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Submission to the Standing Committee on Legal and Constitutional Affairs

Inquiry into the National Security Legislation Amendment Bill 2010 (Cth)

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PRELIMINARY

This submission pertaining to the National Security Legislation Amendment Bill 2010 (Cth) (hereafter "the Bill") supports the need for ongoing review and, where required, amendment or repeal, of Australia's laws relating to national security.

It is fair to say that the administration of these laws, at least in the criminal justice sphere, has been replete with a greater-than-usual degree of illegality and impropriety on the part of administering agencies. Examples include:

- The unlawful questioning of Joseph Thomas in Pakistan by members of the Australian Federal Police, which resulted in two convictions being quashed by the Victorian Court of Appeal;[1]

- the well-known arrest and subsequent release of Dr Mohammed Haneef in 2007;

- the finding in 2007 by Justice Adams of the New South Wales Supreme Court that ASIO officers, in the course of investigating Izhar Ul-Haque, had 'committed the criminal offences of false imprisonment and kidnapping at common law and also an offence under s86 of the *Crimes Act* 1900'[2];

- the conduct of the Australian Federal Police in arresting and questioning Arumugam Rajeevan, which involved arresting him at gunpoint despite having no legal basis to do so, refusing him access to his lawyer, and subjecting him to questioning described by Justice Paul Coghlan of the Victorian Supreme Court as "really well over the top" and "outrageous"[3]

With these events in mind, this submission supports those elements of the Bill which would narrow the operation of these laws, and urges further such narrowing and in some cases repeal. It opposes those elements of the Bill which would confer further power on agencies in relation to the investigation and prosecution of national security offences.

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[1] *R v Thomas* [2006] VSCA 165.

[2] *R v Ul-Haque* [2007] NSWSC 1251 [62].

[3] As reported in *The Sydney Morning Herald*, March 1. 2010.

OFFENCES

Treason and urging violence

Crimes Act 1914 *offences*

This submission supports the repeal of sections 30A to 30H and 30R of the *Crimes Act 1914* (Cth), on the grounds that such political offences are unnecessary in a contemporary pluralist, liberal democracy such as Australia.

Treason

This submission advocates that, on the assumption that Australia criminal law will continue to include a treason offence, Division 80 of the *Criminal Code* be amended in a fashion different from that in Schedule 1 of the National Security Legislation Amendment Bill 2010 (Cth) (hereafter "the Bill").

First, Australia may well be the only country in the world which has a treason offence that imposes duties of national loyalty on non-residents and non-citizens (by operation of section 80.4 of the *Criminal Code*, which applies Category D extended geographical jurisdiction to all Division 80 offences, and which the Bill does not amend in respect of the existing Division 80 offences). Assuming that extended geographical jurisdiction is to be maintained as a feature of Australia's treason law, the relevant jurisdiction would be Category B (section 15.2 of the *Criminal Code*), which requires (roughly) either that the offence be committed in Australia, or that it be committed by an Australian citizen or resident.

Second, while the repeal of paragraphs (e) and (f) of section 80.1(1) of the *Criminal Code* is to be welcomed, this submission does not support the partial re-enactment of those paragraphs by the Bill in a new section 80.1A. These offences continue to be drawn in overly broad terms:

- In each case, while "material assistance" is part of the fault element, it is not part of the physical element;[4]

- "Material assistance" is not defined, and hence the offence may continue to criminalise the conduct of conscientious objectors, pacifists and other opponents of Australian military engagements.

In relation to the last-made point, it is arguable that urging conscientious objection, or the laying down by soldiers of their arms, may constitute conduct that:

- Materially assists an enemy to engage in war with the Commonwealth, or a country or organisation to engage in armed hostilities with the ADF;

- Is intended materially to assist that enemy, country or organisation in that way (because, as per Division 5 of the *Criminal Code*, the person may be aware that the urged result would occur in the ordinary course of events).[5]

The concept of "material assistance" ought to be defined to include only direct assistance, such as the provision of troops, funds, arms or other materiel, or intelligence, but to exclude indirect assistance such as the refusal to fight, the provision of humanitarian supplies, etc. A definition of "material assistance" would also make the defence found currently in subsection 80.1(1A), which the Bill would re-enact as subsection 80.1A(6), unnecessary.

On the assumption that Australian criminal law will continue to include a treason offence (as well as other offences under Division 80), this submission strongly supports the extension to the good faith defence that the Bill would enact. The defence should be further extended, however, by removing the requirement in paragraph 80.3(b) of the *Criminal Code* that the pointing out of good faith errors take place with a view to reform. In a democracy, the pointing out of errors in good faith should be permissible whether or not done for a reforming, nihilistic or other reason.

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[4] Curiously, recommendation 11–2 in ALRC, *Fighting Words* (Report No 104, 2006) recommended that "material support" be part of the physical element, but not the fault element. It belongs in both.

[5] *Criminal Code* (Cth) s 5.2(3), defining 'intention' in respect of physical elements that are results of conduct.

This submission also supports repeal of the Attorney-General's consent as a requirement for prosecution under Division 80. This is one useful step towards depoliticisation of Australian criminal law.

Urging violence

This submission strongly supports the repeal of subsections 80.2(7), (8) and (9) of the *Criminal Code*. To the extent that such conduct is to be criminalised at all, the offence of incitement to treason is sufficient (section 11.4 of the *Criminal Code* in conjunction with Division 80 offences).

