



**HUMAN RIGHTS AND EQUAL OPPORUTNITY  
COMMISSION**

**SUBMISSION TO THE ICJ EMINIENT JURISTS  
PANEL ON TERRORISM, COUNTER-TERRORISM  
AND HUMAN RIGHTS**

**March 2006**

# INDEX OF CONTENTS

<a href="#">INTRODUCTION</a> .....	3
<a href="#">PART 5.3 OF THE CRIMINAL CODE</a> .....	4
<a href="#">Preventative Detention Orders</a> .....	4
<a href="#">Control Orders</a> .....	14
<a href="#">The proscription of terrorist organisations regime</a> .....	17
<a href="#">Sedition Offences</a> .....	22
<a href="#">POLICE POWERS TO STOP AND QUESTION PEOPLE IN RELATION TO TERRORIST ACTS</a> .....	23
<a href="#">AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION ACT 1979 (Cth) (ASIO Act)</a> .....	25
<a href="#">Part III, Division 3 ASIO ACT</a> .....	25
<a href="#">SPECIAL EVIDENCE LAWS</a> .....	33
<a href="#">National Security Information (Criminal Proceedings and Civil Proceedings) Act 2004</a> ...	33
<a href="#">Law and Justice Legislation Amendment (Video Evidence and Other Measures) Act 2005</a> .....	44

## INTRODUCTION

1. The Human Rights and Equal Opportunity Commission ('HREOC') is established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act'). It is Australia's national human rights institution.
2. Its functions are set out in section 11(1) of the HREOC Act and include the power to promote an understanding and acceptance, and the public discussion, of human rights in Australia.
3. In this submission, HREOC limits itself to commenting on some of the key human rights issues arising from the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and the *Criminal Code Amendment (Terrorism) Act 2003* (Cth) and *Anti-Terrorism Act (No.2) 2004* (Cth), the *Anti-Terrorism Act 2005* (Cth) and the *Anti-Terrorism Act 2005 (No.2)* (Cth) which now form Part 5.3 of the *Criminal Code 1995* (Cth) (the 'Criminal Code'), as well as aspects of the *Australian Intelligence Security Organisation Act 1979* (Cth) (*ASIO Act*) and the *Crimes Act 1914* (Cth) (the 'Crimes Act').
4. HREOC has made submissions to the following inquiries into counter-terrorism legislation:
  - *The Senate and Constitutional Legal Constitutional Committee Inquiry into the Anti-Terrorism Bill (No.2) 2005*
  - *The Senate Legal and Constitutional Legislation Committee inquiry into the Law and Justice Legislation Amendment (Video Evidence and Other Measures) Bill 2005*
  - *The Senate Legal and Constitutional Committee inquiry into the provisions of the Anti-Terrorism Bill 2005*
  - *the Senate Legal And Constitutional Committee Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004*
  - *The Senate Legal and Constitutional Committee on the National Security Legislation Amendment Bill 2005*
  - The Parliamentary Joint Committee on ASIO, ASIS and DSD on *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill* and the *Review of Division 3 Part III of the ASIO Act 1979*.
  - *The Security Legislation Review on the Security Legislation Amendment (Terrorism) Act 2002 (Cth and Criminal Code Amendment (Terrorism) Act 2003*.

HREOC encourages the ICJ Panel of Eminent Jurists ('the Panel') to consider these submissions. The Panel should note, however, that the submissions refer to counter-terrorism bills not the final form of the legislation. The submissions are available at: <http://www.hreoc.gov.au/legal/submissions/index.html>
5. HREOC asks this Panel to accept that international human rights law is not an optional extra during times of concern about international terrorism. Such an approach implies that human rights are somehow antithetical to issues of national security and ignores the fact that international human rights law already strikes a balance between security interests and rights considered to be fundamental to the person. It allows for protective actions to be taken by states, but demands that those actions remain within carefully crafted limits – most notably proportionality.
6. HREOC observes that a re-occurring feature of counter-terrorism legislation has been the expansion of executive power. From a human rights perspective, it is not always the text of the law that is the problem but how the powers which the laws create are exercised in a given case. It is therefore important to ask what review is available to

check that the power exercised was proportionate and necessary in the particular circumstances. In HREOC's view, to discharge Australia's obligations under the ICCPR, decision making powers must be subject to judicial review, to check the legal validity of the decision, and merits review, to properly investigate the facts on which the decision was based.

7. Concerns about the heightened risks of domestic terrorist attacks are plainly legitimate and require innovative measures on the part of all responsible states, including Australia. However, as the United Nations Secretary General has stated, it is crucial that those measures are consistent with international human rights law to ensure that in an attempt to safeguard our society we do not give away the very rights that are essential to the maintenance of the rule of law, one of the fundamental principles of a functioning democracy.<sup>1</sup>
8. HREOC emphasises the importance of adequate political and public scrutiny of proposed counter-terrorism legislation. HREOC is concerned that attempts have been made to hurry significant counter-terrorism legislation, including the recent *Anti-Terrorism Bill (No.2) 2005*, through the Senate process, without adequate time for public scrutiny. To protect both national security and the rights of all citizens it is necessary to expose the practical implications of proposed counter-terrorism legislation to public and political scrutiny. By identifying potential drafting problems and ensuring that the safeguards against the abuse of power are adequate, this process of public scrutiny creates better legislation and reduces the likelihood of court challenges.<sup>2</sup>
9. HREOC notes that the Human Rights & Disability Discrimination Commissioner, Mr Graeme Innes AM, is a member of the Security Legislation Review Committee currently reviewing Australia's Counter-Terrorism legislation. As such, Mr Innes has excluded himself from participation in this submission.

## **PART 5.3 OF THE CRIMINAL CODE**

### ***Preventative Detention Orders***

#### **General outline of the Preventive Detention Order scheme**

10. The Preventative Detention Order (PDO) scheme was part of a broad package of initiatives affirmed at a meeting of the Council of Australian Governments (COAG) held in September 2005. A copy of the communiqué issued at the conclusion of the meeting on 27 September 2005 is attached as Annexure A in this submission.
11. Item 24 of Schedule 4 of the *Anti-Terrorism Act (No.2) 2005* amended the *Criminal Code (Cth)* to insert a new division 105. Division 105 provides for preventative detention for up to 48 hours for the purpose of preventing an imminent terrorist act<sup>3</sup> and preserving evidence after an act of terrorism has occurred<sup>4</sup>.

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<sup>1</sup> See U N Secretary-General's keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, Madrid, Spain, 10 March 2005. See also, Security Council Resolution 1373 (2001) adopted by the Security Council at its 4385<sup>th</sup> meeting, on 28 September 2001.

<sup>2</sup> See [http://www.hreoc.gov.au/media\\_releases/2005/47\\_05.html](http://www.hreoc.gov.au/media_releases/2005/47_05.html)

<sup>3</sup> To utilise that head, the issuing authority must be satisfied that: (a) there are reasonable grounds to suspect that the subject(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 (ii) has done, or will do, an act in preparation for, or planning, a terrorist act; and

(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).

<sup>4</sup> To utilise that head, the issuing authority must be satisfied that:

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

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

12. The PDO regime provides that AFP officers may apply for an ‘initial’ PDO to an ‘issuing authority’. A senior AFP<sup>5</sup> officer may grant an initial PDO for a period up to 24 hours, calculated from the time the person is first taken into custody under the order.<sup>6</sup> If the order is first made for a period less than the 24 hour maximum, the senior AFP officer can extend the duration of detention on written application.<sup>7</sup> However, the entire period of detention, as extended, or further extended, cannot exceed a maximum total of 24 hours.<sup>8</sup> The application is made in the absence of the person to be detained.
13. The PDO regime then provides for a period of further detention (beyond 24 hours) which must be authorised by a ‘continued’ PDO. A continuing PDO can be granted by an ‘issuing authority’<sup>9</sup>. A continuing PDO cannot be granted unless the person is subject to an initial PDO. Like initial PDOs, a continuing PDO may be extended. However, a continuing PDO, as extended or further extended, must only allow for detention up to a period of 48 hours, after the person is first taken into detention under an initial PDO. The application is made in the absence of the person to be detained.
14. The powers to grant initial and continuing PDOs are subject to a number of safeguards:
- the detained person is entitled to contact the Commonwealth Ombudsman or relevant equivalent state authority;<sup>10</sup>
  - the detained person is entitled to contact a lawyer (subject to certain limitations) to arrange for the lawyer to act for them to seek a remedy relating to the PDO or their treatment whilst detained;
  - there are certain review rights available in the courts and the administrative appeals tribunal.<sup>11</sup> The limitations on those rights are discussed below;
  - the “nominated senior AFP officer”, who oversees the exercise of the powers under a PDO,<sup>12</sup> has certain obligations. They include an obligation to ‘consider’ representations made by the person who is being detained, their lawyer or parent or guardian (in the case of the detention of a person aged between 16 and 18).

### Issues regarding the right to liberty – the requirement of “proportionality”

15. A number of commentators<sup>13</sup> have suggested that the scheme for granting PDOs violates the rights conferred by article 9(1) of the ICCPR, which 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.

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(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).

<sup>5</sup> Defined to mean the Commissioner, a deputy Commissioner or an AFP officer above the rank of superintendent (see s100.1 of the *Criminal Code*).

<sup>6</sup> See s 105.9 of the *Criminal Code Act 1995* (Cth) (the ‘Criminal Code’).

<sup>7</sup> See s105.10 of the *Criminal Code*.

<sup>8</sup> Section 105.10(5) provides that: “The period as extended, or further extended, must end no later than 24 hours after the person is first taken into custody under the order.”

<sup>9</sup> An ‘issuing authority’ is defined in section 105.2(1) as a Federal Court judge or magistrate, a State or Territory Supreme Court Judge, a retired judge or the President or Deputy President of the AAT.

<sup>10</sup> See s105.36 of the *Criminal Code*.

<sup>11</sup> See s105.51 of the *Criminal Code*.

<sup>12</sup> See s105.19(5), (7) of the *Criminal Code*.

<sup>13</sup> See, for example: Dr Penelope Matthews, “Are we crossing the line?: Forum on Nation Security Laws and Human Rights”, (Speech delivered at The Anti-Terrorism Bill – Forum at ACT legislature, 31 October 2005). See: [http://www.hreoc.gov.au/speeches/other/20051031\\_national\\_security\\_forum.html](http://www.hreoc.gov.au/speeches/other/20051031_national_security_forum.html)

16. Article 9(1) does permit detention for security purposes.<sup>14</sup> However, such detention must not be ‘arbitrary’. The term ‘arbitrary’ has been interpreted as requiring more than mere compliance with domestic law. In *Van Alphen v Netherlands*,<sup>15</sup> the Human Rights Committee<sup>16</sup> held that the term includes ‘inappropriateness, injustice and lack of predictability’.<sup>17</sup> Where, for example, a person has been held on remand, it is not sufficient that the detention be legal in terms of domestic law. Rather, it must be reasonable in all the circumstances.<sup>18</sup> Similar comments were made in Australia by the Full Federal Court in the matter of *MIMIA v Al Masri*:

...we conclude that the text of Art 9.... requires that arbitrariness is not to be equated with ‘against the law’ but is to be interpreted more broadly, and so as to include a right not to be detained in circumstances which, in the individual case, are ‘unproportional’ or unjust.<sup>19</sup>

17. Like the Full Federal Court, the Human Rights Committee has stressed, on a number of occasions, that detention must meet the requirement of ‘proportionality’.<sup>20</sup> ‘Proportionality’ in the context of article 9 requires one to consider the relationship between a purpose (the purpose underlying the person’s detention) and the means by which that purpose is achieved (the particular form of detention). Put simply, the means must be ‘proportional’ to the purpose.

18. If one simply applied that formulation, proportionality could be in the eye of the beholder.<sup>21</sup> However, the Human Rights Committee has developed a clearer ‘bright line’ proportionality test for the purposes of article 9(1) which essentially involves asking whether the particular detention represents the least restrictive means of achieving the relevant purpose.<sup>22</sup> If it does not, then it will be disproportionate and thus arbitrary. That test has been variously expressed by the Human Rights Committee as imposing a requirement that detention not continue ‘beyond the period for which a State can provide appropriate justification’<sup>23</sup> or that a person not be detained if it is ‘not necessary in all the circumstances of the case’.<sup>24</sup>

### Do issues of arbitrary detention arise in relation to PDOs?

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<sup>14</sup> Human Rights Committee, *General Comment No 8 Right to liberty and security of persons (Art. 9)*, Para 4 (1982). See also *Mansour Ahani v Canada*, Communication No. 1051/2002, UN Doc: CCPR/C/80/d/1051/2002 (2004).

<sup>15</sup> 305/88.

<sup>16</sup> The Human Rights Committee is the United Nations human rights treaty body created under article 28 of the ICCPR. Amongst other things, the Committee hears complaints submitted by individuals under the Optional Protocol to the ICCPR.

<sup>17</sup> At par 5.8

<sup>18</sup> *Ibid.*

<sup>19</sup> (2003) 126 FCR 54 at [152].

<sup>20</sup> See eg *A v Australia* UNHRC 560/93 para 9.2. See also Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary* NP Engel (1993) p 172.

<sup>21</sup> As has been suggested by S Joseph ‘Australian Counter-Terrorism Legislation and the International Human Rights Framework’ 27(2) *UNSWLJ* (2004) 428 at 443.

<sup>22</sup> See generally regarding proportionality and the tests applied internationally: J Kirk “*Constitutional Guarantees, Characterisation and Proportionality*” (1997) 21 *MULR* 1.

<sup>23</sup> *A v Australia* (UNHRC Communication No. 560/1993) at paragraph 9.4, *C v Australia* (UNHRC Communication No. 1014/2001) at paragraph 8.2, *Baban v Australia* (UNHRC Communication No. 1014/2001) at paragraph 7.2.

<sup>24</sup> *A v Australia* at paragraph 9.2. This approach to the limits on permissible detention should not be seen as the product of naïve idealism on the part of the United Nations or the Human Rights Committee. In fact, the notion of arbitrariness as a limit on permissible detention was based on an Australian proposal during the drafting of the ICCPR (See Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary*, 1993, p172). In HREOC’s view, it reflects the strong tradition of jealously guarding liberty in Anglo-Australian law which, in turn, embodies the notion that deprivation of liberty is a punitive measure which should not be implemented lightly. Indeed, it is arguably precisely that tradition that has generated much of the controversy surrounding the Bill.

19. The *Criminal Code* requires that the issuing authority be satisfied that detaining the subject for the relevant period is ‘reasonably necessary’ for the purpose of preventing a terrorist attack or preserving evidence of such an attack. Scrutiny of the necessity of the order does mean that proportionality is being considered to some extent. However, HREOC considers that a more stringent proportionality test would appropriately reflect the fact that PDOs are exceptional orders and should only be made in exceptional circumstances.<sup>25</sup>
20. HREOC considers that a more stringent proportionality test could be achieved by amending the *Criminal Code* to include additional sub-clauses (in s105.4(4) and (6)), which require the issuing authority to be satisfied that the purpose for which the order is made cannot be achieved by a less restrictive means.
21. HREOC is concerned that, in its current form, Division 105 of *The Criminal Code* does not sufficiently protect against arbitrary detention. That is because the use of the word ‘reasonably’ in ss 105.4(4)(c) and (6)(c). In an Australian constitutional context, the use of the word ‘reasonably’ in relation to proportionality has been viewed as giving the government increased latitude to infringe upon freedoms and as requiring more deference on the part of the courts.<sup>26</sup> This increases the risk that people who have little or no connection with terrorism will be wrongfully detained.
22. HREOC observes that proposed section 19 of the exposure draft of the *Terrorism (Extraordinary Temporary Powers) Bill 2005* (ACT) ensures that a preventative detention order represents the least restrictive means of achieving the relevant purpose by stating that the ACT Supreme Court can only make a PDO if the Court is satisfied, on ‘reasonable grounds’ –
  - (a) that the person –
    - (i) intends, and has the capacity to carry out a terrorist act; or
    - (ii) possesses something connected with the preparation for, or carrying out of, a terrorist act; or
    - (iii) has done an act in preparation for, or planning, a terrorist act; and
  - (b) that it is reasonable and necessary to detain the person to prevent a terrorist act; and
  - (c) that detaining the person under the order is the least restrictive way of preventing the terrorist act mentioned in paragraph (b); and
  - (d) that detaining the person for the period which the person is to be detained under the order is reasonable and necessary to prevent the terrorist act.

### **Judicial Oversight**

23. The need for judicial oversight of the implementation of counter terrorism measures has been recognised by expert bodies. The Berlin Declaration of the International Commission of Jurists entitled *The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (adopted 28 August 2004) relevantly states:

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<sup>25</sup> It is also relevant to observe that the other conditions for the making of PDOs may be relatively easily satisfied (particularly those which relate to an imminent terrorist threat, where the powers are only otherwise conditioned upon a ‘reasonable suspicion’ and satisfaction that the making of an order will ‘substantially assist’ in the prevention of a terrorist act).

<sup>26</sup> *Levy v Victoria* (1997) 189 CLR 579, 598 (Brennan CJ). Relevantly, Brennan CJ stated: “Under our Constitution, the courts do not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose. The courts acknowledge the law-maker’s power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose”.

In the development and implementation of counter-terrorism measures, states have an obligation to guarantee the independence of the judiciary and its role in reviewing state conduct.

