Human Rights and Human Security

Joint Submission to the Commonwealth Attorney-General's Department regarding National Security Legislation

1 October 2009

Human Rights Law Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000
Australia
www.hrlrc.org.au

Amnesty International
NSW Action Centre
Level 1, 79 Myrtle Street
Chippendale NSW 2008
www.amnesty.org.au

Emily Howie and Prabha Nandagopal
Human Rights Law Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4432
F: + 61 3 8636 4455
E: emily.howie@hrlrc.org.au
W: www.hrlrc.org.au

Katie Wood
Governance Coordinator
Amnesty International Australia
NSW Action Centre
Level 1, 79 Myrtle Street
Chippendale NSW 2008

T: + 61 2 8396 7626
F: + 61 2 8396 7677
E katiewood@amnesty.org.au
W: www.amnesty.org.au

About Amnesty International Australia

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the *Universal Declaration of Human Rights* (UDHR) and other international instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights. Amnesty International is the world's largest independent human rights organisation, comprising more than 2.7 million supporters in more than150 countries and has over 80,000 supporters in Australia. Amnesty International is impartial and independent of any government, political persuasion or religious belief. It does not receive funding from governments or political parties.

About the Human Rights Law Resource Centre

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

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

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

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

Contents

1. Introduction and Overview

1. Since the events of 11 September 2001, the Australian Government has introduced 44 pieces of 'anti terrorism' legislation. In the absence of a comprehensive national human rights framework, these laws have not been adequately assessed against, or counterbalanced by, human rights considerations and obligations.

2. On 12 August 2009 the Attorney-General published the National Security Legislation (**NSL**) Discussion Paper (the **NSL review**), which set out the measures that the Government proposes to take to respond to a number of recent reviews of counter-terror laws.

3. Amnesty International Australia (**Amnesty**) and the Human Rights Law Resource Centre (**HRLRC**) congratulate the Government for facilitating community engagement and involvement in the law reform process. The absence of consultations on previous legislative amendments and reforms has led to scepticism and a lack of confidence in Australia's national security legislation framework in particular sectors of the community. Amnesty and the HRLRC encourage the Government to continue to conduct public inquiries when reforming significant aspects of national security legislation to improve the transparency and accountability of the law reform process, and to enhance the quality and relevance of the laws themselves.

4. This submission sets out Amnesty and the HRLRC's views on the human rights concerns that are raised by counter-terror laws, including the laws proposed to be amended by the NSL Discussion Paper. The submission discusses amendments to:

   (a) the terror offences in the *Criminal Code Act* 1995 (Cth) (the **Criminal Code**);

   (b) the *Crimes Act* 1914 (Cth) (the **Crimes Act**);

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

   (d) the review of listing in the *Charter of the United Nations Act* 1945 (**UN Charter Act**); and

   (e) the *National Security Information (Criminal and Civil Proceedings) Act* 2004 (the **NSI Act**).

5. Finally, the submission briefly discusses some of the counter-terror laws that are not reviewed or amended in the NSL Discussion Paper which raise serious human rights concerns and which Amnesty and the HRLRC consider require urgent attention.

2. Executive Summary

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

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

8. In responding to the threat of terrorism, the Australian Government should assess its laws and practices by reference to the protection of fundamental human rights. Through this assessment, the Government can seek to identify where human rights are limited or restricted, and therefore seek to ensure that those limitations do not unnecessarily or disproportionately infringe upon the fundamental rights of people. To this end, it is disappointing that the NSL review does not expressly refer at all to a consideration of the human rights implications of the counter-terror laws or the amendments proposed to them; nor does it engage in a rigorous, evidence-based proportionality assessment of those laws.

9. The NSL review provides a welcome opportunity for consultation and for consideration of the human rights implication of counter-terror laws.

10. Amnesty and the HRLRC submit that many of Australia's counter-terror laws considered in the NSL Discussion Paper violate fundamental human rights, and the NSL review does not adequately alleviate the rights violations. For example:

    (a) Some terror-related offences are defined so broadly that the law effectively criminalises thought and speech, such as the 'praising' of a terrorist act or a mere threat to do an act that is preparatory to a terrorist act (see parts 4.3 and 4.1(c) below). These laws operate in a manner that constitutes an impermissible violation of freedom of expression.

(b) Under changes proposed by the NSL review, persons suspected of terrorism offences can be detained for up to 8 days without charge. While this is an improvement on the current laws, which contains no cap on time spent in pre-charge detention, the detention of a person without charge for 8 days is very likely to breach the prohibition against arbitrary detention (see part 5.1 below).

(c) New search powers allow the police broad discretion to enter private homes without a warrant if they suspect on reasonable grounds that a 'thing' is on the premises that is relevant to a terrorist act (even one that has not occurred) and it is necessary to prevent the thing from being used in connection with a terrorist act. The lack of judicial oversight of police action, and the broad terms of the legislative power to enter premises significantly limits the right to privacy (see part 5.2 below).

(d) Some offences of urging group violence on the basis of race, religion or national origin in the Criminal Code may infringe the right to freedom of speech, whilst at the same time not adequately protect against racial and religious vilification (see part 6.4 below).

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

11. Finally, although it covers many issues, the NSL review does not address some of the most controversial elements of Australia's counter-terror laws. Amnesty and the HRLRC call on the Australian Government to immediately take steps to review the human rights implications of the control order and preventative detention order schemes; the excessively broad powers of ASIO to detain and question people, including non-suspects; the process for listing of terrorist organisations and reviewing such listing; and the offence of association with a terrorist organisation.

12. Amnesty and the HRLRC make the following recommendations in relation to the NSL review.

2.1 List of recommendations

Recommendation 1:

Amnesty and the HRLRC recommend that the term 'physical' not be removed from the definition of 'terrorist act' in section 100.1 of the Criminal Code.

Recommendation 2:

Amnesty and the HRLRC recommend that the proposed definition of 'terrorist act' in section 100.1 of the Criminal Code be amended to:

- remove references to 'threat of action' and other references to 'threat';
- remove reference to 'is likely to cause';
- remove references to 'the damage of property and interference, disruption or destruction of information, telecommunication, financial, transport or essential public utility systems or the delivery of essential government services'; and
- include action of hostage taking as capable of being a terrorist act.

Recommendation 3:

Amnesty and the HRLRC recommend that a separate offence of 'threat to commit a terrorist act' be included in Division 202 of the Criminal Code.

Recommendation 4:

Amnesty and the HRLRC recommend that the Government justify why terrorism related hoax offences are required in Commonwealth law and why they are not already adequately be dealt with at state law. If a terrorism hoax offence is enacted in the Criminal Code the offence should only apply to threats that are '**serious and credible**'

Recommendation 5:

Amnesty and the HRLRC recommend that paragraph 102.1(1A)(c) be deleted to remove praise of a terrorist act as a ground for proscribing an organisation, as recommended by the Sheller Committee.

Recommendation 6:

Amnesty and the HRLRC recommend that section 102.7 of the Criminal Code be amended to ensure that, in the offence of providing support to a terrorist organisation, the word 'support' cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objectives.

Recommendation 7:

Amnesty and the HRLRC recommend that the offence of training a terrorist organisation or receiving training from a terrorist organisation under section 102.5 of the Criminal Code be amended to:

- replace the intention element of recklessness with knowledge in section 102.5(1)(c);
- repeal strict liability under section 102.5(3); and
- redraft section 102.5 to make it an element of the offence that either the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act.

Recommendation 8:

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

Recommendation 9:

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

Recommendation 10:

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

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

Recommendation 11:

Assuming that the offences in section 80.2 are retained in the form proposed in the NSL Review:

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

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

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

Recommendation 12:

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

Recommendation 13:

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

Recommendation 14:

The NSI Act should be repealed and the disclosure of national security information dealt with in accordance with the doctrine of public interest immunity.

Recommendation 15:

Assuming that the NSI Act is retained:

(a) the provisions of the Act that require security clearances for lawyers and the provisions which enable closed court hearings to be conducted that prevent the disclosure of information from the accused and their representatives should be reviewed and amended in accordance with the right to a fair trial under the article 14 of the ICCPR; and

(b) section 31(8) of the NSI Act should be amended so that the court's discretion in determining whether national security information is admitted does not give greater weight to any of the considerations before the court.

Recommendation 16:

Amnesty and the HRLRC consider that the control order and preventative detention order regimes be reviewed immediately in order to bring those provisions in line with Australia's international human rights obligations.

Recommendation 17:

Amnesty and the HRLRC consider that ASIO's detention powers be reviewed immediately to ensure that they comply with the right to a fair trial and to be free from arbitrary detention, including:

(a) amendment to the maximum period of time a person may be detained under section 34S the ASIO Act such that a person may never be detained for more than 48 hours without independent judicial review;

(b) repeal of sections 34F(6) and 34G(2) of the ASIO Act to prevent detention periods being extended indefinitely through 'rolling warrants'; and

(c) repeal of the secrecy provisions in the ASIO Act.

Recommendation 18:

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

Recommendation 19:

Amnesty and the HRLRC consider that the offence of associating with a terrorist organisation under section 102.8 of the Criminal Code be repealed.

3. Human Rights and Counter-Terror Laws

3.1 Human Rights Engaged by Counter-Terror Laws and Measures

13. Amnesty and the HRLRC are concerned that Australia's counter-terrorism laws violate Australia's international law obligations to respect, protect and fulfil human rights, in particular the rights set out in the *International Covenant on Civil and Political Rights (***ICCPR**).[1] The counter terrorism regime as it currently exists and also as it is proposed to be amended limits the following rights in the ICCPR:

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

(b) right to privacy (article 17);

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

(d) freedom of religion (article 18);

(e) freedom of association (article 22);

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

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

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

(i) minority rights (article 27).

