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Discussion Paper – National Security Legislation
Assistant Secretary
Security Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

24 September 2009

Dear Assistant Secretary,

Discussion Paper on Proposed Amendments to National Security Legislation

1. Thank you for the opportunity to make a submission to the public consultation on proposed legislative reforms to Australia's counter-terrorism and national security legislation as set forth in your July 2009 Discussion Paper.¹ The Sydney Centre for International Law is a leading centre for research and policy on international law in the Asia-Pacific region.
2. We applaud the initiative taken by Attorney-General, the Hon Robert McClelland MP, and the Government to solicit public comment on these proposed legislative reforms. We agree that processes of public consultation such as these are vital to ensuring public confidence is maintained in Australia's counter-terrorism and national security legislation and the agencies charged with its implementation and enforcement.

¹ Attorney-General's Department, *National Security Legislation: Discussion Paper on Proposed Amendments* (July, 2009) (hereafter the Discussion Paper).

3. We also commend the Government, and the Attorney-General's Department in particular, on the care and seriousness with which they have treated the recommendations of the various inquiries that precipitated these proposed legislative changes.

4. We welcome, in addition, the Government's public commitment to re-engage with international law and international organisations,² to human rights 'at both the domestic and the international level',³ and to ensuring that Australia's counter-terrorism and national security laws 'will be exercised in a just and accountable way' while 'preserving the democratic rights that protect our freedoms'.⁴ This submission is made with these commitments and objectives in mind.

Introduction

5. The legislative provisions that are the subject of focus in the Discussion Paper do not appear to be fully consistent with Australia's obligations under international law, chiefly under the International Covenant on Civil and Political Rights (ICCPR).⁵ The Government is no doubt mindful that, as a signatory to the ICCPR, Australia has a legal obligation to 'ensure to all individuals within its territory and subject to its jurisdiction the rights recognized' in the Covenant (Article 2), and to refrain from committing 'any act aimed at the destruction of any of the rights and freedoms recognized' (Article 5). The United Nations Security Council has reminded states of the importance of upholding these obligations in the context of national security legislation in its Resolution 1566. That Resolution recalled that states 'must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law'.⁶

6. In certain respects (outlined in this submission), we believe that the legislative amendments proposed also render the law overbroad or uncertain in its application. We have made a series of recommendations to render the provisions more tightly drawn, seeking to minimise the extent to which they are likely to yield unintended consequences, particularly the capture of innocuous activities, political protest or dissent. We submit that provisions more closely tailored to the main concerns of this legislation are desirable in three main ways. First, the precise prohibition of behaviour capable of attracting a criminal sanction is consistent with the general principle *nullum crimen, nulla poena sine lege*. In common law jurisprudence, this principle has been associated both with a requirement of non-retrospectivity and a requirement that facts constituting an offence (and, by extension, those that will not constitute an offence) be defined with maximal certainty.⁷ Second, we submit that tightly drawn provisions are more likely to prove effective in deterring the behaviours on which they focus than provisions that are vague and over-reaching. This is even more so when legislative drafting articulates well with public expectations about the harms criminal laws should address. Prohibitions that don't overreach are also less likely to chill the sort of robust political and social exchanges and adventurous creative work vital to the maintenance a vibrant democracy. Third, tightly drawn criminal prohibitions are more likely to found effective

² E.g., Remarks of the Attorney-General, the Hon Robert McClelland MP, at the Attorney-General's Non-Government Organisation Forum on Domestic Human Rights (14 August 2009), available at <http://ww.ag.gov.au>.

³ Remarks of the Attorney-General, the Hon Robert McClelland MP, at the Castan Centre Human Rights Conference (17 July 2009), available at <http://ww.ag.gov.au>.

⁴ Statement of the Attorney-General, the Hon Robert McClelland MP: Reforms to National Security Legislation (12 August 2009), available at <http://ww.ag.gov.au>.

⁵ *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (in force 23 March 1976).

⁶ S/RES/1566 (2004), preamble.

⁷ *Maxwell v Murphy* (1956) 96 CLR 261 at 267; *R v JS* (2007) 175 ACrimR 108 at [35]-[39].

enforcement actions. Neither law enforcement personnel nor prosecutors are well served by provisions of imprecise or uncertain application. Such provisions leave police and others with inadequate guidance as to what is expected of them: a state that may encourage undue hesitancy as much as opportunism or rapaciousness. Imprecise laws are typically the trigger for lengthy, resource-intensive litigation. Overbroad laws that impinge upon human rights are also typically read down by the courts in ways that law enforcement personnel cannot be expected to predict, compounding the uncertainty to which they are subject.⁸

7. With the goal of ensuring compliance with these obligations highlighted above, as well as contributing to the overall effectiveness of the legislative scheme, this submission addresses, and makes recommendations concerning, the following areas of the Discussion Paper:

- The treason and urging violence offences;
- The definition of a terrorist act and the terrorism hoax offence;
- The terrorist organisation listing provisions and related offences;
- The procedures and conditions applicable to pre-charge detention of persons arrested for terrorist and non-terrorist offences; and
- The warrantless entry and search provisions.

A. Treason (ss.80.1; 80.1AA)

8. We support the amendments proposed for s. 80.1 of the Schedule to the *Criminal Code Act 1995* (Cth) (hereafter, the *Criminal Code*). Nonetheless, we feel that the offence of treason set forth in s. 80.1(1) remains overbroad in a way that imposes unnecessary constraints upon freedom of expression. In this context, we note that Australia's obligations under Article 19 of the ICCPR require it to refrain from imposing restrictions on individuals' right to freedom of expression except to the extent necessary for the protection of national security, public order, public health or morals. We recall, furthermore, the observation of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) that 'given the seriousness and penalties attached to the offence [of treason] it is crucial that the law achieves the highest degree of certainty'.⁹ As indicated above, we also regard it as in the interests of the law's operational effectiveness that it be as tightly drawn as possible.

Scope of harm

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

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

10. We believe that it is not necessary for the protection of national security, public order,

⁸ *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115 at 131, per Lord Hoffman, as approved in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 467 at [30] per Gleeson CJ and Kirby J; see also *Coco v The Queen* (1993) 179 CLR 427 at 437; *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19] per Gleeson CJ and Kirby J.

⁹ Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2008) (hereafter, PJCIS Report), para [4.11].

public health or morals that the Sovereign, the Governor-General or the Prime Minister be protected from harm to their mental health. Because of uncertainty surrounding what might be deemed 'within the limits of what is acceptable as incidental to social interaction or to life in the community', and what could potentially harm the mental health of the individuals in question, such an offence has the potential to exert a chilling effect upon legitimate critique of, and satirical commentary on, the named offices and the decisions of those who occupy them.

11. We note, furthermore, that other Commonwealth jurisdictions that include similar offences in their criminal law limit the actions criminalised (beyond killing or attempting to kill and imprisonment) to those causing 'grievous bodily harm' or 'bodily harm tending to death or destruction' to the Sovereign.¹⁰ We recommend that s. 80.1(1)(c) be amended in a manner consistent with this approach.

