GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

24 September 2009

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

By email: CTconsultation@ag.gov.au

Dear Assistant Secretary,

NATIONAL SECURITY LEGISLATION DISCUSSION PAPER

Thank you for the opportunity to make a submission in response to the National Security Legislation Discussion Paper (Discussion Paper) released in August 2009.

Our main submission (which follows) discusses, and makes recommendations in relation to, the specific amendments to Australia's counter-terrorism lawsproposed in the Discussion Paper.

We have also **attached** a submission on the Anti-Terrorism Laws Reform Bill 2009 that four of the authors of this submission made to the Senate Legal and Constitutional Affairs Committee in August 2009. This submission is an annexure to our main submission and provides supplementary information in relation to issues about Australia's counter-terrorism laws not raised in the Discussion Paper.

We make this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its content.

If you have any questions relating to this submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely,

Dr Ben Golder, Dr Andrew Lynch, Ms Nicola McGarrity, Mr Christopher Michaelsen, Mr Edward Santow, Mr Ben Teeger and Professor George Williams

SYDNEY 2052 AUSTRALIA
Email: n.mcgarrity@unsw.edu.au
Telephone: +61 (2) 9385 3445
Facsimile: +61 (2) 9385 1175
Web: www.gtcentre.unsw.edu.au

PART I: DEFINITION OF A TERRORIST ACT

The Discussion Paper proposes a number of changes to the definition of a 'terrorist act' in section 100.1 of the *Criminal Code*.[1] Some of these changes we support. However, others we see as problematic in that they broaden the scope of the definition (and thus the other terrorism-related provisions of the *Criminal Code*), while not enhancing the clarity with which the targeted action is understood.

Recognising International Bodies as Targets of Terrorism

We support the addition of section 100.1(1)(c)(ia) which would recognise an action or threat of action as a 'terrorist act' when it is made with the intention of 'coercing, or influencing by intimidation, the United Nations, a body of the United Nations or a specialised agency of the United Nations'. We note that this proposed amendment responds directly to Recommendation 11 of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) *Review of Security and Counter Terrorism Legislation* in December 2006.[2]

Broadening 'Harm'

We support the removal from the definition of 'terrorist act' the words 'that is physical harm' at paragraphs 100.1(2)(a) and (3)(b)(i). This would mean simply that the definition of 'harm' in the Dictionary to the *Criminal Code Act 1995* (Cth) (*Criminal Code*) applies, and therefore these provisions also now extend to cover serious harm to a person's mental health caused by an actual or threatened terrorist attack. This change was recommended by the Security Legislation Review Committee (Sheller Committee) in its 2006 Report.[3] The PJCIS, in its December 2006 report, did not share this view,[4] however, it was prepared for the Commonwealth Government to consult with the States and Territories for their thoughts on this issue.

We believe a good case can be made for including damage in all the forms which the law recognises more generally when criminalising terrorism. Apart from the attraction of simple consistency on this score, the primary aim of terrorist groups is to instil fear in the community – and in that sense, we are all intended victims. Usually the lives of some individuals are used by extremists to this end, but it is appropriate that the law recognise the wider harm intended and inflicted by those who peddle political violence. As a matter of practical application, perhaps little is likely to turn on the expansion of the harm element of the definition of 'terrorist act' since ideally plots will be foiled and charges laid in connection with the preparatory stages of a terrorist plan. This has been the actual operation of the laws to date and prosecutions have been successful even though the 'harm' has not come to fruition. Were a plot to progress to execution, it would seem very likely that some physical harm (bear in mind the definition currently includes property damage absent any casualties) would result. However, it is not totally inconceivable that an act of terrorism could occur without physical victims – a thwarted hostage-taking for example.

---

1 Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 43-49.

2 Parliamentary Joint Committee on Intelligence and Security (PJCIS), Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006).

3 Security Legislation Review Committee (Sheller Committee), *Report of the Security Legislation Review Committee* (2006) Recommendation 6.

4 PJCIS, *Review of Security and Counter Terrorism Legislation* (2006) Recommendation 9.

Threat

As the Discussion Paper acknowledges, there was clear consensus in earlier inquiries[5] that criminalisation of the making of a threat of terrorist violence would be better dealt with through a separate offence rather than retention in the definition of 'terrorist act' itself. The Discussion Paper rejects these calls saying that 'to remove the 'threat of action' from the definition of terrorist act dilutes the policy focus of criminalising 'threat of action' within the offences in Division 101 of the *Criminal Code*'.[6] It is unclear to us why the opprobrium directed towards any form of illegal activity may be said to be diminished by being the subject of a separate offence provision in what is undoubtedly the strictest division of the *Criminal Code*. The government's position is an insufficient justification given the conceptual difficulty and lack of clarity to which the inclusion of 'threat' in the definition of 'terrorist act' gives rise.

Further, the government's proposed solution to unease over this issue is to try to better accommodate threats of political violence within the definition by providing that the activity no longer just 'causes' harm but is also 'likely to cause' serious harm or damage. While the intention behind this addition is understandable, it produces an undeniably expansionist effect to the entire definition and in turn the many offences and extraordinary powers which follow from it. This consequence only underscores the desirability of removing the 'threat' aspect from s 100.1 and criminalising it separately. We view the suggested amendment of the definition to include acts which are 'likely to cause' harm as highly undesirable and do not support it.

Regarding the 'threat' of terrorist violence, we remain favourable to the approach recommended by the SLRC and endorsed by the PJCIS.

Recommendation 1

Regarding the 'threat' of terrorist violence, we recommend that the approach favoured by the Sheller Committee and endorsed by the PJCIS in December 2006 be adopted in preference to the position adopted by the Discussion Paper.

---

5 Sheller Committee, *Report of the Security Legislation Review Committee* (2006) Recommendations 7 and 8; PJCIS, *Review of Security and Counter Terrorism Legislation* (2006) Recommendation 10.

6 Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 49.

PART II: LISTING OF A TERRORIST ORGANISATION

Definition of 'Advocates'

The Governor-General may make regulations proscribing an organisation as a 'terrorist organisation' if the Attorney-General is satisfied on reasonable grounds that the organisation 'advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)' (Division 102.1(2)(b)). 'Advocates' is defined in Division 102.1(1A) of the *Criminal Code*. Currently, paragraph 102.1(1A)(c) provides that an organisation 'advocates' the doing of a terrorist act if '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 number of inquiries examining the operation of the proscription provisions have criticised the existing advocacy provisions as too broad-reaching, expansive, ambiguous and imprecise, as well as posing a threat to freedom of expression.[7] Conceivably, the current definition of 'advocacy' may result in the proscription of an organisation (which may be a company, club or church group) even where:

- The person who praised the terrorist act is not the leader of the group;
- The statement is not on official material distributed by the organisation;
- The statement is not accepted (and perhaps even rejected) by other members as representing the views of the group;
- The organisation has no other involvement in terrorism;
- The person praising terrorism did not intend for a terrorist act to be committed.