24. As noted above, an initial PDO or an extension of an initial PDO can be made by a senior AFP member. A continuing PDO is normally made by a judge or former judge of a superior court.
25. HREOC acknowledges that the PDO scheme established by the *Criminal Code* is structured to allow rapid action in situations of urgency. In those situations time may not permit judicial oversight of the authorisation in advance of the making of an initial PDO. However, HREOC submits that where time does permit – in cases where the urgency of the situation does not dictate to the contrary – the *Criminal Code* should provide that, if time permits, an initial PDO should be made by a judicial officer.
26. Relevantly, HREOC observes that under recently enacted NSW<sup>27</sup> and Victorian<sup>28</sup> legislation only the Supreme Court of NSW has the authority to grant an interim or continued PDO.

### Review of preventative detention orders

27. In addition to proscribing arbitrary detention, article 9 of the ICCPR guarantees some fundamental review rights. The most important of these for present purposes appears in paragraph 4, which provides:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
28. “Lawfulness”, in the context of article 9(4), does not simply mean lawfulness under Australian domestic law. It requires consideration of whether the detention is within the limits set out in the ICCPR – that is, detention must be limited to what is necessary in all the circumstances of the case and cannot be achieved by lesser means.<sup>29</sup>
29. These obligations to provide review rights for detained people were based upon the Anglo-Australian remedy of habeas corpus. Like that remedy, they are not merely a safeguard against extreme cases involving abuse of power. They recognise the very real possibility (or, perhaps more accurately, inevitability) that decision makers in large bureaucracies will make mistakes.
30. In determining what will exceed the limits of judicial review ‘without delay’, the Human Rights Committee has emphasised that it is necessary to proceed on ‘a case by case basis’.<sup>30</sup> However, the Committee has suggested that relatively short delays (in the order of hours and days) will violate those limits in the circumstances of particular cases.<sup>31</sup>

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<sup>27</sup> See s26 H *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005*

<sup>28</sup> See s 13C *Terrorism (Community Protection) (Amendment) Act 2005* (Vic)

<sup>29</sup> This was made clear by the Human Rights Committee in considering the review rights available to a person in immigration detention in *A v Australia*. The Committee rejected an argument that there had been no breach of article 9(4) because the author of the complaint had access to the courts and was simply unable to be released by virtue of the effects of the *Migration Act 1958* (Cth). The Committee’s more recent decision in *Baban v Australia* similarly emphasised the broader notion of lawfulness and observed that the author and his son had been held in immigration detention:... “without any chance of substantive judicial review of the continued compatibility of their detention with the Covenant”.

<sup>30</sup> *Torres v Finland* 291/1988.

<sup>31</sup> In *Hammel v Madagascar* (155/83), incommunicado detention for three days was held to violate article 9(4). In its concluding comments on Gabon, the Committee suggested that detention in police custody should ‘never’ exceed 48 hours so as to avoid violation of the similar protection for those charged with criminal offences in article 9(3). In *Hammel v Madagascar* (155/83), incommunicado detention for three days was held to violate article 9(4).

31. The Committee has also made clear that the procedural right conferred by article 9(4) is simply a specific manifestation of the overarching right to an ‘effective remedy’ for violations of the ICCPR (which is recognised by article 2(3) of the ICCPR).<sup>32</sup> In the context of the PDO regime under the Bill, a remedy which is ‘effective’ must be one which provides a means for a person who is wrongfully detained or is being treated inhumanely to obtain redress before the wrongful detention or ill-treatment comes to an end.
32. HREOC is of the view that the *Criminal Code* does not adequately provide people subject to PDOs with an ‘effective remedy’. This is for the following reasons:
- State and territory courts have no jurisdiction over PDOs while they are in force,<sup>33</sup> except in cases where a person is simultaneously detained under a federal and a state PDO.<sup>34</sup> That leaves judicial review in the Federal Court under s39B of the *Judiciary Act 1903* (Cth) or in the High Court under s75(v) of the *Constitution*. Judicial review is a technical term applied to an arid process of checking for technical legal errors in the steps that lead to the making of the order. It is not a process that allows an investigation of the facts or of the reasonableness and proportionality of the detention.
  - While the AAT does have jurisdiction to review the merits of a decision to make a PDO, an application cannot be made to the AAT while the PDO is in force.<sup>35</sup> As such, AAT review is essentially limited to awarding compensation after the fact.<sup>36</sup> The ICCPR requires that such compensation be available to a victim of unlawful arrest or detention.<sup>37</sup> However, the provision of a right to financial compensation does not supersede the (arguably more significant) right to be released from detention which is unlawful or disproportionate.
  - Division 105 of the *Criminal Code* provides for a right to complain to the Commonwealth Ombudsman. However, the ombudsman has no power to make binding recommendations.<sup>38</sup> The Human Rights Committee has indicated that such a non-binding complaint mechanism does not provide an effective remedy for the purposes of the ICCPR.<sup>39</sup>
  - Division 105 of the *Criminal Code* envisages that the ongoing need for a PDO will potentially be reviewed on a number of occasions (each time an extension is sought, when a continuing PDO is sought and in any application for revocation). However, the detained person (or their lawyer) has no right to appear before the issuing authority on those occasions. They are able to make representations to the Nominated AFP Officer – but that person is under no obligation to draw those matters to the attention of the issuing authority. The Nominated AFP Officer must merely ‘consider’ any such representations.<sup>40</sup>
33. The ex-parte nature of the issuing, revocation and extension applications raises a further human rights issue, being the right to a fair and public hearing. The right to a fair and public hearing is provided for in article 14(1) of the ICCPR which states (in part):

of law, All persons shall be equal before the courts and tribunals. In the determination any criminal charge against him, or of his rights and obligations in a suit at everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

<sup>32</sup> See eg *Baritussio v Uruguay* 25/1978.

<sup>33</sup> See s105.51(2) of the Criminal Code.

<sup>34</sup> See s105.52 of the Criminal Code.

<sup>35</sup> See s105.51(5) of the Criminal Code.

<sup>36</sup> See s105.51(7) of the Criminal Code.

<sup>37</sup> See article 9(5) of the ICCPR.

<sup>38</sup> See *Ombudsman Act 1976* (Cth)

<sup>39</sup> *Baban v Australia* (Communication No. 1014/2001) at paragraph 4.3

<sup>40</sup> See s105.19(7)(c) of the Criminal Code.

34. In HREOC's view, issuing, revocation and extension applications are suits at law.<sup>41</sup>
35. Article 14 does not explicitly confer a right to be present at a civil hearing as an aspect of a fair trial (as compared with criminal defendants, who do have explicit protection under article 14(3)(d) of the ICCPR). However, the Human Rights Committee has stressed the importance of being able to respond to the legal contentions and evidence of the other parties in a civil matter, stating that it is
- a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party.<sup>42</sup>
36. The PDO regime is inconsistent with this guarantee in a number of significant respects.
- First, it does not allow the detained person to directly contest matters said to require their detention until the detention has run its course. This places the person in an unequal position as compared to the AFP and violates the 'fundamental duty' to ensure equality between the parties.
  - This is not to say that the application for the initial PDO should be made in the presence of the person to be detained. In the context of anti-terrorism measures, there has been acceptance that ex-parte orders will be necessary in some special circumstances, including where there is a legitimate fear of disappearance or in other circumstances.<sup>43</sup>
  - Given the stated purposes of the PDO regime (preventing imminent terrorist attacks and preserving evidence of a recent terrorist attack) one would assume that special considerations requiring ex-parte orders will generally apply in the case of an initial PDO. However, once a person is detained, they have very limited access to the outside world and the grounds for proceeding in an ex-parte fashion are no longer present.
37. HREOC therefore considers that the *Criminal Code* should provide that a detained person or their lawyer can make an application for revocation of a PDO and can appear in any application for a continuing PDO or for revocation or extension of a PDO.
38. Not only would such an amendment avoid violation of the right to a fair hearing, it would also address the concerns expressed above regarding the right to an effective remedy and the related right to review of detention without delay.

### **Review rights and access to information**

39. There is another issue which arises for consideration under articles 9 and 14 of the ICCPR. The person who is detained is required to be given certain information. That includes a copy of the initial PDO, a continuing PDO and an extension of an initial or continuing PDO.<sup>44</sup> An initial PDO and a continuing PDO must set out "a summary of grounds" on which the order is made.
40. It is specifically provided that information is not to be included in that summary if it is 'likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)). It is also notable in this

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<sup>41</sup> A 'suit at law' need not involve formal legal proceedings before a court and can involve proceedings before administrative tribunals. The Human Rights Committee has looked to the nature of the right in question rather than the characteristics of the relevant forum. Given that the PDO proceedings involve the deprivation of liberty (which is normally a matter reserved to criminal courts) it seems strongly arguable that they are a suit at law, meaning that article 14(1) applies

<sup>42</sup> *Äärelä v Finland* Communication No 779/1997 CCPR/C/73/D/779/1997 at 7.4.

<sup>43</sup> See, for example, the United Kingdom House of Lords Joint Committee on Human Rights observed, in discussing the compatibility of the UK control order regime with the right to a fair trial under the European Convention on Human Rights Prevention of Terrorism Bill, Tenth Report of Session 2004-5, p4, para 5.

<sup>44</sup> See s105.32(1) of the Criminal Code.

context that the *Criminal Code* provides that an application cannot be made under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*.<sup>45</sup> A significant feature of that act is the entitlement to request written reasons for a decision.<sup>46</sup> The High Court has held that this is not a requirement at common law,<sup>47</sup> meaning that there is no entitlement to written reasons in relation to PDOs.

41. A person may request that copies of the summary and the orders be forwarded to their lawyer. However, it is made clear that this does not entitle the lawyer to see any other document.<sup>48</sup>
42. A detained person may be able to obtain access to a wider range of documentary information through the court's compulsory processes after commencing a judicial review application in a Federal Court. However, there are a number of difficulties with this. First, the Court would only compel production of documents relevant to a matter in issue. As noted above, judicial review is a narrow technical process and this will limit the scope of any documents required to be produced. In addition, the Attorney could potentially invoke the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* and seek to have the Court make non-disclosure orders and orders allowing the use of redacted evidence.<sup>49</sup>
43. Under the ICCPR a person is entitled to be informed of the reasons for their arrest. The notification given must be sufficient to enable the person to take immediate steps to secure her or his release if she or he believes that the reasons given are invalid or unfounded.<sup>50</sup> In discussing those obligations in the context of preventative detention, the Human Rights Committee has observed:
 

[I]f so-called preventative detention is used, for reasons of public security, it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and control of the detention must be available (para. 4)<sup>51</sup>
44. A person who is charged with a criminal offence has a right to even more detailed information as one of the express guarantees designed to ensure a fair hearing.<sup>52</sup> While there is no express equivalent in relation to the situation covered by the Act (as detainees are not subject to a criminal charge), such an obligation follows from the requirement to treat both parties equally. As noted above, this is fundamental to the right to a fair hearing.
45. In HREOC's view, the PDO regime set out in the *Criminal Code* fails to meet those obligations. This has serious practical implications. It might mean, for example, that a detained person simply has no real opportunity to present an innocent explanation for a matter which was central to the issuing of an initial PDO.
46. HREOC considers, at the very least, that the *Criminal Code* should set out the minimum requirements for the content of a 'summary' of the grounds on which an initial or continuing PDO is made. Summaries should also be required in respect of each extension, refused revocation and decision to grant a continuing PDO.

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<sup>45</sup> See s105.51(4)

<sup>46</sup> See s13.

<sup>47</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 662 (Gibbs CJ). Relevantly, Gibbs CJ held that there "is no general rule of the common law, or principles of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons".

<sup>48</sup> See ss105.32 (6) and (9) of the Criminal Code.

<sup>49</sup> See Part 3, Divisions 2 and 3 of the Act.

<sup>50</sup> See article 9(2) and *Caldas v. Uruguay*, Communication No. 43/1979, U.N. Doc. CCPR/C/OP/2 at 80 (1990).

<sup>51</sup> Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994).

<sup>52</sup> See article 14(3)(a) of the ICCPR.

Summaries should be should be required to be sufficient to alert the subject of the order to the factual basis upon which the order or decision is made.

47. HREOC accepts that there will be some classes of security sensitive information which will require protection. To the extent possible, the AFP should be required to consider whether the information can be provided in an altered form (which is the approach adopted under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)). However, where, in exceptional cases, non-disclosure is required, HREOC is of the view that Special Advocates or a National Public Interest Monitor could be used to ensure fairness to a detained person where security sensitive information is involved.<sup>53</sup>

### **Contact with family members and other persons**

48. The *Criminal Code* provides that a person who is subject to a PDO has no right to contact other people (and may be prevented from doing so), subject to a number of limited exceptions. Under those exceptions a detained person may contact a lawyer and the Commonwealth Ombudsman or state equivalent for the purposes of making a complaint.
49. They may also contact the following people, but solely for the purpose of ‘letting the person know that the person being detained is safe but is not able to be contacted’:
- one of the detained person’s family members;
  - if the person lives with people other than their family, one of those people;
  - if the detained person is an employer, one of their employees;
  - if the detained person is an employee, their employer;
  - with the permission of the detaining AFP officer, any other person.
50. A concerning practical consequence appears to be that people who are detained in a state or territory prison<sup>54</sup> will need to be held in solitary confinement to prevent contact with other people in the prison population.
51. Section 105.35(2) of the *Criminal Code* provides that a person is not entitled to disclose the fact that a PDO has been made, the fact that the person is being detained or the period for which they are being detained. Some surprising consequences arise from that limitation: for example, why should an employer be prevented from giving instructions solely for the running of a legitimate business? Who bears the financial consequences for any loss arising from these restrictions?
52. The restrictions also raise issues in terms of article 10(1) of the ICCPR, which provides:
- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
53. Article 10(1) establishes a broad general standard of humaneness in detention. The content of this standard has been developed with the assistance of the Standard Minimum Rules for the Treatment of Prisoners (the ‘Standard Minimum Rules’) and the Body of Principles for the Protection of all Persons under any form of Detention (the ‘Body of Principles’).<sup>55</sup>

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<sup>53</sup> For further information on how Special Advocates or a National Public Interest Monitor could be used in cases where non-disclosure is required please see Annexure B to HREOC’s submission to the Senate Legal and Constitutional Committee Inquiry into *Anti-Terrorism Bill (No.2) 2005*.

<sup>54</sup> Under s105.27 of the Criminal Code.

<sup>55</sup> The Third Committee of the General Assembly in its 1958 Report on the drafting of the ICCPR stated that the Standard Minimum Rules should be taken into account when interpreting and applying Article 10(1) (United Nations, Official Records of the General Assembly, Thirteenth Session, Third Committee, 16 September to 8 December 1958, pages 160-173 and 227-241). The Human Rights Committee has also indicated that compliance

54. Rule 37 of the Standard Minimum Rules under the heading “*Contact with the outside world*”, provides:

Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

55. Principle 16 of the Body of Principles states:

Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

56. These provisions are designed to avoid ‘incommunicado detention’, which has been found to breach the right to be treated with humanity and dignity.<sup>56</sup>

57. The contact permitted under the *Criminal Code* falls short of these minimum standards. The Act does not provide a right to receive visits from family members (rule 37 of the Standard Minimum Rules) – such contact is only guaranteed in the case of people aged between 16 and 18 years of age (see further below). The limits on what may be disclosed also fail to meet the requirements of Principle 16 of the Body of Principles.

58. Some departure from those standards is permissible in exceptional circumstances. For example, the notification required under rule 37 may be delayed for a ‘reasonable period’ where the ‘exceptional needs of the investigation so require’. HREOC doubts that such exceptions justify the approach taken in the *Criminal Code*: a family member who is involved in a terrorist conspiracy would be likely to be alerted to the fact that the person is being preventatively detained by virtue of the somewhat odd communication envisaged under s105.35(1). An ‘innocent’ family member is simply likely to be alarmed.

59. Given that the limited contact regime for family members is arguably of little practical utility from a national security perspective, HREOC considers that more expansive contact rights should be included in the *Criminal Code*. For example, the contact rights available to people aged under 18 or who are incapable of managing their own affairs could be applied more generally. This would still be subject to the right of the AFP to prevent contact with a particular person through the use of prohibited contact orders (discussed in the next section).

60. Amendments should also be made to give greater scope for detained people to address pressing personal or business affairs. This could be facilitated, for example, by expanded rights to make written communications (which could be vetted by the AFP). It could also be achieved by allowing a person to instruct their legal representative to attend to such matters.

### Reviewability of Prohibited Contact Orders

61. The AFP may seek a ‘prohibited contact order’ when applying for a PDO or in relation to a PDO which is already in force.<sup>57</sup> Such an order provides that the person detained under a preventative detention order is not to contact certain persons.<sup>58</sup> A

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with the Standard Minimum Rules and the Body of Principles is the minimum requirement for compliance with the ICCPR obligation that people in detention are to be treated humanely Human Rights Committee General Comment No. 21 (1992), paragraph 5. See also *Mukong v Cameroon* (1994) HRC Comm No 458/1991, UN Doc CCPR/C/51/458/1991 at para 9.3.

<sup>56</sup>Which is guaranteed by article 10(1) of the ICCPR. See eg *Gilboa v Uruguay* (147/83).

<sup>57</sup> See s 105.15 of the Criminal Code

<sup>58</sup> See s 105.15(4) of the Criminal Code. The AFP is not required to inform the detainee that a prohibited contact order has been made in relation to the person’s detention or the name of a person specified in the prohibited contact order See s 105.28(3) of the Criminal Code.

