CHAPTER 3

Key issues – National Security Legislation Amendment Bill 2010

3.1 In a general sense, submitters and witnesses commended the Australian Government for initiating various reviews of Australia's national security and counter-terrorism laws. In relation to the NS Bill specifically, there was support for certain amendments resulting from independent and bipartisan parliamentary committee reviews. However, there was also strong opposition to certain amendments. This chapter discusses key concerns raised in submissions and evidence relating to:

- elements of the National Security Discussion Paper (Discussion Paper) not addressed in the NS Bill;
- treason and urging violence offences;
- terrorist organisations;
- pre-charge detention;
- emergency entry to premises;
- presumption against bail for terrorism offences; and
- extended notification requirements under the NSI Act.

Discussion paper

3.2 On 12 August 2009, the Attorney-General released a discussion paper on proposed legislative reforms to Australia's counter-terrorism and national security legislation. The Discussion Paper, which included the draft NS Bill and draft LE Bill, called for submissions by 9 October 2009. 50 submissions were subsequently received by the Attorney-General's Department (Department), 42 of which were published on the Department's website.[1]

3.3 Several submitters and witnesses told the committee that issues raised and recommendations made in those submissions are not addressed in the NS Bill. The comments referred to both the number and type of matters outstanding.

3.4 Australian Lawyers for Human Rights (ALHR), for example, submitted:

---

1 Attorney-General's Department, *Submission 12*, p. 2; and http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Nationalsecuritylegislation-publicconsultation_SubmissionstotheNationalSecurityLegislationPublicConsultation (accessed 14 May 2010).

> …a comparison of the draft legislation annexed to the 2009 Discussion Paper and the NS[L]A and PJCLE Bills 2010 reveals that most of those submissions have fallen on deaf ears as far as the government is concerned.[2]

3.5 The submission from the Gilbert & Tobin Centre of Public Law (Gilbert & Tobin) attached a table setting out specific amendments proposed during the consultation process and changes subsequently made to the NS Bill:

> In brief, of the 267 amendments to Australia's anti-terrorism legislation proposed in the Bill, only 66 of these reflect changes made since the Exposure Draft. As the table demonstrates, most of these 66 changes can be described as technical (as opposed to substantive) changes.[3]

3.6 In relation to the types of matter outstanding, the Law Council of Australia (Law Council) submitted that the NS Bill and LE Bill do not comprehensively reform Australia's counter-terrorism and national security legislation:

> For example, the amendments proposed do not address in any way some of the most controversial and concerning aspects of Australia's anti-terror regime such as:
>
> -the terrorist organisation proscription process;
>
> -the majority of the terrorist organisation offences;
>
> -the preparatory terrorism offences;
>
> -the preventative detention regime;
>
> -the control orders regime;
>
> -[the Australian Security Intelligence Organisation's] questioning and detention powers; and
>
> -telecommunication interception powers, such as B-Party warrants.[4]

3.7 Similar comments were made by Gilbert & Tobin:

> It is disappointing that the Government has chosen to ignore key arguments and suggestions put in the submissions in relation to fundamental aspects of the proposed legislative amendments. In particular, it is regrettable that it has done so without providing any explanation as to why the initially proposed (and highly problematic) amendments were retained. We feel that such explanations would have been necessary to allow for a meaningful engagement with experts and the community.[5]

---

2 *Submission 11*, p. 2.

3 *Submission 10*, p. 8.

4 *Submission 22*, p. 3. Also see Sydney Centre for International Law, *Submission 6*, p. 28; and Human Rights Law Resource Centre and Amnesty International, *Submission 15*, pp 49-52.

5 *Submission 10*, p. 9. Also see Law Society of NSW, *Submission 23*, p. 4.

3.8 The Australian Human Rights Commission (AHRC) contended:

> …the Bill does not go far enough to restore the balance between the protection of national security and the protection of basic human rights, such as liberty, which are fundamental to our democracy.[6]

3.9 The perception that the NS Bill is neither comprehensive nor substantive, and that little has been done to explain the provisions ultimately introduced into the Parliament, clearly concerned submitters with at least one – the National Association of Community Legal Centres (NACLC) – questioning whether the Department truly understood and gave due consideration to submissions received as part of the consultation process.[7]

Department response

3.10 In evidence, officers of the Department told the committee that all suggestions and recommendations arising from the Discussion Paper were given very careful consideration. However, the Department emphasised:

> …that this exercise is mainly about responding to previous reviews. It is by no means the end of the process. It is obviously an ongoing process of review and reform, and there are other mechanisms coming up in relation to that—like the [Council of Australian Governments] review and the establishment of the independent national security legislation monitor.[8]

3.11 The Department further noted that the Australian Government:

> …is working with States and Territories to develop and implement a more sophisticated and coordinated national approach to countering violent extremism in Australia. An effective counter-terrorism strategy requires a combination of an effective legal framework, appropriate security and law enforcement responses, and broader strategies to enhance social cohesion and lessen the appeal of the extremist ideologies that fuel terrorism.[9]

3.12 It was primarily proposals concerning Divisions 101 (Terrorism) and 102 (Terrorist organisations) of Part 5.3 of the Criminal Code that stirred the most interest, and in relation to these non-inclusions in the NS Bill, the Department submitted:

> Following the public consultation process, certain proposed measures which were to be included in the NSLA Bill were deferred…There were two key reasons for deferring some of the amendments to Part 5.3 of the Criminal Code…[S]ome of the measures required further consideration in consultation with the States and Territories…[and] some of the proposed

---

6 *Submission 18*, p. 5.

7 *Submission 13*, p. 5.

8 Ms Annette Willing, Attorney-General's Department, *Committee Hansard*, 21 May 2010, p. 45.

9 *Submission 12*, p. 5.

> amendments will require the States and Territories to amend their reference legislation for the measures to be constitutionally supported.[10]

3.13 In particular, departmental officials identified non-terrorist acts and non-terrorist actions relating to terrorist acts as matters which are not supported by the existing reference legislation:

> The definition of a terrorist act in the state legislation is identical to the definition in the Commonwealth Criminal Code. Accordingly, changing the notion of a terrorist act beyond that reflected in the existing definition is not supported by the referred power to amend the text of part 5.3 of the code.
>
> …
>
> [O]ur view is that the proposed amendments to the definition of a terrorist act and the proposed hoax offence would not be supported by the existing state referral of power.[11]

3.14 However, the committee notes that Gilbert & Tobin did not agree with such assertions. In its submission, Gilbert & Tobin argued that it is not necessary for the states and territories to amend their reference legislation before the Commonwealth can make changes to its own legislation:

> The Commonwealth possesses sufficient power under the 'amendment references' of the States to carry out those changes originally proposed in the Discussion paper–and any others it may also care to devise. Any valid requirement for State approval does not require legislative enactment at the State level, but merely executive assent.
>
> The High Court has confirmed that the Commonwealth possesses substantial powers to legislate with respect to terrorism using s 51(vi) [the defence power] and there is every reason to suspect that the proposed amendments which the Attorney-General has deferred would fall within the scope of this power, rendering resort to the referrals power unnecessary in any case.[12]

Treason and urging violence offences

3.15 Part 1 of Schedule 1 amends existing treason and urging violence offences in Division 80 of the Criminal Code. Part 2 of Schedule 1 inserts new offences of urging violence against groups and members of groups into the Criminal Code.

---

10 *Submission 12*, pp 2-3. Also see the Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 18 March 2010, p. 5.

11 Ms Annette Willing, Attorney-General's Department, *Committee Hansard*, 21 May 2010, pp 45-46. Also see the Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 18 March 2010, p. 5.

12 *Submission 10*, Attachment 2, p. 4. Also see Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 21 May 2010, p. 6; and Professor George Williams, *Committee Hansard*, 21 May 2010, p. 26 for similar arguments.

3.16 The Australian Law Reform Commission (ALRC) stated that Schedule 1 implements the bulk of its recommendations from the *Fighting Words: A Review of Sedition Laws in Australia* report.[13] However, other submitters and witnesses questioned the extent of or manner in which the NS Bill implements those recommendations.

Treason offences

3.17 Proposed section 80.1AA of the Criminal Code creates two new offences for treason: assisting enemies at war with the Commonwealth; and assisting countries engaged in armed hostilities against the Australian Defence Force.