Furthermore, the definition is not limited to circumstances where a terrorist act has actually occurred, and captures statements and conduct in support of previous and prospective terrorist acts.

The listing of an organisation has serious criminal consequences for any individual connected to a proscribed organisation. First, a person who is merely a member or associate of such an organisation may have committed a criminal offence. The membership and association offences carry terms of imprisonment ranging from 3 to 10 years. Second, for the purposes of the prosecution of an individual for a terrorism offence in Division 102, the proscription of the organisation furnishes conclusive proof that the organisation is a terrorist organisation. There is no means available to the defendant to challenge that categorisation of the organisation.[8]

The approach taken by the Commonwealth Government in the Discussion Paper is in line with the 2006 PJCIS report.[9] The Discussion Paper recommends that the word 'substantial' be inserted before 'risk' in Division 102.1(1A)(c). According to the Discussion Paper, the threshold of a 'mere' risk is too low.[10] The effect of this amendment raises the threshold from a 'mere' risk that praise might have the effect of leading another person to engage in a

---

7 Sheller Committee, *Report of the Security Legislation Review Committee* (2006) 69-73; PJCIS, *Review of Security and Counter Terrorism Legislation* (2006) 68-71.

8 PJCIS, *Review of Security and Counter Terrorism Legislation* (2006) 70.

9 PJCIS, *Review of Security and Counter Terrorism Legislation* (2006) 71.

10 Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 57.

terrorist act to a 'heightened' risk that is 'real and apparent on the evidence presented'.[11] The 2006 PJCIS report noted that such 'a small and essentially technical amendment to clarify that 'substantial risk' is the intended threshold, would provide some improvement in certainty and proportionality'.[12]

While this addition was supported by the Sheller Committee in 2006, its primary recommendation was that paragraph 102.1(1A)(c) be deleted in its entirety.[13]

We believe that it is important to clarify and tighten the risk threshold necessary to ground the advocating of a terrorist act. However, we support the bolder change proposed by the Sheller Committee. That is, we believe that paragraph 102.1(1A)(c) should be deleted in its entirety. Paragraph (c) is an extraordinary extension of the power of proscription and of criminal liability, since it collectively punishes members of groups for the speech of their associates beyond their control.

It is not hard to imagine that bodies which refer approvingly to the activities of the leaders of national liberation movements, including Nelson Mandela or Mahatma Gandhi, could conceivably fall foul of Australia's counter-terrorism laws. Many other hypothetical examples come to mind, such as where someone praises past liberation struggles in East Timor or against a colonial power, or current battles in West Papua, the Middle East and parts of Africa. Whatever the merits or otherwise of these struggles, the inclusion of 'praise' in the Australian definition of 'advocacy' renders it far too broad.

Recommendation 2

We recommend that paragraph (c) should be deleted from the definition of 'advocacy' in subsection 102.1(1A) of the Criminal Code.

Expiration Time for Regulations

A regulation listing a terrorist organisation automatically ceases to have effect two years after it is made (subsection 102.1(3) of the *Criminal Code*). According to a 2007 report of the PJCIS, the purpose of this provision is to require the Attorney-General to consider afresh all relevant information in order to be satisfied that a sufficient factual basis exists to justify the proscription of an organisation for a further period.[14] As that Report states:

> The automatic cessation of a listing has been effective in institutionalising the review and ensuring that any chances in circumstances have been taken into account, for example, the renouncement of violence, entry into a peace process, and so forth.[15]

---

11 Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 57.
12 PJCIS, *Review of Security and Counter Terrorism Legislation* (2006) 71.
13 Sheller Committee, *Report of the Security Legislation Review Committee* (2006) 73.
14 PJCIS, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007) 50.
15 PJCIS, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007) 51.

The Discussion Paper recommends that the period of automatic expiration in subsection 102.1(3) be increased from two years to three years.[16] Regardless of whether a regulation ceases to have effect after two or three years, we emphasise the importance of there being a meaningful process of review of regulations. We note the important role played by the PJCIS in reviewing both the listing and the re-listing of a group as a terrorist organisation. The PJCIS should be given sufficient notice of the making of a new regulation, as well as updated information about the particular organisation, to enable it to carry out its review function.

[16] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 58-59.

PART III: TERRORIST ORGANISATION OFFENCES

Offence of Providing Support to a Terrorist Organisation

Pursuant to Division 102.7 of the *Criminal Code*, it is an offence for a person to intentionally provide support or resources to an organisation that would help the organisation engage in preparing, planning or assistance in or fostering the doing of a terrorist act, providing that the person either knows that, or is aware of a substantial risk that, the organisation to which they are providing support or resources is a terrorist organisation.

We accept that it is appropriate, as section 102.7 of the *Criminal Code* provides, to criminalise the provision of certain types of support to a terrorist organisation.

The Discussion Paper proposes two amendments to section 102.7:

- the word 'material' be inserted before 'support', so as to require a person to intentionally provide 'material support' to an organisation rather than mere 'support'; and

- the fault elements in relation to the physical elements of the offence are clarified, so that a person must provide resources or material support to an organisation *with the intention* of helping the organisation engage in terrorist activity.[17]

Material Support

Both the Sheller Committee and the 2006 PJCIS Report took the view that 'support' in the context of section 102.7 should be refined to mean 'material support'. This is because the rationale for the offence is to target the provision of support (and resources) that helps a terrorist organisation to *engage in terrorist activity*.[18] Therefore, to the extent that the Discussion Paper proposes to include the word 'material' in section 102.7, it is for the purposes of clarification only.

The real problem, as identified by the Sheller Committee, is that 'support' is not defined in the *Criminal Code*. It 'could be regarded as support that directly or indirectly helps a terrorist organisation engage in a terrorist act' and may even 'extend to the publication of views that appear to be favourable to a proscribed organisation and its stated purpose'.[19] The charging of Dr Mohamed Haneef under section 102.7 highlights the indeterminate meaning of 'support'. Dr Haneef simply provided a partially used SIM card to a relative in England before he left that country.

We support the addition of the word 'material' before 'support' as a means of limiting the scope for judicial interpretation of section 102.7. However, we further recommend that the word 'material' be defined in the Criminal Code. A model for this type of approach can be found in the United States offence of 'providing material support to terrorists'. This offence

---

17 Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 62-65 (emphasis added).

18 Sheller Committee, *Report of the Security Legislation Review Committee* (2006) 121; PJCIS, *Review of Security and Counter Terrorism Legislation* (2006) 78 (emphasis added).

19 Sheller Committee, *Report of the Security Legislation Review Committee* (2006) 121

contains an extended definition of 'material support or resources'. [20] We believe that, in the context of section 102.7, 'material' should be defined as not including 'the mere publication of views that appear to be favourable to an organisation or its objectives'.[21] We believe that this potential additional amendment would appropriately limit the scope of section 102.7 and minimise its impact on the freedom of expression.