‘prohibited contact order’ will only be granted if the person is satisfied that making the prohibited contact is ‘reasonably necessary’:

- (a) to avoid a risk to action being taken to prevent a terrorist act occurring; or
- (b) to prevent serious harm to a person; or
- (c) to preserve evidence of, or relating to, a terrorist act; or
- (d) to prevent interference with the gathering of information about:
  - (i) a terrorist act; or
  - (ii) the preparation for, or planning of, a terrorist act; or
- (e) to avoid a risk to:
  - (i) the arrest of a person who is suspected of having committed an offence against this Part; or
  - (ii) the taking into custody of a person in relation to whom a preventative detention order is likely to be made; or
  - (iii) the service on a person of a control order.<sup>59</sup>

**62.** The AFP is not required to inform the detainee that a prohibited contact order has been made in relation to the person’s detention or the name of a person specified in the prohibited contact order.<sup>60</sup> As a practical matter, that will mean that a person may not seek any form of redress in respect of such an order – they will not even be able to suggest to the AFP that the order has been made on a mistaken basis.

**63.** The making of such orders may affect human rights, including the right of a detained person to be treated humanely and with dignity and the right not to be subjected to arbitrary interference with family life.<sup>61</sup> The approach of allowing the making of such orders to be kept from the detained person therefore potentially violates the right of a person to obtain an effective remedy for breaches of their human rights.

**64.** HREOC considers that the *Criminal Code* should be amended to provide a detained person has a right be informed of a prohibited contact order, save in exceptional circumstances (for example, where disclosure would inevitably compromise intelligence gathering efforts). There should also be provision for a detainee to seek to have such an order revoked.

### **Limitations on the role of lawyers**

**65.** HREOC has other concerns relating to provisions concerning contact between the subject of a PDO and another person (including their lawyer) and, in particular, the limitations placed on the role of lawyers. For further information about these concerns HREOC refers the ICJ panel to HREOC’s submission to the Senate Legal and Constitutional Committee Inquiry into *Anti-Terrorism Bill (No.2) 2005* at paragraphs 84-89

## ***Control Orders***

### **General description**

**66.** The provisions for control orders appear in division 104 of the *Criminal Code*. These provisions are also part of the package of initiatives agreed at the COAG meeting in September 2005. The stated purpose is to allow obligations, prohibitions and restrictions to be imposed upon a person for the purpose of protecting the public from a terrorist act.

**67.** The obligations, prohibitions and restrictions which may be imposed are as follows:

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<sup>59</sup> See s105.14A(4)

<sup>60</sup> See s 105.28(3).

<sup>61</sup> Article 17(1) of the ICCPR.

- a prohibition or restriction on the person being at specified areas or places;
- a prohibition or restriction on the person leaving Australia;
- a requirement that the person remain at specified premises between specified times each day, or on specified days;
- a requirement that the person wear a tracking device;
- a prohibition or restriction on the person communicating or associating with specified individuals;
- a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the Internet);
- a prohibition or restriction on the person possessing or using specified articles or substances;
- a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
- a requirement that the person report to specified persons at specified times and places;
- a requirement that the person allow himself or herself to be photographed;
- a requirement that the person allow impressions of his or her fingerprints to be taken;
- a requirement that the person participate in specified counselling or education.

**68.** Such restrictions potentially infringe upon a number of human rights, including:

- the right to liberty (article 9(1) of the ICCPR);
- the right to privacy (article 17 of the ICCPR);
- the right to freedom of association (article 22 of the ICCPR);
- the right to freedom of expression (article 19 of the ICCPR);
- the right to freedom of movement (article 12 of the ICCPR); and
- the right to work (article 7 of the *International Covenant on Economic, Social and Cultural Rights*).

**69.** As noted above, the right to liberty is not absolute – a person may be deprived of that right subject to certain conditions, most notably proportionality. The same may generally be said of the other human rights potentially infringed by the restrictions available under control orders.

**70.** A control order may only be sought with the permission of the Attorney-General.

**71.** If the Attorney consents, the AFP officer may seek an ‘interim control order’<sup>62</sup> from the Federal Court, Family Court or Federal Magistrates Court. The Court may make such an order if it is satisfied, on the balance of probabilities that:

- making the order would substantially assist in preventing a terrorist act; or
- the person has provided training to, or received training from, a listed terrorist organisation; and (in either case)
- each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

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<sup>62</sup> The AFP may also seek an ‘urgent interim control order’. The principal difference between those orders and interim control orders is that the application may be made without the prior consent of the Attorney-General. See s104.6(2) of the Criminal Code. The Attorney’s consent must be sought within 4 hours of the making of a request for an urgent order (see s104.10).

### **Proportionality and the test for making control orders**

72. Scrutiny of the necessity of the orders involves a consideration of proportionality (similar to that which applies to the making of PDOs). Section 104.4(2) of the *Criminal Code* also provides that, in considering whether that condition is met, the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).
73. However HREOC considers that, as with PDOs, a stricter proportionality test is appropriate. HREOC considers that the issuing Court should be specifically required to consider whether there are less restrictive means of achieving the relevant purpose (protecting the public from a terrorist act).

### **Ex parte nature of interim control order applications**

74. Both interim control orders and urgent interim control orders may be made ex-parte. The person to be the subject of those orders has no right to appear before the court. Nor does the Act impose any requirement upon the AFP or the Court to consider whether the circumstances of the case are such that the person may be given such an opportunity without endangering national security.
75. As noted above, ex-parte hearings pose issues in terms of the right to a fair and public hearing. They should only be undertaken when, for example, there is a flight risk or a risk that the person will destroy evidence. Such risks seem less likely to arise in the context of the making of control orders as compared to the making of PDOs. In relation to the control order scheme in the United Kingdom, the House of Lords Human Rights Committee observed that in the absence of such concerns there should be a normal inter-partes hearing so as to avoid violating the right to a fair hearing.<sup>63</sup>
76. HREOC considers that the Act should be amended such that the issuing court is specifically directed to satisfy itself that any ex-parte application is warranted in the particular circumstances. This is the normal practice of a court asked in other circumstances to consider an ex-parte application.

### **Confirmation/revocation proceedings**

77. The *Criminal Code* does provide for an inter partes "confirmation" hearing to be held as soon as practicable and within 72 hours of the making of an interim order. The purpose of that hearing is to confirm or declare void or revoke the order.<sup>64</sup>

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<sup>63</sup> See *Prevention of Terrorism Bill*, Tenth Report of Session 2004-5, p4, para 5.

<sup>64</sup> See s 104.5(e), *The Criminal Code*

78. The interim order must set out a summary of the grounds upon which the order was made<sup>65</sup> but there is no requirement at the time of service to provide the subject of the order with any of the evidentiary material on which the interim order was obtained.
79. At least 48 hours before the time set out for the confirmation hearing the applicant for the order must elect whether to seek confirmation of the order, and if so must then serve on the subject of the order a statement of the facts relating to why the order should be made, and an explanation as to why each of the obligations, prohibitions and restrictions sought in the order should be made. The applicant must also serve any other details required to enable the person to understand and respond to the substance of the fact, matters and circumstances which will form the basis of the confirmation order.<sup>66</sup>
80. At the confirmation hearing the applicant for the order, the subject of the order and their legal representative may appear and adduce evidence (including the calling of witness and the production of material) and make submissions.<sup>67</sup>
81. If an order is confirmed, the subject of the order may thereafter apply to the issuing Court to revoke or vary the order, and that application will be determined at the inter partes hearing.
82. The *National Security Information (Criminal and Civil Proceedings) Act 2004* applies to evidence adduced on an application for a control order. As noted above, the use of that procedure may result in information being withheld (through orders for redaction or non-disclosure). It will also delay any determination as to whether the control order should be revoked or varied. Again, this raises the possibility of delay in correcting mistaken exercises of power and longer lasting and more intense violations of the human rights of people who should not be subjected to control orders.
83. HREOC suggests that consideration should be given to the use of the special advocate procedure and/or a Public Interest Monitor in the case of security sensitive material.

### ***The proscription of terrorist organisations regime***

84. Section 102.1 of the *Criminal Code* establishes a regime whereby an organisation may be specified or proscribed by regulation as being a “terrorist organisation”.<sup>68</sup>
85. An organisation can be proscribed as a terrorist organisation (or ‘terrorist listing regulation’ made) where the Attorney-General is satisfied on reasonable grounds that the organisation proposed to be specified is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a ‘terrorist act’ (whether or not the terrorist act has occurred or will occur),<sup>69</sup> or ‘advocates’<sup>70</sup> the doing of a terrorist act.<sup>71</sup>
86. The criminal sanctions in division 101 and division 102 of the *Criminal Code* consequential on the proscription of an organisation as a terrorist organisation give

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<sup>65</sup> See s.104.5(1)(h)

<sup>66</sup> See s104.12A(2)

<sup>67</sup> See s104.14 (1)

<sup>68</sup> Terrorist organisation is defined in s 102.1(1) as follows: ***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 the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)).

<sup>69</sup> See section 102.1(2)(a).

<sup>70</sup> ‘Advocates’ is defined in section 102.1(1A) as follows: (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 or indirectly 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 age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.

<sup>71</sup> See section 102.1(2)(b), which was inserted by the *Anti-Terrorism Act (No.2) 2005* (Cth).

rise to a substantial interference with the right to freedom of expression under article 19 of the International Covenant on Civil and Political Rights (the ‘ICCPR’) and the right to freedom of association under article 22 of the ICCPR.

87. Article 19 relevantly provides:

1. ...
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

88. Article 22 relevantly provides:

1. Every one shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society, in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

89. However, neither the right to freedom of expression nor the right to freedom of association are absolute. Those rights may be limited to the extent that the limitations are provided or prescribed by law and proportionate and necessary to achieve a legitimate end.

#### **When is a limitation provided or prescribed by law?**

90. The United Nations Human Rights Committee (the ‘HRC’) has stated that the expression “provided by law” in the context of article 19(3) and “prescribed by law” in the context of article 22(2) requires that the limiting measure must be sufficiently delineated in an accessible law.<sup>72</sup> Laws should not be so vague as to permit too much discretion and unpredictability in its implementation.<sup>73</sup> In the context of permissible restrictions on the right to freedom of movement the HRC has stated that:

[L]aws authorizing the application of restrictions should use precise criteria and may **not confer unfettered discretion** on those charged with their execution.<sup>74</sup> (Emphasis added)

91. The provision conferring an unfettered discretion on the executive may therefore constitute an arbitrary interference with ICCPR rights. Such a restriction will not constitute a restriction provided or prescribed by law.<sup>75</sup>

92. Any limitation on the rights to freedom of expression and association must also be proportionate to the legitimate end sought to be achieved. The principle of

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<sup>72</sup> S Joseph et al., *ICCPR: Cases, Materials and Commentary*, 2<sup>nd</sup> Ed, OUP 2004, [1.67] and [18.19].

<sup>73</sup> Ibid [1.67].

<sup>74</sup> Human Rights Committee, *Freedom of movement (Art.12)*, UN Doc CCPR/C/21/Rev.1/Add.9, General Comment No.27 (General Comments) available at [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf)

<sup>75</sup> Ibid [1.68].

proportionality is imported into article 19(3) by the word “necessary”<sup>76</sup> and into article 22(2) by the words “necessary in a democratic society”.<sup>77</sup>

93. The principle of proportionality therefore requires a consideration of the relationship between a purpose and the means by which that purpose is achieved. The test of proportionality adopted by the HRC requires that a particular limiting measure be the **least restrictive means** of achieving the relevant purpose.<sup>78</sup> This is to ensure that the restriction does not jeopardise the right itself.<sup>79</sup>
94. HREOC considers that the broad discretion given to the Attorney-General to proscribe and subsequently de-list an organisation does not satisfy the international human rights law requirement that any interference with ICCPR rights (in this case, the right to association and expression) be “prescribed by law” and proportionate to the legitimate aim sought to be achieved by the legislature.

### **The proscription regime may not meet the requirement that it be “prescribed by law”**

95. The requirement that listing regulations be placed before the parliament and the requirement that the leader of the Opposition be briefed in relation to organisations under subparagraph (b) of the definition of terrorist organisation provide some parliamentary control on the exercise of the Attorney-General’s proscription powers.
96. However, HREOC considers that those requirements are inadequate to safeguard against the potentially arbitrary exercise of those powers given the absolute nature of that discretion, the breadth of the definition of ‘terrorist act’ in section 100.1 and ‘advocates’ in sections 102.1(1A) and 102.1(2), the significant consequences of proscription for an organisation and the absence of any other procedural safeguards. In particular, HREOC is concerned:
  - about the lack of any criteria for the exercise of the Attorney-General’s discretion in specifying an organisation as a terrorist organisation or in considering whether to de-list an organisation.<sup>80</sup>
  - that interested parties (including community groups) are provided with a limited opportunity to make representations to the Attorney or the Parliament as to the appropriateness of the proposed proscription of an organisation prior to its listing. Indeed, HROEC notes that it is not mandatory for the Parliamentary Joint Committee on ASIO, ASIS and DSD to review and report to Parliament in relation to the regulations.<sup>81</sup> There is also limited opportunity to challenge the Attorney-General’s decision to specify an organisation (see below).
  - merits review of the Attorney-General’s decision not to de-list an organisation is unavailable under the legislation. Review of the Attorney’s decision is limited to judicial review under the ADJR Act. Judicial review is the term applied to the process of checking for technical legal errors in the steps that lead to the making of the order. It is not a process that allows an investigation of the facts or of the reasonableness and proportionality of the detention.

### **Proscription should be subject to judicial review**

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<sup>76</sup> See *Faurisson v France*, HRC Communication No. 550/93, [8].

<sup>77</sup> see S Joseph, et al., *ICCPR: Cases, Materials and Commentary*, 2<sup>nd</sup> Ed, OUP 2004, [19.05].

<sup>78</sup> See generally regarding proportionality and the tests applied internationally: J Kirk “Constitutional Guarantees, Characterisation and Proportionality” (1997) 21 *MULR* 1.

<sup>79</sup> See, for instance, Human Rights Committee, *General Comment No.10: Freedom of Expression (Art 19): 29/6/83, CCPR General Comment No.10 (General Comments)*, available at <http://www.unhchr.ch/tbs/doc.nsf>

<sup>80</sup> An example of the process followed by the Attorney-General is contained in Chapter 1 of the Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of four terrorist organisations*, May 2005, the full text of which is available at:

[http://www.aph.gov.au/house/committee/pjcaad/terrorist\\_listingsc/report.htm](http://www.aph.gov.au/house/committee/pjcaad/terrorist_listingsc/report.htm)

<sup>81</sup> Note that section 102.1A only states that the committee “may” review the listing regulation and report its comments and recommendations to the Parliament.

97. Given the nature of the human rights potentially restricted upon proscription of an organisation and the serious criminal penalties that apply to the derivative offences, HREOC considers that the proscription process should attract careful judicial scrutiny.<sup>82</sup>
98. Ideally, in HREOC's view, the proscription process itself should be a judicial rather than executive process. The power to proscribe an organisation should be vested in the Court, to be exercised on application of the Attorney General or a Senior Police Officer with the Attorney-General's consent.
99. Judicial oversight would assist to ensure that the proscription process does not operate in a politically motivated or discriminatory manner contrary to article 26 of the ICCPR.<sup>83</sup> HREOC also considers that it would also increase public confidence in the impartiality of the proscription process.
100. In the absence of a judicial proscription process, HREOC considers that, at a minimum, merits review should be available to persons seeking to challenge the Attorney-General's decision to proscribe an organisation. This would assist in ensuring that the proscription power does not operate disproportionately, and imposed impermissible restrictions on the right to freedom of association and expression.<sup>84</sup>
101. HREOC considers that, on the assumption that the power to prescribe an organisation remains with the Attorney General, the Criminal Code should include criteria required to be taken into account by the Attorney-General in determining whether to proscribe an organisation as a terrorist organisation and considering an application for de-listing. This would not only ensure that the proscription process meets the requirement that it be "prescribed by law", but also the requirement of proportionality (see discussion below).
102. HREOC notes that in its most recent report<sup>85</sup> the Parliamentary Joint Committee on ASIO, ASIS and DSD recommended that ASIO and the Attorney-General specifically address each of the following six criteria in the statements of reasons accompanying listing regulations:<sup>86</sup>
  - Engagement in terrorism
  - Ideology and links to other terrorist groups/networks
  - Links to Australia
  - Threat to Australian interests

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<sup>82</sup> See *Hasan and Chaush v Bulgaria* (2002) 34 ECHRR 55. See also, *Al-Nashif v Bulgaria* (2003) 36 ECHRR 37, [H14] a case involving detention for the purposes of deportation of an alien on national security grounds, the European Court of Human Rights held that:

Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information.

The individual must be able to challenge the executive's assertion that national security is at stake.

<sup>83</sup> Ibid 437.

Article 26 of the ICCPR requires that all persons be equal before the law and entitled without discrimination to the equal protection of the law.

<sup>84</sup> See S Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights Framework', (2004) 27(2) *UNSW Law Journal* 428, 438.

<sup>85</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of four terrorist organisations*, May 2005, the full text of which is available at:

[http://www.aph.gov.au/house/committee/pjcaad/terrorist\\_listingsc/report.htm](http://www.aph.gov.au/house/committee/pjcaad/terrorist_listingsc/report.htm)

<sup>86</sup> Ibid, [3.2].

- Proscription by the UN or other like-minded countries<sup>87</sup>
  - Engagement in peace/mediation processes
- 103.** HREOC submits that these factors identified by the Committee could form the basis of criteria to which the Attorney-General is required to have regard in proscribing an organisation and considering a de-listing application.
- 104.** Circumscribing the Attorney-General's discretion in this way will provide greater legal certainty to organisations and persons to whom the derivative offences may apply. Making it clear on what basis organisations are selected for proscription will also assist in ensuring that proscription does not operate in a discriminatory manner, contrary to article 26 of the ICCPR.<sup>88</sup> Enhancing the transparency of the proscription process will increase public confidence in the process.<sup>89</sup>
- 105.** In the event that a judicial proscription process were to be adopted in favour of the current process HREOC submits that the legislation should similarly set out those factors required to be taken into account by the courts in determining whether to proscribe an organisation, as well as the criterion of proportionality (see discussion in paragraph 5.14 below). This would ensure that any judicial proscription process also complies with the requirement that it be "prescribed by law" and proportionate in all the circumstances.

