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

Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Committee

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Australian Human Rights Commission
ABN 47 996 232 602

Level 8 Piccadilly Tower
133 Castlereagh Street
Sydney NSW 2001

GPO Box 5218
Sydney NSW 2001

General enquiries 1300 369 711
Complaints infoline 1300 656 419
TTY 1800 620 241
www.humanrights.gov.au

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Senate Legal and Constitutional Affairs Committee in its Inquiry into the National Security Legislation Amendment Bill 2010 (the Bill) and the Parliamentary Joint Committee on Law Enforcement Bill 2010.

2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution.

3. Governments have an obligation to enact counter-terrorism measures to protect the community. However, where these measures impact upon human rights and fundamental freedoms, they must be necessary and proportionate to their goal.

4. The Commission remains concerned that some provisions in the existing national security legislation regime undermine human rights. The Bill fails to deliver a comprehensive response to the following five separate parliamentary reviews of these provisions:

    - The inquiry of the Hon John Clarke QC into the case of Dr Mohamed Haneef (the Clarke Report);[1]
    - The Report of the Security Legislation Review Committee (the Sheller Report);[2]
    - The inquiry of the Parliamentary Joint Committee on Intelligence and Security into the proscription of 'terrorist organisations' (the PJCIS Proscription Report);[3]
    - The Parliamentary Joint Committee on Intelligence and Security review of security and counter-terrorism legislation (the PJCIS Review Report);[4] and
    - The Australian Law Reform Commission's review of sedition laws in Australia (the ALRC Report).[5]

5. While the Commission welcomed the opportunity to contribute to the Attorney-General's Department 2009 National Security Legislation Discussion Paper (AGD discussion paper)[6], the Explanatory Memorandum to the Bill contains limited explanation for the legislative choices evident in the Bill. Further, there appears to be little movement from the position proposed in the

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[1] The Hon John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008).
[2] *Report of the Security Legislation Review Committee*, (June 2006)
[3] Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (September 2007).
[4] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006).
[5] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report no 104 (2006).
[6] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009).

AGD discussion paper despite the number of submissions received outlining concerns with the proposals.[7]

6. The Commission therefore urges the Committee to seize this opportunity to ensure the Bill amends the national security legislation regime so that it is a more effective and proportionate response to the threat of terrorism in Australia.

7. The Commission notes that the Bill has been referred to the Committee for inquiry because:

> A thorough examination is required of what adjustments have been made. The process of reviewing and amending these laws needs to contrast starkly with the undue haste with which the anti-terrorism laws were passed in the highly politically charged post-September 11 environment. An inquiry into the changes offers an opportunity to examine if the laws remain necessary, effective and proportional to the extant threat.[8]

8. While the Commission supports many of the Bill's proposed amendments, in the Commission's view the Bill does not go far enough to restore the balance between the protection of national security and the protection of basic human rights, such as liberty, which are fundamental to our democracy.

9. Further, the Commission is particularly concerned that the Bill yet again increases the broad powers available to police to investigate terrorism offences.

2 Summary

10. The Commission's submission focuses on the human rights implications of the Bill's proposals to:

- Amend the pre-charge detention regime (sch 3 of the Bill);
- Insert a right of appeal in the bail provisions (sch 6 of the Bill);
- Broaden police search powers (sch 4 and 5 of the Bill);
- Amend the treason & urging violence offences (sch 1 of the Bill); and
- Amend the terrorism organisation offences (sch 2 of the Bill).

11. The Commission also notes that many of the proposed amendments to the terrorist organisation offences discussed in the AGD discussion paper have not been included in the Bill.

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[7] See: Attorney –General's Department, 'Submissions to the National Security Legislation Public Consultation',http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Nationalsecuritylegislation-Publicconsultation_SubmissionstotheNationalSecurityLegislationPublicConsultation, (viewed 4 May 2010).

[8] Selection of Bills Committee, Parliament of Australia, Report No 6 of 2010 (2010), Appendix 3.

12. The submission therefore sets out the Commission's concern that the terrorist organisation offences in the national security legislation regime remain problematic and in need of urgent reform.

13. The submission also highlights:

- Concerns in relation to the Parliamentary Joint Committee on Law Enforcement Bill 2010 establishing the Parliamentary Joint Committee on Law Enforcement; and

- Significant aspects of the national security legislation regime that should be scheduled for urgent review.

3 Recommendations

The Commission recommends:

Recommendation 1:

- Repeal proposed ss 23DB(9)(m) and as a consequence, also repeal ss 23DB(11), 23DC and 23DD;

- Repeal proposed s 23DB(9)(f), (g), (h), (i) and (k); and

- Amend proposed s 23DF(7) so that the maximum time an investigation can be extended by is four days subject to any further time as required by the court to dispose of an application under ss 23DE, 23WU or 23XB.

Recommendation 2: Alternatively, if the Committee recommends that s 23DB(9)(m) be repealed but s 23DB(9)(f), (g), (h), (i) and (k) be retained, the maximum time for an extension of the investigation period under proposed s 23DF(7) should be no more than three days.

Recommendation 3: Alternatively, if proposed s 23DB(9)(m) is retained, it should be capped under proposed s 23DB(11) at no more than 48 hours.

Recommendation 4: Amend proposed ss 23DC(4) or 23DE(3) to include as a requirement that an investigating official include a statement about the steps taken to progress the investigation.

Recommendation 5: Delete proposed ss 23DC(5) and 23DE(4). The Commission notes that to address any national security concerns, a Magistrate could have the discretion to withhold any sensitive information identified in these provisions from a detainee and their legal representative.

Recommendation 6: Delete proposed s 23DC(4)(e)(i) of the *Crimes Act 1914* (Cth).

Recommendation 7: Amend s 23DB(2)(b) to refer to a 'belief on reasonable grounds' and insert a clause that amends s 23C(2)(b) to also refer to 'belief on reasonable grounds'.

Recommendation 8: Repeal s 15AA of the *Crimes Act 1914* (Cth) or define 'exceptional circumstances'.

Recommendation 9: Amend proposed s 3UEA of the *Crimes Act 1914* (Cth) as follows:

- Change 'suspects' in sub-s (1) to 'believes';
- Delete sub-ss (3) and (4); and
- In sub-s (5):
    - Change 'suspects' to 'believes';
    - Insert the words 'reasonably necessary' after 'anything'; and
    - Amend (a) to read 'in order to protect a person from a serious and imminent threat to a person's life, health and safety'.

Recommendation 10: Include an ex post facto warrant procedure in proposed s 3UEA of the *Crimes Act 1914* (Cth).

Recommendation 11: Amend s 3UF(3) of the *Crimes Act 1914* (Cth) to ensure a seizure receipt includes a description of any items taken from the premises (rather than from a person) or destroyed or damaged on the premises where relevant to a particular search.

Recommendation 12: Amend proposed s 3UEA of the *Crimes Act 1914* (Cth) to include a system of authorisation and supervision by police officers with the rank of Superintendent or above.

Recommendation 13: Amend sch 5 of the Bill as follows:

- Delete proposed s 3J(2)(aa) of the Bill.
- In proposed s 3JA(c), change '12 hour period mentioned in paragraph 3J(2)(aa)' to 'one hour period mentioned in 3J(2)(a)'.
- Amend proposed s 3JA(3) so that it reads:

> (3) If an application mentioned in subsection (1) has been made, an issuing officer may extend the period during which the executing officer and constables assisting may be away from the premises
>
> > (a) for not more than 12 hours if there is an emergency situation and an issuing officer is satisfied by information on oath or affirmation that because of the emergency situation, the constables assisting will not be able to return to the premises within 1 hour; or
> >
> > (b), a period longer than 12 hours if there is an emergency situation and an issuing officer is satisfied by information on oath or affirmation, that there are exceptional circumstances that justify a period longer than 12 hours.

> (4) an issuing officer can grant more than one application to extend the period during which the executing officer and constables assisting may be away from the premises under subsection (3) provided any one extension would not result in the period ending after the expiry of the warrant.

Recommendation 14: Applications to the issuing officer under proposed s 3JA(3) of the *Crimes Act 1914* (Cth) should be kept in a register and made available for inspection to the proposed Parliamentary Joint Committee on Law Enforcement.

Recommendation 15: Insert a provision into the Bill or the Parliamentary Joint Committee on Law Enforcement Bill 2010, which provides the Parliamentary Joint Committee on Law Enforcement with a specific function to review and report on the exercise of police powers under proposed ss 3UEA, 3J(2)(a) and 3JA of the *Crimes Act 1914* (Cth).

Recommendation 16: Insert a clause similar to proposed s 80.1AA(1)(f) and (4)(e) into s 80.1 of the Criminal Code.

Recommendation 17: Insert a new sub-s (2A) into s 80.1AA of the *Criminal Code* (Cth) that requires an announcement in all national media outlets that a proclamation referred to in s 80.1AA(2) has been made as soon as reasonably practicable after a proclamation has been made.

Recommendation 18: Relocate proposed ss 80.2A(2) and 80.2B(2) into ch 9 of the Criminal Code, entitled 'Dangers to the Community'.

Recommendation 19: Replace the term 'urges' in proposed ss 80.2A(2) and 80.2B(2) of the *Criminal Code* (Cth) with 'incites'.

Recommendation 20: Amend ss 80.2A(2) and 80.2B(2) of the *Criminal Code* (Cth) to replace the element that 'the first person does so intending that force or violence will occur' with the element 'that the force or violence is reasonably likely in the circumstances'.

The Commission notes that this recommendation could be applied to s 80.2 as well as proposed ss 80.2A(1) and 80.2B(1).

Recommendation 21: Implement recommendation 12-2 of the ALRC Report by either:

a) inserting new ss 80.2A(6) and 80.2B(4A) into the *Criminal Code* (Cth) as follows:

> When determining whether a person intentionally urges another person or group to use force or violence against a group, the court may have regard to any relevant matter, including whether the acts were done
>
> (a) in the development, performance, exhibition or distribution of an artistic work; or
>
> (b) 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; or
>
> (c) in the dissemination of news or current affairs.

The Commission notes that the same provision could be used for determining whether a person 'intends force or violence to occur'.

b) Alternatively, if the Committee recommends including an element that 'the force or violence is reasonably likely to occur in the circumstances' in ss 80.2A and 80.2B of the Criminal Code, then including the following paragraph:

> These circumstances may include:
>
> (a) whether the acts were done in the development, performance, exhibition or distribution of an artistic work; or
>
> (b) whether the acts were done 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; or
>
> (c) whether the acts were done in the dissemination of news or current affairs.

These recommendations could also be applied to s 80.2 as well as proposed ss 80.2A(1) and 80.2B(1).

Recommendation 22: If Recommendation 21 is accepted, proposed s 80.3(3) of the *Criminal Code* (Cth) should not apply to proposed ss 80.2, 80.2A and 80.2B of the Criminal Code.

Recommendation 23: Delete proposed ss 80.2A(1) and 80.2B(1) of the *Criminal Code* (Cth).

Recommendation 24: Remove from the Bill proposed s 102.1.3 of the Criminal Code. Amend s 15A of the *Charter of the United Nations Act 1945* (Cth) to provide for a two year review. Allow both of these decisions to be reviewable under the *Administrative Appeals Tribunal Act 1975* (Cth).

Recommendation 25: Remove the term 'indirectly' from s 102.1(1A)(a) and (b) of the Criminal Code.

Recommendation 26: Insert a definition into the *Criminal Code* (Cth) that defines when an organisation and not just one of its members is 'advocating'.

Recommendation 27: Insert a subsection that states an organisation advocates the doing of a terrorist act only if it does one of the acts in s 102.1(1A) (a) or (b) intending its advocacy to persuade others to do terrorist acts.

Recommendation 28: Repeal s 102.1(1A)(c) of the Criminal Code.

Recommendation 29: Remove the term 'indirectly' from s 9A(2) and repeal s 9A(2)(c) from the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

Recommendation 30: Remove 'threat of action' from the definition of 'terrorist act' in s 100.1 of the *Criminal Code*.