Recommendation 3

We recommend that the word 'material' be inserted before 'support' in section 102.7 of the *Criminal Code*.

We further recommend that 'material' be defined as not including 'the mere publication of views that appear to be favourable to an organisation or its objectives'.

Fault Elements

The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef noted that there was considerable confusion about the elements of paragraph 102.7(2)(a). That is, whether it is sufficient for the prosecution to prove that the defendant intentionally provided support or resources to an organisation *and* also intended that the support or resources would help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act. Or, alternatively, whether the prosecution must also establish that the defendant intended the resources to, or was reckless as to whether they would, help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act. Given this confusion, it was recommended that there be 'a reconsideration of the wording of the offence'. [22]

The Discussion Paper recommends that the fault elements of section 102.7 be clarified. For an offence to be committed under the proposed amendments, it would be necessary to establish two fault elements, namely, that the person intentionally provides resources or material support to an organisation and that this is done *with the intention of helping that organisation engage in terrorist activity.*[23]

Recommendation 4

We support the proposal to clarify the fault elements of section 102.7 as a mean of avoiding confusion. We believe that the amendment proposed in the Discussion Paper appropriately limits the scope of the offence.

Other Offences

---

20 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) [11.32].

21 Suggested in the *Anti-Terrorism Laws Reform Bill 2009* (Cth) Item 15. See also Sheller Committee, *Report of the Security Legislation Review Committee* (2006) 13 (Recommendation 14).

22 The Hon. John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008) 256-260.

23 Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 62-65.

It concerns us that no other offences in Division 102 are the subject of proposed amendment by the Discussion Paper. Earlier reviews made numerous suggestions about the Division 102 offences including:

- replacing the membership offence of section 102.3 with an offence of participation in a terrorist organisation and expressly linking 'participation' to the purpose of furthering the terrorist aims of the organisation;[24]
- that section 102.5, dealing with training in respect of a terrorist organisation be redrafted 'as a matter of urgency', to define more clearly the type of training targeted – namely that which could reasonably prepare the trainees to commit a terrorist act (see also next section of this submission);[25]
- changing the legal burden to an evidential one in section 102.6, as well as providing an exemption to that offence for funds received solely for the purpose of providing legal representation;[26] and
- whole or partial repeal of the section 102.8 offence of association with member of a terrorist organisation.[27]

The Discussion Paper contains no statement explaining the omission of any of the above offences. While it is anticipated that the new National Security Legislation Monitor may make his or her own recommendations about these provisions, it is difficult to understand why the Clarke Inquiry's recommendations about section 102.7 should be included in the current round of proposals but not those of earlier inquiries that have made recommendations about other sections in Division 102.

Recommendation 5

The amendments recommended by the SLRC and PJCIS in respect of the full range of offences in Division 102 should be implemented.

New Section 102.8A – Declared Aid Organisations

The Discussion Paper does acknowledge the concerns expressed by both the SLRC and PJCIS in December 2006 about the operation of section 102.5 – the offence of providing training to or receiving training from a terrorist organisation.[28] It proposes a rather different approach to address the potential for legitimate activities to be captured by this offence – namely the addition of section 102.8A.

At the outset, we would state that the Discussion Paper's approach does not squarely address the particular concerns of the SLRC and PJCIS in that they were focused upon defining more narrowly the particular nature of the 'training' that is prohibited. Essentially,

---

24 PJCIS, *Review of Security and Counter Terrorism Legislation* (2006) Recommendation 15.

25 Sheller Committee, *Report of the Security Legislation Review Committee* (2006) Recommendation 12; PJCIS, *Review of Security and Counter Terrorism Legislation* (2006) Recommendation 16.

26 Sheller Committee, *Report of the Security Legislation Review Committee* (2006) Recommendation 13; PJCIS, *Review of Security and Counter Terrorism Legislation* (2006) Recommendation 17.

27 Sheller Committee, *Report of the Security Legislation Review Committee* (2006) Recommendation 15.

28 Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 67.

and as stated in the preceding section, both committees favoured refinement of the term so as to capture only training which could reasonably prepare the trainees to commit a terrorist act. Proposed section 102.8A does not deal with this issue at all but rather the nature of the organisation that is involved in the training.

Recommendation 6

The term 'training' should be refined so as to capture only training which could reasonably prepare the trainees to commit a terrorist act.

While any attempt to provide those who deal with political and religious organisations here and overseas with a measure of reassurance and clarity that they will not be exposed to liability under Division 102 is commendable, we submit that ultimately section 102.8A is misguided and deeply problematic. It represents a further expansion of the power of the state to determine the legitimacy of various political positions and the organisations and individuals which hold them. In simple terms, section 102.8A equates to a positive version of the proscription regime on which the Division in part depends. But while there may be a strong case for allowing the state to declare organisations to be terrorist in character, we think the justification to be rather weaker in relation to a power to declare those organisations with which individuals may safely deal. The idea that organisations should apply for Ministerial endorsement is especially worrying since few may be enthusiastic about exposing themselves to the extraordinary governmental scrutiny which would seem to be required. Organisations are likely to be reluctant to seek a declaration for perfectly legitimate reasons, but those without one may find themselves attracting diminished aid as a result.

Recommendation 7

We do not support the inclusion of section 102.8A in proposed amendments to the *Criminal Code*.

PART IV: SEDITION OFFENCES

Part 2 of the Discussion Paper proposes to amend the sedition offences and related provisions, currently set out in Part 5.1 Division 80 of the *Criminal Code*. This part of the *Criminal Code* was the subject of significant amendments in 2005. In 2006, the Australian Law Reform Commission (ALRC) was given the task of recommending amendments to improve these laws. In particular, the ALRC's Terms of Reference asked it to consider whether these provisions 'effectively address the problem of urging the use of force or violence'.[29] The ALRC's final report (ALRC 104) made a number of recommendations for reforming these laws. The Discussion Paper reiterates the Commonwealth Government's support for ALRC 104, and subject to certain exceptions, the reforms proposed in the Discussion Paper would implement the ALRC's recommendations.

There is a broader question as to whether it is necessary or desirable to include 'urging force or violence' offences as outlined in the Discussion Paper. Some argue persuasively that the ordinary criminal offence of incitement, in combination with other existing offences, is sufficient to deal with the criminality that these offences are designed to combat.[30] Without commenting on that broader question, this submission proceeds from the Commonwealth Government's assumption that there should to be more specific legislation criminalising the urging of force or violence in certain circumstances.