#### **The proscription regime may lead to disproportionate outcomes in some circumstances**

- 106.** Adopting clear criteria for the exercise of the discretion, whether exercised by a Court or by the Attorney-General, would also assist to ensure that proscription of an organisation as a terrorist organisation is proportionate to the aim sought to be achieved in light of the aims and activities of the organisation and the significant consequences of proscription on the rights to freedom of association and expression guaranteed by the ICCPR.
- 107.** The breadth of the Attorney-General's present proscription power may lead to those powers disproportionately restricting the right to freedom of association or expression in some cases.<sup>90</sup> For instance, it may be a disproportionate limitation on the right to freedom of association or expression to:
- Proscribe an organisation whose activities are directed against a repressive and brutal regime and who do not target civilians.<sup>91</sup>
  - Impose criminal sanctions (via the derivative provisions in division 102) on a person who supports the non-violent or political wing of a specified organisation which has several aspects to its organisation.<sup>92</sup>

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<sup>87</sup> Note however, proscription regimes in the UK and Canada and the USA operate in the context of the *Human Rights Act 1988* (UK) and the *Canadian Charter of Rights and Freedoms* and the *US Bill of Rights*, respectively. In relation to the UK, HREOC notes that the *Human Rights Act 1998* (UK) operates to ensure that the *Terrorism Act 2000* (UK) (in both its terms and operation) is consistent with the ECHR. In particular the *Human Rights Act 1998* provides affected persons with an opportunity to challenge action taken against them under the *Terrorism Act 2000*. Hence, while the proscription regime established by the Criminal Code reflects that adopted under the UK *Terrorism Act 2000*, when considering the UK Act, it should be borne in mind that the *Human Rights Act 1998* creates a fundamental difference in the context in which the UK and Australian laws operate.

<sup>88</sup> Article 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

<sup>89</sup> See C Uhlmann, *About the House*, (23) May 2005, pp 39-40. See also, S Joseph 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' 27(2) *UNSWLJ* (2004) 428, 433.

<sup>90</sup> See S Joseph 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' 27(2) *UNSWLJ* (2004) 428, 438.

<sup>91</sup> See, for instance, *The Queen (On Application of the Kurdistan Workers' Paper and Others), (On Application of the People's Mojahedin Organisation of Iran and Others) and (On Application of Lashkar e Tayyabah and Others) v Secretary of the Home Department* [2002] EWHC 644. See also, S Joseph 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' 27(2) *UNSWLJ* (2004) 428, 434.

108. *The Queen (On Application of the Kurdistan Workers' Paper and Others), (On Application of the People's Mojahedin Organisation of Iran and Others) and (On Application of Lashkar e Tayyabah and Others) v Secretary of the Home Department*<sup>93</sup> the applicants applied for judicial review of the Home Secretary's decision to proscribe them as terrorist organisations under the UK *Terrorism Act 2000*. Although the application was dismissed on the basis that it had been made prematurely, the High Court (Administrative Division) held that in its view it was "arguable" that the proscription of the People's Mojahedin Organisation of Iran (the PMOI) and Lashkar e Tayyabah (the LeT) was disproportionate having regard to the evidence before the court as to the limited aims and activities of those organisations,<sup>94</sup> and the very serious consequences of proscription for rights as important as those of freedom of association and expression.<sup>95</sup>
109. Whether the proscription of a particular organisation lacks proportionality will depend on all the facts and evidence before the decision maker at the time. As suggested by the Parliamentary Joint Committee on ASIO, ASIS and DSD, HREOC considers there is a real danger that in some cases an organisation may be inappropriately proscribed having regard to its limited activities and links with and threat posed to Australia. This is especially the case given the breadth of the Attorney-General's discretion and definitions of terrorist organisation and terrorist act.
110. HREOC considers that in addition to the criteria suggested by the Parliamentary Joint Committee on ASIO, ASIS and DSD to which the Attorney-General should have regard on proscribing an organisation, the Attorney-General should be required to consider whether proscription is proportionate in all the circumstances. This could be achieved by adopting a provision similar to section 104.4 of the Criminal Code,<sup>96</sup> which imports a proportionality test. That section provides that, in relation to the making of an interim control order, the issuing court must be satisfied on the balance of probabilities that "each of the obligations, prohibitions and restrictions to be imposed on the person by the order is **reasonably necessary, and reasonably appropriate and adapted**, for the [legitimate] purpose of protecting the public from a terrorist act" (emphasis added).

### *Sedition Offences*

111. HREOC notes that the Sedition offences introduced by the *Anti-Terrorism Act (No.2) 2005* are now the subject of a review by the Australian Law Reform Commission.<sup>97</sup>

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<sup>92</sup> HREOC notes that in Australia (unlike Canada and the USA) it would appear that only the military wing of Hamas has been specified by the Attorney-General: see Henry Jackson, 'The power to proscribe terrorist organisations under the Commonwealth Criminal Code: Is it open to abuse?' (2005) 16 *Public Law Review* 134, fnte 38. However, in the absence of any criteria circumscribing the Attorney-General's power to specify an organisation as a terrorist organisation and given the breadth of the definition of 'terrorist organisation', in HREOC's view, it would be open to the Attorney-General to specify the non-violent aspect of Hamas on the basis that it indirectly assisted in or fostered the doing of a terrorist act.

<sup>93</sup> [2002] EWHC 644.

<sup>94</sup> The evidence before the court in relation to PMOI had been that it was an organisation working for democratic, secular and pluralist government in Iran which would respect human rights. It has sought to achieve this through the Iranian political system but when denied access to that system resorted to underground armed struggle. Its armed attacks inside Iran are limited to military targets inside Iran. As such the PMOI does not target civilians or pose a threat to UK nationals overseas. The evidence before court in relation to LeT was that it does not advocate the armed overthrow of the Government of India in Kashmir but campaigns for the right to a plebiscite and its military activities are confined to attacks against the Indian regime's military/security apparatus and as such do not target civilians or pose a threat to UK nationals overseas.

<sup>95</sup> *The Queen (On Application of the Kurdistan Workers' Paper and Others), (On Application of the People's Mojahedin Organisation of Iran and Others) and (On Application of Lashkar e Tayyabah and Others) v Secretary of the Home Department* [2002] EWHC 644, [67].

<sup>96</sup> That section was inserted into the Act by the *Anti-Terrorism (No.2) Act 2005* (Cth).

<sup>97</sup> See <http://www.alrc.gov.au/inquiries/current/sedition/terms.htm>

## POLICE POWERS TO STOP AND QUESTION PEOPLE IN RELATION TO TERRORIST ACTS

112. Schedule 5 of the *Anti-Terrorism Act (No.2) 2005* amended the *Crimes Act 1914* to expand the powers of the AFP, and state and territory police forces to stop, question and search persons for the purposes of investigating and preventing terrorism. It also enables police to seize items related to terrorism and other serious offences.
113. These provisions were introduced as part of the initiatives agreed at the COAG meeting in September 2005. The provisions in Schedule 5 of the *Anti-Terrorism Act (No.2) 2005* are intended to operate in respect of Commonwealth places. The States and Territories are enacting complimentary legislation in respect of non-Commonwealth places.
114. Under section 3UB a police officer may exercise these special powers in either of two situations; namely, if a person in a Commonwealth place (other than a prescribed security zone – see below) and the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act, or the person is in a Commonwealth place in a prescribed security zone.
115. Under section 3UJ of the *Crimes Act* the Attorney-General can declare a ‘prescribed security zone’ if he or she considers that that a declaration would assist:
- (a) in preventing a terrorist act occurring; or
  - (b) in responding to a terrorist act that has occurred.<sup>98</sup>

The declaration of a ‘prescribed security zone’ and any subsequent revocation are not legislative instruments<sup>99</sup> so the declarations need not be tabled in parliament and can not be disallowed.

116. In a prescribed security zone, a police officer is not required to form a “reasonable suspicion” to stop and search a person in the zone. Any person who is in the prescribed security zone may be subject to stop, search, questioning and seizure powers.
117. Section 3UC provides that a police officer has the power to demand a person’s name, address, their reason for being in the particular Commonwealth place and evidence of the person’s identity.<sup>100</sup> It is an offence not to comply with such a request or to give a false name or address.<sup>101</sup>
118. Section 3UD provides a police officer has the power to stop and detain a person for the purpose of carrying out a search for a terrorism related item.
119. Section 3UE provides that if a police officer conducts a search under s 3UD the police officer may seize any items related to terrorism or a serious offence. The owner of the seized item may apply to a magistrate to request the return of the thing and, if the magistrate is not satisfied that the thing is likely to be used by the owner or another person in the commission of a terrorist act or serious offence, the magistrate must order the thing be returned to the owner.<sup>102</sup>
120. Submissions to the Senate Legal and Constitutional Inquiry into the *Anti-Terrorism Bill (No.2) 2005* were critical of the on the ‘broad and random nature’ of the stop and search powers, as well as the highly discretionary nature of the power to declare a “prescribed security zone”. One submission, for example, said:

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<sup>98</sup> A police officer may apply to the Minister for a declaration that a Commonwealth place be declared as a prescribed security zone. See s3UI, *Crimes Act 1914*

<sup>99</sup> See s 3UJ(7)

<sup>100</sup> See s3UC

<sup>101</sup> See s 3UC *Crimes Act*

<sup>102</sup> See s3UG *Crimes Act*

There are no guidelines in the Act as to the criteria that have to be satisfied before a place is declared a prescribed security zone, and no requirement that the Minister make his or her decision on the basis of reliable intelligence or information. Although a procedure is set out requiring the Minister to publish the declaration, the declaration remains effective notwithstanding a failure to follow this procedure. Wide, unfettered discretion of this nature is unsatisfactory, given the potential adverse implications that the declaration of an area as a prescribed zone may have for people who live or work in the area.

<sup>103</sup>

121. HREOC observes that the *Anti-Terrorism Act (No.2) 2005* provides for no independent monitoring of the Minister’s power to declare a “prescribed security zone” or the exercise of police powers under Division 3A.
122. HREOC notes that while section 3UJ(5) requires the Minister to arrange for gazettal and publication of the declaration of a ‘prescribed security zone’, this provision does not require the Minister to publish reasons. In any event, subsection 3UJ(6) provides that a failure to comply with s3UJ(5) does not make the declaration or its revocation ineffective to any extent.
123. HREOC considers that, at the very least, the Minister’s power to declare a prescribed security zone should be subject to independent review by the Commonwealth Ombudsman.
124. Subsection 3UK sets out a sunset clause that states the powers under Division 3A can not be exercised 10 years after the day on which the division commences. Given the wide ranging nature of the powers in Division 3A, HREOC considers that a sunset clause providing for a lesser time is desirable. This recognises that the powers in Division 3A of the *Crimes Act* represent extreme measures for a particular time and that what may be a proportionate response today may be disproportionate in the future.
125. HREOC notes that the recommendation of the Senate Legal and Constitutional Committee report on the Inquiry into the *Anti-terrorism Bill (No.2) 2005* that:
- the Commonwealth Ombudsman be tasked with the comprehensive oversight of the use of the proposed stop, question, detain, search and seizure powers under Schedule 5 of the Bill
- was not adopted.
126. Bearing in mind the exercise of these special powers, if misused, has the potential to infringe the fundamental human rights, including:
- ICCPR Art 3 – the right to an effective remedy for any person whose rights or freedoms contained in the ICCPR are violated;
  - ICCPR Art 12 – the right to freedom of movement (subject only to restrictions provided by law **necessary** to protect national security , public order, public health or morals or the rights and freedoms of others); and
  - ICCPR Art 17 – the prohibition against arbitrary or unlawful interference with a person’s privacy, family, home or correspondence.

HREOC is concerned about the absence of independent oversight by either the judiciary or the Commonwealth Ombudsman.

127. The need for judicial oversight of the implementation of counter terrorism measures has been recognised by expert bodies. The Berlin Declaration of the International Commission of Jurists entitled *The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (adopted 28 August 2004) relevantly states:

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<sup>103</sup> PIAC, Submission 142, pp35-36

Judges play a primary role in ensuring that national laws and the acts of the executive relating to counter-terrorism conform to international human rights standards, including through judicial consideration of the constitutionality and legality of such norms and acts.

The Advisory Council of Jurists<sup>104</sup> has noted that:

While there may be justification for restricting the right to privacy in light of the threat to national security posed by terrorism and a willingness by citizens to accept restrictions in such circumstances, any information gathering powers must be clearly defined and be subject to judicial oversight. They must also be necessary and proportional in order to respond to the threat to national security.<sup>105</sup>

128. HREOC acknowledges the amendments to the *Crimes Act* are structured to allow rapid action in situations of urgency. In those situations time would not permit judicial oversight of the authorisation in advance of the exercise of the special powers in the traditional way that occurs with the grant of many kinds of warrants. However, HREOC submits that where time does permit – in cases where the urgency of the situation does not dictate to the contrary – the Act should provide that the authorisation for the exercise of a special power should be approved in advance by a judicial officer.
129. HREOC observes that under the complimentary legislation introduced by Victoria the authorisation that special police powers may be exercised in a targeted area must be conferred by the Supreme Court.<sup>106</sup>
130. In cases where the urgency does not allow time for this to occur, the Act should provide that the authorisation may, on the application of a person affected by the exercise of the special power, be judicially reviewed after the event. If on review it is found that the exercise of the special power was not in accordance with the requirements in the Act that condition the exercise of the power, remedial orders should be available.
131. The prospect of judicial review after the event would provide a potent check on the risk of an improper or excessive exercise of power under the Act. It would also fulfil Australia's obligations under ICCPR Art 3.

## **AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION ACT 1979 (Cth) (ASIO Act)**

### ***Part III, Division 3 ASIO ACT***

132. Part III, Division 3 of the ASIO Act provides for special powers relating to terrorism offences.
133. Division 3 of Part III effectively creates three classes of warrant:
  - Warrants which require a person aged over 18 to appear before a 'prescribed authority' to provide information or produce records or things ('Questioning Warrants');

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<sup>104</sup> The Advisory Council of Jurists advises the Council of the Asia Pacific Forum of National Human Rights Institutions (APF) on the interpretation and application of international human rights standards. The Advisory Council is comprised of eminent jurists who have held high judicial office or senior academic or human rights appointments.

<sup>105</sup> Reference on the Rule of Law in Combating Terrorism, Final Report May 2004, p59.<http://www.asiapacificforum.net/jurists/terrorism/final.doc>

<sup>106</sup> See ss 21B, 21C, 21D and 21E, *Terrorism (Community Protection) (Amendment) Act 2005*(VIC);

- Warrants authorising a police officer to take a person aged over 18 into custody and bring them before a ‘prescribed authority’ for such purposes (‘Detention Warrants’); and
- Warrants for the detention and/or questioning of children before a ‘prescribed authority’ (‘Children’s Warrants’). Children’s Warrants are only able to be sought and issued if the child is aged between 16 and 18 years and it is likely that the child will commit or has committed a terrorism offence. Further procedural protections apply to these warrants.

‘Prescribed authorities’ will normally be former judge of a superior court.<sup>107</sup>

- 134.** HREOC has some general concerns about the necessity for and thus arbitrariness of the detention authorised by Division 3 of Part III (considered as a whole).
- 135.** Both Questioning and Detention Warrants may only be sought by the Director-General of ASIO after meeting certain procedural requirements. In particular, the Director General must seek the consent of the Attorney-General for the issue of a warrant.<sup>108</sup> In seeking that consent, the Director-General must provide a "draft request", which includes a draft of the proposed warrant, a statement of the facts and other grounds upon which the Director-General considers it necessary that the warrant be issued and a statement providing details of any previous requests for such warrants.<sup>109</sup> The Attorney-General may grant written consent to such a request, but only if she or he is satisfied (inter alia):
- that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence;
  - that relying on other methods of collecting that intelligence would be ineffective; and
  - in the case of Detention Warrants, that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:
    - a. may alert a person involved in a terrorism offence that the offence is being investigated;
    - b. may not appear before the prescribed authority; or
    - c. may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.<sup>110</sup>
- 136.** Once the Attorney’s approval has been obtained, a Questioning or Detention Warrant may be sought from an ‘issuing authority’. An issuing authority is either a federal magistrate or a judge (acting in their personal, rather than judicial, capacity).<sup>111</sup> The request must be the same as the draft request provided to the Attorney (with any required changes) and must include a copy of the Attorney’s consent.<sup>112</sup> An issuing authority must be satisfied that the Director General has followed the relevant procedural requirements in requesting the warrant and 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.<sup>113</sup>

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<sup>107</sup> See s34B ASIO Act. If there are insufficient former judges, the Attorney may appoint a serving State or Territory judge or a member of a federal administrative authority as a prescribed authority.

<sup>108</sup> See s 34C(1) ASIO Act.

<sup>109</sup> See s34C(2) ASIO Act

<sup>110</sup> See s 34C(3) ASIO Act.