3.2 Permissible Limitations on Human Rights

14. None of the rights set out above are absolute. Under the ICCPR, each of the rights can be limited, but only in particular circumstances and to the extent necessary. A proportionality analysis is used to determine whether a right can be limited and the extent to which a limitation is lawful. That proportionality test for limitation of ICCPR rights can be stated in general terms (although strictly speaking under the ICCPR each of these rights is limited by words contained within the articulation of the right itself).[2]

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

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

15. Put broadly, general provisions setting out a proportionality analysis require that any limitation of rights be reasonable and demonstrably justified in a free and democratic society.[3] This is a two stage process.

16. First, the purpose of the limitation on the right must be of sufficient importance to a free and democratic society to justify limiting the right.[4] This might also be described as requiring a 'pressing and substantial' objective,[5] reflecting a need to balance the interests of society with those of individuals and groups. Examples of purposes for limitations that might accord with a free and democratic society include protection of public security, public order, public safety or public health.[6]

17. Secondly the means used by the State to limit rights must be proportionate to the purpose of the limitation. The most widely accepted test of proportionality is derived from the Canadian case *R v Oakes.*[7] In that case the Supreme Court of Canada set out the three components of a proportionality test:

> There are three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance.[8]

18. The onus of establishing that a limitation is reasonable and demonstrably justified rests on the party seeking to rely on the limitation, which will usually be the government.[9] The standard of proof is generally the balance of probabilities, although it may change in given circumstances, requiring 'a degree of probability which is commensurate with the occasion'.[10] That is, the more serious the infringement of rights, the more important the objective of the limitation of

---

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

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

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

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

[7] [1986] 1 SCR 103

[8] [1986] 1 SCR 103, 43.

[9] Ibid, 66. *Kracke v Mental Health Review Board* [2009] VCAT 646, 108

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

those rights must be to a free and democratic society, and the higher the standard of proof will be for the State.[11]

19. Finally, the state may only take measures that derogate (or suspend) the enjoyment of these particular rights in times of a public emergency which threatens the life of the nation, and in those circumstances only to the extent strictly required by the exigencies of the situation.[12]

4. Amendments to the *Criminal Code*

4.1 Definition of Terrorist Act

20. Given the serious consequences associated with terrorism related offences (set out below), it is crucial that the definition of 'terrorist act' in the Criminal Code is reasoned, proportionate and adapted to risks arising in Australia. It is extremely important that terrorist conduct is carefully defined to cover only the conduct that the community considers truly to be a terrorist act, but does not include conduct that although criminal, does not amount to terrorism. Once an act is classified as a 'terrorist act' it has the following consequences:

(a) It becomes an offence to do the act, or to provide training to do the act, to possess 'things' connected with the act or to collect or make documents likely to facilitate the act or to do any other acts done in preparation for the terrorist act (Division 101 of the Criminal Code).

(b) Organisations can be proscribed if they are directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs) or the organisation advocates the doing of a terrorist act.[13] So, the broader the definition of terrorist act, the broader the range of organisations that can be caught under the definition of terrorist organisation.

(c) Upon proscription, it becomes an offence to be involved with the proscribed organisation. For example, it is currently an offence to be associated with the organisation and to provide support to an organisation (s 102.7 and 102.8).[14]

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

[12] Article 4, ICCPR.

[13] Section 102.1(1A) In this Division, an organisation advocates the doing of a terrorist act if: (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or (c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.

[14] The NSL Discussion Paper proposes to amend this to 'material' support, see paragraphs 44 to 47 below.

Proscription raises concerns regarding the right to freedom of expression, the right to freedom of association, the right to freedom from discrimination and minority rights.

(d) A range of procedural matters are triggered by the characterisation of conduct as being related to 'terrorism', for example:

(i) Police investigation matters: you can be detained for longer if you are accused of terror-related offences (s 23CA(4) Crimes Act). This raises concerns regarding the right to be free from arbitrary detention.

(ii) Presumption is against bail (s 15AA). This raises concerns regarding fair trial rights and the presumption of innocence.

(iii) An accused is potentially subject to control orders and preventative detention orders. This raises concerns regarding the right to be free from arbitrary detention, the presumption of innocence and the right to a fair hearing.

(iv) ASIO special powers are enlivened, which enable them to question and detain any person who can substantially assist their investigation into a terrorist act (regardless of whether the person is a suspect) and hold that person for up to seven days. This is longer even than terror suspects can be held. These powers raise concerns regarding the right to a fair trial and to be free from arbitrary detention.

21. Given that these procedural matters have significant human rights consequences for accused persons, they should only be used in circumstances that are truly related to terrorist conduct.

22. Amnesty and the HRLRC consider the current definition of 'terrorist act' is excessively broad and goes beyond internationally accepted characteristics of terrorism. The United Nations Human Rights Committee (the **HRC**) and the United Nations Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism (the **Special Rapporteur**) have similarly expressed concern with definition of 'terrorist act' in the Criminal Code.

23. In December 2006, the Special Rapporteur released a report on Australia's counter-terrorism law and practice. The Special Rapporteur strongly urged Australia to reconsider its broad definition of a 'terrorist act', which fails to clearly distinguish between terrorist conduct and ordinary criminal conduct. The Special Rapporteur was of the view that: 'The definition goes beyond the UN Security Council's characterisation of the type of conduct which should be

targeted in countering terrorism, as it criminalises activity without requiring an element of intention 'to cause death or serious bodily injury, or the taking of hostages.''[15]

24. Earlier this year, the HRC expressed similar concerns to those of the Special Rapporteur. In their recent Concluding Observations, the HRC recommended that Australia address 'the vagueness of the definition of terrorist act in the Criminal Code Act 1995, in order to ensure that its application is limited to offences that are indisputably terrorist offences.' [16] Amnesty and the HRLRC are concerned that the proposed amendments fail to address these concerns.

(a) Harm that is physical

25. The proposed amendments remove the words 'harm that is physical' from subsections 100.1(2)(a) and 100.1(3)(b)(i) of the Criminal Code. Contrary to narrowing the scope of 'terrorist act', the removal of 'harm that is physical' broadens the definition of terrorist act to encompass psychological harm.

26. The Security Legislation Review Committee (the **Sheller Committee**)[17] recommended the inclusion of psychological harm to conform with the definition of 'harm' contained in the dictionary to the Criminal Code.[18] Amnesty and the HRLRC do not consider this to be a sufficient reason to further broaden the definition. As set out above at paragraph 20, the rights of a person accused of terror-related offences are comparatively diminished to the rights afforded to an accused under general criminal law. Accordingly, ensuring consistency of terms in two very different criminal paradigms cannot justify the limitation on rights that may result in broadening the definition of 'terrorist act'. Furthermore, removing 'harm that is physical' makes the law uncertain and unnecessarily ambiguous. Accordingly, Amnesty and the HRLRC recommend that the term 'physical' should not be removed from the definition of 'terrorist act' in section 100.1 of the Criminal Code.

Recommendation 1:

Amnesty and the HRLRC recommend that the term 'physical' not be removed from the definition of 'terrorist act' in section 100.1 of the Criminal Code.

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

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

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

[18] Ibid, 10 and 50.

(b) Consistency with United Nations definition

27. Security Council resolution 1566 (2004) calls upon States to cooperate fully to prevent and punish acts that have the following three cumulative characteristics:

    (a) acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages; and

    (b) irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; and

    (c) such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

28. Amnesty and the HRLRC consider that the definition of 'terrorist act' should be aligned with the cumulative characteristics espoused by the United Nations Security Council. Specifically, references should be removed in the Criminal Code to the damage of property and interference, disruption or destruction of information, telecommunication, financial, transport or essential public utility systems or the delivery of essential government services as action that can be considered a terrorist attack. In addition, the action of hostage taking should be included in the definition of terrorist act in the Criminal Code.

(c) Threat of action

29. Amnesty and the HRLRC are concerned that the proposed amendments do not remove 'threat of action' from the definition of 'terrorist act'. The Sheller Committee considered the inclusion of threat and recommended that it should be removed from the definition of 'terrorist act' and that an offence of 'threat of action' or 'threat to commit a terrorist act' be included in a separate, stand alone provision. [19]

30. The inclusion of threat in the definition of terrorist act unnecessarily broadens the definition of terrorist act, particularly when that definition is applied to certain terrorist offences. For example, any act preparatory to or in planning for *a threat* would be an offence, which may potentially result in thoughts and conversations being criminalised. The Federation of Community Legal Centres (Vic) has provided a useful example, namely 'where a person

[19] Sheller Committee Report, n 17, 10.

simply contemplates making a threat of property damage for political reasons and has a discussion with another person regarding whether this is a good idea and whether that other person would hypothetically wish to be involved, a 'terrorist act' may be committed.' [20]

31. This grossly undermines democratic principles, and may infringe on the freedom of expression. Article 19 of the ICCPR establishes the right to hold opinions without interference, and the right to freedom of expression. Article 19(3) provides that 'the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole'.[21] Restrictions are permissible only if provided for by law and if necessary for the respect of rights and reputations of others or for the protection of national security, public order or public health or morals. Any such restriction must be reasonable, necessary, proportionate and demonstrably justified.

