



amnesty international australia

Submission to the

The International Commission of Jurists

regarding

***EMINENT JURISTS PANEL ON TERRORISM, COUNTER-
TERRORISM & HUMAN RIGHTS***

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The global defender of human rights

Part A Analytical approach to issues

The Australian Government has introduced a number of legislative measures in its response to terrorism which Amnesty International Australia believes undermine human rights and the rule of law.

In this regard, Amnesty International Australia refers to provisions of, amongst others:

- the **Anti-Terrorism Act 2005 (Cth)**;
- the **Criminal Code Act 1995 (Cth)**;
- the **Australian Security Intelligence Organisation Act 1979 (Cth)**;
- the **National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)**;
- and
- the **Terrorism (Police Powers) Amended (Preventative Detention) Act 2005 (NSW)**.

as they conflict with Australia's international treaty obligations, particularly pursuant to the **International Covenant on Civil and Political Rights (ICCPR)**, and the **Universal Declaration of Human Rights**.

Amnesty International Australia wishes to address three aspects of this body of legislation in this part of its submission. Those areas are:

1. arrest and detention without charge;
2. control orders; and
3. due process and the right to legal representation.

Article 9.1 of the ICCPR provides:

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

Article 9.2 reads:

“Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”

The **Anti-Terrorism Act 2005 (Cth)** amended the **Criminal Code Act 1995** and creates two concepts which are novel to Australian law in peace time and which Amnesty International Australia believes are in direct conflict with Australia's treaty obligations. The first of those is preventative detention.

Preventative Detention Orders

The regime for preventative detention is established by Division 105 of the **Criminal Code Act 1995 (Cth)** (the Code). This legislation is supplemented by various State enactments. The International Commission of Jurists (ICJ) is no doubt familiar with the statutory structure established by this Division for the making and enforcement of preventative detention orders and their continuation.

At its heart is the fundamental proposition that the principal purpose of such orders must be that they are made in relation to people where no criminal charge is preferred, otherwise, no doubt, such charges would be preferred.

Article 2.3(a) and (b) of the ICCPR reads as follows: -

- 3. Each State Party to the present Covenant undertakes:**
- (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;**
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.**

The regime establishing these orders makes it practically impossible for those orders to be tested in a court of law. Section 105.28(2) of the Code describes what must be told to a person the subject of such an order. Section 105.28(9) makes it clear that the only material that the person subject to the order (or his or her lawyer) is entitled to is a copy of the order and an extension of it. The person who is the subject of the order does not know why he or she is to be detained or is being detained.

Section 105.37 of the Code severely restricts the detainee's access to a lawyer and the areas of advice which can be given by the lawyer (see below in relation to due process and the right to legal representation).

Commonwealth preventative detention orders last only up to 48 hours.

Under State law (see for example, **Terrorism (Police Powers) Amended (Preventative Detention) Act 2005 (NSW)** (the New South Wales Act)) a regime similar to those that applies to control orders within the Code applies (see for example s.26ZB of Schedule 1 of the New South Wales Act).

Control Orders

These are established by Division 104 of the Code. Section 104.5 sets out the various restrictions that can be imposed upon a person's activities which can amount to effective house arrest. Such orders are unchallengeable in a practical sense because no access is available to the information which founds them.

In relation to both control orders and preventative detention orders a lawyer is only entitled to see or request a copy of the order and (where confirmation of an order is sought) a statement of facts said to have the reasons for the order (s.104.12A). It is probable that these reasons will not be provided if it would, amongst other things, prejudice national security and/or be protected by public interest immunity. This is circular. A person may never know the reason he or she is the subject of an order and might never find out.

The effect of all this is that neither the person who is the subject of the order or anybody acting on his or her behalf is given documentation other than the order which describes the basis upon which the order is made. The information that the Australian Federal Police (or any other officer for that matter) rely upon may be wildly inaccurate, maliciously informed, distorted or hysterically motivated or simply little more than gossip or rumour that is dressed as reliable information. It is untested and untestable.

International law is clear that a person be presumed innocent until proven guilty.

Article 14.2 of the ICCPR reads as follows: -

“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

The regimes for preventative detention orders and control orders fly in the face of this presumption.

The Australian Security Intelligence Organisation's Powers to Detain and Interrogate

In July 2003 amending legislation inserted Division 3 of Part III to the **Australian Security Intelligence Organisation Act 1979 (Cth)** (the ASIO Act). This enabled the organisation to seek the issue of a judicial warrant to detain and interrogate a person in circumstances where the warrant “will substantially assist the collection of intelligence that is important in relation to a terrorism offence” and that other methods of collecting intelligence would be ineffective (see s.34C(3)(a) and (b)). The person so detained can be detained for up to seven days and can be interrogated for a period of 24 hours in eight hour increments during that time.

The detained person is entitled to a lawyer in certain circumstances however that right is restricted given that contact between the detainee and the lawyer is monitored (s.34U(2)); the legal adviser is to be given a copy of the warrant but has no entitlement to see any other document (s.34U(2A)) and there is precious little room for any active involvement of the lawyer during the questioning process. The lawyer cannot intervene in the questioning or address the prescribed authority, save and except to request clarification of an ambiguous question (s.34U(4)). “Disruptive” legal advisers may be removed from the place where the questioning is taking place (s.34U(5)).

It should be noted that the ASIO Act abrogates the rule against self incrimination but does accept that evidence given cannot be used in any criminal proceedings against the person.

Due Process and the Right to Legal Representation

An essential component of a fair hearing is the principle of ‘equality of arms’. Any process that denies both parties access to information necessary for the presentation of a case or to be present in court during a hearing undermines this essential right. Amnesty International Australia believes that the new regimes for preventative detention orders and control orders as well as under the legislation discussed below violates this principle.

The National Security Information (Criminal & Civil Proceedings) Act 2004 (Cth) (the NSI Act) provides for the exclusion of a party and their legal representative if the court considers that their presence is likely to prejudice national security and if they do not have a security clearance. The NSI Act further restricts the free right of representation by counsel of choice.

International law is once again clear on the right to due process of law and the right to legal representation. Article 14(3) of the ICCPR provides:

- 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:**
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;**
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;**
 - (c) To be tried without undue delay;**

- (d) **To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;**
- (e) **To examine or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;**
- (f) **To have the free assistance of an interpreter if he cannot understand or speak the language used in court;**
- (g) **Not to be compelled to testify against himself or to confess guilt.**

This provision clearly applies to other aspects of Amnesty International Australia's submissions.