This submission opposes the existence, in Australian law, of the offence created by sub-section 80.2(1). This offence overlaps to a large extent with the existing offence of incitement to treachery.[6] While overlap is not total, in respect of those aspects where there is overlap the urging violence offence is broader:

- The urging violence offence includes urging another to overthrow by force or violence the lawful authority of the Commonwealth;[7]
- The urging violence need only be reckless, rather than have intention, with respect to the target of the violence;
- An urging violence offender need only urge treacherous conduct, rather than intend both treacherous conduct and treacherous intentions, on the part of others;
- Universal jurisdiction (that is to say, Category D extended geographical jurisdiction) applies to the urging violence offence – thus, it would not be incitement to treachery to urge interference with an Australian soldier in the Solomon Islands participating in the RAMSI mission, but if preventing such a soldier from carrying out orders would constitute an overthrow of

[6] *Crimes Act 1914* (Cth) s 24AA(1)(a) together with *Criminal Code* s 11.4. The maximum penalty for incitement to treachery is 10 years; for the urging violence offence, it is 7 years.

[7] *Criminal Code* (Cth) s 80.2(c).

the lawful authority of the Commonwealth, then urging such interference might constitute an urging violence offence.[8]

A further objectionable feature of the urging violence offence is the vagueness of 'lawful authority of the Commonwealth'. Is it sufficient to constitute the overthrowing of this that the execution of one law be prevented? If so, then there is a manifestly excessive intrusion on political dissent. Importantly, the Gibbs Report recommended not merely a reference to urging the overthrow of lawful authority, but talked of lawful authority in respect of the whole or part of Australia and its territories.[9] And the Gibbs Report did not recommend universal jurisdiction.

This submission contends that there are existing offences – such as those found in Divisions 147 and 149 of the Commonwealth *Criminal Code*, of harming a Commonwealth official because they are such an official, of threatening such harm, and of obstructing Commonwealth officials[10]– which seem more appropriate to protect the proper functioning of Australian government, without threatening with criminal punishment the expression of political dissent.

If, nevertheless, this offence is to be retained in spite of the lack of a demonstrated threat of violence that requires criminalisation, the amendments the Bill would introduce, requiring that the offender intend the urged violence to occur, should be supported. Further amendments would be highly desirable, however, including:

- Removing universal jurisdiction – even more so than in respect of treason, there is no evident need or utility in attempting to enforce loyalty to Australian institutions on foreigners;
- Requiring, as a physical element, that the criminal speech is likely to result in the use of force or violence as urged.[11]

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[8] *Criminal Code* (Cth) s 80.4. In the case of treachery, either the conduct or its effects must occur within Australia.

[9] See the discussion in ALRC, *Fighting Words* (Report No 104, 2006) [9.8].

[10] *Criminal Code* (Cth) ss 147.1, 147.2, 149.1. These offences carry maximum penalties of 10 years, 7 years and 2 years imprisonment respectively, although if the harm threatened to an official is not serious, the maximum penalty under s 147.2 is 2 years imprisonment.

[11] Similar to the requirement in American law: see DP 71 [6.36].

The ALRC has expressed concern that a physical element of this sort could be very difficult to prove in the event of a prosecution.[12] But this objection was not regarded as fatal by at least some members of the ALRC on an earlier occasion, who recommended that a similar physical circumstance – of the likelihood of incited hatred coming to pass – be an element of a new offence of incitement to racist hatred.[13] Given the absence of a demonstrated threat to the wellbeing of Australians by speech urging revolutionary or insurrectionary violence, the offence ought to be defined in such a way as to narrow, rather than expand, its reach. There is no need to criminalise futile speech, even virulent futile speech.

A physical element of likelihood would have the additional virtue of requiring investigating and prosecuting authorities to turn their minds expressly to that question. This might help eliminate unintended biases in the application of these offences, as this submission will now explain: It seems almost inevitable that any offence criminalising political speech will have a disproportionate effect on those political actors whose methods and rhetoric are less familiar to investigators and prosecutors, or are less at home in the culture that has shaped the expectations of the officers of those agencies. In particular, in the current political and social climate it is plausible to suppose that certain speech (such as certain speech produced by Muslims) is more likely to be targeted by authorities, while other speech having objectively much the same content will be treated as normal or unthreatening or of no practical consequence, simply because it is more familiar (for example, Communist revolutionary literature, or white supremacist or anti-Semitic hate speech). An express element of the offence requiring proof of likelihood to lead to violence would oblige investigators and prosecutors to ask, of unfamiliar speech, the same question to which they already know the answer in respect of familiar speech, namely, that most speech urging violence is, in a society like Australia, harmless if offensive (to some) and unlikely to actually result in any violence taking place.

With respect to the offence created by section 80.2(3) of the *Criminal Code*, this submission notes that there are other offences that protect the integrity of the formal processes of Australian democracy:

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[12] DP 71 (2006) [8.63].

[13] Cited in DP 71 [9.15].