Generally speaking, we support the recommendations contained in ALRC 104, and the majority of the proposals in the Discussion Paper on reforming Australian sedition laws. In particular, we endorse the following changes proposed in the Discussion Paper:

- the term 'sedition' should not be used in Australian criminal law;
- the 'urging force or violence' offences should contain a clear intention element, with a clear onus on the prosecution, as set out in the Discussion Paper;
- the 'urging force or violence' offences should apply to referenda as well as parliamentary elections;
- the offences of 'urging a person to assist' an enemy of Australia, or those engaged in armed hostilities against the Australian Defence Force, in subsections 80.2(7) and (8) should be repealed; and
- the requirement to obtain the Attorney-General's consent in respect of these offences should be repealed.

As outlined in greater detail below, we recommend that the action should also be taken:

- the offences regarding urging violence within the community ought properly to be dealt with in anti-vilification legislation, rather than in national security legislation; and
- the 'good faith' defence in section 80.3 should be further repealed and replaced with a different provision.

<u>Intercommunity Violence Offences</u>

---

29 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) 5.

30 See, for example, Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) 169.

There are two types of offences in proposed sections 80.2A and 80.2B. The first are 'public order' offences—that is, offences whose primary purpose is to protect the broader public, rather than simply any people who are specifically targeted by the criminal behaviour. Both proposed subsections 80.2A(1) and 80.2B(1) are examples of this type of offence, because an element of the offence is that 'the use of force or violence would threaten the peace, order and good government of the Commonwealth'. The second type of offence—as seen in proposed subsections 80.2A(2) and 80.2B(2)—is directed at protecting individuals who might suffer harm from criminal behaviour. A defendant could be found guilty of such an offence even if their behaviour does *not* threaten the peace, order and good government of the Commonwealth.

As the ALRC accepted, there is a justification for including public order offences in this part of the *Criminal Code*. However, the offences in proposed subsections 80.2A(2) and 80.2B(2) are, in essence, anti-vilification offences. We note the considerable dangers of connecting the inter-group violence offences with Australia's legislative response to terrorism. In particular, presenting such offences as counter-terrorism measures stigmatises inter-group violence and reinforces the stereotyping of certain ethnicities or religions as terrorists.[31]

Recommendation 8

The offences in proposed subsections 80.2A(2) and 80.2B(2) should be recast as anti-vilification offences, and moved into legislation, such as the *Racial Discrimination Act 1975* (Cth), whose primary object is to promote human rights.

Good Faith Defence

The ALRC recommended repealing the 'good faith' defence in section 80.3, and instead providing that, in determining whether a defendant exhibited the element of intention required by the section 80.2 offences, the court should be required to consider

> the context in which the conduct occurred, including (where applicable) whether the conduct was 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 connection with an industrial dispute or an industrial matter; or
> (d) in the dissemination of news or current affairs.[32]

However, the Discussion Paper departs from the approach recommended by the ALRC. The Discussion Paper proposes the insertion of an additional subsection that expressly allows a court to consider such matters in determining whether the defence in section 80.3 has been made out.

---

31 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) 209.

32 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) Recommendation 12-2.

In explaining its preferred approach, the Discussion Paper makes clear that while it 'supports in principle' the ALRC's recommendation, it believes that the ALRC's approach would 'overly complicate the newly drafted urging violence offences'.[33] In other words, the Discussion Paper seems to agree with the sentiment behind the ALRC's recommendation, but not with its proposed method of execution. Therefore, the disagreement is not really one of policy (what the law should attempt to do), but rather how best to translate the agreed policy into law.

In practice, the solution proposed in the Discussion Paper would be problematic. It is logically difficult to conceive of a situation where a trier of fact is convinced that the elements of an urging force or violence offence in section 80.2 are satisfied, but nevertheless the defendant has carried out this behaviour in 'good faith'. As the ALRC observed, the notion of 'good faith' is difficult to square with offences of this nature.[34] One can readily imagine situations in which a person urges the overthrow of the Constitution (cf. section 80.2(1) of the *Criminal Code*) in good faith—for example, because the person believes that the current Constitution should be peacefully and democratically replaced with another Constitution. Equally, one can imagine how a person might urge the overthrow of the Constitution in bad faith—for instance, if the person wanted to carry out a coup d'etat and install himself or herself as dictator. However, it is almost impossible to conceive of a situation where a person *intentionally urges force or violence* to overthrow the Constitution, but does so in good faith. This is because urging force or violence, if it is to have the meaning intended by the Discussion Paper, must involve an element of malice or *bad* faith.

The defence in section 80.3, and the ALRC's recommendations, are both designed to prevent a trier of fact from concluding that a person intentionally urges force or violence in circumstances where the person's behaviour is essentially innocuous. They are designed to prevent these offences from inhibiting free expression such as genuine media reportage, public comment and academic debate. However, the defence as proposed in the Discussion Paper would be practically very difficult to rely on. This is because it is only of assistance to a defendant where the other elements of the offence have been satisfied. But by that point, the defence becomes logically difficult, if not impossible, for a defendant (who would bear the evidential onus of proof) [35] to make out. In practice, one would hope that a court would take this into account in interpreting section 80.3, allowing it to have an operation that is more in keeping with the intention manifested in the Discussion Paper. However, this would involve a non-literal reading of the provision, and would seem an unnecessary risk to run that, in any event, could chill freedom of expression.

Recommendation 9

Instead of amending the good faith defence as proposed by the Discussion Paper, we recommend that the defence be repealed and replaced with a provision along the lines of that proposed by the ALRC.

---

33 Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 29.

34 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) 244-246.

35 See the note accompanying section 80.3 of the *Criminal Code*.

PART V: PRE-CHARGE DETENTION

Part 1C of the *Crimes Act 1914* (Cth) (*Crimes Act*) enables a terrorism suspect to be questioned without charge for up to 24 hours.[36] However, it also provides for the recognition of 'dead time' so that this period of questioning can be spread over an undefined number of days.

This new pre-charge regime for terrorism offences was brought about by the *Anti-Terrorism Act 2004*. Its object was to provide for a longer, and more flexible investigation period for terrorism offences. However, the resulting legislation achieved this in an inadequate and flawed manner.

When the Anti-Terrorism Bill was debated in the Commonwealth Parliament in 2004, Professor Williams argued in a written submission and in oral evidence before the Senate Legal and Constitutional Legislation Committee for a maximum of two days detention without charge.[37] This was to overcome the possibility of significant periods of 'dead time' causing over-lengthy detention. The Attorney-General's Department rejected this, with a senior official saying: 'I would be extraordinarily surprised if the dead time, for example, in relation to the time zones would get anything like the sorts of time periods that were being suggested by Professor Williams.'[38] Of course, Dr Mohamed Haneef was detained for 12 days, not two.

