Australian Human Rights Commission

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National Security Legislation Proposed Amendments

Submission on the Attorney-General's Discussion Paper on Proposed Amendments to National Security Legislation

9 October 2009

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Table of Contents

1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Attorney-General's Department, providing comments on the Attorney-General's discussion paper on proposed amendments to the National Security Legislation (the discussion paper).

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

3. The Commission welcomes the opportunity to make a contribution to the National Security Legislation Review. It is important that significant areas of law reform such as this, involve broad consultation. The Commission encourages the Australian Government to conduct further consultation processes as it continues to reform national security legislation.

4. Governments have both a right and a duty to enact counter-terrorism measures to protect their communities. However, the Commission agrees with the Attorney-General's recent comment that not only is it possible to respond to threats to national security whilst recognising and adopting human rights, but imperative to the long term fight against terrorism.[1]

5. The reforms suggested in this discussion paper do in large part further the protection of human rights. However, the Commission remains concerned that some provisions in the existing national security legislative regime undermine human rights. Further, some of the amendments proposed by the discussion paper further undermine human rights.

6. Given the fundamental importance of ensuring that human rights are protected in national security legislation, it is disappointing that the discussion paper does not raise for consideration or discussion the human rights implications of the proposed amendments. The Commission encourages the government to ensure that human rights impacts are explicitly made a key consideration of any future review of national security legislation.

7. This submission sets out the Commission's observations and concerns about the impact on human rights of the reforms suggested in the discussion paper.

[1] The Hon Robert McClelland MP, Attorney General 'Human Rights: A Moral Compass (Speech delivered at the Lowy Institute For International Policy, Sydney, 22 May 2009).

2 Summary

8. The proposed amendments in large part enact the governments responses to the reports of:

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

9. The Commission emphasises the overriding duty of governments to define precisely, by law, all criminal offences in the interest of legal certainty[6] and therefore supports the amendments seek to more precisely define offences within the national security regime.

10. The proposed amendments largely enhance the protection of human rights. However, the Commission has concerns in relation to a number of the proposed changes, including:

    - the retention of the reference to 'threat' in the definition of 'terrorist act'';[7]
    - the breadth of the 'hoax' offence and associated penalty;[8] and
    - the introduction of a power for police to enter a premises without warrant.[9]

11. The Commission is also concerned that some aspects of Australia's National Security Legislation have not been included in the discussion paper and are not otherwise due to be reviewed.

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[2] The Hon. John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008).
[3] Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (September 2007).
[4] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006).
[5] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006).
[6] M Nowak, *U.N. Covenant on civil and Political Rights – CCPR Commentary* (2nd revised edition 2005),p 360
[7] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 47.
[8] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 51.
[9] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 151.

12. This submission discusses:

- treason offences
- urging violence offences
- the definition of 'terrorist act'
- terrorism hoax offence
- the definition of 'advocates'
- offences in relation to terrorist organisations
- pre-charge detention
- entry to premises without warrant
- oversight of the Australian Federal Police
- national security legislative provisions that have not been dealt with by the discussion paper.

3 Recommendations

13. The Commission recommends that:

Recommendation 1: Section 80.1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code)* be amended to require that the person committing the offences contained within that section owe an allegiance to the Commonwealth.

Recommendation 2: The term 'ethnic origin' be added to s 80.2A(1)(c) *Criminal Code* and the proposed section 80.2B(1)(c) *Criminal Code* so that a group may be distinguished by 'race, religion, nationality, national origin, ethnic origin or political opinion'.

Recommendation 3: Recommendation 12-2 the ALRC report, that s 80.2 of the *Criminal Code* be amended, be implemented as it was proposed.

Recommendation 4: The words 'threat of action' be removed from the definition of 'terrorist act' in section 100.1(1) of the *Criminal Code* and a separate offence of threatening to commit a terrorist act be created in Div 101 of the *Criminal Code.*

Recommendation 5: The hoax offence that is proposed to be inserted in the *Criminal Code* be amended so as to limit the nature of the conduct that is captured.

Recommendation 6: Section 102.5 of the *Criminal Code* be redrafted so that it is not an offence to provide to or receive training from a terrorist organisation if that training does not have any connection with a terrorist act.