Residual redundancy

12. Second, we recall that the Australian Law Reform Commission (ALRC) recommended that s. 80.1(1)(h) be deleted as redundant and of uncertain purpose, as the Gibbs Committee had previously recommended in 1991.¹¹ We reiterate this recommendation and support its adoption.

Possible retrospective effect

13. Finally, s. 80.1AA(2), which sets out the offence of materially assisting enemies at war with the Commonwealth, has been amended to ensure that a proclamation specifying the enemy in question must have been made before an offence in relation to that enemy will be capable of commission. We support this clarification to ensure that the provision cannot be given retrospective effect and that the law is thereby consistent with Article 15(1) of the (ICCPR) Rights. Nonetheless, we remain concerned that a person might still be susceptible to criminal liability under s. 80.1AA(1)(b) during the period after a proclamation is made but before it is publicised (through registration under the *Legislative Instruments Act 2003* (Cth)). The same basic principle that underpins international human rights law's prohibition upon retrospective criminal law (and the presumption against retrospectivity in Australian law) requires that changes in criminal law should not be enforceable until such time as they are knowable by the members of the public against whom they may be enforced. For this reason, we recommend that a Proclamation made for purposes of s. 80.1AA(1)(b) only be capable of taking effect from the date, on or after the date of its making, on which it is published by registration under the *Legislative Instruments Act 2003*, by publication in the *Gazette* or by other reasonably appropriate means of publicity.

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

Recommendation A.2: We recommend that the separate treason offence set forth in s. 80.1(1)(h) be deleted, as recommended by the ALRC.

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

'Despite subsection 12(2) of the *Legislative Instruments Act 2003*, a Proclamation made for the purpose of paragraph (1)(b) of this subsection may only be expressed to take effect from a date: (a) on or after the date on which the Proclamation is made; but

¹⁰ See *Criminal Code of Canada*, s. 46(1)(a); *Crimes Act 1961* (NZ), s. 73(a). See also *Treason Act 1351* (UK).

¹¹ ALRC Sedition Report, 235-236; H. Gibbs, R. Watson and A. Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) (hereafter Gibbs Report), para. [31.38].

(b) not before the date on which the Proclamation has been publicised by one of the following means:

- (i) by registration under the *Legislative Instruments Act 2003*; or
- (ii) publication in the *Gazette*; or
- (iii) such other means as are reasonably appropriate to bring the Proclamation to the attention of persons described in paragraph (1)(f) of this subsection.'

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

14. We congratulate the Government on the amendments proposed to ss. 80.2, 80.2A, 80.2B and 80.3 of the *Criminal Code*. These amendments significantly improve the law to take account of concerns raised by the ALRC and in the 1991 Gibbs Committee Report.¹² We welcome, in particular, the newly proposed ss. 80.2A(2) and 80.2B(2) which give effect to Australia's obligations under Article 20(2) of the ICCPR and Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).¹³ Nonetheless, we feel that there is room for improvement in these provisions and we would like, with respect, to offer some suggestions in this regard.

15. We note that s. 80.2A(1), the offence subject to the most serious penalty among those included in this section, hinges on a link between violence targeting a group and a threat to the 'peace, good order and good government of the Commonwealth'. Given that the latter threat (required by s. 80.2A(1)(d)) is the distinguishing characteristic of this offence (as opposed to s. 80.2A(2)), we believe that the offence in its entirety should be directed towards this end. As currently drafted, the inclusion of the word 'would' in s. 80.2A(1)(d) gives the impact of the 'urg[ing]' in question on 'peace, good order and good government of the Commonwealth' a speculative tone. Bearing in mind that a criminal offence framed in terms of 'urging' amounts to a restriction of speech on the basis of its content, we believe that this offence should be as narrowly drawn as possible.¹⁴ Accordingly, we would recommend that the current wording s. 80.2A(1)(d) be revised as set forth immediately below, in order to strengthen the link between the 'urg[ing]' and the threat to the Commonwealth. This is consistent with the spirit of the ALRC recommendations to which these revisions are otherwise responsive.¹⁵

Unintended implications of the legislative setting

16. A number of compelling submissions were made to the ALRC in connection with its review of sedition laws concerning the dangers of Parliament establishing an implicit link between inter-group violence of a racially or religiously targeted character and terrorism.¹⁶ While we appreciate that it *is* in the interests of national security to prevent violence of this kind (and many other kinds), we remain concerned about the possible counter-productive effects of introducing a prohibition on racially or religiously targeted violence as part of a suite of

¹² ALRC Sedition Report, chapters 9 and 10; Gibbs Report.

¹³ We note that Australia entered a reservation upon its 1975 ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination* whereby it expressed 'the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4 (a)'.

¹⁴ On the circumspection rightly directed towards content-based restrictions on freedom of speech, see *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* (1992) 177 CLR 106, at 143 (per Mason CJ), and at 235 per McHugh J; *Levy v Victoria* (1997) 189 CLR 579 at 647 (per Kirby J) and at 619 (per Gaudron J); *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582 at 595 per Gleeson CJ. Recall also, in general, the requirement that any restrictions on freedom of speech be shown to be necessary for the protection of national security (etc.) under Article 19 of the ICCPR.

¹⁵ Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (2006) (hereafter ALRC Sedition Report), para [836].

¹⁶ ALRC Sedition Report, paras [10.51]-[10.56].

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

Political opinion

17. Finally, we would like to express concerns about the inclusion of ‘political opinion’ among the list of grounds upon which a targeted person or group may be distinguished. Article 4(a) of the ICCPR calls upon State parties to render punishable by law acts of violence or incitement to such acts ‘against any race or group of persons of another colour or ethnic origin’. Article 20 of the ICCPR requires State parties to prohibit ‘national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’. In neither of these cases does violence targeted on the basis of political opinion feature, nor is it the focus of domestic anti-vilification laws at the state, territory or federal levels.¹⁷ Rather, ‘political opinion’ is more familiar as a ground of distinction upon which anti-discrimination laws at the state, territory and federal levels operate.¹⁸ Its inclusion in this context dilutes the sense that ss. 80.2A and 80.2B are responsive to and consistent with our international legal commitments. The inclusion of this single additional ground (above and beyond those contemplated by relevant instruments of international law) also begs the question why other grounds upon which discrimination law routinely operates, such as colour, gender, sexual orientation, disability and illness, are not included within the ambit of this provision. The latter raises the prospect of these provisions lending unintended legitimacy to, or appearing to diminish the significance of, incitement to violence targeting such categories of persons (of which there are regrettably many examples throughout history). For these reasons, and because complicity in violence (including but not limited to violence targeting persons on grounds of political opinion) may otherwise be open to prosecution under general criminal law, we recommend the deletion of ‘political opinion’ from ss.80.2A(1) and (2) and 80.2B(1) and (2).