Despite the apparent problem of having an unrestricted period of 'dead time' for questioning, no cap was then put on those provisions. The consequences of this flaw were explored in detail in the report by the Hon John Clarke QC into the case of Dr Mohamed Haneef.[39] This material is well reflected in the Discussion Paper.[40]

We do not support the proposal in the Discussion Paper to insert a seven day cap upon the amount of 'dead time' that can be disregarded during the pre-charge detention of a terrorism suspect.[41] In proposing a seven day cap, the law would permit a maximum possible period of detention of up to eight days.[42] This is an enormous increase on the pre-charge detention time in the *Crimes Act* of twelve hours for non-terrorist suspects.[43]

The seven day cap is proposed in the Discussion Paper without conducting the review of this area of law recommended by the Clarke Inquiry.[44] In the absence of such a review, insufficient evidence has been provided to support why a seven day cap is needed. Allowing

---

36 This include four hours of initial questioning (section 23 CA(4)) and up to 20 additional hours if allowed by a Magistrate or Justice of the Peace (section 23DA(7)).

37 George Williams, Submission No. 7, 1, Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Anti-Terrorism Bill 2004* (May 2004).

38 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill 2004* (2004) [3.25].

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

40 The amendments to Part 1C of the *Crimes Act 1914* (Cth) (and the recommendations of the Clarke Inquiry into the Case of Dr Mohamed Haneef) are discussed in: Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 87-144.

41 Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 126-127.

42 Up to 24 hours of questioning plus up to seven days of 'dead time'.

43 *Crimes Act 1914* (Cth) s 23D.

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

pre-charge detention of up to eight days, or sixteen times the normal maximum period, could only be justified by compelling evidence and clear reasoning. In the absence of such an inquiry or such material in the Discussion Paper, there is insufficient justification for this proposal.

Support from the Clarke Inquiry for a seven day cap is weak at best. The inquiry recommended a review and not a specific cap. After a discussion over several paragraphs that noted varying periods of pre-charge detention, Mr Clarke concluded only by stating 'I would tend to say that the cap should be *no more* than seven days' (emphasis added).[45] Hence, the Clarke Inquiry only found that the cap should be seven days or less.

The maximum period of pre-charge detention for terrorism offences should be based upon clear evidence both as to the operational needs of investigating authorities and the impact of an extended period of time on the liberties of the detainee. Any increase in pre-charge detention over the twelve hour period for non-terrorism offences should be fully justified. We do not reach a final view as to the maximum period of pre-charge detention – in light of such evidence not yet having been produced – but put forward the proposal that the cap should be in the order of forty-eight hours.

Recommendation 10

We recommend that the cap on pre-charge detention should be in the order of forty eight hours.

[45] The Hon. John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008) 249.

PART VI: *NATIONAL SECURITY INFORMATION (CIVIL AND CRIMINAL PROCEEDINGS) ACT 2004* (CTH)

The vast majority of the amendments made to the *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) (*NSIA*) are clarifications rather than substantive amendments. Included in this category are amendments that recognise the role and obligations of the defendant's legal representative, for example, the duty on him or her to give notice to the Attorney-General about the potential disclosure of national security information. We accept the statement in the Discussion Paper that '[t]hese proposed amendments do not impose further obligations on defence representatives'.[46] Other amendments that fall into this category include: clarification of what aspects of criminal and civil proceedings the *NSIA* applies to; definitions of 'court official' and 'national security information'; and, a range of consequential amendments. We do not propose to deal with these particular amendments in any detail.

There are, however, a number of substantial amendments that are made to the *NSIA*. We refer in our discussion of these amendments to the proposed sections dealing with federal *criminal* proceedings.[47]

Streamlining of the *NSIA*

One of the primary criticisms of the *NSIA* (especially from legal practitioners and judicial officers) relates to its impact on the efficient running of a criminal trial. Of particular concern are: the requirement to notify the Attorney-General of information which relates to or may affect national security; the delay whilst the Attorney-General considers whether to issue a non-disclosure certificate; the need to hold a closed hearing to consider what orders should be made in relation to the information; and, finally, the various avenues for appeal after orders have been made.[48] We believe that the Government should be commended for making a number of proposals aimed at streamlining the procedures in the *NSIA* so as to reduce the potential for delay and disruption to proceedings.

First, amended sections 24(1A) and 25(2A) narrow the circumstances in which the Attorney-General and the courts must be notified of the potential disclosure of national security information.

Second, the court will no longer be required to adjourn the whole proceeding once notification has been given to the Attorney-General of the potential disclosure of national security information. Instead, the court need only adjourn 'so much of the proceeding as is necessary to ensure that the information is not disclosed' (amended section 24(5)). We believe that discussion of the workability of this section is best left to practitioners experienced in the conduct of civil and criminal proceedings involving national security information. However, we have some doubts about whether the courts will be able to clearly segregate that part of the proceedings affected by the national security information from that

---

46 Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 174.

47 The *NSIA* also deals with *all* (that is, not only federal) civil proceedings. The procedures for the protection of national security information in civil proceedings are, for the most part, identical to those for criminal proceedings.

48 The Hon. Justice Anthony Whealy, 'The Impact of Terrorism Related Laws on Judges Conducting Criminal Trials' (2007) 8 *The Judicial Review* 353, 363. See also Phillip Boulten, 'Preserving National Security in the Courtroom: A New Battleground' in Andrew Lynch, Edwina MacDonald and George Williams, *Law and Liberty in the War on Terror* (2007) 96-105.

part which is able to continue. Furthermore, the defence case may be undermined by being forced by the court to alter the order in which it has chosen to call witnesses or present evidence in order to enable the proceedings to continue expeditiously.

Third, the court is no longer immediately required to adjourn the proceedings and hold a closed hearing when it is notified of the potential disclosure of national security information by a witness in answer to a question. Instead, amendments to section 25 require that the witness give the court a written answer to the question, which is then shown to the prosecutor and, if present, the Attorney-General or his or her representative. It is only if the prosecutor or the Attorney-General's representative believes that the information in the witness' answer is national security information, that the court will be required to adjourn the proceedings (in whole or in part) to enable the Attorney-General to decide whether to issue a non-disclosure certificate. This brings the procedures for criminal proceedings in line with the existing procedure for civil proceedings in section 38E.

Finally, the court may at any time during the course of a proceeding, on the application of the Attorney-General or his or her legal representative, the prosecutor or the defendant or his or her legal representative, hold a hearing to consider issues relating to the disclosure, protection, storage information, handling or destruction of national security information (amended section 21).

Whilst, as discussed above, we appreciate the efforts of the Government to stream-line the procedures in the *NSIA*, we do not believe that the amendments are sufficient to respond to the concerns of practitioners and judicial officers.

