THE UNIVERSITY OF SYDNEY

Sydney Centre for International Law

30 April 2010

Senate Standing Committee on Legal and Constitutional Affairs
By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Re: *National Security Legislation Amendment Bill 2010* and *Parliamentary Joint Committee on Law Enforcement Bill 2010*

Thank you for the opportunity to make a submission to the above inquiry. The Sydney Centre for International Law is a leading centre for research and policy on international law in the Asia-Pacific region. This submission addresses the following areas:

A. Treason offences
B. Urging violence offences;
C. Definition of a terrorist act;
E. Offences of providing support or resources or training to a terrorist organisation;
D. Proscription of terrorist organisations;
F. The standard for investigative detention for terrorist offences;
G. The duration of investigative detention for non-terrorist offences;
H. Judicial extension of investigative detention for non-terrorist offences;
I. The duration of investigative detention for terrorist offences;
J. Exclusion of information in applications to extend investigative detention;
K. Police powers to enter and search without warrant in emergency situations;
L. Disclosure of national security information in criminal and civil proceedings;
M. Other related matters.

In the course of this submission we also comment on a number of proposals in the Attorney-General's Discussion Paper of 2009 which have been omitted from the Bill.

Please be in touch if you require any further information.

Yours sincerely,

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Submission by the Sydney Centre for International Law

Re: *National Security Legislation Amendment Bill 2010* and *Parliamentary Joint Committee on Law Enforcement Bill 2010*

A. Treason (ss. 80.1; 80.1AA)

We support the amendments proposed for s. 80.1 of the Schedule to the *Criminal Code Act 1995* (Cth) (hereafter, the *Criminal Code*). Nonetheless, the offence of treason in s. 80.1(1) remains overbroad. Australia's obligations under Article 19 of the ICCPR require it to refrain from imposing restrictions on individuals' right to freedom of expression except to the extent necessary for the protection of national security, public order, public health or morals.

Further, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) has stated that 'given the seriousness and penalties attached to the offence [of treason] it is crucial that the law achieves the highest degree of certainty'.[1] It is in the interests of the law's operational effectiveness that it be as tightly drawn as possible.

Scope of harm

Section 80.1(1)(c) of the *Criminal Code* makes it an offence, punishable by life imprisonment, if a person 'causes harm to the Sovereign, the Governor-General or the Prime Minister, or imprisons or restrains the Sovereign, the Governor-General or the Prime Minister'. By virtue of s. 4 of the *Criminal Code*, 'harm' is given the meaning specified in the *Criminal Code* Dictionary, namely:

> '*harm*' means physical harm or harm to a person's mental health, whether temporary or permanent. However, it does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

It is not necessary for the protection of national security, public order, public health or morals that the Sovereign, the Governor-General or the Prime Minister be protected from harm to their mental health. Because of uncertainty surrounding what might be deemed 'within the limits of what is acceptable as incidental to social interaction or to life in the community', and what could potentially harm the mental health of the individuals in question, such an offence has the potential to exert a chilling effect upon legitimate critique of, and satirical commentary on, the named offices and the decisions of those who occupy them.

Other Commonwealth jurisdictions that include similar offences limit the actions criminalised (beyond killing or attempting to kill and imprisonment) to those causing 'grievous bodily harm' or 'bodily harm tending to death or destruction' to the Sovereign.[2] We recommend that s. 80.1(1)(c) be amended in a manner consistent with this approach.

Materially assisting enemies at war with the Commonwealth

Section 80.1AA sets out the offence of materially assisting enemies at war with the Commonwealth, and in particular, subsection (1)(f) requires that a person can only be guilty of the offence if they have an allegiance to Australia. That is, they must be a citizen or resident of

[1] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2008) (hereafter, PJCIS Report), para [4.11].
[2] See *Criminal Code of Canada*, s. 46(1)(a); *Crimes Act* 1961 (NZ), s. 73(a). See also *Treason Act* 1351 (UK).

Australia, or have placed themselves voluntarily under the protection of the Commonwealth, or be a body corporate incorporated under Australian law. We support this proposed amendment because normatively it does not make sense to find a person guilty of treason if he or she has no allegiance to Australia.

Subsection (1)(c) also provides that an element of the offence is that the conduct of the accused will 'materially' assist an enemy engaged in hostilities against the Australian Defence Force. While we support limiting the offence to cover real contributions to an enemy, no definition of 'material' is provided by the Bill. Indeed, upon reading the explanatory memorandum accompanying the Bill, the relevant item does not elucidate the meaning of 'material' other than stating it applies to conduct that is intended to be 'real and concrete'.

International human rights law and the rule of law (including its principle of fairness) requires that people must be able to prospectively know with sufficient certainty the scope of their criminal liabilities for conduct that they perform. In particular, under article 15 of the International Covenant on Civil and Political Rights, the prohibition on retrospective criminal punishment embodies a principle of legality requiring specificity in the definition of crimes. An offence must be clearly defined by law, as stated in *Kokkinakis v Greece* (1993) 17 EHRR 397 at para. 52:

> ... [freedom from retroactive punishment] also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.

We submit that a definition of 'material' should be included with the *Criminal Code*. This should emphasise that the impact of any impugned conduct must have been intended to be substantive and significant in enabling enemy forces to engage in hostilities against the Australian Defence Force

We note, however, that paragraph (d) refers to conduct which 'assists' the enemy, rather than 'materially assists'. After recognising the importance of any assistance being material and not insubstantial, it seems that this latter paragraph dispenses with this requirement. We submit that paragraph (d) should be amended to include the requirement of materiality of the assistance.

Possible retrospective effect

Finally, s. 80.1AA(2), which sets out the offence of materially assisting enemies at war with the Commonwealth, has been amended to ensure that a proclamation specifying the enemy in question must have been made before an offence in relation to that enemy will be capable of commission. We support this clarification to ensure that the provision cannot be given retrospective effect and that the law is thereby consistent with Article 15(1) of the ICCPR.

We remain concerned, however, that a person might still be susceptible to criminal liability under s. 80.1AA(1)(b) during the period after a proclamation is made but before it is publicised (through registration under the *Legislative Instruments Act 2003* (Cth)). The same basic principle that underpins international human rights law's prohibition upon retrospective criminal law (and the presumption against retrospectivity in Australian law) requires that changes in criminal law should not be enforceable until such time as they are knowable by the members of the public against whom they may be enforced. For this reason, we recommend that a Proclamation made for purposes of s. 80.1AA(1)(b) only be capable of taking effect from the date, on or after the date of its making, on which it is published by registration under the *Legislative Instruments Act 2003*, by publication in the *Gazette* or by other reasonably appropriate means of publicity.

Recommendation A.1: We recommend that s. 80.1(1)(c) be amended to insert the words 'grievous bodily' before the word 'harm'.

Recommendation A.2: We recommend that the words 'and significantly' be inserted immediately after the word 'materially' and immediately before the word 'assist' in s.80.1AA(1)(c). We further recommend that the word[s] 'materially and significantly' be inserted immediately before the word 'assists' in s.80.1AA(1)(d).

Recommendation A.3: We recommend that s. 80.1AA(2) be amended to read as follows:

'Despite subsection 12(2) of the *Legislative Instruments Act 2003*, a Proclamation made for the purpose of paragraph (1)(b) of this subsection may only be expressed to take effect from a date:
(a) on or after the date on which the Proclamation is made; but
(b) not before the date on which the Proclamation has been publicised by one of the following means:

(i) by registration under the *Legislative Instruments Act 2003*; or

(ii) publication in the *Gazette*; or

(iii) such other means as are reasonably appropriate to bring the Proclamation to the attention of persons described in paragraph (1)(f) of this subsection.'

B. Urging Violence (ss. 80.2, 80.2A, 80.2B and 80.3)

We support the amendments proposed to ss. 80.2, 80.2A, 80.2B and 80.3 of the *Criminal Code*. These amendments significantly improve the law to take account of concerns raised by the ALRC and in the 1991 Gibbs Committee Report.[3] We welcome, in particular, the newly proposed ss. 80.2A(2) and 80.2B(2) which give effect to Australia's obligations under Article 20(2) of the ICCPR and Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination(ICERD).[4] Nonetheless, we feel that there is room for improvement.

Section 80.2A(1), the offence subject to the most serious penalty in this section, hinges on a link between violence targeting a group and a threat to the 'peace, good order and good government of the Commonwealth'. Given that the latter threat (required by s. 80.2A(1)(d)) is the distinguishing characteristic of this offence (as opposed to s. 80.2A(2)), we believe that the offence in its entirety should be directed towards this end. As currently drafted, the inclusion of the word 'would' in s. 80.2A(1)(d) gives the impact of the 'urg[ing]' in question on 'peace, good order and good government of the Commonwealth' a speculative tone. Bearing in mind that a criminal offence framed in terms of 'urging' amounts to a restriction of speech on the basis of its content, we believe that this offence should be as narrowly drawn as possible.[5] Accordingly, we would recommend that the current wording s. 80.2A(1)(d) be revised as set forth immediately below, in order to strengthen the link between the 'urg[ing]' and the threat to the Commonwealth. This is consistent with the spirit of the ALRC recommendations to which these revisions are otherwise responsive.[6]

We also make the point that the 'peace, order and good government' requirement is uncertain in scope and may operate to restrict the scope of the anti-vilification character of the offence. Under international human rights law, vilification is prohibited regardless of whether it is connected to some wider public order concern such as the protection of peace, order and good government. We submit that such requirement is unnecessary and unjustifiably restricts the scope of protection.

