.5 The Proposed Urging Group Violence Provisions Sections 80.2A and 80.2B

57. Amnesty and the HRLRC have a number of concerns with the urging group violence provisions, which are discussed in turn below. It is easiest to deal with these separately as the public order offences (the graver offences that have a connection with the peace order and good government of the Commonwealth) and the urging group violence offences.

(a) The public order offences

58. At common law, the UK and Canadian courts have found that "sedition" is not appropriate to use in violence against or between groups, unless there is an intention to incite resistance or violence for the purpose of disturbing constituted authority.[54] The requirement for an intention to incite violence to disturb a constituted authority is crucial to establishing a public order justification for the offence.

59. The ALRC considers that "the focus of sedition offences is the subversion of political authority and indicate that there is little scope for the common law of sedition to be used to prosecute vilification or incitement to violence against particular groups, except where it can be shown that there is a clear intention to incite violence or public disturbance against the state or the institutions of government".[55]

60. The public order offences in sections 80.2A(1) and 80.2B(1), would to a large degree cover conduct that could also be prosecuted under sections 80.2(1) and (3), as offences that have an intention to incite violence against an authority.

61. As with all the offences in section 80.2 and as set out above, it is not clear that there is any need for provisions in the Criminal Code that prohibit inter-group violence that threatens the peace, order and good government of the Commonwealth. For the same reasons given above, the Government should articulate the need that the law seeks to address and adduce evidence to support this.

[54] *Boucher v The King* [1951] 2 DLR 369.

[55] ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006), [10.34].

62. However, if these provisions are retained, they should require an express intention that the urging of group violence was done with the intention of threatening the peace, order and good government of the Commonwealth, and not merely that the force or violence had that effect.

(b) Urging group violence offences

63. Placing offences of communications relating to inter-group violence in the context of counter-terrorism or national security offences is problematic for a number of reasons.

64. First, the placement of the laws is stigmatising of certain racial and religious speech and groups as terror-related. When the inter-group violence offences in section 80.2(5) were introduced, the government justified these provisions as addressing "key terrorism themes such as urging violence by one racial group against another".[56] The ALRC acknowledged that there are concerns in the community that this provision reinforces stereotypes that members of certain ethnicities or religions are terrorists.[57]

65. The rights to non-discrimination and substantive equality are fundamental components of human rights law that are entrenched in a wide range of human rights treaties,[58] human rights instruments,[59] national laws,[60] and jurisprudence.[61]

66. Many aspects of Australia's counter-terrorism measures impact disproportionately and detrimentally on Australia's Muslim and Arab population. Following the events of 11 September 2001, anti-Muslim and anti-Arab prejudice has increased and these communities have reported "a substantial increase in fear, a growing sense of alienation from

[56] ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006), [10.43].

[57] ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006), [10.52]. See also Ben Saul, 'Speaking of Terror: Criminalising Incitement to Violence', (2005) 28(3) *UNSW Law Journal* 868, 877.

[58] See, eg, International Covenant on Civil and Political Rights, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171 (**ICCPR**), arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 (*entered into force* Jan. 3, 1976), 993 UNTS 3 (**ICESCR**), art 2; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979 (entered into force Sept. 3, 1981), 1249 UNTS 13 (**CEDAW**); International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**), Dec. 21, 1965 (entered into force Jan. 4, 1969), 660 UNTS 195; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006 (entered into force May 3, 2008), GA Res 61/106, UN Doc A/61/611 (2006) (**CRPD**), art 5.

[59] See, eg, Human Rights Committee, *General Comment No. 28: Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000); HRC, *General Comment No. 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.1 at 26 (1994); Committee on Economic, Social and Cultural Rights (**CESCR**), *General Comment No. 16: The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, UN Doc E/C.12/2005/4 (2005); CESCR, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009); Committee on the Elimination of Discrimination against Women (**CEDAW Committee**), *General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN Doc A/59/38 (2004).

[60] See, eg, *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

[61] See, eg, *D.H. v The Czech Republic*, Appl. No. 57325/00 (2007); *Nachova v Bulgaria*, Appl. Nos. 43577/98 & 43579/98 (2005); *Morales de Sierra v Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev (2001); *Schuler-Zgraggen v Switzerland*, Ser. A No. 263 (1993).

the wider community and an increasing distrust of authority".[62] There is a real risk that characterising speech concerning inter-group violence could add to the stigmatisation of certain communities.

67. Secondly, the laws fail to properly protect members of our community from racial and religious vilification. Protection from group violence is conceptually distinct from sedition and security-related offences and should be treated separately in anti-vilification laws or in ordinary criminal laws. As Ben Saul states:

> The idea of sedition centres on rebellion against, or subversion of, political authority; it has little to do with communal violence between groups. The rationale for protecting one group from violence by another is not to prevent sedition or terrorism, but to guarantee the dignity of members of human groups in a pluralist society.[63]

68. Further, the urging group violence provisions address inter-group violence, and do not have any connection to the peace, order and good government of the Commonwealth, and therefore do not belong in the provisions of the Criminal Code titled the *Security of the Commonwealth*.[64] These offences are appropriately dealt with by anti-vilification legislation, rather than counter-terrorism legislation.

69. Australia has obligations under international law to implement comprehensive anti-vilification laws.[65] Under article 20 of the ICCPR, Australia is required to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[66]

70. There is currently no comprehensive protection against racial and religious vilification at a national level in Australia. There is some protection provided by in section 18 of the *Racial Discrimination Act 1992* (Cth) of any act which prohibits any act that "is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people" for reasons of "race, colour or national or ethnic origin" (section 18C(1)) or to incite racial discrimination (section 17(a)). Notably there is no express protection against religious vilification. Sikhs and Jews have been found to be groups distinguished by "ethnic origin".[67] However, it is unlikely that the protection in the RDA would extend to vilification on the basis of

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[62] Human Rights and Equal Opportunity Commission, *Isma - Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004), 4.

[63] Ben Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28(3) *UNSW Law Journal* 868, 877.

[64] Sections 80.2A and 80.2B both sit within Part 5 of the Criminal Code (*The Security of the Commonwealth*).

[65] Article 20 ICCPR, and article 4(a) of CERD.

[66] The HRLRC notes Australia's reservation to Article 20, which states: "Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters". See the text of Australia's reservations to the ICCPR at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec.

Islamic faith.[68] Further, racial and religious hatred is not a crime under Australian law, as required by article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (**CERD**).

71. It is true that violence that is motivated by religious or racial hatred is capable of being prosecuted under ordinary criminal laws. However, "treating group-based violence or 'hate crimes' as ordinary offences fails to recognise the additional psychological element and social harm involved in such cases".[69] It also fails to implement Australia's obligation to properly protect against racial and religious vilification.

72. The Supreme Court of Canada has held that extreme speech may be protected in some circumstances. In *R v Keegstra*,[70] Dickson CJ stated: "it is partly through clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive". However, in that case the Supreme Court upheld the constitutionality of the proscription of racist hate speech, finding that such speech plays no part in the discovery of truth and injures the people targeted, by deterring them from participating in the democratic process. Put another way, restricting freedom of speech on racial and religious vilification grounds is a justifiable limitation on the right:

> Suppressing speech which proximately encourages violence is a justifiable restriction in a democratic society, since the protection of life is a higher normative and social value which momentarily trumps free expression – but only to the extent strictly necessary to prevent the greater harm.[71]

73. The urging group violence provisions have no rational connection to the security of the Commonwealth and they do not adequately implement Australia's obligations to protect people from racial and religious vilification. Rather than prohibit inter-group violence under section 80.2, Australia should discharge its international law obligations and pass comprehensive anti-vilification laws.

[67] Human Rights and Equal Opportunity Commission, *Isma-Listen: National Consultations on Eliminating Prejudice Against Arab and Muslim Australians* (2004), p 29.

[68] Human Rights and Equal Opportunity Commission, *Isma-Listen: National Consultations on Eliminating Prejudice Against Arab and Muslim Australians* (2004), p 29.

[69] Ben Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28(3) *UNSW Law Journal* 868, p 878.

[70] [1990] 3 SCR 697, 765-766.

[71] Ben Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28(3) *UNSW Law Journal* 868, p 883.

Recommendation 3:

Assuming that the offences in section 80.2 of the Criminal Code are retained in the form proposed in the NSL Bill:

(a) the public order offences in sections 80.2A(1) and 80.2B(1) should include an express requirement that the urging of group violence was done with the intention of threatening the peace, order and good government of the Commonwealth;

(b) the inter-group violence offences should be removed from the *Security of the Commonwealth* provisions of the Criminal Code; and

(c) the Australian Government should introduce comprehensive anti-vilification laws to implement article 20 of the ICCPR, to address, among other things, the issue of race and religious motivated inter-group violence.