Justifications for the introduction of this legislation

The Australian Government when introducing each piece of legislation has justified its introduction on the basis that it is to counter terrorism in Australia.¹

Conclusion

In conclusion, Amnesty International Australia submits that a number of provisions introduced both at the commonwealth and state levels in its legislative response to terrorism violate or undermine Australia's international human rights obligations.

¹ See, for example, the media release of the Prime Minister on 8 September 2005 on the announcement of the introduction of new counter terrorism laws: http://www.pm.gov.au/news/media_releases/media_Release1551.htm stating that '[t]hese proposals are designed to enable us to better deter, prevent, detect and prosecute acts of terrorism.'

Part B Specific issues

1. What relevance has been given by government to human rights norms in regard to counter-terrorism laws and policies? Has your government questioned the relevance of these norms in the fight against terrorism?

The Commonwealth Attorney-General the Hon. Phillip Ruddock MP stated in his second reading speech on the Anti-Terrorism Bill (No.2) 2004 that:

Security is not an anathema to freedom and liberties. I might say, if you read the Universal Declaration of Human Rights, it gives primacy, amongst other matters, to the responsibility of governments to secure a person's right to life – a person's entitlement to live in a situation of safety and security. Of course that has to be weighed up with other values that we see as important, but I often like to point out to people that the right to life and safety often restricts where we can go. We do not allow people to drive on the same side of the road in different directions, because we know that to give people a freedom of choice about where they might go on the road could in fact lead to the loss of life.²

The Commonwealth Attorney-General again stressed this point in relation to the Anti-Terrorism Bill (No.2) 2004 in consideration of Senate Message:

I just emphasise in this context the Universal Declaration on (sic) Human Rights, article 3, which provides that we should respect the right to life but also the safety and security of a community. That is a very important obligation that has to be weighed up with other rights that are often mentioned in relation to counter-terrorism legislation.³

Several State Premiers and Territory Chief Ministers raised concerns regarding the implications the counter-terrorism laws negotiated with the Commonwealth Government through the Council of Australian Governments (COAG) had for human right standards. While many of the major concerns State and Territories had regarding the bill were addressed in negotiation with the Commonwealth Government, Jon Stanhope, Chief Minister, the Australian Capital Territory outlined his remaining concerns regarding the Anti Terrorism Bill (No 2) 2005⁴ in his submission to the Senate Legal and Constitutional Legislation Committee including:

- the broad definition of a terrorist organisation, relying on vague criteria as 'praising terrorism'. He stated the definition had the potential to seriously curtail freedom of speech and could be used to muzzle or outlaw legitimate protest organisations, preferring an inclusion of 'intention to incite'
- restricted access to information upon which a control order was based for individuals and lawyers
- Control orders, preventative detention orders and prohibited contact orders continued to be applicable to 16- to 18- year-olds.
- No privacy of contact between someone who was the subject of a preventative detention order and their lawyer, potentially affecting their right to a fair trial in the event that charges were laid.
- Steps taken to reduce the risk of a constitutional challenge had had the effect of heightening the potential for human-rights breaches, by undermining real judicial review.

² House of Representatives Hansard, 24 June 2004 page 31702

³ House of Representatives Hansard, 12 August 2005 page 3050.

⁴ 17 November 2005, Press release: Chief Minister fronts Senate Terror Inquiry, <http://www.chiefminister.act.gov.au/media.asp?media=851§ion=24&title=Media%20Release&id=24>

2. What is the impact of counter-terrorism laws, policies and practices on the full observance of international humanitarian law; Is the application of those laws denied, are there any positions taken which affect the distinction between combatants and non-combatants?

The primary area in which counter-terrorism policies and practices impact upon the full observance of international humanitarian law in Australia is in relation to the continued detention of Australian citizen Mr David Hicks⁵ by the United States of America (US) in Guantanamo Bay, Cuba as an 'enemy combatant'.

The Australian Government has supported the US policies in relation to the detention of 'enemy combatants' and the denial of the application of the Geneva Conventions to those held in Guantanamo Bay. On 17 January 2002, the Attorney-General stated that '... I think whether the Geneva Conventions apply in these circumstances is really a matter for the United States'.⁶ The Attorney-General stated further on 1 June 2003 that:

*[Mr Habib and Mr Hicks] were detained by the Americans under the laws of armed conflict, and that puts the whole situation into an entirely different light. Under the laws of armed conflict, they would normally be held until the end of hostilities. The war against terrorism is ongoing*⁷

The Australian Government has also supported, and continues to support, the US military commissions established by Military Order on Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, signed by President Bush on 13 November 2001 as fair.⁸ The Attorney-General stated on 4 July 2003 that:

*The Government has had detailed discussions with the US concerning any possible trials and is confident that any Military Commission trials will be fair and transparent. We have made every effort to ensure procedures for any possible trial will provide the fundamental guarantees of normal criminal processes.*⁹

⁵ And also in relation to the detention of Mr Mamdouh Habib, who was released from Guantanamo Bay and repatriated to Australia in January 2005.

⁶ See

http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Interview_Transcripts_2002_Transcripts_January_2002_Welfare_of_David_Hicks

⁷ See

[http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Interview_Transcripts_2003_Transcripts_June_2003_Transcript_-_Sunday_Sunrise_Interview_Daryl_Williams_\(1_June_2003\)](http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Interview_Transcripts_2003_Transcripts_June_2003_Transcript_-_Sunday_Sunrise_Interview_Daryl_Williams_(1_June_2003))

⁸ See for example the transcript of an interview with Philip Ruddock, Attorney-General, and others on 7.30 Report television programme on 1 August 2005 accessed at <http://www.abc.net.au/7.30/content/2005/s1427592.htm>, "A military commission process was seen as appropriate to deal with unlawful combatants where intelligence issues need to be protected...". See also interview with ABC Radio National Breakfast on 12 January 2005 (<http://www.abc.net.au/rn/talks/brkfast/stories/s1280523.htm>), where the Attorney General notes there's provision for Military Commissions in both Australian and US law: '... and in a situation in which you are at war – and there is a war against terrorism – it is a form of procedure by which people can be charged and guilt determined. And it is a form of procedure when you need to deal with evidence which may also have an intelligence consequence. And what you have when you are dealing with intelligence information is the potential when it is used in an open court and disclosed people who have provided that information can be at risk, sources can be at risk. And you also have the potential that information you might otherwise want to receive will be denied to you – and systems and techniques that you might use for collecting information can sometimes be exposed and that's not necessarily a desirable objective either. So that's the reason that this form of procedure – when you are actively engaged in a war – and the fact is that Bin Laden and his associates have not renounced terrorism and this is a matter of very considerable consequence when large numbers of people can so tragically lose their lives as we have seen... [re natural justice for the accused in military commissions] what we have sought in relation to the process from the United States is assurances that the rules that you would regard as being fundamental to ensuring that a trial is fair are observed. Now different people have views in relation to those matters and it is a question of striking a balance in relation to protecting the lives of other people and protecting intelligence gathering capacities in the situation that I've outlined to you. When you are dealing with terrorists who don't observe the rules of war – don't don uniforms – target civilians – these are very serious issues and we have seen it has very tragic consequences for many thousands of people.'