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

¹⁷ *Racial Discrimination Act 1975* (Cth) Part IIA (racial hatred); *Anti-Discrimination Act 1977* (NSW) Part 2 Division 3A (racial vilification), Part 3A Division 5 (transgender vilification), Part 4C Division 4 (homosexuality vilification), Part 4F (HIV/AIDS vilification); *Racial and Religious Tolerance Act 2001* (Vic) (racial and religious vilification); *Anti-Discrimination Act 1991* (Qld) s124A (racial and religious vilification); *Anti-Discrimination Act 1998* (Tas) s19 (inciting hatred on the grounds of race, disability, sexual orientation, lawful sexual activity, religious belief or activity); *Discrimination Act 1991* (ACT) Part 6 (racial vilification); *Racial Vilification Act 1996* (SA) s4 (racial vilification).

¹⁸ *Ibid.* Note that the ACT anti-discrimination statute cited immediately above extends to ‘political conviction’, the Qld anti-discrimination statute extends to ‘political belief or activity’ and the Tasmanian anti-discrimination statute extends to ‘political activity’. Victoria’s *Equal Opportunity Act 1995* (Vic) likewise prohibits discrimination on the basis of ‘political belief or activity’ (s. 6(g)); Western Australia’s *Equal Opportunity Act 1984* (WA) prohibits discrimination on the basis of ‘political conviction’ (s.53) and the Northern Territory’s *Anti-Discrimination Act* (NT) prohibits discrimination on the basis of ‘political opinion, affiliation or activity’ (s.19(n)).

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

Recommendation B.3: We recommend the deletion of ‘political opinion’ from ss. 80.2A(1) and (2) and 80.2B(1) and (2).

C. Definition of Terrorist Act (s.100.1)

18. We support the amendment of s. 100.1 of the *Criminal Code* to extend to terrorist acts targeting the United Nations, a body of the United Nations or a specialised agency of the United Nations.

Scope of harm

19. We are concerned, however, by the proposed deletion of the words ‘that is physical harm’ from paragraphs (2)(a) and (3)(b)(i) of this subsection. As noted above, the effect of this will be for ‘harm’ to be given the meaning set forth in the Dictionary section of the *Criminal Code* which, as we indicated in Part A of this submission, extends to harm to a person’s mental health.¹⁹ We recall the observations of the PJCIS that ‘the implications of including psychological harm are not entirely clear’, that definitions of terrorism ‘do not generally include a reference to psychological harm’ and that the inclusion of psychological harm would set the law at odds with popular understandings of terrorism.²⁰ We recall, too, the importance that the PJCIS rightly attached to the pursuit of the utmost clarity in these provisions, given the gravity of the penalties and the public condemnation to which any person charged thereunder may be exposed.²¹ It is also pertinent to recall the Sheller Committee’s observation that uncertainties in the terrorist act definition will be ‘likely to make prosecutions prolonged and more difficult, and increase the difficulties members of the public have in understanding the legislation’.²² We recognise that the *Criminal Code* definition of harm is designed to exclude ‘impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community’.²³ Nonetheless, we feel that the extension of the definition of terrorist act to include an action or threat of action made with the intention of causing, and even the mere likelihood of causing, serious psychological harm (which includes temporary harm, according to the *Criminal Code* definition) is, as noted above, to render these laws uncertain and potentially overbroad and thereby diminish their effectiveness.

20. Following are three examples of categories of actions or threats that could potentially fall within the ambit of a definition so extended. In each of these cases, it would likely be open to heated debate whether the impact of the actions or threats in question fell ‘within the limits of

¹⁹ *Supra*, at 2.

²⁰ PJCIS Report, paras [5.35]-[5.37]. The Draft Comprehensive Convention on International Terrorism, for instance, is restricted in relevant part to causing ‘[d]eath or serious bodily injury’. See Letter dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly, UN Doc. A/59/894 (12 August 2005), Appendix II, Article 1(a). Also, UN SC Res 1566 (October 2004), concerning ‘threats to international peace and security caused by terrorism’ refers, at para. 3, to ‘criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury’. Further, prohibitions on terrorism have not been extended beyond this ambit in the US (U.S. Code Title 22, Ch.38, Para. 2656f(d)), the UK (*Terrorism Act 2000*, s.34(2)), Canada (*Anti-Terrorism Act*, part II.1, s.83.01), or New Zealand (*Terrorism Suppression Act 2002*, s.7).

²¹ PJCIS Report (n.4), para [5.25].

²² *Report of the Security Legislation Committee*, June 2006 (hereafter, Sheller Report), para [6.12].

²³ Dictionary to the *Criminal Code Act 1995* (Cth).

what is acceptable as incidental to social interaction or to life in the community' so as to be excluded from the *Criminal Code's* definition of 'harm'.

- A protest or other action taken, or threatened to be taken, by representatives of a 'pro-life' lobbying group, calculated to intimidate persons attempting to enter a facility where pregnancy termination procedures are performed in order to discourage those persons from proceeding with a termination. Globally, the tactics of the 'pro-life' movement have frequently included confronting people with graphic and distressing images of terminated fetuses – actions that may prove (and arguably have proven) seriously traumatic for at least some of the persons towards whom they are directed. It is open to interpretation that the intention of at least some persons responsible for actions of this type is precisely to cause serious psychological harm (at least temporarily) so as to bring about a radical change of heart in the persons in question.
- A protest or other action taken, or threatened to be taken, by representatives of an animal rights group, calculated to intimidate and distress persons attempting to enter a facility where particular animal products are produced or displayed or where animal experimentation is performed. Globally, the tactics of the animal rights movement have frequently included confronting people with graphic and distressing images of cruelty to animals. It is open to interpretation that the intention of at least some persons responsible for actions of this type is precisely to cause serious psychological harm (at least temporarily) so as to bring about a radical change of heart in the persons in question.
- An artistic performance or display of artwork calculated to intimidate persons viewing or otherwise encountering the work in question, or amounting to a threat to do so. Historical and contemporary artistic practice has often included work that is deliberately confronting, alarming or severely distressing in its engagement with questions of existential, philosophical, religious or political significance. It is open to interpretation that the intention of at least some artists responsible for work of this nature is precisely to cause serious psychological harm (at least temporarily) so as to bring about a profound questioning of basic assumptions and attachments or otherwise pursue an artistic goal or inquiry related to the advancement of a political, religious or ideological cause.²⁴

21. As noted above, to criminalise expressive actions and communications (threats) on the basis of their content is something that the law in democratic societies has traditionally only done with extreme circumspection.²⁵ This hesitancy flows from a commitment to freedom of expression, but also from the recognition that law enforcement agencies are not well served by being deployed in one or other 'war of ideas'. The proposed deletion of the physical harm limitation from the terrorist act definition in s. 100.1 renders the provision, at least in part, a content-based restriction on speech and speech-acts without a clear national security or public protection rationale.