5.6 The "Good Faith" Defence in Section 80.3

74. The NSL Bill retains the good faith defence in section 80.3, and proposes some amendments to the defence by setting out matters for the court to consider relevant to the context of the speech involved.

75. A logical difficulty exists with the good faith defence, which makes it difficult to understand how the defence could ever be utilised. A court is unlikely to find circumstances in which a person urges the violent overthrow of the Commonwealth, or an act that threatens the peace, order and good government of the Commonwealth, *in good faith*. The offence itself suggests an element of bad faith, which makes the defence absurd.

76. The ALRC confirmed that the sedition offences in section 80.2 involve some dilution of an absolute notion of freedom of expression.[72] To combat this diminution of freedom of expression, the ALRC recommended that the offences in subsections 80.2(1), (2) and (5) of the Criminal Code be amended to include the following protections for freedom of expression in Australia:[73]

(a) a requirement that the person intended that the force or violence will occur; and

(b) that in considering this intention, the trier of fact consider the context in which the words were spoken or conduct undertaken, namely if they were done

(i) in the development, performance, exhibition or distribution of an artistic work;

[72] ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006), [7.67].

[73] ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006), [7.77]-[7.80].

(ii) 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;

(iii) in connection with an industrial dispute or an industrial matter; or

(iv) in the dissemination of news or current affairs.

77. In response, the Bill inserts the requisite intention, which is welcome. However, rather than amend the offence to include a requirement that intention be informed by the context in which the words were spoken, the NSL Bill amends the defence in section 80.3 of the Criminal Code to include a discretion for the judge to consider some of the above factors in paragraph 76 (but significantly not the industrial dispute matters in (iii)) when considering whether the acts were done in good faith. Although the Government argues that this amendment does allow for the consideration of context,[74] it is submitted that this is not the case, as amended section 80.3 places the onus on the accused to establish the context, rather than the state to make its case.

78. Given the difficulties with ever using the good faith defence discussed above, the utility of these amendments is limited.

79. Rather than amend the defence in this way, the Government should amend the offences in the manner recommended by the ALRC, set out at paragraph 76 above.

Recommendation 4:

Rather than amend the good faith defence by the insertion of subsection 80.3(3) of the Criminal Code, the Government should implement ALRC Recommendation 12-2 and require the Court to consider the context in which conduct was engaged in as an element of the offence.

6. Proscription of Terrorist Organisations under the Criminal Code

6.1 The Amendments Proposed

80. Schedule 2 of the NSL Bill proposes the following amendments relating to the power of the Attorney-General to proscribe organisations as terrorist organisations:

(a) Section 102.1(2) of the Criminal Code gives the Attorney-General the power to list organisations as "terrorist organisations" on the grounds that they are directly, or indirectly, engaged in, assisting, preparing, planning or fostering acts or threats of

[74] See Explanatory memorandum to the National Security Legislation Amendment Bill 2010, p 10.

violence or on the basis that they directly advocate terrorist acts. Under paragraph 102.1(2)(b), the Attorney-General can proscribe an organisation if he or she is, among other things, satisfied that the organisation directly advocates the doing of a terrorist act. Current 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 and there is a "risk" that the praise might lead to a person engaging in a terrorist act. The proposed amendment replaces "risk" with "substantial risk".

(b) Under subsection 102.1(3), a proscription of an organisation ceases to have effect after two years. The NSL Bill proposes to increase this period to three years. According to the explanatory memorandum to the NSL Bill, this is consistent with a recommendation made by the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**), which "concluded that extending the period of a listing regulation from two to three years would offer an adequate level of oversight".[75]

6.2 Human Rights Impact and Recommendations

81. The wording in paragraph 102.1(1A)(c) is problematic as it enables an Attorney-General to proscribe an organisation on the basis that it praises the doing of a terrorist act and there is a "substantial risk" that the praise might lead to a person engaging in a terrorist act. There is no need for the organisation to be actively involved in a terrorist act or for a terrorist act to occur as a result of the praise. The definition is unworkably broad and disproportionate, as it allows the proscription of an entire organisation, with adverse implications to all people associated with that organisation, in circumstances where there is merely a substantial risk that praise could, in the future, trigger the response from one individual (not the response of a reasonable person). Given the effects which flow for organisations that are proscribed, including that it is an offence to be associated with the organisation and to provide support to an organisation (s 102.7 and 102.8),[76] the threshold for proscribing an organisation must be set at a higher level.

82. Prohibiting members from merely praising certain acts disproportionately limits the right to freedom of expression protected in article 19 of the ICCPR. It particularly limits the freedom of religious and political expression given the religious, ideological and political motive element that may accompany a terrorist act. Political expression, subject to limitations, has been recognized by courts in various instances as a form of expression protected by the rights under article 19.[77] Unnecessarily prohibiting political and religious expression seriously undermines fundamental democratic principles and may only serve to drive political opposition underground.

[75] Explanatory memorandum to the National Security Legislation Amendment Bill 2010, p 14.

[76] The NSL Discussion Paper proposes to amend this to 'material' support, see paragraphs **Error! Reference source not found.** to **Error! Reference source not found.** below.

[77] See *Mpandanjila et al v Zaire* (138/83); *Kalenga v Zambia* (326/88); *Kivenmaa v Finland* (412/90).

83. While the amendment of "substantial risk" is an improvement, the link between directly praising a terrorist act and an actual involvement with a terrorist act is too tenuous to warrant the criminal liability that arises from proscription. Accordingly, it is recommended that paragraph (c) be deleted from the definition of advocates.

84. Innocent members of organisations may also be caught by the loosely framed section. The Security Legislation Review Committee (the **Sheller Committee**)[78] accepted that "paragraph (c) could lead to proscription of an organisation which was in no way involved in terrorism because a person identified as connected with the organisation praises a terrorist act, although the person had no intention to provoke a terrorist act". [79] In light of these concerns the Sheller Committee recommended paragraph (c) be deleted.

85. Regarding the proposed increase in the period of proscription, Amnesty and the HRLRC note that the concerns raised with the proscription power are only compounded by this increase in time. This is particularly concerning given paragraph 102.1(1A)(c) and, as discussed below, the absence of any mechanism to review the merits of the Attorney-General's decision.

> ***Recommendation 5:***
>
> Amnesty and the HRLRC support the Sheller Committee recommendation that paragraph 102.1(1A)(c) of the Criminal Code be deleted to remove praise of a terrorist act as a ground for proscribing an organisation.

6.3 Recommendation of Merits Review of Decisions Not Heeded

86. Amnesty and the HRLRC are disappointed that, despite strong recommendations by the Sheller Committee to further reform the listing process (in addition to removing 102.1(1A)(c)), no other amendments have been proposed in the NSL Bill.

87. The proscription of an organisation may infringe the right to freedom of expression and the right to freedom of association protected in the ICCPR. The right to freedom of association is recognised in article 22 which provides that, "everyone shall have the right to freedom association with others, including the right to form and join trade unions for the protection of his interests".

88. Freedom of association permits a person to join together in groups formally to pursue common interests. Examples of such groups are:

- political parties;

[78] Security Legislation Review Committee, *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and the *Criminal Code Act 1995* (Cth), *Report of the Security Legislation Review Committee* (2006) (***Sheller Committee Report***), p 21.

[79] *Sheller Committee Report*, p 73.

- professional or sporting clubs;
- non-governmental organisations;
- trade unions; and
- corporations.

89. International human rights law recognises that the right to freedom of association and the right to freedom of expression may be limited to protection national security on the condition that the limitation is necessary and proportionate.

90. Amnesty and the HRLRC are deeply concerned that the broad power granted to the Attorney-General may result in, or cause the perception of, arbitrary, disproportionate and discriminatory decision-making.

91. According to information available from the Government, 18 organisations have been listed as terrorist organisations, with all but one of those organisations being self-identified Islamic organisations.[80] The effect of a listing is to increase, in certain circumstances, the scope of criminal liability for involvement with the organisation in question. Listing also acts as a significant condemnation by public authorities of the political, religious or ideological goals of the organisation in question. Amnesty and the HRLRC are concerned that the disproportionate representation of Islamic organisations amongst those listed may suggest a discriminatory application of the relevant laws by the Executive.

92. In 2006, the Sheller Committee considered the current process of proscription and recommended, inter alia, that the process be reformed to:[81]

(a) provide notification, if it is practicable, to a person, or organisation affected, when the proscription of an organisation is proposed;

(b) provide the means, and right, for persons and organisations, to be heard in opposition, when proscription is considered; and

(c) provide for the establishment of a committee to advise the Attorney-General on cases that have been submitted for proscription of an organisation.