32. Amnesty and the HRLRC acknowledge the need for prohibiting threats of terrorist acts particularly given the severity of harm and disturbance to public order that can result from such threats. However, the inclusion of 'threat' in the definition of 'terrorist act' results in a disproportionate restriction of the freedom of expression as exemplified in the examples above. A less restrictive means of achieving the objective of prohibiting threats would be to include a separate offence of threatening to commit a terrorist act in the criminal law. If enacted, such an offence should be a lesser offence than that of committing a terrorist act and accordingly must carry a lesser penalty. Further, the offence of threatening to commit a terrorist act should be a stand alone offence, to avoid incorporating ancillary offences such as threatening to do offences preparatory to a terrorist act.

33. Amnesty and the HRLRC recommend that 'threat of action' and other references to 'threat' should be removed from the definition of 'terrorist act' and a separate offence be created in accordance with the recommendation of the Sheller Committee and in conformity with the United Nations definition.

34. The NSL review proposes to further broaden the definition of terrorist act by including action that 'is likely to cause' harm. The reason for this expansion is to make it clear that threats of action relate to damage which is likely to be caused by the threat compared to damage actually caused by a terrorist act. Amnesty and the HRLRC do not support further expanding

---

[20] Federation of Community Legal Centres, *Submission to the Parliamentary Joint Committee on Intelligence and Security (***PJCIS***) regarding Australian Security Legislation* (10 July 2006), 12, available at http://www.aph.gov.au/House/committee/pjcis/securityleg/subs.htm.

[21] See also HRC, *General Comment No 10: Freedom of Expression* (1983) [4], available from http://www2.ohchr.org/english/bodies/hrc/comments.htm.

the definition and recommend removing reference to 'it is likely to cause' on the basis that threat of action should be dealt with as a separate offence.

Recommendation 2:

Amnesty and the HRLRC recommend that the proposed definition of 'terrorist act' in section 100.1 of the Criminal Code be amended to:

- remove references to 'threat of action' and other references to 'threat';
- remove reference to 'is likely to cause';
- remove references to 'the damage of property and interference, disruption or destruction of information, telecommunication, financial, transport or essential public utility systems or the delivery of essential government services'; and
- include action of hostage taking as capable of being a terrorist act.

Recommendation 3:

Amnesty and the HRLRC recommend that a separate offence of 'threat to commit a terrorist act' be included in Division 202 of the Criminal Code.

4.2 Terrorism Hoax Offences

35. The NSL review proposes to introduce a new offence for terrorism-specific hoaxes under the Criminal Code. Proposed section 101.7 makes it an offence to engage in conduct with the intention of inducing a false belief that a terrorist act has, will or is likely to occur.

36. Hoax offences are sufficiently covered in state criminal law.[22] However, the Commonwealth Department of Public Prosecutions has submitted that a separate offence covering terrorism related hoaxes is required at the federal level in light of the potentially serious consequences.[23] Amnesty and the HRLRC consider that state authorities have the capacity to deal with serious terrorism-related hoax offences and note that no counter argument has been put forward. The government must carefully consider whether further expanding counter-terrorism offences by the addition of a terrorism hoax offence is necessary.

[22] For example in Victoria see *Crimes Act 1958* sections 20, 21, 27, 28, 198, 247, 247L and 250.

[23] Sheller Committee Report, n 17, 189

37. Hoax offences potentially limit the right to freedom of expression protected in article 19 of the ICCPR. There is a risk that the law will cover jokes or threats that are made without any substance and are, in truth, not intended as a hoax. Whilst it may be legitimate for the government to make laws preventing persons from seeking to induce a false belief that a terrorist act will occur, it is imperative that any limits on the freedom of expression in those laws are necessary and proportionate.

38. Amnesty and the HRLRC submit that the terrorism hoax offences, as proposed in the NSL review, are overbroad in their application. The Sheller Committee recommended a narrower offence, which applied only to threats which are 'serious and credible'.[24] Amnesty and the HRLRC consider that a threshold that the threat be 'serious and credible' will adequately safeguard against the prosecution of mere jokes and threats made without substance and ensure any limitation on the freedom of expression is proportionate.

Recommendation 4:

Amnesty and the HRLRC recommend that the government justify why terrorism related hoax offences are required in Commonwealth law and why they are not already adequately be dealt with at state law. If a terrorism hoax offence is enacted in the Criminal Code, the offence should only apply to threats that are '**serious and credible**'.

4.3 Proscribing Terrorist Organisations

(a) Definition of 'advocates'

39. Section 102.1(2) of the Criminal Code gives the Attorney-General power to list organisations as 'terrorist organisations' on the grounds that they, among other things, directly advocate terrorist acts. Section 102.1(1A) of the Criminal Code provides that an organisation advocates the doing of a terrorist act if the organisation, among other things:

> (c)….directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment … that the person might suffer) to engage in a terrorist act.

40. The definition in paragraph (c) is problematic as it enables an Attorney-General to proscribe an organisation on the basis that it praises the doing of a terrorist act without any need for the organisation to be actively involved in a terrorist act. It is also unworkably broad, allowing the

offence to be committed even where there is merely a substantial risk that praise will trigger an individual's subjective response (not the response of a reasonable person).

41. Prohibiting members from merely praising certain acts disproportionately limits the right to freedom of expression protected in article 19 of the ICCPR. It particularly limits the freedom of religious and political expression given the religious, ideological and political motive element of a terrorist act. Political expression, subject to limitations, has been recognized by courts in various instances as a form expression protected by the rights under article 19.[25] Unnecessarily prohibiting political and religious expression seriously undermines fundamental democratic principles and may only serve to drive political opposition underground.

42. The NSL review proposes to increase the risk threshold in paragraph (c) by amending 'risk' to 'substantial risk'. While this amendment is an improvement, the link between directly praising a terrorist act and an actual involvement with a terrorist act is too tenuous to warrant the criminal liability that arises from proscription. Accordingly, it is recommended that paragraph (c) be deleted from the definition of advocates.

43. Innocent members of organisations may also be caught by the loosely framed section. The Sheller Committee accepted that 'paragraph (c) could lead to proscription of an organisation which was in no way involved in terrorism because a person identified as connected with the organisation praises a terrorist act, although the person had no intention to provoke a terrorist act'.[26] In light of these concerns the Sheller Committee recommended paragraph (c) be deleted.

Recommendation 5:

Amnesty and the HRLRC recommend that paragraph 102.1(1A)(c) be deleted to remove praise of a terrorist act as a ground for proscribing an organisation, as recommended by the Sheller Committee.

4.4 Support for a Terrorist Organisation

44. Section 102.7 provides that it is an offence for a person to intentionally provide support or resources to an organisation that would help that organisation engage in preparing, planning,

[24] Sheller Committee Report, n 17, 190.

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

[26] Ibid, 73.

assisting in or fostering the doing of a terrorist act. The NSL review proposes to insert the word 'material' before 'support' in order to 'clarify that the level of support required to commit the offence goes beyond mere support.' [27] In addition, amendments are made to clarify the fault elements so that a person must intentionally provide resources or material support and must do so with the intention of helping the organisation engage in a terrorist activity.

45. Amnesty and the HRLRC welcome the proposed amendments which provide greater clarity to the offence. However, concern remains that the term 'support' is not defined, making the offence ambiguous and overly broad. The Sheller Committee accepted the submissions of the Australian Human Rights Commission which considered that term 'support':

> could be regarded as support that directly or indirectly helps a terrorist organisation engage in a terrorist act. Thus, it could extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objective. The term 'support' is not defined in the Criminal Code…HREOC submitted that section 102.7 may therefore disproportionately restrict the right to freedom of expression. This is because it arguably extends to expression other than expression that 'incited to violence or public disorder. [28]

46. Amnesty and the HRLRC share the concerns of the Australian Human Rights Commission that section 102.7 may disproportionately restrict the right to freedom of expression by extending to the publication of views that appear to be favourable to a proscribed organisation. Furthermore, such a prohibition grossly undermines fundamental principles of a free and democratic society, and would constitute a severe restriction on freedom of speech.

47. Amnesty and the HRLRC recommend that section 102.7 of the Criminal Code be amended to ensure that the word 'support' cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objectives.

Recommendation 6:

Amnesty and the HRLRC recommend that section 102.7 of the Criminal Code be amended to ensure that in the offence of providing support to a terrorist organisation, the word 'support' cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objectives.

[27] Attorney-General Robert McClelland, *Discussion Paper – National Security Legislation Public Consultation* (12 August 2009), 63, available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Nationalsecuritylegislation-Publicconsultation_Nationalsecuritylegislation-Publicconsultation.

[28] Sheller Committee Report, n 17, 122.

4.5 Training Offences

(a) Knowledge

48. Section 102.5(1) of the Criminal Code provides that a person commits an offence if:

    (a) the person intentionally provides training to, or intentionally receives training from, an organisation; and

    (b) organisation is a terrorist organisation; and

    (c) the person is reckless as to whether the organisation is a terrorist organisation.

49. The penalty of committing an offence under section 102.5(1) is imprisonment for twenty-five years.

50. Amnesty and the HRLRC are concerned that the penalty for training with a terrorist organisation is completely disproportionate to the fault element of the offence which is mere recklessness.

51. Amnesty and the HRLRC recommend that section 102.4(1)(c) be amended to require a person to have *knowledge* that the organisation is a terrorist organisation.

(b) Strict liability

52. Section 102.5(2) provides that it is also an offence if:

    (a) the person intentionally provides training to, or intentionally receives training from an organisation; and

    (b) the organisation is a terrorist organisation that is covered by paragraph (b) of the definition of terrorist organisation in subsection 102.1(1).

53. Section 102.5(3) provides that strict liability applies to paragraph 2(b) which effectively means that a person cannot contest the factual merits of whether an organisation is a terrorist organisation. Amnesty and the HRLRC have grave concerns about this section, particularly given there is no opportunity to review the Attorney-General's decision to proscribe an organisation. Furthermore, the inclusion of strict liability is concerning given the severe penalty attached to the offence being 25 years imprisonment.