- Subsections 327(1) of the *Commonwealth Electoral Act 1918* (Cth) and 120 (1) of the *Referendum (Machinery Provisions) Act 1984* (Cth) makes it an offence, punishable by a $1,000 fine and/or up to 6 months in prison, to hinder or obstruct the performance of a political right or duty in respect of Commonwealth referenda or parliamentary elections;

- Section 28 of the *Crimes Act 1914* (Cth) imposes a maximum penalty of 3 years imprisonment for interfering with the performance of a political right or duty (such as casting a vote in an election or referendum, or super-intending such a vote) by violence, threats or intimidation;

- Section 11.4 of the Commonwealth *Criminal Code* makes it an offence to urge commitment of any of the above offences, and imposes the same maximum penalty;

There is, therefore, no need for a distinct offence of the sort created by section 80.2(3) of the *Criminal Code*. There is especially no need to create such an offence having a maximum penalty that is – at 7 years – considerably greater than the penalty that would apply to anyone convicted of actually committing the urged violence.

If, despite the absence of any rationale for the offence and the manifest excessiveness of the maximum penalty, the offence is to remain in the *Criminal Code*, then the amendments the Bill would introduce, requiring that the offender intend the urged violence to occur, should be supported, and further amendments of the sort canvassed above (removing universal jurisdiction, and introducing a physical element that the urged violence be likely to occur) would be highly desirable.

This submission does not support the retention of the offence created by section 80.2(5) of the *Criminal Code*, nor the variant of that offence that the Bill would introduce as subsection 80.2A(1) of the *Criminal Code*. The existing fence is anomalous for at least three reasons:

- It creates a type of hate speech offence in the absence of an offence which actually criminalises the hate crimes that might ensue;

- It creates a type of offence which has a legitimate rationale *only* as a hate speech offence, but does not require motivation by hatred, or intention to foster hatred, as an element of the offence;

- It instead characterises the offence as a public order offence, pertaining to the security of the Commonwealth, rather than either as an offence against the person, or as an element of human rights law;

- It identifies political opinion as a protected attribute of groups.

The last of these points warrants elaboration. It is not uncommon for political actors, including ministers of Australian governments, to urge the use of force and violence against groups distinguished by their political opinion (such as the Taliban, Al-Qa'ida or Jemaah Islamiyah). The justification for prohibiting such speech is therefore unclear. It becomes more unclear when it is remembered that the offence is defined as one of universal jurisdiction.[14]

The variant offence that would be introduced by the Bill as subsection 80.2A(1) is to be supported only in one respect, namely, that it would require that the offender intend the urged violence to occur, should be supported. If it is to be enacted, further amendments of the sort canvassed above (removing universal jurisdiction, and introducing a physical element that the urged violence be likely to occur) would be highly desirable.

The other offences that would be introduced into a new sections 80.2A and 80.2B are anomalous for the same reasons as given above. Furthermore, they introduce a strange distinction between hate speech urging violence which would threaten the peace, order and good government of the Commonwealth, and that which would not. This phrase was included in subsection 80.2(5) of the *Criminal Code* because, as the Attorney-General's Department put it in 2006, it gave the offence an appropriate Commonwealth flavour.[15] It is now to be made an operative element of an offence, including one on which questions of alternative verdicts and maximum penalties turn, despite having been held by Dixon J to be meaningless

[14] *Criminal Code* (Cth) s 80.4.

[15] ALRC, *Fighting Words* (Report No 104, 2006) [10.58].

as such an element.[16] This is a poorly conceived piece of criminal law drafting, and ought not to be enacted. If it is the policy of the Commonwealth government to introduce hate crime offences, this ought to be done in a serious and systematic fashion with properly drafted offences whose elements are properly considered and do the job that they are meant to do.

Terrorist acts and terrorist offences

This submission contends that the present statutory definitions of "terrorist act" and "terrorist organisation" are untenably broad, and lead in practice to an exercise of investigatory and prosecutorial discretion on a degree that is unprecedented in Australian criminal law for offences having maximum penalties ranging from 10 years to life imprisonment.[17]

For this reason, this submission supports the absence, in this Bill, of those provisions of the draft exposure Bill which would have expanded the definition of "terrorist act" and introduced a new hoax offence. If it continues to be seen as desirable to clarify how threats fit into the definition of "terrorist act", this could be done in the following way, without expanding the definition:

- Amend paragraph (a) of the definition of "terrorist act" in subsection 100.1(1) to read

  The action or threat falls within subsection (2) and does not fall within subsection (3);

- Amend the introductory clause of subsection 100.1(2) to read

  Action, or a threat of action, falls within this subsection if it …;

- For each of the disjunctive consequences in subsection 100.1(2), in lieu of adding "or is likely to" in the fashion of the Bill, add "or would";

- Amend subsection 100.1(3) to read

  Action, or a threat of action, falls within this subsection if:

  (a) it is advocacy, protest, dissent or industrial action; and

[16] Ibid [10.60], referring to the *Sharkey* case.

[17] See Patrick Emerton, "Australia's Terrorism Offences – A Case Against" in Andrew Lynch, Edwina MacDonald and George Williams, *Law and Liberty in the War on Terror* (2007).

(b) the action, or the threatened action, is not intended ….

Such redrafting of the existing definition would make it clear how the "threat" component of the definition works, without having any expansionary consequences.

An even simpler, and preferable, alternative would be to exclude threats from the definition altogether.