93. Amnesty and the HRLRC are disappointed that none of these recommendations has been implemented in the NSL Bill. Amnesty and the HRLRC strongly urge the Government to adopt the recommendations of the Sheller Committee to safeguard the rights of affected organisations and members to procedural fairness and to increase transparency and public

[80] See http://www.ag.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument. The single non-Islamic organisation is the Kurdistan Workers Party (PKK), which is "primarily committed to the creation of an independent Kurdish state in south-eastern Turkey" (see link to PKK). The page of listings was last updated 15 September 2009.

confidence in the decision making process. There is presently no right to procedural fairness protected in Division 102 of the Criminal Code.

94. Amnesty and the HRLRC are also extremely concerned that there is no option to review the factual merits of the Attorney-General's decision. Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is confined to review of the legal process by which the decision was made. The absence of merits review is particularly concerning given the serious consequences of proscription, including potential infringement of fundamental rights such as freedom of expression and the potential criminalisation of association. Accordingly, Amnesty and the HRLRC recommend that decisions of the Attorney-General listing or re-listing terrorist organisation be subject to independent merits review by the Administrative Appeals Tribunal.

Recommendation 6:

Amnesty and the HRLRC recommend that the Criminal Code be amended to allow decisions of the Attorney-General relating to listing or re-listing terrorist organisation to be subject to independent merits review by the Administrative Appeals Tribunal.

7. Detention without Charge under the Crimes Act

7.1 Detention Without Charge under Part 1C

95. Under Part 1C Division 2 of the Crimes Act, suspects can be detained without charge for questioning regarding terrorism and other serious Commonwealth offences. Non-terrorism suspects may be held for four hours, which can be extended by another eight hours (12 hours in total).[82] Terrorism suspects may be held initially for four hours, which can be extended by another 20 hours (24 hours in total).[83]

96. However, the actual time spent in detention may be significantly longer because, under current subsection 23CA(8), certain periods may be disregarded from the investigation period. This is known as "dead time". Most of the activities outlined in paragraphs 23CA(8)(a)-(l) as constituting dead time are uncontroversial, as they are activities that are naturally limited in time and account for periods where it is not possible to question a person; for example where a person is recuperating, praying or eating. However, currently, paragraph 23CA(8)(m), which relates only to terrorism offences, differs from subsections (a)-(l) because it allows for a period

[81] *Sheller Committee Report*, p 9.

[82] See current *Crimes Act 1914* (Cth) ss 23C(4) and 23D(5).

[83] See current *Crimes Act 1914* (Cth) ss 23CA(4) and 23DA(7).

of dead time in investigation for which there is no cap on the amount of time that may be disregarded, potentially resulting in indefinite detention. Section 23CA(8)(m) (**reasonable dead time power**) provides that *any reasonable time* may be disregarded that:

> (i) is a time during which the questioning of the person is reasonably suspended or delayed; and
>
> (ii) is within a period specified under section 23CB.

97. Under section 23CB, an application for a time to be specified may be granted for terrorism offences if, *inter alia*, the detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence.[84]

7.2 The Amendments Proposed

98. Detention without charge powers for both terrorism and non-terrorism offences are contained in Part 1C Division 2. The NSL Bill proposes the following substantive amendments to the regime:

(a) It is proposed that it will be clarified that a person can only be detained for investigatory purposes while arrested for a Commonwealth offence. Investigations can take place regarding whether the person committed the offence in question, or another Commonwealth offence.[85]

(b) The dead time regime will be clarified so that:

(i) dead time events may occur at the same time, although any overlapping time can be disregarded only once;[86] and

(ii) questioning can take place even if a dead time event takes place, but any time spent questioning during such a period counts to the investigation period.[87]

(c) A number of proposals are also suggested regarding the use of the reasonable dead time power for terrorism offences. Current subsection 23CA(8)(m) will be replicated under proposed subsection 23DB(9)(m). However, proposed subsection 23DB(11) sets a cap of seven days on the amount of time that can be disregarded from the investigation period under the power. Further procedural requirements are also proposed for use of the power. These are that applications must be in writing,[88] authorised by a senior officer[89] and made to a magistrate,[90] and that a copy of an application must be provided to the suspect or the suspect's legal representative.[91]

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[84] *Crimes Act 1914* (Cth) s 23CB(7)(b).

[85] Proposed *Crimes Act 1914* (Cth) note to s 23C(1) and s 23C(2) (regarding non-terrorism offences) and note to s 23DB(1) and s 23DB(2) (regarding terrorism offences).

[86] Proposed *Crimes Act 1914* (Cth) ss 23C(7) (regarding non-terrorism offences) and 23DB(9) (regarding terrorism offences).

[87] Proposed *Crimes Act 1914* (Cth) ss 23C(7A) (regarding non-terrorism offences) and 23DB(10) (regarding terrorism offences).

[88] Proposed *Crimes Act 1914* (Cth) s 23DC(2).

[89] Proposed *Crimes Act 1914* (Cth) s 23DC(3).

(d) Although the time limits for investigations have been retained (maximum of 12 hours for non-terrorism offences and 24 hours for terrorism offences), the NSL Bill proposes more requirements for extension of time applications. For both types of offences, it is proposed that:

(i) only a magistrate (as opposed to a bail justice or justice of the peace, as is currently the case) can grant an extension of time;[92]

(ii) an application for extension must contain certain information (there is currently no requirement), although information does not need to be included if it is "likely to prejudice national security";[93] and

(iii) before submitting an application to a magistrate, the investigating official must provide the suspect with a copy of a written application or inform him or her of the contents of a non-written application (although national security information may be removed beforehand).[94]

(e) Regarding applications for extensions of time for terrorism offences only, it is proposed that a senior officer's authorisation in writing must be obtained beforehand,[95] and that the application itself must be in writing.[96] It is not explained why these measures are not required for non-terrorism offences, given that any argument based on the need for expediency would probably be more relevant in the terrorism sphere.

7.3 Human Rights Impact and Recommendations

99. Amnesty and the HRLRC welcome a number of the proposed amendments above. These amendments are:

(a) the clarification that a person can only be detained for investigatory purposes while arrested for a Commonwealth offence;

(b) questioning taking place during dead time will count towards the investigation period; and

(c) the additional procedural requirements for extension of time applications (ie, applications must contain certain information, be made to a magistrate, and given to the defendant). However, Amnesty and the HRLRC do not see any valid reason why the additional safeguards proposed for terrorism offences (applications must be made

[90] Proposed *Crimes Act 1914* (Cth) s 23DC(2).

[91] Proposed *Crimes Act 1914* (Cth) s 23DC(6).

[92] Proposed *Crimes Act 1914* (Cth) ss 23D(1) (regarding non-terrorism offences) and 23DE(1) (regarding terrorism offences).

[93] Proposed *Crimes Act 1914* (Cth) ss 23D(3) and (4) (regarding non-terrorism offences) and 23DE(3) and (4) (regarding terrorism offences).

[94] Proposed *Crimes Act 1914* (Cth) ss 23D(5) and (6) (regarding non-terrorism offences) and 23DE(5) and (6) (regarding terrorism offences).

[95] Proposed *Crimes Act 1914* (Cth) s 23DE(2).

[96] Proposed *Crimes Act 1914* (Cth) s 23DE(1).

> in writing and approved in writing by a senior officer) should not also be applied to non-terrorism offences.

100. Despite these welcome changes, Amnesty and the HRLRC are still gravely concerned with the reasonable dead time power for terrorism offences. The problematic nature of the power was illustrated by the case of Dr Mohamed Haneef. Dr Haneef was arrested on 2 July 2007 for suspected terrorist related activities, specifically in connection with the 2007 Glasgow International Airport attack. Dr Haneef was detained for twelve days without charge. The investigation period was extended through dead time being disregarded for further investigative activities under current sections 23CA(8)(m) and 23CB. Although the NSL Bill proposes to limit dead time under this power to seven days (which would allow investigators to hold a terrorism suspect for a maximum of eight days, excluding the other grounds for dead time), Amnesty and the HRLRC still consider this time to be an excessive and disproportionate limitation on the right to freedom from arbitrary detention.

101. Arbitrary detention is prohibited under article 9(1) of the ICCPR, which provides that:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

102. Obligations of states under this article are only derogable in times of public emergency, in accordance to article 4(1) of the ICCPR.

103. This right includes procedural guarantees provided in articles 9(2) to (5), being:

- the right to be informed of a criminal charge (article 9(2));
- the rights of persons detained on criminal charges (article 9(3));
- the right of habeas corpus (article 9(4)); and
- the right to compensation for unlawful arrest or detention (article 9(5)).