(c) Declared Aid Organisations

54. Amnesty and the HRLRC are disappointed that the substance of the training offences in section 102.5 of the Criminal Code has been retained despite a recommendation by the

Sheller Committee that the section 'be redrafted as a matter of urgency'. [29] The Sheller Committee recommended that:

> The re-draft should make it an element of the offence either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act.[30]

55. The Government purports to have addressed the concerns of the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**)[31] and the Sheller Committee in the NSL review by introducing a ministerial authorisation scheme to exempt humanitarian aid organisations from being caught by section 102.5.[32]

56. Under the proposed ministerial authorisation scheme[33] the Attorney-General can make a declaration that an organisation is a 'declared aid organisation' if satisfied on reasonable grounds that:

(a) the organisation is, or will be, providing humanitarian aid to a community; and

(b) the benefits to that community of providing the humanitarian aid outweigh, or will outweigh, ay benefits that could be received, directly or indirectly, by a terrorist organisation as a result of the organisation providing the aid.

57. Organisations may apply for exemption or the Attorney General may list those organisations which he considers to meet the statutory criteria. Once an organisation is listed as a 'declared aid organisation' they are exempted from the training offences under section 102.5 for a period of three years.[34]

58. Amnesty and the HRLRC support the idea of the scheme which in principle provides certainty to humanitarian aid organisations that they can conduct their activities without fear of criminal prosecution. However, the scheme does not take into consideration that many organisations may not want to publicise their aid activities by applying for ministerial declaration. For example, it is not difficult to envisage that some organisations providing aid to Tamil civilians in northern Sri Lanka may be fearful that the Sri Lankan government may expel their employees if such activities were publicised. The scheme also fails to recognise that many individuals

[29] Sheller Committee Report, n 17, 125.

[30] Sheller Committee Report, n 17, 118.

[31] Parliamentary Joint Committee on Intelligence and Security *Review of Secuirty and Counter Terrorism Legislation* (2006)

[32] Attorney-General Robert McClelland, Discussion Paper – National Security Legislation Public Consultation (12 August 2009), 67.

[33] Proposed new Criminal Code s 102.8A

provide humanitarian aid that may be caught by the training offence, but that they do not operate under the umbrella of an organisation and are therefore not eligible for the protection of the ministerial scheme.

59. Amnesty and the HRLRC consider the problem of section 102.5 capturing legitimate activities could be dealt with by amending the intention elements of the offence rather than introducing an exception for declared aid organisations. Amnesty and the HRLRC consider that the recommendation of the Sheller Committee be adopted that section 102.5 be re-drafted to make it an element of the offence that either the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the raining, to engage in, or assist with, a terrorist act.

Recommendation 7:

Amnesty and the HRLRC recommend that the offence of training a terrorist organisation or receiving training from a terrorist organisation under section 102.5 of the Criminal Code be amended to:

- replace the intention element of recklessness with knowledge in section 102.5(1)(c);
- repeal strict liability under section 102.5(3); and
- redraft section 102.5 to make it an element of the offence that either the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act.

5. Amendments to the *Crimes Act* 1914

5.1 Detention Without Charge

60. Under Part 1C of the Crimes Act a person arrested for a terrorism offence may be detained without charge up to 24 hours.[35] However, the actual time spent in detention may be significantly longer because, under section 23CA(8), certain periods may be disregarded from the investigation period. This is known as 'dead time'. Most of the activities outlined in subsection 23CA(8)(a)-(l) as constituting dead time are uncontroversial, as they are activities

[34] Proposed new Criminal Code s 102.5(5)

[35] *Crimes Act 1914* (Cth) ss 23CA(4)(b) and 23DA(7)

that are naturally limited in time and account for periods where it is not possible to question a person, for example where a person is recuperating, praying or eating. However, subsection 23CA(8)(m) differs from subsections (a)-(l) because it allows for a period of dead time in investigation for which there is no cap on the amount of time that may be disregarded, potentially resulting in indefinite detention. Section 23CA(8)(m) provides that *any reasonable time* may be disregarded that:

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

61. Under section 23CB an application for a time to be specified may be granted for terrorism offences if, *inter alia*, the detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence.[36]

62. The danger of this unlimited power to disregard time was illustrated in the case of Dr Mohamed Haneef. Dr Haneef was arrested on 2 July 2007 for suspected terrorist related activities, specifically in connection with the 2007 Glasgow International Airport attack. Dr Haneef was detained for twelve days without charge. The investigation period was extended through 'dead time' being disregarded for further investigative activities under sections 23CA(8)(m) and 23CB.

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

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

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

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

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

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

66. The length of pre-charge detention must be proportionate to avoid violation of article 9(1) of the ICCPR which prohibits arbitrary detention. Article 9(3) of the ICCPR requires that the lawfulness of any person's arrest or detention on a criminal charge be promptly reviewed by a court or tribunal. A detainee's right to be brought 'promptly before a judge' following arrest or detention on a criminal charge exists regardless of whether the arrest or detention is authorised by a court order.[37]

67. The length of time in which a person facing criminal charges must be brought before a court in order for it to be considered to be 'promptly' is contingent upon factors such as the gravity and complexity of the matter. However, the length of time should not exceed a few days, and in every case it should only be the minimal time reasonably necessary. In General Comment 8, the HRC stated that:

> Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days. [38]

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

> The State party should take action to ensure that detention in police custody never lasts longer than 48 hours and that detainees have access to lawyers from the moment of their detention. The State party must ensure full de facto compliance with the provisions of article 9, paragraph 3 of the Covenant. [39]

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

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

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

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

Case	Length of detention before being brought before a judge	Circumstances of detention	ECtHR Finding
Brogan v United Kingdom[40]	4 days and 6 hours	Person detained under the *Prevention of Terrorism (Temporary Provisions) Act* 1984	Breach of Art 5
Koster v Netherlands[41]	5 days	In context of military criminal law	Breach of Art 5
McGoff v Sweden[42]	15 days		Breach of Art 5
Duinhoff and Duif v Netherlands[43]	8 days	Held to be 'far in excess' of time limits set out in art 5(3)	Breach of Art 5

70. The NSL review proposes to cap investigative dead time at seven days (which effectively means 8 days detention without charge). Amnesty and the HRLRC consider eight days to be an excessive and a disproportionate limitation on the right to freedom from arbitrary detention.

71. Putting aside the 'dead time' provisions, suspects arrested for terrorism offences may be detained for up to 24 hours whereas those arrested for ordinary criminal offences can only be detained for up to 12 hours. Amnesty and the HRLRC consider this additional 12 hours in terrorism offences appropriately reflects the complexities of investigating terrorism offences. Accordingly, there is no need for additional time to be disregarded for investigative activities under section 23CA(8)(m). Section 23CA(8)(m) should be repealed and a cap should be placed on pre-charge detention to ensure that pre-charge detention does not exceed 48 hours. For completeness it is acknowledged that subsections 23CA(8)(a)-(l) are uncontroversial.

Recommendation 8:

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

[40] (1988) 11 EHRR 117.

[41] (1991) 14 EHRR 396.

[42] (1984) 8 EHRR 246.

[43] (1984) 13 EHRR 478.

5.2 Search without Warrant

72. The amendments proposed by the NSL review insert a new emergency entry, search and seize power in the Crimes Act. Under proposed section 3UEA, a police officer may enter private premises without a warrant if the police officer suspects on reasonable grounds that:

(a) a 'thing' is on the premises that is relevant to a terrorism offence, whether or not that offence has occurred; and

(b) it is necessary to exercise a power under subsection (2) in order to prevent the thing from being used in connection with a terrorism offence; and

(c) 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.

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

74. Interferences to privacy may be lawful and permitted where states parties undertake to ensure that relevant legislations are precise and circumscribed.[44] A decision to make use of such permitted interference must be made only by an authority designated under the law, and on a case-by-case basis.[45] States must also ensure that decision makers do not possess overly wide discretion in authorizing interferences with the right to privacy.[46] In *Toonen v Australia*[47], the HRC commented that any non-arbitrary interference with privacy must be proportionate to the end sought, and must also be reasonable and necessary in the circumstances of any given case.

[44] Ibid, [8]. See also the Committee's Concluding Observations on the Russian Federation where it expressed concerns in relation to existing mechanisms to intrude into private telephone communications. Legislations setting out the conditions of legitimate interferences with privacy and providing for safeguards against unlawful interferences lacked sufficient clarity.

[45] Ibid.

[46] Ibid. See also Joseph, Schultz and Castan, above n 8, 480-481.

[47] (488/92)

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

76. Amnesty and the HRLRC agree with the Law Council of Australia who have said that 'poorly defined, overly broad offence provisions can never be justified on the basis that, despite their potentially wide application, they are only intended to be utilised by the authorities in the most limited and serious circumstances.'[48] It is imperative that any law limiting the right to privacy clearly set out the limits of the extent to which it infringes that right. In this regard, it is concerning that the term 'thing' is not defined which makes the offence vague and ambiguous and can lead to unpredictability in its implementation. In addition, the threshold of reasonable suspicion is inadequate given the serious consequences that wrongful exercise of the power can cause. In this regard, the level of discretion granted to individual officers is disproportionate to the power of being able to enter private premises. It is concerning that absolutely no safeguards are implemented to prevent the discretion being abused.