⁹ See

[http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media_Releases_2003_July_2003_David_Hicks_eligible_for_US_Military_Commission_trial_\(4_July_2003\)](http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media_Releases_2003_July_2003_David_Hicks_eligible_for_US_Military_Commission_trial_(4_July_2003)) and the Joint News Release of the Attorney General and the Minister for Foreign Affairs dated 25 November 2005 'Government accepts military commissions for Guantanamo Bay detainees' at

The Australian Government has sought and obtained certain concessions from the US Administration for David Hicks in relation to the US military commission processes. These concessions include that the death penalty will not be imposed in any sentencing of Mr Hicks should he be found guilty of the charges against him, the application of the presumption of innocence, legal representation and the appointment of an Australian legal consultant.¹⁰

3. Have anti-terrorist laws been passed by the use of exceptional procedures which reduce the Parliamentary role? eg, by executive regulation, by expedited procedures, or by reference to Security Council resolutions. Extent of public information about the level of threat. Effectiveness of regular reviews of the laws.

The Commonwealth Government recalled the Senate to pass the *Anti-Terrorism Bill 2005* which effectively broadened an offence for planning terrorist acts on 3 November 2005. Prime Minister the Hon. John Howard cited 'specific intelligence and police information' which gave cause for "serious concern about a potential terrorism attack. The Government provided the Leader of the Opposition and the Shadow Minister for Homeland Security with 'all the detail' of the security information."¹¹

However the Australian National Security Alert Level was not raised from 'medium'.

Concern was also expressed by Parliamentarians from both the House of Representatives and the Senate regarding appropriate scrutiny of the *Anti-Terrorism Bill (No.2) 2005*.¹² While no exceptional procedures were used, Parliamentary scrutiny was considered to be limited by the time made available for debate.

4. Impact of counter-terrorism laws on the role of the judiciary? Have the judiciary's powers to oversee the operation of the law, to ensure legality of actions been reduced? Has recourse to judicial remedies been diminished? What justification is given?

a) Impact of counter-terrorism laws on the role of judiciary.

i) Control orders

Under the control order regime (Div 104 *Criminal Code Act 1995*), a person is *not* detained as a result of having been found guilty of a criminal offence by a court. The effect of the regime is that the person is essentially being judged, convicted and punished without any right to a fair and public trial. A control order can last up to 12 months (s104.16(1)(d)), renewable up to 10 years (see s104.32) on a yearly basis. A

[http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media_Releases_2003_July_2003_David_Hicks_eligible_for_US_Military_Commission_trial_\(4_July_2003\)](http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media_Releases_2003_July_2003_David_Hicks_eligible_for_US_Military_Commission_trial_(4_July_2003))

¹⁰ See transcript of interview with the Attorney General, 11 January 2005 accessed at http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview_Transcripts_2005_Transcripts_11_January_2005_-_Transcript_-_News_Conference_Commonwealth_Parliamentary_Offices : [on occasion of the announcement of the release of Mamdouh Habib] 'I've argued that the military commissions are an appropriate mechanism to deal with offences when you are in a war-like situation which the United States was in... We sought certain guarantees in relation to that process, before we would agree that it was appropriate that Australians be committed under it and that included matters such as a presumption of innocence, proper legal representation and proper due process. And we looked at those matters and where we've had doubts from time to time we've raised them.' [re David Hicks] 'So in his case the United States has brought three charges against him and as a result of that he is in the military commission process and we have not sought his return.'

¹¹ 02 November 2005, Transcript of the Prime Minister the Hon John Howard MP Joint Press Conference with the Hon. Phillip Ruddock MP, Parliament House Canberra <http://www.pm.gov.au>

¹² See Senator Natasha Stott Despoja, *Numbers up for civil liberties and Senate process*, Press release, 13 October 2005 http://www.democrats.org.au/news/index.htm?press_id=4855; see Australian Labor Party's spokesman on homeland security, Arch Bevis: *To give the premiers and states one week to look at it, to give the Federal Parliament one week to deal with the whole thing, to give the Senate one day to deal with it is just heavy-handed* as quoted in Joseph Kerr, 'Mum's the word in terrorist purge', *Sydney Morning Herald*, October 22, 2005 (available at <http://www.smh.com.au/news/national/mums-the-word-in-terrorist-purge/2005/10/21/1129775959888.html>).

senior Australian Federal Police (AFP) officer has the power to apply to a court for a control order over a person (ss104.2, 104.3) provided the Attorney General has given consent for an interim control order (s104.2). The AFP officer in seeking the Attorney General's consent must provide, amongst other things, a summary of the grounds on which the order should be made (s104.2(3)(f)).

Significantly, the summary of the grounds

'does not require any information to be included in the summary if disclosure of that information is likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004)' (s104.2(3A)).

The court can issue an interim control order if the court is satisfied that:

'(c) on the balance of probabilities:

(i) that making the order would substantially assist in preventing a terrorist act; or

(ii) that the person has provided training to, or received training from, a listed terrorist organisation; and

(d) the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the court is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act' (s104.4)

Information forming the basis of seeking the control order does therefore not get ventilated through the court issuing the order as it most likely will be of a nature deemed to 'prejudice national security'. As such, the merits of placing such potentially serious restrictions on a person do not undergo thorough judicial scrutiny. It is important to note also that if there was sufficient evidence in particular in relation to s104.4(c)(ii) reproduced above, the person would have been charged for that offence under s102.5 of the *Criminal Code Act 1995*. Please also see the section on control orders in Part A above.