Further, it does not make sense to restrict the offence to the targeting of groups, as opposed to individual members of those groups on account of their group membership. Again, vilification can be directed against a single member of the group in circumstances where incitement against the group as a whole is not necessary established.

Unintended implications of the legislative setting

A number of compelling submissions were made to the ALRC in connection with its review of sedition laws concerning the dangers of Parliament establishing an implicit link between inter-group violence of a racially or religiously targeted character and terrorism.[7] While we appreciate that it *is* in the interests of national security to prevent violence of this kind (and many other kinds),

[3] ALRC Sedition Report, chapters 9 and 10; Gibbs Report.

[4] We note that Australia entered a reservation upon its 1975 ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination* whereby it expressed 'the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4 (a)'.

[5] On the circumspection rightly directed towards content-based restrictions on freedom of speech, see *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* (1992) 177 CLR 106, at 143 (per Mason CJ), and at 235 per McHugh J; *Levy v Victoria* (1997) 189 CLR 579 at 647 (per Kirby J) and at 619 (per Gaudron J); *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582 at 595 per Gleeson CJ. Recall also, in general, the requirement that any restrictions on freedom of speech be shown to be necessary for the protection of national security (etc.) under Article 19 of the ICCPR.

[6] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (2006) (hereafter ALRC Sedition Report), para [836].

[7] ALRC Sedition Report, paras [10.51]-.[10.56]; see also Ben Saul, 'Speaking of Terror: Criminalizing Incitement to Violence' (2005) 28 *UNSW Law Journal* 868-886.

we remain concerned about the possible counter-productive effects of introducing a prohibition on racially or religiously targeted violence as part of a suite of legislative reforms focused on counter-terrorism and national security. This could inadvertently reinforce a misapprehension (not uncommon within the Australian populace) that terrorism is necessarily or naturally linked to certain religious beliefs (particularly beliefs held by Muslims) or persons of particular race (particularly persons of Arab ethnicity). Such a misapprehension is not only conducive to discrimination, it is also inconsistent with the community maintaining a sensible degree of alertness to terrorism in all its possible forms and settings and thus at odds with law enforcement and preventative policing goals. For these reasons, we favour a relocation of ss. 80.2A(2) and 80.2B(2) to Chapter 9 of the *Criminal Code*, which concerns dangers to the community, or their introduction (as criminal offences) into Part IIA of the *Racial Discrimination Act 1975* (Cth).

Political opinion

The inclusion of 'political opinion' among the list of grounds upon which a targeted person or group may be distinguished goes beyond Australia's specific human rights obligations under article 4(a) of the ICCPR (which requires State parties to render punishable by law acts of violence or incitement to such acts 'against any race or group of persons of another colour or ethnic origin') and article Article 20 of the ICCPR (requiring State parties to prohibit 'national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'). In neither of these cases does violence targeted on the basis of political opinion feature, nor is it the focus of domestic anti-vilification laws at the state, territory or federal levels.[8] Rather, 'political opinion' is more familiar as a ground of distinction upon which anti-discrimination laws at the state, territory and federal levels operate.[9]

The inclusion of this single additional ground (above and beyond those contemplated by relevant instruments of international law) begs the question why other grounds upon which discrimination law routinely operates, such as colour, gender, sexual orientation, disability and illness, are not included within the ambit of this provision. There is no persuasive reason for singling out political opinion, when, for instance, hate crimes or crimes of incitement have recurrently been directed against persons with disabilities or homosexuals. There may be progressive public policy reasons for extending the range of protected groups beyond the minimum requirements of the ICCPR, to better protect all potentially vulnerable groups from hatred and violence. We submit that if such an approach is adopted, then all relevant additional groups should be protected, not just political opinion.

The violence urged should be likely

Given the paramount importance of freedom of expression in maintaining democracy and enabling individual liberty, any restrictions on freedom of expression require strong and careful justification. In our view, holding a person criminally liable for urging violence, in circumstances where there

[8] *Racial Discrimination Act 1975* (Cth) Part IIA (racial hatred); *Anti-Discrimination Act 1977* (NSW) Part 2 Division 3A (racial vilification), Part 3A Division 5 (transgender vilification), Part 4C Division 4 (homosexuality vilification), Part 4F (HIV/AIDS vilification); *Racial and Religious Tolerance Act 2001* (Vic) (racial and religious vilification); *Anti-Discrimination Act 1991* (Qld) s124A (racial and religious vilification); *Anti-Discrimination Act 1998* (Tas) s19 (inciting hatred on the grounds of race, disability, sexual orientation, lawful sexual activity, religious belief or activity); *Discrimination Act 1991* (ACT) Part 6 (racial vilification); *Racial Vilification Act 1996* (SA) s4 (racial vilification).

[9] Ibid. Note that the ACT anti-discrimination statute cited immediately above extends to 'political conviction', the Qld anti-discrimination statute extends to 'political belief or activity' and the Tasmanian anti-discrimination statute extends to 'political activity'. Victoria's *Equal Opportunity Act 1995* (Vic) likewise prohibits discrimination on the basis of 'political belief or activity' (s. 6(g)); Western Australia's *Equal Opportunity Act 1984* (WA) prohibits discrimination on the basis of 'political conviction' (s.53) and the Northern Territory's *Anti-Discrimination Act* (NT) prohibits discrimination on the basis of 'political opinion, affiliation or activity' (s.19(n)).

may not necessarily be any likelihood or probability of imminent violence actually occurring as a result, is not a justifiable restriction on free expression.

While the right of free speech is not absolute and may be limited to prevent serious harms, it cannot be restricted because of mere speculation that it leads to terrorism. Only incitements which have a direct and close or proximate connection to the commission of a specific crime are justifiable restrictions on speech. This view is reflected in United States constitutional jurisprudence. In *Brandenburg v Ohio*, 395 US 444 (1969), the Supreme Court found that the First Amendment to the *US Constitution* did not 'permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'.

The twin requirements of the imminence and likelihood (or probability) of crime ensure that speech is not prematurely restricted; there must be a sufficiently proximate connection or causal link between the advocacy and the eventuality of crime.

Australia has not presented any cogent explanation for why the freedom of expression of Australians should be more limited than that enjoyed by Americans, particularly in circumstances where it is well accepted that the US is at greater risk of international terrorism than Australia, such that security justifications for restrictions on speech would appear to be stronger in the US than in Australia.

Recommendation B.1: We recommend that s. 80.2A(1)(d) be replaced with 'the use of the force or violence *is intended to* threaten the peace, good order and good government of the Commonwealth' (the newly proposed words have been highlighted here in italics for clarity).

Recommendation B.2: We recommend that the requirement of 'peace, order and good government of the Commonwealth', and the restriction of the offence to incitements targeting groups as opposed to individual members of groups, be removed from s. 80.2A(1)(d), to ensure that the purpose of the offence in protection against vilification is properly enabled and fulfilled.

Recommendation B.3: We recommend that ss. 80.2A(2) and 80.2B(2) be moved to Chapter 9 of the *Criminal Code*, or introduced as criminal offences into Part IIA of the *Racial Discrimination Act* 1975 (Cth).

Recommendation B.4: We recommend that in addition to 'political opinion' in ss. 80.2A(1) and (2) and 80.2B(1) and (2), other grounds should be considered for protection, such as (for instance) gender, sexual orientation, disability and illness. In the alternative, we propose that the reference to 'political opinion' be removed from this provision so that it more closely tracks Australia's obligations under the ICCPR.

Recommendation B.5: The urging violence offences should include an additional element that there must be a substantial risk that violence will occur as a result of the urging.

C. Definition of Terrorist Act (s. 100.1)

Omission of the United Nations

At present, 'terrorist act' is defined in s. 100.1 of the *Criminal Code* as applying to coercion or intimidation of the government of the Commonwealth or a State, Territory or a foreign country or part thereof. However, in the Attorney-General's Discussion Paper, *National Security Legislation: Discussion Paper on Proposed Amendments* (July 2009) it was proposed that the subsection be altered to include in the definition of a terrorist act similar acts that target the United Nations, a body of the United Nations or a specialised agency of the United Nations.

We are disappointed in the decision to remove this amendment from the Bill. We supported the amendment as a strong step forward in dealing with the occurrence of terrorist acts. The United Nations is intimately involved with peacekeeping and other activities intended to prevent terrorism. It therefore is a significant potential target for terrorist groups, and has in the past suffered both loss of life of employees and other works and damage to property as a result of groups' attempt to intimidate or coerce the United Nations and its affiliated agencies. As the United Nations is clearly in the forefront of dealing with potentially dangerous international situations, we submit that any attempts to engage the United Nations or its agencies with force or violence should be treated in exactly the same way as attempts to do the same to foreign governments. We therefore suggest that the amendment suggested in the Discussion Paper to include the United Nations and its agencies within the defined potential targets of a 'terrorist act' in s 100.1 be reintroduced into the Bill.

The need to exclude certain acts committed in armed conflict

Australia's definition of terrorism in the Criminal Code does not currently carve out any conduct whatsoever committed in the course of an international or non-international armed conflict. The lack of an exception is problematic for a number of reasons.