3.18 The AHRC supported the proposed provisions as:

> …[they] will appropriately narrow these offences to ensure only material assistance to an enemy country provided intentionally by a person owing an allegiance to the Commonwealth will constitute treason.[14]

3.19 However, the key phrase 'material assistance' concerned the Castan Centre for Human Rights Law, Monash University (Castan Centre). Its submission argued that the lack of definition and lack of connection to a physical element produces overly broad offences:

> The concept of 'material assistance' ought to be defined to include only direct assistance, such as the provision of troops, funds, arms or other materiel, or intelligence, but to exclude indirect assistance such as the refusal to fight, the provision of humanitarian supplies, etc.[15]

3.20 The Sydney Centre for International Law (Sydney Centre) similarly recommended the inclusion of a definition of 'material assistance' in the NS Bill. It told the committee:

> 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.[16]

3.21 At the public hearing, the committee heard that to date there have been no prosecutions in respect of either treason offences or urging violence offences.[17]

---

13 *Submission 17*, p. 2. Also see Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104 (2006).

14 *Submission 18*, p. 33.

15 *Submission 9*, p. 3. Also see Sydney Centre for International Law, *Submission 6*, p. 2.

16 *Submission 6*, p. 2.

17 Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 21 May 2010, p. 7; Dr Patrick Emerton, *Committee Hansard*, 21 May 2010, p. 29; and Human Rights Law Resource Centre and Amnesty International, *Submission 15*, p. 17.

Urging violence offences

3.22 Proposed subsections 80.2(1) and 80.2(3) of the Criminal Code create a new offence for urging violence: urging the overthrow of the Constitution or government by force or violence; and urging interference in parliamentary elections or constitutional referenda by force or violence, respectively.

3.23 Several submitters and witnesses did not support the inclusion of urging violence offences within the Criminal Code.[18] Some of these inquiry participants argued that if such offences were to continue to form part of Australian law, they should be properly drafted to achieve a specific purpose.[19] Other participants argued that existing law already covers the criminality targeted by the NS Bill.

3.24 The Castan Centre, for example, submitted that proposed subsection 80.2(1):

> …overlaps to a large extent with the existing offence of incitement to treachery. While overlap is not total, in respect of those aspects where there is overlap the urging violence offence is broader.
>
> …
>
> [T]here are existing offences–such as those found in Divisions 147 and 149 of the Commonwealth Criminal Code, of harming a Commonwealth official because they are such an official, of threatening such harm, and of obstructing Commonwealth officials–which seem more appropriate to protect the proper functioning of [the] Australian government, without threatening with criminal punishment the expression of political dissent.[20]

3.25 In relation to proposed subsection 80.2(3), the Castan Centre again noted:

> …there are other offences that protect the integrity of the formal processes of Australian democracy…
>
> There is, therefore, no need for a distinct offence of the sort created by section 80.2(3) of the Criminal Code. There is especially no need to create such an offence having a maximum penalty that is–at 7 years–considerably greater than the penalty that would apply to anyone convicted of actually committing the urged violence.[21]

---

18 For example, Castan Centre for Human Rights Law, Monash University, *Submission 9*, p. 18; Civil Liberties Australia, *Submission 14*, p. 1; National Association of Community Legal Centres, *Submission 13*, p. 7; and Sydney Centre for International Law, *Submission 6*, pp 16-17.

19 Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 21 May 2010, p. 7; and Professor George Williams, *Committee Hansard*, 21 May 2010, p. 23.

20 *Submission 9*, pp 4-5. Also see Liberty Victoria, *Submission 8*, p. 1; Law Council of Australia, *Submission 22*, p. 6; Mr Ed Santow, *Committee Hansard*, 21 May 2010, p. 23; and Sydney Centre for International Law, *Submission 6*, p. 28 for similar views on existing legislation.

21 *Submission 9*, pp 6-7.

3.26 Proposed subsections 80.2(1) and 80.2(3) both provide for penalties of seven years imprisonment, and in passing, the Castan Centre commented:

> It is a matter of concern that there has been a general trend to increase very significantly the maximum penalties for national security offences as those offences have been moved from the *Crimes Act 1914* to the *Criminal Code*.
>
> …
>
> No policy rationale has been stated for this trend of significantly increasing the severity of penalties. There is an urgent need for review of the severity of the penalties for these Criminal Code offences, none of which has the actual infliction of violence as an element.[22]

3.27 At the public hearing in Melbourne, departmental officers told the committee:

> …the penalties have been worked out based on the fact not that they are linked with terrorism but that they are serious offences that would have major security implications.[23]

3.28 In response to suggestions that there is no place in the Criminal Code for urging violence offences, the Department submitted:

> The sedition offences were reviewed by the Australian Law Reform Commission (ALRC) in 2006. As part of this review, the ALRC considered the issue that some thought it unnecessary to retain the sedition offences in the Criminal Code. The ALRC concluded that the offences should be retained and that governments have a right, and in many cases a duty, to legislate to protect the institutions of democracy, and the personal integrity of citizens, from attack by force or violence...The ALRC's recommendations were largely concerned with streamlining and altering the description of the sedition offences rather than significantly changing their substance. The Government accepted most of the ALRC's recommendations, and the proposed amendments to the sedition offences reflect many of the ALRC's recommendations.[24]

Freedom of expression

3.29 Another issue concerning submitters and witnesses was the impact of the urging violence offence provisions on the right to freedom of speech.

3.30 Civil Liberties Australia (CLA), for example, submitted that proposed subsections 80.2(1) and 80.2(3) overlook that '[urging violence] is an offence of the mind.' In its view, it is unjust for the government to restrict an adversary's freedom of expression. CLA argued that freedom of speech is necessary in a modern western

---

22 *Submission 9*, p. 18. Also see Dr Patrick Emerson, *Committee Hansard*, 21 May 2010, pp 32-33.

23 Ms Annette Willing, Attorney-General's Department, *Committee Hansard*, 21 May 2010, p. 50.

24 Answer to question on notice, received 3 June 2010, p. 1.

liberal democracy, and the proposed provisions extend beyond what is necessary and proportionate in the interests of national security and public safety:

> Our primary concern is that the [NS] Bill regulates an action constituting the expression of words, not the commission of violence. The proposed offences contained in Subdivision C are speech acts, and imply that the expression of an opinion equates to an intention to act on that opinion.
>
> Absent specific situational context in which the expression is made that clearly connects the expression with the acts that they advocate, or an actual act of violence, the implication is that the words become performative and urging violence is performing an act of violence.[25]

3.31 With respect to the right of free speech, the Law Council expressed similar concerns:

> …the [urging violence] offences, by their very nature, have the potential to unduly burden freedom of expression and may have the effect of chilling legitimate political debate.[26]

3.32 In relation to proposed sections 80.2A and 80.2B (see below for further discussion), the AHRC raised identical arguments by stating that those provisions would 'restrict freedom of expression' as protected by Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[27] Paragraph 3 of Article 19 restricts the right as necessary for the protection of national security or public order, or for public health or morals. Therefore, to maintain consistency with these international covenants:

> The urging violence provisions will therefore only constitute a permissible restriction on freedom of expression to the extent that they can be said to be necessary for the purposes of protecting the rights or reputation of others or protecting public order or national security.[28]

3.33 The AHRC also noted that, under proposed sections 80.2A and 80.2B, political opinion is a protected attribute[29] and cautioned:

> In Australia the freedom of political communication is constitutionally protected but only in very limited circumstances. Offences that limit freedom of expression must be carefully drafted to ensure that legitimate speech, particularly political dissent, is not captured.[30]

---

25 *Submission 14*, p. 1.

26 *Submission 22*, p. 6.

27 For the full text of Article 19, see: http://www2.ohchr.org/english/law/ccpr.htm (accessed 1 June 2010).

28 Australian Human Rights Commission, *Submission 18*, p. 35.

29 Proposed paragraphs 80.2A(1)(c), 80.2A (2)(c), 80.2B(1)(d) and 80.2B(2)(d) of the NS Bill.

30 *Submission 18*, pp 36-37. Also see Liberty Victoria, *Submission 8*, p. 2.