It would also be preferable for the Bill to narrow the definition of "terrorist act", in order to reduce its current breadth (which leads to excessive discretion in investigation and prosecution) and bring it into greater conformity with accepted international legal norms pertaining to terrorism. Provisions along these lines can be found in items 3 and 4 of Schedule 1 of the Anti-Terrorism Laws Reform Bill 2009 (Cth):

- the inclusion of hostage taking within the definition;
- the exclusion of property damage from the definition;
- the exclusion of conduct that occurs within the context of an armed conflict (which is already governed, under Australian law, by Division 268 of the *Criminal Code*); and,
- the exclusion of conduct which has no violent intention but only an intention to create a serious risk to health or safety.

The listing of organisations

This submission is of the view that the listing regime under Division 2 should be repealed.

To list an organisation is to trigger a number of departures from the ordinary rule of law in Australia. Offences are enlivened of involvement with an organisation, which do not require the proof of any terrorist intent or conduct on the part of an accused or the organisation, and which have maximum sentences comparable to those for manslaughter, rape and serious war crimes.[18] One of these offences – that of training with a banned organisation – places an

[18] *Criminal Code* (Cth) ss 102.2-102.8.

evidential burden on the accused to lead evidence of his or her innocent state of mind.[19] Furthermore, all of these offences are subject to departures from the ordinary rules relating to pre-charge, pre-trial and post-conviction detention, and empower ASIO's interrogation and detention powers, in the ways discussed above in relation to the proposed hoax offence.

Listing an organisation is therefore a serious matter, having serious consequences for the application of Australian criminal law. For this reason, an organisation ought not to be listed simply to make a political point. It is not the proper function of Australian law to make criminals of those whose opinions on matters of politics and foreign policy happen to differ from those of the government of the day. Unfortunately, to date the regime has been applied in what appears to be an ad hoc fashion which, in the absence of any clearly articulated rationale from ASIO or the government for the singling out of those organisations that have been listed cannot but be perceived as discriminatory, reflecting little more than the foreign policy priorities of the government. In a liberal democracy, better grounds ought to be given for criminalising what would otherwise be lawful conduct than that the conduct in question is inconsistent with the government's own foreign policy goals. The criminal law is not an appropriate vehicle for foreign policy symbolism.

Given these features of the listing regime, there are no grounds for increasing the period for which a listing regulation would remain in effect. This submission therefore opposes the extension from 2 to 3 years of the duration of the listing of an organisation under Division 102 of the *Criminal Code*.

Advocacy

Given that "advocacy" has never been used as a basis for the listing of an organisation, there appears to be no need to retain this aspect of Division 102. Independent of the general considerations advanced for repeal of the listing regime as a whole, it ought to be repealed as redundant, and unduly burdening of political and religious speech.

If advocacy is to be retained as a ground for the listing of organisations, then the amendment contained in the Bill would at least be a move in the right direction.

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[19] *Criminal Code* (Cth) s 102.5(2),(3),(4). This will be discussed further below.

Advocacy also plays a role in the film and literature classification process. Although the amendment contained in the Bill would be an improvement in this respect, what is desirable is a removal altogether of this basis for censorship. Given the extreme breadth of material that would fall under the definition of "advocating terrorist acts", a serious concern arises that the definition will be applied by the classification authorities in a partial, and potentially discriminatory, manner.

This concern is not purely abstract: it arises out of the very examples given in the Discussion Paper that preceded this change to Australia's classification regime.[20] That Discussion Paper gave the following examples:

- "An article published by a fundamentalist religious organisation describes the action of an individual who has detonated a suicide bomb amidst a market place of civilian shoppers, causing death and mayhem. The article directly praises the particular act, its deadly effect on 'the enemy' and the bomber's consequent martyrdom. It claims that the person would be assured a place in heaven."[21]

- "A pamphlet distributed at a cultural festival, or a DVD of a speech adopts words and / or tone which indirectly advocate committing a terrorist act. It does not provide detailed step-by-step instruction on how to carry out any specific action. It does not expressly urge anyone to take action. It does not expressly praise an action."[22]

- "[P]atriotic material that might appear to glorify war or battle."[23]

- "[A]ction legitimately taken by the armed forces of a country on the international stage in accordance with what they perceive to be their national interests and international law."[24]

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[20] Attorney-General's Department, *Material that Advocates Terrorist Acts – Discussion Paper* (2007)

[21] Ibid at 3.

[22] Ibid.

[23] Ibid at 6.

[24] Ibid.

The first of these is offered as an example of direct praise of a terrorist act, the second as an example of indirect counselling, urging and/or instruction. It is said, of the third example, that it is "not intended" to be caught by the prohibition upon advocacy of terrorist acts. However, it is completely obscure in what way the third example differs from the first or second, each of which could properly be described as *patriotic material glorifying war or battle*.

It might be thought that it is relevant that the first example involves attacks upon civilians, but there are two reasons why this is irrelevant under the definitions of "advocacy" and "terrorist act":

- The definition of terrorist act makes no reference to the targets of the actual or threatened violence;
- Many acts of war or battle involve the deliberate killing of civilians (for example, the bombing of German and Japanese cities by the Allies during the Second World War).