First, the definition of terrorism criminalises conduct which is lawful under the international law of armed conflict, in particular, conduct committed by authorised combatants in an international armed conflict. Under international humanitarian law, combatants (including State armed forces and irregular forces under article 4 of the Third Geneva Convention 1949) are entitled to combatant immunity for hostile acts that are lawful in armed conflict. It is a lawful purpose of State armed forces to use violence to coerce a foreign government for political purposes, which is the essence of the Australian definition of terrorism. The definition of terrorism not only criminalised foreign States' armed forces engaged in military conflict with other States or with Australia, but it also necessarily criminalises Australia's own armed forces when engaged in combat against foreign States. Such criminalisation is not consistent with Australia's obligations under the international law of armed conflict.

Secondly, Australia's definition of terrorism criminalises certain conduct in armed conflict which is not authorised by international law but which is also not criminal. In particular, the definition of terrorism criminalises the participation of non-State armed forces in hostilities in any civil war or other non-international armed conflict, in circumstances where such violence is solely directed towards other 'combatants' in internal conflicts. The participation of rebel, guerrilla or insurgent forces in military hostilities in non-international armed conflict is not regarded as terrorism by international law. Australia's criminalisation of such conduct, even where it is targeted at opposing military forces and otherwise complies with humanitarian law, removes any incentive for non-State forces to comply with humanitarian law, if they can in any event be prosecuted for military acts under counter-terrorism law.

Thirdly, Australia's definition of terrorism also criminalises unauthorised civilian participation in hostilities in armed conflict (see Protocol I 1977, article 51, reflecting customary law). While civilian participation in hostilities is not permitted by international humanitarian law, it is not criminalized as a war crime. If Australia wishes to criminalise civilian participation in hostilities (which it is entitled to do), then it is possible to do so without also criminalising lawful military hostilities by lawful combatants as set out above.

Fourthly, Australia's definition of terrorism criminalises acts of violence (whether suicide bombings or other violence) committed against civilians in armed conflict. Two issues are raised here. First, lawful combatants in armed conflict may sometimes 'intend', in the relevant criminal law sense, that civilians are incidentally or collaterally killed as part of an attack on a military objective, in circumstances where such killings are lawful under the international law of armed conflict. Australia's definition of terrorism criminalises such conduct and makes it criminal for a soldier to ever harm any civilian. Again, such acts should be carved out of the Australian definition so as not to criminalise conduct that is necessarily lawful under the law of armed conflict, if conflicts are to be allowed to be fought at all.

The other issue here is that otherwise *unlawful* attacks on civilians in armed conflict are already criminalised by the law of armed conflict. Numerous war crimes exist which protect civilians in armed conflict from violence, including wilful killing, spreading terror among a civilian population, and so on. There is no purpose in the Australian terrorism offence additionally criminalizing them, when Australia already has comprehensive war crimes legislation in place in (under both the Geneva Conventions Act 1957 and under the 2002 amendments to the Criminal Code to implement the Rome Statute of the International Criminal Court). While in our view nothing is gained by additional criminalisation of the same conduct under anti-terrorism law, if Australia wishes to preserve such duplication, then the definition of terrorism still ought to carve out lawful acts of combatancy as set out above.

Fifthly, the definition of terrorism also criminalises certain acts of violence committed against civilians in a territory experiencing armed conflict, in circumstances where such acts *are not connected* to the armed conflict but occur alongside it. Such acts of ordinary crime are appropriately criminalised by the extraterritorial Australian offence of terrorism. The criminalisation of such acts would not be affected by a provision carving out lawful (or indeed any) acts committed in connection with an armed conflict, such nexus with conflict already forming part of the jurisprudence on when a violent act can be characterised as a war crime.

We note that the Federal Government has previously rejected the recommendation of the Parliamentary Joint Committee on Intelligence and Security (in its *Review of Security and Counter-Terrorism Legislation, 4 December 2006, Recommendation 12),* that the terrorism definition exclude conduct regulated by the law of armed conflict: Australian Government, *Response to PJCIS Review of Security and Counter-Terrorism Legislation*, December 2008, stating as follows:

> Acts of terrorism may still occur during armed conflict; therefore the unqualified exclusion of armed conflict will encourage misapplication of the principles of public international law. The express exclusion of conduct regulated by the law of armed conflict from the definition of terrorist act would neither add to nor detract from Australia's international obligations and is unlikely to add clarity to the operation of relevant Criminal Code provisions.

An 'unqualified exclusion' of armed conflict is *not* the only option available. The response above is regrettably blunt, misunderstands the precise impacts of Australia's definition of terrorism on international law, and does not distinguish between the variety of different circumstances criminalised by the definition as set out above. It is also inconsistent with Australia's obligations under international anti-terrorism treaties. For example:

- The Terrorist Financing Convention 1999 does not apply to violence against any person taking an active part in hostilities (thus excluding military targeting of lawful and unlawful combatants) (article 2(1)(b));
- The Terrorist Bombings Convention 1997 excludes the 'activities of armed forces during an armed conflict' from that Convention" (article 19(2)); and
- The Nuclear Terrorism Convention 2005 also excludes the 'activities of armed forces during an armed conflict" from that Convention' (article 4).

As explained above, with an appropriately drafted exception clause, it is entirely possible for the Australian definition to:

- *properly criminalise* (a) unlawful violence against civilians in armed conflict (even if duplicating war crimes law), (b) unlawful civilian participation in hostilities, and (c) violence against civilians not connected to armed conflict in the territory;
- *while at the same time excluding* acts committed by combatants or members of armed forces under the law of armed conflict.

That end could be accomplished by inserting a simple exclusion clause in the Criminal Code definition of terrorism to this effect: 'Acts committed by members of armed forces during (or in connection with) an armed conflict are not terrorist acts'.

Disruption or destruction of an electronic system

A further aspect of the s. 100.1 definition to which we would like to draw attention is the breadth of the scope of paragraphs (2)(f) and (g), which pertain to actions or threats of action seriously interfering with, disrupting or destroying an 'electronic system', or likely to do so. The term 'electronic system' is said to include a range of systems ('an information system', 'a telecommunications system', etc.) but these inclusions are non-exhaustive. Given this unlimited scope, the open-endedness of the term itself (which has not been included the *Criminal Code Act* Dictionary, nor defined elsewhere in the Act), and the generality of each of the 'systems' it includes, the reach of a 'terrorist act' with respect to an 'electronic system' is highly uncertain and potentially very broad.[10] This is likely to generate considerable uncertainty in the public consciousness as to where 'hacking' offences (such as those already punishable under the *Cybercrime Act 2001* (Cth)) end and where offences concerning an 'electronic system' that amount to a 'terrorist act' begin.

The distinguishing feature in this subsection is the co-presence of the two forms of intention specified in paragraphs (1)(b) and (1)(c) (intent to advance a political, religious or ideological cause and to coerce or influence by intimidation), and the absence of both of the exonerating factors specified in paragraph (3) (having the nature of advocacy, protest, dissent or industrial action and not being intended to cause harm, or create a serious risk to the health or safety of the public or a section of the public, etc.). Nonetheless, because of the fact that 'harm' is proposed to include temporary or permanent psychological harm and because the ordinary meaning of 'to intimidate' may include to 'render timid, inspire with fear; to overawe, cow',[11] it is possible for a wide range of relatively peripheral hacking actions, or the threat of such actions, to be caught by this definition of a 'terrorist act'.

Various relatively harmless forms of so-called 'hactivism' (hacking undertaken in pursuit of an

[10] While 'telecommunications system' (one possible type of 'electronic system') is not defined in the *Criminal Code Act*, 'telecommunications network' is defined – it is given the definition conferred upon it by the *Telecommunications Act 1997*. The relationship between these two terms is unclear.
[11] *Oxford English Dictionary*, 2nd Edition (1989).

explicit political agenda) could, for instance, be caught by this legislation, to the extent that the persons responsible fell within its jurisdictional reach. Consider, by way of an extra-jurisdictional example, the hacking of the website of the German Interior Minister, Wolfgang Schäuble, to protest against Germany's biometric passports and telecommunications data retention legislation.[12] Another example, pre-dating East Timorese independence, is the defacing of Indonesian websites by Portugese hackers posting 'Free East Timor' slogans.[13] In such cases, a breach of website security protocols would almost undoubtedly have caused disruption. Moreover, in scenarios like these, it would be arguable that the posting of political slogans pertaining to such sensitive and controversial subjects amounted to a threat to cause psychological harm to a section of the public, or to create a serious risk to the health or safety of a section of the public (such as military personnel engaged in or near the conflicts in question). Yet where no critical public services are comprised, and no physical harm is actually forthcoming, it seems difficult to justify the classification of such actions or threats as 'terrorist acts' in the same realm of criminality as the Bali, Madrid or London bombings. Such a classification would not, we suspect, be consistent with the Australian public's understanding of what amounts – and should amount – to terrorism.