Urging violence against groups or members of groups

3.34 Proposed sections 80.2A and 80.2B of the Criminal Code create offences for the urging of violence against groups and the urging of violence against members of groups, respectively. There are two offences within each of these categories, the difference between the two being an additional element in each proposed subsection (1):

> The use of the force or violence would threaten the peace, order and good government of the Commonwealth.[31]

3.35 In relation to the proposed sections, submissions and evidence focussed on two particular issues: specific elements of the offences; and placement of the subsection 80.2A(2) and 80.2B(2) offences within the Criminal Code rather than alongside federal anti-vilification laws.

Specific elements of the offences

3.36 Throughout the inquiry, three specific elements of the offences attracted most comment: first, the element of threat to the peace, order and good government of the Commonwealth; second, the element of intent; and third, distinction of a group or individual by reference to race, religion, nationality, national or ethnic origin, or political opinion.

3.37 The Castan Centre, for example, submitted that the phrase 'threaten the peace, order and good government of the Commonwealth' has been judicially held to be meaningless.[32]

3.38 Liberty Victoria objected to the same phrase on the ground of its extraterritorial operation:

> [It] might well criminalize a person in Australia urging that arms be taken up in relation to some foreign cause (for example, a civil war in a foreign country). If a person were charged with such an offence, it would then be for the courts to determine whether the violence proposed would 'threaten the peace order and good government of the Commonwealth' – something which would bring into question Australia's foreign policy in relation to particular disputes. This is properly a matter to be determined by the Executive, as accountable to Parliament, not the Judiciary.[33]

3.39 Associate Professor Dr Katharine Gelber submitted that the connection to the threat to the Commonwealth is conjunctive and not determinative, meaning that subsections 80.2A(1) and 80.2B(1) could capture purely coincidental threats:

---

31 Proposed paragraphs 80.2A(1)(d) and 80.2B(1)(e) of the NS Bill.

32 *Submission 9*, p. 9.

33 *Submission 8*, p. 1.

> The nature of the offence is that a person must intend to urge a person or group to use force against a targeted group or person, and must intend that force or violence will occur. There is a conjunctive connection to a threat to the Commonwealth, with the use of the word 'and'. This means that the threat to the Commonwealth could be purely coincidental; the construction of the provision emphasises that it be established that the activity would threaten the Commonwealth, not that it was intended to do so.[34]

3.40 By way of solution, Dr Gelber recommended that the word 'would' should be replaced with the phrase 'is intended to' before the word 'threaten' in proposed paragraphs 80.2A(1)(d) and 80.2B(1)(e).[35]

3.41 The Executive Council of Australian Jewry (ECAJ) focussed its submission on the element of intention within proposed sections 80.2A and 80.2B, that is:

- a person intentionally urged another person, or a group, to use force or violence against a targeted group or a targeted person; and
- that person did so intending that force or violence will occur.[36]

3.42 The ECAJ submitted that it would be virtually impossible for a prosecutor to prove to a criminal standard the second limb of this element and it would be judicially construed as 'imposing a far more stringent evidentiary onus on the prosecutor than appears to have been contemplated'.[37] In addition, the use of the terms 'intentionally' and 'intending' is likely to exclude from criminal liability a person's reckless indifference to consequences:

> …the intentional urging of force or violence against a targeted group, or a supposed member of the group, with reckless indifference as to whether force or violence will occur, should also be proscribed.[38]

3.43 The ECAJ recommended that proposed paragraphs 80.2A(1)(b) and 80.2A(2)(b) be amended to read 'the first person does so intending that force or violence will occur or is recklessly indifferent as to whether force or violence will occur'. [39]

---

34 *Submission 5*, p. 2. Also see Sydney Centre for International Law, *Submission 6*, p. 4; and Human Rights Law Resource Centre and Amnesty International, *Submission 15*, pp 19-20.

35 *Submission 5*, p. 2. Also see Sydney Centre for International Law, *Submission 6*, p. 4; and Human Rights Law Resource Centre and Amnesty International, *Submission 15*, pp 19-20.

36 Proposed paragraphs 80.2A(1)(a)-(b), 80.2A(2)(a)-(b), 80.2B(1)(a)-(b) and 80.2B(2)(a)-(b) of the NS Bill.

37 *Submission 2*, p. 6.

38 *Submission 2*, p. 6.

39 *Submission 2*, p. 6.

3.44 In relation to the grounds of distinction, the AHRC told the committee that the proposed offences might not offer sufficient protection to persons targeted for reasons of race, religion and political opinion.[40]

3.45 Dr Gelber appeared to concur with this viewpoint and submitted that the ground of religion is not consistent with the International Convention on the Elimination of All Forms of Racial Discrimination, which relies on the term 'race or group of persons of one colour or ethnic origin'.[41] That phrase forms the basis for current federal anti-vilification laws as the inclusion of religion as an explicitly protected ground in anti-vilification laws is highly controversial.[42]

3.46 Dr Gelber also submitted that the ground of political opinion confuses the difference between a criminal vilification offence and an offence against the Commonwealth. In her view, while there might be some logic in retaining the ground of political opinion for proposed subsections 80.2A(1) and 80.2B(1), Dr Gelber argued that such retention for proposed subsections 80.2A(2) and 80.2B(2) would be:

> …inconsistent with the phenomenology of vilification, inconsistent with the international instruments from which our obligation to implement criminal vilification laws derives…and inconsistent with all other State, Territory and federal anti-vilification laws in Australia.[43]

3.47 Accordingly, Dr Gelber recommended removing the grounds of religion and political opinion from the proposed offences in subsections 80.2A(2) and 80.2B(2).[44]

3.48 The Sydney Centre, from a slightly different viewpoint, submitted that inclusion of political opinion in the proposed grounds goes beyond Australia's specific human rights obligations under Articles 4(a) and 20 of ICCPR. The Sydney Centre stated that political opinion is more familiar as a ground of distinction upon which federal, state and territory discrimination laws operate, leading it to question why other grounds of discrimination are also not included within the ambit of the proposed provision.[45]

Placement of subsections 80.2A(2) and 80.2B(2)

3.49 The second issue concerning submitters and witnesses in relation to proposed sections 80.2A and 80.2B was the placement of subsections (2) in Subdivision C

---

40 The Hon. Catherine Branson QC, Australian Human Rights Commission, *Committee Hansard*, 21 May 2010, p. 10.

41 International Convention on All Forms of Racial Discrimination, Article 4. See: http://www2.ohchr.org/english/law/cerd.htm (accessed 2 June 2010).

42 Dr Katharine Gelber, *Submission 5*, pp 3-4.

43 *Submission 5*, p. 4.

44 *Submission 5*, p. 4.

45 *Submission 6*, p. 5.

(Urging violence) of the Criminal Code rather than within non-terrorism related legislation.

3.50 The NACLC, for example, submitted that the proposed sections:

> ...[seek] to provide a legislative response to the problem of racism in the community, and in particular racially motivated violence, in a Bill about counter-terrorism.[46]

3.51 The Law Council similarly argued that the proposed offences are of a different character to treason and urging violence offences, do not relate to political dissent or acts of violence directed toward the government and its institutions, and are not focussed on inter-group violence. Subject to a separate and more detailed review, the Law Council submitted:

> …if these offences are to be included in the Criminal Code they should be in a separate Division dealing with anti-vilification laws.[47]

3.52 Dr Gelber explained that elements of the constructions in proposed sections 80.2A and 80.2B demonstrate confusion between the two distinct concepts of urging violence and vilification. Further, the placement of proposed subsections 80.2A(2) and 80.2B(2) in Chapter 5 of the Criminal Code (Security of the Commonwealth) will compromise their effectiveness and utility:

> It is likely that the police might be confused about the heading under which these charges sit, and may shy away from considering charging people who act in a manner that might fall under these provisions where those actions do not also threaten the Commonwealth. It is also likely that should such activities occur the police would consider applying other criminal provisions against violence more generally. This will significantly dilute the impact of the introduction of a criminal vilification offence both symbolically and practically.
>
> Additionally, retaining both offences in the Chapter devoted to security of the Commonwealth could significantly reduce the currently existing, long standing support for anti-vilification laws that exists in the broader community. If anti-vilification laws become equated with a criminal offence against the Commonwealth, they become more vulnerable to charges that they constitute impermissible restrictions on freedom of speech.[48]

3.53 Dr Gelber recommended that the offences in subsections 80.2A(2) and 80.2B(2) be removed from Chapter 5 of the Criminal Code and instead placed in

---

46 *Submission 13*, p. 7.