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

Recommendation 9:

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

6. Amendments to Sedition Offences

6.1 The Amendments Proposed

78. Section 80.2 of the Criminal Code, as proposed to be amended, makes it an offence for a person to:

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

- intentionally urge another person to overthrow by force or violence the Constitution or the Government of the Commonwealth, a State or a Territory, doing so with the intention that the force or violence will occur;[49]
- intentionally urge another person to interfere by force or violence in parliamentary elections and referenda, doing so with the intention that the force or violence will occur;[50] or
- intentionally urge a group or a person to use force or violence against another group or members of a group (whether distinguished by race, religion, nationality, national origin or political opinion), where that would threaten the peace, order and good government of the Commonwealth.[51]

79. The following offences are repealed by the proposed amendments:

- urging another person to assist an organisation or country that is at war with the Commonwealth (whether declared or undeclared);[52]
- urging another person to assist those engaged in armed hostilities with the Australian Defence Force; and[53]
- a range of outdated offences contained in Part IIA of the *Crimes Act*.

80. The amendments also remove the requirement that the proceedings for an offence under the Division have the Attorney-General's consent.[54]

81. A defence is currently provided in section 80.3 if the person can show that the impugned acts were done 'in good faith'. It is proposed that section 80.3 will be amended by the review to allow the court, when considering a defence, to consider 'any relevant matter', including whether acts done were in connection with artistic works, in the course of debate or academic or scientific work, or in the dissemination of news or current affairs.[55]

[49] *Criminal Code Act 1995* (Cth) s. 80.2(1).

[50] *Criminal Code Act 1995* (Cth) s 80.2(4).

[51] *Criminal Code Act 1995* (Cth) ss 80.2A and 80.2B.

[52] *Criminal Code Act 1995* (Cth) s 80.2(7).

[53] *Criminal Code Act 1995* (Cth) s 80.2(8).

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

[55] Proposed new Criminal Code subsection 80.3(3)

82. Generally the amendments to the sedition provisions are welcome insofar as they implement the Australian Law Reform Commission's (***ALRC***) recommendations in its 2006 *Fighting Words* report to:[56]

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

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

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

83. However, even with the proposed amendments, there are still significant problems with the offences contained in section 80.2. The following parts set out some of Amnesty and the HRLRC's concerns with the offences in section 80.2 in the form proposed by the NSL review, namely:

(a) the limitations that the provisions continue to impose on human rights, particularly the right to freedom of expression;

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

(c) the need for public order offences to include an intention that there be a threat to the peace, order and good government of the Commonwealth;

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

(e) the utility of the 'good faith' defence provision.

84. Each of these issues is discussed further below.

6.2 Diminishing the Right to Freedom of Expression

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

[56] ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) available at www.austlii.edu.au/au/other/alrc/publications/reports/104/. These amendments also implement the *Australian Government response to ALRC Review of sedition laws in Australia*, December 2008, available at www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoALRCReviewofseditionlawsinAustralia-December2008.

(a) The implied freedom of political communication

86. Although some of the provisions in section 80.2 relate to speech on political matters, they probably do not burden the implied constitutional freedom of communication on government or political matters.[57] The constitutional freedom protects public criticism of the government or government action.[58] The implied freedom of political communication is also not absolute.[59] In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court formulated a two stage test to determine the constitutional validity of a law:

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

    (b) Is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?[60]

87. In *Fighting Words*, the ALRC stated that sedition offences (as they currently exist) probably do not infringe the constitutional freedom to engage in public criticism of the government or government action, particularly given that an essential element of the offences is that the seditious communication urges force or violence.[61] On this basis, the ALRC stated that the provisions probably do not capture 'mere criticism' of government action.[62]

(b) The right to freedom of speech

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

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

---

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

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

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

[60] *Lange*, at 567-8.

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

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

90. The rights to freedom of opinion and expression are particularly important in areas of political communication, journalism and the media, demonstrations, industrial activity and 'whistleblowing'. Political expression, subjected to limitations, has been recognized by courts in various instances[63] as a form of expression protected by the rights under article 19.

91. The ICCPR recognises the potentially destructive nature of certain types of expression, and in article 20 provides for mandatory limitations to freedom of expression. In the view of this, states parties are obliged to adopt necessary legislative measures to prohibit actions giving rise to any propaganda for war, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[64] It is unlikely, however, that limitations are permissible on the communication of information or ideas which merely 'offend, shock or disturb', because 'such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society'.[65]

92. The HRC has noted that any state-imposed restrictions on the exercise of freedom of expression must be examined with particular care and scrutiny[66], and must not put the right itself in jeopardy.[67]

93. The ALRC acknowledged that human rights, including the right to freedom of expression in the ICCPR, are valuable measures by which to analyse sedition laws in Australia, particularly in the absence of comprehensive federal legislative protection of rights.[68] The ALRC confirmed that the sedition offences in section 80.2 undoubtedly involve some limitation of the right to freedom of expression.[69]

94. In the context of sedition laws, the Supreme Court of Canada has said that freedom of expression protects any activity or communication that conveys a meaning so long as it does so in a non-violent manner.[70] Courts in England and Canada have considered the interaction of sedition laws with the right to freedom of expression. In *Boucher v R*,[71] Rand J of the Supreme Court of Canada rejected the validity of a sedition prosecution based on allegations

---

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

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

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

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

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

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

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

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

[71] [1951] SCR 265, 288 (the first trial).

that the relevant conduct created hostility, ill-will and hatred towards the government. His Honour stated:

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

95. At common law, the UK and Canadian courts have found that 'sedition' is not appropriate to use in violence against or between groups, unless there is an intention to incite resistance or violence for the purpose of disturbing constituted authority.[72]

6.3 The Need for the Offences must be Articulated

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

97. Given that the offences contained in s 80.2 impose a limitation on freedom of expression, the government must articulate an evidence-based justification for restricting the freedom. The government must prove that the law is necessary. As the party seeking to uphold the limitation, the government should demonstrably justify the limitation.[73] The measures adopted to justify the limitation should be for the protection of national security, public order, public health or morals.

98. In short, given that:

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

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

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

(d) the right to freedom of speech is now acknowledged as being fundamental to our system of representative democracy (see *Lange* discussed at paragraph 68); and

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

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

---

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

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

(a) Sedition laws are no longer necessary or relevant

99. Good arguments are made for abolishing sedition laws on the basis that the laws are outdated and respond to anachronistic notions of governmental institutions being embodiments of the sovereign. Further, there is very little evidence of the need for the laws.[74] The last successful prosecution for sedition in England was in 1909,[75] and it has been recommended to be repealed or significantly scaled back in a range of comparable jurisdictions given the limitations that such laws pose on freedom of expression.[76]

100. There has been no successful federal prosecution of sedition in Australia since the prosecution of members of the Australian Communist Party in the late 1940s.[77] Further, the convictions in the Communist Party cases were for words that expressed disloyalty to the sovereign and Australia, but fell short of actually inciting violence or public disorder.[78] It is almost certain that words that merely express a disloyalty to the Australian state would not be considered a punishable offence now, as reflected in the amendment of the offences when included in legislation to include the element of incitement to violence or public disorder.

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

> With a growth in free speech, a more tolerant society and greater democracy it became more possible to criticise Church and state more freely, without committing sedition.[79]

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

> It is essential to the health of a parliamentary democracy such as Canada that citizens have the right to criticize, debate and discuss political, economic and social matters in the freest possible manner.[80]

---

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

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

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

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

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

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

[80] Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49, 1986, 35.

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

103. If the offences duplicate other laws, this would support an argument that the laws are unnecessary. It may be that the offence of sedition is already covered by other laws, and the offence of incitement.[81] It is argued that sedition offences can largely be prosecuted by applying criminal incitement to existing federal offences, such as treason or treachery.[82] In short, McBain says:

> …the offence of sedition used to punish criticism of (and, later, the incitement of violence against) various state institutions [and] has been superseded by other offences, by a greater toleration of criticism of state institutions and by the realisation that, in a democratic system, criticism of government is both healthy and essential.[83]

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

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

Recommendation 10:

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

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

6.4 Urging Force or Violence against a Group or a Member of a Group

106. Section 80.2(5) of the Criminal Code currently contains an offence of urging a group to use force or violence against another group which would threaten the peace, order and good government of the Commonwealth.

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

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

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

107. The NSL Review proposes to repeal section 80.2(5), and replace it with subsections 80.2A and 80.2B (the ***urging group violence provisions***).

(a) These sections create two offences: first, an offence of urging violence against groups (s 80.2A) and secondly, an offence of urging violence against members of groups (80.2B).

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

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

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

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

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

(a) The public order offences

109. At common law, the UK and Canadian courts have found that 'sedition' is not appropriate to use in violence against or between groups, unless there is an intention to incite resistance or violence for the purpose of disturbing constituted authority.[84] The requirement for an intention to incite violence to disturb a constituted authority is crucial to establishing a public order justification for the offence.

110. The ALRC consider that 'the focus of sedition offences is the subversion of political authority and indicate that there is little scope for the common law of sedition to be used to prosecute vilification or incitement to violence against particular groups, except where it can be shown

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

that there is a clear intention to incite violence or public disturbance against the state or the institutions of government'.[85]

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

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

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

(b) Urging group violence offences

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

115. First, the placement of the laws is stigmatising of certain racial and religious speech and groups as terror-related. When the inter-group violence offences in section 80.2(5) were introduced, the government justified these provisions as addressing 'key terrorism themes such as urging violence by one racial group against another'.[86] The ALRC acknowledged that there are concerns in the community that this provision reinforces stereotypes that members of certain ethnicities or religions are terrorists.[87]

116. The rights to non-discrimination and substantive equality are fundamental components of human rights law that are entrenched in a wide range of human rights treaties,[88] human rights instruments,[89] national laws,[90] and jurisprudence.[91]

---

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

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

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

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

117. Many aspects of Australia's counter-terrorism measures impact disproportionately and detrimentally on Australia's Muslim and Arab population. Following the events of 11 September 2001, anti-Muslim and anti-Arab prejudice has increased and these communities have reported 'a substantial increase in fear, a growing sense of alienation from the wider community and an increasing distrust of authority'.[92] There is a real risk that characterising speech concerning inter-group violence could add to the stigmatisation of certain communities.