Recommendation 31:

(a) Scrutinise the Government's position in relation to not being able to amend s 102.7 of the *Criminal Code* (Cth) without the States amending their referral legislation;

(b) If the Committee is satisfied that an amendment to the States referral legislation is not required, the Committee recommend that s 102.7 of the *Criminal Code* (Cth) be amended as follows:

- Clarify that the support provided must be 'material' and that the material support must be provided by the person with the 'intention that the support helps the organisation engage in a terrorist act'.

- Define the term 'support' to exclude the publication of views that appear to be favourable to a terrorist organisation and its stated objectives.

Recommendation 32: Amend s 102.5 of the *Criminal Code* (Cth) in accordance with the recommendations of the Sheller Committee and the PJCIS Review:

- Define 'training' to mean training that is connected with a terrorist act or that training that could reasonably prepare the organisation or person receiving the training, to engage in, or assist with, a terrorist act; and

- Repeal the element of strict liability in sub-s (3).

Recommendation 33: Repeal ss 102.5(1)(c) and (4) of the *Criminal Code* (Cth) and replace them with the following:

At the time of providing the training:

- the person has knowledge that the organisation is a terrorist organisation; and

- either the person providing the training intends that the person receiving the training will commit a terrorist act; or the person receiving the training intends to commit a terrorist act.

Recommendation 34: Refer the offences of membership, funding and financing of terrorist organisations to the Legislation Monitor for review as a matter of urgency.

Recommendation 35: Amend proposed s 7 of the Parliamentary Joint Committee on Law Enforcement Bill 2010 to include the specific function of monitoring and reporting on how the exercise of any national security legislation powers interferes with human rights.

Recommendation 36: Repeal ss 8(2)-(6) and 9(2)-(6) of the Parliamentary Joint Committee on Law Enforcement Bill 2010 and replace with provisions that penalise members and staff of the PJC Committee for disclosing any sensitive information.

Recommendation 37: Remove subs-s (h) and (k) from the definition of 'sensitive information' in proposed s 3 of the Parliamentary Joint Committee on Law Enforcement Bill 2010.

Recommendation 38: Insert a provision into the Bill that refers the below provisions to the Legislation Monitor for review:

- Preventative detention orders – proposed to be reviewed by the Council of Australian Governments (COAG);[9]
- Control orders - proposed to be reviewed by COAG;[10]
- Police powers to stop, search and seize in 'prescribed security zones' and Commonwealth places - proposed to be reviewed by COAG;[11] and
- Proscription of terrorist organisations – proposed to be reviewed by COAG.

4 Pre-Charge detention

4.1 Time limits

(a) The current regime

14. As highlighted by the Clarke Report, pt IC of the *Crimes Act 1914* (Cth) (Crimes Act) currently provides the Australian Federal Police (AFP) with the power to arrest and detain a person, without a warrant, for an indefinite period of time, while the AFP investigates whether the person committed a terrorism offence.

15. Under this regime, Dr Haneef was detained for 12 days without charge.[12]

16. The current regime operates by providing that a person can be arrested for a terrorism offence until the 'investigation period' expires.[13] The default investigation period for terrorism offences is 4 hours.[14]

17. There are two separate mechanisms for extending the 'investigation period'.

18. The first mechanism is the 'extension of investigation mechanism'. Under this mechanism, applications can be made to a judicial officer to extend the investigation period, any number of times, to a total period of 20 hours.[15]

19. The second mechanism is the 'disregarded time mechanism'. This second mechanism allows for both:

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[9] Details and process for Council of Australian Governments' (COAG) review of counter-terrorism legislation', Council of Australian Governments' Meeting (10 February 2006), Attachment G. At <http://www.coag.gov.au/coag_meeting_outcomes/2006-02-10/docs/attachment_g_counter_terrorism.rtf>, (viewed 28 April 2010).
[10] COAG above.
[11] COAG above.
[12] See the Clarke Report.
[13] See *Crimes Act 1914* (Cth) s 23CA.
[14] See *Crimes Act 1914* (Cth) s 23CA(4).
[15] See *Crimes Act 1914* (Cth) s 23DA(7) and proposed ss 23DE and 23DF.

- Certain specified time to be disregarded when calculating the investigation period[16] (specified disregarded time); and

- Applications to be made to a judicial officer to authorise further time that may be disregarded from the investigation period[17] (unspecified disregarded time).

20. There is currently no limit to the amount of time which can be disregarded from the investigation period nor is there any limit on the number of times an application to disregard time from the investigation period can be made.

21. The current regime in pt IC, div 2 of the Crimes Act is complex and, as demonstrated by the Clarke Report's findings, causes police officers considerable practical difficulties.[18]

(b) Changes proposed by the Bill

22. Item 16 of schedule 3 of the Bill proposes to insert s 23DB(11) into the Crimes Act. This proposed subsection will cap at 7 days the period that may be authorised under the unspecified disregarded time mechanism in proposed s 23DB(9)(m).

23. This will set the limit on the maximum length of detention at 8 days[19] plus any further time disregarded under the specified disregarded time mechanism in proposed s 23DB(9)(a)-(l) of the Crimes Act.

(c) Human rights concerns

24. The Commission recognises that the Government has created counter-terrorism offences in furtherance of its duty to protect citizens from violence and to protect citizens' right to security.[20]

25. The Commission also acknowledges that investigation of terrorism offences may raise particularly complex issues as well as practical difficulties, such as where events are international in their scope.

26. However, where measures adopted by Governments to pursue a legitimate public purpose or to protect rights interfere with other rights, there must be careful scrutiny of the measures to ensure they are proportionate, justified and the least restrictive on these other human rights.

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[16] See *Crimes Act 1914* (Cth) s 23CA(8)(a)-(l).
[17] See *Crimes Act 1914* (Cth) ss 23CA(8)(m) and 23CB.
[18] Clarke Report, 283 and ch 3, 45-80.
[19] Seven days under proposed s 23DB(11) plus 24 hours under the extension of investigation mechanism.
[20] Article 9 of the ICCPR protects both the right to liberty and the right to security of the person. See also art 3 of the Universal Declaration of Human Rights and art 5(1) of the European Convention on Human Rights.

27. Of particular concern in relation to the power to detain a person prior to being charged is the right not to be arbitrarily detained under art 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).[21] In order to avoid a violation of this right, the length of time for which a person can be detained must be necessary, limited and proportionate.[22]

28. Further, art 9(3) of the ICCPR specifically provides:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

29. The Human Rights Committee has commented:

> 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.[23]

30. Pre-trial detention should be an exception and as brief as possible. While each case will ultimately depend on its particular facts, a delay of more than a few days in bringing a person before a judge or other judicial officer is likely to breach art 9(3) of the ICCPR unless the detention can be justified as necessary.[24]

31. Article 5.3 of the *European Convention on Human Rights* (ECHR) protects liberty in similar terms to art 9(3) of the ICCPR. It provides:

> Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power.

32. The ECHR authorities establish that in order to fulfil a State's obligation to bring a detainee promptly before a judge or judicial officer, that judge or judicial officer must review the lawfulness of the detention.[25]

33. In *Ipek and Others v Turkey*,[26] the Court observed that art 5.3 requires

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[21] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999UNTS 171 (entered into force 23 March 1976 except Article 41 which came into force on 28 March 1979).
[22] See for example *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway*, Communication No 631/1995, UN Doc CCPR/C/67/D/631/1995; *C v Australia* Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 and *Baban v Australia*, Communication No 1014/2001, UN Doc CCPR/C/78/D/1014/2001.
[23] UN Human Rights Committee, General Comment 8: Right to liberty and security of persons (Art 9), UN Doc 30/06/82, (1982), [2].
[24] *Borisenko v Hungary,* Case No. 852/1999 (A/58/40), *Freemantle v Jamaica*, Case No. 625/1995 (A/55/40, *Nazarov v Uzbekistan*, Case No. 911/2000 (A/59/40), *Kennedy v Trinidad and Tobago*, Case No. 845/1998 (A/57/40).
[25] *Samoila and Cionca v Romania*, No 33065/03, (04.03.2008).

> that an arrested individual be brought promptly before a judge or judicial officer, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty.
>
> While promptness has to be assessed in each case according to its special features, the strict time constraint imposed by this requirement of Article 5.3 leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual, and the risk of impairing the very essence of the right protected by this provision.[27]

34. In *Ipek*, the Court commented that even though the investigation of terrorism offences undoubtedly presents authorities with particular problems, this does not mean that investigating authorities have *carte blanche* whenever they choose to assert that terrorism is involved.[28] The Court also stated that while each case is determined on its facts, it has held on many occasions that the prima facie strict time limit constraint imposed for detention without judicial control is a maximum of four days.[29]

35. In the case of *Brogan v United Kingdom*,[30] the Court held that the detention of a terrorist suspect which lasted for 4 days and 6 hours, without judicial control, breached the requirement for 'promptness' in art 5.3 of the ECHR. The Court emphasised

> that the significance to be attached to the special features of a case can never be taken to the point of impairing the very essence of the right guaranteed by Article 5.3, that is to the point of effectively negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority.[31]

36. In particular, the Court noted that the 'undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5.3'.[32]

37. Therefore, by ensuring that the pre-charge detention of persons suspected of terrorism offences is necessary and for a limited and proportionate period of time, the Government is able to balance its obligations to protect both the right to security and the right to liberty under the ICCPR.

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[26] *Ipek v Turkey* (2009) Eur Court HR (2nd Section) (unreported). Applications nos 17019/02 and 30070/02 (3 May 2009).
[27] *Ipek v Turkey* (2009) Eur Court HR (2nd Section) (unreported). Applications nos 17019/02 and 30070/02 (3 May 2009), [34] (references omitted).
[28] *Ipek v Turkey* (2009) Eur Court HR (2nd Section) (unreported). Applications nos 17019/02 and 30070/02 (3 May 2009), [35].
[29] *Ipek v Turkey* (2009) Eur Court HR (2nd Section) (unreported). Applications nos 17019/02 and 30070/02 (3 May 2009), [36].
[30] *Brogan v United Kingdom* (1989) 11 Eur Court HR (ser A) 117.
[31] Cited in *McKay v United Kingdom* (2007) 44 Eur Court HR 41, 827 and *Koster v Netherlands* (1992) 14 Eur Court HR (ser A) 396.
[32] *Brogan v United Kingdom* (1989) 11 Eur Court HR (ser A) 117, [62].

38. It is in this context that the Commission makes the following submissions on the proposals in sch 3 of the Bill that will, if passed, amend pt 1C, div 2 of the Crimes Act.

(d) Amendments required to achieve an appropriate balance

39. The Commission supports the capping of the investigation period in Part 1C of the Crimes Act.

40. However, the Commission submits that the Bill's proposal to limit the maximum length of detention at eight days plus any further time to be disregarded under the specified disregarded time mechanism remains too high.

41. Further, the Bill leaves in place the complex and overlapping dual mechanisms for extending the investigation period and does not restrict the categories of specified disregarded time. In the Commission's view the overlap and complexity in the two mechanisms reduces the possibility for effective oversight.

42. The Commission is therefore concerned that there is still scope for a person to be detained for an unjustified and disproportionate period of time under the new scheme proposed by the amendments in sch 3 of the Bill.

43. The Clarke Report highlights the need to remedy the deficiencies in pt 1C of the Crimes Act 'not only to limit the length of detention but also to ensure that an investigation is carried out expeditiously and with a sense of the need to act with urgency'.[33]

44. The Commission therefore proposes amendments to the Bill that strike a better balance between the AFP's investigation needs in terrorism cases and an individual's right to liberty.

(i) Remove mechanism to disregard further time under proposed ss 23DB(9)(m) of the Crimes Act

45. The Commission submits that proposed ss 23DB(9)(m) and 23DC of the Crimes Act be removed from the Bill.

46. Proposed s 23DB(9)(m) replicates s 23CA(8)(m) of the Crimes Act and provides for a Magistrate to authorise further time that may be disregarded when calculating the investigation period.