<sup>111</sup> See *Grollo v Palmer* (1995) 184 CLR 348

<sup>112</sup> See s34C(4) ASIO Act

<sup>113</sup> See s34D(1) ASIO Act

- 137.** A person who is the subject of a Detention Warrant must be brought immediately before a prescribed authority for questioning. Questioning under a Questioning Warrant must also take place before a prescribed authority. The ASIO Act includes offences for failing to appear as required under a warrant, failing to give information, records or things requested in accordance with the warrant and making a false or misleading statement.<sup>114</sup>
- 138.** A person may be detained for a maximum of 7 days.<sup>115</sup>
- 139.** Time limits on questioning are also imposed. A person may be questioned for a maximum period of 24 hours. However, the prescribed authority must authorise ongoing questioning every 8 hours.<sup>116</sup> The total time for questioning increases to 48 hours if ‘an interpreter is present at any time while a person is questioned under a warrant’.<sup>117</sup> In the case of a Detention Warrant, the prescribed authority must direct that the person be released from detention:
- at the end of the 24 or 48 hour maximum period; or
  - at such a time as the authority refuses permission to continue questioning or revokes an earlier granted permission.<sup>118</sup>
- 140.** A further Questioning or Detention Warrant may be issued after a person has been released from detention.<sup>119</sup> However, the issuing authority must be satisfied that the warrant is justified by information which is additional to or materially different from that known to the Director-General at the time the Director-General sought the Attorney General’s consent to request the issue of the earlier warrant.<sup>120</sup>
- 141.** In the case of Detention Warrants, the person detained may not communicate with anyone while in custody or detention.<sup>121</sup> This prohibition is subject to certain exceptions,<sup>122</sup> including in relation to contact with lawyers. In giving consent for the issue of a Detention Warrant, the Attorney-General must be satisfied that the warrant permits the person detained to contact a lawyer of their choice at any time that the person is in detention in connection with the warrant, but which is a time after:
- the person is brought before the prescribed authority for questioning;
  - the person has informed the prescribed authority of the identity of the lawyer they propose to contact; and
  - ASIO has had the opportunity to ask the prescribed authority to prevent the person being detained from contacting that lawyer.<sup>123</sup>

No such provision is made in respect of Questioning Warrants. The prohibition on external communications does not apply to the subject of a Questioning Warrant, unless the prescribed authority orders the detention of that person.<sup>124</sup> If such a direction is made, the prescribed authority **may** (but need not) make a direction allowing them to contact a lawyer.<sup>125</sup>

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<sup>114</sup> See s 34G ASIO Act

<sup>115</sup> See s34HC ASIO Act

<sup>116</sup> See ss34HB(1),(2) and (6) ASIO Act.

<sup>117</sup> See s34HB(8) and (11) ASIO Act.

<sup>118</sup> See s34HB(7) ASIO Act.

<sup>119</sup> Such a warrant is required to be issued after release by reason of s34D(1A)(b)(ii), which requires the issuing authority to be satisfied that the person is not being detained. However, this may still be very shortly after release, depending upon the circumstances.

<sup>120</sup> See s34D(1A) ASIO Act.

<sup>121</sup> See s34F(8) ASIO Act.

<sup>122</sup> See s34F(9) ASIO Act.

<sup>123</sup> See s 34C(3B) ASIO Act.

<sup>124</sup> Under s34F(1)(a) ASIO Act.

<sup>125</sup> See s34F(1)(d) ASIO Act.

- 142.** The prescribed authority may prevent the subject of a Detention Warrant from contacting a particular lawyer if satisfied, on the basis of circumstances relating to that lawyer, that:
- a person may be alerted to the fact a terrorism offence is being investigated; or
  - a record or thing that the person may be requested in connection with the warrant to produce may be destroyed, damaged or altered.<sup>126</sup>
- 143.** The prescribed authority must provide a reasonable opportunity for the lawyer to advise the person detained during breaks in questioning.<sup>127</sup> However, contact between the lawyer and the person detained must be made in a way that can be monitored by a person exercising authority under the warrant.<sup>128</sup> The lawyer may not interrupt the questioning of the person detained or address the prescribed authority before whom questioning is being conducted, except to request clarification of an ambiguous question.<sup>129</sup> Indeed, the Act specifically provides that a person may be questioned in the absence of their lawyer.<sup>130</sup> In addition, a lawyer may be removed from the location where questioning is taking place if the prescribed authority considers that they are ‘unduly interrupting questioning’.<sup>131</sup> The person detained is then to be given the opportunity to contact a further lawyer of their choice.<sup>132</sup>
- 144.** Division 3 of Part III also includes certain safeguards and oversight provisions. The person who is the subject of a warrant or the prescribed authority may request an interpreter.<sup>133</sup> A number of rules govern the conduct of strip searches.<sup>134</sup> A person who is the subject of a Detention or Questioning Warrant must be treated with ‘humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, by anyone exercising authority under the warrant or implementing or enforcing the direction’.<sup>135</sup> Offences apply to contraventions of these and other safeguards.<sup>136</sup>
- 145.** It is not an offence to contravene a term of a ‘procedural statement’ provided for under s34C of the ASIO Act (the ‘Protocol’).<sup>137</sup> The Protocol deals with matters such as ensuring that detainees are allowed a minimum of 8 hours uninterrupted sleep in every 24 hour period,<sup>138</sup> are not questioned for more than four hours without being offered a break,<sup>139</sup> are provided with three meals per day<sup>140</sup> and are given a separate room or cell in which to sleep.<sup>141</sup> Contraventions of the Protocol may be the subject of a complaint to the ombudsman or the Inspector General of Intelligence Services (IGIS).<sup>142</sup> Division 3 of Part III makes other provision for the oversight roles of the ombudsman and the IGIS.<sup>143</sup>

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<sup>126</sup> See s 34TA ASIO Act.

<sup>127</sup> See s 34U(3) ASIO Act.

<sup>128</sup> See s34U(2) ASIO Act.

<sup>129</sup> See s34U(4) ASIO Act.

<sup>130</sup> See s34TB(1) ASIO Act.

<sup>131</sup> See s34U(5) ASIO Act.

<sup>132</sup> See s34U(6) ASIO Act.

<sup>133</sup> See ss34H and 34HAA ASIO Act.

<sup>134</sup> See ss34L-M ASIO Act.

<sup>135</sup> See s34J(2) ASIO Act.

<sup>136</sup> See s34NB ASIO Act.

<sup>137</sup> The Protocol appears as ‘Annex 2’ to the 2003/2004 Annual Report of the Inspector General of Intelligence Services.

<sup>138</sup> See para 6.3.

<sup>139</sup> See para 4.4.

<sup>140</sup> See para 6.2.

<sup>141</sup> See para 6.3.

<sup>142</sup> See s34NC ASIO Act.

<sup>143</sup> See ss 34E(1)(e), 34F(9)(c), 34HAB, 34HA, 34Q and 34QA ASIO Act.

146. Division 3 of Part III ceases to have effect 3 years after commencement.<sup>144</sup> That is, on 23 July 2006.
147. Very little is known by the Australian public about the operation of Division 3 of Part III, largely by reason of the expansive secrecy provisions.<sup>145</sup> Please see HREOC's submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD: Review of Division 3 Part III of the ASIO Act 1979 (Cth) for further information on the operation of Division 3, Part III to date.

### Arbitrary detention

148. Some commentators have suggested the main human rights concerns arising from ASIO's enhanced powers relate to the internationally recognised right to liberty and proscription of 'arbitrary detention'. Those matters are dealt with in article 9(1) of the ICCPR, which 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.

149. In approaching that issue of what constitutes arbitrary detention, HREOC notes the relevant international and domestic jurisprudence set out at paragraphs 16-18 of this submission.
150. Most analyses dealing with article 9(1) and the ASIO Act have focussed upon the Detention Warrants. However, the Questioning Warrant regime may also involve a species of detention for the purposes of article 9(1). The Human Rights Committee has observed that 'detention' is not to be narrowly understood and that article 9 applies to all forms of detention or deprivations of liberty whether they be criminal, civil, immigration, health or vagrancy related.<sup>146</sup> The distinction between measures constituting 'deprivation of' as opposed to 'restrictions upon' liberty is one of degree or intensity and not one of nature or substance. Nor does it depend in any way upon the labelling of something as 'detention'. Rather, it will depend upon criteria such as the type, duration, effects and manner of implementation of the measure in question.<sup>147</sup> In HREOC's view, many Questioning Warrants will involve detention for the purposes of article 9(1) by reason of the following matters:
- a person who is the subject of a Questioning Warrant will be required to attend a particular place (before the prescribed authority) or be guilty of an offence;<sup>148</sup>
  - that person may be required to stay in that place for a period of up to 24 hours (or more if an interpreter is required or further warrants are issued). Again, failure to do so may constitute an offence. In addition, a person seeking to leave a place where they were being questioned might be the subject of a 'detention direction' made by the prescribed authority;<sup>149</sup>
  - that person will be exposed to onerous restrictions on their ability to communicate with third parties about certain matters;<sup>150</sup> and
  - that person will be subjected to intense scrutiny, including having their communications with their lawyer monitored.<sup>151</sup>

<sup>144</sup> See s34Y ASIO Act.

<sup>145</sup> See s34VAA ASIO Act.

<sup>146</sup> Human Rights Committee General Comment No 8 par 1.

<sup>147</sup> See, in the context of the *European Convention on Human Rights, Amuur v France* (1992) 22 EHRR 533, paragraph 42.

<sup>148</sup> See s34G(1) ASIO Act.

<sup>149</sup> Under s34F(1)(a) of the ASIO Act on the basis that the person 'may not continue to appear, or may not appear again, before the prescribed authority' (s34F(3)(b) ASIO Act).

<sup>150</sup> See the secrecy provisions in s34VAA(1) of the ASIO Act.

<sup>151</sup> See s34U(2) of the ASIO Act.

- The question then is: does the detention contemplated by the Questioning and Detention Warrants breach the prohibition on arbitrariness? HREOC considers it to be of assistance to divide that question into:
- concerns regarding arbitrary detention which relate to Division 3 of Part III as a whole; and
- concerns regarding arbitrary detention which relate to specific aspects of the potential operation of Division 3 of Part III.

## **General Concerns regarding the possible arbitrariness of the detention authorised by Division 3 of Part III**

### **Detention of non-suspects**

- 151.** In asking whether the detention authorised is disproportionate, one must first identify the purpose of detention authorised by Division 3 of Part III.
- 152.** Although not entirely clear,<sup>152</sup> that purpose has been characterised as being the collection of intelligence for the prevention of terrorist attacks.<sup>153</sup>
- 153.** Considerable weight must be attached to the Director-General's (and ASIO's) assessments of the current threat to Australia. HREOC sees no reason to doubt that those assessments are well founded and informed by the considerable expertise and knowledge of ASIO and other Australian and international intelligence organisations.
- 154.** However, to satisfy the proportionality test, the detention authorised by the legislation must represent the least restrictive means of achieving the relevant purpose (collection of intelligence for the prevention of terrorist attacks).
- 155.** The detention authorised by Division 3 of Part III, not being associated with an exercise of judicial power, is generally referred to as 'administrative detention'.<sup>154</sup> The Human Rights Committee and the Working Group on Arbitrary Detention<sup>155</sup> scrutinise administrative detention provisions particularly closely for potential arbitrariness.<sup>156</sup> Indeed, the Working Group has expressed concern regarding the use of administrative detention in connection with counter-terrorism measures.<sup>157</sup>
- 156.** The detention authorised by Division 3 of Part III is not limited to persons suspected of committing an offence or to those with some involvement in a future offence. The provisions are aimed at anyone who (wittingly or unwittingly) is able to 'substantially assist in the collection of intelligence that is important in relation to a terrorism offence'.<sup>158</sup> It should also be noted that the term 'intelligence' is not defined in the ASIO Act and appears to extend beyond hard, factual data. It rather seems to

<sup>152</sup> See discussion in Senate Legal and Constitutional References Committee 'Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters' December 2002, Chapter 3.

<sup>153</sup> Evidence of the Attorney-General's Department to the Senate Legal and Constitutional Committee, *Committee Hansard*, 12 November 2002, p3. Note that it was also said by the Department that 'law enforcement was not the 'primary purpose' of the legislation and was, at most, an incidental purpose (ibid, p24).

<sup>154</sup> As noted above, while a Chapter III judicial officer is the 'issuing authority', the warrant is issued in their personal capacity.

<sup>155</sup> The Working Group was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. The Working Group is composed of five independent experts appointed following consultations by the Chairman of the Commission on Human Rights. Like the Human Rights Committee the Working Group has an individual complaints procedure and publishes "decisions" or "opinions" on the website of the High Commissioner for Human Rights (<http://www.unhchr.ch>).

<sup>156</sup> See eg Human Rights Committee, Concluding Comments on Switzerland (1996) UN Doc CCPR/C/79/Add.70 and *Report of the Working Group on Arbitrary Detention* E/CN.4/2005/6, 1 December 2004, para 61.

<sup>157</sup> Ibid.

<sup>158</sup> Section 34C(3)(c) ASIO Act.

encompass material which is 'speculative and unverified'.<sup>159</sup> These features mean that Division 3 of Part III potentially authorises the detention of a very wide section of the Australian population.

- 157.** Legislation providing for the administrative detention of people with no involvement with terrorism offences is largely absent from comparable foreign jurisdictions, including those which have a significantly higher risk of domestic terrorist attack than is the case with Australia. This is significant in the context of the issue of proportionality. It has been accepted that, in determining whether measures represent the least restrictive means of achieving a particular purpose, one can and should have regard to how similar purposes are achieved in other circumstances.<sup>160</sup>
- 158.** HREOC observes that, prior to the introduction of the Questioning and Detention warrants, ASIO already had powers (under warrant) to:
- install and use listening devices;<sup>161</sup>
  - inspect and make copies of postal articles;<sup>162</sup>
  - hack into computer files and data-bases;<sup>163</sup>
  - use tracking devices;<sup>164</sup>
  - conduct searches of persons and premises (including covert searches);<sup>165</sup> and
  - intercept telecommunications.<sup>166</sup>
- 159.** The ASIO Annual Report 2004-2005 states that ASIO issued 11 questioning warrants in 2004-2005. None of these warrants authorised the detention of a person.<sup>167</sup> In November 2005, ASIO stated:

ASIO has not yet had to use the detention powers which were always intended to be used only in the most exceptional circumstances and, accordingly, can only be used in the limited circumstances prescribed in the ASIO

Act.<sup>168</sup>

While this undoubtedly indicates admirable restraint, it also illustrates that ASIO has been able to conduct its work relying almost solely upon its considerable armoury of alternative intelligence gathering tools. In HREOC's view, this reinforces concerns over the necessity for (and thus proportionality of) the mechanisms provided for in Division 3 of Part III, particularly the more onerous Detention Warrants.

- 160.** The approach taken in Canada is instructive when considering the question of proportionality. Canada appears to be the only comparable jurisdiction where legislation provides for the questioning and detention of non-suspects in connection with past or future terrorism offences.<sup>169</sup> However, in contrast to the provisions of

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<sup>159</sup> J Hocking *Terror Laws* (2004) UNSW Press p236. See also the discussion by the Senate Legal and Constitutional Committee in *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* December 2002 at p15.

<sup>160</sup> See, discussing proportionality in the context of the derogation provisions of the *European Convention on Human Rights*, *A v Secretary of State for the Home Department* [2004] UKHL 56 Lord Bingham at [35]; Lord Nicholls at [76] Lord Hope at [129]; Lord Rodger at [189] and Baroness Hale at [231]. This decision is discussed in further detail below.

<sup>161</sup> See s26(3) ASIO Act.

<sup>162</sup> See ss27(2) and (3) ASIO Act.

<sup>163</sup> See s25A(4) ASIO Act.

<sup>164</sup> See ss26B(1) and 26C(1) ASIO Act.

<sup>165</sup> See s25 ASIO Act.

<sup>166</sup> See s9(1) *Telecommunications (Interception) Act 1979* (Cth).

<sup>167</sup> ASIO Annual Report 2004/2005. See <http://www.asio.gov.au/Publications/comp.htm>

<sup>168</sup> ASIO Submission to the Senate Legal and Constitutional Committee inquiry into the *Anti-Terrorism Bill (No.2) 2005*. See [http://www.asio.gov.au/Media/Contents/slcl\\_committee\\_anti\\_terrorism\\_bill.htm](http://www.asio.gov.au/Media/Contents/slcl_committee_anti_terrorism_bill.htm)

<sup>169</sup> See s83.28 *Anti-Terrorism Act 2002* (CA).

Division 3 of Part III, the Canadian approach is far more protective of the rights of the people who are subjected to that procedure. The significant differences include:

- The Canadian proceedings are controlled by a judicial officer.<sup>170</sup>
- The power to order a person to attend for questioning under the Canadian legislation is restricted to circumstances involving past terrorist offences or the risk of identifiable terrorist offences being committed. It is only enlivened if the judicial officer is satisfied that there are reasonable grounds for believing that:
  - a terrorism offence has been committed and that information concerning the offence or the whereabouts of the offender are likely to be obtained as a result of the order; or
  - a terrorism offence will be committed and that a person has direct and material information that relates to such an offence or which may reveal the whereabouts of a suspected future offender.<sup>171</sup>

**161.** In contrast, as noted above, the ASIO Act requires that that the Attorney 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’. As was noted above, ‘intelligence’ is an undefined and nebulous term.

**162.** Further, as was observed by Mr Fajgenbaum QC, in evidence before the Senate Legal and Constitutional Committee:

...the Canadian description of the circumstances, that the reasonable grounds where the person has direct and material information that relates to the terrorism offence, would exclude the hypothetical, academic ‘You may be able to give information about the nature of terror in Islam,’ and it is more confined, I suspect, than the current provision in the proposal, which speaks about ‘information in relation to a terrorism offence’, without the use of the language ‘direct and material information’, which concentrates on the actual commission of the crime rather than background information.<sup>172</sup>

**163.** The Canadian legislation confers power upon the judicial officer to issue an arrest warrant. However, such a warrant may only be issued if the judicial officer is satisfied (on an information in writing and under oath) that the person:

- is evading service of the order for gathering information;
- is about to abscond; or
- did not attend the examination or did not remain in attendance as required.<sup>173</sup>

**164.** In comparison, as noted above, the ASIO Act requires that the Attorney-General be satisfied that there are **reasonable grounds for believing that**, if the person is not immediately taken into custody and detained, the person **may**: alert a person involved in a terrorism offence that the offence is being investigated; not appear before the prescribed authority or destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.<sup>174</sup>

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<sup>170</sup> See ss83.28(1),(2) and (5) *Anti-Terrorism Act 2002 (CA)*.