104. The length of pre-charge detention must be proportionate to avoid violation of article 9(1) of the ICCPR which prohibits arbitrary detention. Article 9(3) of the ICCPR requires that the lawfulness of any person's arrest or detention on a criminal charge be promptly reviewed by a court or tribunal. A detainee's right to be brought "promptly before a judge" following arrest or detention on a criminal charge exists regardless of whether the arrest or detention is authorised by a court order.[97]

105. The length of time in which a person facing criminal charges must be brought before a court in order for it to be considered to be "promptly" is contingent upon factors such as the gravity and complexity of the matter. However, the length of time should not exceed a few days, and in

every case it should only be the minimal time reasonably necessary. In General Comment 8, the HRC stated that:

> Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days.[98]

106. In its 2000 Observations on Gabon, the HRC stated:

> The State party should take action to ensure that detention in police custody never lasts longer than 48 hours and that detainees have access to lawyers from the moment of their detention. The State party must ensure full de facto compliance with the provisions of article 9, paragraph 3 of the Covenant.[99]

107. The following are some examples of cases in which the European Court of Human Rights has considered there to have been a breach of the analogous right to freedom from arbitrary detention under article 5 of the *European Convention on Human Rights* (in a manner substantially similar to article 9 of the ICCPR).

Case	**Length of detention before being brought before a judge**	**Circumstances of detention**	**ECHR finding**
Brogan v United Kingdom[100]	4 days and 6 hours	Person detained under the *Prevention of Terrorism (Temporary Provisions) Act 1984* (UK)	Breach of article 5
Koster v Netherlands[101]	5 days	In context of military criminal law	Breach of article 5
McGoff v Sweden[102]	15 days		Breach of article 5
Duinhoff and Duif v Netherlands[103]	8 days	Held to be "far in excess" of time limits set out in article 5(3)	Breach of article 5

108. Putting aside the "dead time" provisions, suspects arrested for terrorism offences may be detained for up to 24 hours whereas those arrested for ordinary criminal offences can only be detained for up to 12 hours. Amnesty and the HRLRC consider this additional 12 hours in

[97] M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary,* (2005, 2nd ed), p 230.

[98] Human Rights Committee, *General Comment No 8: Right to liberty and security of persons (Art. 9),* 30/06/82, [2].

[99] HRC, Concluding Observations on Gabon, UN doc. CCPR/CO/70/GAB, [13].

[100] (1988) 11 EHRR 117.

[101] (1991) 14 EHRR 396.

[102] (1984) 8 EHRR 246.

[103] (1984) 13 EHRR 478.

terrorism offences appropriately reflects the complexities of investigating terrorism offences. Accordingly, there is no need for the reasonable dead time power. Current section 23CA(8)(m) should thus be repealed and a cap should be placed on pre-charge detention to ensure that pre-charge detention does not exceed 48 hours, excluding dead time events in current subsections 23CA(8)(a)-(l). This is especially the case as Government has not provided a cogent explanation as to why the reasonable dead time power is needed at all, given that it is, in substance, a replication of the process to extend investigation time before a magistrate. It is arguable that the reasonable dead time power can therefore provide a "backdoor" for extensions of time that would otherwise need to be made under the extension of time provisions.

109. For completeness, it is acknowledged that these dead time events listed in current subsections 23CA(8)(a)-(l) are uncontroversial.

Recommendation 7:

Amnesty and the HRLRC recommend that applications for extensions of time for pre-charge detention for non-terrorism offences under the Crimes Act be required to be in writing and to have been authorised in writing by a senior officer.

Recommendation 8:

Amnesty and the HRLRC recommend that the reasonable dead time power under current section 23CA(8)(m) of the Crimes Act be repealed and a cap be placed on pre-charge detention of 48 hours.

8. Search without Warrant and Re-Entry of Premises

8.1 Search without Warrant

(a) The Proposed Amendments

110. Schedule 4 of the NSL Bill proposes a new emergency entry, search and seize power in the Crimes Act. Under proposed section 3UEA, a police officer may enter private premises without a warrant if the police officer suspects on reasonable grounds that:

(a) it is necessary to exercise a power under subsection (2) (ie, search the premises for a thing and seize it) in order to prevent a thing 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.

111. Once police have entered the premises, a number of additional powers are also proposed:

(a) If another thing is discovered and it is reasonably suspected that it is relevant to an indictable or summary offence, the police officer can secure the premises so that he or she can make an application for a search warrant.[104]

(b) The police officer may seize another thing or do anything to make the premises safe if he or she suspects on reasonable grounds that it is necessary to protect someone's life, health or safety and the circumstances are urgent.[105] It should be noted that this power is greatly expanded from the proposed amendment in the Exposure Draft, which only granted the power to seize a thing.

(c) The police officer can use force against a thing or a person or get assistance from another person while exercising a power under the proposed section.[106]

112. If the occupier is not present at the time of entry, he or she must be notified within 24 hours, or, if this is not practical, a written notice of entry must be left at the premises.[107] This proposed amendment was not present in the Exposure Draft.

(b) Human Rights Impact and Recommendations

113. Amnesty and the HRLRC are extremely concerned about the broad power to search without warrant granted to the AFP, particularly in the absence of any judicial or other oversight. The search without warrant power proposed infringes the right to privacy protected in article 17 of the ICCPR. Article 17 of the ICCPR enshrines the right of every individual to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. Protection by law in relation to this right is equally conferred upon all persons, and is guaranteed whether interferences to privacy emanate from state authorities or from natural or legal persons. Obligations of state parties under this article are derogable only in times of public emergency.

114. Interferences to privacy may be lawful and permitted where legislation is precise and circumscribed.[108] A decision to make use of such permitted interference must be made only by an authority designated under the law, and on a case-by-case basis.[109] States must also ensure that decision makers do not possess overly wide discretion in authorizing interferences

[104] Proposed *Crimes Act 1914* (Cth) s 3UEA(3).

[105] Proposed *Crimes Act 1914* (Cth) s 3UEA(5).

[106] Proposed *Crimes Act 1914* (Cth) s 3UEA(6).

[107] Proposed *Crimes Act 1914* (Cth) s 3UEA(7).

[108] *Duinhoff and Duif v Netherlands* (1984) 13 EHRR 478, [8]. See also the Committee's Concluding Observations on the Russian Federation where it expressed concerns in relation to existing mechanisms to intrude into private telephone communications. Legislation setting out the conditions of legitimate interferences with privacy and providing for safeguards against unlawful interferences lacked sufficient clarity.

[109] *Duinhoff and Duif v Netherlands* (1984) 13 EHRR 478, [8].

with the right to privacy.[110] In *Toonen v Australia*,[111] the HRC commented that any non-arbitrary interference with privacy must be proportionate to the end sought, and must also be reasonable and necessary in the circumstances of any given case.

115. Accordingly, if the Government wishes to limit the right to privacy it must state the overriding public interest in limiting the right, and establish that the means used are proportionate. At present, the Government has not provided a sufficient explanation as to why such an extraordinary power has become necessary to justify the limitations on the right of privacy proposed in the new powers to search premises without a warrant. Amnesty and the HRLRC are not aware of any instances where the current powers of the AFP were insufficient to perform their duties.

116. Amnesty and the HRLRC agree with the Law Council of Australia who have said that "poorly defined, overly broad offence provisions can never be justified on the basis that, despite their potentially wide application, they are only intended to be utilised by the authorities in the most limited and serious circumstances".[112] It is imperative that any law limiting the right to privacy clearly set out the limits of the extent to which it infringes that right. In this regard, it is concerning that the term "thing" is not defined. This makes the offence vague and ambiguous and can lead to unpredictability in its implementation. In addition, the threshold of reasonable suspicion is inadequate given the serious consequences that wrongful exercise of the power can cause. In this regard, the level of discretion granted to individual officers is disproportionate to the power of being able to enter private premises. It is concerning that absolutely no safeguards are implemented to prevent the discretion being abused.

117. In light of the concerns discussed, Amnesty and the HRLRC do not support the inclusion of a new emergency entry, search and seize power proposed in section 3UEA of the Crimes Act.

Recommendation 9:

Amnesty and the HRLRC do not support the new emergency entry, search and seize power in proposed section 3UEA of the Crimes Act.

8.2 Re-entry of Premises

(a) The Proposed Amendments

[110] *Duinhoff and Duif v Netherlands* (1984) 13 EHRR 478, [8]. See also Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Second Edition, 2004), p 480-481.

[111] (488/92).

[112] Law Council of Australia submission on Anti-Terrorism Laws Reform Bill 2009, p 8.