Recommendation 7: Part 1C, Division 2 of the Crimes Act be amended so that:

1. Disregarded time be limited in nature to that in which the person under arrest is accessing services such as; legal representation, interpreters and medical practitioners and time in which the arrested person is resting, recuperating, eating, sleeping etc and time related to these times;

2. The maximum time by which the investigation period can be extended pursuant to s23DA(7) is 4 days.

Recommendation 8:

1. That the proposed section regarding entry to premises without warrant be amended as follows:

   a. 'suspect' in subparagraph (1) be changed to 'belief';

   b. subparagraphs (3) and (4) be deleted; and

   c. amend subparagraph (5) to refer to a 'serious and imminent threat to a persons life, health and safety'.

2. A mechanism be established whereby the Police report on each use of this power, in the nature of a retrospective warrant application, such applications to be reviewed by the newly named PJC-Law Enforcement

4 Treason Offences

14. The discussion paper proposes to amend the offence of treason by shifting the offence of providing assistance to the enemy, currently in s 80.1 (e) and (f) of the *Criminal Code*, to a new section, 80.1AA of the *Criminal Code*. It is also proposed to amend the offence in the new section 80.1AA to require:

    a. the person owe an allegiance to the Commonwealth; and

    b. the assistance that is provided must be 'material' assistance.[10]

15. The Commission supports both of these amendments

4.1 Allegiance to the Commonwealth

16. As the offence is currently worded, any person anywhere in the world is liable to commit an offence of providing assistance to an enemy at war with Australia. Adding the requirement that to commit the offence of treason, a person must owe an allegiance to the Commonwealth, will limit the extraterritorial ambit of the

[10] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 4-7.

offence so that only a person with a relevant connection to Australia will be caught by the offence. It is not appropriate that such an offence apply, for example, to people legitimately serving in armies who are at war with Australia. The Commission notes that proposal is consistent with the recommendations in the ALRC report and the PJCIS review report.[11]

17. The Commission notes that the proposed amendment is to apply only to the new s 80.1AA of the *Criminal Code* and not to the offences remaining in s 80.1 of the *Criminal Code*. There does not appear to be any basis upon which to distinguish between the offence in sub-paragraphs s 80.1(a)-(d), (g), (h) and those in the new s 80.1AA. The discussion paper does not discuss or explain the reason why there is no proposal to amend s 80.1 to also require that the person owe an allegiance to Australia.

18. The ambit of the offences in both s 80.1 and 80.1AA are currently the same. The concerns raised about the breadth of the offence are equally applicable to those remaining in s 80.1 such as causing the death of the Sovereign etc. Both the Australian Law Reform Commission (ALRC) and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) recommended that it should be a requirement for all offences in s 80.1 that the person owe an allegiance to Australia.[12] The Government supported both of these recommendations.[13]

Recommendation 1: Section 80.1 of the *Criminal Code* be amended to require that the person committing the offences contained within that section owe an allegiance to the Commonwealth.

4.2 Material Assistance

19. As the offences in s 80.1 of the Criminal Code currently stand, a person will commit an offence if they provide assistance to the enemy by 'any means whatever'.[14] This can be direct or indirect assistance including expressions of support and does not have to help the enemy actually engage in war. It therefore captures an extraordinary breadth of conduct.

20. The proposal to remove the words 'by any means whatever' and require 'that the conduct will materially assist the enemy to engage in war with the

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[11] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) Recommendation 11-4 and Parliamentary Joint Committee on Intelligence and Security *Report on Review of Security and Counter-Terrorism Legislation* (2006) Recommendation 6(a).
[12] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) Recommendation 11-4 and Parliamentary Joint Committee on Intelligence and Security *Report on Review of Security and Counter-Terrorism Legislation* (2006) Recommendation 6(a).
[13] Government Response to the Parliamentary Joint Committee on Intelligence and Security, *Report on Review of Security and Counter-Terrorism Legislation.* Tabled December 2008. At http://www.ag.gov.au (viewed 17 September 2009) and Government Response to the Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia.* Tabled December 2008. At http://www.ag.gov.au (viewed 17 September 2009).
[14] *Criminal Code Act 1995* (Cth) s 80.1.