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

> The idea of sedition centres on rebellion against, or subversion of, political authority; it has little to do with communal violence between groups. The rationale for protecting one group from violence by another is not to prevent sedition or terrorism, but to guarantee the dignity of members of human groups in a pluralist society.[93]

118.1 Further, the urging group violence provisions address inter-group violence, and do not have any connection to the peace, order and good government of the Commonwealth, and therefore do not belong in the provisions of the Criminal Code entitled the 'Security of the Commonwealth'.[94] These offences are appropriately dealt with by anti-vilification legislation, rather than counter-terror legislation.

119. Australia has obligations under international law to implement comprehensive anti-vilification laws.[95] Under article 20 of the ICCPR, Australia is required to prohibit by law any advocacy of

---

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

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

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

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

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

[94] Sections 80.2A and 80.2B both sit within Part 5 of the Criminal Code which is entitled 'The Security of the Commonwealth'.

[95] Article 20 ICCPR, and Art 4(a) of CERD

national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[96]

120. There is currently no comprehensive protection against racial and religious vilification at a national level in Australia. There is some protection provided by in section 18 of the RDA of any act which prohibits any act that 'is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people' for reasons of 'race, colour or national or ethnic origin' (s 18C(1)) or to incite racial discrimination (section 17(a)). Notably there is no express protection against religious vilification. Sikhs and Jews have been found to be groups distinguished by 'ethnic origin'.[97] However, it is unlikely that the protection in the RDA would extend to vilification on the basis of Islamic faith.[98] Further, racial and religious hatred is not a crime under Australian law, as required by article 4 of CERD.

121. It is true that violence that is motivated by religious or racial hatred is capable of being prosecuted under ordinary criminal laws. However, 'treating group-based violence or 'hate crimes' as ordinary offences fails to recognise the additional psychological element and social harm involved in such cases.'[99] It also fails to implement Australia's obligation to properly protect against racial and religious vilification.

122. The Supreme Court of Canada has held that extreme speech may be protected in some circumstances. In *R v Keegstra*,[100] Dickson CJ stated: 'it is party through clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive.' However, in that case the Supreme Court upheld the constitutionality of the proscription of racist hate speech, finding that such speech plays no part in the discovery of truth and injures the people targeted, by deterring them from participating in the democratic process. Put another way, restricting freedom of speech on racial and religious vilification grounds is a justifiable limitation on the right:

> Suppressing speech which proximately encourages violence is a justifiable restriction in a democratic society, since the protection of life is a higher normative and social value which

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

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

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

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

[100] [1990] 3 SCR 697 at 765-766.

> momentarily trumps free expression – but only to the extent strictly necessary to prevent the greater harm. [101]

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

Recommendation 11:

Assuming that the offences in section 80.2 are retained in the form proposed in the NSL Review:

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

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

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

6.5 The 'Good Faith' Defence

124. The NSL Review retains the good faith defence in section 80.3, and proposes some amendments to the defence by setting out matters for the court to consider relevant to the context of the speech involved. The good faith defence provides a full defence to the offences in section 80.2 on the basis that a person was acting in good faith in engaging in the impugned conduct.

125. A logical difficulty exists with the good faith defence, which makes it difficult to understand how the defence could ever be utilised. A court is unlikely to find circumstances in which a person urges the violent overthrow of the Commonwealth, or an act that threatens the peace, order

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

and good government of the Commonwealth, *in good faith*. The offence itself suggests an element of bad faith, which makes the defence absurd.

126. The ALRC confirmed that the sedition offences in section 80.2 involve some dilution of an absolute notion of freedom of expression.[102] To combat this diminution of freedom of expression, the ALRC recommended that the offences in subsections 80.2(1), (2) and (5) of the Criminal Code be amended to include the following protections for freedom of expression in Australia:[103]

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

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

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

(ii) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest;

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

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

127. In response, the review paper inserts the requisite intention, which is welcome. However, rather than amend the offence to include a requirement that intention be informed by the context in which the words were spoken, the NSL review amends the defence in s 80.3 of the Criminal Code to include a discretion for the judge to consider some of the above factors in paragraph 126 (but significantly not the industrial dispute matters in (iii) above) when considering whether the acts were done in good faith. This places the onus on the accused to establish the context, rather than the state to make its case.

128. Given the difficulties with ever using the good faith defence (see paragraph 125 above), the utility of these amendments is limited.

129. Rather than amend the defence in this way, the Government should amend the offences in the manner recommended by the ALRC, set out at paragraph 126 above.

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

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

Recommendation 12:

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

7. Amendments to the *Charter of the United Nations Act* 1945

7.1 The Listing and Proscription Provisions of the Charter of the United Nations Act

130. Under *United Nations Security Council Resolution 1373* (2001), Australia must, among other things freeze funds and financial assets of persons and entities connected with terrorist acts (paragraphs 1(c) and (d)). The *Charter of the United Nations Act* 1945 (the ***UN Charter Act***) is said to give effect to these obligations. Listing of persons, entities or assets under the Charter Act is separate to the proscription of an organisation under the Criminal Code.[104]

131. A 'proscribed person or entity' under the UN Charter Act, is a person or entity who has been listed by the Minister under section 15 or proscribed by regulation under section 18. Under the UN Charter Act it is an offence to deal with a freezable asset[105] or to give an asset to a proscribed person or entity.[106]

132. Under the UN Charter Act, the Minister has powers to revoke listings in certain circumstances (section 16) and the listed person or entity has limited powers to apply for the revocation of the listing (section 17).[107]

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

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

[105] Charter of the United Nations Act 1945, section 20 – 'freezable asset' is defined in section 14 as (a) is owned or controlled by a proscribed person or entity; or (b) is a listed asset; or (c) is derived or generated from assets mentioned in paragraph (a) or (b).

[106] *Charter of the United Nations Act* 1945, section 21.

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

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

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

134. In light of the harsh impact of listing on Shayadi, Vinck, and their families, Sir Nigel Rodley suggested a number of criteria that should be applied when interpreting Security Council resolutions, including a presumption that the Security Council did not intend that actions taken pursuant to its resolutions should violate human rights.[108]

7.2 Amendments Proposed

135. The Review Paper states that the amendments to the UN Charter Act represent the Government's response to recommendation 22(a) of the Parliamentary Joint Committee on Intelligence and Security (***PJCIS***), *Review of Security and Counter-Terrorism Legislation,* tabled in December 2006. The PJSCIS noted that currently there is no parliamentary scrutiny of listing decisions made under the UN Charter Act.[109] Further, given that there are criminal offences triggered by a listing, there should be procedural safeguards in place.[110]

136. The key amendments do the following:

(a) require the Minister to be satisfied 'on reasonable grounds' of the prescribed matters before listing a person, entity or asset; and

(b) insert section 15A, which purports to provide a 'regular review of listing'.

137. The Government should be commended for inserting the requirement that the Minister be satisfied on 'reasonable grounds'.[111]

---

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

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

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

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

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

139. The PJCIS states that amending the Minister's discretion by adding a requirement of reasonable grounds (as has been done), a court would be able to assess the decision in judicial review under the *Administrative Decision Judicial Review Act* 1977 (**ADJR**).[112] Whilst the ability to review section 15 decisions under the ADJR Act is an improvement, judicial review is limited to errors of law and does not provide the full range of remedies that merits review would provide (and which the PJCIS recommended).

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

Recommendation 13:

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

8. Amendments to the National Security Information (Criminal and Civil Proceedings) Act 2004

8.1 National Security Information Act

141. The *National Security Information (Criminal and Civil Proceedings) Act* 2004 (the **NSI Act**) was passed on 8 December 2004. The objective of the NSI Act is to prevent disclosure of

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

information in civil and federal criminal proceedings where the information is likely to prejudice national security.[113] 'National security' is defined as Australia's defence, security, international relations and law enforcement interests. This broad definition encompasses political, military, economic relations with foreign governments, and methods and technologies of information-gathering.[114]

8.2 Amendments Proposed by the NSL Review

142. Most of the amendments seek to streamline provisions so as to make proceedings move more smoothly. The NSL Review states that the amendments it proposes fall within five categories:

(a) **Obligations of legal representatives**: clarifying the role and obligations of a party's legal representative under the NSI Act.

(b) **Attorney's right to intervene**: Increasing the role of the Attorney-General, by providing that office with the right to intervene in cases to protect national security and to be party to consent arrangements under the NSI Act;

(c) **Clarifying availability of court procedures:** 'to ensure processes are flexible and efficient' (ie stating public interest immunity is still available, notwithstanding the NSI Act);

(d) **Agreements under ss 22 and 38B**: Clarifying the policy intention behind agreements about dealing with national security evidence, as well as the parties to those agreements and that the agreements can cover the protection, storage, handling and destruction of national security information;

(e) **Procedural matters**: Stating that notices are not required to be given for re-trials, and where A-G is not required to be given notice twice.

143. Amnesty and the HRLRC make no submissions on the changes proposed, save that the streamlining of procedures is welcome.

144. However, Amnesty and the HRLRC are disappointed that the amendments proposed by the NSL Review do not address two serious human rights issues relating to the right to a fair trial that are raised in the NSI Act; namely, the right of the accused to know the evidence against them and the right to choose a legal representative.