It is an offence to contravene a control order, with a maximum penalty of 5 years imprisonment (s104.27).

ii) Initial preventative order

A senior AFP officer may make an initial preventative detention order. The maximum time for such an order is 24 hours if the person has been taken into custody, otherwise the maximum period is 48 hours. This period can be extended by state and territory complementary legislation to 14 days¹³. An initial preventative detention order can be extended (s105.10 *Criminal Code Act 1995*). There is no judicial involvement required for issuing an initial preventative detention order – rather an 'issuing authority' makes the order. An issuing authority is defined in ss100.1(1) and 105.2 as being a person who is a judge or a magistrate appointed by the Minister. The issuing authority, and the AFP officer, must be satisfied that:

'(a) there are reasonable grounds to suspect that the subject [the person the subject of the preventative detention order]:

(i) will engage in a terrorist act; or

(ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or

(iii) has done an act in preparation for, or planning, a terrorist act; and

¹³ See for example *Terrorism (Police Powers) Amended (Preventative Detention) Act 2005(NSW)*.

(b) making the order would substantially assist in preventing a terrorist act occurring; and

(c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).’(s105.4(4))

Alternatively, the issuing authority, and the AFP officer must be satisfied that:

(a) a terrorist act has occurred within the last 28 days; and

(b) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and

(c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b)’ (s105.4(6)).

As with the concerns outlined in (i) above of this submission in relation to control orders, if there was sufficient evidence of the acts being committed in subsections 105.4(4)(a)(i)-(iii), under the corresponding offences in Division 101, the person the subject of the order would surely be charged with those offences.

As with control orders, the issuing authority may not see the information forming the basis of the preventative detention order as only a summary of grounds on which the AFP officer considers that the order should be made (s105.7((2)(g)). Information which may prejudice national security does not need to be included in the summary (s105.7(2A)).

The effect of these provisions is to limit the role of the judiciary in scrutinising the issuing of preventative detention orders which restrict a person’s liberty without being found guilty of an offence by a court.

iii) Limitations to proper legal defence

The *National Security Information (Criminal and Civil Proceedings) Act* limits the ability of the defendant to choose his or her own lawyer due to the requirement for lawyers to be security cleared in certain situations (criminal proceedings: s39; civil proceedings: s39A).

The *National Security Information (Criminal and Civil Proceedings) Act* also provides for restriction of information both at the pre-trial and trial stage (criminal proceedings: Part 3; civil proceedings: Part 3A). The Attorney-General may issue a certificate which serves as conclusive evidence for pre-trial proceedings that disclosure of the information is likely to prejudice national security (criminal proceedings: ss26, 28; civil proceedings: ss38F, 38H). It is an offence to disclose this information (criminal proceedings: ss40, 41; civil proceedings: ss46A, 46B). If the information is in the control of the prosecution, it may not be disclosed to the defendant and their counsel and would thereby impact upon their ability to prepare a defence.

The *National Security Information (Criminal and Civil Proceedings) Act* provides for the possible exclusion of the defendant and his or her legal counsel while the prosecution gives details of the information concerned, argues why the information should not be disclosed (criminal proceedings: s24; civil proceedings: s38D) or why the witness should not be called to give evidence (criminal proceedings: s25; civil proceedings: s38E). This would prevent the defendant from rebutting the evidence or from providing appropriate instructions to their legal representative.

The monitoring of communications between a person detained and their lawyer undermines an essential component of a person's right to a proper defence - that is, full and frank confidential discussion with a lawyer. Additionally, contact that a detained person has with another person `may take place only if it is conducted in

such as way that the contact, and the content and meaning of the communication that takes place during the contact can be effectively monitored by a police officer' s105.5 *Criminal Code Act 1995*.

b) Judicial power to oversee the operation of the law.

Please also see sections (a) (i) and (ii) above.

i) Control orders

The obligations, prohibitions or restrictions must be reasonably necessary, reasonably appropriate and adapted to protect the public from at terrorist act (s104.4(1)(d) *Criminal Code Act 1995*).

An AFP member must enclose a summary of the grounds on which an interim control order to the Attorney General for approval. However, as discussed above, the summary does not require any information to be included in the summary if disclosure of that information is likely to prejudice national security (s104.2(3A))

ii) Initial preventative detention order

The internal nature of the entire process prevents lack of scrutiny by courts and transparency - While a person is being detained under a preventative detention order, the person is not entitled to contact any other person and may be prevented from contacting another person (s105.34). A person is able to contact a family member but only to advise him/her that he/she is "safe but unable to be contacted for the time being" (s105.35). The person may not state that he/she is subject to preventative detention, or that he/she is being detained or the period for which the person is being detained.

The person may contact a lawyer (s105.37) but it is an offence to disclose that the person is subject to a preventative detention order (s105.41)- limiting judicial involvement

iii) Other

The admissibility of sensitive evidence in civil or criminal litigation is determined by the Attorney General on the question of whether that information is "likely to prejudice national security" (s17 *National Security Information (Criminal and Civil Proceedings) Act*). If the Attorney General issues a certificate in relation to any information forming part of proceedings deemed 'likely to prejudice national security' then court must adjourn the hearing and hold a separate hearing (criminal proceedings: ss27(3), 28(5); civil proceedings: ss38G, 38H(6) *National Security Information (Criminal and Civil Proceedings) Act*) to determine what orders to make regarding the information. The information may be fully disclosed, withheld, summarised or redacted (criminal proceedings: s31; civil proceedings: s38L *National Security Information (Criminal and Civil Proceedings) Act*).

5. Have there been changes in criteria for declaring state of emergency, and have any declarations or derogations from human rights occurred as a result?

Australia has not formally derogated from any of its human rights treaty obligations. Amnesty International Australia is unaware of any changes in criteria for declaring a state of emergency.

6. How are "terrorism", "terrorist act", and "terrorist organisations" defined in the law?

a) Definition of terrorism & terrorist act:

"Terrorism" is defined in the *Criminal Code Act 1995* at section 100.1 (the "Australian definition"). The Australian definition is as follows:

'Section 100.1

(1) terrorist act means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and*
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and*
- (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or*
 - (ii) intimidating the public or a section of the public.**

(2) Action falls within this subsection if it:

- (a) causes serious harm that is physical harm to a person; or*
- (b) causes serious damage to property; or*
- (c) causes a person's death; or*
- (d) endangers a person's life, other than the life of the person taking the action; or*
- (e) creates a serious risk to the health or safety of the public or a section of the public; or*
- (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or*
 - (ii) a telecommunications system; or*
 - (iii) a financial system; or*
 - (iv) a system used for the delivery of essential government services; or*
 - (v) a system used for, or by, an essential public utility; or*
 - (vi) a system used for, or by, a transport system.**

(3) Action falls within this subsection if it:

- (a) is advocacy, protest, dissent or industrial action; and*
- (b) is not intended:
 - (i) to cause serious harm that is physical harm to a person; or*
 - (ii) to cause a person's death; or*
 - (iii) to endanger the life of a person, other than the person taking the action; or*
 - (iv) to create a serious risk to the health or safety of the public or a section of the public.'**

b) Definition of terrorist organisation:

Section 102.1 of the *Criminal Code Act 1995* provides that “terrorist organisation” means:

- ‘(a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or*
- (b) an organisation specified by regulation by the Governor-General on the advice of the Attorney-General.’*

The Governor-General may only make a regulation specifying an organisation as a terrorist organisation if the Attorney-General is satisfied that the organisation:

- (a) satisfies the definition of a terrorist organisation available to the courts above, or
- (b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

Once satisfied of these matters, the Attorney-General must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation.