<sup>171</sup> For future offence warrants, the judicial officer must also be satisfied that reasonable efforts have been made to obtain the information from the relevant person. Note in addition that, like Division 3 of Part III of the ASIO Act, the Canadian police must seek the prior consent of the Attorney-General.

<sup>172</sup> See *Committee Hansard*, 22 November 2002, p161.

<sup>173</sup> See s83.29 *Anti-Terrorism Act 2002 (CA)*

<sup>174</sup> See s 34C(3) ASIO Act.

165. When such a person is arrested under the Canadian provisions, they are brought immediately before a judicial officer who **may**, to ensure compliance with the questioning order, order that the person be detained in custody.<sup>175</sup>
166. This is significant because article 9(3) of the ICCPR requires that ‘[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release’. The judicial officer must be empowered to either direct pre-trial detention or order release and is to exercise their discretion on the basis that pre-trial detention should be the exception rather than the general rule.<sup>176</sup> While article 9(3) does not in its terms apply to administrative detainees, international legal scholars have suggested that it is relevant to the more general obligation to avoid arbitrary detention under article 9(1).<sup>177</sup> This proposition appears to be conceptually sound, as to hold otherwise would mean that non-suspects could be treated less favourably than those suspected of terrorism offences.
167. While Division 3 of Part III of the ASIO Act ensures that the prescribed authority will generally be a former judge, it is not clear that such a person would be considered by the Human Rights Committee to have the requisite degree of ‘institutional objectivity and impartiality’.<sup>178</sup> In particular, they would lack security of tenure which is an important guarantee of judicial independence.<sup>179</sup> Perhaps more significantly, although the prescribed authority may make a direction for a person’s release from detention,<sup>180</sup> that direction must be consistent with the terms of the warrant, be approved by the Attorney-General in writing or be responsive to a concern raised by the IGIS under s34HA.<sup>181</sup> As such, their power to order release is far more constrained than is the case under the Canadian legislation.
168. HREOC is also of the view that any proposal to re-enact the provisions of Division 3 of Part III after they cease to operate on 23 July 2006 should be subjected to very close scrutiny. In particular, there should be an examination of the level of threat posed by terrorism at that time; assessment of the value of the material which has been obtained under Division 3 of Part III; consideration of whether that material could have been obtained through less restrictive means and consideration as to why comparable nations facing greater risks have not enacted such measures. Any further legislative measures should also include sunset clauses to enable those issues to be reconsidered as conditions change.

## SPECIAL EVIDENCE LAWS

### *National Security Information (Criminal Proceedings and Civil Proceedings) Act 2004* (“The National Security Information Act”)

169. In HREOC’s view, the National Security Information Act<sup>182</sup> raises the concerns set out below in respect of two key human rights:
- the right to a fair and public hearing; and
  - the right to an effective remedy for violations of a person’s human rights.

<sup>175</sup> See s83.29(3) *Anti-Terrorism Act 2002* (CA)

<sup>176</sup> See Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary*, 1993, pp 176-7.

<sup>177</sup> S Joseph Australian Counter-Terrorism Legislation and the International Human Rights Framework 27(2) *UNSWLJ* (2004) 428 at 444.

<sup>178</sup> See *Kulomin v Hungary* 521/92, para 11.3.

<sup>179</sup> See Dr S Donaghue *Judicial Independence: Bradley, Fardon and Baker*, paper presented at 2005 Gilbert and Tobin Centre of Public Law Constitutional Law Conference available at <http://www.gtcentre.unsw.edu.au/Conference-Papers-February-2005.asp>

<sup>180</sup> See s34F(1)(f) ASIO Act.

<sup>181</sup> See s34F(2) ASIO Act.

<sup>182</sup> As amended by the *National Security Information (Criminal Proceedings) Consequential Amendments Act 2004* and the *National Security Legislation Amendment Act 2005*

170. The right to a fair and public hearing is provided for in article 14(1) of the ICCPR which states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

171. The right to a fair hearing under Article 14(1) is not limited to criminal matters. Rather, it guarantees certain rights to parties in “suits at law”. Those rights include, for example, ‘equality of arms, the respect of adversarial proceedings... and the swiftness of the procedure at all stages’.<sup>183</sup>

### Security clearances

172. Article 14<sup>184</sup> of the ICCPR provides (emphasis added) that everyone charged with a criminal offence "shall be entitled to the following minimum guarantees, in full equality: ...

(b) ... to communicate with **counsel of his own choosing**; ...

(d) ...to defend himself in person or through **legal assistance of his own choosing** ..."

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<sup>183</sup> Weissbrodt D, *The Right to a Fair Trial: Articles 8, 10 and 11 of the Universal Declaration of Human Rights* (Kluwer Law International, The Hague, The Netherlands: 2001) at 125.

<sup>184</sup> Article 14 provides in whole as follows:

"1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

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

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.

173. Section 39 of the *National Security Information Act* requires the defendant's legal representative to be security cleared. Section 41 provides it is an offence to disclose information before the Attorney General gives a criminal non-disclosure certification and under section 40 it is an offence to disclose information to a lawyer before the Attorney General gives a criminal witness exclusion certification.
174. The requirement for security clearance of lawyers in section 39 of the Act (and ss40 and 41 which makes it an offence to disclose certain information to anyone without a security clearance) may compromise the entitlement of the accused to choose their own legal representative. HREOC notes that courts and litigants already have a range of mechanisms at their disposal to protect national security information.

**Part 3 – Protection of information whose disclosure in federal criminal proceedings is likely to prejudice national security**

175. The ICCPR concept of a fair criminal trial is based upon an adversarial model in which the defendant is confronted by the witnesses against them, who give oral evidence to the court, which is open to the public. Under Article 14 of the ICCPR, the press and the public may be excluded from all or part of a trial for reasons of national security only so long as the principles of a democratic society are observed, and only to the extent strictly necessary in proportion to the perceived threat to national security.<sup>185</sup> Reasons must be provided for not providing a public trial.<sup>186</sup>
176. HREOC is concerned that under section 29 of the Act, courts are directed by statute to hold a hearing in closed session in certain circumstances. HREOC is of the view that discretion to hold part or all of a hearing *in camera* should be left to the courts and safeguards upon the use of closed hearings should:
- reflect the requirement that the exclusion of the public be "necessary in a democratic society";
  - reflect the requirement of proportionality; and
  - ensure that clear reasons for not providing a public trial are given and recorded.
177. Section 25 provides that in certain circumstances, an *in camera* hearing must be held and the witness must provide a written answer to a question. The court must show that answer to the prosecutor, who in certain circumstances must advise the court and notify the Attorney-General, causing the proceedings to be adjourned. The court is not required to show the answer to the defence.
178. Section 29(3) provides that the court may order that the defendant or legal representative, or both, are not entitled to be present during part of the hearing in respect of the national security information.
179. The possibility of restrictions on material disclosed to a party and denying a party access to the hearing undermines the right to a fair trial. It raises issues in respect of Article 14(3)(d) of the ICCPR, which provides that everyone charged with a crime has the right to be tried in their presence, and Article 14(3)(e), which provides the accused with the right to obtain the attendance and examination of witnesses under the same conditions as the witnesses against them. The ECHR has recognised that the right of a defendant to call witnesses and to confront and cross-examine witnesses against him

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<sup>185</sup> Joseph S, "A Rights Analysis of the Covenant on Civil and Political Rights" (1999) 5 Journal of International Legal Studies 57 at 78. The principle of proportionality in relation to the limitations in certain ICCPR rights was considered in *Faurisson v France* (550/93). The author was a professor of literature at the Sorbonne University who was removed from his chair and convicted under France's Gayssot Act which prohibited the publication of opinions that denied the occurrence of the Holocaust. He argued that his right to freedom of expression had been curtailed. The Committee found that his conviction was justifiable under the limitation to Article 19, as it was a necessary and proportionate measure (under Article 19(3)(a), which permits restrictions on the right to freedom of expression "for respect of the rights and reputations of others").

<sup>186</sup> In *Estrella v Uruguay* (74/1980), the Human Rights Committee found that a trial *in camera* violates Article 14(1) of the ICCPR if the State fails to provide a reason for not providing a public trial.

are not absolute rights where there is a compelling reason for encroaching on these rights.<sup>187</sup> However it is required that there be appropriate measures to assess the necessity for doing so, in which the defence can take part (to the extent that the purpose of the protective measures is not undermined).<sup>188</sup>

- 180.** Therefore any modifications of the ordinary criminal process must so far as is possible satisfy the principle of equality of arms<sup>189</sup>, the most important criterion of a fair trial. While the court would appear to retain discretion under section 25 as to whether to show the witness's written answer to the defence, and under section 29(3) as to whether to exclude the defendant from part of the hearing, HREOC is of the view that safeguards should be set out in the Act. Such safeguards should explicitly state that the court must give equal weight to the potential adverse affect of such an order on the defendant's right to receive a fair hearing.
- 181.** Section 31(8) provides that the court must, in determining whether it will accept the Attorney-General's certificates, give the greatest weight to the possible prejudice to national security when determining. While acknowledging that possible prejudice to national security ought to be given great weight, HREOC is of the view that the courts should retain a more flexible discretion which can be better tailored to the circumstances of each matter. This will ensure that the interests of justice and the rights of the defendant are given equal weight and are served in each individual case.
- 182.** HREOC notes and supports Recommendation 11-26 of the Australian Law Reform Commission (ALRC) Report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, which states:
- If the protection of any classified or sensitive national security information requires that it not be fully disclosed to the court (or tribunal) or to a party with the result that any party's rights, and its ability to fairly and freely present its case and to test the case of, and evidence tendered by, any other party is unfairly diminished, the court (or tribunal) may order that the whole or any part of a proceedings be stayed, discontinued, dismissed or struck out (or that any pleading be struck out in part or whole). Any such order may be made on the application of any party to the proceedings or of the Attorney-General of Australia intervening, or on the court's (or tribunal's) own motion. Where in a criminal case the judge has suppressed evidence which in the judge's opinion must raise a reasonable doubt as to the guilt of the accused, the court may enter a verdict of acquittal or order that no further proceedings be brought for the crime(s) charged."
- 183.** While courts already possess some of those powers (which are expressly preserved by section 19 of the Act), HREOC agrees with the ALRC that: "... a clear expression of all the powers available to the court in such circumstances is nonetheless useful."<sup>190</sup>
- 184.** Any modification to the ordinary criminal law must conform to the human rights principles set out in the ICCPR, especially Article 14. The Act establishes a scheme for the handling of national security information in criminal proceedings that removes a degree of discretion and flexibility from the courts, and this is of concern.
- 185.** The balance between implementing measures for the protection of national security and the protection of human rights has been the subject of much thought and jurisprudence in the Western world, particularly in Europe. The non-disclosure of

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<sup>187</sup> Van Mecheln v Netherlands (1997-III) 691 at paragraph 58.

<sup>188</sup> Rowe and Davis v United Kingdom (16/02/2000) at paragraph 62.

<sup>189</sup> Rowe and Davis v United Kingdom (16/02/2000) at paragraphs 60-67. In PG and JH v United Kingdom, the ECHR, finding no violation, said:

"... as far as possible, the decision-making procedure complied with the requirement of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interest of the accused."

There is in that approach some flexibility for States by reason of the words "as far as possible", and some protection for accused persons in "adequate safeguards".

<sup>190</sup> ALRC report, page 469, para 11.148.

evidence and related issues were a substantial component in many miscarriages of justice in terrorist trials in the United Kingdom. That experience shows that any variation on standard criminal procedures must satisfy the principles of a fair trial and equality of arms between the prosecution and defence.

**Part 3A – Protection of information whose disclosure in civil proceedings is likely to prejudice national security**

**186.** The central issue in determining whether the right to a fair and public hearing (article 14(1) ICCPR) applies to a particular set of civil proceedings is whether those proceedings constitute a ‘suit at law’. The Human Rights Committee has adopted an expansive construction of that term. It plainly includes the determination of private law rights, such as those in tort or contract. However, the Committee has held that the determination of public law rights will also constitute a ‘suit at law’ if:

- within the particular municipal legal system, such determination is conducted by a court of law; or
- administrative determination of such rights is subject to judicial control or judicial review.<sup>191</sup>

As such, article 14(1) would seem to apply to most (if not all) matters to which the Part 3A of the Act applies.

**187.** The obligation to provide effective remedies for violations of human rights appears in Article 2(3) of the ICCPR states:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized 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;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

**188.** The Act would apply to many proceedings in which such remedies are in issue. For example, information that relates to ‘national security’<sup>192</sup> may be relevant in the following proceedings:

- Proceedings relating to the Attorney’s decision not to de-list a ‘terrorist organisation’.<sup>193</sup> Such proceedings would potentially provide a remedy for a violation of a person’s freedom of association.<sup>194</sup>
- Proceedings in tort alleging assaults or unlawful conduct during questioning under a warrant issued pursuant to Part 3 of Division III of the *Australian Security Intelligence Organisation Act 1979* (Cth). Such proceedings would potentially provide a remedy for breaches of the right not to be subjected to torture and other cruel or inhuman treatment<sup>195</sup> and the right to be treated with humanity and respect for the human person while detained.<sup>196</sup>
- Proceedings seeking orders in the nature of habeas corpus in relation to a ‘detention warrant’ issued under Division 3 of Part III of the *Australian Security*

<sup>191</sup> See Weissbrodt D, *op. cit.* at 139; see also *Y.L. v Canada* (112/81) and *Casanovas v France* (441/90).

<sup>192</sup> See discussion of the definition of this term below.

<sup>193</sup> Under section 102.1(17) *Criminal Code* (Cth).

<sup>194</sup> See article 22 of the ICCPR.

<sup>195</sup> See article 7 of the ICCPR.

<sup>196</sup> See article 10 of the ICCPR.

*Intelligence Organisation Act 1979* (Cth). Such proceedings would potentially provide a remedy for violation of the right not to be arbitrarily detained.<sup>197</sup>

- Proceedings relating to a person's entitlement to a refugee protection visa.<sup>198</sup> Such proceedings potentially provide remedy against violation of the prohibition on 'refoulement' (returning a person to a country where they face persecution). That prohibition is recognised as one of the most fundamental principles in international human rights law. It arises out of Australia's obligations under the Refugees Convention as well as the ICCPR, the CRC and the CAT.<sup>199</sup>
- Proceedings concerning a decision to cancel a person's visa on character grounds.<sup>200</sup> Again, such proceedings may provide a remedy against possible refoulement. As will be discussed below, the *Migration Act 1958* (Cth) already imposes a restrictive regime for the treatment of information obtained from security agencies in such matters.
- Proceedings concerning a decision to detain and deport a non-citizen.<sup>201</sup> Depending on the circumstances, such proceedings may provide a remedy for violation of the right not to be arbitrarily detained<sup>202</sup> and/or the prohibition on arbitrary interference with family life.<sup>203</sup>
- Proceedings relating to a decision to order the surrender of a passport on security grounds.<sup>204</sup> Those proceedings might provide a remedy for a violation of the right to leave one's own country.<sup>205</sup>

**189.** Whether a victim has available an **effective** remedy through such proceedings may only be determined in the particular case, having regard to matters such as the relevant circumstances and the features of the right or freedom in question.<sup>206</sup> In particular, in the context of judicial remedies it is necessary to consider any constraints which apply to the exercise of judicial power. This may be seen in the decision of the European Court of Human Rights in *Chahal v United Kingdom*,<sup>207</sup> where the Court considered article 13 of the *European Convention on Human Rights* (ECHR) which is analogous to article 2(3) of the ICCPR. In that decision, the Court found that the availability of judicial review from a deportation decision did not provide an effective remedy because the court was limited to satisfying itself that the Home Secretary had balanced the risk to the individual against the danger to national security.<sup>208</sup> This was not considered to provide an effective remedy to the potential violation of Mr Chahal's right not to be subjected to torture (guaranteed by article 3 of the ECHR).

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<sup>197</sup> Article 9 of the ICCPR.

<sup>198</sup> See as an example of proceedings where the disclosure of such information arose: *NAVK v MIMIA* [2004] FCAFC 160.

<sup>199</sup> See paras 9-15 of the Commission's submission dated 29 April 2004 on the Migration Amendment (Judicial Review) Bill 2004.

<sup>200</sup> See s 501 *Migration Act 1958* (Cth).

<sup>201</sup> See ss202 and 253 of the *Migration Act 1958* (Cth).

<sup>202</sup> Article 9 of the ICCPR. See *C v Australia*, Communication No. 900/1999.

<sup>203</sup> Article 17 of the ICCPR. See *Winata v Australia* Communication No. 930/2000.

<sup>204</sup> See s16(1) *Passports Act 1938* (Cth).

<sup>205</sup> Article 12(2) of the ICCPR.

<sup>206</sup> See M Nowak *UN Covenant on Civil and Political Rights* NP Engel 1993 p61.

<sup>207</sup> (1996) 23 EHRR 413.

<sup>208</sup> The Court stated (at [153]): 'In the present case, neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations. On the contrary, the courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security (see paragraph 41 above). It follows from the above considerations that these cannot be considered effective remedies in respect of Mr Chahal's Article 3 (art. 3) complaint for the purposes of Article 13 of the Convention (art. 13)'.