47. In the Commission's view, this mechanism overlaps with the mechanism to extend the period of investigation time provided for in proposed ss 23DE and 23DF of the Crimes Act. This view is supported by the Clarke Report:

[33] Clarke Report, 249.

> It is not accurate to describe the s 23CA(8)(m) dead time as dead time. Rather it is additional investigation time, and the only reason questioning is suspended during that time is because the section so permits.[34]

48. Having two separate mechanisms that in substance both deal with extensions of investigation time increases the complexity of the scheme. This additional complexity reduces the possibility of effective oversight.

49. In the Commission's view, all applications to extend the investigation time should be dealt with under a single legislative mechanism.

50. A single mechanism to extend investigation time would reduce the complexity of these provisions considerably, simplify and streamline the application process for the AFP and would probably reduce the amount of time lost to making and disposing of applications during crucial investigation time.

51. This approach is supported by the Clarke Report:

> It follows, in my opinion, that there is a strong argument that ss 23CA(8)(m) and 23CB should be removed from the Crimes Act: in lieu thereof all applications for extended time would be made under s 23DA, with a reconsideration of the time limit.[35]
>
> …
>
> Section [23CA(8)(m)] is quite out of place in the dead-time provisions and is better positioned for consideration as investigation time in s 23DA or reinstated as originally proposed in the Bill.[36]

52. The Commission shares Clarke's view that 'provisions allowing for further investigation time beyond the statutory four hours should be made as simple as possible in order to limit the risk of police being distracted from the investigative process'.[37]

53. The Commission therefore recommends that proposed ss 23DB(9)(m) of the Crimes Act be removed from the Bill.

(ii) Remove procedural aspects of the specified disregarded time mechanism under s 23DB(9)(f),(g),(h),(i) and (k)

54. The Commission is also of the view that the acts listed in proposed s 23DB(9)(f),(g),(h),(i) and (k) are so closely connected with investigation time that they should also be dealt with under the mechanism to extend investigation time in proposed ss 23DE and 23DF.

55. The procedural investigation acts in proposed s 23DB(9) are:

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[34] Clarke Report, 246.
[35] Clarke Report, 246.
[36] Clarke Report, 249.
[37] Clarke Report, 250.

- (f) – to allow for an identification parade to be arranged and conducted;
- (g) – to allow for the making of an application under s 3ZQB or the carrying out of a prescribed procedure to determine a person's age;
- (h) – to allow the making and disposing of an application under ss 23DC (disregard time), 23DE (extend investigation time), 23WU (carry out a forensic procedure) or 23XB (apply for an interim order to carry out a forensic procedure without delay);
- (i) – to allow a constable to inform the person of matters specified in s 23WJ (information relevant to consent to a forensic procedure); and
- (k) – to allow a forensic procedure to be carried out on the person by order of a Magistrate under div 5 of pt ID.

56. Some of these activities could authorise significant extensions of the investigation period. For example, the Clarke Report found that in the case of Dr Haneef, it was thought that a further 48 hours could technically be disregarded from the investigation period for the purpose of allowing the Magistrate to dispose of one of the AFP's applications to disregard time.[38]

57. Proposed s 23DB(10) expressly permits questioning, where possible, during periods that might otherwise be disregarded, however, time may still be disregarded when it is reasonable for questioning to be suspended or delayed.

58. While it is possible for a detainee to challenge the reasonableness of any delay, in the Commission's view, this is not an adequate safeguard because it is only available after a person may have been unreasonably detained.

59. Dealing with the procedural aspects of any investigation as part of the extension of investigation mechanism would mean that all acts that relate to the investigation would be dealt with under the same legislative mechanism. The disregarded time mechanism would then only apply to time spent while the detainee accesses his or her rights, such as waiting for a lawyer to arrive or while resting.

60. The Explanatory Memorandum cites the following as reasons for retaining the procedural aspects of the investigation under sub-ss (f), (g),(h),(i) and (k) in the disregarded time mechanism in proposed s 23DB(9) of the Crimes Act:

    - To prevent a situation where the investigation period runs out while a judicial officer is considering whether to grant an extension of the investigation period; or

[38] Clarke Report, 76, 82 and 262.

- Where it may be impractical to question a person during the time that is spent arranging and conducting an investigation parade.[39]

61. In relation to proposed s 23DB(9)(h), the Commission notes that the Clarke Report states:

> Ideally, an application should be disposed of promptly, after any representations have been made by the investigating official and the arrested person. It should be in exceptional circumstances only that a magistrate or other issuing official should reserve their decision on the application or adjourn the application for any lengthy period.[40]

62. The Commission is of the view that a preferable way to deal with these exceptional circumstances is to provide for this possibility in the extension of investigation procedure in proposed ss 23DE and 23DF of the Crimes Act.

63. In relation to the possible delay due to sub-ss (f), (g), (i) and (k), (including while arranging and conducting an identification parade), the Commission is of the view that a single mechanism dealing with both the procedural and substantive aspects of the investigation will be simpler for the AFP to use. The increased simplicity in the scheme will reduce the likelihood of confusion and provide greater judicial oversight over the whole investigation period.

64. The Commission considers that the same amendments should be applied to the provisions dealing with non-terrorism offences in proposed s 23C(7) of the Crimes Act.

(iii) Cap on time to be disregarded under s 23DB(11) of the Crimes Act

65. As discussed above, the Bill's proposal to introduce s 23DB(11) into the Crimes Act, will cap the unspecified category of time that may be disregarded when calculating the investigation period at seven days.

66. The period of seven days appears to be linked to Clarke's comment that:

> if pressed – and having regard to Dr Haneef's detention in circumstances where the overseas involvement created time problems generally for the investigation – I would tend to say the cap should be no more than seven days.[41]

67. The Commission notes the very tentative nature of this comment. Indeed, Clarke stated that he did not understand his task as requiring him 'to put forward a specific recommendation as to the allowable time'.[42]

68. Having regard to the international case law cited above, the findings of the Clarke Report and the particular legislative scheme provided for in the Crimes

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[39] See Explanatory Memorandum, National Security Legislation Amendment Bill 2010, 32, which refers to the explanation of the two categories of time that may be disregarded from the investigation period that apply to both terrorism and non-terrorism offences on 25.
[40] Clarke Report, 70.
[41] Clarke Report, 249.
[42] Clarke Report, 249.

Act, the Commission is of the view that the maximum length of pre-charge detention should be capped at four days plus any time that may be disregarded for the benefit of the detainee.

69. As explained above, the Commission considers that all extensions of the investigation period beyond four hours should be dealt with under a single mechanism to extend time – the extension of investigation mechanism. Further, those activities closely related to the investigation currently dealt with under the specified disregarded time mechanism should be dealt with under the extension of investigation mechanism.

70. If the Committee recommends these reforms, the extension of investigation mechanism should be capped at four days.

71. Alternatively, if the Committee recommends that there should be a single mechanism to extend time but the categories of specified disregarded time remain unchanged, the extension of investigation mechanism should be capped at three days. This is because the recommended period of four days above takes into account some categories of time that could otherwise be reasonably disregarded under the specified disregarded time mechanism.

72. However, if the Committee concludes that the dual extension mechanisms and all the categories of specified disregarded time should be retained, the Commission urges that the unspecified disregarded time mechanism should be capped at no more than 48 hours.

73. This is because the total maximum length of permissible detention would still be three days (made up of 24 hours extended investigation time plus 48 hours of authorised unspecified disregarded time) plus any extra time that may be reasonably disregarded under all the existing categories of specified disregarded time.

74. The Commission is of the strong view that should the scheme retain its complexity, the cap on unspecified disregarded time in proposed s 23DB(11) must be capped at 48 hours.

Recommendation 1:

- Repeal proposed ss 23DB(9)(m) and as a consequence, also repeal ss 23DB(11), 23DC and 23DD;
- Repeal proposed s 23DB(9)(f), (g), (h), (i) and (k); and
- Amend proposed s 23 DF(7) so that the maximum time an investigation can be extended by is four days subject to any further time as required by the court to dispose of an application under ss 23DE, 23WU or 23XB.

Recommendation 2: Alternatively, if the Committee recommends that s 23DB(9)(m) be repealed but s 23DB(9)(f), (g), (h), (i) and (k) be retained, the maximum time for an extension of the investigation period under proposed s 23DF(7) should be no more than three days.

Recommendation 3: Alternatively, if proposed s 23DB(9)(m) is retained, it should be capped under proposed s 23DB(11) at no more than 48 hours.

4.2 The application procedures

75. As stated above, the Commission recommends that s 23DB(9)(m) be removed from the Bill. It follows that the Commission also recommends that ss 23DC and 23DD be removed from the Bill, as these provisions deal with the application for and the grant of unspecified time to be disregarded from the investigation period.

76. However, in the event that ss 23DB(9)(m), 23DC and 23DD are retained, the Commission makes the following comments relevant to the application and grant procedures set out in both:

    - The disregarded time mechanism (ss 23DC and 23DD); and
    - The extension of investigation mechanism (ss 23E and 23DF).

(a) Improved safeguards

77. The Commission considers judicial oversight over the application for and grant of extensions of the investigation period to be a vital safeguard.

78. The Commission therefore supports the proposals to restrict the hearing and grant of applications to extend time under both mechanisms to a Magistrate. Previously applications could also be heard by justices of the peace or a bail justice.[43]

79. However, a Magistrate hearing and determining applications for extensions of time is, of itself, an insufficient safeguard.[44] The Commission therefore also supports the following improved safeguards in the application process for both mechanisms proposed by sch 3 of the Bill:

    - That an application under both mechanisms must be made in writing under proposed ss 23DC(2) and 23DE(1);
    - That applications under both mechanisms must first be authorised by an 'authorising officer' under proposed ss 23DC(3) and 23DE(2); and
    - That a copy of the applications or an instrument in relation to disregarded time or extensions of the investigation period respectively must be given to the detainee and his or her legal representative under proposed ss 23DC(6), 23DD(6), 23DE(5) and 23DF(6).

80. The Commission is concerned that the proposed safeguard that applications be made in writing for terrorism offences is not proposed to be included for

[43] *Crimes Act 1914* (Cth), ss 23CA(10), 23CB(3), 23DA(2).
[44] Clarke Report, 81.

non-terrorism offences in proposed s 23D(2) of the Crimes Act. There does not seem to be any valid reason for including this safeguard for terrorism offences and not non-terrorism offences.

81. Further, the Commission recommends that the following additional safeguards for terrorism offences also be implemented.

(b) All relevant information should be before the Magistrate

82. In addition to the safeguards proposed by sch 3 of the Bill, Magistrates must have access to all relevant information in order to play an effective oversight role.

83. In particular, the Commission notes that before a Magistrate may grant an extension, he or she must determine whether 'the investigation into the offence is being conducted properly and without delay' under ss 23DD(2)(d) and 23DF(2)(c) of the Crimes Act.

84. However, there is no requirement in s 23DC(4) or 23DE(3) that obliges an investigating official to include a statement about the steps taken to progress the investigation.

85. This information would greatly assist the Magistrate in his or her task of review.

86. Further, the Commission submits that the national security matters identified in ss 23DC(5) and 23DE(4) should be before the Magistrate when he or she is determining an application under either mechanism to extend the investigation period.

87. To address any national security concerns, provisions could be inserted into the Bill that allow the Magistrate the discretion to withhold sensitive information from the detainee and their legal representative in appropriate circumstances.

(c) Collating and analysing information should not be a ground for justifying an application to disregard time

88. Further, if ss 23DB(9)(m) and 23DC of the Crimes Act are retained, the Commission believes that any reasons used to justify an application to disregard time from the investigation period should be specific to additional time that suspends or delays an investigation due to the nature of a terrorism offence.

89. The Commission notes that an alternative solution posed by Clarke was that s 23CA(8)(m) of the Crimes Act be limited to time-zone differences.[45]

[45] Clarke Report, 258.

90. While the possible grounds for applying for a period of time to be disregarded from the investigation period under proposed s 23DB(9)(m) of the Crimes Act listed under proposed s 23DC(4)(3)(ii)-(iv) are not controversial, the Commission is concerned that the first possible ground is:

> (i) the need to collate and analyse information relevant to the investigation from sources other than the questioning of the person (including, for example, information obtained from a place outside Australia)[.]