The suggestion is therefore raised that certain sorts of patriotism will not be censored (eg that involving Australia, the United States, etc) but others will be (eg that involving Lebanon, the occupied Palestinian territories, etc). This sort of discriminatory application of censorship laws is inimical to liberal democracy, in which the government does not take sides in its citizens political opinions and disagreements.

The fourth example identified above is said, in the Discussion Paper on Material that Advocates Terrorist Acts, to not be included in the definition of "terrorist act". No reason for this assertion is given; and in fact the assertion is false, for no distinction is drawn in the definition of "terrorist act" between violence carried out by state and non-state actors, and nor is any distinction drawn between legitimate violence and illegitimate violence.[25] Again, then,

[25] There is in fact express statutory warrant for the proposition that "terrorist act" encompasses the activities of armed forces. The *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) establishes as defence to the crime of incursion, that the accused was serving in the armed forces of a foreign state (s 6(4)(a)). An exception to that defence arises, however, if the organisation with which the accused was serving has been listed under Division 102 of the *Criminal Code* as a "terrorist organisation" (ss 6(5),(6),(7)(b)). At the time this provision was introduced into the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (by the *Anti-Terrorism Act 2004* (Cth)), the principal criteria for listing an organisation under Division 102 of the *Criminal Code* was that the organisation be "directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act" (*Criminal Code* (Cth) s 102.1(1)). This demonstrates that statute expressly contemplates the activities of armed forces as falling within the definition of "terrorist act".

the only basis on which such activity can be excluded from the scope of the proposed censorship is if the proposed Code and guidelines are applied in a discriminatory fashion, legitimating the violence of states but censoring expressions of support for non-state violence. This, again, would be inimical to liberal democracy. In practical terms, for example, it would have the capacity to limit the distribution of material by organisations of the sort who, in times past, offered political support to the ANC's struggle in South Africa, and the struggle of Fretilin in East Timor.

Given that it is a serious criminal offence, punishable by up to life imprisonment, to engage in a terrorist act,[26] and given that the pre-existing Classification Code required that material to be refused classification if it "promotes, incites or instructs in matters of crime or violence", there is ample power to censor material that promotes, incites or instructs in the doing of terrorist acts without need for deploying the notion of "advocacy of terrorist acts". The only way in which "advocacy" expands upon "promotion, incitement or instruction" is that in addition to "counselling", "urging" and "providing instruction" it encompasses "praising". In a liberal democracy, however, in which political freedom is paramount, there is no basis for censoring material of this sort. Where material cannot be shown to promote, incite or instruct in the doing of terrorist acts, then the mere fact that it expresses praise for an act of politically-motivated violence should not be a sufficient basis for censoring it. The Discussion Paper on Material that Advocates Terrorist Acts, with its expressed desire to exempt patriotic material, in effect concedes this point, at least in respect of those political views that enjoy the favour of censorship authorities. But in a liberal democracy even unfavoured political views must be permitted expression. Rather than reduce the impact of the prohibition on "praising" by increasing the necessary threshold of risk, this feature of the censorship regime should simply be repealed.

The offence under section 102.7

This submission believes that the Bill should contain amendments to the offence created by section 102.7 of the *Criminal Code*, as recommended by the Clarke report.

[26] *Criminal Code* (Cth) s 101.1.

The offences created under Division 102 of the *Criminal Code* are extremely broad in their operation, criminalising as they do a wide range of behaviours which may have no violent intention, nor any significant connection to violent acts (given that an organisation may be a "terrorist organisation" simply on the basis, for example, that it indirectly fosters threats of politically motivated violence). With this in mind, the offence created under Division 102.7 can actually be seen to be more narrow than the other offences under this Division, requiring that the support in question help an organisation engage in terrorist acts, or in the preparation, planning, assistance or fostering of such acts. It is highly desirable, however, that the support in question be limited to material support. Furthermore, this ought to be defined (as suggested in the discussion above of Division 80) to include only direct support, such as the provision of personnel, funds, arms or other materiel, or intelligence, but as excluding indirect assistance or merely moral support.

Also, as noted in the Clarke report, the fault elements of the offence need to be clarified. In this respect, the drafting in the draft exposure Bill was inadequate: while that drafting did succeed in introducing as a fault element an additional ulterior intention, namely, that the material support be intended to help the organisation engage in terrorist acts, or in the preparation, planning, assistance or fostering of such acts, it also broadened the physical element, by removing as a physical element the requirement that the support or resources would in fact help the organisation engage in terrorist acts, or in the preparation, planning, assistance or fostering of such acts. Items 12, 14 and 15 of Schedule 1 of the Anti-Terrorism Law Reform Bill 2009 (Cth) contained the correct drafting: it simply retains the existing paragraph (a) which states the physical elements of the offence, and adds as an additional element an ulterior intention, namely, that the accused intend the that support or resources provided be used by the organisation to engage in terrorist acts, or in the preparation, planning, assistance or fostering of such acts.

The offence under section 102.5

This submission supports the abandonment of the notion of "declared aid organisations" that was found in the draft exposure Bill. In an area of law already fraught with politicisation in its application by investigating and prosecuting agencies,[27] further vesting of executive

[27] Emerton, above n 17.

discretions to decide which sorts of social, political and civic engagement are permissible and which not would make things worse, not better. The offence created by section 102.5 should be amended, however, so that such ad hoc exceptions are not necessary.