118. Schedule 5 of the NSL Bill proposes to extend re-entry powers for police after leaving premises under search warrant under Part 1AA of the Crimes Act. Currently, section 3J allows re-entry for up to one hour after leaving. It is proposed that the time available for police officers to re-enter premises under a search warrant can be extended to 12 hours in emergency situations.[113] Furthermore, a longer period can be granted in "exceptional circumstances" as long as the extension would not result in the period ending after the warrant's expiry.[114]

(b) Human Rights Impact and Recommendations

119. Amnesty and the HRLRC are concerned that the extended proposed powers to re-enter premises may constitute a disproportionate interference with the right to privacy (article 17 of the ICCPR). Other than simply arguing that the current one hour limit "does not provide sufficient scope for police to re-enter premises if they need to evacuate the premises because they have discovered a threat which could endanger the safety of police officers or the public",[115] the Government has not put forward clear evidence that such extended powers are required to protect public safety. Amnesty and the HRLRC therefore ask that such evidence be put forward. Failing that, the proposed extension of time should not be adopted.

Recommendation 10:

The Government should provide adequate evidence to support its proposed extension of time to re-enter premises under search warrant under the Crimes Act. Otherwise, the proposed extension should not be adopted.

9. Appealing Bail Decisions under section 15AA of the Crimes Act

9.1 The Amendments Proposed

120. Schedule 6 of the NSL Bill proposes to amend section 15AA of the Crimes Act so as to allow appeals against decisions granting or refusing bail under that section. Current section 15AA directs a bail authority to refuse bail, unless there are "exceptional circumstances", for offences listed under section 15AA(2). This list includes terrorism offences. Proposed section 15AA(3A) will provide that the prosecution or the defendant may appeal against a decision to grant or refuse bail for the offences covered by section 15AA. The proposed right is intended to operate alongside State and Territory laws unless there is an inconsistency.

[113] Proposed *Crimes Act 1914* (Cth) s 3J(2)(aa).

[114] Proposed *Crimes Act 1914* (Cth) s 3JA.

[115] See Explanatory memorandum to the National Security Legislation Amendment Bill 2010, p 46.

9.2 Human Rights Impact and Recommendations

121. Despite the welcome proposed amendment clarifying the right to appeal a bail decision under section 15AA, the strongly worded presumption against bail still remains. This raises concerns regarding fair trial rights contained in article 14(1) of the ICCPR and the presumption of innocence, which is contained in article 14(2). It is not clear why the imposition of this reverse onus is necessary in the first place, given the ordinary discretion of the Courts to grant or refuse bail. Amnesty and the HRLRC therefore believe that the section should be repealed in its entirety.

> ***Recommendation 11:***
>
> Section 15AA of the Crimes Act, which sets a strong presumption against bail for terrorism offences, should be repealed.

10. Proposed Amendments to the UN Charter Act

10.1 The Listing and Proscription Provisions of the UN Charter Act

122. Under *United Nations Security Council Resolution 1373* (2001), Australia must, among other things, freeze funds and financial assets of persons and entities connected with terrorist acts (paragraphs 1(c) and (d)). The UN Charter Act is said to give effect to these obligations. Listing of persons, entities or assets under the UN Charter Act is separate to the proscription of an organisation under the Criminal Code.[116]

123. A "proscribed person or entity" under the UN Charter Act is a person or entity who has been listed by the Minister under section 15 or proscribed by regulation under section 18. Under the UN Charter Act it is an offence to deal with a freezable asset[117] or to give an asset to a proscribed person or entity.[118]

124. Under the UN Charter Act, the Minister for Foreign Affairs has powers to revoke listings in certain circumstances (section 16) and the listed person or entity has limited powers to apply for the revocation of the listing (section 17).[119]

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[116] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, [6.23].

[117] UN Charter Act s 20 – 'freezable asset' is defined in section 14 as (a) is owned or controlled by a proscribed person or entity; or (b) is a listed asset; or (c) is derived or generated from assets mentioned in paragraph (a) or (b).

[118] *Charter of the United Nations Act 1945* (Cth) s 21.

[119] For example, the Minister has no requirement to consider the application for revocation within a year of a listing or application.

125. In the recent Human Rights Committee (the **HRC**) case, *Sayadi and Vinck v Belgium*, the HRC noted the human rights implications arising from listing persons pursuant to Security Council sanctions. In that case the authors were listed prior to finalisation of criminal proceedings, and charges were ultimately dropped. However, the damage had been done – their details were publicly listed on the UN Sanctions List and their assets frozen. The HRC noted that:

(a) The listing of the authors resulted in them being unable to leave Belgium. It was held that, in the absence of any criminal sanction against the authors, it could not be said that the authors posed a threat to national security. Accordingly, the limitation on their freedom of movement violated article 12 of the ICCPR.

(b) Providing personal information about the authors prior to completing the criminal investigation against them constituted an attack on the authors' honour and reputation and that, accordingly, there was a breach of the article 17 right to privacy.

126. In light of the harsh impact of listing on Shayadi, Vinck, and their families, Sir Nigel Rodley suggested a number of criteria that should be applied when interpreting Security Council resolutions, including a presumption that the Security Council did not intend that actions taken pursuant to its resolutions should violate human rights.[120]

10.2 The Amendments Proposed

127. Schedule 7 of the NSL Bill proposes the following amendments to the proscription regime:

(a) the addition of a requirement of the Minister for Foreign Affairs to be satisfied "on reasonable grounds" of the prescribed matters before listing a person, entity or asset (ie, the person, entity or asset relates to terrorist activities);[121] and

(b) the insertion of section 15A, which purports to provide a "regular review of listing" after three years.

128. The explanatory memorandum to the NSL Bill states that the amendments to the UN Charter Act in Schedule 7 represent the Government's response to recommendation 22(b) of the PJCIS, *Review of Security and Counter-Terrorism Legislation*, tabled in December 2006.[122] The PJSCIS noted that currently there is no parliamentary scrutiny of listing decisions made

[120] Individual Opinion of Sir Nigel Rodley, in *Sayadi and Vinck*, 36-37.

[121] Proposed *Charter of the United Nations Act 1945* (Cth) s 15(1) and (3).

[122] See Explanatory memorandum to the National Security Legislation Amendment Bill 2010, p 50.

under the UN Charter Act.[123] Further, given that there are criminal offences triggered by a listing, there should be procedural safeguards in place.[124]

10.3 Human Rights Impact and Recommendations

129. The Government should be commended for inserting the requirement that the Minister be satisfied on "reasonable grounds" of the prescribed matters before listing a person, entity or asset.[125]

130. Although section 15A purports to provide for regular reviews of listings, it really only requires the same decision-maker (the Minister for Foreign Affairs) to re-consider the continuing merits of the matter at three year intervals. Section 15A in no way creates a right of independent merits review of any decision under the UN Charter Act, as recommended by the PJCIS. In Recommendation 22(a), the PJCIS recommended that external merits review of a decision to list a person, entity or assets under section 15 of the UN Charter Act should be made available in the Administrative Appeals Tribunal. This has not been provided in the amendments to the UN Charter Act.

131. The PJCIS states that amending the Minister's discretion by adding a requirement of reasonable grounds (as has been done), a court would be able to assess the decision in judicial review under the *Administrative Decision Judicial Review Act* 1977 (**ADJR**).[126] Whilst the ability to review section 15 decisions under the ADJR Act is an improvement, judicial review is limited to errors of law and does not provide the full range of remedies that merits review would provide (and which the PJCIS recommended).

132. Given the serious criminal consequences and human rights concerns that arise from a listing under the UN Charter Act, the Act should be amended to ensure that external merits review of a decision to list a person, entity or assets under section 15 be made available in the Administrative Appeals Tribunal.

[123] See Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, [6.33].

[124] See Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, [6.34], referring to Professors Bill Bowring and Douwe Korff, *Terrorist Designation with Regard to European and International Law: The case of the PMOI*, November 2004.

[125] This was recommended by the Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, recommendation 22(b).

[126] See Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, [6.39].

Recommendation 12:

Given the serious criminal consequences and human rights concerns that arise from a listing under the UN Charter Act, the UN Charter Act should be amended to provide a right to seek external merits review in the Administrative Appeals Tribunal of any decision to list a person, entity or assets under section 15 of the UN Charter Act.