47 *Submission 22*, p. 8. Also see Dr Patrick Emerton, *Committee Hansard*, 21 May 2010, p. 29.

48 *Submission 5*, pp 2-3. Also see Sydney Centre for International Law, *Submission 6*, pp 4-5; Gilbert & Tobin Centre of Public Law, *Submission 10*, p. 13; Human Rights Law Resource Centre and Amnesty International, *Submission 15*, p.21; and Australian Human Rights Commission, *Submission 18*, p. 37.

Chapter 9 (Dangers to the community) of the Criminal Code, or elsewhere (such as Part IIA (Prohibition of offensive behaviour based on racial hatred) of the *Racial Discrimination Act 1975*).

Department response

3.54 The committee asked the Department why proposed sections 80.2A and 80.2B are located in Chapter 5 of the Criminal Code. Its answer was as follows:

> While the offences in sections 80.2A and 80.2B, in effect, condemn ethno-racially or religiously motivated discrimination, their primary purpose is to criminalise the urging of force or violence as opposed to conduct which offends, humiliates, insults or ridicules a person on specified grounds. They are serious offences targeting conduct that has the potential to impact on the security of the Commonwealth. They are therefore appropriately located in Chapter 5 of the Criminal Code.[49]

Subdivision C defences

3.55 Proposed subsection 80.3(3) of the Criminal Code provides additional non-exclusive matters to which a court may have regard when considering a defence under section 80.3 (Defence for acts done in good faith) in relation to proposed subsections 80.2(1), 80.2(3), 80.2A and 80.2B. An essential element of this defence is an intention to act in good faith.

3.56 Submitters and witnesses briefly commented on the proposed provision, and in general, their comments varied according to their view of the relevant offence provision or the ALRC recommendations to expand the 'good faith defence' for urging violence offences.[50]

3.57 The ALRC considered that the NS Bill effectively implements its recommendations through the proposed amendments to section 80.3 of the Criminal Code,[51] a view with which the Department agreed.[52]

3.58 The Castan Centre also supported the extension of the good faith defence as proposed in subsection 80.3(3) but recommended a further extension by:

> …removing the requirement in paragraph 80.3(b) of the Criminal Code that the pointing out of good faith errors take place with a view to reform. In a

---

49 Answer to question on notice, received 3 June 2010, p. 3 and p. 18. Also see Ms Annette Willing, Attorney-General's Department, *Committee Hansard*, 21 May 2010, p. 50.

50 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104 (2006), Recommendations 12-1 and 12-2.

51 *Submission 17*, p. 3.

52 Answer to question on notice, received 3 June 2010, pp 19-20.

> democracy, the pointing out of errors in good faith should be permissible whether or not done for a reforming, nihilistic or other reason.[53]

3.59 Gilbert & Tobin did not agree that the NS Bill adopts the ALRC's recommendations and suggested implementing the ALRC's proposals verbatim as, in its view, proposed subsection 80.3(3) will be problematic:

> It is logically difficult to conceive of a situation where a trier of fact is convinced that the elements of an urging force or violence offence in [for example] section 80.2 are satisfied, but nevertheless the defendant has carried out this behaviour in 'good faith'...This is because urging force or violence, if it is to have the meaning intended by the Bill, must involve an element of malice or bad faith.[54]

3.60 The ECAJ made similar submissions:

> An intention that 'force or violence will occur' in [the context of incitement to racial violence] is therefore incompatible with the act having been done in 'good faith'. Reckless indifference as to whether force or violence will occur in that context is also incompatible with the act having been done in 'good faith'.[55]

3.61 In addition, and consistent with its views on the element of intent in proposed sections 80.2A and 80.2B, the ECAJ argued that the 'good faith defence' serves no purpose for those particular provisions as 'in the circumstances in which [the defence] could be established, the elements of the offence would not have been made out in the first place'. The ECAJ suggested that if the legislative intent is to protect freedom of expression in the form of acts done in good faith, then the elements of the offences should appropriately address that objective,[56] a viewpoint with which the NACLC and AHRC agreed.[57]

3.62 The Human Rights Law Resource Centre and Amnesty International also submitted that, even if the justification for proposed subsection 80.3(3) is that it allows for consideration of context:

> …amended section 80.3 places the onus on the accused to establish the context, rather than the state to make its case.[58]

---

53 *Submission 9*, p. 3. Also see Nicholas Petrie, Samuel Peirce, Samual Flynn, Claire Bongiorno, Patrick Magee, Louise Brown and Grace Jennings-Edquist, *Submission 20*, p. 4.

54 *Submission 10*, p. 15. Also see Human Rights Law Resource Centre and Amnesty International, *Submission 15*, p. 23.

55 *Submission 2*, p. 7. Also see Australian Human Rights Commission, *Submission 18*, p. 38; and Law Council of Australia, *Submission 22*, p. 8.

56 *Submission 2*, p. 9.

57 National Association of Community Legal Centres, *Submission 13*, p. 7; and Australian Human Rights Commission, *Submission 18*, p. 41.

58 *Submission 15*, p. 24.

Terrorist organisations

3.63 Part 1 of Schedule 2 primarily amends Part 5.3 (Terrorism) of the Criminal Code by focussing on Division 102 (Definitions).

Definition of 'advocates'

3.64 Proposed paragraph 102.1(1A)(c) of the Criminal Code amends the definition of the term 'advocates' for terrorist organisations to provide that an organisation advocates the doing of a terrorist act if it directly praises the doing of a terrorist act in circumstances where there is a *substantial* risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act.

3.65 Some submitters and witnesses directed the committee's attention to existing subsection 101.1(1A), as opposed to its proposed amendment. In general, there was support for the proposed amendment but opposition to the existing subsection.

3.66 Gilbert & Tobin, for example, advised that a number of inquiries examining the operation of the proscription provisions have criticised existing advocacy provisions as being too broad, expansive, ambiguous and imprecise, as well as posing a threat to freedom of expression:

> Conceivably, the current definition of 'advocacy' may result in the proscription of an organisation (which may be a company, club or church group) even where:
>
> The person who praised the terrorist act is not the leader of the group;
>
> The statement is not on official material distributed by the organisation;
>
> The statement is not accepted (and perhaps even rejected) by other members as representing the views of the group;
>
> The organisation has no other involvement in terrorism; or
>
> The person praising terrorism did not intend for a terrorist act to be committed.[59]

3.67 While the proposed paragraph raises the criminal threshold, Gilbert & Tobin recommended deleting existing paragraph 102.1(1A)(c) of the Criminal Code:

> Paragraph (c) is an extraordinary extension of the power of proscription and of criminal liability, since it collectively punishes members of groups for the speech of their associates beyond their control.[60]

3.68 At the public hearing in Melbourne, a representative from the Law Council also voiced similar concerns:

---

59 *Submission 10*, pp 17-18. Also see Human Rights Law Resource Centre and Amnesty International, *Submission 15*, p. 25.

60 *Submission 10*, p. 19.

> The main problem with those provisions is working out who is criminally responsible. If a person associated with an organisation makes declarations that are inflammatory and designed to rip up improper and now illegal acts, then it is one thing to criminalise that person's statements. It is another thing altogether to criminalise membership of the organisation that person belongs to. There will be difficulties working out whether the statement is the statement of the organisation and it will be difficult to work out whether somebody is a member of the organisation. Membership is a very fluid concept and a very broad concept under these provisions. We are concerned that people might be in trouble for serious criminal offences even though they are not the maker of the statement.[61]

3.69 The AHRC noted such concerns and suggested that unintentional capture could be resolved by removing the word 'indirectly' from existing subsection 101.1(1A).[62] In its view, the 'praising' of a terrorist act is too tenuous a link with the actual commission of a terrorist act and the subsection could disproportionately interfere with the right to freedom of expression.[63]

3.70 However, the Department cautioned:

> This would mean that an organisation would not be able to be listed if it indirectly counsels or urges the doing of a terrorist act or the organisation indirectly provides instruction on the doing of a terrorist act. This would create a gap in the counter-terrorism framework, which could enable organisations to engage in conduct that advocates the doing of a terrorist act. For example, an organisation could indirectly provide instruction on the doing of a terrorist act by simply referring its members to material provided by another person or organisation that provides instruction on the doing of a terrorist act. This gap in the framework would substantially weaken the listing provisions and enable an organisation to avoid listing by arranging its activities to ensure it only indirectly counsels or urges or provides instructions on doing a terrorist act.[64]

Listing of a terrorist organisation

3.71 Proposed subsection 102.1(3) of the Criminal Code amends the period of a regulation listing a terrorist organisation from two to three years.