Commonwealth',[15] will appropriately narrow the offence in such a way as to capture conduct that is intended to and does assist the enemy engage in war.

5 Urging violence offences

5.1 Removal of the word 'sedition'

21. The discussion paper proposes to replace the word 'sedition' in the heading of Part 5.1 and the heading of Division 80 of the *Criminal Code* and replace it with the term 'urging violence'. The Commission supports this proposal. The word has traditionally and historically been associated with 'political' crimes.[16] It does not adequately describe the criminality of the offences that now make up Part 5.1 of the *Criminal Code* which include the offences of treason, and urging violence against the Constitution, the Government etc and groups. The removal of the word sedition is consistent with the recommendations of the ALRC.[17]

5.2 Urging violence within a community

22. Section s 80.2(5) of the *Criminal Code* currently provides that a person commits an offence if the person urges a group or groups to use force or violence against another group distinguished by 'race, religion, nationality or political opinion' and the use of the force or violence would threaten the peace, order or good government of the Commonwealth.

23. The offence is directed at conduct that 'urges'. By implication this would be conduct in the nature of imparting information and ideas. The right to freedom of expression is protected by article 19(2) of the ICCPR and can only be limited in appropriate circumstances.

24. The discussion paper proposes to amend the existing offence of 'urging violence within a community' in s 80.2(5) of the *Criminal Code* to:

    a. Add the word 'intentionally' before the word 'urges' in relation to the violence;

    b. Add the requirement that the person urging the violence has the intention that the force or violence will occur;

    c. Add 'national origin' to the distinguishing features of a group for the purpose of the offence;

    d. Extend the offence so that it covers the situation where a person urges another person, as distinct from another group, as the offence currently provides; and

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[15] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 5.
[16] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) chapter 2.
[17] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) Recommendation 2-1.

e. Clarify where a group is urged to use force or violence against another group, only the targeted group needs to be distinguished by race, religion, nationality, national origin or political opinion.[18]

25. The Commission generally supports the proposed changes and notes they are consistent with the recommendations of the ALRC.[19] The Commission recommends, however, that groups distinguished by ethnic origin should also be included in the provisions.

(a) Intention to urge the use of force or violence

26. Section 80.2(5) does not currently provide that it is necessary to prove the person intended to urge the use of force or violence. The Commission agrees it is appropriate to clarify that the fault element in relation to the urging is intention.

(b) Intention that the force or violence will occur

27. At present, it is not necessary to prove that the person intended that the force or violence would occur. The conduct covered by the offence is accordingly expansive. The Commission agrees that by adding the requirement of intention that force or violence be carried out, the offence will be appropriately narrowed.

(c) Including 'national origin' as a distinguishing feature

28. The features by which a group that is the target of force or violence may be distinguished do not currently include 'national origin'. The Commission agrees that there may be people who are targets of violence because of features that do not fall within those identified in the section. For example, people who are Australian citizens but who also identify with a particular national community or a more broadly based community such as one based on ethnicity.

29. The Commission supports the proposal to include 'national origin' in the section. Further the Commission submits that the section should also extend to groups distinguished on the basis of their ethnicity.

30. Australia's obligations under Article 4(a) of International Covenant on the Elimination of all Forms of Racial Discrimination (ICERD) require it to create an offence of incitement of violence against groups on the basis of race, colour and ethnic origin. The *Racial Discrimination Act 1975* (Cth) (RDA) which substantially implements Australia's obligations under ICERD also extends the prohibition on discrimination to the ground of 'ethnic origin'.

31. Accordingly, ss 80.2A and B should be extended to violence that targets groups or members of groups distinguished by ethnic origin.

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[18] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 17-18.
[19] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) Recommendations 9-2, 9-5, 10-2 and 10-4.

32. The addition of both 'national origin' and 'ethnic origin' to the grounds covered by the offence is consistent with the *Crimes Act Amendment (Incitement to Violence) Bill* 2005 introduced by the government whilst it was on 5 December 2005 in opposition.