As well as making the law in question harder to enforce, over-inclusiveness of this kind threatens to dilute the moral opprobrium with which a charge of terrorism is currently (and should properly) be weighted. Moreover, even without paragraphs (2)(f) and (g) of this subsection, hacking that, for instance, disrupted the air traffic control systems of Australian airports could still be defined as a terrorist act (assuming satisfaction of the other applicable criteria) by reason of its creation of a serious risk to the health or safety of the public or a section of the public. For these reasons, we recommend the removal of paragraphs (2)(f) and (g) from this subsection and, if necessary, a review of the *Cybercrime Act 2001* to determine if it is suitably responsive to the serious public harms that can flow from cybercrime.

Recommendation C.1: The amendment suggested in the Discussion Paper to include the United Nations and its agencies within the defined potential targets of a 'terrorist act' in s 100.1 should be reintroduced into the Bill.

Recommendation C.2: Acts committed by armed forces during or in connection with an armed conflict should be excluded from the definition of 'terrorist act' in the Criminal Code.

Recommendation C.3: We recommend the removal of paragraphs (2)(f) and (g) from s.100.1 of the *Criminal Code* and a review of the *Cybercrime Act 2001* to determine if it is suitably responsive to the serious public harms that can flow from cybercrime.

[12] See http://www.focus.de/digital/internet/hacker-angriff-auf-schaeubles-homepage_aid_370096.html (last accessed 12 September 2009).

[13] Seth F. Kreimer, 'Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet' (2001-2002) 150 *University of Pennsylvania Law Review* 119, at 157, note 102.

D. Providing support or resources to a terrorist organisation (s. 102.7) and receive or provide training to a terrorist organisation (s. 102.5)

We are disappointed that the proposed amendments to ss. 102.5 and 102.7 of the *Criminal Code* in the Discussion Paper have not been pursued in the Bill. These provisions addressed serious concerns noted by the Clarke Inquiry regarding confusion and uncertainty surrounding the interpretation of the fault element by juries after judicial directions.[14]

As s. 102.7 currently stands, there is significant uncertainty as to precisely what the prosecution must establish in order to make out the offence of providing support to a terrorist organisation, thus leaving open the risk of capturing innocuous activities. s. 102.7(2) provides:

> (2) A person commits an offence if:
> (a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of ***terrorist organisation*** in this Division; and
> (b) the organisation is a terrorist organisation; and
> (c) the person is reckless as to whether the organisation is a terrorist organisation.

Having regard to Chapter 2.2, Division 5, 'Fault elements', of the Criminal Code, s. 102.7(2) can be interpreted in the following ways:

- s.102.7(2)(a) has only one physical element, and 'intentionally' qualifies both the provision of support or resources, and the 'would help the organisation engage in' a terrorist act part of it.
- s.102.7(2)(a) has only one physical element, but it is only necessary to prove that the provision was intentional as long as, objectively viewed, the support or resources 'would help…'
- s. 102.7 has two physical elements; the word 'intentionally' qualifies only the provision. The second physical element is a result, and thus recklessness is the fault element with respect to that physical element.

The second potential construction of this section broadens the offence unjustifiably; it potentially captures a person who was not even reckless to the risk that the support or resources provided would help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act. That is, it need not be proven that he or she was aware of a substantial risk that the resources 'would help' and, having regard to the circumstances known to him or her, it was unjustifiable to take the risk[15]. The consequence of omitting the fault requirement with respect to the 'would help' part of s. 102.7(2)(a) is potentially to criminalise innocuous conduct and to render the criminal law over-reaching.

The Clarke Inquiry observed that the third potential construction of this section is confusing and tautologous. It is tautologous because the requisite evidence to make out recklessness with respect to the second physical element in s. 102.7(2)(a) could, having regard to the definition of a terrorist organisation in s.102.7(a), be seen to include not only the defendant being reckless as to whether the

[14] *Report into the Case of Dr Mohamed Haneef*, November 2008 (hereafter, the Clarke Inquiry), para [5.6] (Recommendation 5).
[15] *Criminal Code* s5.4

resource would help but also as to whether the resource would help a terrorist organisation. This leaves open the risk of judicial error.[16]

Furthermore, it is apparent that the offences set forth in ss. 102.7 and 102.5 both depend upon the organisation(s) in question qualifying as a 'terrorist organisation': status that may arise by virtue of specification as such by regulation.[17] We understand that there are currently 18 organisations so listed.[18] However, there is no publicly available information which explains why these were chosen in preference to other similar organisations, beyond a restatement of the general definitional standard. Nor is there any available information about organisations that are currently under consideration for such listing. It should be noted that a 2006 PJCIS Report reviewing the re-listing of Al-Qa'ida and Jemaah Islamiyah as terrorist organisations stated that 'a clearer exposition of the criteria would strengthen the Government's arguments, provide greater clarity and consistency in the evidence and therefore increase public confidence in the regime as a whole'. [19] Clearly defined criteria for organisations' specification as terrorist organisations would also limit what is essentially a discretionary power to proscribe and therefore will play an important role in ensuring transparency and accountability.

We note, further, that the temporal relationship between the provision or receipt of training from/to 'an organisation' and the fact of the organisation becoming a terrorist organisation needs to be ascertained as clearly as possible given the consequences attached to providing training to, or receiving training from, a 'terrorist organisation'. As currently drafted, paragraphs (1) and (2) of s. 102.5 could, however, be given retrospective effect. Paragraphs (1)(a) and (2)(a) of this subsection do not require that an 'organisation' to which a person provides training or from which a person receives training be a terrorist organisation at the time of that training. It could be understood to suffice, under these subsections, that the organisation in question *subsequently* became a terrorist organisation and that the person in question *subsequently* formed the requisite intent with respect to that organisation. We recognise that courts would be inclined to interpret these provisions so as to ensure that this could not be the case, in view of the common law presumption against the retrospective application of statutes.[20] Nonetheless, we submit that it should not depend on litigation to procure this result and that the Government should strive, as it has done elsewhere in this legislation, to preclude the possibility of criminal offences having retrospective effect. Indeed, such a legislative approach is required by international human rights norms prohibiting retrospectivity in criminal law.[21]

In addition, we recall that the Sheller Report recommended that the type of training targeted by the offences set forth in s. 102.5 be drafted more carefully to avoid catching in their net legitimate training activities.[22] The Sheller Report also highlighted that the training offences, as currently drafted, do not require any connection to a terrorist act.[23] As currently drafted, the s. 102.5 offences would extend, for instance, to the provision of training calculated to steer a terrorist organisation, or particular individuals within it, *away* from a terrorist path. Likewise the offence in s. 102.5(2) would extend to entirely peripheral and non-violent activities, such as someone teaching a teenager in their village (who happens to be a member of a terrorist organisation, whether or not an active member) to ride a bike, bake bread or carry out first aid. School teachers in some areas might

[16] *Clarke Inquiry*, para [5.6]
[17] *Criminal Code* s.102.1.
[18] http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument (last accessed 22 September 2009).
[19] PJCIS, *Review of the re-listing of Al-Qa'ida and Jemaah Islamiyah as terrorist organisations under the Criminal Code 1995* (16 October 2006), at para [1.20].
[20] *Rodway v The Queen* 169 CLR 515 at 518-519.
[21] ICCPR, Art.15(1).
[22] Sheller Report, para. [5.77] (Recommendation 16).
[23] Ibid.

inadvertently be caught by these offences merely by virtue of their continued instruction of their pupils. A humanitarian aid exemption should be available.

We note that the Government has considered the Sheller recommendations and has decided to opt for a proposed ministerial authorisation scheme instead, by way of exempting legitimate actors and activities. We will address our concerns regarding this scheme in the forthcoming section. In view of those concerns and the public interest in these criminal offences being as clearly expressed as possible from the outset, we feel that it remains essential to specify the type of training that might expose persons to liability under subsection 102.5. US law offers a convenient model in its reference to 'military type training' defined, in the equivalent section in Title 18 of the US Code s. 2339D, as training in methods that can cause death or serious bodily harm, destroy or damage property, disrupt services to critical infrastructure or training in the use, storage, production or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction.[24]

Humanitarian exemption

As foreshadowed in the Attorney-General's Discussion Paper, we would like to see amendments to ss. 102.8 and 102.5 to ensure that the surrounding offences (training and association) do not inadvertently capture legitimate activities undertaken by aid and regional aid organisations. In that context, we would also like to see a further savings clause added to those proposals, which have been omitted from the Bill, to ensure that humanitarian organizations are not penalized where they inadvertently failed to obtain a declaration within time. To address these concerns, we would propose that the Government insert a savings clause in s. 102.5(5), providing that s. 102.5(1) and (2) shall not apply if the training was provided by an organisation that satisfied certain explicit criteria, even if the organisation in question did not fulfil the requirements of 102.5(5)(a) or (b).

Recommendation D.1: We recommend that the proposed amendments to ss. 102.5 and 102.7 of the *Criminal Code* set out in the Discussion Paper be reinserted into the Bill.

Recommendation D.2: We recommend that s. 102.7 be amended to contain a schedule with the specific criteria for the selection of terrorist organisations.

Recommendation D.3: We recommend that paragraph (1)(b) and (2)(b) of s. 102.5 be amended to insert the words ', at the time of the training,' after the word 'is' and before the words 'a terrorist organisation' to prevent these offences from having retrospective effect.

Recommendation D.4: We recommend that s. 102.5 be amended to confine its operation to 'military type training' defined in line with Title 18 of the US Code, and should not cover training provided for humanitarian or related purposes.