3.72 The committee received only brief submissions regarding this proposed amendment. While Gilbert & Tobin emphasised the importance of meaningful review,[65] other submitters opposed proposed subsection 102.1(3) on the basis of either

---

61 Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 21 May 2010, p. 5.

62 The Hon. Catherine Branson QC and Ms Bronwyn Byrnes, Australian Human Rights Commission, *Committee Hansard*, 21 May 2010, p. 12.

63 *Submission 18*, p. 45.

64 Answer to question on notice, received 3 June 2010, p. 21.

65 *Submission 10*, p. 20.

a lack of such review or the existing provision's general inconsistency with the ordinary rule of law in Australia.

3.73 Civil Liberties Australia illustrated the first viewpoint by arguing that a three year period does not provide an adequate level of oversight: a two year period would better enable the Attorney-General to more frequently consider all relevant material and reflect on changes in the international sphere.[66]

3.74 In opposing the entire listing regime, the Castan Centre presented the second viewpoint:

> To list an organisation is to trigger a number of departures from the ordinary rule of law in Australia. Offences are enlivened of involvement with an organisation, which do not require the proof of any terrorist intent or conduct on the part of an accused or the organisation, and which have maximum sentences comparable to those for manslaughter, rape and serious war crimes…Listing an organisation is therefore a serious matter, having serious consequences for the application of Australian law. For this reason, an organisation ought not to be listed simply to make a political point.[67]

3.75 The NACLC similarly considered that the current listing regime should be repealed in its entirety:

> In our view [it is] fundamentally inconsistent with the aspirations of a democratic society and [the provisions] compromise fundamental human rights and principles of the criminal law by the automatic criminalisation of political affiliations, associations and convictions by executive discretion.[68]

Pre-charge detention

3.76 Schedule 3 of the NS Bill amends Part 1C (Investigation of Commonwealth offences) of the Crimes Act. These provisions currently provide the Australian Federal Police (AFP) with the power to arrest and detain a person without warrant while the AFP investigates whether the person committed a non-terrorism or terrorism offence.

3.77 The present regime operates by providing that a person can be arrested for an offence until the 'investigation period' expires (four hours). There are two separate mechanisms by which the investigation period can be extended:

- the extension of investigation mechanism (up to 20 hours); and
- the disregarded or dead time mechanism (which can be certain time relating to the calculation of the investigation period or further time authorised by a judicial officer also in relation to the investigation period).

---

66 *Submission 14*, p. 2. Also see Sydney Centre for International Law, *Submission 6*, p. 14.

67 *Submission 9*, pp 10-11.

68 *Submission 13*, p. 8.

3.78 There are therefore three separate time components particularly relevant to Part 1C of the Crimes Act, and the NS Bill proposes to create similar – but not identical – provisions and then differentiate between non-terrorism and terrorism offences in Subdivisions A and B of Division 2 of Part IC, respectively.[69]

3.79 In general, submitters and witnesses supported amendments to the current regime either as contemplated by the NS Bill or otherwise. These comments were principally directed toward the proposed provisions for the investigation of terrorism offences against the Commonwealth. These arguments are examined below.

Period of investigation

3.80 Proposed subsection 23DB(5) states that, in relation to a terrorism offence, the investigation period begins when a person is arrested and does not extend beyond two hours, if the person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander, or four hours in any other case, subject to the extension of investigation mechanism under proposed section 23DF (up to 20 hours).

3.81 Proposed paragraphs 23DB(9)(a)-(l) set out the first limb of the disregarded time mechanisms: certain time relating to the calculation of the investigation period (reasonable time only but otherwise undefined).

3.82 Proposed paragraph 23DB(9)(m) sets out the second limb of the disregarded time mechanisms: further time authorised by a judicial officer under proposed section 23DD also in relation to the investigation period (reasonable time only but otherwise limited to seven days under proposed paragraph 23DB(11)).

Procedural issues

3.83 There was some comment on the process for making an application to extend the investigation mechanism for terrorism offences. For example, the NSW Premier and Cabinet on behalf of the NSW Police Force submitted:

> …[A] continued ability to make an application by telephone would promote some operational flexibility if the circumstances permit, and not unnecessarily limit the policing response.[70]

3.84 Rather than the mode by which an application can be made, the Australian Federal Police Association (AFPA) commented on the judicial officer to whom an application can be made: the NS Bill proposes to restrict this function to magistrates only, excluding justices of the peace and bail justices. In its view:

---

69 The National Association of Community Legal Centres submitted that there should not be two separate categories of offences with different powers and safeguards: see *Submission 13*, p. 9. Also see Liberty Victoria, *Submission 8,* p. 2.

70 *Submission 19*, pp 1-2.

> This [requirement] would create unnecessary administrative delays and inefficiencies and could prolong the investigative process due to the 'dead time' required to finalise an extension application.[71]

3.85 In relation to the application to extend the investigation mechanism and disregarded time mechanism, the NACLC expressed concern with proposed provisions permitting information to be withheld from a magistrate in an application for a specified period and/or be removed from the copy of an instrument made by a magistrate and given to a person or their legal representative:

> If these exclusions are to be retained, we are particularly concerned that in the interests of justice and to enable a proper assessment of the application to be made, that a court be provided with all relevant information.[72]

3.86 The Law Council made similar submissions but focussed on the appropriateness of the investigating official making all the necessary determinations:

> …once a decision is taken to include certain information in the application and to seek to rely on it to the detriment of the arrested person, it should not remain the exclusive prerogative of the investigating official to determine that the information cannot be disclosed because it is likely to be protected by public interest immunity or if disclosed, is likely to prejudice national security, to put at risk ongoing operations or put at risk the safety of the community.
>
> [T]he relevant provisions should be redrafted to give the judicial officer the discretion to determine what information should be disclosed, to whom and in what form.[73]

3.87 The Sydney Centre similarly submitted that the 'open-ended' exclusionary provisions are not consistent with Australia's obligation 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):

> 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…are rendered meaningless.
>
> …
>
> 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

---

71 *Submission 16*, p. 4.

72 *Submission 13*, p. 9. Also see Australian Human Rights Commission, *Submission 18*, p. 21.

73 *Submission 22*, p. 17. Also see Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 21 May 2010, p. 3.

> 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.[74]

3.88 In response, the Department told the committee:

> It is essential for police to be able to protect the operational integrity of an investigation and run it without risk that sensitive information could be disclosed. Police are in the best position to determine the sensitivity of the information in these applications as they have all the material in relation to the information's source and context...If a magistrate considers the information the police have redacted from the application should be disclosed to the arrested person, the magistrate may form the view that the person has not been given the opportunity to make adequate representations about the application and therefore reject the application. Accordingly, the magistrate retains the ultimate discretion as to how to deal with the redacted information.[75]

Disregarded time mechanism

3.89 In general, however, the majority of submissions and evidence commented on the proposed time limits or lack thereof in the disregarded time mechanism. Almost all submissions supported the introduction of a cap for the second limb of the disregarded time mechanism, but the necessity for that mechanism and any time limits introduced by the NS Bill was the subject of considerable debate, the tone of which was set by the AHRC.

3.90 In its submission, the AHRC argued that the NS Bill allows for a maximum length of eight days detention plus any further time to be disregarded under the first limb of the disregarded time mechanism. In its view, this is unjustified and disproportionate.[76]

3.91 To strike a better balance between the AFP's investigation needs in terrorism cases and an individual's right to liberty, the AHRC recommended that:

- the mechanism to disregard further time under proposed paragraph 23DB(9)(m) be removed from the NS Bill;
- procedural aspects of the first limb of the disregarded time mechanism under proposed paragraphs 23(DB)(9)(f)-(i) and (k) be deleted; and
- proposed subsection 23DF(7) be amended so that the maximum time an investigation can be extended by is four days subject to any further time

---

74 *Submission 6*, pp 19-21.