11. Proposed Amendments to the NSI Act

11.1 The NSI Act

133. The NSI Act was passed on 8 December 2004. The objective of the NSI Act is to prevent disclosure of information in civil and federal criminal proceedings where the information is likely to prejudice national security.[127] "National security" is defined as Australia's defence, security, international relations and law enforcement interests. This broad definition encompasses political, military, economic relations with foreign governments, and methods and technologies of information-gathering.[128]

11.2 The Amendments Proposed

134. Schedule 8 of the NSL Bill proposes a number of amendments to the NSI Act. Most of the amendments seek to streamline provisions so as to make proceedings move more smoothly. The explanatory memorandum to the NSL Bill states that the amendments proposed fall within five general categories:[129]

(a) **Application of the NSI Act to legal representatives**: amendments are proposed to clarify the application of the NSI Act to the defendant's lawyer in criminal proceedings, and a party's lawyer in civil proceedings. This includes the obligation of a party's lawyer to give notice to the Attorney-General about the possible disclosure of national security information;[130] and the obligation of the prosecution or Attorney-General to give notice of the application of the NSI Act to the defendant's lawyer.[131]

(b) **Role of the Attorney-General under the Act**: amendments are proposed to clarify that the Attorney-General or a representative can attend and be heard during federal proceedings in the interests of national security.[132] It is also proposed that the Attorney-General be able to enter into consent arrangements in relation to the

[127] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 3.

[128] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 17.

[129] See Explanatory memorandum to the National Security Legislation Amendment Bill 2010, p 52-53.

[130] Proposed *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 24(1) (criminal) and 38D(1) (civil).

[131] Proposed *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 6(1) (criminal) and 6A(1)(b) and (2)(b) (civil).

[132] Proposed *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 20A (criminal) and 38AA (civil).

protection of national security information.[133] Furthermore, current section 16 provides a list of circumstances when information can be disclosed in civil and criminal proceedings. It is proposed that the circumstances under current paragraphs 16(aa), (ab), (ac), (ad) and (b) be repealed. Proposed paragraph 16(b) will instead state that national security information can only be disclosed as specified in a certificate or advice issued by the Attorney-General under sections 26, 28, 38F or 38H. It is stated that this will give the Attorney-General greater flexibility to prescribe the circumstances in which national security information can be disclosed.

(c) **Flexibility and efficiency in the conduct of court proceedings**: amendments are proposed to expand the powers of the courts to deal with national security information beyond conducting closed proceedings.[134] Further amendments are proposed to clarify that pre-trial hearings can be heard at any stage of a proceeding (ie, in the same fashion as directions hearings), and can be used to consider issues relating to the disclosure, protection, storage, handling or destruction of national security information.[135]

(d) **Facilitate agreements under sections 22 and 38B**: agreements can be made under the NSI Act as to arrangements about the disclosure of national security information (section 22 concerns criminal proceedings and section 38B civil). Amendments are proposed to clarify the policy intention that an agreement between the parties is preferable to regulations prescribing how information is dealt with;[136] who can enter into such agreements;[137] and that agreements can cover the protection, storage, handling and destruction, as well as disclosure of, national security information.[138]

(e) **Avoid unnecessary procedures**: amendments are proposed to streamline court processes concerning national security information. These amendments clarify that:

(i) re-hearings and proceedings relating to re-hearings should be considered as part of the same trial (which means that NSI Act procedures need not be repeated);[139]

(ii) once the Attorney-General has been notified of the potential disclosure of national security information, it is not necessary to provide notice again through other processes;[140]

(iii) it is only necessary to adjourn those parts of proceedings that may involve a disclosure of national security information;[141] and

[133] Proposed *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 22(1) (criminal) and 38B(1) (civil).

[134] Proposed *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 19(1A) and 20B (criminal) and 19(3A) and 38AB (civil).

[135] Proposed *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 21(1) and 21(1A) (criminal) and 38A(1) (civil).

[136] Proposed *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 23(2) (criminal) and 38C(2) (civil).

[137] Proposed *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 22(1) (criminal) and 38B(1) (civil).

[138] Proposed *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 22(1) (criminal) and 38B(1) (civil).

[139] Proposed *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 13(3) (criminal) and 15A(3) (civil).

[140] Proposed *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 24(1A) (criminal) and 38D(2) (civil).

(iv) the automatic requirement under current section 25 that a closed proceeding be held to determine if a witness in a criminal proceeding can disclose potential national security information be abolished. The witness will be instead required to provide a written statement to the court, which can then be shown to the prosecutor and, if present, the Attorney-General.[142] This will make the process consistent with the procedure in civil proceedings.[143]

135. A party must notify the Attorney-General if it is believed that national security information will be disclosed in a criminal proceeding. Current section 24(3) requires that all other parties be informed of this notification. This includes a description of the information in writing. It is argued in the explanatory memorandum to the NSL Bill that this "may potentially compel the defence to disclose aspects of their defence".[144] Proposed section 24(4) will therefore exclude defendants and their lawyers from providing such descriptions to the prosecution in criminal cases.

11.3 Problems with the NSI Act that are not Addressed in the NSL Bill

136. Amnesty and the HRLRC make no submissions on the changes proposed, save that the streamlining of procedures and the amendment in proposed section 24(4) are welcome.

137. However, Amnesty and the HRLRC are disappointed that the amendments proposed in the NSL Bill do not address two mechanisms established under the NSI Act that raise prima facie incompatibilities with the right to a fair trial in the ICCPR (article 14).[145]

(a) First, the NSI Act requires security clearances for a defendant's lawyer to see national security information that might be used as evidence. This is inconsistent with the right of defendants to communicate with legal counsel of their own choosing (ICCPR article 14(3)(b)), and the right of defendants to defend themselves through legal counsel of their own choosing (ICCPR article 14(3)(d)).

(b) Secondly, the NSI Act gives the Attorney-General the power to issue certificates that prevent the disclosure of information (including the disclosure to the accused and the accused's lawyers) deemed to prejudice the national security interest, or prevent a witness from appearing in trial. These powers allow for closed trials that could exclude the defendants themselves. This is inconsistent with the right of the defendant to be tried in their presence and to defend themselves (ICCPR article 14(3)(d)), and the right of a defendant to have and obtain the attendance and examination of witnesses (ICCPR article 14(3)(e))

[141] Proposed *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 24(5) (criminal) and 38D(5) (civil).

[142] Proposed *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 25(3)-(5).

[143] See *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 38E and proposed s 38E amendments.

[144] Explanatory memorandum to the National Security Legislation Amendment Bill 2010, p 65.

138. Article 14 of the ICCPR provides that "all persons shall be equal before the courts and tribunals". The right a fair trial is regarded as a fundamental rule of law which is essential to the proper administration of justice. The administration of justice must "effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice".[146] This right is concerned with procedural fairness, rather than substantive fairness of a decision or judgment of a court or tribunal, and is guaranteed in both civil and criminal trials via a series of due process rights.[147]

(a) Security clearances

139. The NSI Act provides that where a defendant's legal representative has been given notice that the case is likely to involve disclosure of information that is likely to prejudice national security, the legal representative may apply for a security clearance "at the level considered appropriate by the Secretary"[148] within 14 days.[149] If they do not apply for a security clearance or are unsuccessful in their application, there is a high likelihood that they will not be able to access information relating to their client's case. Further, it is an offence for any person to disclose national security information to legal representatives that do not have an appropriate security clearance.[150]

140. One of the due process rights in the right to fair trail is set out in article 14(3)(b), which guarantees the right of defendants to communicate with legal counsel of their own choosing, and article 14(3)(d) of the ICCPR guarantees the right of defendants to defend themselves through legal counsel of their own choosing.

141. The requirement in section 39 that legal representatives have a security clearance implements a procedure that lacks transparency and severely restricts the right of defendants to access to legal counsel of their own choosing. If a lawyer does not obtain a security clearance, then a defendant is denied the right to obtain a lawyer of their choosing. This is particularly of concern given that many members of the legal profession have made an in principle decision not to seek a security clearance should the requirement arise. Whilst the right to a lawyer of one's choosing is not absolute and may be restricted in certain circumstances, in the absence of a review of the decision of the Secretary, there is clear opportunity for a restriction of the right in unlimited circumstances.

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[145] *International Covenant on Civil and Political Rights*, U.N. Doc A/6136 (1966).

[146] HRC, *Draft General Comment No 32: Article 14 Concerning the Right to Equality before Courts and Tribunals and to a Fair Trial,* CCPR/C/GC/32/CRP.1Rev.2 (2006), [2] available at http://www.ohchr.org/english/bodies/hrc/comments.htm. See also *Raymond v Honey* [1983] 1 AC 1.

[147] HRC, *General Comment No 13: Administration of Justice* (1984), [2].

[148] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 39(2).

[149] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 39(5).

[150] A person may receive a sentence of imprisonment for 2 years: *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 46.