The unworkability of the *NSIA* in practice is demonstrated by the frequent use of section 22 orders in terrorism trials, especially in the Victorian Supreme Court. Under section 22, the prosecutor and defendant may agree to an arrangement about any disclosure, in the proceeding, of information that relates to national security or may affect national security. The Discussion Paper itself states that 'the policy intention behind the Act is that, if possible, it is preferable that the parties agree to an arrangement under section 22'.[49]

We accept, as the ALRC recommended in 2004,[50] that there is a need for a legislative regime to protect national security information, beyond the protection available at common law and under the *Evidence Act 1995* (Cth). However, the frequent use of section 22 orders demonstrates that there needs to be a wholesale review of the operation of the *NSIA*, and an assessment of other available options to protect national security information,[51] rather than merely tinkering around the edges and making largely technical changes as the Discussion Paper does. We draw the Department's attention to the comment of Justice Whealy in 2007 that the *NSIA* 'gives the appearance of having been drafted by persons who have little knowledge of the function and processes of a criminal trial'.[52]

---

49 Attorney-General's Department, *National Security Legislation Discussion Paper* (2009) 209.

50 See Australian Law Reform Commission, Media Release, 'Justice system must adapt to meet terror challenges: ALRC', 23 June 2004 <http://www.alrc.gov.au/media/2004/mr2306.html> (11 September 2009); Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (June 2004) Recommendation 11-1.

51 One such option may be the introduction of a special advocates system like that which exists in the United Kingdom, Canada and New Zealand.

52 Justice A G Whealy, 'Difficulty in obtaining a fair trial in terrorism cases' (2007) 81 *Australian Law Journal* 743, 745.

Recommendation 11

We commend the Commonwealth Government for its recognition of the delay and disruption caused by the *NSIA* in court proceedings. However, rather than the piecemeal approach taken in the Discussion Paper to the *NSIA*, we recommend that there be a wholesale review of its terms and operation. This should include an assessment of other available options to protect national security information. We do not believe that amendments to the *NSIA* along the lines of those in the Discussion Paper should be made until after such a review is conducted.

Intervention by the Attorney-General

One of the most controversial aspects of the amendments is the expanded role given to the Attorney-General. Currently, under section 30, the Attorney-General may only intervene in a federal criminal proceeding where the closed hearing requirements apply. New section 20A would entitle the Attorney-General and/or his or her legal representative or other representative to attend and be heard on any issue relating to the disclosure, protection, storage, handling or destruction of national security information. Further, the Attorney-General would be entitled to apply to the court to hold a hearing to consider any such issue (amended section 21). He or she would also be able to be a party to a consent arrangement under amended section 22.

We do not agree with concerns, made by commentators such as Patrick Emerton, that presently section 30 demonstrates an unacceptable level of involvement by the executive branch of government in the process of a criminal trial. [53] This is because we accept that it is the executive branch of government (including government agencies such as ASIO) which possesses the most detailed knowledge of what information may prejudice national security and is thereby in the best position to raise concerns about the disclosure of such information. We have, however, been alerted by legal practitioners to potential practical problems with amending section 22 as proposed in the Discussion Paper. The attitude of the executive branch of government to the handling and disclosure of national security information is typically a conservative one. The inclusion of the Attorney-General as a party to consent arrangements may mean that an agreement is far more difficult (if not impossible) for the prosecution and defence to reach. In the absence of consent arrangements, it is likely that even greater delay and disruption will be caused to proceedings whilst each potential disclosure of national security information is considered by the Attorney-General and then by the court.

Recommendation 12

We do not support the expanded role given to the Commonwealth Attorney-General under the proposed amendments to the *NSIA*.

---

53 Patrick Emerton, 'Paving the Way for Conviction Without Evidence – A Disturbing Trend in Australia's 'Anti-Terrorism' Laws' (2004) 4(2) *Queensland University of Technology Law Journal* 1, 30.

Expanded Obligation to Notify the Attorney-General

The National Security Legislation Discussion Paper also proposes to require the prosecution and defence to notify the Attorney-General of the potential disclosure of national security information in response to a subpoena. In our opinion, this would place too onerous a burden on the prosecution and defence. This is because of:

- the extremely vague definition of 'national security' (discussed below);
- the typically broad terms in which subpoenas are expressed (often capturing unexpected information); and,
- the serious criminal consequences of failing to comply with the notification requirement, namely, up to two years' imprisonment.[54]

Recommendation 13

We do not support the proposal in the National Security Legislation Discussion Paper to expand the notification obligation to the issue of subpoenas.

Other Issues Not Addressed in the National Security Legislation Discussion Paper

There are a number of important issues which are not addressed in the Discussion Paper.

First, the definition of 'national security' in the *NSIA* is extremely broad. It means 'Australia's defence, security, international relations or law enforcement interests'.[55] The parties in civil proceedings and the prosecution and defence in criminal proceedings are required by the *NSIA* to notify the Commonwealth Attorney-General and/or the courts of the potential disclosure of any information that either 'relates to' or 'may affect' national security. In our opinion, this burden is an overly onerous one. For example, as noted by Stephen Donaghue, all information presented during the course of a trial for a terrorism offence may fall within the definition of 'national security'.[56] Therefore, the prosecution and/or defence would technically be committing an offence if they failed to notify the Attorney-General of *every* piece of information to be presented at trial.

Recommendation 14

There should be a review of the definition of 'national security' in the *NSIA* with the aim of tightening the definition, and clarifying when a person will be committing an offence by failing to notify the Attorney-General or the courts of the potential disclosure of national security information.

---

54 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 42.

55 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 8.

56 Stephen Donaghue, 'Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice' in Andrew Lynch, Edwina MacDonald and George Williams, *Law and Liberty in the War on Terror* (2007) 88. 'Security' is defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) as including the protection of Australians from 'politically motivated violence' which, in turn, is defined as including 'terrorism offences'.

Second, when a non-disclosure or criminal exclusion certificate has been issued by the Attorney-General, we believe that it should be up to the discretion of the court to decide whether a closed hearing should be held to determine what orders to make in relation to the particular information. This would accord with the recommendations of the ALRC in 2004[57] and the Senate Legal and Constitutional Legislation Committee in 2004.[58] It would also recognise the importance of the principle of open justice, and that all possible steps should be taken to ensure that court proceedings are held in public (for example, handing up documents to the court but not reading them into the public record). Instead, currently, there is an automatic rule that the courts *must* hold a closed hearing to decide what orders to make.

Recommendation 15

The courts should have the *discretion* to close the court-room when considering what orders to make under section 31 of the *NSIA*.

Finally, and most importantly, we are concerned about the impact of section 31(8) on the ability of a defendant to receive a fair trial. Section 31(7) specifies a number of matters that the court must take into account in deciding what order to make in relation to the disclosure of information. These include: (a) whether there would be a risk of prejudice to national security if the information was disclosed; and (b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence. Section 31(8) then goes on to limit the discretion of the court by requiring it to give greatest weight to (a). Whilst a constitutional challenge to section 31(8) failed,[59] former judge of the High Court, the Hon. Michael McHugh AC QC has observed:

> It is no doubt true that in theory the *National Security Information Act (Criminal and Civil Proceedings) Act* does not direct the court to make the order which the Attorney-General wants. But it goes as close as it thinks it can. It weights the exercise of the discretion in favour of the Attorney-General and in a practical sense directs the outcome of the closed hearing. How can a court make an order in favour of a fair trial when in exercising its discretion, it must give the issue of fair trial less weight than the Attorney-General's certificate.[60]

Recommendation 16

---

57 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (June 2004) 351-352.