Recommendation D.5: We recommend that the humanitarian amendments proposed in the Discussion Paper be inserted into ss. 102.5 and 102.5, and further that a savings clause be inserted in s. 102.5(5), providing that s. 102.5(1) and (2) shall not apply if the training in question was provided by an organisation that satisfied certain explicit criteria, even if the organisation in question did not fulfil the requirements of s. 102.5(5)(a) or (b).

[24] *US Code*, Part 1, Chapter 113B, §2339D(c)(1).

E. Duration and method of listing proscribed organizations

Subsection 102.1(3) of the *Criminal Code* is amended by the Bill to increase the duration of listing of proscribed terrorist organisations. The amendment proposes to increase the duration from the present two year period to a three year period. The explanatory memorandum indicates that this change was made in accordance with the recommendation of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in their *Inquiry into the Proscription of 'terrorist organisations' under the Australian Criminal Code* (September 2007).

However, the Committee's report does not offer any substantive reasons as to why the duration of listing should be increased. The report compares a number of foreign jurisdictions with similar legislative frameworks including the United Kingdom, New Zealand, Canada and the United States. Some of these jurisdictions have more frequent reviews of proscription and some have less frequent reviews. It is not apparent that a two year review cycle is out of the ordinary amongst the international community. However, the Committee made their recommendation to decrease the frequency of reviews, commenting that a review once every Parliamentary cycle would 'offer an adequate level of oversight'.

We submit that it is preferable that the status of proscribed organisations is reviewed as regularly as possible, particularly in circumstances where the listing does not result from a judicial process. The Committee acknowledged that automatic cessation of proscription ensures that changing circumstances are taken into account. As there does not appear to be any evidence suggesting that the two year cycle is too onerous, we suggest that this proposed amendment be removed and the two year cycle remain in place.

Consistent with some previous reviews of terrorism laws and our earlier submissions, we also submit that: (1) the power to proscribe a terrorist organisation should be exercised by the judiciary, affording procedural fairness, rather than the executive; and (2) where an organisation is proscribed for advocating terrorism, the law should clarify the circumstances in which the views of an individual member (such as a senior leader) are to be taken as representative of the organisation.

Recommendation E.1: Review of listed terrorist organizations should occur at least every two years rather than every three years, to ensure the accuracy and currency of such listings.

Recommendation E.2: Listing of terrorist organizations should arise from a judicial determination in a judicial proceeding.

Recommendation E.3: Where an organization is listed as terrorist on the basis of 'advocacy' of terrorism, the law should specify whose advocacy is regarded as binding or expressing the will or policy of the organization.

F. Standard for preventative/investigative detention (*Crimes Act* s. 23C(2); 23DB(2))

We would prefer the adoption of reasonable belief threshold test under ss. 23C(2) and 23DB(2) of the *Crimes Act 1914* (Cth) (hereafter, the *Crimes Act*), rather than a 'reasonable suspicion' standard. A clear distinction exists in criminal law regarding the states of mind underlying the reasonable suspicion and reasonable belief standards. In *R v. Rondo*, for instance, the NSW Court of Criminal Appeal observed that: 'A reasonable suspicion involves less than a belief but more than a possibility.[25] Suspicion entails 'more than a mere idle wondering' but is consistent with the creation of a mere 'apprehension or fear' regarding the existence of certain circumstances in the mind of a reasonable person.[26] In *Henderson v Surfield and Carter*, the Full Court of the Supreme Court of South Australia observed that '[s]uspicion lives in the consciousness of uncertainty', in contrast to belief.[27] Belief on the other hand, transcends a mere apprehension or fear. 'As a belief is a strongly held conviction, the absence of doubt makes the state of mind far removed from suspicion'.[28] The reasonable suspicion standard may be sufficient for some purposes.

However, we submit that reasonable suspicion is not an appropriate standard to utilise for purposes of detention, which international human rights law requires be subject to particular guarantees and conditions.[29] This is particularly the case in a counter-terrorism context where, given public anxiety in the wake of events of the past decade, there remains a real risk of fear being aroused without foundation. We recommend, therefore, that as far as detention is concerned (investigative or otherwise), 'reasonable belief' is the more appropriate test.

Recommendation F.1: We recommend that ss. 23C(2)(b) and 23DB(2)(b) be amended to raise the threshold test to that of 'reasonable belief' (instead of a lower standard of 'reasonable suspicion').

[25] *R v Rondo* (2001) 126 A Crim R 562.
[26] *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303 (per Kitto J).
[27] *Henderson v Surfield and Carter* [1927] SASR 192 at 196 (quoted with approval in the High Court in *Ruddock v Taylor* [2005] HCA 48 at para. [77] (per Gleeson CJ, Gummow, Hayne and Heydon JJ)).
[28] *Ruddock v Taylor* [2005] HCA 48 at para. [92] (per Gleeson CJ, Gummow, Hayne and Heydon JJ).
[29] ICCPR, Art. 9.

G. Duration of investigative detention – non-terrorist offences (*Crimes Act* s. 23C(7))

We support the proposed amendments to s. 23C(7) of the *Crimes Act* to clarify the disregarded periods of time ('dead time') in the calculation of the investigation period. We note the operative rationale for the absence of capping provisions in s 23C in contrast to s. 23DB (the latter to be made subject to a cap in paragraph (11) by virtue of the additional ground for extension afforded by paragraph 9(m) of that section). The Clarke Inquiry in its discussion of what was formerly s. 23CA(8)(a)–(l) (now paragraphs 9(a)-(l) of s.23DB), which mirrors s. 23C(7)(a)-(l), noted that the activities addressed in these sections are by their nature of finite length and as such are 'naturally capped'.[30] Nonetheless, we remain concerned about the absence of an overall cap applicable to all extensions of the investigation period under s. 23C(7).

The Clarke Inquiry did not examine the potential for abusive or, at a minimum, unduly permissive interpretations of paragraphs (a) to (l) of s. 23C(7) so as to extend the investigation period. For instance, allowing time for a detainee to 'rest or recuperate' (under s. 23C(7j)) could potentially be used as a pretext for extending the detainee's experience of the legal limbo invariably associated with pre-charge detention, perhaps in order to pressure the detainee into a particular course of action. The lead-in to paragraph (7) does afford some reassurance in this respect, by subjecting the periods of time that may be disregarded under the ensuring sub-paragraphs to an overall requirement of reasonableness echoing that included in s. 23C(4).

Nonetheless, we submit that it is in the interests of law enforcement personnel as much as detainees that the legislation give more specific and reliable guidance as to the outer limits beyond which pre-charge detention should not extend. The ICCPR stresses at a number of instances the importance of 'promptness' in the pre-charge and pre-trial handling of criminal suspects, particularly those detained; this an important theme in Article 9 of the Covenant.[31] Leaving detainees in a prolonged state of uncertainty as to their legal status may also be inconsistent with the requirement that all persons deprived of their liberty 'be treated with humanity and with respect for the inherent dignity of the human person' under Article 10 of the ICCPR.[32] We therefore urge the Government to minimise scope for abuse or uncertainty by subjecting the extensions contemplated by s. 23C(7) to an overall cap along the lines of that to be provided by s. 23DB(11).

Recommendation G.1: We recommend the inclusion of a maximum allowable period of detention permitted by s. 23C or, in the alternative, a maximum allowable period of 'dead time' that may be subject to disregard under s. 23C(7).

[30] The Clarke Inquiry, para [5.4.4].

[31] ICCPR, Art. 9(2) and (3). Detention is arbitrary if it is *unpredictable* its duration; a law must *clearly* define the conditions for deprivation of liberty and be *foreseeable* and *certain* in its application in order to safeguard this freedom: *Melnikova v Russia* [2007] ECHR Appllication No 24552/02 (21 June 2007).

[32] It has been established, for instance, in the European Court of Human Rights that the law must provide clearly defined pre-conditions for detention and its application must be foreseeable: *Baranowski v Poland*, No. 28358/95 (Judgement of 28 March, 2000), para [52]; *Jecius v Lithuania* (2002) 35 EHRR 16, para [56]. Further, it has also been established that any significant delay in releasing a detainee is likely to breach the provision of the European Convention that is equivalent to ICCPR Art. 10 (Art.5); this has included a mere one hour delay (*Quinn v France* (1996) 21 EHRR 529) and, in another instance, a three day delay (*Mancini v Italy*, No.44955/98 (Judgment of 2 September, 2001).

H. Judicial extension of duration of investigative detention – non-terrorist offences (*Crimes Act* s. 23DA(2))

We welcome the amendment of s. 23DA(2) of the *Crimes Act* to clarify the parameters relevant to the extension of the investigation period by order of a magistrate. However, we reiterate concerns expressed in the Clarke Inquiry that this section is not prescriptive enough and could potentially give rise to breaches of procedural fairness. As the Clarke Inquiry emphasised, it is imperative that such sections 'detail a comprehensive set of procedures to ensure that applications can be made simply and expeditiously'.[33] We do not believe that s. 23DA(2) yet provides such detail. It is, for instance, not clear what might be entailed in evaluating whether an investigation has been conducted 'properly' for purposes of satisfying s. 23DA(2)(c).

Fortunately, general law offers a convenient and non-controversial way of addressing this residual uncertainty. Section 138 of the *Evidence Act 1995* (Cth) (hereafter, the *Evidence Act*), mirrored in many jurisdictions throughout Australia, outlines factors to be taken into account in the exercise of the discretion whether to exclude improperly or illegally obtained evidence.