22. Serious harm to a persons' mental health is something that Australian law must recognise, address and seek to prevent in a variety of ways. However, counter-terrorism legislation does not seem the appropriate context in which to pursue this public policy agenda. The interpretive disagreement that has long plagued the definition of terrorism in international law indicates

²⁴ Ingmar Bergman once said, for example, that 'I don't want to produce a work of art that the public can sit and suck aesthetically ... I want to give them a blow in the small of the back, to scorch their indifference, to startle them out of their complacency': quoted in Myrna Oliver, 'Film master Ingmar Bergman dies at 89', *Los Angeles Times*, 31 July, 2007.

²⁵ *Supra*, note 11.

the difficulty of legislating in this area with precision and clarity.²⁶ This difficulty would only be compounded by the extension of a 'terrorist act' to embrace the threat or likelihood of serious psychological harm, in view of the diagnostic controversies and expert disagreements by which mental health issues have long been surrounded.

23. The uncertainty that would arise from the proposed extension of the 'terrorist act' definition to actions or threats causing or likely to cause psychological harm would exert a chilling effect upon the free exchange of political, religious or ideological views and ideas. To legislate in this way would communicate a message to the Australian public and the world that Australia is a nation intolerant, indeed fearful, of ideas and forms of expression that are controversial, challenging or *avant-garde*. For these reasons, we urge the Government not to make the proposed deletion.

Disruption or destruction of an electronic system

24. A further aspect of the s. 100.1 definition to which we would like to draw attention is the breadth of the scope of paragraphs (2)(f) and (g) of this subsection, both of which pertain to actions or threats of action seriously interfering with, disrupting or destroying an 'electronic system', or likely to do so. The term 'electronic system' is said to include a range of systems ('an information system', 'a telecommunications system', etc.) but these inclusions are non-exhaustive. Given this unlimited scope, the open-endedness of the term itself (which has not been included in the *Criminal Code Act Dictionary*, nor defined elsewhere in the Act), and the generality of each of the 'systems' it includes, the reach of a 'terrorist act' with respect to an 'electronic system' is highly uncertain and potentially very broad.²⁷ This is likely to generate considerable uncertainty in the public consciousness as to where 'hacking' offences (such as those already punishable under the *Cybercrime Act 2001* (Cth)) end and where offences concerning an 'electronic system' that amount to a 'terrorist act' begin.

25. The distinguishing feature as far as this subsection is concerned is obviously the co-presence of the two forms of intention specified in paragraphs (1)(b) and (1)(c) (intent to advance a political, religious or ideological cause and to coerce or influence by intimidation), and the absence of both of the exonerating factors specified in paragraph (3) (having the nature of advocacy, protest, dissent or industrial action and not being intended to cause harm, or create a serious risk to the health or safety of the public or a section of the public, etc.). Nonetheless, because of the fact that 'harm' is proposed to include temporary or permanent psychological harm and because the ordinary meaning of 'to intimidate' may include to 'render timid, inspire with fear; to overawe, cow',²⁸ it is possible for a wide range of relatively peripheral hacking actions, or the threat of such actions, to be caught by this definition of a 'terrorist act'.

26. Various relatively harmless forms of so-called 'hactivism' (hacking undertaken in pursuit of an explicit political agenda) could, for instance, be caught by this legislation, to the extent that the persons responsible fell within its jurisdictional reach. Consider, by way of an extra-jurisdictional example, the hacking of the website of the German Interior Minister, Wolfgang Schäuble, to protest against Germany's biometric passports and telecommunications data retention legislation.²⁹ Another example, pre-dating East Timorese independence, is the

²⁶ Ben Saul, *Defining Terrorism in International Law* (2006), 317.

²⁷ While 'telecommunications system' (one possible type of 'electronic system') is not defined in the *Criminal Code Act*, 'telecommunications network' is defined – it is given the definition conferred upon it by the *Telecommunications Act 1997*. The relationship between these two terms is unclear.

²⁸ *Oxford English Dictionary*, 2nd Edition (1989).

²⁹ See http://www.focus.de/digital/internet/hacker-angriff-auf-schaeubles-homepage_aid_370096.html (last accessed 12 September 2009).

defacing of Indonesian websites by Portuguese hackers posting 'Free East Timor' slogans.³⁰ In such cases, a breach of website security protocols would almost undoubtedly have caused disruption. Moreover, in scenarios like these, it would be arguable that the posting of political slogans pertaining to such sensitive and controversial subjects amounted to a threat to cause psychological harm to a section of the public, or to create a serious risk to the health or safety of a section of the public (such as military personnel engaged in or near the conflicts in question). Yet where no critical public services are comprised, and no physical harm is actually forthcoming, it seems difficult to justify the classification of such actions or threats as 'terrorist acts' in the same realm of criminality as the Bali, Madrid or London bombings. Such a classification would not, we suspect, be consistent with the Australian public's understanding of what amounts – and should amount – to terrorism.

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

Recommendation C.1: We recommend that the words 'that is physical harm' be restored to paragraphs (2)(a) and (3)(b)(i) of s.100.1 of the *Criminal Code*.

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

D. Terrorism Hoax (s.101.7)

28. The introduction of a specific terrorist hoax offence in s. 101.7 of the *Criminal Code* is designed to address matters of public concern, namely the arousal of public alarm and misdirection of resources that may flow from the making of unfounded threats of terrorism in circumstances where the threat in question doesn't satisfy the intention-based requirements of a 'terrorist act'. The proposed s. 101.7 purports to be responsive, in this respect, to recommendation 20 of the Sheller Report and recommendation 13 of the PJCIS Report.

29. We note, however, that the language proposed does not, in fact, correspond to the recommendations of these two Reports. The Sheller Report proposed the introduction of an offence framed in the same terms as Article 2(2) of the Draft Comprehensive Convention on International Terrorism, a proposal that the PJCIS Report appeared to endorse. That Article renders it an offence under the Convention for someone to make 'a credible and serious threat to commit an offence' prohibited by Article 2(1) of the Convention.³¹ The Sheller Report observed that it is important that the *Criminal Code* 'not inadvertently apply to threats made in anger or as a joke (however distasteful) which are without substance and the product of ill judgment'. To have the Act so apply would, the Report maintained, 'disproportionately restrict

³⁰ Seth F. Kreimer, 'Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet' (2001-2002) 150 *University of Pennsylvania Law Review* 119, at 157, note 102.

³¹ Letter dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly, UN Doc. A/59/894 (12 August 2005), Appendix II.

the right to freedom of expression'.³² We endorse the views expressed in the Sheller Report and recommend the revision of s.101.7 to track the language of Article 2(2) of the Draft Comprehensive Convention on International Terrorism.

30. As it is currently drafted, it is possible that a person could form the intent required by paragraph (b) of s. 101.7 (namely, intent to induce a false belief that a terrorist act has occurred, is occurring or is likely to occur) out of rage or poor judgment, or in recognition of the tendency of the person towards whom the conduct is directed to be persuaded readily into such false beliefs, without the threat in question ever amounting to a serious and credible one. It would, for instance, capture:

- the overblown tauntings of a young adult directed towards his or her gullible younger sibling; and
- a cruel and preposterous joke made to a person known to suffer from paranoid delusions, with the intention of upsetting them and them alone.