As currently drafted, the offence under section 102.5 of the *Criminal Code* is objectionable in at least three respects, and there is therefore an urgent need to repeal or substantially amend the section.[28]

First, section 102.5 draws no distinction between knowledge of, and recklessness with respect to, the character of an organisation as a "terrorist organisation" – unlike the offences under sections 102.2, 102.4, 102.6 and 102.7.

Second, if the organisation in question is a listed organisation, the offence under section 102.5 takes on a quasi-reverse onus character:

- Subsection 102.5(3) provides that, for the offence of training with a listed terrorist organisation, strict liability applies as to the status of the organisation;

- Subsection 102.5(4) establishes an exception to liability, namely, if the accused was not reckless as to the status of the organisation;

- As the statutory note to section 102.5 indicates, subsection 13.3(3) of the *Criminal Code* imposes an evidential burden on any defendant wishing to rely on an exception provided by the law creating an offence – such an evidential burden is discharged by "adducing or pointing to evidence that suggests a reasonable possibility that the matter in question exists";[29]

- For practical purposes, then, the combined effect of subsections 102.5(3) and (4) is to make the offence of training with a listed organisation a reverse-onus recklessness offence, according to which the onus is on the accused to raise a reasonable possibility that her or she was not reckless as to the organisation being a banned organisation, before the prosecution then

[28] The Sheller Committee agreed: *Report of the Security Legislation Review Committee* (2006) [10.41].

[29] *Criminal Code* (Cth) s 13.3(6).

> incurs an obligation to prove that recklessness beyond reasonable doubt – if the accused cannot discharge the evidential burden in relation to an absence of recklessness, then the prosecution does not have to prove that the accused had any awareness that the organisation was, or may have been, banned.

The placing of an evidential burden on an accused, which requires him or her to adduce evidence of his or her absence of recklessness as to the status of an organisation, is particularly significant in the context of an offence of training with a listed organisation. At present 18 organisations are listed, active in various conflict zones in North Africa, the Horn of Africa, and West, Central, South and South-East Asia.[30] If an individual is accused of training with such an organisation, it is quite likely that any witness who can testify as to his or her state of mind will not be available – either being in hiding, or in the custody of a foreign government. Of course, it is open to the accused to attempt to discharge the evidential burden by testifying at his or her trial, but for the accused to testify is also for the accused to face the possibility of cross-examination. An offence which places this sort of pressure on the accused to take the witness stand raises a further concern not only about its reverse onus character, but also about its implications for the right to silence.

Third, section 102.5 criminalises training whether or not that training is directly or indirectly linked to a "terrorist act". Given the expansive notion of "terrorist organisation", this is a very wide range of criminalisation which fails to distinguish between training for criminal or violent purposes and innocent training. This should be corrected not by adding a defence to the section – which introduces issues of evidential burdens and the right to silence discussed above – but by changing the elements of the offence itself. Section 101.2 of the *Criminal Code* already creates an independent offence of undertaking training that is connected to "terrorist acts", where the accused knows of, or is reckless with respect to, such connection. If it is to be the case that there is to be a Division 102 training offence with an operation distinct from the operation of section 101.2, the connection of training to a "terrorist act" in the context of section 102.5 could be made a matter of strict liability. This would give the offence its own work to do, without criminalising innocent training.

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[30] *Criminal Code Regulations 2002* (Cth) Part 2.

Criminal Code offences – severity of penalties

It is a matter of concern that there has been a general trend to increase very significantly the maximum penalties for national security offences as those offences have been moved from the *Crimes Act 1914* to the *Criminal Code*.

The penalties under the *Crimes* Act unlawful association offences, which the Bill would repeal, are up to one year imprisonment for being a member or officer of such an association.[31] Funding such an organisation carries a maximum penalty of 6 months.[32] This contrasts with penalties of up to 25 years imprisonment for directing[33] or funding a "terrorist organisation",[34] and of up to 10 years for being a member of such an organisation,[35] under Division 102 of the *Criminal Code*.

Similarly, section 30C of the *Crimes Act 1914* (Cth), which the Bill would repeal, has a maximum penalty of 2 years imprisonment, compared to the maximum of 7 years under the similar offence under subsection 80.2(1) of the *Criminal Code*. Section 28 of the *Crimes Act 1914* (Cth) imposes a maximum of 3 years imprisonment for violently interfering with an election. Subsection 80.2(3) of the *Criminal Code* imposes a maximum of 7 years imprisonment for the urging of such conduct.

No policy rationale has been stated for this trend of significantly increasing the severity of penalties. There is an urgent need for review of the severity of the penalties for these *Criminal Code* offences, none of which has the actual infliction of violence as an element.

Charter of the United Nations Act listing of persons, entities and assets

This submission supports the amendments which the Bill would make to the process of listing under the *Charter of the United Nations Act 1945* (Cth). These would go some way to addressing the deficiencies of this asset-freezing regime.

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[31] *Crimes Act 1914* (Cth) s 30B.

[32] *Crimes Act 1914* (Cth) s 30D.

[33] *Criminal Code* (Cth) s 102.2.

[34] *Criminal Code* (Cth) s 102.6.

[35] *Criminal Code* (Cth) s 102.3.