75 Answer to questions on notice, received 3 June 2010, p. 5.

76 *Submission 18*, p. 15. Also see Human Rights Law Resource Centre and Amnesty International, *Submission 15*, p. 26; and Law Council of Australia, *Submission 22*, p. 15.

> as required by the court to dispose of an application under proposed sections 23DE, 23WU or 23XB.[77]

3.92 That is, there should be a maximum investigation period with only one disregarded time mechanism, a rationalisation supported by the Law Council:

> At the moment there are actually three compartments of time. There is what is called the investigation period, which is 24 hours. You have the dead time, which is downtime which relates to the investigators' need to get extra time to investigate. Then there are downtimes that relate to matters that are peculiar to the suspect, like the need for a rest, the need to get an interpreter or the need to get a lawyer.[78]

3.93 The Law Council described these compartments of time as 'clumsy'. In response to questions from the committee, a representative agreed that the Crimes Act could eliminate 'dead time' altogether, leaving a maximum investigation period – in its view no more than 48 hours – with 'down time' for matters particular to the accused (such as the need to rest, contact a legal representative, et cetera):

> It is going to be much easier for the police to understand, it will be easier for the court to understand and it gives a greater degree of certainty as to why the suspect is in custody.[79]

3.94 Some submitters did not consider the recommendations of the AHRC but commented on the seven day cap in proposed subsection 23DB(11). These viewpoints supported a much lesser cap of between 24 and 48 hours only,[80] with some submissions stating that there has been no justification for the proposed seven day cap.

3.95 Gilbert & Tobin, for example, referred to the findings of the *Inquiry into the Case of Dr Mohamed Haneef* which recommended a review of this area of law prior to implementation of a seven day cap.[81] In the absence of such a review, Gilbert & Tobin submitted:

> The maximum period of pre-charge detention for terrorism offences should be based upon clear evidence both as to the operational needs of investigating authorities and the impact of an extended period of time on the liberties of the detainee. Any increase in pre-charge detention over the normal maximum period for non-terrorism offences [12 hours] should be

---

77 *Submission 18*, p. 19; and the Hon. Catherine Branson QC, Australian Human Rights Commission, *Committee Hansard*, 21 May 2010, p. 16. Also see Dr Katharine Gelber, *Committee Hansard*, 21 May 2010, p. 18.

78 Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 21 May 2010, pp 2-3.

79 Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 21 May 2010, p. 8. Also see Professor George Williams, *Committee Hansard*, 21 May 2010, p. 23.

80 For example, Civil Liberties Australia, *Submission 14*, p. 2; and National Association of Community Legal Centres, *Submission 13*, p. 9.

81 The Hon. John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008), Recommendation 3.

> fully justified. We do not reach a final view as to the maximum period of pre-charge detention – in light of such evidence not yet having been produced – but put forward the proposal that the cap should be in the order of 48 hours.[82]

3.96 The Australian Human Rights Law Resource Centre and Amnesty International submitted that the length of pre-charge detention must be proportionate to avoid violation of Article 9(1) of the ICCPR, which prohibits arbitrary detention. It noted that the precise length of time is dependent on a number of factors but should not exceed a 'few days' and in every case should be only the minimal time reasonably necessary. In its view, the maximum time allocated under the investigation period (24 hours) appropriately reflects the complexities of investigating terrorism offences; therefore, there is no need for proposed paragraph 23DB(9)(m) and proposed paragraphs 23DB(9)(a)-(l) should not exceed 48 hours.[83]

3.97 Similarly, the Castan Centre argued that if the regime of 'dead time' is to be retained it should be capped at 24 hours, giving rise to a total maximum period of pre-charge detention of 48 hours, to balance the competing interests of investigating authorities and the rights of persons accused of terrorism offences:

> …it is not in the interests of the integrity and efficiency of investigating authorities that they be vested with these sorts of expansionary discretions. It is in the interests of the administration of justice, as well as the civil liberties of the accused, that the time between arrest and the laying of charges be as brief as possible. Arrest ought to be the culmination of an investigation, not the trigger for a fishing expedition.[84]

3.98 From a slightly different point of view, the Sydney Centre submitted that the absence of a cap under proposed subsection 23DB(9), or in any of its proposed paragraphs, leaves open a real possibility that the subsection might be abused in some way in the pressured environment of a terrorism-related investigation. It therefore recommended either a maximum period of pre-charge detention under proposed subsection 23DB or, alternatively, a maximum period of 'dead time' that may be subject to disregard under proposed subsection 23DB(9).[85]

---

82 *Submission 10*, p. 30. Also see Liberty Victoria, *Submission 8*, pp 2-3; Nicholas Petrie, Samuel Peirce, Samual Flynn, Claire Bongiorno, Patrick Magee, Louise Brown and Grace Jennings-Edquist, *Submission 20*, p. 3; and Mr Edward Santow, *Committee Hansard*, 21 May 2010, p. 23.

83 *Submission 15*, pp 31-33.

84 *Submission 9*, p. 21. Also see National Association of Community Legal Centres, S*ubmission 13*, p. 9.

85 *Submission 6*, p. 18.

Viewpoint of law enforcement bodies

3.99 At the public hearing, Professor George Williams noted that 'the bodies that were in the best position to explain what they need and what operational requirements demand in terms of a detention period were simply not involved in [the consultation] process'.[86]

3.100 The committee then heard from relevant witnesses who described their operational procedures and requirements. Representatives from the AFPA, for example, stated that the current 'down time' provisions are quite prescriptive and could be improved to facilitate the investigation process:

> If the proposal were to have a particular, set time, it would certainly be more operationally effective and efficient for the police officers to manage that particular aspect of the pre-charge detention, purely because you do have to focus some attention on the down time requirements and whether you are exceeding the four hours.[87]

3.101 In addition, the AFPA representatives agreed that a maximum investigation period without 'dead time' would seem sensible, subject to consideration of the finer details. In their view, a 48 hour cap on the investigation period would be too short a time due to the 'international liaison that needs to occur' for terrorism offences.[88]

3.102 The Department concurred and provided a summary of the types of operational considerations relevant to 'international liaison':

> …counter-terrorism investigations are often heavily reliant on information from overseas sources and the receipt of this information can significantly influence the direction and outcomes of the investigation. Difficulties are commonly encountered in securing important and accurate information expediently from overseas. Such difficulties include delays associated with time zone differences. It also acknowledges that large volumes of complex information may need to be collated, processed and analysed before an interview is able to be effectively conducted with a suspect and charging decisions made.[89]

3.103 In its evidence, the Australian Federal Police (AFP) did not commit to a view regarding a maximum investigation period:

---

86 *Committee Hansard*, 21 May 2010, p. 25.

87 Mr Ben Santamaria, Australian Federal Police Association, *Committee Hansard*, 21 May 2010, pp 33-34.

88 Mr Jonathan Hunt-Sharman, Australian Federal Police Association, *Committee Hansard*, 21 May 2010, p. 36; and Mr Ben Santamaria, Australian Federal Police Association, *Committee Hansard*, 21 May 2010, p. 37.

89 Answer to questions on notice, received 3 June 2010, p. 11. Also see Australian Federal Police, answer to questions on notice, received 4 June 2010, pp 2-3.

> …setting a period [on the investigation period] would be difficult to quantify. If you capped it at seven days as a hard bar, for example, we could potentially get to a situation where we needed to go over that depending on the complexity of the incident or the investigation itself. I think it is worthy of further consideration.[90]

3.104 The AFP did not agree with the AHRC's recommendations regarding proposed paragraph 23DB(9)(m) and proposed subsection 23DB(11) which '[balance] the rights of an arrested person with the needs of law enforcement.'[91] However, officers agreed that simplification of the current regime would be welcome.

Department response

3.105 In response to concerns regarding pre-charge detention, the Department recognised that detaining persons is a serious matter and it is important to strike the right balance between enabling law enforcement agencies to conduct their investigations and recognising the rights of a suspect.