91. The collection and analysis of information is an important part of any investigation. The same ground should not be capable of supporting both an application to disregard time and an application to extend time.

92. In this regard, the Commission notes that the maximum extended investigation period for terrorism offences of 24 hours is already 12 hours longer than non-terrorism offences to account for their increased complexity.[46]

93. The Commission restates its position that applications to extend the period of investigation time should be dealt with by a singular legislative mechanism. The Commission submits the most appropriate mechanism for this is the mechanism to extend the investigation period under proposed s 23DE of the Crimes Act.

94. The Commission is therefore of the view that the proposed ground of 'collating and analysing information' in proposed s 23DC(4)(e)(i) should only be used as a ground for the extension of the investigation period under proposed s 23DE of the Crimes Act.

95. The Commission therefore submits that proposed s 23DC(4)(e)(i) should be removed from the Bill.

Recommendation 4: Amend proposed ss 23DC(4) or 23DE(3) to include as a requirement that an investigating official include a statement about the steps taken to progress the investigation.

Recommendation 5: Delete proposed ss 23DC(5) and 23DE(4). The Commission notes that to address any national security concerns, a Magistrate could have the discretion to withhold any sensitive information identified in these provisions from a detainee and their legal representative.

Recommendation 6: Delete proposed s 23DC(4)(e)(i) of the Crimes Act.

4.3 Threshold for state of mind for arresting officer

96. The Commission recommends that the Bill be amended to ensure consistency between the state of mind required to arrest a person without a warrant and that required to continue to hold a person under arrest.

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[46] See *Crimes Act 1914* (Cth), proposed s 23DA(7).

97. Under s 3W(1) of the Crimes Act, an arresting officer must 'believe on reasonable grounds' that a person has committed the offence. Under s 23C(2)(b) and proposed s 23DB(2)(b), an arresting officer need only 'reasonably suspect' that the person committed an offence other than the one for which they were arrested.

98. A reasonable suspicion is a lower threshold than a reasonable belief.[47]

99. The Explanatory Memorandum to the Bill does not explain why the Bill does not amend s 23C(2)(b) or why proposed s 23DB(2)(b) still refers to a 'suspicion' rather than a 'belief'. The AGD discussion paper specifically called for comment on this inconsistency.[48]

100. There does not appear to be any valid reason to distinguish between the power to arrest without warrant under s 3W(1) in relation to a first offence and the power to maintain that arrest under s 23C(2)(b) and proposed s 23DB(2)(b), still without warrant, for a second offence.

101. The Commission therefore recommends that the Committee amend the Bill so that proposed s 23DB(2)(b) refers to a 'belief' rather than a suspicion and to include a clause that amends s 23C(2)(b) to also refer to a 'belief'.

Recommendation 7: Amend s 23DB(2)(b) to refer to a 'belief on reasonable grounds' and insert a clause that amends s 23C(2)(b) to also refer to 'belief on reasonable grounds'.

5 Presumption against bail for terrorism offences

102. The Commission supports the proposed amendments in sch 6 of the Bill, which provide a right of appeal to both the prosecution and the defendant against the grant or refusal of bail under s 15AA of the Crimes Act.

103. However, the Commission is concerned that the Bill leaves s 15AA unchanged and is not satisfied that a right of appeal will remedy the Commission's significant concerns with the presumption against bail in s 15AA of the Crimes Act.

104. Section 15AA of the Crimes Act provides that persons charged with terrorism and other serious or violent offences must not be granted bail except in exceptional circumstances.

5.1 Human rights concerns

105. The Commission is of the view that s 15AA is inconsistent with the right to liberty in art 9(3) of the ICCPR. Article 9(3) provides:

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[47] See *George v Rockett* (1990) 170 CLR 104. For further discussion, see also Clarke Report, 233-234.
[48] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009), [107].

> It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

106. It is the Commission's view that s 15AA of the Crimes Act is a disproportionate interference with the right to liberty under art 9 of the ICCPR as well as the presumption of innocence under art 14(2) of the ICCPR.

107. The UN Human Rights Committee, in its 2009 Concluding Observations on Australia, stated:

> The Committee is particularly concerned at:
>
> (a)….
>
> (b) the reversal of the burden of proof contrary to the right to be presumed innocent;
>
> (c) the fact that "exceptional circumstances", to rebut the presumption of bail relating to terrorism offences, are not defined in the Crimes Act;
>
> …
>
> The State party should ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant…The State party should in particular: (a) guarantee the right to be presumed innocent by avoiding reversing the burden of proof; (b) ensure that the notion of "exceptional circumstances" does not create an automatic obstacle to release on bail.[49]

108. The Commission also notes that Article 5.3 of the ECHR provides in summary that:

> Everyone arrested or detained shall be entitled to trial within a reasonable time or to release pending bail where the arrest and detention is for the purpose of bringing him before a competent legal authority:
>
> - on reasonable suspicion of having committed an offence; or
> - when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.
>
> Release may be conditioned by guarantees to appear for trial.

5.2 Repeal s 15AA of the Crimes Act

109. Given the length of time a person charged with a terrorism offence can lawfully be detained prior to charge under the provisions discussed above, it is deeply worrying that a judge's discretion to grant bail with reference to the individual circumstances of the case is fettered by s 15AA of the Crimes Act.[50]

110. The Commission is not convinced of the need for s 15AA of the Crimes Act and is of the view that it is a disproportionate response to the threat of

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[49] UN Human Rights Committee, Concluding Observations on Australia (2009), UN Document No: CCPR/C/AUS/CO/5, (7 May 2009), [11].

[50] See *Crimes Act 1914* (Cth), s 15AB,

terrorism that is inconsistent with Australia's international human rights obligations under Article 9 and 14 of the ICCPR.

111. In this regard, the Commission notes that requirements to show 'exceptional circumstances can lead to lengthy periods of pre-trial detention.[51]

112. While the Commission's primary position is that s 15AA of the Crimes Act should be repealed, as an alternative, the Commission recommends that 'exceptional circumstances' be defined.

113. A possible definition of 'exceptional circumstances' could come from Coldrey J's judgment in *DPP v Cozzi*.[52] In that case, Coldrey J considered, in the context of the *Bail Act 1977* (Vic), that whether circumstances are 'exceptional' requires that all the circumstances be 'viewed as a whole' and may be exceptional as a result of a 'variety of factors which of themselves might not be regarded as exceptional'.[53]

114. Coldrey J listed a number of circumstances which had previously been found to constitute 'exceptional circumstances', including:

- Strength of the Crown case;
- The question of delay;
- Strong family support;
- Stable accommodation;
- Availability of employment;
- Low risk of flight or re-offending;
- Lack of prior criminal history; and
- Personal situation of the applicant.[54]

Recommendation 8: Repeal s 15AA of the *Crimes Act 1914* (Cth) or define 'exceptional circumstances'.

6 Police search powers

115. The Commission views the provisions of the Bill relating to emergency search and seizure and emergency re-entry as unduly broad and subject to inadequate safeguards to protect individual rights.

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[51] Almost 2 years in *Raad v DPP* [2007] VSC 330; 3.5 years in *Re Kent* [2008] VSC 431.
[52] [2005] VSC 195.
[53] Coldrey J citing with approval Vincent J in *R v Maloney,* unreported, 31 October 1990.
[54] *DPP v Cozzi* [2005] VSC 195, [22], [25].

116. It is vital that Parliament carefully draft laws authorising interferences with the human right to privacy, an aspect of which is the home, to ensure that interferences with this right can be justified.

6.1 Human rights concerns

117. Both the new emergency search and seize powers introduced by sch 4 of the Bill and the emergency re-entry powers introduced by sch 5 of the Bill raise for consideration art 17 of the ICCPR.

118. Article 17 of the ICCPR prohibits both unlawful and arbitrary interferences with a person's privacy and home. Every invasion of the 'home' that occurs without the consent of the individual affected represents an interference.[55]

119. The Commission acknowledges that preventing a person's death or serious injury is a legitimate purpose for which an individual's right to privacy and home might be impinged upon. However, it is necessary that any interference is justified and proportionate to avoid arbitrariness.

120. For example, in the case of *Rojas Garc´a v Columbia*,[56] the UN Human Rights Committee found that an interference with the right to the home under art 17 of the ICCPR was arbitrary even if it was in accordance with domestic law, where the need for the intrusion into the home was not justified.

6.2 Emergency search & seize powers

121. Proposed s 3UEA of the Crimes Act will introduce a new power which will allow a police officer to enter premises in emergency situations without first obtaining a warrant.

(a) Circumstances in which the powers can be used

122. Proposed s 3UEA of the Crimes Act authorises entry without a warrant where a police officer 'suspects', on reasonable grounds, that it is necessary to

> (a) enter a premises in order to prevent a thing that is on the premises from being used in connection with a terrorism offence; and
>
> (b) 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 and safety.

123. The Commission is concerned that proposed s 3UEA authorises warrantless entry powers on the mere 'suspicion' rather than a 'belief', of the above circumstances.

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[55] M Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd ed, 2005), 382, [12].
[56] UN Human Rights Committee Communication No 687/1996 [2.1] and [10.3].

124. While it may be appropriate in the circumstances of obtaining a warrant to enable an officer to swear the information on the basis of a suspicion, it is not acceptable in a situation where there is no independent scrutiny of that information.

125. Further, the Commission notes that once the police officer has entered the premises without a warrant, he or she may:

- Search the premises for the thing and seize the thing if found;[57]
- Secure the premises for as long as is reasonably necessary to obtain a warrant authorising removing another thing relevant to an indictable or summary offence;[58]
- Seize any other thing or do anything to make the premises safe, if the police officer suspects, on reasonable grounds, that it is necessary to do so to protect a person's life, health or safety; and without the authority of a search warrant because the circumstances are serious and urgent.[59]

126. The broad scope of these powers reinforces the Commission's view that they should only be authorised where a police officer 'believes' and not merely 'suspects' that it is necessary to enter the premises for the reasons set out in proposed s 3UEA(1)(a) and (b).

127. The Commission does not support the power to secure the premises to obtain a warrant to seize another thing relevant to an indictable or summary offence. The Commission considers the inclusion of this power to go beyond what is necessary to prevent death or serious injury and may render the power susceptible to misuse.

128. In the Commission's view, there is little evidence to support the view that police officers could not leave the premises having prevented any threat to a person's life, obtain a warrant within 24 hours and then return to the premises to seize anything found that related to another indictable offence.

129. Further, given that s 3UEA(5) authorises a police officer to seize 'any other thing' or 'do anything' without a warrant, the Commission considers that the power set out in s 3UEA(5) should be narrowed to cases where not only are the circumstances serious and urgent but also the threat to a person's life, health or safety is 'imminent'.

130. Given the primary powers are only exercisable in emergency situations this change would ensure any ancillary powers exercised while on the premises are exercised in the same narrow range of circumstances. Inserting 'imminent' would also bring these powers into line with the proposed new definition of 'emergency situation' in s 3C(1) of the Crimes Act (sch 5, cl 1 of the Bill).

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[57] *Crimes Act 1914* (Cth), proposed s 3UEA(2)(a), (b).
[58] *Crimes Act 1914* (Cth), proposed s 3UEA(3), (4).
[59] *Crimes Act 1914* (Cth), proposed s 3UEA(5).

131. Further, the power should only be to do anything 'reasonably necessary' to make the premises safe.

Recommendation 9: Amend proposed s 3UEA of the Crimes Act as follows:

- Change 'suspects' in subsection (1) to 'believes';
- Delete sub-ss (3) and (4); and
- In sub-s (5):
    - Change 'suspects' to 'believes';
    - Insert the words 'reasonably necessary' after 'anything'; and
    - Amend (a) to read 'in order to protect a person from a serious and imminent threat to a person's life, health and safety'.