**190.** Similarly, if the Act operates so as to unduly restrict the ability of Courts to provide remedies for the potential human rights violations described in paragraph 9 above, it may leave Australia in breach of its obligations under article 2(3).

### **Hearings to consider the disclosure of security information and restrictions upon the Court's discretion**

196 Under sections 38G(1) and 38H(6) and (7) of the Act, courts are directed to hold a hearing in closed session in certain circumstances. In essence, those circumstances arise where the Attorney forms the view that:

- information will be disclosed in a civil matter, being information (in documentary or oral form) which will prejudice national security;<sup>209</sup> or
- a person whom a party intends to call as a witness will disclose information by his or her mere presence and that disclosure would prejudice national security.<sup>210</sup>

In such circumstances, the Attorney may give parties, witnesses or other persons a certificate, which prevents or restricts disclosure of the information in question or prevents the calling of a witness.<sup>211</sup>

‘National security’ has been defined broadly.<sup>212</sup> For example, it includes matters such as political and economic relations between Australia and foreign governments and international organisations.<sup>213</sup> There is no carve out for information which provides evidence of corruption or maladministration on the part of government decision makers.<sup>214</sup> As such, the Attorney’s powers to issue certificates are very broad. The Act places an onerous burden upon parties to civil litigation to provide certain notifications where they know or believe that information will be disclosed which relates to national security.<sup>215</sup> It is an offence to contravene those notification provisions where the disclosure of the information in question is likely to prejudice national security.<sup>216</sup>

**191.** Any certificate issued by the Attorney must be provided to the Court<sup>217</sup> and will trigger the requirement to hold a closed hearing. The Court must hold the closed hearing before the substantive proceedings begin.<sup>218</sup> If the substantive proceedings have already begun, the Court must adjourn and hold a closed hearing.<sup>219</sup> The restrictions specified in the Attorney’s certificate operate until the conclusion of the closed hearing.

**192.** At the conclusion of the closed hearing, the Court must make one of the following orders:

- A. In cases other than disclosure through mere presence of a witness:
- orders for the non-disclosure of the information in question (whether in the civil proceeding or otherwise);<sup>220</sup>
  - orders allowing the disclosure of the information in the civil proceeding;<sup>221</sup> or

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<sup>209</sup> See ss38F(1) and 38G(1).

<sup>210</sup> See ss38H(1) and (6).

<sup>211</sup> See ss38F(2) and (3) and 38H(2).

<sup>212</sup> See ss8-11 of the Act.

<sup>213</sup> See ss 8 and 10 of the Act.

<sup>214</sup> See discussion in Senate Legal and Constitutional Committee *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* August 2004, pp 17-19.

<sup>215</sup> See ss38D(1)(3) and (4) and 38E(2).

<sup>216</sup> See s46C.

<sup>217</sup> See ss 38F(5) and 38H(4).

<sup>218</sup> See ss38G(1)(a) and 38H(6)(a).

<sup>219</sup> See ss38G(1)(b) and (c) and 38H(6)(b).

<sup>220</sup> See s 38L(4).

- in the case of information in documents, orders that the information not be disclosed in the civil proceeding or otherwise, but permitting disclosure of the following documents in the proceeding:
    - documents containing deletions of the information in question;
    - documents containing deletions and a summary of the deleted information; or
    - documents containing deletions and a statement of facts which the deleted information would or would be likely to prove.<sup>222</sup>
- B. In the case of witnesses whose mere presence would disclose information, orders that they not be called in the substantive proceedings or orders allowing them to be called.<sup>223</sup>
- 193.** Under section 38(L)(7) the court is to take into account certain matters when deciding what orders to make at the conclusion of the closed hearing:
- whether, having regard to the certificate required to be issued by the Attorney, there would be a risk of prejudice to national security if the relevant information were disclosed or the witness called;
  - whether such an order would have a *substantial* adverse effect on the substantive hearing; and
  - any other matter the Court thinks relevant.

The inclusion of the word ‘substantial’ means that some adverse impacts upon substantive hearings are to be tolerated. In addition, section 38(L)(8) requires the Court to give greatest weight to prejudice to national security.

- 194.** While acknowledging that possible prejudice to national security ought to be given great weight, HREOC is of the view that the courts should retain a more flexible discretion which can be better tailored to the circumstances of each matter. That will be particularly so in matters such as those referred at paragraph 188 above, where decisions to exclude certain evidence may diminish a party’s capacity to seek remedies for violations of their human rights. HREOC also notes that the ALRC did not make a recommendation for such constraints to apply to the Court’s discretion.<sup>224</sup>
- 195.** HREOC considers that: the word ‘substantial’ should be deleted from section 38(L)(7)(b); section 38(8) should be omitted; and a new subsection should be added to s38(L)(7) requiring the Court to consider ‘whether any such order would have an adverse effect on the human or fundamental rights of a party’.
- 196.** The need for such an amendment is arguably more pressing in the case of at least some civil proceedings than it is in some criminal proceedings. For example, in the case of proceedings regarding deportation or removal orders under the *Migration Act 1958* (Cth), the lives of one or more of the parties to those proceedings may literally depend upon their outcome.
- 197.** A further relevant difference between civil and criminal proceedings arises from the possible effects of orders that proceedings be stayed or summarily dismissed. Part 3A of the Act expressly provides that:

[t]he power of a court to control the conduct of a civil proceeding, in particular with respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise<sup>225</sup>

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<sup>221</sup> See s 38L(5).

<sup>222</sup> See s38L(2).

<sup>223</sup> See s38L(6).

<sup>224</sup> See ALRC Report [8.241]-[8.243], [11.164]-[11.167], [11.173]-[11.184] and recommendations 11-33, 11-34 and 11-36.

<sup>225</sup> See s 19(3) and (4)

and that:

[a]n order under section 38L does not prevent the court from later ordering that the civil proceeding be stayed on a ground involving the same matter, including that an order made under section 38L would have a substantial adverse effect on the substantive hearing in the proceeding.<sup>226</sup>

- 198.** In civil proceedings, the Court's power to stay, discontinue, dismiss or strike out the relevant proceedings (where unfairness results from the fact that confidential information cannot be revealed) will work against parties seeking to use the courts to obtain effective remedies for violations of fundamental rights. Such orders may still be important in protecting human rights in some civil matters. For example, defamation proceedings against a journalist over an article concerning maladministration in a security agency where truth is raised as a defence and documents relevant to that defence are not permitted to be disclosed.<sup>227</sup> A stay in such a matter would protect the right to freedom of expression.<sup>228</sup> However, in each of the examples given in paragraph 188 above, a stay or summary dismissal would foreclose the possibility of the party obtaining an effective (or indeed any) remedy for the relevant human rights violation. In those circumstances, the provisions of Part 3A of the Act will result in violations of article 2(3) of the ICCPR. Amendments of the kind suggested in paragraph 195 above would provide further safeguards against injustice in such situations.

#### **Requirement that hearings be closed**

- 199.** The requirement to hold the hearings referred to above in closed session raises a further human rights issue. Article 14(1) specifically requires public hearings, with limited exceptions. That requirement applies equally to civil and criminal matters.<sup>229</sup> The Human Rights Committee has discussed this requirement in the following terms:

The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons...

- 200.** In addition, where the 'exceptional circumstances' specified in article 14(1) are relied upon for closing a court, reasons must be provided for not providing a public trial.<sup>230</sup>
- 201.** While one of the exceptions to a public hearing is 'for reasons of ... national security', that does not mean that any matter touching upon national security may be considered in closed court without offending article 14(1). Rather such encroachments on the right to a public hearing must be limited to what is strictly necessary in proportion to the perceived threat to national security.<sup>231</sup>
- 202.** By removing from the court the discretion to hold a closed hearing, the Act I adopts a 'one size fits all' approach to the issue. This leaves no room for judicial officers to order greater or lesser restrictions, depending upon the nature of the information said to require protection. As such, the approach adopted in the Act seems unlikely to satisfy the test of proportionality. HREOC would also recommend that the Court be expressly obliged to provide reasons where proceedings are heard *in camera*.

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<sup>226</sup> Ibid.

<sup>227</sup> See comments made by the Hon. Mr McClelland, *House Hansard* 15 March 2005, pp34-5.

<sup>228</sup> Article 19(2) ICCPR.

<sup>229</sup> See eg *Van Meurs v Netherlands* (215/86).

<sup>230</sup> In *Estrella v Uruguay* (74/1980), the Human Rights Committee found that a trial *in camera* violates Article 14(1) of the ICCPR if the State fails to provide a reason for not providing a public trial.

<sup>231</sup> Joseph S, "A Rights Analysis of the Covenant on Civil and Political Rights" (1999) 5 *Journal of International Legal Studies* 57 at 78.

203. HREOC also notes that the ALRC Report did not propose that a court be directed or legislatively required to hold any hearing in closed session in either criminal or civil matters.<sup>232</sup>

### Section 38I – parties and legal representatives may be excluded from part of hearing

204. Section 38I(3) provides that the court may exclude a party and/or a party's legal representative from certain parts of a closed hearing if the Court considers:

- they have not been given security clearance at the level 'considered appropriate' by the Secretary of the Attorney-General's Department in relation to the information concerned; and
- the disclosure of the information concerned would prejudice national security.

205. The parts of the closed hearing from which those persons may be excluded are those parts where the Attorney or his or her legal representative intervenes (under s38K) and:

- gives details of the information in question; or
- gives information in arguing that the court should exercise its powers (under section 38L) to restrict disclosure of the information or prevent the calling of a witness.<sup>233</sup>

206. In many cases, the excluded party will have difficulties offering assistance to the Court by presenting a contrary argument. The absence of such an argument may well result in a central evidentiary element of the case being excluded or (in the case of documents) considerably modified.<sup>234</sup> In the matters referred to in paragraph XX above, this will once more potentially render ineffective the remedy which could otherwise be offered by the Court.

207. Moreover, while there is no explicit right to be present at a civil hearing (cf criminal defendants, who do have explicit protection under article 14(3)(d) of the ICCPR), the Human Rights Committee has stressed the importance of being able to respond to the legal contentions and evidence of the other parties in a civil matter. For example, *Äärelä v Finland*<sup>235</sup> concerned an injunction sought in respect of certain logging and road-making activities. The Finnish Court of appeal refused to allow the authors of the complaint an opportunity to comment on the brief containing legal argument submitted by the Forestry Authority. In finding a violation of article 14(1), the Committee made the following comments:

...the Committee notes that it is a **fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party**. The Court of Appeal states that it had "special reason" to take account of these particular submissions made by the one party, while finding it "manifestly unnecessary" to invite a response from the other party. In so doing, the authors were precluded from responding to a brief submitted by the other party that the Court took account of in reaching a decision favourable to the party submitting those observations. The Committee considers that these circumstances disclose a failure of the Court of Appeal to provide full opportunity to each party to challenge the submissions of the other, thereby violating the principles of equality before the courts and of fair trial contained in article 14, paragraph 1, of the Covenant.<sup>236</sup>

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<sup>232</sup> See recommendations 11-19 and 11-20.

<sup>233</sup> Sees 38(I) (2)(e) and (3).

<sup>234</sup> See s38L(2).

<sup>235</sup> Communication No 779/1997 CCPR/C/73/D/779/1997

<sup>236</sup> Ibid at 7.4.

**208.** In the absence of an explicit requirement to be able to be present at one's civil hearing,<sup>237</sup> article 14 may permit the exclusion of a party from civil proceedings in exceptional circumstances, provided the fundamental obligation to ensure equality between the parties is preserved. HREOC considers that section 38I be amended so as to:

- require the Court to consider, in exercising the discretion conferred by s38I(3), whether the making of an order excluding a party and/or their legal representative would adversely affect their right to a fair hearing, including the right to contest all the argument and evidence adduced by other parties; and
- in exceptional circumstances where an 'exclusion order' is made, require the Court to consider making orders which will ensure that a person is able to contest all the argument and evidence adduced by the Attorney or her or his legal representative (including through the use of redacted evidence or submissions). This would ensure that the right to make submissions about non-disclosure or witness exclusion (preserved by s38I(4)) may be exercised in a meaningful fashion.

This approach will also alleviate the concerns regarding the availability of an effective remedy.

**209.** On a related issue, while the Court is required to make a record of a closed hearing and give a statement of reasons for orders made under s38L:

- access to the record is restricted to:
  - the appellate court;
  - the Attorney (and the Attorney's representatives) if she or he exercises the intervention power in section 38K;
  - legal representatives of parties; and
  - parties who have not engaged a legal representative;<sup>238</sup>
- in the case of access to the record by a party without legal representation or the legal representative of a party, the person must possess a security clearance at the level 'considered appropriate' by the Secretary of the Attorney-General's Department;<sup>239</sup>
- the Attorney may seek to have the record varied if she or he considers disclosure to such a person is likely to prejudice national security.<sup>240</sup>
- while the parties and their legal representatives must be given a copy of the reasons, for matters where the Attorney is an intervener, the Attorney has an opportunity to have the reasons varied to avoid the disclosure of information likely to prejudice national security.<sup>241</sup>

**210.** In HREOC's view, those provisions stand to frustrate a person's appeal from a decision made under s38L, which may in turn violate their right to an effective remedy. They also raise further possible violations of article 14(1), in the sense that one or more of the parties to a piece of litigation may be treated less favourably than the Attorney (where they intervene<sup>242</sup>) or the other parties. Amendments should at least be made to permit access to the record by security cleared parties who have engaged lawyers— otherwise the capacity to give meaningful instructions is diminished. HREOC also considers that:

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<sup>237</sup> The Human Rights Committee has also found that article 14(1) includes the right to be present at one's hearing (*Wolf v Panama* (289/88) at para 6.6). However, this was in the context of a criminal matter.

<sup>238</sup> See s38I(5).

<sup>239</sup> See s38I(9).

<sup>240</sup> See ss38I(7) and (8).

<sup>241</sup> See section 38M(3).

<sup>242</sup> See s38K.

- the Court should be given a wider discretion to determine the disclosure regime for the record (including the power to allow access by parties and legal representatives who are not security cleared, subject to such undertakings and conditions as the Court considers appropriate –see also the discussion in the next section);
- in applications to vary the record, the Court should be expressly required to consider the possible adverse effects on affected parties. Further, to avoid doubt, an appeal court should be empowered to vary such an order.

### **Restrictions on disclosure of information to parties and legal representatives**

**211.** Section 46G creates an offence of disclosing information to parties, legal representatives and persons assisting legal representatives, where that disclosure is likely to prejudice national security. A complex set of exemptions apply to that offence, including that:

- the person **disclosing** the information is a legal representative or person assisting a legal representative who has been given a security clearance considered appropriate by the Secretary and discloses the information in the course of her or his duties in relation to the proceedings;<sup>243</sup>
- the person **disclosing** the information is a party who has been given a security clearance considered appropriate by the Secretary and discloses the information in the proceeding or a closed hearing;<sup>244</sup> or
- the person **receiving** the information is a party, legal representative or person assisting a legal representative who holds such a security clearance.<sup>245</sup>

**212.** This scheme departs from the recommendation made by the Senate Legal and Constitutional Committee<sup>246</sup> and the ALRC<sup>247</sup> to the effect that the court should determine the disclosure regime for such information. Such matters should not be solely dependent upon the exercise of executive discretion, particularly in proceedings in which the Commonwealth or officers of the Commonwealth are parties. Again, that approach gives rise to the possibility of a breach of article 14(1) because the Court is not in a position to ensure equality between parties in their preparations for hearing.<sup>248</sup>

### ***The Law and Justice Legislation Amendment (Video Evidence and Other Measures) Act 2005***

**213.** *The Law and Justice Legislation Amendment (Video Evidence and Other Measures) Act 2005* (“The Act”) adds part 1AE to the *Crimes Act*. Part 1AE sets up a new regime for the taking of video evidence in criminal proceedings for federal terrorism offences and related offences and proceedings under the *Proceeds of Crime Act 2002* (Cth) in relation to one of those offences.<sup>249</sup>

**214.** Section 15YV provides for the making of an order for the taking of video evidence. As with other recent procedural legislation in this area, a ‘directive approach’ has been taken - the discretion of the Court has been deliberately limited. This is achieved by providing that the Court ‘must’ (rather than ‘may’) direct or order that evidence be given by video link upon being satisfied of certain matters.

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<sup>243</sup> See s16(ac).

<sup>244</sup> See s16(aa).

<sup>245</sup> See s46G(c)(i).

<sup>246</sup> See recommendation 10.

<sup>247</sup> See ALRC Report [11.131]-[11.133] and recommendations 11.24-11.25.

<sup>248</sup> See, in that regard, *Jansen-Gielen v Netherlands* 846/99.