7. *What new criminal offences, based on the definition of terrorism or related to terrorism, have been introduced, and how have the laws been used?*

a) Specific terrorist offences (Div 101 *Criminal Code Act*).

- To engage in a terrorist act (section 101.1);
- To provide or receive training connected with terrorist act (section 101.2);
- To possess things connect with terrorist acts (section 101.4);
- To collect or make documents likely to facilitate terrorist acts (section 101.5); and
- To commit any act in preparation for, or planning, a terrorist act (section 101.6).

b) Offences related to terrorist organisations (Div 102 *Criminal Code Act*)

- to direct the activities of a terrorist organisation (section 102.2);
- to intentionally be a member of a terrorist organisation (section 102.3);
- to recruit a person to join or participate in the activities of a terrorist organisation (section 102.4);
- to train a terrorist organisation or receiving training from a terrorist organisation (section 102.5);
- to get funds to or from a terrorist organisation (section 102.6);
- to provide support to a terrorist organisation (section 102.7);
- to associate with terrorist organisations (section 102.8).

c) Offence of financing terrorism (Div 103 *Criminal Code Act*)

- To finance terrorism (section 103.1); and
- To finance a terrorist (section 103.2).

8. What changes have been made in arrest and detention provisions applicable to terrorism suspects? Have administrative detention, arbitrary arrest, restricted access to counsel, limit on right to be informed, etc been introduced?

a) Arrest

- Warrants can be obtained under the *Australian Security Information Organisation Act 1979* (ASIO Act) to require a person to appear attend before a prescribed authority or for the person to be arrested and detained (s34D(2)). The Director-General of ASIO must obtain the Minister's consent for a warrant to be issued (s34C(1)). The Minister must be satisfied "that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence" (s34C(3)(a)), and that relying on other methods of collecting that intelligence would be ineffective (s34C(3)(b)).
- The senior AFP member can make a request for a control order if he/she considers on reasonable grounds that an order would substantially assist in preventing a terrorist act; or if he/she suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation (s104.4(1)(c)).
- A senior AFP member may make an initial preventative detention order (the maximum time for such an order is 24 hours if the person has been taken into custody, otherwise the maximum period is 48 hours). An initial preventative detention order can be extended (s105.10) with no judicial approval required.

b) Detention

- People can be detained by a police officer for four hours after arrest for the purpose of investigation of whether the person committed a terrorism offence (s23CB *Crimes Act 1914*). The period can be extended. The investigation period may be extended any number of times, but the total of the periods of extension cannot be more than 20 hours (s23DA(7)). Thus the total detention period is 24 hours.
- The ASIO Act allows for the detention of people for up to 168 hours (ss34D(3), 34HC). People may not be suspected of committing any criminal offence, but may merely be suspected of having information about a possible criminal offence.

- It is an offence for a person who has been detained to contact anyone while they are detained (s34F(8) ASIO Act).
- A person may not decline to answer a question on the grounds that it may incriminate him or her (s34G(8)(b) ASIO Act)
- The person is required to give information, and failure to give the information carries a penalty of maximum five years' imprisonment (s34G(3) ASIO Act).
- The ASIO Act fails to provide for an overall shorter detention period for minors, although it does provide for shorter blocks of questioning (see ss34NA (4) - (10) for applicability to people aged between 16 and 18 years).
- There is no guidance given to the Minister, the issuing authority or the prescribed authority as to the relevance of a person's age for the purpose of detention under ASIO Act
- Control order s104.5(3) *Criminal Code Act 1995* as amended by the *Anti Terrorism Act 2005* – prohibitions include requirement that the person remain at specified premises - may constitute arbitrary detention
- Under amendments to Division 105 of the *Criminal Code Act 1995* by the *Anti Terrorism Act 2005*, a police officer or "issuing authority" (see s105.2) may apply for a "preventative detention order". Such an order may subject an individual to detention for up to 48 hours.
- While a person is being detained under a preventative detention order, the person is not entitled to contact any other person and may be prevented from contacting another person (s105.34 *Criminal Code Act 1995*).
- A person is able to contact a family member but only to advise him/her that he/she is "safe but unable to be contacted for the time being" (s105.35 *Criminal Code Act 1995*). The person may not state that he/she is subject to preventative detention, or that he/she is being detained or the period for which the person is being detained.
- As the Commonwealth is subject to constitutional limitations, it was unable to provide for preventative detention for longer than 48 hours. Accordingly the states were asked to pass complementary legislation providing for preventative detention for up to 14 days. At the time of writing, all states and territories except the Australian Capital Territory had done so.

c) Restricted access to counsel

- The person detained by ASIO under its detention and questioning powers under the ASIO Act must be permitted to contact a single lawyer of the person's choice however the person must first inform the prescribed authority of the identity of the lawyer and ASIO must have had an opportunity to object to that lawyer. The ASIO Act provides that, in any event, the person can be questioned in the absence of a lawyer (s34TB ASIO Act 1979).
- A person under a preventative detention order under Division 105 (preventative detention orders) of the *Criminal Code Act 1995* may contact a lawyer (s105.37 *Criminal Code Act*) but it is an offence to disclose that the person is subject to a preventative detention order (s105.41 *Criminal Code*).