31. In these types of scenarios, the threat in question would not be likely to trigger the adverse consequences that the proposal is purportedly designed to prevent (i.e., arousal of public alarm and misdirection of resources). Nonetheless, it is entirely possible that the acts described would fall within the scope of s. 101.7 as currently drafted. The language presented by Article 2(2) of the Draft Comprehensive Convention on International Terrorism, and recommended by the Sheller Report, provides a satisfactory way of avoiding these unintended consequences.

Recommendation D.1: We recommend that s. 101.7 be revised to reflect the language of Article 2(2) of the Draft Comprehensive Convention on International Terrorism which prohibits the making of a 'serious and credible' threat to engage in a terrorist act.

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

32. We applaud the Government on the proposed amendments to ss. 102.5 and 102.7 of the *Criminal Code*. These provisions address serious concerns noted by the Clarke Inquiry regarding confusion and uncertainty surrounding the interpretation of the fault element by juries after judicial directions.³³ Notwithstanding these improvements, we believe that the proposed provisions could be further enhanced and would like to offer some suggestions.

33. It is apparent that the offences set forth in ss. 102.7 and 102.5 both depend upon the organisation(s) in question qualifying as a 'terrorist organisation': status that may arise by virtue of specification as such by regulation.³⁴ We understand that there are currently 18 organisations so listed.³⁵ However, there is no publicly available information which explains why these were chosen in preference to other similar organisations, beyond a restatement of the general definitional standard. Nor is there any available information about organisations that are currently under consideration for such listing. It should be noted that a 2006 PJCIS Report reviewing the re-listing of Al-Qa'ida and Jemaah Islamiyah as terrorist organisations stated that 'a clearer exposition of the criteria would strengthen the Government's arguments, provide greater clarity and consistency in the evidence and therefore increase public

³² Sheller Report, paras [17.3]-[17.4].

³³ *Report into the Case of Dr Mohamed Haneef*, November 2008 (hereafter, the Clarke Inquiry), para [5.6] (Recommendation 5).

³⁴ *Criminal Code* s.102.1.

³⁵ <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument> (last accessed 22 September 2009).

confidence in the regime as a whole'.³⁶ Clearly defined criteria would also limit what is essentially a discretionary power to proscribe and therefore will play an important role in ensuring transparency and accountability.

34. We note, further, that the temporal relationship between the provision or receipt of training from/to 'an organisation' and the fact of the organisation becoming a terrorist organisation needs to be ascertained as clearly as possible given the consequences attached to providing training to, or receiving training from, a 'terrorist organisation'. As currently drafted, paragraphs (1) and (2) of s. 102.5 could, however, be given retrospective effect. Paragraphs (1)(a) and (2)(a) of this subsection do not require that an 'organisation' to which a person provides training or from which a person receives training be a terrorist organisation at the time of that training. It could be understood to suffice, under these subsections, that the organisation in question *subsequently* became a terrorist organisation and that the person in question *subsequently* formed the requisite intent with respect to that organisation. We recognise that courts would be inclined to interpret these provisions so as to ensure that this could not be the case, in view of the common law presumption against the retrospective application of statutes.³⁷ Nonetheless, we submit that it should not depend on litigation to procure this result and that the Government should strive, as it has done elsewhere in this legislation, to preclude the possibility of criminal offences having retrospective effect. Indeed, such a legislative approach is required by international human rights norms prohibiting retrospectivity in criminal law.³⁸

35. In addition, we recall that the Sheller Report recommended that the type of training targeted by the offences set forth in s. 102.5 be drafted more carefully to avoid catching in their net legitimate training activities.³⁹ The Sheller Report also highlighted that the training offences, as currently drafted, do not require any connection to a terrorist act.⁴⁰ As currently drafted, the s. 102.5 offences would extend, for instance, to the provision of training calculated to steer a terrorist organisation, or particular individuals within it, *away* from a terrorist path. Likewise the offence in s. 102.5(2) would extend to entirely peripheral and non-violent activities, such as someone teaching a teenager in their village (who happens to be a member of a terrorist organisation, whether or not an active member) to ride a bike, bake bread or carry out first aid. School teachers in some areas might inadvertently be caught by these offences merely by virtue of their continued instruction of their pupils.

36. We note that the Government has considered the Sheller recommendations and has decided to opt for a proposed ministerial authorisation scheme instead, by way of exempting legitimate actors and activities. We will address our concerns regarding this scheme in the forthcoming section. In view of those concerns and the public interest in these criminal offences being as clearly expressed as possible from the outset, we feel that it remains essential to specify the type of training that might expose persons to liability under subsection 102.5. US law offers a convenient model in its reference to 'military type training' defined, in the equivalent section in Title 18 of the US Code s. 2339D, as training in methods that can cause death or serious bodily harm, destroy or damage property, disrupt services to critical infrastructure or training in the use, storage, production or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction.⁴¹

³⁶ PJCIS, *Review of the re-listing of Al-Qa'ida and Jemaah Islamiyah as terrorist organisations under the Criminal Code 1995* (16 October 2006), at para [1.20].

³⁷ *Rodway v The Queen* 169 CLR 515 at 518-519.

³⁸ ICCPR, Art.15(1).

³⁹ Sheller Report, para. [5.77] (Recommendation 16).

⁴⁰ *Ibid.*

⁴¹ *US Code*, Part 1, Chapter 113B, §2339D(c)(1).

Recommendation E.1: We recommend that s. 102.7 be amended to contain a schedule with the specific criteria for the selection of terrorist organisations.

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

Recommendation E.3: We recommend that s. 102.5 be amended to confine its operation to ‘military type training’ defined in line with Title 18 of the US Code.

F. Declared aid/regional aid organisations (s.102.8A; 102.5(5))

37. We recognise that transparency, fiscal accountability, compliance with applicable law and good governance are the indispensable features of a responsible charitable organisation. To this end, we support the amendment of ss. 102.8A and 102.5(5) aiming to ensure that the surrounding offences do not inadvertently capture legitimate activities undertaken by aid and regional aid organisations.

38. Nonetheless, we would like to express our concerns regarding the potentially significant risks for humanitarian aid organisations, with finite human and fiscal resources, of not successfully navigating the process of seeking declaration as an aid or regional aid organisation. Even if subsequently rectified, any failure to be declared under s. 102.8A after submission of an application could have grave repercussions for the organisation(s) in question, potentially affecting their standing with donors and other governments in irreparable ways. A further risk is that humanitarian aid organisations, otherwise preoccupied and with limited resources, might simply neglect to obtain the requisite declaration in a timely manner. This would, in the meantime, expose their personnel to risk of criminal liability as they continued to address urgent humanitarian needs.

39. In order to address these concerns, we would propose that the Government insert a savings clause in subsection 102.5(5), providing that subsections 102.5(1) and (2) shall not apply if the training was provided by an organisation that satisfied certain explicit criteria, even if the organisation in question did not fulfil the requirements of 102.5(5)(a) or (b).