(d) Urging an individual to use force or violence

33. The offence in s 80.2(5) is currently directed at the urging of groups to use force or violence and does not apply when it is an individual that is being so urged. The Commission agrees that a distinction should not be drawn between the urging of violence by a group and the urging of violence by an individual. The conduct that should be targeted is the urging of violence by anyone in the relevant circumstances. Extending the ambit of the offence to cover the situation where a single person is being urged to use the force or violence is an appropriate measure to protect the rights of those being targeted.

Recommendation 2: The term 'ethnic origin' be added to section 80.2A(1)(c) and the proposed section 80.2B(1)(c) so that a group may be distinguished by 'race, religion, nationality, national origin, ethnic origin or political opinion'.

5.3 Urging violence against an individual

34. The discussion paper proposes the introduction of a new offence of urging violence against an individual. The proposed offence is in the same terms as that of urging violence against a group except that the target of the force or violence is a single person within a group which is distinguished by one of the listed features.

35. The Commission supports the introduction of an offence where a person is the subject of force or violence because they are a member of a group which is distinguished by race, religion, nationality, national origin or political opinion. As indicated above, the Commission also believes it is appropriate to extend the bases upon which the group is distinguished to include 'ethnic origin'.

36. The Commission has consistently called for a comprehensive regime of Commonwealth legislation designed to prohibit acts of racial or religious violence in order to fulfil Australia's obligations under international law,[20] particularly:

    a. Article 4 of ICERD which requires that there be an offence of incitement to violence or discrimination against groups of another colour or ethnic origin, punishable by law; and

    b. Article 20 of International Covenant on Civil and Political Rights (ICCPR) which requires any advocacy of national, racial or religious hatred that constitutes incitement hostility or violence be prohibited by law.

[20] Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991), Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998) and Human Rights and Equal Opportunity Commission, *Isma—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004).

37. The Commission supports the introduction of an offence directed at prohibiting violence against individuals in these circumstances. However, it has some concerns regarding the location of the offence within Chapter 5 of the *Criminal Code* which is entitled 'the Security of the Commonwealth' and contains the bulk of the Commonwealth's anti-terrorism provisions. The Commission believes that intergroup violence should be understood as separate and distinct from acts of terrorism. The organisation of the *Criminal Code* should reflect this. Further consideration should be given to relocating the urging violence offences to another Chapter of the *Criminal Code.*[21]

5.4 Defence to acts of treason and urging violence for acts done in good faith

38. The discussion paper proposes to amend s 80.3 of the *Criminal Code* to include additional factors to which the court may have regard to when considering if a person has a 'good faith' defence to the offences of urging violence.[22]

39. Currently, there is a defence available to those who commit an offence of treason under s 80.1 and sedition (urging violence) under s 80.2 of the *Criminal Code*. The defence in s 80.3 is available where the acts were done in defined circumstances which are broadly referred to as being done in 'good faith'. Subsection 80.3(2) sets out various matters which the court may have regard to when considering the defence. It is proposed to add an additional subsection which will set out a number of factors to which the court may have regard when considering a defence to the urging violence offences only.[23]

40. The additional factors are centred around works of expression such as art, publications and public statements.

41. The proposal is designed to overcome the concerns raised regarding the breadth of the urging violence offences and their imposition on the right to freedom of expression. In their current form the urging violence offences inappropriately capture legitimate activities and restrict the right to freedom of expression.[24]

42. The Commission supports the intent behind the proposed amendment but believes it would be better to protect the right to freedom of expression by amending the offences so that legitimate conduct is not prohibited rather than relying on a defence to excuse the conduct.

43. The Commission supports the ALRC's recommendation that the offence be reframed to obviate the need for a defence to protect legitimate freedom of expression.[25] The ALRC proposed that s 80.2 should be amended to provide that, the same factors as are proposed to be inserted as the new subsection 80.3(2),

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[21] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) 196-215.
[22] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 29.
[23] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 29.
[24] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 29.
[25] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006) Recommendation 12-2.

should be taken into account by the court when determining whether a person intended that the urged force or violence would occur.[26]

Recommendation 3: Recommendation 12-2 the ALRC report, that Section 80.2 of the *Criminal Code* be amended, be implemented as it was proposed.