9. *What significant counter-terrorism prosecutions have there been and what has been the experience in regard to prosecutions? Have there been other proceedings, such as detention, control orders in regard to terrorism suspects?*

- Jack Roche pleaded guilty to conspiring to bombing the Israeli Embassy in Canberra in May 2004 and was sentenced to nine years' jail in June 2004 (*Sydney Morning Herald* 28 May 2004).
- Zeki Mallah was found not guilty of preparing a suicide attack on an Australian Security Intelligence Organisation (ASIO) or Department of Foreign Affairs and Trade buildings in Sydney having been denied a passport. He was also accused of trying to sell a written manifesto and video exhorting jihad for Aus\$3000 to an undercover officer posing as a journalist (*Sydney Morning Herald* 7 April 2005)
- Bilal Tayba is currently facing charges of intimidating police and stalking Australian Federal Police agents. He is suspected of acts in preparation for an impending terrorist act (*Sydney Morning Herald* 8 June 2004)
- Faheem Lodhi is currently facing charges of planning to commit a terrorist act, collecting or making documents likely to facilitate terrorist acts and other terrorism related charges with the Commonwealth alleging he conspired with Willie Brigitte to bomb the electricity grid and defence bases in Sydney and also attending terrorist training camps in Pakistan. The trial was to have commenced in February 2006.
- A Sydney student, Izhar ul-Haque, was arrested and charged in 2004 with attending a 21-day terrorist training course run by Lashkar e Toiba in Pakistan. He faces trial on the charge of training with a proscribed terrorist organisation.
- Belal Khazaal has been charged with collecting or making documents likely to facilitate terrorist acts.

- Nine Victorian men (Shane Kent, Fadal Sayadi, Abdul Nacer Benbrika, Raad Ahmed, Mr Hadarra, Abdulla Merhi Raad Ezzit, Hany Taha and Aimen Joud) have been charged with being members of a proscribed terrorist group and appeared in Melbourne Magistrate's Court 8 November 2005.
- The prosecution made the following allegations:
 - Members for over 12 months (no name given for organisation);
 - Committed to violent jihad;
 - Contributed to common fund known as sandook;
 - Received military style training in Australia; and
 - Possession of unauthorised firearms.
- Joseph Terrence Thomas has been found guilty of intentionally receiving funds (A\$4740) and an airline ticket from Al Q'aeda and of possessing a false passport. Mr Thomas is appealing the conviction on the basis of contamination of evidence by Australian Federal Police agents (*Sydney Morning Herald* 27 February 2006).

10. *Are there any special courts for this outside the justice system, or military courts or tribunals? [Not relevant for Australia.]*

N/A

11. *Are there special jurisdiction inside the justice system, or special procedures, limiting the right to defence or other attributes of fair trial?*

Perhaps the most difficult piece of legislation is the National Security Information (Criminal & Civil Proceedings) Act 2004 ("NSI Act"). (See also submission in answer to question 4 at (b)(iii)).

Objects of Act – Section 3

- (1) The object of this Act is to prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.
- (2) In exercising powers or performing functions under this Act, a court must have regard to the object of this Act.

"Information" is defined by section 90.1 of the Criminal Code as:

“information” means information of any kind, whether true or false and whether in a material form or not, and includes:

- (a) an opinion; and
- (b) a report of a conversation.”

Notably this Act expands the definition to include information which is in the public domain.

“National Security” is defined in section 8 of the NSI Act as:

“Security” means:

- (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
 - (i) espionage;
 - (ii) sabotage;
 - (iii) politically motivated violence;
 - (iv) promotion of communal violence;
 - (v) attacks on Australia’s defence system; or
 - (vi) acts of foreign interference;

Whether directed from, or committed within, Australia or not; and

- (b) the carrying out of Australia’s responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).

and “Law Enforcement Interests” means:

“Interests in the following:

- (a) avoiding disruption to national and international efforts relating to law enforcement criminal intelligence, criminal investigation, foreign intelligence and security intelligence;

- (b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;
- (c) the protection and safety of informants and of persons associated with informants;
- (d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.

Amnesty has quoted these definitions at length because they demonstrate the width of material caught by this Act. What is also apparent is the generality of the language which make the provisions difficult to confine.

Sections 24 and 25 of the NSI Act obliges not only a prosecutor but also a defendant (in some circumstances) to notify the Attorney General if he or she believes information relating to or affecting national security will be disclosed in a criminal proceeding.

By s.26 the Attorney can issue a non-disclosure certificate on the basis of a s.24 or section 25 disclosure or by section 26(1)(ii) if the Attorney expects disclosure may occur off his/her own motion.

A summary of the contents of a subject document is provided to the parties and the court.

S. 27 makes the Attorney's certificate conclusive evidence that the disclosure of the information is likely to prejudice national security.

S. 28 provides for the Attorney to give a certificate in relation to a witness, whom it is believed will disclose information by mere presence. The prosecutor and/or defendant must not call that witness.

A hearing in relation to such certificates is to be closed and unless the defendant and his lawyers have a security clearance to the level considered appropriate they are excluded from the hearing (s. 29(3)).

It is highly unlikely that the defendant will have such a clearance. Very few lawyers in this country have security clearances of any description.

The Commonwealth Government is effectively trying to force a position where only defence lawyers who have such clearances can appear by restricting payment of legal aid (see letter from NSW Legal Aid Commission to the Commonwealth Attorney General's Department).

This means that a hearing under s. 31 will in all probability be held in the absence of the defendant and his/her legal representatives.

S. 31 hearings have a shackled function given that s.27 provides for the certificate of the Attorney to be conclusive proof of its assertions.

The role of the Court is severely restricted by s. 31(2), (7) and (8).

Part 4 of the Act deals with security clearances. S.39(2) allows for a lawyer to apply for a security clearance and (3) allows for the proceedings to be adjourned to enable that application to be considered.

S. 39(5) provides that if a clearance is not given, the defendant is to be advised by the Court of the consequences of having a lawyer without a clearance represent him/her and recommend that he/she get a lawyer who is cleared.

Part 5 makes criminal disclosure of material which is the subject of a certificate under s.24(1).

Thus the certificate might relate to material that is already in the public domain.

The whole scheme directly conflicts with Article 14(3)(d) and (e) of the ICCPR.

12. *Have special evidence laws been introduced which may affect fair trial, and what justification is given for these?*

See 11 above.

In addition to what is said above it should be noted collaterally that information provided as the basis for control orders under Division 104 of the Criminal Code and Preventative Detention Orders under Division 105 is severely restricted so as to make a successful legal challenge to either specie extremely difficult if not impossible.

Amnesty International Australia refers to those parts of its submission which relates to those provisions.

13. Have laws or policies increased the risk of torture? eg, coercive interrogation?

The following new laws may contribute to an increased risk of torture.