Recommendation F.1: We recommend that a savings clause be inserted in subsection 102.5(5), providing that subsections 102.5(1) and (2) shall not apply if the training in question was provided by an organisation that satisfied certain explicit criteria, even if the organisation in question did not fulfil the requirements of 102.5(5)(a) or (b).

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

40. We support the adoption of reasonable belief threshold test under ss. 23C(2) and 23DB(2) of the *Crimes Act 1914* (Cth) (hereafter, the *Crimes Act*). A clear distinction exists in criminal law regarding the states of mind underlying the reasonable suspicion and reasonable belief standards. In *R v Rondo*, for instance, the NSW Court of Criminal Appeal observed that: ‘A reasonable suspicion involves less than a belief but more than a possibility.’⁴² Suspicion entails ‘more than a mere idle wondering’ but is consistent with the creation of a mere ‘apprehension or

⁴² *R v Rondo* (2001) 126 A Crim R 562.

fear' regarding the existence of certain circumstances in the mind of a reasonable person.⁴³ In *Henderson v Surfield and Carter*, the Full Court of the Supreme Court of South Australia observed that '[s]uspicion lives in the consciousness of uncertainty', in contrast to belief.⁴⁴ Belief on the other hand, transcends a mere apprehension or fear. 'As a belief is a strongly held conviction, the absence of doubt makes the state of mind far removed from suspicion'.⁴⁵ The reasonable suspicion standard may be sufficient for some purposes. However, we submit that reasonable suspicion is not an appropriate standard to utilise for purposes of detention, which international human rights law requires be subject to particular guarantees and conditions.⁴⁶ This is particularly the case in a counter-terrorism context where, given public anxiety in the wake of events of the past eight years, there remains a real risk of fear being aroused without foundation. We recommend, therefore, that as far as detention is concerned (investigative or otherwise), 'reasonable belief' is the more appropriate test.

Recommendation G.1: We recommend that ss. 23C(2)(b) and 23DB(2)(b) be amended to raise the threshold test to that of 'reasonable belief'.

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

41. We commend the Government on their proposed amendments to s. 23C(7) of the *Crimes Act* to clarify the parameters relevant to disregarded periods of time ('dead time') in the calculation of the investigation period. We note, in this connection, the operative rationale for the absence of capping provisions in s 23C in contrast to s. 23DB (the latter to be made subject to a cap in paragraph (11) by virtue of the additional ground for extension afforded by paragraph 9(m) of that section). The Clarke Inquiry in its discussion of what was formerly s. 23CA(8)(a)-(l) (now paragraphs 9(a)-(l) of s.23DB), which mirrors s. 23C(7)(a)-(l), noted that the activities addressed in these sections are by their nature of finite length and as such are 'naturally capped'.⁴⁷ Nonetheless, we remain concerned about the absence of an overall cap applicable to all extensions of the investigation period under s. 23C(7).

42. The Clarke Inquiry did not examine the potential for abusive or, at a minimum, unduly permissive interpretations of paragraphs (a) to (l) of s. 23C(7) so as to extend the investigation period. For instance, allowing time for a detainee to 'rest or recuperate' (under s. 23C(7j)) could potentially be used as a pretext for extending the detainee's experience of the legal limbo invariably associated with pre-charge detention, perhaps in order to pressure the detainee into a particular course of action. The lead-in to paragraph (7) does afford some reassurance in this respect, by subjecting the periods of time that may be disregarded under the ensuring subparagraphs to an overall requirement of reasonableness echoing that included in s. 23C(4). Nonetheless, we submit that it is in the interests of law enforcement personnel as much as detainees that the legislation give more specific and reliable guidance as to the outer limits beyond which pre-charge detention should not extend.

43. The ICCPR stresses at a number of instances the importance of 'promptness' in the pre-charge and pre-trial handling of criminal suspects, particularly those detained; this an important theme in Article 9 of the Covenant.⁴⁸ Leaving detainees in a prolonged state of uncertainty as to their legal status may also be inconsistent with the requirement that all

⁴³ *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303 (per Kitto J).

⁴⁴ *Henderson v Surfield and Carter* [1927] SASR 192 at 196 (quoted with approval in the High Court in *Ruddock v Taylor* [2005] HCA 48 at para. [77] (per Gleeson CJ, Gummow, Hayne and Heydon JJ)).

⁴⁵ *Ruddock v Taylor* [2005] HCA 48 at para. [92] (per Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁴⁶ ICCPR, Art. 9.

⁴⁷ The Clarke Inquiry, para [5.4.4].

⁴⁸ ICCPR, Art. 9(2) and (3).

persons deprived of their liberty 'be treated with humanity and with respect for the inherent dignity of the human person' under Article 10 of the ICCPR.⁴⁹ We therefore urge the Government to minimise scope for abuse or uncertainty by subjecting the extensions contemplated by s. 23C(7) to an overall cap along the lines of that to be provided by s. 23DB(11).

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

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

44. We welcome the amendment of s. 23DA(2) of the *Crimes Act* to clarify the parameters relevant to the extension of the investigation period by order of a magistrate. However, we reiterate concerns expressed in the Clarke Inquiry that this section is not prescriptive enough and could potentially give rise to breaches of procedural fairness. As the Clarke Inquiry emphasised, it is imperative that such sections 'detail a comprehensive set of procedures to ensure that applications can be made simply and expeditiously'.⁵⁰ We do not believe that s. 23DA(2) yet provides such detail. It is, for instance, not clear what might be entailed in evaluating whether an investigation has been conducted 'properly' for purposes of satisfying s. 23DA(2)(c).

45. Fortunately, general law offers a convenient and non-controversial way of addressing this residual uncertainty. Section 138 of the *Evidence Act 1995* (Cth) (hereafter, the *Evidence Act*), mirrored in many jurisdictions throughout Australia, outlines factors to be taken into account in the exercise of the discretion whether to exclude improperly or illegally obtained evidence. In this context, paragraph (3)(f) provides that consistency with or contravention of a person's rights under the ICCPR shall be a relevant consideration. The ICCPR contains a number of guarantees regarding detainee treatment (Articles 9 and 10) and liberty of movement (Article 12), among others, which could be implicated if an investigation period is extended. Moreover, there is a wealth of guidance available on their interpretation and application of these guarantees thanks to the Human Rights Committee's general comments and consideration of individual complaints. Accordingly, we believe that the ICCPR would be an appropriate point of reference to which magistrates should have regard when determining whether an investigation has been conducted 'properly and without delay' for purposes of s. 23DA(2)(c), just as it is already under s. 138 of the *Evidence Act*.

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

⁴⁹ It has been established, for instance, in the European Court of Human Rights that the law must provide clearly defined pre-conditions for detention and its application must be foreseeable: *Baranowski v Poland*, No. 28358/95 (Judgement of 28 March, 2000), para [52]; *Jecius v Lithuania* (2002) 35 EHRR 16, para [56]. Further, it has also been established that any significant delay in releasing a detainee is likely to breach the provision of the European Convention that is equivalent to ICCPR Art. 10 (Art.5); this has included a mere one hour delay (*Quinn v France* (1996) 21 EHRR 529) and, in another instance, a three day delay (*Mancini v Italy*, No.44955/98 (Judgment of 2 September, 2001)).