<sup>249</sup> The Law and Justice Legislation Amendment (Video Evidence and Other Measures) Act also amends the Foreign Evidence Act. For the Commission’s submissions on the amendments (in bill form) please see HREOC’s submission to the Senate Legal and Constitutional Committee Inquiry into *the Law and Justice Legislation Amendment (Video Evidence and Other measures) Bill 2005*

215. The matters of which the Court must be satisfied before making a direction or order are that:
- the prosecution or the defendant has made an application for a direction or order that a witness give evidence by video link;
  - the prosecutor and defendant has given the court reasonable notice of their intention to make the application;
  - the witness is available to give evidence by video link;
  - certain specified video facilities are available or reasonably capable of being made available; and
  - the proposed witness is not be a defendant in the proceeding
216. Once the Common Conditions are made out, the Court **must** order that the witness be allowed give evidence by video link, unless:
- in the case of an application made by the prosecution, the defendant positively satisfies the Court that the making of the order or direction would have a substantial adverse impact<sup>250</sup> upon the right of defendant to a fair hearing;<sup>251</sup> or
  - in the case of an application made by the defendant, the prosecution positively satisfies the Court that the making of the order or direction would be inconsistent with the interests of justice.<sup>252</sup>
217. HREOC is concerned that the use of these different tests favours the prosecution over the defence.<sup>253</sup>
218. For a detailed analysis of HREOC’s concerns about the different tests please see the Senate Legal and Constitutional Legislation Committee inquiry into the Law and Justice Legislation Amendment (Video Evidence and Other Measures) Bill 2005.<sup>254</sup>
219. In the above submission, HREOC notes that while there is considerable uncertainty regarding the manner in which the two tests in s15YV would be applied, the following points are tolerably clear:
- The ‘substantial adverse effect’ test, which applies if the defence seeks to oppose a prosecution application to adduce video evidence, will not be satisfied by the defence demonstrating some degree of disadvantage to the accused.
  - The ‘substantial adverse effect’ test contemplates **at least some** adverse effects on the defendant’s right to a fair hearing. Indeed, in the absence of a more narrow definition, it would be open to a Court to find that it **contemplates adverse effects which are ‘considerable or big’**.
  - In contrast, the ‘interests of justice test’, which applies if the prosecution seeks to oppose a defence application to adduce video evidence, is a more flexible test. In particular, it does not specify as an enlivening condition any particular level of disadvantage to the prosecution.
220. HREOC is concerned that the amendments made by the Act to the *Crimes Act* and *Foreign Evidence Act* favour the prosecution over the defence in terrorism trials. That is, it is HREOC’s view that it will be comparatively more difficult for a defendant to successfully challenge a direction or order sought by the prosecution and easier for the prosecution to successfully challenge a direction or order sought by the defendant.

<sup>250</sup> Substantial adverse effect is defined as “an effect that

<sup>251</sup> See s15YV(1).

<sup>252</sup> See s15YV(2).

<sup>253</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 2005, pp 17-19 (The Hon Nicola Roxon MP) and pp 22-25 (The Hon Daryl Melham MP).

<sup>254</sup> See [http://www.hreoc.gov.au/legal/submissions/video\\_evidence\\_and\\_other\\_measures.html](http://www.hreoc.gov.au/legal/submissions/video_evidence_and_other_measures.html)

This potentially violates article 14 of the ICCPR, which provides for the right to a fair hearing.

**221.** HREOC is also concerned that the Act does not provide sufficient safeguards to ensure Australian Courts exclude evidence obtained through torture. To address those concerns, HREOC suggests:

- amendments to s 15YV of the Crimes Act and s5A of the FEA so as to apply the same tests to applications made by the prosecution and defence. That approach is more consistent with the principle of equality of arms;
- an absolute prohibition on the use of evidence obtained by torture or other cruel or inhumane treatment.

**Human Rights and Equal Opportunity Commission**

**March 2006**

## **ANNEXURE A**

### **COUNCIL OF AUSTRALIAN GOVERNMENTS' COMMUNIQUÉ**

#### **SPECIAL MEETING ON COUNTER-TERRORISM**

**27 SEPTEMBER 2005**

The Council of Australian Governments (COAG), comprising the Prime Minister, Premiers, the Chief Ministers of the Australian Capital Territory and the Northern Territory and the President of the Australian Local Government Association, held a special meeting in Canberra today to consider Australia's national counter-terrorism arrangements.

This Communiqué sets out the agreed outcomes of the discussions.

#### **Current Security Environment**

COAG was briefed on the current global and domestic security environment by the Directors-General of the Office of National Assessments and the Australian Security Intelligence Organisation, and noted that the national counter-terrorism alert remains at medium, as it has since 12 September 2001. A terrorist attack in Australia continues to be feasible and could occur. COAG also discussed the implications of the July 2005 terrorist bombings in London for Australia's security and counter-terrorism arrangements.

#### **National Emergency Protocol**

COAG noted that national emergency arrangements are well developed and are coordinated across Australia through a range of inter-governmental fora.

COAG also noted the importance of a consistent and co-ordinated response by Commonwealth, State, Territory and local government at the onset of any national emergency. Leaders noted that the current arrangements have the capacity to manage any foreseen substantial emergencies. Leaders agreed to develop a protocol to ensure effective coordination and communication in the unlikely event of an emergency of greater magnitude.

COAG Senior Officials will report back to COAG out-of-session on the protocol.

#### **Security of Mass Passenger Transport**

COAG agreed that the security of mass passenger transport continued to be a high priority for Australian governments. COAG noted the findings of a recent assessment

of Australia's urban mass passenger transport security arrangements, conducted jointly by the Commonwealth and State and Territory Governments through the National Counter-Terrorism Committee (NCTC) and the Transport Security Working Group, a sub-group of the Standing Committee on Transport. COAG also agreed to strengthen and build on existing transport security arrangements through a range of measures which aim to:

- further develop and implement technological and other solutions;
- broaden the capacity of transport operators, their staff and the public to contribute to the security of surface transport;
- facilitate incident planning and preparation by operators; and
- support an integrated approach to transport precinct security.

The NCTC will report to COAG on progress in implementing these measures by mid-2006.

### **A National Approach to Closed-Circuit Television**

COAG discussed the significant role that closed-circuit television (CCTV) played in the identification of the perpetrators of the July 2005 terrorist attacks in London and its potential to assist police counter-terrorism investigations. COAG noted that jurisdictions already have extensive CCTV networks across transport, public spaces and major facilities. COAG agreed that each jurisdiction would undertake and share across governments a review of the functionality, location, coverage and operability of mass passenger transport sector CCTV systems. This will be a first step towards a broader consideration of the use of CCTV in support of counter-terrorism arrangements.

COAG also agreed to a national, risk-based approach to enhancing the use of CCTV for counter-terrorism purposes, including the development of a National Code of Practice for CCTV systems for the mass passenger transport sector. The Code will set a policy framework, objectives, protocols and minimum requirements for the use of CCTV systems to enhance counter-terrorism arrangements so that future investment is based on appropriate risk analysis. It will also contain agreed requirements for fixed and mobile CCTV systems, and national guidelines for the collection, storage, access, use, privacy, disclosure, protection and retention of CCTV information. The Code will allow each jurisdiction to determine its own CCTV requirements having regard to the use of CCTV for local counter-terrorism purposes. COAG further agreed that a COAG Working Group, to be chaired by Victoria, would be established to develop the Code that will involve consultation with private industry. The Working Group will make an initial report to COAG in February 2006 with the draft Code.

COAG agreed to identify necessary legislative measures to ensure consistent implementation of the Code, to encourage business and industry to comply with the Code, and to work cooperatively in research, development, trial and evaluation of new CCTV technologies.

## **National Action Plan to build on the Principles agreed at the Prime Minister's Meeting with Islamic Community Leaders**

A meeting of Islamic community leaders, the Prime Minister and other Commonwealth Ministers held on 23 August 2005 unanimously rejected terrorism in all its forms, endorsed a Statement of Principles and committed itself to work within the laws of Australia to combat intolerance and violence.

All jurisdictions are pursuing initiatives to strengthen links with Australian Muslim communities and promote respect and understanding. COAG noted the outcomes from Commonwealth and State initiatives involving faith leaders to strengthen community harmony, safety and understanding. COAG encourages inter-faith dialogue. To address further intolerance and the promotion of violence, COAG agreed to request the Ministerial Council on Immigration and Multicultural Affairs to develop a national action plan to build on the principles agreed at both the Prime Minister's August 2005 meeting and meetings between State and Territory leaders, and faith and community leaders, and to report back to COAG on progress by the end of 2005.

### **Strengthening Counter-Terrorism Laws**

COAG considered the evolving security environment in the context of the terrorist attacks in London in July 2005 and agreed that there is a clear case for Australia's counter-terrorism laws to be strengthened. Leaders agreed that any strengthened counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate. Leaders also agreed that COAG would review the new laws after five years and that they would sunset after 10 years.

COAG agreed to the Commonwealth Criminal Code being amended to enable Australia better to deter and prevent potential acts of terrorism and prosecute where these occur. This includes amendments to provide for control orders and preventative detention for up to 48 hours to restrict the movement of those who pose a terrorist risk to the community. The Commonwealth's ability to proscribe terrorist organisations will be expanded to include organisations that advocate terrorism. Other improvements will be made, including to the financing of terrorism offence.

COAG noted that in 2002 when Leaders agreed to new national investigative powers, Queensland's use of a Public Interest Monitor was recognised. COAG also noted that Queensland would continue to use the Public Interest Monitor for control orders and preventative detention.

State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days and stop, question and search powers in areas such as transport hubs and places of mass gatherings. COAG noted that most States and Territories already had or had announced stop, question and search powers.

The NCTC will settle the amendments to the Commonwealth Criminal Code by the end October 2005 and consider options for harmonising State and Territory legislative provisions. Details on the operation of, and safeguards for, control orders and prevention detention are attached.

Leaders also noted that the Commonwealth will consult States and Territories on:

- proposed amendments to Part IIIAAA of the *Defence Act 1903* to enhance and clarify the arrangements for calling-out the Australian Defence Force to assist civilian authorities; and
- the possible enactment of laws to prevent the use of non-profit or charitable organisations for the financing of terrorism.

### **Wheeler Report on Aviation Security and Policing at Australian Airports**

COAG strongly supported the findings in the Wheeler Report, particularly a single command structure at Australian airports.

COAG agreed:

- to establish a unified policing model at each of the 11 counter-terrorism first response (CTFR) airports including: an Airport Police Commander, a dedicated Joint Intelligence Group, a CTFR capability and a permanent community policing presence, and at each of the five major international airports (Sydney, Melbourne, Brisbane, Perth and Adelaide), a Joint Airport Investigation Team;
- that the Commonwealth will fund under the unified model a full-time community policing presence of Australian Federal Police (AFP) officers wearing AFP uniforms under AFP command, at all 11 CTFR airports;
- that recruitment and selection of the Airport Police Commander will be undertaken by a panel which will include both Commonwealth and State or Territory representation;
- that the arrangements for the secondment or recruitment of State and Territory police to the AFP command will be finalised by the NCTC in consultation with Police Commissioners as soon as practicable;
- to conduct via the NCTC a review of information and intelligence- sharing processes between Commonwealth and State and Territory agencies to facilitate better information flow to counter crime and terrorism in the aviation sector and to report back to COAG by mid 2006; and
- that the Department of the Prime Minister and Cabinet would lead an NCTC working group comprising relevant Commonwealth, State and Territory agencies to prepare a report on possible further refinements to terrorist incident response and crisis management arrangements at CTFR airports and report back to COAG by mid 2006.

### **Identity Security**

The preservation and protection of a person's identity is a key concern and right of all Australians. COAG agreed to the development and implementation of a national identity security strategy better to protect the identities of Australians. The strategy will enhance identification and verification processes and develop other measures to combat identity crime. The strategy will be underpinned by an inter-governmental agreement.

COAG also agreed to:

- the development and implementation of a national document verification service to combat the misuse of false and stolen identities; and
- investigate the means by which reliable, consistent and nationally interoperable biometric security measures could be adopted by all jurisdictions.

### **National Standards for the Security Industry**

COAG noted the important contribution the private security industry makes in supporting Australia's counter-terrorism arrangements. COAG agreed that New South Wales will undertake a review of security industry training, competency, accreditation, registration and licensing, in consultation with all other jurisdictions, to identify any variations in approaches and any response required and report back to COAG Senior Officials by February 2006.

### **National Counter-Terrorism Plan**

COAG endorsed a revised version of the *National Counter-Terrorism Plan*, the primary document on Australia's national counter-terrorism policy and arrangements. The Plan sets out the collaborative arrangements between the Commonwealth and the States and Territories for preventing, preparing for and responding to terrorist incidents within Australia. The Plan was recently reviewed by the NCTC to take into account the lessons of Australia's first multi-jurisdictional counter-terrorism exercise *Mercury 04* held in March 2004, as well as other developments in the national arrangements since the Plan was first launched in June 2003.

### **Counter-Terrorism Exercises**

COAG noted that the effectiveness of the United Kingdom's response to the July 2005 terrorist attacks in London had further underscored the value of regular counter-terrorism exercises.

Leaders noted that Australia's current regime of regular counter-terrorism exercises, at both the national and State and Territory levels, provides a strong framework for testing and evaluating Australia's counter-terrorism arrangements. COAG agreed to refocus the current regime in light of the lessons learned from the London terror attacks.

This refocussing will include regular drill-style exercises in all major Australian cities, focussing on transport infrastructure and other places of mass gatherings, to provide greater exercising and training of Australia's ability to manage mass-casualty incidents. Leaders agreed that these exercises should involve, where appropriate, a broad range of government agencies, local government and the private sector. The NCTC, in consultation with the Australian Emergency Management Committee and other relevant intergovernmental fora, will report back to COAG by mid-2006 on how the enhanced regime will be implemented.

COAG also noted that the second multi-jurisdictional counter-terrorism exercise, *Mercury 05*, will take place in October 2005 and will involve the Commonwealth, New South Wales, Victoria, Western Australia, South Australia and the Australian Capital Territory. It will be the largest counter-terrorism exercise conducted in Australia to date.

### **Promoting Public Understanding of the National Counter-Terrorism Arrangements**

COAG noted that the terrorist attacks in London in July 2005 have reinforced the importance of maintaining public understanding of, and confidence in, our national counter-terrorism arrangements.

COAG agreed:

- that each government should have robust arrangements in place to provide the community, business and the media with timely, well coordinated and relevant information during a crisis; and
- to request the NCTC to develop a national strategy to explain in clear and simple terms the prevention, preparedness, response and recovery arrangements set out under the *National Counter-Terrorism Plan*, with the objectives of:
  - promoting public understanding of, and confidence in, the arrangements between the Commonwealth and the States and Territories for responding to terrorist incidents,
  - reassuring the community that it will be kept informed of changes to the security environment,
  - reinforcing the important role that the community can play in preventing terrorist incidents, including through the reporting of possible terrorist planning and activities, and
  - raising community awareness of what to expect in the event of a terrorist incident, including by providing advice and guidance on how to be prepared for emergencies and how to respond to a terrorist attack.

The NCTC will report to COAG on the strategy by mid-2006.

### **A Strategy for Chemical, Biological, Radiological and Nuclear Security**

COAG agreed to the development of a national Chemical, Biological, Radiological and Nuclear (CBRN) security strategy focussing on prevention, preparedness, response and recovery. The strategy will be developed by the NCTC with the involvement of relevant emergency management and health agencies and in consultation with national emergency management and health government committees.

The NCTC will report to COAG on the development of the national CBRN strategy by mid-2006.

*Council of Australian Governments  
27 September 2005*

## Control Orders

In relation to control orders COAG noted:

- the Australian Federal Police (AFP) must have reasonable grounds that issuing the control order would substantially assist in preventing a terrorist act or that a person has trained with a listed terrorist organisation before applying for a control order;
- the Attorney-General must consent to the application being made;
- if the Attorney-General consents, the AFP may apply to a court for the issue of a control order;
- the court must be satisfied on the balance of probabilities that issuing the control order would substantially assist in preventing a terrorist act or that a person has trained with a listed terrorist organisation;
- the court must also be satisfied on the balance of probabilities that each of the controls in the order is reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act;
- there is no provision for a person to be given advance notice of a control order in case a person tips off associates who are involved in terrorism. This would potentially undermine the purpose of the orders;
- however, once a court has issued a control order it must be given to a person immediately by the AFP officer who requested the order. The officer must ensure that the person understands the order;
- the control order does not come into effect until the person, the subject of the order, is notified;
- once notified, the person can immediately apply for revocation of the order. The person's lawyer is also able to obtain a copy of the order. The same court that issued the control order can revoke it;
- in addition normal judicial review processes would apply to decisions to issue or revoke control orders;
- control orders would not apply to people under 16 and would apply in a modified way to people between 16 and 18; and
- each year, the Attorney-General would report to Parliament on the operation control orders.

## **Preventative Detention**

In relation to preventative detention orders COAG noted:

- the AFP must have reasonable grounds that making the order would substantially assist in preventing a terrorist attack or, where a terrorist act has occurred, preserve evidence;
- an AFP officer could issue an order for an initial 24 hours; that period could be extended by an issuing authority for a further 24 hours only; the total detention period allowable would be a maximum of 48 hours;
- an issuing authority would be a Magistrate or Judge who agrees to act as an issuing authority in their personal capacity;
- a person detained could not be questioned except to confirm their identity;
- any preventative detention order, as well as the treatment of the person detained, would be subject to judicial review;
- any preventative detention order, as well as the treatment of the person detained, could be subject to investigation by the Commonwealth Ombudsman;
- a person detained would be given an opportunity to contact a lawyer for these purposes as well as being entitled to contact a family member and employer solely for the purpose of letting them know they are safe but are not able to be contacted for the time being;
- in some circumstances, the right to contact a lawyer or other person could be limited - for example, if there are facts or grounds to suggest that the lawyer or other person is linked to the terrorist act; the contact with a lawyer or other person would be monitored to ensure that the communication relates solely to the purposes permitted under the legislation;
- where the person is unable to contact their nominated lawyer for security reasons, access to a security cleared lawyer would be offered to them;
- preventative detention would not apply to people under 16; special rules would apply for people between the ages of 16 and 18 and people incapable of managing their own affairs;
- consistent with Australia's international human rights obligations, any person being preventatively detained must be treated with humanity and respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment. Any official who fails to treat a detained person in accordance with these obligations is subject to an offence punishable by two years' imprisonment; and

- each year, the Attorney-General would report to Parliament on the operation of preventative detention orders.