In this context, paragraph (3)(f) provides that consistency with or contravention of a person's rights under the ICCPR shall be a relevant consideration. The ICCPR contains a number of guarantees regarding detainee treatment (Articles 9 and 10) and liberty of movement (Article 12), among others, which could be implicated if an investigation period is extended. Moreover, there is a wealth of guidance available on their interpretation and application of these guarantees thanks to the Human Rights Committee's general comments and consideration of individual complaints. Accordingly, we believe that the ICCPR would be an appropriate point of reference to which magistrates should have regard when determining whether an investigation has been conducted 'properly and without delay' for purposes of s. 23DA(2)(c), just as it is already under s. 138 of the *Evidence Act*.

Recommendation H.1: We recommend that s. 23DA(2)(c) be amended to direct magistrates to have regard to, among other factors, the rights of persons under the ICCPR when determining whether an investigation has been conducted 'properly and without delay' for purposes of granting an extension to the investigation period.

[33] Clarke Inquiry, para [5.4.6].

I. Duration of preventative/investigative detention – terrorist offences (*Crimes Act*, proposed ss. 23DB and 23DC)

We support proposed ss. 23DB and 23DC of the *Crimes Act*. In particular, we welcome the imposition, pursuant to proposed s. 23DB(11), of a maximum cap for the amount of time susceptible to disregard in calculating the investigation period under ss. 23DB(5) and (7), as well as the salient requirement for the inclusion of the total amount of disregarded time in the application for judicial specification under proposed s. 23DC(4)(d), in each case with respect to an extension of the investigation period under s. 23DB(9)(m). The inclusion of a maximum cap on an investigation period's 'dead time' has considerably enhanced the statutory regime to address a deficiency highlighted by the Clarke Inquiry.[34]

Nonetheless, we believe that the absence of an overall cap on the maximum duration of the investigation period insofar as it may be extended under *any* of the paragraphs of s.23DB(9), and/or an overall cap on 'dead time' open to disregard under s. 23DB(9) in its entirety, leaves open a real possibility that this subsection may be subject to abuse (albeit perhaps well-meaning abuse) in the pressured environment of a terrorism-related investigation. Above in this submission we have already outlined the nature of this risk and proposed a mechanism for its mitigation; the same concerns apply in the context of s. 23DB(9), arguably to a greater extent in view of the particular pressures to which law enforcement personnel investigating terrorism offences are likely to find themselves subject.

Recommendation I.1: We recommend the inclusion of a maximum allowable period of detention permitted by s. 23DB or, in the alternative, a maximum allowable period of 'dead time' that may be subject to disregard under s.23DB(9).

[34] Clarke Inquiry, paras [5.4.7]-[5.5] (although we note that Mr. Clarke proposed that the cap in question be 'no more than seven days' and observed that submissions had been made that no more than a 48 hour capacity for 'dead time' was appropriate).

J. Exclusion of information from application for extension of investigation period and/or from copy provided to accused (*Crimes Act* s. 23D(4), (6), 23DA(4), 23DC(5), 23DD(4), 23DE(4), (6), 23DF(4))

We welcome the amendments to ss. 23DC, 23DD, 23DE, and/or 23DF of the *Crimes Act* insofar as they address a concern raised in the Clarke Inquiry that applications for extensions of investigations periods be entrusted only to senior officers (see ss. 23DC(3), 23DD(2)(e), 23DE(2), and 23DF(2)(d)).[35] We hope that, in practice, this requirement will be supported by the provision of appropriate training to senior officers. We welcome also the clarification afforded by the proposed amendments that applications for extensions to investigations periods and instruments granting such extensions should be provided to the person to whom they relate or to his or her legal representative before their consideration by a magistrate or as soon as practicable after their issuance as the case may be (see ss. 23D(4), 23DA(6), 23DC(6), 23DD(6), 23DE(5), and 23DF(6)).

We remain concerned, however, that the open-ended provision made for exclusion of information in ss. 23D(4), (6), 23DA(4), 23DC(5), 23DD(4), 23DE(4) or (6), or 23DF(4) is inconsistent with Australia's obligations to safeguard the rights of accused persons by allowing them a capacity to defend themselves against criminal allegations occasioning a suspension of their rights. Articles 9(2) and 14(3)(b) of the ICCPR, protecting rights to liberty and security of person and to a fair trial, stress the necessity for an accused person to be duly informed of charges against him or her and to have adequate time and facilities to prepare his or her defence. The Human Rights Committee (charged with monitoring ICCPR compliance) has noted that it is important in the context of the guarantee to fair trial that the 'defence has an opportunity to familiarise itself with the documentary evidence against an accused'.[36] We submit that these guarantees are pertinent to the capacity of an arrestee to defend himself or herself against allegations upon which reliance is placed in an application for an extension of the investigation period (whether by disregard of time or otherwise) under ss. 23D, 23DA, 23DC, 23DD, 23DE, and/or 23DF of the *Crimes Act*.

Under ss. 23D(4), (6), 23DA(4), 23DC(5), 23DD(4), 23DE(4) or (6), or 23DF(4) of the *Crimes Act*, information material to an application for extension of the investigation period may be withheld from the accused and his or her defence if it is likely to: (1) prejudice national security; (2) be protected by public interest immunity, (3) risk ongoing operations by law enforcement or intelligence agencies, and (4) put at risk the safety of the community or law enforcement/intelligence officers. We note that the Discussion Paper rationalised these provisions by reference to a quote from the Clarke Inquiry stating that 'it should be borne in mind that a judicial officer might be required to consider sensitive or classified information in the absence of the person under arrest and/or their lawyer'.[37] However, it should be noted that this quotation is followed, in the Clarke Inquiry, by a further clause stating that 'provision should be made to ensure that, where necessary, that type of material may be put before the judicial officer *without there being an undue risk of questions of procedural fairness or nature justice arising*'.[38]

We are concerned that if the accused and his or her defence counsel are denied access to exculpatory or inculpatory evidence, the opportunities afforded the accused or his or her legal representatives to make representations to a magistrate about the application in question (under ss.

[35] Clarke Inquiry, para [5.5].
[36] Harward v. Norway, UN Human Rights Committee, Communication No.451/1991, U.N.Doc. CCPR/C/51?D/451/1991(1994), para9.5.
[37] Clarke Inquiry at para [5.4.6], quoted in the Discussion Paper at p.117.
[38] Ibid (emphasis added).

23D(6), 23DA(2)(d), 23DC(6)(b), 23DD(2)(f), 23DE(5)(b), or 23DF(2)(e)) are rendered meaningless. It is difficult to comprehend how an accused person or his or her legal representative might formulate apt and compelling representations while lacking critical information about the nature of the investigation underway in relation to the arrestee.

International human rights law protects against arbitrary decision making by guaranteeing a fair hearing to an affected person. As the European Court of Human Rights observed in *Al-Nashif v Bulgaria*, Application No. 50963/99, ECHR Judgment, 20 June 2002, at paras. 123-124:

> 123. Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information….
>
> 124. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.

The Grand Chamber of the European Court of Human Rights (and the UK House of Lords, now Supreme Court) has elaborated on the scope of those fair hearing rights as they apply in national security cases (for example, concerning detention and control orders). The protection of classified information may be justified to protect national security, but it must be balanced against the requirements of procedural fairness and a fair trial: *A and others v United Kingdom* (*Application No. 3455/05*), Judgment, 19 February 2009, at paras. 217-218. The starting point is that it is 'essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others': at para. 218.

Where 'full disclosure' is not possible, a person must still enjoy 'the possibility effectively to challenge the allegations against him': at para. 218. The Grand Chamber observed that 'where all or most of the underlying evidence remained undisclosed', 'sufficiently specific' allegations must be disclosed to the affected person to enable that person to effectively provide his representatives (including security-cleared counsel) 'with information with which to refute them': at para. 220. The provision of purely 'general assertions' to a person, where the decision made is based 'solely or to a decisive degree on closed material' will not satisfy the procedural requirements of a fair hearing: at para. 220. On the facts, the Grand Chamber held that the affected person's hearing had been unfair because the case against him had largely been contained in closed material and the open case was insubstantial.

The UK House of Lords has followed the test set out by the Grand Chamber. In *Secretary of State for the Home Department v AF and another* [2009] UKHL 28, at para. 59, the House of Lords stated (in respect of control order hearings) that:

> The controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.

We recognise that it is arguable that there might be extreme circumstances in which it may be determined necessary to hamstring an arrestee's defence in this way for reasons of public safety. We believe, however, that such a determination is one that a magistrate should be called upon to make, once in possession of all the relevant information, rather than being a decision left to investigating officers likely to have made significant personal investments in the investigation. This, we believe, is consistent with the 'overriding concern' emphasised in the Clarke Inquiry 'that procedural fairness should be accorded a person and, if the judicial officer [in question] considers there is a need to depart from normal processes for reasons he or she believes should outweigh the need for procedural fairness, the making of an order authorising that departure' should be a necessary precondition to such departure.[39]

Recommendation J.1: We recommend that ss. 23D(4), S.23DC(5) and 23DE(4) be amended:

- to require that information proposed to be excluded from an application for extension of an investigation period be put before a judicial officer; and

- to require that the judicial officer make a determination about which elements, if any, of that information may be withheld from the arrestee.