- People can be detained by a police officer for four hours after arrest for the purpose of investigation of whether the person committed a terrorism offence (s23CB *Crimes Act*). The period can be extended. The investigation period may be extended any number of times, but the total of the periods of extension cannot be more than 20 hours (s23DA(7)). Thus the total detention period is 24 hours without charge or trial. Detention without charge or trial can facilitate an environment in which human rights abuses could occur.
- A person detained under ASIO's detention and interrogation powers must be permitted to contact a single lawyer of the person's choice however the person must first inform the prescribed authority of the identity of the lawyer and ASIO must have had an opportunity to object to that lawyer. The Act provides that, in any event, the person can be questioned in the absence of a lawyer (s34TB *ASIO Act 1979*). The absence of a lawyer during questioning could facilitate coercive interrogation.
- The ASIO Act allows for the detention of people for up to 168 hours (ss34D(3), 34HC). People may not be suspected of committing any criminal offence, but may merely be suspected of having information about a possible criminal offence. This amounts to detention without charge or trial and could facilitate an environment in which coercive interrogation may occur.
- A person may not decline to answer a question on the grounds that it may incriminate him or herself under ASIO's detention and questioning powers (s34G(8)(b) *ASIO Act 1979*). The person is required to give information, and failure to give the information carries a penalty of maximum five years' imprisonment (s34G(3) *ASIO Act*). This could facilitate coercive interrogation.
- While a person is being detained under a preventative detention order, the person is not entitled to contact any other person and may be prevented from contacting another person (s105.34 *Criminal Code*). This amounts to secret detention which is an environment which could facilitate human rights abuses.
- The preventative detention order regime does not clearly establish where the person is to be detained. Section 105.27 of the *Criminal Code Act 1995* states that '[a] senior AFP member may arrange for a person who is being detained ... to be detained under the order as a prison or remand centre'. This provision still provides some leeway as to where the person is held and fails to specify whether children will be held separately from adult detainees or whether the detainees will be held separately to the convicted prisoners.

14. Have any laws or policies contributed to enforced disappearances or arbitrary killings?

Not to the knowledge of Amnesty International Australia.

15. Are there any changes in laws or policies in regard to return and transfer of persons in terrorist cases which may affect human rights, or increased risk of torture? eg, return, extradition or deportation to risk of unfair trial, death penalty

The following measures have been introduced since 2002:

- *Anti -Terrorism Act (No 3) 2004* amended the *ASIO Act 1979* to give ASIO powers to demand the surrender of Australian and foreign passports in certain circumstances (ss 34JBA, 34 JC *ASIO Act 1979*).
- *Anti-Terrorism Act (No 3) 2004* amends the *Passports Act 1938* to give authorities certain powers to demand, confiscate and seize foreign passports (ss 23-26 *Australian Passports Act 2005*) The *Passport Act 1938* is now called the *Australian Passports Act 2005*.
- *National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004* amends the *Administrative Decisions (Judicial Review) Act 1977* to limit a court's jurisdiction to determine a defendant's application for review; and to exclude a person from requesting a written statement of reasons from the Attorney-General (s9A(4) *Administrative Decisions (Judicial Review) Act 1977*).
- *National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004* amends the *Judiciary Act 1903* to give the relevant Supreme Court jurisdiction in respect of applications for writs of mandamus or prohibition, or injunctions (s 39B(3) *Judiciary Act 1903*)
- There is also a review of Australia's extradition laws being undertaken by the Attorney-General's Department.¹⁴

16. Are there counter-terrorism laws which limit the right to freedom of expression? eg, censorship or incitement laws, laws about praise of terrorism, etc

Recklessness

¹⁴ Please see

<http://www.ag.gov.au/agd/WWW/agdHome.nsf/D2801B61EABE80A2CA256809001328BA/2B87D3FE11DDD632CA257069000BAD7A> in relation to this review.

Section 102.6(2)(c) of the **Criminal Code** and its equivalent section in 102.7(2)(c) create the disturbing concept of either reckless membership of an organisation or reckless support for an organisation .

Amnesty is of the view that such concepts have a very real capacity to criminalise what might be intemperate conduct innocently displayed. In such a delicate area where minds differ within a democratic community as to the legitimacy of various types of activity by political and religious organisations nationally and internationally, that to criminalise conduct in this way has the capacity to dangerously intrude upon what can be legitimately seen as being within permissible commentary, advocacy or dissent.

There are plenty of examples in this country's history where support has been innocently given, or perhaps even recklessly given, to organisations which may have been merely fronts for what could then have been regarded as a terrorist organisation. The Provisional IRA is an example of it as was the ANC when it existed as a paramilitary organisation resisting the then government of South Africa.

Similarly s.103.1(1)(b) suffers from the same problem. It should be noted that the potential penalty for this offence is life imprisonment.

The existing Criminal Code (s 102) defines a "terrorist organisation" and creates offences of being a member of such an organisation or associating with one. The Anti Terrorism Act (No 2) 2005 inserts an extended definition of terrorist organisation to include organisations which 'advocate' terrorism.

"Advocates" means:

1A

In this Division, an organisation advocates the doing of a terrorist act if:

- (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or
- (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or
- (c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (with the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.

One commentator Michael Walton (2005:3) has pointed out that the effect of sub-section (c) is that when an organisation's leaders praise a terrorist act, every member of that organisation instantly becomes a criminal. The Act now effectively prevents organisations expressing what are, after all opinions, albeit dissenting ones, and thus the legislation criminalises dissent.

In order for an organisation to be specified under the Act (ie proscribed) the relevant Minister is to determine whether an organisation meets this criteria. Sub-section 102.1(2) of the Criminal Code has been amended such that –

Before the Governor General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of terrorist organisation in this section, the Minister must be satisfied on reasonable grounds that the organisation:

- (a) *is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or*
- (b) *advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).*

On its face, this is very far reaching. Although the wording may suggest that it is intended to confine the decision maker in terms of what the Minister must be satisfied about, it may well be that the fear of consequences of non-action may allow a Minister to extend what he or she considers to be "reasonable grounds" to include such things as hearsay and speculation by "experts".

17. Are there counter-terrorism laws which impose limits on freedom of association, assembly, religious expression? eg, proscription of organisations, etc. How are these justified?

a) Freedom of Association

Under s102.3 of the *Criminal Code Act 1995* it is an offence to be a member of a terrorist organisation. This may breach the right to freedom of association as it goes beyond the permissible restrictions under the ICCPR.