(b) Other safeguards

132. Proposed subsection 3UEA(7) requires that where a police officer has entered a premises he or she must notify the occupier of the premises within 24 hours of the entry that entry has taken place.

133. The Commission supports the notification requirements.

134. The European Court of Human Rights has stressed the importance of ensuring that people are given enough information about searches of their homes to 'enable them to identify, prevent and challenge any abuse'.[60]

135. The ability to challenge searches that are unreasonable, not based on proper grounds, or are excessive is vital to ensuring proportionality between the legitimate aim pursued by the searches and the means deployed to achieve that aim.

136. However, notification in itself is insufficient to safeguard against the abuse of power.

137. The power to enter and search a private home without a warrant is an extraordinarily broad power. It presents a significant intrusion on the right to privacy and the home.

138. Therefore the power must be proportionately balanced with a number of safeguards to ensure it is exercised in a transparent and accountable manner. Specific recommended safeguards are discussed below.

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[60] *Van Rossem v Belgium*, Application No. 41872/98. See English version of registry summary on <http://www.echr.coe.int/Eng/Press/2004/Dec/ChamberjudgmentVanRossemvBelgium91204.html>, (viewed 18 March 2009).

(i) Ex post facto warrant procedure

139. The Commission considers that if a police officer conducts a warrantless search then that police officer should be required to obtain a search warrant from a judicial officer after the search is completed.

140. The police officer should be required to first demonstrate that there were reasonable grounds to exercise powers under section 3UEA and second explain why a search warrant could not be obtained by alternate means (for example by telephone or facsimile).

141. For example, the Canadian Criminal Code grants power for a 'peace officer' to search and seize without a warrant in relation to the possession of prohibited devices, ammunition or explosive substances.[61] If this power is exercised the peace officer must go before a justice and identify:[62]

- The grounds on which it was concluded that the peace officer was entitled to conduct the search; and
- The things or documents, if any, seized.

142. An ex post facto warrant procedure is fundamental to ensuring police officers are held accountable for their actions and safeguarding against any abuse of power.

143. The Commission therefore recommends that an ex post facto warrant procedure be included in the Bill. The procedure should state that the AFP will not be able to rely on any evidence obtained in a search, where an ex post facto warrant application for the search is unsuccessful.

Recommendation 10: Include an ex post facto warrant procedure in proposed s 3UEA of the *Crimes Act 1914* (Cth).

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[61] Criminal Code, RS 1985, c.C-46 s117.04(2) provides 'Where, with respect to any person, a peace officer is satisfied that there are reasonable grounds to believe that it is not desirable, in the interests of the safety of the person or any other person, for the person to possess any weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, the peace officer may, where the grounds for obtaining a warrant under subsection (1) exist but, by reason of a possible danger to the safety of that person or any other person, it would not be practicable to obtain a warrant, search for and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person'.

[62] Criminal Code, RS 1985, c.C-46 s117.04(3) provides 'A peace officer who executes a warrant referred to in subsection (1) or who conducts a search without a warrant under subsection (2) shall forthwith make a return to the justice who issued the warrant or, if no warrant was issued, to a justice who might otherwise have issued a warrant, showing
(a) in the case of an execution of a warrant, the things or documents, if any, seized and the date of execution of the warrant; and
(b) in the case of a search conducted without a warrant, the grounds on which it was concluded that the peace officer was entitled to conduct the search, and the things or documents, if any, seized'.

(ii) Seizure receipts

144. In the case of delayed notice of an entry and search, as proposed by the Bill, it is important that detailed records are kept and made available to individuals so that they can monitor the scope of the search when they learn of it. These records must include details of items damaged or destroyed.

145. The Commission acknowledges that item 4 of sch 4 will require seizure receipts to be provided for things seized under the proposed new power under s 3UEA of the Crimes Act. Section 3UF(3) of the Crimes Act provides that a seizure notice must:

> (a) identify the thing; and
> (b) state the date on which the thing was seized; and
> (c) state the ground or grounds on which the thing was seized; and
> (d) state that, if the owner does not request the return of the thing within 90 days after the date of the notice, the thing is forfeited to the Commonwealth.

146. The Commission notes however that the notice only relates to things seized[63] and that notice need only be given to the owner of the thing or the person from whom the thing was seized.[64]

147. Given that the proposed new powers under s 3UEA of the Crimes Act include the ability to 'do anything' to make a premises safe, it is foreseeable that items will be damaged or destroyed. Further, these items may be taken from the premises and not necessarily from a person.

148. Accordingly, the Commission recommends that these provisions be amended to ensure a description of any items taken from the premises (rather than from a person) or destroyed or damaged on the premises is included in a seizure notice where relevant to a particular search.

Recommendation 11: Amend s 3UF(3) of the *Crimes Act 1914* (Cth) to ensure a seizure receipt includes a description of any items taken from the premises (rather than from a person) or destroyed or damaged on the premises where relevant to a particular search.

(iii) Authorisation and supervision

149. The Commission is also concerned that the emergency search and seizure powers are available to all officers, regardless of rank.

150. In the Commission's view, the proposed provisions should include a system of authorisation and supervision by police officers with the rank of Superintendent or above.

151. This would further prevent any misuses of this extreme power.

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[63] *Crimes Act 1914* (Cth), s3UF(1).
[64] *Crimes Act 1914* (Cth), s 3UF(1) and (2)(i) and (ii).

Recommendation 12: Amend proposed s 3UEA of the *Crimes Act 1914* (Cth) to include a system of authorisation and supervision by police officers with the rank of Superintendent or above.

6.3 Emergency re-entry powers

152. Proposed ss 3J(2)(a) and 3JA of the Crimes Act will extend the time available for police officers to re-enter a premises under a search warrant from one hour to 12 hours or a longer authorised period not exceeding the life of the warrant.

153. The Commission is concerned that the broadness of these draft provisions leaves them susceptible to misuse.

154. The Commission accepts that there may be 'emergency situations' which require police officers to leave premises and then re-enter longer than one hour after they have left the premises. However, in the Commission's view, such re-entry should be first authorised by an issuing officer.

155. The purpose of this amendment is to provide for a *longer* period of time during which re-entry is permitted, rather than to authorise urgent re-entry into premises in cases where there is insufficient time to apply for an application. Given this, the Commission considers that it would be an appropriate safeguard for police officers to make an application to an issuing officer in almost all cases.

156. This level of oversight would guard against the disproportionate and unjustified use of these powers.

157. Accordingly, the Commission recommends that proposed ss 3J(2)(aa) and 3JA be amended to ensure that the power to re-enter premises in an emergency situation is only available where an application to an issuing officer has been made.

158. Further, the Commission notes that the definition of 'emergency situation' in proposed s 3C(1) of the Crimes Act is only in relation to the reason for the executing officer and constables assisting *leaving* the premises.

159. In the Commission's view, the issuing officer should not only be satisfied that the emergency situation has required the officers to leave the premises but also that it is the reason why the officers are unable to re-enter the premises within the one hour time limit.

160. These applications should be kept in a register and made available for inspection to the proposed Parliamentary Joint Committee on Law Enforcement.

Recommendation 13: Amend sch 5 of the Bill as follows:

- Delete proposed s 3J(2)(aa) of the Bill.
- In proposed s 3JA(c), change '12 hour period mentioned in paragraph 3J(2)(aa)' to 'one hour period mentioned in 3J(2)(a)'.

- Amend proposed s 3JA(3) so that it reads:

> (3) If an application mentioned in subsection (1) has been made, an issuing officer may extend the period during which the executing officer and constables assisting may be away from the premises
>
> > (a) for not more than 12 hours if there is an emergency situation and an issuing officer is satisfied by information on oath or affirmation that because of the emergency situation, the constables assisting will not be able to return to the premises within 1 hour; or
> >
> > (b), a period longer than 12 hours if there is an emergency situation and an issuing officer is satisfied by information on oath or affirmation, that there are exceptional circumstances that justify a period longer than 12 hours.
>
> (4) an issuing officer can grant more than one application to extend the period during which the executing officer and constables assisting may be away from the premises under subsection (3) provided any one extension would not result in the period ending after the expiry of the warrant.

Recommendation 14: Applications to the issuing officer under proposed s 3JA(3) of the Crimes Act should be kept in a register, which is available to the proposed Parliamentary Joint Committee on Law Enforcement for inspection

6.4 Oversight by the new Parliamentary Joint Committee on Law Enforcement

161. The Commission recommends that the Bill provide the newly established Parliamentary Joint Committee on Law Enforcement with a specific function to review and annually report on the exercise of police powers under new ss 3UEA, 3J(2)(a) and 3JA of the Crimes Act.

162. The Parliamentary Joint Committee on Law Enforcement should have the power to request and inspect copies of all notices provided to occupiers of premises, seizure receipts and applications to re-enter premises after one hour in emergency situations.

163. If an ex post facto warrant procedure is introduced to accompany proposed s 3UEA of the Crimes Act, the Parliamentary Joint Committee on Law Enforcement should be given the power to request and inspect all applications for ex post facto warrants as well as copies of any instruments granting or refusing the applications.

164. A mechanism could also be established whereby the AFP reports on each use of the power to the proposed Parliamentary Joint Committee on Law Enforcement quarterly.

Recommendation 15: Insert a provision into either the Bill or the Parliamentary Joint Committee on Law Enforcement Bill 2010, which provides the Parliamentary Joint Committee on Law Enforcement with a specific function to review and report on the exercise of police powers under proposed ss 3UEA, 3J(2)(a) and 3JA of the *Crimes Act 1914* (Cth).

7 Treason offences

165. Division 80 of pt 5.1 of the *Criminal Code* (Cth) (Criminal Code) provides for the offences of treason (s 80.1).

166. The Commission supports the amendments proposed by item 15 of sch 1 of the Bill relating to the offences of 'assisting enemies at war with the Commonwealth' and 'assisting countries, etc, engaged in armed hostilities against the Commonwealth' in proposed s 80.1AA of the Criminal Code.

167. The proposed amendments will appropriately narrow these offences to ensure only material assistance to an enemy country provided intentionally by a person owing an allegiance to the Commonwealth will constitute treason.

168. However, the Commission considers that the requirement to have an allegiance to the Commonwealth should be an element of all the treason offences in new sub-div B of pt 5.1 of the Criminal Code, including for example, causing death or harm to the Sovereign, the Governor-General or the Prime-Minister[65] or levying or preparing to levy war against the Commonwealth.[66]

169. Both the ALRC Report and the PJCIS Review Report recommended that an allegiance to the Commonwealth be required for all treason offences.[67]

170. The Government supported both of these recommendations.[68] It is unclear, therefore, why the distinction appears in the Bill. There is no justification for the differential treatment in the Explanatory Memorandum. The Commission raised this drafting concern in response to the AGD discussion paper in October 2009.[69]

171. There is no apparent reason to distinguish between the treason offences in proposed ss 80.1AA and 80.1 of the Criminal Code. The concerns with the breadth of the offence that have led to the amendments apply equally to all treason offences in div 80 of pt 5.1 of the Criminal Code.

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[65] Criminal Code, s 80.1(1)(a)-(c).
[66] Criminal Code, s 80.1(1)(d).
[67] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in* Australia, ALRC 104 (2006), recommendation 11-4 and Parliamentary Joint Committee on Intelligence and Security, *Report on Review of Security an Counter-Terrorism Legislation* (2006), recommendation 6(a).
[68] Government Response to the Parliamentary Joint Committee on Intelligence and Security, *Report on Review of Security and Counter-Terrorism Legislation*. Tabled December 2008. At : <http://www.aph.gov.au/house/committee/pjcis/reports.htm>, (viewed 28 April 2010) and Government Response to the Australian law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*. Tabled December 2008. At <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoALRCReviewofseditionlawsinAustralia-December2008>, (viewed 28 April 2010).
[69] Australian Human Rights Commission, *Submission on the Attorney-General's Discussion Paper on Proposed Amendments to National Security Legislation*, (9 October 2009), recommendation 1, see further 6-7. At <http://www.hreoc.gov.au/legal/submissions/2009/20091009_national_security.html>, (viewed 28 April 2010).