⁵⁰ Clarke Inquiry, para [5.4.6].

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

46. We commend the Government on proposed ss. 23DB and 23DC of the *Crimes Act*. In particular, we welcome the imposition, pursuant to proposed s. 23DB(11), of a maximum cap for the amount of time susceptible to disregard in calculating the investigation period under ss. 23DB(5) and (7), as well as the salient requirement for the inclusion of the total amount of disregarded time in the application for judicial specification under proposed s. 23DC(4)(d), in each case with respect to an extension of the investigation period under s. 23DB(9)(m). The inclusion of a maximum cap on an investigation period's 'dead time' has considerably enhanced the statutory regime to address a deficiency highlighted by the Clarke Inquiry.⁵¹ Nonetheless, we believe that the absence of an overall cap on the maximum duration of the investigation period insofar as it may be extended under *any* of the paragraphs of s.23DB(9), and/or an overall cap on 'dead time' open to disregard under s. 23DB(9) in its entirety, leaves open a real possibility that this subsection may be subject to abuse (albeit perhaps well-meaning abuse) in the pressured environment of a terrorism-related investigation. In Section H of this submission we have already outlined the nature of this risk and proposed a mechanism for its mitigation; the same concerns apply in the context of s. 23DB(9), arguably to a greater extent in view of the particular pressures to which law enforcement personnel investigating terrorism offences are likely to find themselves subject.

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

K. Exclusion of information from application for extension of investigation period and/or from copy provided to accused (*Crimes Act* s. 23D(3), (5), 23DA(4), 23DC(5), 23DD(5), 23DE(4), (6), 23DF(4))

47. We welcome the amendments to ss. 23DC, 23DD, 23DE, and/or 23DF of the *Crimes Act* insofar as they address a concern raised in the Clarke Inquiry that applications for extensions of investigations periods be entrusted only to senior officers (see ss. 23DC(3), 23DD(2)(e), 23DE(2), and 23DF(2)(d)).⁵² We hope that, in practice, this requirement will be supported by the provision of appropriate training to senior officers. We welcome also the clarification afforded by the proposed amendments that applications for extensions to investigations periods and instruments granting such extensions should be provided to the person to whom they relate or to his or her legal representative before their consideration by a magistrate or as soon as practicable after their issuance as the case may be (see ss. 23D(4), 23DA(6), 23DC(6), 23DD(6), 23DE(5), and 23DF(6)).

48. We remain concerned, however, that the open-ended provision made for exclusion of information in ss. 23D(3), (5), 23DA(4), 23DC(5), 23DD(5), 23DE(4) or (6), or 23DF(4) is inconsistent with Australia's obligations to safeguard the rights of accused persons by allowing them a capacity to defend themselves against criminal allegations occasioning a suspension of their rights. Articles 9(2) and 14(3)(b) of the ICCPR, protecting rights to liberty and security of person and to a fair trial, stress the necessity for an accused person to be duly informed of charges against him or her and to have adequate time and facilities to prepare his or her

⁵¹ Clarke Inquiry, paras [5.4.7]-[5.5] (although we note that Mr. Clarke proposed that the cap in question be 'no more than seven days' and observed that submissions had been made that no more than a 48 hour capacity for 'dead time' was appropriate).

⁵² Clarke Inquiry, para [5.5].

defence. The Human Rights Committee (charged with monitoring ICCPR compliance) has noted that it is important in the context of the guarantee to fair trial that the 'defence has an opportunity to familiarise itself with the documentary evidence against an accused'.⁵³ We submit that these guarantees are pertinent to the capacity of an arrestee to defend himself or herself against allegations upon which reliance is placed in an application for an extension of the investigation period (whether by disregard of time or otherwise) under ss. 23D, 23DA, 23DC, 23DD, 23DE, and/or 23DF of the *Crimes Act*.

49. Under ss. 23D(3), (5), 23DA(4), 23DC(5), 23DD(5), 23DE(4) or (6), or 23DF(4) of the *Crimes Act*, information material to an application for extension of the investigation period may be withheld from the accused and his or her defence if it is likely to: (1) prejudice national security; (2) be protected by public interest immunity, (3) risk ongoing operation by law enforcement or intelligence agencies, and (4) put at risk the safety of the community or law enforcement/intelligence officers. We note that the Discussion Paper rationalised these provisions by reference to a quote from the Clarke Inquiry stating that 'it should be borne in mind that a judicial officer might be required to consider sensitive or classified information in the absence of the person under arrest and/or their lawyer'.⁵⁴ However, it should be noted that this quotation is followed, in the Clarke Inquiry, by a further clause stating that 'provision should be made to ensure that, where necessary, that type of material may be put before the judicial officer *without there being an undue risk of questions of procedural fairness or nature justice arising*'.⁵⁵ We are concerned that if the accused and his or her defence counsel are denied access to exculpatory or inculpatory evidence, the opportunities afforded the accused or his or her legal representatives to make representations to a magistrate about the application in question (under ss. 23D(6), 23DA(2)(d), 23DC(6)(b), 23DD(2)(f), 23DE(5)(b), or 23DF(2)(e)) are rendered meaningless. It is difficult to comprehend how an accused person or his or her legal representative might formulate apt and compelling representations while lacking critical information about the nature of the investigation underway in relation to the arrestee.

50. We recognise that it is arguable that there might be extreme circumstances in which it may be determined necessary to hamstring an arrestee's defence in this way for reasons of public safety. We believe, however, that such a determination is one that a magistrate should be called upon to make, once in possession of all the relevant information, rather than being a decision left to investigating officers likely to have made significant personal investments in the investigation. This, we believe, is consistent with the 'overriding concern' emphasised in the Clarke Inquiry 'that procedural fairness should be accorded a person and, if the judicial officer [in question] considers there is a need to depart from normal processes for reasons he or she believes should outweigh the need for procedural fairness, the making of an order authorising that departure' should be a necessary precondition to such departure.⁵⁶

Recommendation K.1: We recommend that ss. 23D(3), S.23DC(5) and 23DE(4) be amended:

- to require that information proposed to be excluded from an application for extension of an investigation period be put before a judicial officer; and
- to require that the judicial officer make a determination about which elements, if any, of that information may be withheld from the arrestee.

⁵³ *Harward v. Norway*, UN Human Rights Committee, Communication No.451/1991, U.N.Doc. CCPR/C/51?D/451/1991(1994), para9.5.

⁵⁴ Clarke Inquiry at para [5.4.6], quoted in the Discussion Paper at p.117.

⁵⁵ *Ibid* (emphasis added).

⁵⁶ *Ibid* at para [5.5].