Even with these amendments, however, the regime would continue to be objectionable in certain respects. First, there is no provision for a person or entity to be heard prior to the listing of it or its assets. The report of the Security Legislation Review Committee suggested that this was impractical, as it would permit dissipation prior to freezing of the assets in question.[36] It would, however, be possible to amend the current provisions such that a listing would lapse within a short timeframe if the Minister failed to take steps to hear from the person or entity in question. This would also help ensure that the Minister's belief is the result of hearing all relevant evidence. Second, there is no requirement the Minister provide reasons for a listing. Such a requirement should be imposed. Third, there is no provision for Parliamentary oversight of listings comparable to that established by Division 102 of the *Criminal Code* for listings under that Division. Such provision should be made.

In the absence of the provision of reasons and Parliamentary oversight, and in a situation in which the voices of listed persons and entities are not being heard, the perception that listing is motivated to a significant extent by political rather than law-enforcement concerns will continue to be widespread, and justifiably so.

[36] At [12.24].

PROCEDURE

Pre-charge and pre-trial detention

Pre-charge detention

With one exception, this submission supports the amendments that the Bill would make to the provisions of the *Crimes Act 1914* pertaining to arrest and detention prior to charge. Those amendments introduce greater clarity into the operation of the Part 1C regime, and its interaction with the power of arrest under section 3W.

The exception is this: this submission does not support the proposed amendments to the provisions (currently found in sections 23CA and 23CB of the *Crimes Act 1914*) providing for "investigative deadtime". These provisions were introduced into the *Crimes Act 1914* by the *Anti-Terrorism Act 2004* (Cth) without proper scrutiny or debate. The Anti-Terrorism Bill 2004 (Cth) that was reviewed by the Senate Legal and Constitutional Legislation Committee contained quite different provisions, which would have confined "investigative deadtime" to the need to communicate with different timezones. Such deadtime would be self-capping at 12 hours per such delay (12 hours being the maximum possible time difference, be it forwards or backwards, between any part of Australia and any other jurisdiction). In evidence presented to the Senate Committee, a witness for the Attorney-General's Department suggested that there was no need for an express cap upon this investigative deadtime because:

> I would be extraordinarily surprised if the dead time, for example, in relation to the time zones would get anything like the sorts of time periods that were being suggested by Professor Williams [a number of days[37]]. I have spoken to the Victorians about cases in Victoria concerning reasonable time and what the court has considered to be reasonable time, and the court has considered periods like 16 hours to be reasonable. So in terms of the time zone issue, if a country was many hours different in time but it was during business hours, then the argument for saying that the time zone difference was a reasonable consideration would be diminished enormously.[38]

[37] Evidence to Senate Legal and Constitutional Legislation Committee, April 30, 2004, Sydney, 33 (Professor George Williams).

[38] Evidence to Senate Legal and Constitutional Legislation Committee, April 30, 2004, Sydney, 35 (Mr Geoff McDonald, Assistant Secretary, Criminal Law Branch, Attorney-General's Department), cited in Senate Legal and Constitutional Legislation Committee, *Report on the Provisions of the Anti-terrorism Bill 2004* (2004) [3.25].

The Committee nevertheless recommended the additional safeguard of judicial scrutiny.[39]

When the Bill actually passed the Parliament, it was amended to include not only a requirement for judicial scrutiny, but also to incorporate the far more extensive provisions for investigative deadtime currently in operation. The case of Dr Haneef shows that the above-quoted prediction by the witness for the Attorney-General's Department was wildly optimistic. The case also shows that it is not in the interests of the integrity and efficiency of investigating authorities that they be vested with these sorts of expansionary discretions. It is in the interests of the administration of justice, as well as the civil liberties of the accused, that the time between arrest and the laying of charges be as brief as possible. Arrest ought to be the culmination of an investigation, not the trigger for a fishing expedition.

This submission therefore does not support the enactment of new sections 23DB(9)(m), 23DB(11), 23DC or 23DD. No serious case has been made, grounded in the evidence of operational experience, that a maximum investigation period of 24 hours is not adequate.

If the regime of investigative deadtime is to be retained, it should be capped at 24 hours, not 7 days, giving rise to a total maximum period of pre-charge detention of 48 hours.

Bail

The present strong presumption against Bail in relation to terrorism offences has shown itself to be unnecessary and a threat to the administration of justice. It is unnecessary because the majority of terrorism offences charged and prosecuted in Australia have not had violence, or even violent intention, as an element. Hence there is no rationale for treating them as on a par with the other offences which give rise to the "exceptional circumstances" requirement, all of which require an allegation of conduct causing or risking the death of a person.[40]

It is a threat to the administration of justice because, when the length of time taken by terrorism prosecutions is taken into account, and also the extremely severe remand conditions to which terrorism accused are typically subject, the refusal of bail threatens to fundamentally undermine the capacity of an accused to participate in his or her own defence. This threat was

[39] Senate Legal and Constitutional Legislation Committee, *Report on the Provisions of the Anti-terrorism Bill 2004* (2004) [3.47].

found to be realised in the case of *R v Benbrika & ors*.[41] The solution in that case was an ad hoc change to the conditions of incarceration of the accused. But what is needed is a systematic solution. The presumption against bail for terrorism offences should therefore be repealed.