(b) Closed court proceedings

142. The NSI Act imposes an obligation on defendants and prosecutors to notify the Attorney-General if they know or believe that a national security information disclosure issue will arise during the course of proceedings, or that the mere presence of a witness will disclose national security information.[151] Under the NSI Act, closed court hearings are triggered when the Attorney-General issues a criminal non-disclosure certificate[152] or a criminal witness exclusion certificate.[153] The certificates provide conclusive evidence that disclosure of the information will prejudice national security,[154] and contravening the certificate is an offence.[155]

143. The NSI Act requires proceedings to be adjourned and closed court proceedings to be held, so that the court may consider whether and how national security information may be disclosed during the proceedings, or whether a witness should be called.[156]

144. Section 29 provides the requirements for closed court hearings. Subsection 29(2) allows the court to order the exclusion of the defendant, or their legal representative, during any part of the closed hearing.[157] However, the defendant may make submissions to the court rejecting the argument that the information should not be disclosed or the witness not called.[158]

145. In making an order whether or not to call a witness and whether and how to disclose information, section 31 requires that the court must consider whether the information is admissible,[159] and if so consider:

(a) the effect of disclosure on national security;

(b) the adverse effects of an order on the defendant's right to receive a fair hearing; and

(c) any other relevant factors.[160]

146. Section 31(8) of the NSI Act requires the court to give greatest weight to national security considerations in making orders on prohibiting the disclosure of information or calling a witness. This direction was found to be constitutional in *Lodhi v R*[161] because it did not usurp

[151] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 24.

[152] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 26.

[153] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 28.

[154] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 27and 28.

[155] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 43 and 44.

[156] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 25(3), 27(5), 28(5) and 31.

[157] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 29(3).

[158] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 29(4).

[159] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(7).

[160] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(7).

[161] *Lodhi v R* [2007] NSWCCA 360.

judicial power. However, the court's discretion is expressly weighted *against* the rights of a defendant to a fair hearing. Former High Court judge Justice McHugh has stated:

> 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.[162]

147. The operation of the closed court hearings in the NSI Act undermines the right to a fair trial.

148. Closed court hearings under section 29 disproportionately infringe on the right to a fair trial by allowing the defendant to be excluded from part of their trial. The terms of section 31 expressly undermine human rights to the extent that they sanction a weighting of discretion against an accused's right to a fair trial and in favour of national security.

149. Under international law, Australia has committed to guarantee the right of the defendant to be tried in their presence and to defend themselves (ICCPR article 14(3)(d)), and the right of a defendant to have and obtain the attendance and examination of witnesses (ICCPR article 14(3)(e)). The European Court of Human Rights and the House of Lords have acknowledged that this right can be limited in the public interest, including in circumstances where evidence cannot be disclosed in the interests of national security.[163] However, where this occurs it must be counterbalanced so that the detainee can effectively challenge the allegations made. Procedural fairness under the right to a fair trial requires that a detainee be informed in sufficient detail to permit him or her to effectively challenge those allegations.[164] This right means that where the undisclosed material is to be heavily relied upon and the accused will not be able to answer allegations made against him or her, there will be a breach of the right to a fair hearing.[165]

150. To the extent that the closed court hearings allow the exclusion of the defendant and the defendant's counsel from a hearing or the disclosure of evidence, they engage the accused's right to be tried in their presence and to defend themselves. Given the weighting of judicial discretion in section 31, the Act proposes a regime that will, as Justice Mc Hugh says, direct the outcome of the closed hearing adversely to the right to a fair trial.

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[162] The Hon. Michael McHugh AC QC, 'Terrorism Legislation and the Constitution' (2006) 28 *Australian Bar Review* 117.

[163] *A v United Kingdom* [2009] ECHR 3455/05 [Grand Chamber] 19 February 2009; followed by the House of Lords in *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28 (10 June 2009).

[164] *A v United Kingdom* [2009] ECHR 3455/05 [Grand Chamber] 19 February 2009; followed by the House of Lords in *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28 (10 June 2009).

[165] *A v United Kingdom* [2009] ECHR 3455/05 [Grand Chamber] 19 February 2009; followed by the House of Lords in *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28 (10 June 2009).

11.4 Public Interest Immunity

151. The infringements on the right to a fair trial discussed above in the NSI Act are unnecessary, as the doctrine of public interest immunity can ordinarily be utilised by the Government to object to disclosures of national security information.

152. The NSI Act was implemented in response to the ALRC's report, *Keeping Secrets*.[166] In that report, the ALRC recommended the implementation of a legislative scheme that would avoid two outcomes of a public interest immunity application: a court ruling either that (1) security sensitive information be admitted into evidence (despite the risk for national security) or (2) that the information be excluded (despite the risks to the parties).[167]

153. The ALRC stated that one of the purposes of the then proposed NSI Act would be to "provide the court with a wide range of possible methods of maximising the amount of evidence available for use in the proceedings – ensuring that fairness is afforded to all parties (including the Crown) and public access is not unduly restricted".[168] The idea was to leave the government with the ultimate option to withhold "extraordinarily sensitive information" where the government considers that the risks of disclosures outweigh all other considerations, including gaining a criminal conviction. However, the court is to determine the conduct of the proceeding in light of the government's decision about disclosures.[169]

154. Importantly, the ALRC also said that as a matter of principle, secret evidence should *never* be led against accused in criminal proceedings. It stated:

> The leading of secret evidence against an accused, for the purpose of protecting classified or security sensitive information in a criminal prosecution, should not be allowed. To sanction such a process would be in breach of the protections provided for in Article 14 of the International Covenant on Civil and Political Rights for an accused to be tried in his or her presence and to have the opportunity to examine, or have examined any adverse witnesses. Where such evidence is central to the indictment, to sanction such a process would breach basic principles of a fair trial, and could constitute an abuse of process.[170]

155. In fact, the ALRC said that courts should never hear part of any civil or criminal proceedings in the absence of one of the parties and its legal representatives (except some judicial review matters) and only in other exceptional cases.[171]

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[166] ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, (2004) ALRC 98.

[167] ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, (2004) ALRC 98, [16].

[168] ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, (2004) ALRC 98, [14].

[169] ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, (2004) ALRC 98, [14].

[170] ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, (2004) ALRC 98, [11.201] to [11.204].

[171] ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, (2004) ALRC 98, [17].

156. The NSI Act does not contain these fundamental safeguards that the ALRC envisaged it needed in order to comply with the right to a fair hearing. Amnesty and the HRLRC submit that the NSI Act should be repealed and that the disclosure of national security information can be dealt with according to the doctrine of public interest immunity. If the NSI Act is retained, it requires urgent amendment to ensure that the provisions containing requirements for security clearances and allowing court hearings in the absence of the accused do not infringe the right of persons to a fair trial.

Recommendation 13:

The NSI Act should be repealed and the disclosure of national security information dealt with in accordance with the doctrine of public interest immunity. If it is to be retained, it requires urgent amendment to ensure that the provisions containing requirements for security clearances and allowing court hearings in the absence of the accused do not infringe the right of persons to a fair trial.

12. Expansion of the Roles of the IGIS and the PJC-LE

12.1 The IGIS

157. The IGIS is an independent statutory office holder acting under the IGIS Act and appointed by the Commonwealth Attorney-General.[172] His or her current role is to review the operations of Australia's intelligence agencies. These agencies, known collectively as the Australian Intelligence Community (**AIC**) are:

(a) the Australian Security Intelligence Organisation (**ASIO**);

(b) the Australian Secret Intelligence Service (**ASIS**);

(c) the Defence Signals Directorate (**DSD**);

(d) the Defence Imagery and Geospatial Organisation (**DIGO**);

(e) the Defence Intelligence Organisation (**DIO**); and

(f) the Office of National Assessments (**ONA**).

158. The IGIS can conduct an inquiry into an AIC organisation at the request of the Prime Minister. He or she can also receive complaints from the public and conduct independent investigations into an AIC organisation.

159. Schedule 9 of the NSL Bill proposes to amend the IGIS Act to expand the role of the IGIS. Under the proposed amendments, he or she will be able to inquire into an intelligence or

[172] See generally http://www.igis.gov.au/faq/index.cfm.

security matter relating to any Commonwealth department or agency, at the request of the Prime Minister (see proposed sub-sections 9(3) and (4)). However, the independent power of review and the handling of complaints will still only be available for the AIC agencies, and not other Commonwealth bodies (see proposed section 23(1)).