172. Further, the Commission considers a proclamation under proposed s 80.1AA(2) of the Criminal Code should be accompanied by announcements in national media outlets such as newspapers, television and radio to ensure that citizens have advanced notice of any proclamations declaring enemies of the Commonwealth.

Recommendation 16: Insert a clause similar to proposed s 80.1AA(1)(f) and (4)(e) into s 80.1 of the *Criminal Code*.

Recommendation 17: Insert a new sub-s (2A) into s 80.1AA of the *Criminal Code* that requires an announcement in all national media outlets that a proclamation referred to in s 80.1AA(2) has been made as soon as reasonably practicable after a proclamation has been made.

8 Urging violence offences

173. The Commission supports the technical amendments that change the terminology from 'sedition' to 'urging violence' throughout pt 5.1 of the Criminal Code as proposed by the items 4, 5 and 17 of sch 1 of the Bill. This terminology better reflects the nature of the offences and is consistent with the recommendations of the ALRC.[70]

174. Significantly, sch 1 of the Bill also proposes to repeal the offence of 'urging violence within a community' in s 80.2(5) of the Criminal Code and replaces it with two new types of offences.

175. Sections 80.2A(1) and 80.2B(1) create offences where:

- A person intentionally urges another person or group to use force or violence against another group or member of a group;
- The group or member is distinguished by race, religion, nationality, national or ethnic origin or political opinion; and
- The use of the force or violence would threaten the peace, order and good government of the Commonwealth (public order offences).

176. Sections 80.2A(2) and 80.2B(2) mirror ss 80.2A(1) and 80.2B(1) with the exception that there is no requirement that the force or violence threaten the peace, order or good government of the Commonwealth (anti-vilification offences).

177. The Commission supports the following amendments proposed by the Bill to the urging violence provisions:

(a) The clarification of the fault elements in the urging violence provisions. The Bill requires that a person *intended* to urge the use of force or violence and *intended* that the force or violence would occur.

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[70] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report no 104 (2006) recommendation 2-1.

(b) The inclusion of 'ethnic origin' so that a group may be distinguished by 'race, religion, nationality, national origin, ethnic origin or political opinion'.

(c) The move to targeting persons that urge individuals to commit violence; and

(d) The move to targeting persons that urge groups or individuals to commit violence against individuals.

8.1 Human Rights concerns

178. The urging violence provisions prohibit communication that incites violence against particular individuals or groups. Accordingly, these offences restrict freedom of expression.

179. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress.[71] Freedom of expression is protected by art 19 of the ICCPR. Article 19(2) protects 'information and ideas of all kinds'; it not only applies to information or ideas that are favourably received, or regarded as inoffensive or as a matter of indifference, but also those that offend, shock and disturb.[72] Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.[73]

180. The freedom is not, however, absolute. Article 19(3) of the ICCPR recognises specific instances in which it is permissible for states parties to restrict freedom of expression. It provides:

> The exercise of rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> - For the respect of the rights or reputations of others;
>
> - For the protection of national security or of public order (*ordre public*), or of public health or morals.

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

182. The word 'necessary' imports the principle of proportionality, which requires that any restriction must be proportionate to the legitimate ends sought to be achieved.[74]

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[71] See *Erdogdu v Turkey* (2002) 34 EHRR 50, [52].
[72] See *Fressoz and Roire v France* (2001) 31 EHRR 2, [45].
[73] See *Erdogdu v Turkey* (2002) 34 EHRR 50, [52].
[74] See *Faurisson v France*, UN Human Rights Committee, Communication No. 550/93, UN Doc: CCPR/C/58/D/550/1993(1996), [8]. This is also the approach adopted by the European Court of Human Rights in relation to the comparable provision of the ECHR, article 10(2): see *Fressoz and Roire v France* (2001) 31 EHRR 2. See also, *R v Shayla* [2003] 1 AC 247.

8.2 Anti-vilification Offences

183. The Commission has consistently called for a comprehensive regime of Commonwealth legislation designed to prohibit acts of incitement to racial or religious violence in order to fulfil Australia's obligations under international law,[75] particularly:

- Article 4a of the *International Covenant on the Elimination of all forms of Racial Discrimination* (CERD),[76] which requires that there be an offence of incitement to violence or discrimination against groups of another colour or ethnic origin, punishable by law; and

- Article 20(2) of the ICCPR which requires that any advocacy of national, racial or religious hatred that constitutes incitement hostility or violence be prohibited by law.

184. Section 18C(1) of the *Racial Discrimination Act 1975* (Cth) provides that:

> It is unlawful for a person to do an act, otherwise than in private, if:
> - the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
> - the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

185. Section 18C(1) of the *Racial Discrimination Act 1975* (Cth) does not cover the dissemination of ideas based on racial superiority or hatred or incitement to acts of violence.

186. The Commission welcomes, in principle, the new alternative offences in proposed ss 80.2A(2) and 80.2B(2) that do not require the prosecution to prove a connection between the use of force or violence and a threat to the peace, order and good government of the Commonwealth. These offences are therefore better targeted at protecting individuals or groups themselves from violence.

187. However, given one of the group's or individual's protected attributes is 'political opinion', it is important to note that in a democracy the freedom of political expression is attributed great weight. In Australia the freedom of political communication is constitutionally protected but only in very limited circumstances.[77] Offences that limit freedom of expression must be carefully drafted to ensure that legitimate speech, particularly political dissent, is not captured.

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[75] Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991), Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998) and Human Rights and Equal Opportunity Commission, *Isma—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004).
[76] *International Convention on the Elimination of All Forms of Racial* Discrimination, opened for signature 21 December 1965, 660UNTS 195 (entered into force 4 January 1969 except Article 14 which came into force 4 December 1982).
[77] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579.

188. The Commission recommends that the balance struck by the proposed anti-vilification offences between protecting freedom of expression and effectively promoting racial equality can be improved by:

- Relocating the anti-vilification offences;
- Replacing the term 'urge' with 'incite'; and
- Including a requirement that force or violence be 'reasonably likely' to occur.

(a) Relocating the anti-vilification offences

189. The Commission has concerns regarding the location of ss 80.2A(2) and 80.2B(2) within ch 5 of the Criminal Code which is entitled 'The Security of the Commonwealth' and contains the majority of the Commonwealth's anti-terrorism provisions.

190. First, ss 80.2A(2) and 80.2B(2) have no connection to the security of the Commonwealth. The offences protect vulnerable groups in the community from serious forms of vilification.

191. Secondly, the Commission has significant concerns about conflating race and religion with terrorist behaviour. The 2004 Australian Human Rights Commission (then HREOC) Report 'Ismaع–Listen' found that Australian Arabs and Muslims experience vilification on the basis that they share responsibility for terrorism or are potential terrorists.[78]

192. The Commission considers that enacting what is in substance an anti-vilification offence under the guise of anti-terrorism legislation will have a counter-productive effect of further vilifying vulnerable groups in the community.

193. In light of these concerns the Commission recommends that the offences proposed in ss 80.2A(2) and 80.2B(2) be relocated to another section of the Criminal Code, for example, ch 9 entitled 'Dangers to the Community'.

Recommendation 18: Relocate proposed ss 80.2A(2) and 80.2B(2) into ch 9 of the Criminal Code, entitled 'Dangers to the Community'.

(b) Use the term 'incite'

194. The Commission is concerned that the term 'urging' is not defined anywhere in the Criminal Code. It is important that such a critical element of the offence be defined to provide guidance to the judiciary and to ensure the public is aware of precisely what conduct is prohibited.

[78] Human Rights and Equal Opportunity Commission, *Ismaع-Listen*: *National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004), [2.2.3].

195. Alternatively, the Commission considers that the concept of 'urge' should be replaced with 'incite'. The term incite or incitement is used both in Article 4a of the CERD and Article 20 of the ICCPR.

196. Using the term 'incites' would enable consistency with the terms used in international law and better enable the judiciary to be guided by international law jurisprudence on this term.[79] It may also better focus the court's attention on the effect of the conduct rather than the subjective intention of the person engaging in the behaviour.

197. The term 'incite' is used in similar legislation in Canada.[80]

Recommendation 19: Replace the term 'urges' in proposed ss 80.2A(2) and 80.2B(2) of the Criminal Code with 'incites'.

(c) Require that force or violence be 'reasonably likely' to occur

198. Proposed ss 80.2A(2) and 80.2B(2) require that the person intended to urge force or violence *and* intended that the force or violence occur.

199. While the Commission supports the intention of the Bill to clarify the fault elements, the Commission does not believe that it should be necessary to prove intention in relation to both of these elements.

200. It is difficult to imagine a situation where a person intentionally urges another person or group to use force or violence against another person or group but does not intend that force or violence to occur.

201. Instead, the offence should be made out if:

- The first person intentionally urges (or incites) another person, or a group, to use force or violence against a group (the *targeted group*);
- The force or violence is reasonably likely to occur in the circumstances; and
- The targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion.

202. This is consistent with the Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth) (Incitement to Violence Bill), introduced by the Government when in opposition.

203. Proposed ss 62(1) and 63(1) of the Incitement to Violence Bill provided:

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[79] This is supported by the common law interpretative principle that, subject to any contrary intention expressed by the legislature, legislation that implements Australia's obligations under an international convention should be interpreted using the same interpretative principles that apply to that convention. See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265. See further, D C Pearce and R S Geddes, 'Statutory Interpretation in Australia' (6th ed, 2006), [2.16].

[80] Canadian Criminal Code RS 1985, s 319(1).

62(1) A person must not, with the intention of inciting violence against another person or a group of people, or with the intention of inciting damage to property, do an act, otherwise than in private, if the act is:

- reasonably likely, in all the circumstances, to incite violence against the other person or group of people; or damage to property, and
- done because of the race, colour, or national or ethnic origin of the other person or of some or all of the people in the group.

….

(d) Define circumstances that a court may consider

204. The Commission also recommends that the offence set out circumstances to which a court may have regard when determining whether a person has committed an offence under ss 80.2A(2) and 80.2B(2).

205. In the ALRC Report, the ALRC recommended that in order to ensure the right to freedom of expression is not curtailed unnecessarily, the court should have regard to the context in which the conduct in the urging violence offences occurred, including the factors specified in proposed s 80.3.[81] The Commission supports this position.

206. The Commission therefore supports the ALRC Report's recommendation 12-2 that in determining whether the offence has been made out, the court should take into account whether the acts were done:

- In the development, performance, exhibition or distribution of an artistic work;
- 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; or
- In the dissemination of news or current affairs.

207. This could be done by directing the court to consider these factors when determining whether:

- A person intended that the urged force or violence would occur; or
- A person intentionally urged another person to use force or violence; or
- It is reasonably likely force or violence will occur in the circumstances.

Recommendation 20: Amend ss 80.2A(2) and 80.2B(2) of the Criminal Code to replace the element that 'the first person does so intending that force or violence will

[81] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report no 104 (2006), 259-261.

occur' with the element 'that the force or violence is reasonably likely in the circumstances'.

The Commission notes that this recommendation could be applied to s 80.2 as well as proposed ss 80.2A(1) and 80.2B(1).

Recommendation 21: Implement recommendation 12-2 of the ALRC report by either:

a) inserting new ss 80.2A(6) and 80.2B(4A) into the Criminal Code as follows:

> When determining whether a person intentionally urges another person or group to use force or violence against a group, the court may have regard to any relevant matter, including whether the acts were done
>
> (a) in the development, performance, exhibition or distribution of an artistic work; or
>
> (b) 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; or
>
> (c) in the dissemination of news or current affairs.

The Commission notes that the same provision could be used for determining whether a person 'intends force or violence to occur'.

b) Alternatively, if the Committee recommends including an element that 'the force or violence is reasonably likely to occur in the circumstances' in ss 80.2A and 80.2B of the Criminal Code, then including the following paragraph:

> These circumstances may include:
>
> (a) whether the acts were done in the development, performance, exhibition or distribution of an artistic work; or
>
> (b) whether the acts were done 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; or
>
> (c) whether the acts were done in the dissemination of news or current affairs.