Searches

This submission does not support those elements of the Bill which would vest police with additional powers to enter and search premises, either by means of authorising re-entry subsequent to the execution of a search warrant, or by authorising entry without a search warrant.

The Discussion Paper on National Security Legislation asserts that "The availability to the AFP of wider emergency powers has become increasingly necessary particularly in the area of counter-terrorism operations."[42] However, at a press conference subsequent to the release of the Discussion Paper, the Attorney-General indicated that there was no evidence suggesting that the lack of such powers had hampered investigations and prosecutions.[43] The Attorney-General did indicate that:

> The right of entry powers that I've referred to are essentially aimed at preventing foreseeable injury, and it's certainly based on experience in Australia and overseas that if the police don't have that ability to enter premises immediately to make safe those devices or explosives, whatever it may be, that there is a foreseeable risk of injury[44]

If there is such a gap in the Australian legislative framework, however, then the correct solution is an extension to the functions and powers of those responsible for securing hazardous sites (primarily fire fighters) within the framework of emergency management and emergency services legislation. There is no need to extend the criminal investigatory powers of the police by permitting entry for the purposes of search and seizure of evidence.

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[40] *Crimes Act 1914* (Cth) s 15AA(2)(b),(c),(d).

[41] *(Ruling No 20)* [2008] VSC 80 [26]–[42], [48]–[70], [80]–[86], [88], [90]–[92], [97], [100] (per Bongiorno J).

[42] At 151.

[43] "Journalist: Are you aware of any circumstances or examples where some people slipped the net if you like, because these search powers weren't available to law enforcement agencies? McClelland: No. We're not aware of that": *Press Conference*, Parliament House, Canberra, August 12, 2009.

[44] Ibid.

Trials involving national security information

This submission does not support the amendments that the Bill would make to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

The author of this submission is on record as expressing the view that the current regime for the handling of national security information in trials is objectionable for three principal reasons:

- By vesting the Attorney-General with wide-ranging statutory powers to intervene in the conduct of trials, to a significantly greater extent than would be the case under the operation of the doctrine of public interest immunity, the regime risks politicisation of criminal trials;

- By making the prosecutor the de facto agent of the Attorney-General for certain purposes of protecting national security information, the regime risks undermining the independence and integrity of the prosecutor's office;

- By inviting the court to take an active role in formulating the presentation of redacted or paraphrased evidence, the regime risks undermining the independence and impartiality of the judiciary, and also risks substituting the judgement of the court for that of the jury in relation to questions of fact having national security dimensions.[45]

The proposed amendments do not remedy these problems, and in some respect compound them, by further extending the powers of the Attorney-General under the regime to intervene into criminal trials. They also preserve the existing provisions concerning security clearances for lawyers, which threaten the independence of defence counsel and have in practice been shown to be a failure, and unnecessary, given the power of the court to accept undertakings from counsel.

One particular respect in which the amendments would only compound existing problems follows from the proposed amendments to sections 21 and 22 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). Since the present national

security information regime came into operation, the predominant practice in Australian criminal trials involving national security information has been for the prosecution and defence to seek the making of consent orders for the handling of that information, thereby circumventing some of the more cumbersome features of the regime's operation. Amending sections 21 and 22 so as to allow the Attorney-General the right to become a party to those consent orders is likely to have two consequences. It will further extending the politicisation of criminal trials involving national security information, and it will reduce the utility of consent orders as a way of making the regime workable in practice.

For these reasons, Schedule 8 of the Bill should not be enacted, except for Items 17 (clarifying the meaning of *conduct likely to prejudice national security*), and Items 89 and 94 (confining the matters to which the Secretary of the Attorney-General's Department is to have regard in deciding whether or not to issue a lawyer with a security clearance).

Matters not addressed in the Bill

This submission concludes by noting that a number of objectionable features of Australia's framework of laws relating to terrorist acts would remain untouched by the Bill. These include:

- the regime of control orders established by Division 104 of the *Criminal Code*;
- the regime of orders for preventative detention, and the protection of evidence, established by Division 105 of the *Criminal Code*;
- the regime for the collection of intelligence by compulsory questioning and, in some cases, detention, established by Division 3 of Part III of the *Australian Security Intelligence Act 1979* (Cth);
- the stop, search and question powers created by .Division 3A of Part 1AA of the *Crimes Act 1914* (Cth).

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[45] Patrick Emerton, "Paving the Way for Conviction Without Evidence – A Disturbing Trend in Australia's 'Anti-Terrorism' Laws", (2004) 4 *QUTLJJ* 129.

If such powers are not to be repealed, there nevertheless is a serious need to consider their interaction, and the need (if any) for them to be retained. As one example, it seems plausible to suggest that the existence of the control order regime makes the "exceptional circumstances" requirement for bail unnecessary, even were it otherwise justified.

There is a further gap in the Discussion Paper on National Security Legislation. As was indicated above, in relation to various of the urging violence offences, and also in relation to the expressed rationale for the introduction of a power of entry and search without warrant, there is an apparent failure in this area of law to develop legislation with reference to other existing and pertinent statutory and policy frameworks. As a result, matters are brought within the ambit of national security law and policy which do not belong there. The overall coherence and necessity of Australian law in this area is in need of urgent review, quite independent of the need to repeal those parts of the framework which unduly contradict basic principles of liberal democracy.