12.2 The PJC-LE

160. The current Parliamentary Joint Committee on the Australian Crime Commission (**PJC-ACC**) was established under Part III of the *Australian Crime Commission Act 2002* (Cth) (**ACC Act**), and is charged with monitoring, reviewing and reporting on the activities of the Australian Crime Commission (**ACC**).[173]

161. The PJC Bill proposes to expand the ambit of the PJC-ACC's oversight to the activities of the Australian Federal Police (**AFP**). To reflect this increased role, the PJC-ACC will be renamed the Parliamentary Joint Committee on Law Enforcement (**PJC-LE**). However, according to the explanatory memorandum to the PJC Bill, the proposed amendments also clarify that the functions of the PCJ-LE will "not extend to review of certain sensitive operational matters, review of particular investigations or operations or inquiring into complaints about the AFP or ACC", and that its functions instead "relate to the broad operation and effectiveness of the ACC and AFP, rather than particular operations or responding to individual complaints or concerns".[174]

12.3 Human Rights Impact and Recommendations

162. Amnesty and the HRLRC welcome any additional oversight into the intelligence activities of Government departments and agencies.

163. However, the expansion of the roles of the IGIS and the PJC-LE provides no additional avenues for people to lodge complaints regarding the conduct of an intelligence agency or government department. At the least, the right to make a complaint to the IGIS and the ability of the IGIS to conduct independent investigations should be extended to all government departments and agencies.

164. In addition, it should be noted that the ability to make complaints is not a satisfactory replacement to the right to external merits review of administrative decisions that can affect one's human rights. As it has been argued above, merits reviews should be granted to decisions such as a proscription as a terrorist organisation under the Criminal Code (see above Part 6) or a listing of an organisation under the Charter Act (see above Part 10).

[173] See generally http://www.aph.gov.au/Senate/committee/acc_ctte/ctte_info/role.htm.

[174] Explanatory memorandum to the Parliamentary Joint Committee on Law Enforcement Bill 2010, p 3.

Recommendation 14:

The independent power of investigation of the IGIS under the IGIS Act should be extended further so that he or she is able to receive complaints about or independently investigate *any* government department or agency in relation to an intelligence or security matter.

13. Matters not Addressed in the NSL or PJC Bills

165. Despite some welcome proposed amendments, Amnesty and the HRLRC are disappointed that the bills do not address at all some of the most problematic counter-terrorism laws insofar as human rights violations are concerned. Although these laws are not covered by the bills, Amnesty and the HRLRC believe that the Standing Committee should at least be informed of the general nature of these concerns so as to provide a broader context for this submission.

166. These other concerns are considered in more detail in the earlier Joint Submission.[175] In summary the main issues are:

(a) **Control orders and preventative detention orders**. The *Anti-Terrorism Act (No 2) 2005* (Cth) introduced a regime of control orders and preventative detention orders to the Criminal Code. In addition to raising concerns regarding freedom from arbitrary detention (article 9 of the ICCPR), the presumption of innocence and the right to a fair hearing (article 14 of the ICCPR), the regimes for these instruments raise significant concerns due to the inadequacy of safeguards to comprehensively prevent ill-treatment.[176]

(b) **ASIO detention powers**.[177] Following amendments introduced under the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) and the *ASIO Legislation Amendment Act 2006* (Cth), a person (including a non-suspect) can be detained without charge under an ASIO warrant for up to 168 hours, or seven days.[178] A separate warrant can be issued at the end of the 168 hours if new material justifies it.[179] A person may thus be held in detention indefinitely for rolling periods of seven days, without any charge having been made out against them in accordance with conventional criminal procedure.

[175] Available at http://www.hrlrc.org.au/content/topics/counter-terrorism/counter-terrorism-and-human-rights-submission-to-national-security-legislation-review-oct-2009/.

[176] See Joint Submission section 9.1.

[177] See Joint Submission section 9.2.

[178] *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34S and 34G(1). A comprehensive list of the "legislative suite" can be found at the Government's "National Security" website (http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/826190776D49EA90CA256FAB001BA5EA?OpenDocument).

[179] *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34F(6) and 34G(2).

(c) **The offences relating to association with a terrorist organisation**.[180] Under section 102.8 of the Criminal Code, it is an offence to associate with a member of a terrorist organisation or a person who promotes or directs the activities of such an organisation. This offence directly limits the freedom of association protected in article 21 of the ICCPR. Amnesty and the HRLRC share the concerns of the Australian Human Rights Commission that "section 102.8 lacks precision and clarity, and is extremely broad in its reach, which may contravene the requirement for proportionality".[181]

(d) **The offences relating to supporting a terrorist organisation**.[182] Section 102.7 of the Criminal Code provides that it is an offence for a person to intentionally provide support or resources to an organisation that would help that organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act. Amnesty and the HRLRC share the concerns of the Australian Human Rights Commission, which were accepted by the Sheller Committee, that section 102.7 may disproportionately restrict the right to freedom of expression by extending to the publication of views that appear to be favourable to a proscribed organisation.[183] Furthermore, such a prohibition grossly undermines fundamental principles of a free and democratic society, and would constitute a severe restriction on freedom of speech. It should be noted that amendments were proposed to this section in the Exposure Draft, but these do not appear in the latest version.

(e) **The offences relating to training with a terrorist organisation**.[184] Section 102.5 contains two training offences: training with a terrorist organisation while being reckless to the fact that the organisation is a terrorist organisation (subsection 102.5(1)); and the strict liability offence of training with a terrorist organisation that is proscribed as such (subsections 102.5(2) and (3)). Amnesty and the HRLRC consider the severe penalty for these offences (25 years imprisonment) to be completely disproportionate given the fault element involved. The Sheller Committee also raised serious concerns with the section.[185] The Exposure Draft proposed to address these concerns by introducing a ministerial authorisation scheme to exempt humanitarian aid organisations from being caught by the section, and not substantively amending the offences themselves. This scheme is no longer in the NSL Bill, which is welcome, given the envisaged problems that the scheme would create. However, the problems with the section still remain.

(f) **The overly broad definition of "terrorist act"**.[186] Amnesty and the HRLRC also have serious concerns with the very broad definition of "terrorist act" in the Criminal

[180] See Joint Submission, section 9.4.

[181] Human Rights and Equal Opportunity Commission, *Submission to the Security Legislation Review* (January 2006), *6*.37, available at http://www.hreoc.gov.au/legal/submissions/security_legislation_review.html.

[182] See Joint Submission, section 4.4.

[183] *Sheller Committee Report*, p 122.

[184] See Joint Submission, section 4.5.

[185] *Sheller Committee Report*, p 118 and 125.

[186] See Joint Submission, section 4.1.

Code. The HRC and the United Nations Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism (the **Special Rapporteur**) have similarly expressed concern with the definition. In 2006, the Special Rapporteur strongly urged Australia to reconsider the definition, which fails to clearly distinguish between terrorist conduct and ordinary criminal conduct. The Special Rapporteur was of the view that the "definition goes beyond the UN Security Council's characterisation of the type of conduct which should be targeted in countering terrorism".[187] Similarly, the HRC recommended in its 2009 Concluding Observations that Australia should address "the vagueness of the definition of terrorist act in the Criminal Code Act 1995, in order to ensure that its application is limited to offences that are indisputably terrorist offences".[188] The Exposure Draft contained a number of amendments that would have broadened the definition further. These were not adopted in the latest version of the NSL Bill, which is welcomed by Amnesty and the HRLRC. Amnesty and the HRLRC, however, believe that the definition still needs substantive amendments.

167. Although it may be beyond the scope of inquiry of the Standing Committee, issues such as these would be highlighted by a comprehensive human rights audit of Commonwealth legislation, as is envisaged in the Government's response to the *National Human Rights Consultation Report* and discussed above in Part 3.

[187] Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism*, [15], UN Doc A/HRC/4/26/Add.3 (2006).

[188] Human Rights Committee, *Concluding Observations: Australia* UN Doc CCPR/C/AUS/CO/5, [11], 2 April 2009.

Recommendation 15:

All Commonwealth counter-terrorism laws should be made subject to an immediate human rights audit and review as a matter of urgency, as was announced in the Government's response to the *National Human Rights Consultation Report*. In particular the Government must urgently review:

(a) The regime for control orders and preventative detention orders that threaten freedom from arbitrary detention, the presumption of innocence and the right to a fair hearing.

(b) ASIO detention powers, pursuant to which a person may be held in detention indefinitely for rolling periods of seven days, without charge.

(c) The unclear and imprecise offences relating to association with a terrorist organisation, which directly limit freedom of association.

(d) The offences relating to 'supporting' a terrorist organisation which may disproportionately restrict the right to freedom of expression.

(e) The disproportionate penalty that applies for offences relating to training with a terrorist organisation.

(f) The overly broad definition of "terrorist act", from which a range of criminal sanctions flow, including those set out at (a) to (e) above.