58 Senate Legal and Constitutional Legislation Committee: *Inquiry into the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (August 2004) Recommendation 1.

59 *Lodhi v The Queen* (2007) 179 A Crim R 470.

60 The Hon. Michael McHugh AC QC, 'Terrorism Legislation and the Constitution' (2006) 28 *Australian Bar Review* 117. See also Anthony Gray, 'Alert and Alarmed: *The National Security Information Act* (Cth) (2004)' (2005) 24(2) *University of Tasmania Law Review* 91.

We recommend that section 31(8) be repealed. This would reinstate the position prior to 2004, whereby it was left to the discretion of the courts to determine whether to give more weight to the prejudice to national security or the adverse effect on the defendant's right to a fair trial.

In the alternative, we believe that the word 'substantial' should be removed from section 31(7)(b).

PART VII: POLICE SEARCH POWERS

Proposed section 3UEA would allow a member of the AFP to enter premises without a warrant where he or she reasonably suspects 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.[61]

The purpose of entry is to search the premises and seize the particular thing. If the member of the AFP finds any other thing relevant to an indictable or summary offence, he or she must secure the premises and then obtain a search warrant.[62] In relation to this, the Commonwealth Attorney-General, Robert McClelland MP, stated:

> The safeguard is that [the AFP] are not permitted, as a result of that entry without a warrant, to undertake law enforcement, evidence gathering tasks. They have to seal the premises and they have to go away to obtain a warrant. The whole thrust and intent is to enable police to render a premises safe and specifically to address some explosive device or material or another dangerous substance such as a dangerous chemical.[63]

Not only is it doubtful that such a clear line can be drawn between searches for the purpose of seizing a particular item and general searches undertaken as part of a criminal investigation, but the Attorney-General's statement also fails to appreciate the underlying rationale for search warrants. Searches of private property – regardless of their purpose – violate the rights to home and privacy. For this reason, and in order to limit the potential for misuse of power by the police during the course of a search, it is important that searches be overseen by a magistrate or judge. In each case, it is for a magistrate or judge to weigh any evidence of a criminal offence and determine whether that evidence is sufficiently strong to justify a violation of the rights to home and privacy by the police.

A compelling justification should be demonstrated before the police are permitted to conduct searches of private property without judicial supervision. However, the only justifications given by the Commonwealth Government in the Discussion Paper are expressed in vague terms:

- the power is 'intended to address *operational issues* that have emerged in law enforcement operations'.[64]
- '[t]he availability to the AFP of wider emergency powers has become *increasingly necessary* particularly in the area of counter-terrorism operations. An emergency

---

61 Attorney-General's Department, *National Security Legislation Discussion Paper* (2009) 151-155.
62 Attorney-General's Department, *National Security Legislation Discussion Paper* (2009) 151-155.
63 *7:30 Report*, Australian Broadcasting Corporation, 12 August 2009 <http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Transcripts_2009_ThirdQuarter_12August2009-Interview-ABC7.30ReportwithKerryOBrien> (18 September 2009).
64 Attorney-General's Department, *National Security Legislation Discussion Paper* (2009) 147.

> entry power is necessary to supplement existing search, entry and seizure powers which only give police partial coverage for emergency situations'.[65]

The Commonwealth Attorney-General, Robert McClelland MP, has also stated that there will be some circumstances in which the police do not have the time to obtain a warrant from a magistrate or judge.[66] In our opinion, the AFP should only be given the power to conduct warrantless searches as a last resort. We note that the police are already able to obtain a search warrant by a variety of means (including phone and fax) at short notice. Another option that might be explored by the Commonwealth Government is the establishment of a duty judge system whereby applications for search warrants could be received and considered on an expedited basis. There is no evidence that such a system would be insufficient to respond to the concerns expressed by the Attorney-General.

Notably, the Australian Federal Police (AFP) does not appear to have sought the power to conduct warrantless searches. The Chief Executive of the AFP Association, Jim Torr, has said that his members prefer the transparency and accountability that the warrant system provides, describing the removal of the requirement for a warrant as 'alien to 100 years of policing'.[67] It is incongruous that the proposal to give the AFP a power to conduct warrantless searches came only a couple of weeks after successful raids were conducted in Melbourne, and which resulted in the arrest and charging of five Somali-born men with terrorism offences. There was no suggestion during the course of the investigation into the activities of these men that the AFP was hampered by the requirement to obtain a search warrant.

It is correct (as the Commonwealth Government notes in the Discussion Paper[68]) that the States and Territories have legislation enabling their police to conduct warrantless searches in certain circumstances. However, this is not sufficient to justify the introduction of warrantless searches at the Commonwealth level for the AFP. Each expansion of police powers must be considered on its own merits. Furthermore, in our opinion, the new section 3UEA would give a broader discretion to the AFP than the State and Territory police forces have. For example, under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), the only circumstances in which the police are permitted to enter premises without a warrant are where they reasonably *believe* (not *suspect*, as proposed in the Discussion Paper) that:

> (a) a breach of the peace is being or is likely to be committed and it is necessary to enter the premises immediately to end or prevent the breach of the peace, or
> (b) a person has suffered significant physical injury or there is imminent danger of significant person and it is necessary to enter the premises immediately to prevent further significant physical injury or significant physical injury to a person.

In the absence of a compelling justification being demonstrated, we oppose the proposal to give the AFP the power to conduct warrantless searches.

---

65 Attorney-General's Department, *National Security Legislation Discussion Paper* (2009) 151.

66 *7:30 Report*, Australian Broadcasting Corporation, 12 August 2009 <http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Transcripts_2009_ThirdQuarter_12August2009-Interview-ABC7.30ReportwithKerryOBrien> (18 September 2009).

67 Sally Neighbour, 'Haunted by Haneef', *The Australian*, 17 August 2009.

68 Attorney-General's Department, *National Security Legislation Discussion Paper* (2009) 151.

Recommendation 17

We do not support the introduction of a warrantless search power for the AFP as set out in proposed section 3UEA.

We further believe that it is inappropriate for new AFP powers to be introduced prior to the Council of Australian Governments (COAG) review due to commence in late 2010. Amongst other things, this review will consider Division 3A of the *Crimes Act*, which was enacted in 2005 and gives the AFP powers to stop, search and question persons in relation to terrorist acts. The COAG review may, for example, recommend the repeal of even the existing powers on the basis that they are either ineffective or no longer necessary. Perhaps the introduction of a warrantless search power for the AFP could be referred to COAG to consider as part of its review.

Recommendation 18

Any discussion of the introduction of a new warrantless search power for the AFP should be postponed until after the 2010 COAG review has been conducted. In the alternative, the introduction of such a power might be referred to COAG for consideration as part of its review.