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

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

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

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

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

52. We are concerned, however, that as currently drafted these proposed amendments unduly impinge upon rights protected by Article 17 of the ICCPR, which provides that no person 'shall be subjected to arbitrary or unlawful interference with his [or her] privacy, family, or correspondence...' As the Government no doubt acknowledges, the powers of police to enter a person's premises and to search through a person's possessions clearly constitute an interference with that person's privacy. The entrance into a person's home of a number of police officers (most likely unknown to the person and unexpected by the person) amounts to a particularly serious infringement upon that person's privacy. International human rights law recognises, nevertheless, that such interferences may be necessary in certain circumstances in order to ensure the effective operation of the criminal justice system and thereby protect the rights of others. This recognition is implicit in the requirement that, in order to be consistent with Article 17 of the ICCPR, interferences with privacy must not be arbitrary or unlawful. The Human Rights Committee has made clear, in its General Comment on this Article, that '[t]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances'.⁵⁷

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

⁵⁷ UN Human Rights Committee, General Comment No. 16: *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)* (8 April 1988), para. 4, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/23378a8724595410c12563ed004aeecc?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/23378a8724595410c12563ed004aeecc?Opendocument) (last accessed 22 September 2009).

intentioned that exercise may be. We have, therefore, put forward a number of suggestions to address this risk below.

M. Power to search premises (s. 3UEA)

54. Section 3UEA(1) allows a police officer to enter premises if ‘the police officer suspects, on reasonable grounds’ that:

- (a) a thing is on the premises that is relevant to a terrorism offence, whether or not the offence has occurred; and
- (b) it is necessary to exercise a power under subsection (2) in order to prevent the thing from being used in connection with a terrorism offence; and
- (c) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person’s life, health or safety.

55. Our concerns relating to this subsection are, in brief, three-fold:

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

‘Suspects, on reasonable grounds’ threshold

56. As discussed above in Section G of this Submission, the threshold of ‘suspects, on reasonable grounds’ is an extremely low one, requiring, mere ‘apprehension or fear’ on reasonable grounds, a state of mind commensurate with a ‘consciousness of uncertainty’.⁵⁸ This low threshold requirement applies to each criterion of the offence, affording a police officer the power to enter premises if he or she:

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

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

⁵⁸ Supra, at pp.12-13.

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

Potential overreach beyond the ambit of emergency

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

60. There are, for instance, a very wide variety of offences defined under the *Criminal Code* as 'terrorism offences', from the actual commission of a terrorist act entailing the causing of serious physical harm to associating with or financing a terrorist organisation, and possessing a thing in connection with a terrorist offence.⁵⁹ Similarly, a 'thing' that is 'relevant' to a terrorism offence will have a very broad ambit, catching not only those 'things' closely or directly related to a terrorist offence, but those even remotely or incidentally relevant. While this is somewhat qualified by sub-section (b), the threshold for 'being used in connection with' a terrorist offence is similarly loose and potentially far-reaching. It is unclear whether the 'connection' required by paragraph (b) is causal, spatial or temporal. As a result, the requirements of s. 3UEA(1) could potentially be satisfied by reference to anything (money, mobile phones or cars, for instance) that could be suspected of being used in some way 'in connection with' a terrorist offence, not necessarily for the purposes of carrying out such an offence. The person subject to the invasion of privacy contemplated by s. 3UEA(1) could well have no connection to a person committing or suspected of committing a terrorist offence beyond the mediating effect of a 'thing' that might itself be entirely tangential to the commission of such an offence.

61. Is unclear whether this breadth is sufficiently qualified by paragraph (c) of s. 3UEA(1). Leaving aside the criticism raised above regarding the role of 'suspects on reasonable grounds', the interplay between the two parts of the sentence in paragraph (c) is unclear. It provides that an officer may enter, *inter alia*, if the officer suspects 'it is necessary to exercise the power without the authority of a search warrant *because there is a serious and imminent threat to a person's life, health or safety*'. Does this mean that it will reasonably be considered 'necessary' to exercise the power provided there is, objectively speaking, a serious and imminent threat to a person's life, health or safety? Or does the officer have to possess a reasonably grounded suspicion that the necessity *arises immediately and imminently from* a threat of which the officer harbours a reasonably grounded suspicion? Under its most permissive interpretation, paragraph (c) might be understood to be satisfied whenever suspicion of necessity coincides

⁵⁹ Within the *Criminal Code*, this includes s.101.2 (providing or receiving training in connection with terrorist acts), s.101.4 (possessing things connected with terrorist acts) and s.103 (financing terrorism).

with the prevalence of what is perceived to be a 'serious and imminent threat', regardless of the distance or proximity between the premises subject to warrantless search or entry and *that particular* serious and imminent threat to which the officer in question is having regard. In this era of ever-present terror alerts and terrorism-related media sensationalism, s. 3UEA(1)(c) seems to allow far too much to chance and apprehension or fear.

Lack of oversight

62. The problems afflicting the current wording of s. 3UEA(1) that we have outlined are compounded by the fact that any officer may hold the requisite state of mind, regardless of age, experience or training. Just as the Clarke Inquiry emphasised the importance of experienced, senior officers making applications for extensions of investigation periods, we believe that the decision when to exercise of powers of such potential gravity and invasiveness ought to be a matter vested in the most experienced and senior of police officers (appropriately trained for this purpose) and exercised under their close supervision.⁶⁰

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

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

⁶⁰ Clarke Inquiry, para [5.5].

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

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

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

Recommendation L4: We recommend s. 3UEA(3) should be amended, replacing the words 'an indictable offence or a summary offence' with the words 'a terrorist offence'.

Recommendation L5: We recommend that a new sub-section be added to s. 3UEA requiring any exercise of the power established by s.3UEA(1) be judicially reviewed to verify its legality. In the alternative, we recommend that an independent administrative body be charged with reviewing the exercise of these powers, including being required to make its findings public.

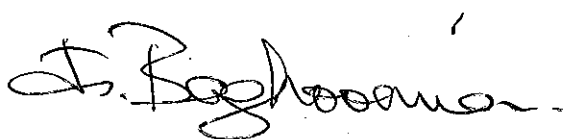
Conclusion

65. You will note that we have confined our remarks to the legislative provisions that are the subject of examination in the Discussion Paper. Nevertheless, we remain concerned about the international human rights law implications of other aspects of Australia's counter-terrorism and national security legislation, particularly those legislative provisions relating to control orders and preventative detention orders. These concerns have been outlined in previous submissions of the Centre.⁶¹

66. Notwithstanding these persistent concerns and despite the number of recommendations for improvement we have made in this submission, we believe that there is much to be applauded in the Government's work laid out in the Discussion Paper. Above all, we commend the Government on its commitment to transparency and consultation in the course of legislative development in this context.

67. We thank you, once more, for the opportunity to make a submission to the public consultation on proposed legislative reforms to Australia's counter-terrorism and national security legislation. We hope that the foregoing recommendations prove useful to you in the challenging and important tasks before you. We remain available to answer questions on, or provide clarification of, any aspect of this submission, should you wish us to do so.

Your sincerely,



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⁶¹ Submission on *Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2005* (11 November, 2005), available at http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/terrorism/submissions/sub188.pdf on 23 September, 2009.