Recommendation J.2: We recommend that ss. 23DA(4), 23DC(7), 23DD(4) and 23 DF(4) be amended:

- to require that information proposed to be excluded from the copy of an application or instrument provided to the arrestee be put before a judicial officer; and

- to require that the judicial officer make a determination about which elements, if any, of that information may be withheld from the arrestee.

[39] Ibid at para [5.5].

K. Police power to enter without warrant in emergency situations (amendments to *Crimes Act*, Division 3A, Part 1AA)

The proposed amendments to Division 3A of the *Crimes Act* provide police with the power of entry, search and seizure without a warrant in emergency situations. At present, the Australian Federal Police do not have a comprehensive emergency search and entry powers, and the existing state laws providing for warrantless search and entry are limited. We appreciate that the provision is intended to address a perceived need for wider emergency powers in the area of counter-terrorism operations.

We are concerned, however, that as currently drafted these proposed amendments unduly impinge upon rights protected by Article 17 of the ICCPR, which provides that no person 'shall be subjected to arbitrary or unlawful interference with his [or her] privacy, family, or correspondence...' As the Government no doubt acknowledges, the powers of police to enter a person's premises and to search through a person's possessions clearly constitute an interference with that person's privacy. The entrance into a person's home of a number of police officers (most likely unknown to the person and unexpected by the person) amounts to a particularly serious infringement upon that person's privacy. International human rights law recognises, nevertheless, that such interferences may be necessary in certain circumstances in order to ensure the effective operation of the criminal justice system and thereby protect the rights of others. This recognition is implicit in the requirement that, in order to be consistent with Article 17 of the ICCPR, interferences with privacy must not be arbitrary or unlawful. The Human Rights Committee has made clear, in its General Comment on this Article, that '[t]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances'.[40]

The use of police warrants has traditionally been an essential device to curtail arbitrariness in the pursuit of law enforcement and public safety goals. The requirement for a warrant ensures that the execution of warrants by one arm of government is supervised by another, as well as ensuring that adequate reasons are furnished that support substantial interferences with privacy. In view of the protection that warrants typically afford, we submit that the Government should exercise extreme caution in structuring search and entry powers designed to be exercised without recourse to warrant-related procedure. We believe that the current drafting of the proposed amendments to Division 3A of the *Crimes Act* generate an unacceptable degree of risk that the powers specified therein may be exercised arbitrarily, however well-intentioned that exercise may be. We have, therefore, put forward a number of suggestions to address this risk below.

Power to search premises (s. 3UEA)

Section 3UEA(1) allows a police officer to enter premises if 'the police office suspects, on reasonable grounds' that:

(a) it is necessary to exercise a power under subsection (2) in order to prevent a thing that is on the premises from being used in connection with a terrorism offence; and
(b) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.

[40] UN Human Rights Committee, General Comment No. 16: *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)* (8 April 1988), para. 4, available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/23378a8724595410c12563ed004aeecd?Opendocument (last accessed 22 September 2009).

Our concerns relating to this subsection are three-fold:

- First, we are concerned that the power vested in police by s.3UEA(1) is not based upon the objective existence of an emergency, but rather upon a police officer 'suspect[ing], on reasonable grounds' that certain emergency circumstances have arisen.
- Second, the effect of this threshold, alongside other features of s.3UEA(1), is to render the powers established by these provisions capable of extending far beyond the scope of the sort of genuine emergency upon which the provision is premised.
- Third, as well as posing substantial risks of arbitrary and unjustified incursion upon ICCPR-protected rights, s. 3UEA provides police with very limited effective guidance as to when the powers specified therein should be exercised and limited scope to ensure accountability for overreaching action taken in exercise of these powers.

'Suspects, on reasonable grounds' threshold

As discussed above of this submission, the threshold of 'suspects, on reasonable grounds' is an extremely low one, requiring, mere 'apprehension or fear' on reasonable grounds, a state of mind commensurate with a 'consciousness of uncertainty'.[41] This low threshold requirement applies to each criterion of the offence, affording a police officer the power to enter premises if he or she:

- Suspects on reasonable grounds that a thing is on the premises relevant to a terrorist offence; and
- Suspects on reasonable grounds that it is necessary to enter to prevent the thing from being used in connection with a terrorist offence; and
- Suspects on reasonable grounds that it is necessary to enter without a warrant because there is a serious and imminent threat to a person's life.

The compound effect of these various levels of suspicion means that the intrusive powers provided by s. 3UEA could be exercised even though a high degree of uncertainty persisted as to whether or not their exercise was justified. Moreover, there are serious questions that arise, in relation to each criterion, as to when this suspicion threshold might be met. For instance, does the officer only have to suspect that there exists on the premises a 'thing' that is objectively relevant to a terrorist offence'? Or is it sufficient to suspect that there exists on the premises a 'thing' which is suspected on reasonable grounds of being relevant to a terrorist offence? Does the 'thing' have to be relevant to what is objectively a 'terrorist offence'? Or is it sufficient that the thing be relevant to what is suspected on reasonable grounds of being a 'terrorist offence'?

Even if this low threshold of suspicion on reasonable grounds can be justified for element (a) of s. 3UEA(1), it is manifestly unreasonable for element (b). For, since the section is premised on the fact that the removal of the safeguard afforded by a warrant procedure is 'necessary' to avoid a loss of life, this necessity must be reflected in the standard. As currently drafted, the provision would essentially allow warrantless entry on the basis of a *mere apprehension* (albeit on reasonable grounds) that the procedure of applying for a search warrant would be ineffective in preventing what is *feared* to be a serious and imminent terrorist attack. The conclusion required by paragraph (b) is likely to flow all too easily from the 'suspicion' contemplated by paragraph (a). As such, the elasticity of the 'suspicion' standard, to be deployed in relation to each of the criteria, renders the provision amenable to quite dramatic expansion beyond the scope of what would otherwise qualify as an emergency, strictly understood, and what would strictly be 'necessary' to avoid or mitigate that emergency.

[41] Supra, at pp.12-13.

Potential overreach beyond the ambit of emergency

A further aspect of s. 3UEA(1) to which we would like to draw attention is the breadth of its coverage. Every aspect of the circumstances occasioning a warrantless search or entry power is expressed in extremely broad terms. While on the one hand, this affords police a great deal of flexibility and discretion, on the other it provides police with very limited effective guidance as to when these powers should be exercised and exposes police to real risks of public backlash and immersion in lengthy and resource-intensive litigation. This is the case because the provision might be taken to authorise many acts likely to be seen by the public as unjustified by any real necessity.

There are, for instance, a very wide variety of offences defined under the *Criminal Code* as 'terrorism offences', from the actual commission of a terrorist act entailing the causing of serious physical harm to associating with or financing a terrorist organisation, and possessing a thing in connection with a terrorist offence.[42] Similarly, the threshold for 'being used in connection with' a terrorist offence in sub-section (a) is similarly loose and potentially far-reaching. It is unclear whether the 'connection' required by paragraph (a) is causal, spatial or temporal. As a result, the requirements of s. 3UEA(1) could potentially be satisfied by reference to anything (money, mobile phones or cars, for instance) that could be suspected of being used in some way 'in connection with' a terrorist offence, not necessarily for the purposes of carrying out such an offence. The person subject to the invasion of privacy contemplated by s. 3UEA(1) could well have no connection to a person committing or suspected of committing a terrorist offence beyond the mediating effect of a 'thing' that might itself be entirely tangential to the commission of an offence.

Is unclear whether this breadth is sufficiently qualified by paragraph (b) of s. 3UEA(1). Leaving aside the criticism raised above regarding the role of 'suspects on reasonable grounds', the interplay between the two parts of the sentence in paragraph (b) is unclear. It provides that an officer may enter, *inter alia*, if the officer suspects '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*'. Does this mean that it will reasonably be considered 'necessary' to exercise the power provided there is, objectively speaking, a serious and imminent threat to a person's life, health or safety? Or does the officer have to possess a reasonably grounded suspicion that the necessity *arises immediately and imminently from* a threat of which the officer harbours a reasonably grounded suspicion? Under its most permissive interpretation, paragraph (b) might be understood to be satisfied whenever suspicion of necessity coincides with the prevalence of what is perceived to be a 'serious and imminent threat', regardless of the distance or proximity between the premises subject to warrantless search or entry and *that particular* serious and imminent threat to which the officer in question is having regard. In this era of ever-present terror alerts and terrorism-related media sensationalism, s. 3UEA(1)(b) seems to allow far too much to chance and apprehension or fear.

Lack of oversight

The problems afflicting the current wording of s. 3UEA(1) that we have outlined are compounded by the fact that any officer may hold the requisite state of mind, regardless of age, experience or training. Just as the Clarke Inquiry emphasised the importance of experienced, senior officers making applications for extensions of investigation periods, we believe that the decision when to exercise of powers of such potential gravity and invasiveness ought to be a matter vested in the most experienced and senior of police officers (appropriately trained for this purpose) and exercised under their close supervision.[43]

[42] Within the *Criminal Code*, this includes s.101.2 (providing or receiving training in connection with terrorist acts), s.101.4 (possessing things connected with terrorist acts) and s.103 (financing terrorism).
[43] Clarke Inquiry, para [5.5].