In the event that the power is introduced, we would recommend that a number of safeguards be built into the legislation. First, that the member of the AFP who conducts the search is required to go before a magistrate or judge after the search has been conducted to obtain an ex post facto search warrant. Such a warrant would be issued on the basis that there were reasonable grounds for the member to suspect 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.[69]

If an ex post facto search warrant is not granted, this should have the consequence that any evidence identified by the member of the AFP during the course of the search should not be admissible in court proceedings.

The exercise of this power by the AFP should also be reported on annually to the Commonwealth Parliament. In particular, reports should be made of any instances in which an ex post facto search warrant has not been granted.

[69] Attorney-General's Department, *National Security Legislation Discussion Paper* (2009) 151-155.

Recommendation 19

If the warrantless search power is introduced, we recommend that the AFP:

(a) be required to obtain an ex post facto search warrant from a magistrate or judge; and,

(b) be required to report annually to the Commonwealth Parliament regarding the exercise of the warrantless search power.

PART VII: OMISSIONS FROM THE DISCUSSION PAPER, AND OTHER AREAS OF AUSTRALIA'S COUNTER-TERRORISM LAWS IN NEED OF REFORM

Insufficient Consideration of Human Rights and Civil Liberties

It is commendable that the Discussion Paper recognises that national security and counter-terrorism laws need to be developed and exercised in an accountable way, protecting key civil liberties and the rule of law. In spite of this recognition, however, the Discussion Paper does not contain any reference to, or discussion of 'human rights', nor does it concern itself with Australia's legally binding obligations under international treaty law including commitments under the International Covenant on Civil and Political Rights (ICCPR). Instead, the Discussion Paper limits itself to noting the 'need to strike a balance between civil liberties and the threat to public safety arising from terrorism'.[70]

We recommend a careful examination of the human rights and civil liberty implications of the proposed amendments. International jurisprudence provides particularly helpful guidance in this regard. For example, in relation to the proposed changes to provisions concerning pre-charge detention (see Part V of this submission), the case law of the European Court of Human Rights is highly instructive, in particular as it is commonly referred to in the context of interpreting obligations under the ICCPR to which Australia became a party in 1980. This case law confirms that there is a presumption that detainees should be brought before a court promptly.

Recommendation 20

The implications of the proposed amendments on human rights and civil liberties need to be considered in more detail. We note that a national Charter of Rights would be of considerable assistance in assessing Australia's counter-terrorism laws for their impact on human rights. Furthermore, it is imperative that the proposed amendments in the Discussion Paper be examined for their compliance with international treaty law such as the ICCPR.

Other Areas of Australia's Counter-Terrorism Laws in Need of Reform

We draw attention to the fact that there is a need for comprehensive reform of Australia's counter-terrorism legislation. Independent and parliamentary reviews of Australia's counter-terrorism laws that have been conducted to date – and to which the Discussion Paper responds – have not considered *all* aspects of these laws. Areas that are not addressed by the Discussion Paper and in which there is a particular need for reform include, but are not limited to, ASIO's questioning and detention powers and the controversial control order and preventative detention regimes. The former is dealt with in detail in the **attached** submission on the Anti-Terrorism Laws Reform Bill 2009.

The Questioning and Detention Powers of ASIO

The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act* 2003 (Cth) provides for the detention by ASIO of persons for questioning in relation to

[70] Attorney-General's Department, *National Security Legislation Discussion Paper* (2009) 87.

terrorism offences, as well as the creation of new offences in respect to withholding of information regarding terrorism. In particular, the Act authorises ASIO to seek a warrant to detain and question people for a maximum period of seven days. In contrast to comparable legislation in the United Kingdom, Canada, New Zealand and the United States, the person detained does not need to be suspected of any offence. He or she can be taken into custody without any charges being laid or even the possibility that they might be laid at some later date.

We continue to have serious concerns that ASIO's questioning and detention powers unduly limit a person's right to challenge the lawfulness of his or her detention and that these powers are so broad as to be applied arbitrarily. In addition, our concerns extend to the fact that the current arrangements limit the ability of detained persons to challenge the lawfulness of their detention, limit access to a lawyer of choice and undermine the right to silence and freedom from self-incrimination.

ASIO's questioning and detention powers have been the subject of review by the Senate Legal and Constitutional Affairs Committee and the PJCIS.[71] Both Committees noted the controversial nature of the powers and the strong opposition to their introduction from a range of stakeholders in the community. The PJCIS made a number of recommendations for reform, some of which were subsequently adopted by the Commonwealth Parliament. However, many of the recommendations, including that a person should have confidential access to legal representation of his or her choice have not yet been incorporated into the Act.

The Control Order and Preventative Detention Regimes

The control order and preventative detention regimes were introduced into the Commonwealth *Criminal Code* (Division 105 and 104 respectively) by the Anti-*Terrorism Act (No 2) 2005* (Cth). Although the High Court held in *Thomas v Mowbray* that the control order regime is constitutionally valid and does not invest the judiciary with powers contrary to Chapter III of the Constitution, we continue to have serious concerns about the operation of the regime.[72]

First, the control order regime allows for the deprivation of a person's liberty even after they have been acquitted at trial or any convictions have been quashed on appeal. Second, the control order and preventative detention regimes pose a challenge to the traditional purpose of legal regulation and are highly problematic in relation to the fundamental rights to liberty and to a fair trial respectively. Persons on whom orders are served do not have to be found guilty of, or even be suspected of committing, a crime.

As such, the new provisions engage several of Australia's obligations under international treaty law, in particular under the ICCPR. In this respect, a 2007 report by the Parliamentary Joint Committee on Human Rights in the United Kingdom is particularly instructive.[73] The Committee held that control orders issued by the British government to limit the movement

---

71 Senate Legal and Constitutional Review Committee, Parliament of Australia, *Report on the ASIO Legislation Amendment (Terrorism) Bill 2002 and related matters* (December 2002); PJCIS, *Report on ASIO's Questioning and Detention Powers* (November 2005).

72 *Thomas v Mowbray* (2007) 237 ALR 194.

73 United Kingdom Parliament Joint Committee on Human Rights - Eighth Report, Session 2006-7, <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/60/6002.htm>.

and conduct of uncharged terror suspects violate the European Convention of Human Rights. In addition, the Committee found that the deficiencies in the adequacy and practical effectiveness of the due process safeguards in the control orders regime, and in particular the lack of opportunity to challenge closed material, made the regime as a whole incompatible with the right to a fair trial in the determination of a criminal charge and to a fair hearing in the determination of civil rights and obligations, and with the equivalent common law right to a fair trial and a fair hearing.

Recommendation 21

There should be a comprehensive review of Australia's counter-terrorism laws. We welcome the proposal to introduce a National Security Legislation Monitor who will fulfil the function of conducting ongoing and holistic review of these laws.