---

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

[114] *National Security Information (Criminal and Civil Proceedings) Act 2004 Cth*, s17.

8.3 Problems with the NSI Act that are not Addressed in the NSL Review

145. The following mechanisms established under the NSI Act raise prima facie incompatibilities with the right to a fair trial in the ICCPR (article 14).[115]

(a) Firstly, the NSI Act requires security clearances for a defendant's lawyer to see national security information that might be used as evidence.

(b) Secondly, the NSI Act gives the Attorney-General the power to issue certificates that prevent the disclosure of information (including the disclosure to the accused and the accused's lawyers) deemed to prejudice the national security interest, or prevent a witness from appearing in trial.

146. Article 14 of the ICCPR provides that 'all persons shall be equal before the courts and tribunals.' The right a fair trial is regarded as a fundamental rule of law which is essential to the proper administration of justice. The administration of justice must 'effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice'.[116] This right is concerned with procedural fairness, rather than substantive fairness of a decision or judgment of a court or tribunal, and is guaranteed in both civil and criminal trials via a series of due process rights.[117]

(a) Security clearances

147. The NSI Act provides that where a defendant's legal representative has been given notice that the case is likely to involve disclosure of information that is likely to prejudice national security, the legal representative may apply for a security clearance 'at the level considered appropriate by the Secretary'[118] within 14 days.[119] If they do not apply for a security clearance or are unsuccessful in their application, there is a high likelihood that they will not be able to access information relating to their client's case. Further, it is an offence for any person to disclose national security information to legal representatives that do not have an appropriate security clearance.[120]

---

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

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

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

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

[119] *National Security Information (Criminal and Civil Proceedings) Act 2004 Cth*, s39(5).

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

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

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

(b) Closed court proceedings

150. The NSI Act imposes an obligation on defendants and prosecutors to notify the Attorney-General if they know or believe that a national security information disclosure issue will arise during the course of proceedings, or that the mere presence of a witness will disclose national security information.[121] Under the NSI Act, closed court hearings are triggered when the Attorney-General issues a criminal non-disclosure certificate[122] or a criminal witness exclusion certificate.[123] The certificates provide conclusive evidence that disclosure of the information will prejudice national security,[124] and contravening the certificate is an offence.[125]

151. The NSI Act requires proceedings to be adjourned and closed court proceedings to be held, so that the court may consider whether and how national security information may be disclosed during the proceedings, or whether a witness should be called.[126]

152. Section 29 provides the requirements for closed court hearings. Subsection 29(2) allows the court to order the exclusion of the defendant, or their legal representative, during any part of

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

[122] *National Security Information (Criminal and Civil Proceedings) Act 2004 Cth*, s26

[123] *National Security Information (Criminal and Civil Proceedings) Act 2004 Cth*, s28

[124] *National Security Information (Criminal and Civil Proceedings) Act 2004 Cth*, ss27,28

[125] *National Security Information (Criminal and Civil Proceedings) Act 2004 Cth*, s43,44

[126] *National Security Information (Criminal and Civil Proceedings) Act 2004 Cth*, ss 25(3)27(5), 28(5), s31

the closed hearing.[127] However, the defendant may make submissions to the court rejecting the argument that the information should not be disclosed or the witness not called.[128]

153. In making an order whether or not to call a witness and whether and how to disclose information, section 31 requires that the court must consider whether the information is admissible,[129] and if so consider:

(a) the effect of disclosure on national security;

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

(c) any other relevant factors.[130]

154. Section 31(8) of the NSI Act requires the court to give greatest weight to national security considerations in making orders on prohibiting the disclosure of information or calling a witness. This direction was found to be constitutional in *Lodhi v R*[131] because it did not usurp judicial power. However, the court's discretion is expressly weighted *against* the rights of a defendant to a fair hearing. Former High Court judge Justice McHugh has stated:

> It is no doubt true that in theory the National Security Information Act (Criminal and Civil Proceedings) Act does not direct the court to make the order which the Attorney-General wants. But it goes as close as it thinks it can. It weights the exercise of the discretion in favour of the Attorney-General and in a practical sense directs the outcome of the closed hearing. How can a court make an order in favour of a fair trial when in exercising its discretion, it must give the issue of fair trial less weight than the Attorney-General's certificate.[132]

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

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

157. Under international law, Australia has committed to guarantee the right of the defendant to be tried in their presence and to defend themselves (ICCPR Art. 14(3)(d)), and the right of a defendant to have and obtain the attendance and examination of witnesses (ICCPR Art. 14(3)(e)). The European Court of Human Rights and the House of Lords have acknowledged

---

[127] *National Security Information (Criminal and Civil Proceedings) Act 2004 Cth*, s29(3).

[128] *National Security Information (Criminal and Civil Proceedings) Act 2004 Cth*, s29(4).

[129] *National Security Information (Criminal and Civil Proceedings) Act 2004 Cth*, s31(7).

[130] *National Security Information (Criminal and Civil Proceedings) Act 2004 Cth*, s31(7).

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

that this right can be limited in the public interest, including in circumstances where evidence cannot be disclosed in the interests of national security.[133] However, where this occurs it must be counterbalanced so that the detainee can effectively challenge the allegations made. Procedural fairness under the right to a fair trial requires that a detainee be informed in sufficient detail to permit him or her to effectively challenge those allegations.[134] This right means that where the undisclosed material is to be heavily relied upon and the accused will not be able to answer allegations made against him or her, there will be a breach of the right to a fair hearing.[135]

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

(c) Public interest immunity

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

160. The NSI Act was implemented in response to the ALRC's report, *Keeping Secrets*.[136] In that report, the ALRC recommended the implementation of a legislative scheme that would avoid two outcomes of a public interest immunity application: a court ruling either that (1) security sensitive information be admitted into evidence (despite the risk for national security) or (2) that the information be excluded (despite the risks to the parties).[137]

161. The ALRC stated that one of the purposes of the then proposed NSI Act would be to 'provide the court with a wide range of possible methods of maximising the amount of evidence available for use in the proceedings – ensuring that fairness is afforded to all parties (including the Crown) and public access is not unduly restricted'.[138] The idea was to leave the

---

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

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

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

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

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

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

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

government with the ultimate option to withhold 'extraordinarily sensitive information' where the government considers that the risks of disclosures outweigh all other considerations, including gaining a criminal conviction. However, the court is to determine the conduct of the proceeding in light of the government's decision about disclosures.[139]

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

> The leading of secret evidence against an accused, for the purpose of protecting classified or security sensitive information in a criminal prosecution, should not be allowed. To sanction such a process would be in breach of the protections provided for in Article 14 of the International Covenant on Civil and Political Rights for an accused to be tried in his or her presence and to have the opportunity to examine, or have examined any adverse witnesses. Where such evidence is central to the indictment, to sanction such a process would breach basic principles of a fair trial, and could constitute an abuse of process.[140]

163. In fact the ALRC said that courts should never hear part of any civil or criminal proceedings in the absence of one of the parties and its legal representatives (except some judicial review matters) and only in other exceptional cases.[141]

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

Recommendation 14:

The NSI Act should be repealed and the disclosure of national security information dealt with in accordance with the doctrine of public interest immunity.

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

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

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

Recommendation 15:

Assuming that the NSI Act is retained:

(a) the provisions of the Act that require security clearances for lawyers and the provisions which enable closed court hearings to be conducted that prevent the disclosure of information from the accused and their representatives should be reviewed and amended in accordance with the right to a fair trial under the article 14 of the ICCPR; and

(b) section 31(8) of the NSI Act should be amended so that the court's discretion in determining whether national security information is admitted does not give greater weight to any of the considerations before the court.

9. Matters not Addressed in the National Security Legislation Review

165. The NSL Review does not address some of the most problematic counter-terror laws insofar as human rights violations are concerned, including those relating to:

(a) control orders and preventative detention orders;

(b) ASIO detention powers;

(c) the listing of terrorist organisations; and

(d) the offences relating to association with a terrorist organisation.

166. The principle concerns of Amnesty and the HRLRC with these provisions is discussed further below.

9.1 Control Orders and Preventative Detention Orders

167. The *Anti-Terrorism Act (No 2)* 2005 amended the *Criminal Code* and introduced, among other things, control orders and preventative detention orders. In addition to raising concerns regarding freedom from arbitrary detention, the presumption of innocence and the right to a fair hearing, the regimes for these instruments raise significant concerns due to the inadequacy of safeguards to comprehensively prevent ill-treatment.

168. In its recent review of Australia, the UN Committee Against Torture stated that the lack of judicial review and the character of secrecy surrounding imposition of preventative detention

and control orders raised concerns in relation to the right to a fair trial, including procedural guarantees.[142]

169. The UN Special Rapporteur on Human Rights and Counter-Terrorism stated his concern that the interim control order imposed on Joseph Thomas was imposed after criminal proceedings had been quashed. The SR said that a control order 'should never substitute for criminal proceedings.' The SR said:

> Where criminal proceedings can not be brought, or a conviction maintained, a control order might (depending on the facts and conditions of that order) be justifiable where new information or the urgency of a situation call for action to prevent the commission of a terrorist act. Transparency and due process must always be maintained in such cases, with the order regularly reviewed to ensure it remains necessary.[143]

170. Amnesty and the HRLRC recommend that the control order and preventative detention order regimes be reviewed immediately in order to bring those provisions in line with Australia's international human rights obligations.