3.106 A representative of the Department noted that the current regime resulted from the *Review of Commonwealth Criminal Law* which found that a 'process with a specified investigation period coupled with disregard of time was the best way of ensuring the appropriate balance was struck'.[92]

3.107 Accordingly, the Department disagreed with the suggestion that the Crimes Act should provide for a maximum investigation period with adequate inclusion of safeguards. It essentially argued that 'dead time' would not function effectively if it were generically included within the investigation period provisions,[93] nor would a less than seven day cap suffice for terrorism-related law enforcement purposes:

> A cap on 'specified disregarded time' [or 'dead time'] of 48 hours could hamper the ability of law enforcement agencies to investigate terrorism.
>
> …[T]he AFP presented evidence that demonstrated an operational need for the specified disregarded time provisions to have a seven day cap. Terrorism presents a high risk to public safety and terrorism investigations are often undertaken with minimal lead-in time or prior knowledge. These investigations must be thorough and broad ranging and often involve multiple suspects, the execution of multiple search warrants, considerable forensic analysis of crime scenes and seized items and significant enquiries and liaison with overseas agencies. It is often necessary for significant elements of these activities to occur pre-charge to ensure the arrested person

90 Commander Scott Lee, Australian Federal Police, *Committee Hansard*, 21 May 2010, p. 52.

91 Commander Scott Lee, Australian Federal Police, *Committee Hansard*, 21 May 2010, p. 46. Also see Australian Crime Commission, answer to questions on notice, received 1 June 2010, p. 1.

92 Ms Annette Willing, Attorney-General's Department, *Committee Hansard*, 21 May 2010, p. 53.

93 Ms Annette Willing, Attorney-General's Department, *Committee Hansard*, 21 May 2010, p. 52.

> can be properly interviewed and charged, the public protected and terrorist acts prevented. For these reasons a 7 day cap is necessary, reasonable and appropriate.
>
> There are also a range of [existing and proposed] safeguards in place in relation to specified disregarded time.[94]

3.108 As an aside, the Department told the committee that the AHRC's proposal does not recognise:

> …the character and rationale for ['dead time']. ['Dead time'] is time that is to be disregarded from the investigation period, rather than part of the investigation period itself. Therefore, it is appropriate to retain separate application processes. Furthermore, the ['dead time'] provisions link the time that is sought to a particular purpose, providing a greater degree of accountability and transparency about how the time is being used.[95]

Emergency entry to premises

3.109 Schedule 4 amends Division 3A of Part 1AA (Search, Information Gathering, Arrest and Related Powers) of the Crimes Act.

3.110 Proposed section 3UEA of the Crimes Act provides police officers with a new power to enter premises without a warrant in emergency circumstances relating to a terrorism offence where there is material that may pose a risk to the health or safety of the public:

- proposed subsection 3UEA(2) limits the proposed power to searching the premises for a particular thing and seizing a particular thing; and
- proposed subsection 3UEA(3) allows police officers to secure the premises for a period that is reasonably necessary to apply for a search warrant over the premises if, in the course of searching for a particular thing, a police officer finds another thing that s/he reasonably suspect is relevant to an indictable offence or a summary offence.

3.111 Some submitters questioned proposed section 3UEA on the ground that it does not appear to adequately safeguard individual rights.[96] Most of this evidence took issue with the potential for abuse and argued that it is essential for the NS Bill to include an appropriate level of judicial oversight.

3.112 The Sydney Centre, for example, submitted:

---

94 Answer to questions on notice, received 3 June 2010, p. 4.

95 Answer to questions on notice, received 3 June 2010, p. 10.

96 For example, Human Rights Law Resource Centre and Amnesty International, *Submission 15*, p. 34; National Association of Community Legal Centres, *Submission 13*, p. 10; and Australian Human Rights Commission, *Submission 18*, p. 25.

> 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…. 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.[97]

3.113 The Sydney Centre expressed concern that proposed section 3UEA could be taken to authorise fishing expeditions by well-meaning police officers looking for evidence where an insufficient basis exists for warrant-based investigation. It submitted that the twin goals of avoiding delay in emergency settings and ensuring that oversight and accountability are maintained are reconcilable:

> 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.[98]

3.114 In evidence, Ms Nicola McGarrity told the committee:

> …[W]e were really unsure as to what compelling justification the government could possibly put forward to justify moving away from the traditional procedure of requiring judicial supervision. There do not appear to be, to the best of our knowledge, any practical examples of a situation in

97 *Submission 6*, p. 22.

98 *Submission 6*, p. 25.

> which the requirement to seek a search warrant has undermined the ability of the AFP to conduct investigations into terrorism matters.[99]

3.115 Gilbert & Tobin's submission stated that the AFP should only be given the power to conduct warrantless searches as a last resort, particularly in view of the existing ability to obtain a search warrant by a variety of means at short notice (such as by phone and fax). Furthermore:

> …[I]n order to limit the potential for misuse of power by the police during the course of a search, it is important that searches be overseen by a magistrate or judge. In each case, it is for a magistrate or judge to weigh any evidence of a criminal offence and determine whether that evidence is sufficiently strong to justify a violation of the rights to home and privacy by the police.[100]

3.116 The Law Council also argued that the government has not discharged its responsibility to justify the introduction of an 'extraordinary' power but, if it could, appropriate safeguards would still need to be in place. For example, an ex post facto search warrant, without which evidence obtained during a search may be ruled inadmissible in future court proceedings, should be required:

> The power to enter and search premises, and seize property without the occupier's consent, is a breach of privacy. For that reason such a power should be carefully confined and subject to strictly enforced conditions…Allowing police to enter and search premises without a warrant and under their own authority increases the risk that such powers will be misused. Moreover, it increases the risk that an individual's privacy rights will be breached in circumstances not justified by the necessary pursuit of a legitimate law enforcement imperative.[101]

3.117 Professor Williams added:

> …we see the ex post facto search warrant process as being particularly important, because unless you have that there is no requirement that you bring the same rigour to these searches that you do to other searches that have the warrant requirement. Doing so after the event is certainly not ideal but it will mean that, in the mind of any officer who undertakes one of these emergency searches...at the end of the day, they do need to make the same

---

99 *Committee Hansard*, 21 May 2010, p. 23. Also see Human Rights Law Resource Centre and Amnesty International, *Submission 15*, p. 35; and Nicholas Petrie, Samuel Peirce, Samual Flynn, Claire Bongiorno, Patrick Magee, Louise Brown and Grace Jennings-Edquist, *Submission 20*, p. 3.

100 *Submission 10*, p. 32.

101 *Submission 22*, p. 19. Also see Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 21 May 2010, p. 3; and the Law Society of NSW, *Submission 23*, pp 3-4.

> level of justification as they would with any other search of private property or any type of warrant.[102]

Viewpoint of law enforcement bodies

3.118 In evidence, law enforcement bodies did not object to the introduction of an ex post facto search warrant requirement in relation to proposed section 3UEA. However, the AFPA, the AFP and the Department all questioned whether such a requirement would serve any useful purpose.

3.119 At the public hearing in Melbourne, the AFP reiterated that proposed section 3UEA is not an evidence gathering power which can be used covertly and, in most circumstances, police officers would obtain a search warrant prior to searching any premises:

> [The proposed section] simply allows us to enter a premises, search for or seize a particular thing in order to prevent its use in connection with a terrorism offence. That is in circumstances where there is an imminent threat to life, health or safety. If we are going to search the premises for evidence, we are required to secure the premises and obtain a warrant.[103]

3.120 Other submissions commented on the various restrictions or limitations of the proposed provision. Victoria Police, in particular, queried operational difficulties which are not addressed in the NS Bill such as:

- the need to identify a particular person whose life, health or safety is threatened;
- the need to extend the powers of entry and seizure to premises where an initiator device might be located;
- the need to grant police officers the power to direct members of the public to leave, not to leave, or not to enter premises and remain at a safe distance until the area is declared safe; and
- the need to indemnify police officers, who acting in the course of their duties, must use force to control a person initiated explosive device.[104]

---

102 *Committee Hansard*, 21 May 2010, p. 24. Also see Gilbert & Tobin Centre of Public Law, *Submission 10*, p. 31.

103 Mr Christopher Goldsmid, Australian Federal Police, *Committee Hansard*, 21 May 2010, p. 55. Also see the Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 18 March 2010, p. 4; Mr Ben Santamaria, Australian Federal Police Association, *Committee Hansard*, 21 May 2010, p. 35; Commander Scott Lee, Australian Federal Police, *Committee Hansard*, 21 May 2010, p. 46; and Attorney-General's Department, answer to question on notice, received 3 June 2010, pp 12-13 for similar arguments.