It is an offence to intentionally provide training to or receive training from a terrorist organisation (s102.5 *Criminal Code Act 1995*). If the organisation is a proscribed organisation, strict liability applies. This means that the prosecution does not need to prove that the person knew that the organisation had been proscribed. The evidential burden shifts immediately to the accused to show that they were not reckless as to the fact that the organisation was a proscribed "terrorist organisation".

It is an offence to associate on two or more occasions with a person who is a member of or who promotes or directs the activities of a proscribed terrorist organisation if the association intentionally provides support to the organisation to help it expand or continue to exist. The person must know that the other person is a member of, promotes or directs the activities of the terrorist organisation.

There are various types of associations which are permitted including if the association is with a close family member or the association is in a place used for public religious worship per s102.8(4) *Criminal Code Act 1995*. However the defendant bears the evidential burden of proving that the association was for one of the acceptable purposes. Further, the offence does not apply unless the person is reckless as to whether the organisation is a proscribed organisation and again the defendant bears the evidential burden per s102.8(5) *Criminal Code Act 1995*. Finally, the section does not apply to the extent that it would infringe upon the implied freedom of political communication in the constitution however the defendant against bears the evidential burden on this matter per s102.8(6) *Criminal Code Act 1995*.

Under s102.8 of the *Criminal Code Act 1995* all that the person does is to arrange to meet with another person on two or more occasions with the knowledge that they are providing support to a “terrorist” organisation that will assist the organisation to expand or continue to exist for an offence to occur. The penalty is 3 years imprisonment. Helping an organisation to expand or continue to exist does not mean that the person is involved with “terrorism” or the commission of a “terrorist” act. The connection with the planning or commission of an actual “terrorist” act is lacking in this offence.

b) Freedom of association and religious expression

The *Criminal Code Act 1995* as amended by the *Anti-Terrorism Act 2005* lists the obligations, prohibitions and restrictions that can be imposed on a person by a court under an interim control order (s104.5(3))¹⁵. These include: being at specified areas or places; communicating or associating with specified individuals; accessing or using specified forms of telecommunication or other technology including the internet; carrying out specified activities; remaining at specified premises between specified times each day or on specified days; and/or wearing a tracking device.

These restrictions either separately or collectively can operate to inhibit freedom of association and religious expression, particularly if an order prohibits a person’s attendance at a place of worship.

¹⁵ An interim control order can be revoked, varied or confirmed by a court: ss104.15 and 104.16

18. Are there counter-terrorism laws affecting the right to privacy? Eg, surveillance laws, laws about collection and sharing of data. What is their justification?

There have been laws passed enhancing the surveillance capability of the relevant Commonwealth agencies. However, Amnesty International Australia has not been addressing these privacy issues but rather focussing on other inroads into human rights standards and the rule of law which inroads have been detailed in this submission.

19. Do any counter-terrorism laws make distinctions on the ground of nationality, race, ethnicity, religion etc? Eg, racial or ethnic profiling, citizenship laws.

All listed terrorists organisations under Regs 4A- 4W *Criminal Code Regulations 2002* are Muslim organisations: - Al Qa'ida 5, Jemaah Islamiyah 5, Abu Sayyaf Group 6, Jamiat ul-Ansar (JuA) 6, Armed Islamic Group 7, Salafist Group for Call and Combat/GSPC 7, Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn, Ansar al-Islam 8, Asbat al-Ansar 9, Islamic Movement of Uzbekistan, Jaish-e-Mohammad 9, Lashkar-e Jhangvi (LeJ) 10, Egyptian Islamic Jihad 10, Islamic Army of Aden (IAA) 11, Hizballah's External Security Organisation (ESO), Palestinian Islamic Jihad (PIJ), HAMAS' Izz al-Din al-Qassam Brigades, Lashkar-e-Tayyiba (LeT).

20. What procedures are used to control finances of terrorists, or to criminalize the financing of terrorism, eg freezing assets? What are the justification for these?

The Australian Government has taken steps to enable the assets of persons or entities listed by the United Nations to be frozen. Specifically, the Australian Government has enacted the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002*¹⁶ on how a Minister can list persons, entities and assets (s15) and the offence committed by a person for holding (s20) or making a freezable asset available to another person (s21).

It is an offence to finance terrorism (section 103.1 *Criminal Code Act 1995*) and to finance a terrorist (section 103.2 *Criminal Code Act 1995*). Section 103.1 of the *Criminal Code Act 1995*, 'Financing terrorism', prescribes that a person commits the offence of financing terrorism even if the terrorist act does not occur (s103.1(2)(a)) or that the funds will not be used to 'facilitate or engage in a specific terrorist act' (s103.1(2)(b)) or that the funds will be used to 'facilitate or engage in more than one terrorist act' (s103.1(2)(c)). The penalty for financing terrorism is life imprisonment.

The offence of financing a terrorist also carries a penalty of life imprisonment. The offence is committed if a person intentionally 'makes funds available (whether directly or indirectly) to another person' (s103.2(1)(a)(i)) or 'collects funds for or on behalf of

¹⁶ see also *Charter of UN Act 1945*

another person (whether directly or indirectly)' (s103.2(1)(a)(ii)) and that person is 'reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act' (s103.2(1)(b)). This is the case even if a terrorist act does not occur (s103.2(2)(a)), or 'the funds will not be used to facilitate or engage in a specific terrorist act' (s103.2(2)(b)) or 'the funds will be used to facilitate or engage in more than one terrorist act' (s103.2(2)(c)).

It is also an offence for a person to intentionally collect, receive funds from or make funds available to a terrorist organisation, whether directly or indirectly (s102.6(1)(a)(i) and (ii)) and the person knows the organisation is a terrorist organisation (s102.6(1)(c)). The penalty is 25 years imprisonment. If a person commits these offences but is 'reckless as to whether the organisation is a terrorist organisation' (s102.6(2)(c)) the penalty is 15 years imprisonment. If a person proves that the funds which were collected or received for a terrorist organisation are for legal representation for a person in proceedings relating to Division 102 of the *Criminal Code Act 1995* then the offences will not apply (s102.6(3)(a)). Similarly there is no offence if the person can prove that the funds are collected or received for the purpose of providing assistance to the organisation for it to comply with a law of the Commonwealth or a State or a Territory (s102.6(3)(b)).

21. Do counter-terrorism laws result in any reduction in accountability for human rights violations or lead to impunity, or reduction in access to remedies?

The following protections have either gone or been restricted:

- habeas corpus
- right to effective judicial review of control or detention orders (see other submissions).
- right to sue for wrongful arrest or malicious prosecution.
- proper access to lawyers.

This submission deals with each of these propositions more substantially elsewhere.