We are concerned that the many layers of ambiguity by which s. 3UEA(1) is plagued could be taken to authorise 'fishing' expeditions by well-meaning police looking for evidence, where an insufficient basis exists for warrant-based investigation. The salience of this concern is highlighted by s. 3UEA(3), which allows police to make use of a warrantless search targeting a particular 'thing' to locate other 'things' which might afford grounds for pursuing a warrant-based search of the same premises in relation relate to any indictable or summary offence (i.e. not only a terrorist offence). This frames any suspicion concerning a terrorist offence as an open door affording police access to a general enlargement of their powers, free of the usual supervisory checks and balances.

We recognise that s. 3UEA is intended to allow police to avoid delay flowing from the warrant procedure in emergency circumstances, rather than being directed towards undermining police accountability *per se*. However, to dispense with the warrant procedure is to dispense with an important mechanism for judicial oversight – a mechanism upon which both police and the public benefit from relying. We believe that the twin goals of avoiding devastating delay in emergency settings and ensuring that oversight and accountability are maintained are reconcilable and we would like to suggest a way of bringing about that reconciliation (or at least bringing s. 3UEA closer to such a reconciliation). We recommend that s.3UEA be amended to establish a retrospective warrant-like procedure that applies after the power is exercised, whereby a judicial officer would affirm that the power had been properly exercised or provide guidance as to how any impropriety or over-reach might be addressed and thereafter avoided. This would ensure that appropriate checks and balances are maintained in relation to warrantless entry or search procedures. Such an ex post facto mechanism for judicial supervision would provide the police with a more certain footing upon which to proceed with the investigation in question (reducing the likelihood of evidence being excluded in the final instance). It would also reassure the Australian public that their fundamental rights and democratic freedoms are secure, notwithstanding the seemingly incessant expansion of police powers advanced under the rubric of counter-terrorism.

Recommendation K.1: We recommend that s. 3UEA(1) be amended to replace 'suspects, on reasonable grounds' with 'believes on reasonable grounds. In the alternative, s. 3UEA(1) should be amended to replace 'suspects on reasonable grounds' with 'suspects, on reasonable grounds, the probability of the following:' In the further alternative, s. 3UEA(1) should be clarified such that the mental requirements are clear in relation to each of the elements specified in paragraphs (a) and (b). That is, the lead-in to s. 3UEA(1) should read, 'a police officer may enter premises if:', with sub-sections (a) and (b) specifying the particular mental state required.

Recommendation K.2: We recommend that the lead-in to s. 3UEA(1) be amended to replace 'police officer' with 'authorised officer'.

Recommendation K.3: We recommend that s. 3UEA(1)(b) be amended to read: 'it is necessary to exercise the power without the authority of a search warrant because the use of the thing to which paragraph (a) refers, for the terrorist offence to which paragraphs (a) refers, poses a serious and imminent threat to a person's life, health or safety, and entry pursuant to a search warrant would be ineffective to prevent that threat'.

Recommendation K.4: We recommend s. 3UEA(3) should be amended, replacing the words 'an indictable offence or a summary offence' with the words 'a terrorist offence'.

Recommendation K.5: We recommend that a new sub-section be added to s. 3UEA requiring any exercise of the power established by s.3UEA(1) be judicially reviewed to verify its legality. In the alternative, we recommend that an independent administrative body be charged with reviewing the exercise of these powers, including being required to make its findings public.

L. National Security Information (Criminal and Civil Proceedings) Act 2004

The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) is unsatisfactory, notwithstanding the proposed amendments contained in the Bill.

First, the definition of 'national security' in section 8 and its sibling definitions (of Australia's defence, security, international relations or law enforcement interests, as defined in ss. 9-11 of the Act and in related legislation such as the ASIO Act 1979) are cast so widely and ambiguously so as to potentially enable the non-disclosure of a wide range of innocuous or non-sensitive information which has no material bearing on Australia's national security.

In consequence, an affected person could be prevented from knowing and challenging the full circumstances of the case alleged against them, or from accessing exonerating or exculpatory information. The Australian Senate Legal and Constitutional Affairs Committee has described the definition as 'broad in the extreme', 'unhelpful or unworkable' for an affected person, and susceptible to abuse by the authorities: *Report of Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004*, 19 August 2004, at paras. 3.20 and 3.22.

Secondly, the Act protects national security information through the use of closed hearings, ministerial certificates and security clearances. However, as the Australian Law Reform Commission noted in its report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (which led to the proposal of the legislation), other measures are available to achieve the same objective of protecting sensitive information (see ALRC recommendation 11-10). In particular, measures that interfere less in the ordinary conduct of civil proceedings should be considered before resorting to the more intrusive measures.

Thirdly, the Act requires certain proceedings to be held in closed session, rather than leaving the courts with the discretion whether to close the court (as the ALRC recommended), which would be an approach more capable of balancing the right to a fair hearing with national security interests in particular cases: Australian Human Rights Commission, *Submission to the Australian Senate Legal and Constitutional Committee Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004*, 2 June 2004, at pp. 5-6.

Fourthly, the Act regards a disclosure as 'likely to prejudice national security' where 'there is a real, and not merely a remote, possibility that the disclosure will prejudice national security' (s. 17). However, a more appropriate standard for ensuring the fairness of the hearing would be to require a showing of a *probability* or *likelihood* of prejudice, rather than the much lower standard of a 'real possibility'.

Fifthly, the Act permits the court to exclude a party and their legal representative from a closed hearing to determine whether to order the non-disclosure of information, where the person lacks the required security clearance: s. 38I(3). However, the judicial discretion to exclude a person is not accompanied by a requirement on the court to equally consider the adverse impact of the exclusion upon an affected person's right to a fair hearing: Australian Human Rights Commission, *Submission to the Australian Senate Legal and Constitutional Committee Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004*, 2 June 2004, at p. 7; see also Australian Senate Legal and Constitutional Affairs Committee, *Report into the provisions of the National Security Information Legislation Amendment Bill 2005*, 11 May 2005, Recommendation 9. The provision is accordingly likely to undermine the principle of equality of arms in the proceeding, to the detriment of a person seeking to contest a control order.

Sixthly, the Act's requirement that counsel be security cleared may not be compatible with the rights under 14(3)(b) and (d) of the ICCPR to communicate with a counsel of one's own choosing and to defend oneself through legal assistance of one's own choosing, particularly as the court has no discretion whether to permit access to non-cleared lawyers: Australian Human Rights Commission, *Submission to the Australian Senate Legal and Constitutional Committee Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004*, 2 June 2004, at p. 5.

Seventhly, in deciding to make an order of non-disclosure under the Act, the court is directed to consider whether an order would have a substantial adverse effect on the substantive hearing in the proceeding (s. 38L(7)(b)), but is also directed to 'give greatest weight' to the likelihood of prejudice to national security (s. 38L(8)). A general direction to prioritise the protection of national security over the protection of the right to a fair hearing, regardless of the context and individual circumstances, is not compatible with article 14 of the ICCPR.

Eighthly, the Act imposes strict criminal liability for a failure to notify the Attorney-General of the existence of information potentially prejudicial to national security, regardless of whether a party unintentionally, inadvertently or mistakenly failed to so notify, and in circumstances where the definition of 'national security' information is so broad as to make it impossible for any person to know what information they are supposed to legally disclose.

Recommendation L.1: *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) should be amended to better balance the interests of public security and the right to a fair hearing under international human rights law, by taking into account the issues identified above.

M. Other matters

We welcome the strengthening of the oversight and accountability of intelligence agencies, through the additional powers of inquiry granted to the Inspector-General of Intelligence and Security.

We welcome the omission of the terrorism hoax offence proposed in the Discussion Paper. Such offence is both unnecessary, uncertain in its operation, and would likely infringe in its implementation on protected freedom of expression.

We have confined our remarks to the legislative provisions of the Bill, although we remain concerned about the international human rights law implications of other aspects of Australia's counter-terrorism and national security legislation, particularly relating to:

- control orders and preventative detention orders;
- ASIO's questioning and detention powers in relation to terrorism;
- classification and censorship in the context of terrorism;
- the securitization of people smuggling in a recent bill;
- the denial of the human right to a fair hearing arising out of restrictions on procedural fairness rights in the issue of adverse security assessments by ASIO.

Some of these concerns are outlined in our previous submissions.[44]

Please contact us if we can be of any further assistance.

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30 April 2010

[44] See, eg, SCIL Submission on the *Anti-Terrorism Bill (No 2) 2005*, 11 November 2005; SCIL Submission on the *Anti-People Smuggling and Other Measures Bill 2010*, 15 April 2010; SCIL Submission on the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007*, 10 July 2007; Submission by Ben Saul and George Williams to the Parliamentary Joint Committee on ASIO, ASIS and DSD, Review of Division 3 Part III of the ASIO Act 1979 – Questioning and Detention Powers, 24 March 2005 (www.gtcentre.unsw.edu.au/News/docs/2005_ASIOReviewSubmission.doc); Ben Saul, Andrew Lynch and George Williams, Submission on the Anti-Terrorism Bill (No. 2) 2005, 10 November 2005 (www.gtcentre.unsw.edu.au/Publications/docs/pubs/submission_AntiTerrorismBill.pdf).