104 *Submission 7*, pp 1-2.

3.121 The AFPA supported these suggestions and added one of its own: the need to expand proposed section 3UEA beyond an 'imminent threat to a person's life, health or safety' to include terrorist attacks on the Australian economy. Specifically:

> The current amendment does not take into account the substantial economic loss to Australia that could occur if critical infrastructure was targeted in the execution of a serious crime. Such an attack may not necessarily result in a 'serious and imminent threat to a person's life, health or safety'…The proposed legislation would be enhanced by the inclusion of additional instances whereby emergency entry to premises without a warrant may occur. These instances could be based on language in the *Criminal Code 1995* (Cth) which prioritizes trade, critical infrastructure and electronic systems as key areas that require protection above and beyond any link to a person's life, health or safety.[105]

Presumption against bail for terrorism offences

3.122 Schedule 6 amends section 15AA (Bail not to be granted in certain cases) of the Crimes Act. Proposed subsection 15AA(3A) of the Crimes Act provides both the prosecution and the defence with a right to appeal a decision to grant or refuse bail in cases of terrorism or other national security offences.

3.123 Some submissions and evidence supported the proposed provision but expressed concern with existing section 15AA of the Crimes Act. In their view, the presumption against bail for terrorism offences is unjustified because it either infringes on a person's right to liberty,[106] or experience to date indicates that terrorism offences do not involve actual violence.[107]

3.124 In their submissions, the Law Council and Liberty Victoria drew attention to one particular feature of the proposed amendments: provision for the stay of a court order granting bail (of up to three days) if the prosecution formally indicates an intention to appeal the bail decision immediately after the decision is made (proposed subsections 15AA(3C) and 15AA(3D)).

3.125 The Law Council told the committee that these proposed amendments do not approach the denial of a person's liberty with the requisite degree of seriousness and detention should never be a default position:

> If a person has successfully satisfied the bail authority that there are exceptional circumstances which warrant his or her release, he or she should not be denied the benefit of that decision, even for a period of three days…[I]f the Government has concerns about the capacity of bail

105 *Submission 16*, p. 5.

106 For example, Australian Human Rights Commission, *Submission 18*, p. 24.

107 For example, Castan Centre for Human Rights Law, Monash University, *Submission 9*, p. 21; National Association of Community Legal Centres, *Submission 13*, p. 10; and Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 21 May 2010, p. 3.

> authorities at certain levels to hear and determine bail applications in terrorism cases, the appropriate response would be to amend the legislation to be more prescriptive about the level of judicial officer to whom a bail application may be made. The Government should not confer authority on an officer to make a bail decision, but then reserve the right to itself not only to appeal that decision but to have it set aside while it does so.[108]

3.126 Liberty Victoria agreed:

> If this proposal is adopted, then any decision of a magistrate granting bail against the opposition of the Commonwealth will have to be validated by the Court of Appeal before the accused can be released from custody. We are concerned that any period of detention between the grant of bail by a judicial officer and the review of that grant by a superior court could amount to arbitrary detention.
>
> If the Magistrates Court has jurisdiction to grant a person their liberty, then any grant should be given effect unless and until the Supreme Court finds an error with that exercise of discretion.[109]

3.127 The Department did not directly respond to these concerns but informed the committee that the restrictions in proposed subsection 15AA(3D) are designed in a broad sense to ensure:

> …a person who has appropriately been granted bail is not unnecessarily held in custody.
>
> Bail can be denied to protect the community, prevent the destruction of evidence and prevent the defendant from absconding. The community could be damaged, evidence lost and the defendant disappear should the defendant be released on bail before an appeal is heard.[110]

3.128 In addition:

> A stay period of up to three days exists under various state bail laws. For example, section 25A of the *Bail Act 1978* (NSW) and section 16 of the *Bail Act 1985* (SA).[111]

Extended notification requirements under the NSI Act

3.129 Schedule 8 amends Division 2 of Part 3 (Protection of Information whose Disclosure in Federal Criminal Proceedings is Likely to Prejudice…National Security) of the NSI Act.

---

108 *Submission 22*, p. 20.

109 *Submission 18*, p. 3.

110 Answer to question on notice, received 3 June 2010, p. 6.

111 Answer to question on notice, received 3 June 2010, p. 6.

3.130 Proposed subsection 24(1) provides that the obligation to notify the Attorney-General of a prospective disclosure of national security information is imposed on the prosecutor, defendant and defendant's legal representative in federal criminal proceedings, including where a person has applied to the court for a subpoena and the issuing of that subpoena will require a third party to disclose national security information in a criminal proceeding (proposed paragraph 24(1)(c)).

3.131 Some submitters did not support the majority or all of the amendments proposed in Schedule 8 of the NS Bill,[112] whereas other submitters expressed concerns regarding particular proposed provisions.[113] However, proposed paragraph 24(1)(c) appeared to cause the most concern among legal stakeholders involved in the inquiry.

3.132 Gilbert & Tobin, for example, accepted that there is a need for a legislative regime to protect national security information beyond the protection available at common law and under the *Evidence Act 1995* (Cth). However:

> …there needs to be a wholesale review of the operation of the NSIA, and an assessment of other available options to protect national security information, rather than merely tinkering around the edges and making largely technical changes as the Bill does.[114]

3.133 Gilbert & Tobin doubted that streamlining the NSI Act procedures to reduce the potential for delay and disruption to proceedings would sufficiently respond to the concerns of practitioners and judicial officers. Ms McGarrity told the committee that practitioners have raised grave concerns about having a broad and vague criminal offence provision (proposed subsection 24(1)) which carries with it a penalty of up to two years imprisonment.[115]

3.134 The Law Council also questioned whether the proposed provision was an improvement to the NSI Act. Its representative told the committee that the amendment creates a 'scary' prospect for somebody who drafts subpoenas:

> The information that is produced in response to a subpoena is already covered by the NSI Act…Now this provision will go a step further; it is actually the document that creates the offence. If you draft a schedule to a subpoena asking for particular documents to be produced to the court, and if it is thought that the list of documents itself might disclose national security information, that is a criminal offence. But in circumstances where the only people who are ever going to see the document are the lawyers

112 For example, National Association of Community Legal Centres, *Submission 13*, p. 11.

113 For example, Castan Centre for Human Rights Law, Monash University, *Submission 9*, p. 23.

114 *Submission 10*, p. 38. Also see Sydney Centre for International Law, *Submission 6*, p. 27 where the centre expressed concern with the NSI Act, including its strict criminal liability provisions.

115 *Submission 10*, pp 36-38; and *Committee Hansard*, 21 May 2010, p. 24.

> who issue it, the party who receives it and the registrar who issues or stamps the document, we think this is unnecessary—and yet scary.[116]

3.135 The committee heard from the Department that the purpose of the notification requirements is to enable the Attorney-General to determine whether a criminal non-disclosure or witness exclusion certificate should be issued under the NSI Act and consequently whether a closed hearing should be held to determine the manner in which the information is handled. At present, there is no such requirement in relation to subpoenas issued by a prosecutor, defendant or defendant's legal representative:

> If the notice obligations apply to a defendant's legal representative and that person intentionally does not comply with these obligations, reckless as to whether disclosure of information is likely to prejudice national security, they could be liable for an offence.
>
> The amendments will also make it clear when notice is not required to be given to the Attorney-General. For example, if notice has already been given by someone else or there is already an agreement between the parties about how national security information should be dealt with.
>
> It has been common practice for parties to enter such arrangements. Accordingly, in the majority of circumstances this notice obligation, and therefore the offence, will not apply. However, if the notice obligation does apply, it would not be difficult to discharge. It is simply an equivalent obligation to that which already applies to expected disclosure of security sensitive information via witness testimony or documentary evidence that is disclosed during a proceeding.[117]

3.136 The next chapter of the committee's report will discuss the main issues raised in relation to the LE Bill and also provides the committee's conclusions and recommendations.

---

116 Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 21 May 2010, pp 3-4. Also see Law Council of Australia, *Submission 22*, p. 25.

117 Answer to question on notice, received 3 June 2010, p. 7.