9.2 ASIO Detention Powers

171. Following amendments introduced under the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act* 2003 and the *ASIO Legislation Amendment Act* 2006 (Cth), a person (including a non-suspect) can be detained without charge under an ASIO warrant for up to 168 hours, or 7 days.[144] A separate warrant can be issued at the end of the 168 hours if new material justifies it.[145] A person may thus be held in detention indefinitely for rolling periods of 7 days, without any charge having been made out against them in accordance with conventional criminal procedure.

172. Further, under this legislation:

(a) the person may be prohibited and prevented from contacting anyone at any time while in custody;[146]

(b) the person may be questioned in the absence of a lawyer of their choice;[147]

---

[142] CAT Concluding Observations, [10].

[143] Special Rapporteur on the Promotion and Protection of human Rights whilst Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add3 (2006), [47].

[144] *Australian Security Intelligence Organisation Act* 1979 (Cth) s 34S, 34G(1). A comprehensive list of the 'legislative suite' can be found at the Government's 'National Security' website.

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

[146] *Australian Security Intelligence Organisation Act* 1979 (Cth) s 34K.

[147] *Australian Security Intelligence Organisation Act* 1979 (Cth) s 34ZP.

(c) the person's lawyer may be denied access to information regarding the reasons for detention and also in relation to the conditions of detention and treatment of the person;[148]

(d) the person is prohibited from disclosing information relating to their detention at risk of five years imprisonment;[149] and

(e) the person's lawyer, parents and guardian may be imprisoned for up to five years for disclosing any information regarding the fact or nature of the detention.[150]

173. These secrecy provisions prevent the press, academics and human rights advocates from independently monitoring the use of ASIO questioning and detention powers. T]he level of secrecy and lack of public scrutiny provided for by this Act has the potential to allow human rights violations to go unnoticed in a climate of impunity.[151]

174. In 2009, the Human Rights Committee recommended that Australia 'abrogate provisions providing the Australian Security Intelligence Organisation (ASIO) the power to detain people without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods.'[152]

175. Similarly the Committee Against Torture expressed concerns that the ASIO detention powers do not comply with the right to a fair trial and the right to take proceedings to a court to determine the lawfulness of detention.[153]

176. Amnesty and the HRLRC recommend that ASIO's detention powers be reviewed immediately to ensure that they comply with the right to a fair trial and to be free from arbitrary detention, including:

(a) amendment to the maximum period of time a person may be detained under section 34S the ASIO Act, such that a person may never be detained for more than 48 hours without independent judicial review;

(b) repeal of sections 34F(6) and 34G(2) of the ASIO Act to prevent detention periods being extended indefinitely through 'rolling warrants'; and

(c) repeal of secrecy provisions in the ASIO Act.

---

[148] *Australian Security Intelligence Organisation Act* 1979 (Cth) s 34ZT.

[149] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZS(2).

[150] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZS(1).

[151] Amnesty International Australia, Concerns Regarding the ASIO Legislation Amendment Bill 2003 (2003).

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

9.3 Listing of Terrorist Organisations

177. Amnesty and the HRLRC are disappointed that despite strong recommendations by the Sheller Committee to reform the listing process, no amendments have been proposed in the NSL Review.

178. Section 102.1(2) of the Criminal Code gives the Executive the power to list organisations as 'terrorist organisations' on the grounds that they are directly, or indirectly, engaged in, assisting, preparing, planning or fostering acts or threats of violence or on the basis that they directly advocate terrorist acts. The proscription of an organisation may infringe the right to freedom of expression and the right to freedom of association protected in the ICCPR. The right to freedom of association is recognised in article 22 which provides that, 'everyone shall have the right to freedom association with others, including the right to form and join trade unions for the protection of his interests'.

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

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

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

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

182. To date, 19 organisations have been listed as terrorist organisations, with all but one of those organisations being self-identified Islamic organisations. The effect of a listing is to increase, in certain circumstances, the scope of criminal liability for involvement with the organisation in question. Listing also acts as a significant condemnation by public authorities of the political, religious or ideological goals of the organisation in question. Amnesty and the HRLRC are

[153] UN Committee Against Torture, Concluding Observations of the Committee Against Torture: Australia, UN Doc

concerned that the disproportionate representation of Islamic organisations amongst those listed suggests a discriminatory application of the relevant laws by the executive.

183. In 2006, the Sheller Committee considered the current process of proscription and recommended, inter alia, that the process be reformed to:[154]

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

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

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

184. Amnesty and the HRLRC are disappointed that none of these recommendations have been implemented in the NSL Review. Amnesty and the HRLRC strongly urge the government to adopt the recommendations of the Sheller Committee to safeguard the rights of affected organisations and members to procedural fairness and to increase transparency and public confidence in the decision making process. There is presently no right to procedural fairness protected in Division 102 of the Criminal Code Act.

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

186. The NSL review proposes to increase the expiration of listing periods from 2 years to 3 years. Amnesty and the HRLRC are particularly concerned about this proposal in absence of any mechanism to review the merits of the Attorney-General's decision.

9.4 Association with a 'Terrorist Organisation'

187. Under section 102.8 of the Criminal Code it is an offence to associate with a member of a terrorist organisation or a person who promotes or directs the activities of such an

---

CAT/C/AUS/CO/1, 15 May 2008, [10].

organisation. This offence directly limits the freedom of association protected in article 21 of the ICCPR. Amnesty and the HRLRC share the concerns of the Australian Human Rights Commission that 'section 102.8 lacks precision and clarity, and is extremely broad in its reach, which may contravene the requirement for proportionality.' [155]

Case Study

X is of Tamil origin and hosts a Tamil radio program on a community radio station. Under Australian law, the Liberation Tigers of Tamil Eelam (**LTTE**) would fall within the legal definition of a 'terrorist organisation'. X has observed that, in the prosecution of two Tamil-Australians in relation to their links with the LTTE, part of the prosecution case was that the defendants held political materials relating to the plight of Tamils in Sri Lanka. X is therefore reluctant to speak about matters relating to the situation in the north-eastern region of Sri Lanka in his radio program for fear of being linked with the LTTE and for fear that political commentary might be used to incriminate him. He therefore avoids speaking about Sri Lankan politics on his radio program altogether.[156]

188. Amnesty, the HRLRC and the Human Rights Commission are not alone in their serious concerns about of this offence. In 2004 the Senate Legal and Constitutional Committee (**SLCC**) reviewed the *Anti-Terrorism Bill (No. 2) 2004* and comprehensively examined the offence of association. The SLCC concluded that:

(a) 'the evidence does not persuade the Committee of the need for the offence in the first place, given the already wide ambit of terrorism offences under current law in Australia, the breadth of the definition of 'terrorist organisation' contained in the Criminal Code, and other existing laws…';[157] and

(b) 'the Committee is of the view that the drafting of the offence provision results in its lacking certainty and clarity. The breadth of the offence, its lack of detail and certainty,

[154] Sheller Committee Report, n 17, 9.

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

[156] Case study taken from NGO Submission to the Human Rights Committee, Freedom Respect Equality Dignity: Action, September 2008, available at http://www.hrlrc.org.au/files/HVORKWYX8K/NGO%20Report%20on%20Australia%20to%20HRC%20-%20Final.doc

[157] The Senate Legal and Constitutional Committee (***SLCC***), *Review on the Provisions of the Anti-Terrorism Bill (No. 2) 2004* (August 2004), 45, available at http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/anti_terror_2/report/report.pdf.

along with the narrowness of its exemptions lead the Committee to conclude that serious difficulties would result in it (sic) practical application.' [158]

189. The SLCC recommend substantial amendments to sections 102.8. [159] However, despite SLCC's concerns and recommendations, the government failed to amend section 102.8. Two years later the Sheller Committee considered the operation of section 102.8 and echoed the concerns of the SLCC. The Sheller Committee went one step further and recommended that the offence be repealed. [160]

190. Amnesty and the HRLRC are disappointed that, despite the unequivocal recommendations of the SLCC and the Sheller Committee, the government refuses to, at the very least, amend section 102.8. Amnesty and the HRLRC strongly recommend the government implement the recommendation of the Sheller Committee by repealing section 102.8.

Recommendation 16:

Amnesty and the HRLRC consider that the control order and preventative detention order regimes be reviewed immediately in order to bring those provisions in line with Australia's international human rights obligations.

[158] The Senate Legal and Constitutional Committee (***SLCC***), *Review on the Provisions of the Anti-Terrorism Bill (No. 2) 2004* (August 2004), 45, available at http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/anti_terror_2/report/report.pdf. 45 and 46.

[159] The SLCC recommended that: the terms "membership", "associated", "support", "promotes", and "family or domestic concern" used in section 102.8 be defined in the Criminal Code; the provisions retaining to the presumption against bail in the *Anti-Terrorism Bill (No.2) 2004* not apply to section 102.8; the exemption in section 102.8(4)(d) be extended to cover religious practice in places other than public places being used for religious worship; and the exemption in section 102.8(4)(d) be amended to ensure that access to legal advice required to meet the obligations and exercise the rights in broader anti-terrorism legislation is permitted.

[160] Sheller Committee Report, n 17, 133.

Recommendation 17:

Amnesty and the HRLRC consider that ASIO's detention powers be reviewed immediately to ensure that they comply with the right to a fair trial and to be free from arbitrary detention, including:

(a) amendment to the maximum period of time a person may be detained under section 34S the ASIO Act such that a person may never be detained for more than 48 hours without independent judicial review;

(b) repeal of sections 34F(6) and 34G(2) of the ASIO Act to prevent detention periods being extended indefinitely through 'rolling warrants'; and

(c) repeal of secrecy provisions in the ASIO Act.

Recommendation 18:

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

Recommendation 19:

Amnesty and the HRLRC consider that the offence of associating with a terrorist organisation under section 102.8 of the Criminal Code be repealed.