These recommendations could also be applied to s 80.2 as well as proposed ss 80.2A(1) and 80.2B(1).

8.3 The good faith defence

208. Item 28 of sch 1 of the Bill proposes to extend the range of circumstances in which the good faith defence in s 80.3 of the Criminal Code is available to include the legitimate public discussion, artistic works and the dissemination of news or current affairs.

209. The good faith defence is available in relation to an offence under s 80.2 of the Criminal Code as well as the proposed public order offences and anti-vilification offences.

210. The Commission considers that the most appropriate way to ensure the right to freedom of expression is not unjustifiably restricted is to amend the offences in the manner outlined above so that legitimate conduct is not prohibited rather than relying on a defence to excuse the conduct.

211. Further, it is difficult to imagine a situation where someone could *intentionally urge* a person to use force or violence against another person or group or intend force or violence to occur 'in good faith'.

212. The Commission recommends that if its above recommendations are implemented, proposed s 80.3(3) of the Criminal Code should not apply to proposed ss 80.2A and 80.2B of the Criminal Code.

Recommendation 22: If Recommendation 21 is accepted, proposed s 80.3(3) of the Criminal Code should not apply to proposed ss 80.2, 80.2A and 80.2B of the Criminal Code.

8.4 Public Order Offences

213. Sections 80.2A(1) and 80.2B(1) prohibit the incitement to violence against particular groups and members of groups where the violence would threaten the peace, order and good government of the Commonwealth.

214. The Commission questions the necessity of this offence. The need for this additional offence, beyond the offences in ss 80.2A(2) and 80.2B(2) and existing offences covering threats to the Commonwealth has not been established.

215. For this reason, the Commission recommends deleting proposed ss 80.2A(1) and 80.2B(1) unless the Government can provide sufficient justification for retaining the offences.

Recommendation 23: Delete proposed ss 80.2A(1) and 80.2B(1) of the Criminal Code.

9 Terrorist organisation offences

216. Section 102.1 of the Criminal Code enables the Governor-General to make a regulation specifying an organisation as a 'terrorist organisation'.

217. Currently, a regulation of this kind ceases to have effect two years after the day on which it takes effect.[82]

[82] Criminal Code, s 102.1(3).

9.1 Human rights concerns

218. The Commission remains concerned that proscribing organisations as 'terrorist organisations' can undermine freedom of expression[83] and has a disproportionate impact on Arab communities.[84]

219. The Commission is also concerned that broadly drafted terrorism offences in relation to assisting or supporting 'terrorist organisations' can criminalise innocent behaviour[85] and unnecessarily broaden the group of people that may be susceptible to the broad range of powers available to police to investigate and detain persons suspected of committing a terrorist offence.[86]

220. The Commission emphasises the overriding duty of governments to define precisely, by law, all criminal offences in the interest of legal certainty.[87]

9.2 Increasing the listing period for terrorist organisations

(a) Listing under the Criminal Code

221. Proposed s 102.1.3 of the Criminal Code will increase the period before a regulation proscribing an organisation as a 'terrorist organisation' expires from 2 to 3 years.

222. The Commission does not support this amendment. As acknowledged by the Parliamentary Joint Committee on Intelligence and Security (PJCIS):

> [t]riggering a review is a safeguard both for the entity and the Minister, who must continue to be satisfied the entity meets the legislative criteria' for proscribing an organisation as a 'terrorist organisation.[88]

223. Given the proscription as a 'terrorist organisation' has significant human rights implications for the individuals concerned, it is important that such a mechanism, if retained, is accompanied by adequate legislative safeguards.

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[83] Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Power to Proscribe Terrorist Organisations* (2007) see especially [5], [7] and [28].
[84] Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008) [8.3]; Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Power to Proscribe Terrorist Organisations* (2007) [8], John von Doussa, President of the Australian Human Rights Commission, 'Incorporating Human Rights Principles into National Security Measures' (speech delivered at the International Conference on Terrorism, Human Security and Development: Human Rights Perspectives, City University of Hong Kong, 16-17 October 2007).
[85] Further, prosecution is relieved of the burden of proving beyond reasonable doubt that an entity is a terrorist organisation in every trial for the terrorist organisation offences under div 102 of the Criminal Code: *Evidence Act 1995* (Cth) s 143(1)(b).
[86] For example, subjecting a person to a control order under s 104.2 of the Criminal Code or a longer period of possible pre-charge detention under pt 1C of the Crimes Act.
[87] M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005), 360.
[88] PJCIS Proscription Report, 51 [6.15].

224. The Commission is not convinced that there are sufficient reasons for limiting the availability of this important safeguard.

225. Further, the Commission submits that, given the significant implications of being proscribed a 'terrorist organisation', the decision to proscribe an organisation as a 'terrorist organisation' should be subject to merits review under the *Administrative Appeals Tribunal Act 1975* (Cth).

(b) Listing under the UN Charter Act

226. Proposed s 15A of the *Charter of United Nations Act 1945* (Cth) (UN Charter Act) will have the effect of limiting the listing period for organisations declared to be 'entities or persons involved in terrorist activities' to three years.

227. Part 4 of the UN Charter Act provides for offences directed at those who provide assets to, or deal in the assets of, 'entities or persons involved in terrorist activities'. Accordingly, declaring a person or entity under s 15 of the UN Charter Act can have significant human rights implications for individuals.

228. The regular review provided for by the expiry of the declarations is an important safeguard to ensure that organisations continue to meet the legislative criteria for being declared an 'entity or person involved in terrorist activities'.

229. The Commission is not convinced that there is any good reason for setting this period at three years rather than two years.

230. The Commission notes that the regular expiry of declarations prompting a review is an even more important safeguard in the context of a listing under the UN Charter Act. This is because s 15(6) of the UN Charter Act provides that a person or entity is listed by notice in the Gazette. At least, regulations under s 102.1 of the Criminal Code are subject to a measure of parliamentary scrutiny through being subject to possible disallowance.

231. Additionally, the decision to declare a person or entity under the UN Charter Act should be made subject to merits review under the *Administrative Appeals Tribunal Act 1975*. The Commission notes that this is consistent with recommendation 22 of the PJCIS Review Report.[89]

Recommendation 24: Remove from the Bill proposed s 102.1.3 of the Criminal Code. Amend s 15A of the *Charter of the United Nations Act 1945* (Cth) to provide for a two year review. Allow both of these decisions to be reviewable under the *Administrative Appeals Tribunal Act 1975* (Cth).

9.3 Definition of 'advocates'

232. The Governor-General can proscribe an organisation as a 'terrorist organisation' under s 102.1(2) of the Criminal Code, if he or she is satisfied

[89] PJCIS Review Report, 32.

that the organisation 'advocates' the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

233. 'Advocates' is currently defined by s 102.1(1A) of the Criminal Code as:

> (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.

(a) Narrow the definition of 'advocates'

234. Section 102.1(1A) of the Criminal Code poses the risk of undermining a person's freedom to express legitimate political views.

235. As set out above, the right to freedom of expression is protected by art 19 of the ICCPR and any legitimate interference with this right must be the least restrictive and proportionate to the actual security risk.

236. In relation to sub-ss (a) and (b), the Commission recommends that these provisions remove the term 'indirectly' so that only directly counselling, urging or instructing terrorist acts to occur attracts criminal liability.

237. The Commission also recommends that the definition of 'advocates' be clarified so that it is clear an organisation and not just one of its members does the advocating and that the organisation intends for its advocacy to persuade others to do terrorist acts.

Recommendation 25: Remove the term 'indirectly' from s 102.1(1A)(a) and (b) of the Criminal Code.

Recommendation 26: Insert a definition into the Criminal Code that defines when an organisation and not just one of its members is 'advocating'.

Recommendation 27: Insert a subsection that states an organisation advocates the doing of a terrorist act only if it does one of the acts in s 102.1(1A)(a) or (b) intending its advocacy to persuade others to do terrorist acts.

(b) Remove s 102.1(1A)(c)

238. The Commission supports the Bill's proposed amendment to s 102.1(1A)(c) that clarifies that there must be a 'substantial risk' that praising the doing of a terrorist act might result in a person engaging in a terrorist act.

239. However, the Commission does not consider this amendment goes far enough. The Commission is concerned that 'praising' the doing of a terrorist

act is too tenuous a link with actually committing a terrorist act and could disproportionately interfere with the right to freedom of expression.

240. The Commission recommends that s 102.1(1A)(c) be repealed. This is consistent with the Sheller Report's preferred recommendation 9.[90]

Recommendation 28: Repeal s 102.1(1A)(c) of the Criminal Code.

(c) Align the definition for the classification of publications, films and computer games

241. Finally, the Commission notes that the definition of 'advocates' is replicated when defining which films, computer games and publications should be classified 'RC' in s 9A(2)(c) of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

242. The Commission submits that the definition of 'advocates' in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) should be narrowed in the same way recommended above for the definition of 'advocates' in s 102.1(1A) of the Criminal Code.

Recommendation 29: Remove the term 'indirectly' from s 9A(2) and repeal s 9A(2)(c) from the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

9.4 Other recommended amendments to the terrorism organisation offences

243. The AGD discussion paper proposed several amendments to the terrorism organisation offences that the Bill does not implement.

244. The Commission notes that among the amendments discussed in the AGD discussion paper were the following important proposals:

- Amending the definition of 'terrorist act' in s 100.1 of the Criminal Code;
- Amending the offence of 'providing support to a terrorist organisation' in s 102.7 of the Criminal Code; and
- Amending the offence of providing training to or receiving training from a terrorist organisation in s 102.5 of the Criminal Code.

245. In his Second Reading speech to the National Security Law Amendment Bill, the Attorney-General explains that the Bill's failure to make any substantial amendment of the core provisions of divs 101 and 102 of the Criminal Code is because the States must first amend the referring legislation by which they enlivened the topic of 'terrorist acts' for Commonwealth legislative power.

[90] Sheller Report, 73.

246. The Attorney-General does not explain why Item 2 of Sch 2 (which inserts 'substantial' before 'risk' in s 102.1(1A)(c)) is not also subject to this requirement.

247. The Commission questions the necessity for an amendment of the States' referral legislation.[91] Clause 3 of the Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisdictional Crime, 5 April 2002 provides that:

> Any amendment based on the referred power will require consultation with and agreement of States and Territories.

248. Section s 100.8(2) of the Criminal Code, if valid,[92] also states that an express amendment of Part 5.3 of the Criminal Code may be made 'if it is approved by a majority of the group consisting of the States and the Australian Capital Territory and the Northern Territory; and at least 4 States'.

249. Consultation and agreement falls far short of an amendment to the referral legislation.

250. The Commonwealth also has wide legislative powers directly conferred on the Parliament by s 51 of the Constitution, which include the defence power (s 51(vi)) and the external affairs power (s 51(xxix)).

251. In *Thomas v Mowbray*,[93] a majority of the High Court held that the defence power in s 51(vi) of the Constitution could extend to the threat of terrorism. The majority further held that a referral of State power was unnecessary to support the validity of the control order provisions in Division 104 of Part 5.3 of the Criminal Code because the Commonwealth's legislative powers directly supported the validity of these provisions.[94]

252. As will be outlined below, the Commission is concerned that these proposals are not being introduced in this Bill and urges the Committee to scrutinise the Government's position, which has the effect of delaying further these discussed proposals.

(a) Definition of 'terrorist act' (s 100.1 of the Criminal Code)

253. The Commission is concerned that the definition of 'terrorist act' in s 100.1 of the Criminal Code remains problematic.

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[91] For further discussion of this issue, see 'Gilbert + Tobin Centre of Public Law – Annexure 2' of the Gilbert + Tobin Centre of Public Law's submission to the Senate Legal and Constitutional Affairs Committee inquiry into the National Security Legislation Amendment Bill 2010, submitted on 3 May 2010.

[92] *Thomas v Mowbray* [2007] HCA 33, [212] (Kirby J), [456] (Hayne J), [607) (Callinan J). The remaining 4 Judges did not consider the issue.

[93] *Thomas v Mowbray* [2007] HCA 33.

[94] [2007] HCA 33, [148], [153], [154] (Crennan and Gummow JJ with respect to the defence and external affairs powers), [445], (Hayne J with respect to the defence and external affairs powers), [6] (Gleeson CJ agreeing with respect to the defence and external affairs powers), [582] (Callinan J with respect to the defence power only), [611] (Heydon J with respect to the defence power only).

254. The definition of 'terrorist act' in s 100.1 of the Criminal Code already covers actions that would not be considered 'terrorism' under the UN Security Council Resolution 1566 (2004), such as serious interference with electronic systems including information systems, telecommunication systems or a financial system.[95]

255. Given the breadth of coverage, the Commission urges the Committee to recommend the removal of 'threat of action' from the definition of 'terrorist act'.

Recommendation 30: Remove 'threat of action' from the definition of 'terrorist act' in s 100.1 of the *Criminal Code*.

(b) Offence of providing support to a terrorist organisation (102.7 of the Criminal Code)

256. In the Commission's view, the offence of providing 'support' to a terrorist organisation in s 102.7 of the Criminal Code is too broad and may capture indirect support, such as the publication of views favourable to the organisation. Section 102.7 provides:

> 102.7 Providing support to a terrorist organisation
>
> (1) A person commits an offence if:
> (a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of terrorist organisation in this Division; and
> (b) the organisation is a terrorist organisation; and
> (c) the person knows the organisation is a terrorist organisation.
>
> Penalty: Imprisonment for 25 years.
>
> (2) A person commits an offence if:
> (a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of terrorist organisation in this Division; and
> (b) the organisation is a terrorist organisation; and
> (c) the person is reckless as to whether the organisation is a terrorist organisation.
>
> **Penalty: Imprisonment for 15 years.**

257. This may disproportionately interfere with the right to freedom of expression in art 19 of the ICCPR by extending to expression which is not expression that incites violence or public disorder. When the Sheller Committee reviewed these offences in 2006, it accepted that:

[95] *Resolution on Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1566, UN SCOR, 5053rd mtg, UN Doc S/Res/1566 (2004).

> the combination of vulnerability and uncertainty requires that the section be amended to limit its application in a way which would reduce any infringement upon the right to freedom of expression.[96]

258. The offence of providing 'support' to a terrorist organisation should therefore be narrowed appropriately and without delay.

259. The AGD discussion paper proposes to amend s 102.7 of the Criminal Code to clarify that the support provided must be 'material' and that the material support must be provided by the person with the 'intention that the support helps the organisation engage in a terrorist act'.[97]

260. The Commission urges the Committee to recommend including in the Bill provisions that implement these proposals.

261. The Commission also urges the Committee to recommend that the term 'support' in s 102.7 of the Criminal Code be defined to exclude the publication of views that appear to be favourable to a terrorist organisation and its stated objective. This would implement recommendation 14 of the Sheller Report.

Recommendation 31:

(a) The Committee scrutinise the Government's position in relation to not being able to amend s 102.7 of the Criminal Code without the States amending their referral legislation;

(b) If the Committee is satisfied that an amendment to the States referral legislation is not required, the Committee recommend that s 102.7 of the Criminal Code be amended as follows:

- Clarify that the support provided must be 'material' and that the material support must be provided by the person with the 'intention that the support helps the organisation engage in a terrorist act'.
- Define the term 'support' to exclude the publication of views that appear to be favourable to a terrorist organisation and its stated objectives.

(c) Offence of providing training to or receiving training from a terrorist organisation (s 102.5 of the Criminal Code)

262. The Commission is concerned that the offence of providing training to or receiving training from a terrorist organisation in s 102.5 of the Criminal Code remains unchanged by the Bill. This is despite the proposals discussed in the AGD discussion paper that sought to implement urgent recommendations made by both the Sheller Report and the PJCIS review in 2006.[98]

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[96] Sheller Committee Report, 122, [10.53].
[97] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009), 63.
[98] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009), 67.

263. While the Commission considers that the exemption scheme proposed in the AGD discussion paper was problematic,[99] the Commission is concerned that the Bill leaves humanitarian organisations carrying out legitimate activities vulnerable to being charged with a criminal offence carrying a maximum sentence of 25 years.

264. The Commission therefore recommends that rather than conduct further consultations around a complex scheme of ministerial approval as proposed by the AGD discussion paper, the offence of providing training to a terrorist organisation in s 102.5 of the Criminal Code be urgently amended in line with recommendation 12 of the Sheller Report and recommendation 16 of the PJCIS Review Report.

265. The amendments proposed by the Sheller Report and the PJCIS Review Report seek to narrow the offence to ensure that innocent and legitimate activity is not criminalised. The Commission considers that the best way to achieve this is to draft the offence narrowly and carefully so that it precisely targets conduct that is ancillary to the committing of a terrorist act and allows for the consideration of all the circumstances of a particular case.

Recommendation 32: Amend s 102.5 of the *Criminal Code* (Cth) in accordance with the recommendations of the Sheller Report and the PJCIS Review Report:

- Define 'training' to mean training that is connected with a terrorist act or that training that could reasonably prepare the organisation or person receiving the training, to engage in, or assist with, a terrorist act; and

- Repeal the element of strict liability in sub-s (3).

Recommendation 33: Repeal ss 102.5(1)(c) and (4) and replace them with the following:

At the time of providing the training:

- the person has knowledge that the organisation is a terrorist organisation; and

- either the person providing the training intends that the person receiving the training will commit a terrorist act; or the person receiving the training intends to commit a terrorist act.

9.5 Further legislative review of terrorist organisation offences

266. The Commission notes that clause 6 of sch 2 of the Bill will repeal the provision providing for a three year review of the terrorist organisation listing provisions because this review has already taken place.

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[99] Australian Human Rights Commission, *Submission to the Attorney-General's Discussion Paper on Proposed Amendments to National Security Legislation*, (9 October 2009), section 9.2. At http://www.hreoc.gov.au/legal/submissions/2009/20091009_national_security.html#Heading241, (viewed 4 May 2010).

267. Given that the Bill makes very little change to the terrorism organisation provisions, the Commission urges the Committee to recommend that a further legislative review of these provisions by an appropriate body, such as the National Security Legislation Monitor, be provided for in the Criminal Code.

268. While the Commission acknowledges that the offence of associating with terrorist organisations is proposed to be reviewed by the Legislation Monitor once established,[100] the Commission urges the Committee to recommend that the following problematic aspects of the terrorist organisation offences identified by the Sheller Committee and the PJCIS reviews also be reviewed by the Legislation Monitor as a matter or urgency:

- Intentionally being a member of a terrorist organisation;
- Getting funds to or from a terrorist organisation; and
- Financing a terrorist organisation.

Recommendation 34: Refer the offences of membership, funding and financing of terrorist organisations to the Legislation Monitor for review as a matter of urgency.

10 Parliamentary Joint Committee on Law Enforcement

269. The Commission supports the establishment of the Parliamentary Joint Committee on Law Enforcement (PJC Committee) as provided for in the Parliamentary Joint Committee on Law Enforcement Bill 2010.

10.1 Functions of the Committee

270. In proposed s 7, the PJC Committee is tasked with the functions of monitoring and reviewing the performance of both the AFP and the Australian Crime Commission (ACC).

271. The Commission is of the view that this oversight function is an important safeguard on the proper and lawful exercise of the broad police powers discussed above, particularly the warrantless search powers and pre-charge detention regime.

272. It is not just the drafting of the laws but the exercise of anti-terrorism police powers that must be proportionate and justified to be consistent with human rights standards.

273. The Commission is therefore concerned that the functions of the PJC Committee as set out in proposed s 7 do not include a reference to human

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[100] Parliamentary Joint Committee on Intelligence and Security, *Report on Review of Security and Counter-Terrorism Legislation* (2006) recommendation 19. Accepted by the government in its response to that Report. *Government Response to the Parliamentary Joint Committee on Intelligence and Security, Report on Review of Security and Counter-Terrorism Legislation*. Tabled December 2008. At <http://www.aph.gov.au/house/committee/pjcis/reports.htm>, (viewed 29 April 2010).

rights and in particular, the right to liberty in art 9 of the ICCPR, privacy and home in art 17 of the ICCPR, freedom of expression in art 19 of the ICCPR and the presumption of innocence in art 14 of the ICCPR.

274. The Commission therefore recommends that the PJC Committee functions include a reference to monitoring and reporting on how the exercise of any national security legislation powers interfere with the above human rights in the ICCPR.

Recommendation 35: Amend proposed s 7 of the Parliamentary Joint Committee on Law Enforcement Bill 2010 to include the specific function of monitoring and reporting on how the exercise of any national security legislation powers interferes with human rights.

10.2 Definition of 'sensitive information'

275. Given the important oversight role the PJC Committee will play, it is crucial that it is well resourced and equipped with sufficient powers to obtain all information relevant to its task.

276. Proposed ss 8(2) and 9(2) of the Bill provides that the CEO of the ACC or the Commissioner of the AFP may decide not to comply with a request for disclosure from the Committee if satisfied that:

- The information is 'sensitive'; and
- The public interest in giving the information to the Committee is outweighed by any prejudicial consequences that might result from providing the information.

277. While the Commission acknowledges that the Government has a legitimate interest in protecting genuinely sensitive information, the Commission considers that in order to give effect to the PJC Committee's intended oversight functions, the Bill should strike a better balance.

278. The Government has not justified why provisions preventing the PJC Committee from disclosing any information obtained through the performance of its functions would not adequately deal with the Government's legitimate concern to protect sensitive information.

279. This is particularly so given the definition of 'sensitive information' in proposed s 3 is so broad that it includes information that if disclosed:

- Could prejudice a person's reputation; or
- Would unreasonably disclose confidential commercial information.

280. The Commission strongly urges the Committee to recommend amendments to the Bill that ensure the mechanism for protection of sensitive information do not prevent the Committee from obtaining the information necessary for it to adequately fulfil its oversight functions.

Recommendation 36: Repeal ss 8(2)-(6) and 9(2)-(6) of the Parliamentary Joint Committee on Law Enforcement Bill 2010 and replace with provisions that penalise members and staff of the PJC Committee for disclosing any sensitive information.

Recommendation 37: Remove subs-s (h) and (k) from the definition of 'sensitive information' in proposed s 3 of the Parliamentary Joint Committee on Law Enforcement Bill 2010.

11 Further legislative reviews required

281. There are a number of crucial provisions of the national security legislation regime that were not discussed in the AGD discussion paper and do not form part of the Bill's proposed amendments. These include:

- Preventative detention orders – proposed to be reviewed by the Council of Australian Governments (COAG);[101]
- Control orders - proposed to be reviewed by COAG;[102]
- Police powers to stop, search and seize in 'prescribed security zones' and Commonwealth places - proposed to be reviewed by COAG;[103] and
- Proscription of terrorist organisations – proposed to be reviewed by COAG.[104]

282. The Commission is also concerned that the ASIO powers to detain and question a person to collect intelligence[105] are not due for review until 2016.

283. The Commission recommends that the above provisions also be referred to the Legislation Monitor for review on an urgent basis.

Recommendation 38: Insert a provision into the Bill that refers the above provisions to the Legislation Monitor for review.

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[101] Details and process for Council of Australian Governments' (COAG) review of counter-terrorism legislation', Council of Australian Governments' Meeting (10 February 2006), Attachment G. At <http://www.coag.gov.au/coag_meeting_outcomes/2006-02-10/docs/attachment_g_counter_terrorism.rtf>, (viewed 28 April 2010).

[102] COAG above.

[103] COAG above.

[104] Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations 'under the Australian Criminal Code.* (September 2007) recommendation 7, accepted by Government in its Response to that Report. Government Response to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations 'under the Australian Criminal Code.* Tabled December 2008. At <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoPJCISInquiryintotheproscriptionofterroristorganisationsundertheAustralianCriminalCode-December2008>, (viewed 28 April 2010).

[105] *Australian Security Intelligence Organisation Act* 1979 (Cth) s 34ZZ.