6 Amendment to the Definition of Terrorist Acts

6.1 Broadening of the extent of 'harm' in the definition of 'terrorist act'

44. The discussion paper suggests that the definition of 'terrorist act' in s 100.1(2) of the *Criminal Code* be extended to cover any serious harm rather than just physical harm.

45. The Commission agrees that there is no relevant basis for distinguishing between types of harm that may arise from terrorist acts. Psychological harm is a very real outcome of terrorist acts. At the same time the Commission recognises the breadth of activity and conduct that is prohibited by virtue of the definition of 'terrorist act' and that any broadening of that definition should be carefully scrutinised. In this regard the Commission notes the limitations placed on the definition by the section itself, notably:

    a. the need for it to be serious harm;

    b. the harm must be caused in circumstances where the person doing the act must have the intention of advancing a political, religious or ideological cause; and

    c. the harm is not caused by an act or threat done as advocacy, protest, dissent or industrial action and in that context was not done with intent to cause the harm.

46. The Commission believes that with these qualifiers the broadening of the definition to capture those terrorist acts that cause serious harm other than physical harm is appropriate.

6.2 Threat of action

47. The definition of 'terrorist act' in s 100.1 of the *Criminal Code* currently includes 'threat of action'. The discussion paper notes the problem that has been identified by the inclusion of threats in the current definition – namely that it may require that the threat itself cause serious harm (rather than the offence simply being a threat to do an act that would cause serious harm).[27]

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

[27] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 47.

48. The discussion paper proposes to resolve the uncertainties surrounding the inclusion of 'threat of action' in the definition by adding to each of the items in the list of the effects, the words 'or is likely to cause' so that each effect will include the likelihood that it will occur. The Commission is of the view that rather than clarifying the definition, the proposed amendment compounds the uncertainty.

49. The proposed wording of the section includes acts that are not threats and do not actually cause harm, but are 'likely to cause harm'. To the extent that failed terrorist acts should be criminalised, these will fall within the provisions of the *Criminal Code* dealing with attempts.[28] This amounts to a broadening of the definition and therefore extends the ambit of the many offences which have reference to it.

50. The Commission therefore opposes the proposed amendment and remains of the view, shared by the Security Legislation Review Committee (the Sheller Committee)[29] and the PJCIS[30] that the reference to 'threat' in the definition of 'terrorist act' is confusing and should be removed, and that a separate offence of threatening to commit a terrorist act should be created.

51. The discussion paper suggests that removing 'threat of action' from the definition of terrorist act 'dilutes the policy focus of criminalising threat of action within Division 101'.[31]

52. The Commission does not agree. A distinct threat offence could be included in Div 101 of the *Criminal Code* as recommended by SLRC and PJCIS without any dilution of policy focus or intent.[32] As is recognised by both the SLRC and PJCIS committees and in the discussion paper, the commission of an act and the threat to commit the act are conceptually distinct. They should be treated as such.

Recommendation 4: The words 'threat of action' be removed from the definition of 'terrorist act' in section 100.1(1) of the *Criminal Code* and a separate offence of threatening to commit a terrorist act be created in Div 101 of the *Criminal Code*.

7 Terrorism Hoax

53. The discussion paper proposes to create a new and separate offence of terrorism hoax. A person will commit such an offence if they engage in conduct with the intention of inducing a false belief, in any person, that a terrorist act has occurred, is occurring or is likely to occur.[33]

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[28] *Criminal Code Act 1995* (Cth) s 11.
[29] Sheller Committee, *Report of the Security Legislation Review Committee* (2006) Recommendations 7 and 8.
[30] Parliamentary Joint Committee on Intelligence and Security *Report on Review of Security and Counter-Terrorism Legislation* (2006) Recommendation 10.
[31] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 49.
[32] Sheller Committee, *Report of the Security Legislation Review Committee* (2006) Recommendations 7 and 8 and Parliamentary Joint Committee on Intelligence and Security *Report on Review of Security and Counter-Terrorism Legislation* (2006) Recommendation 10.
[33] New s101.7 Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 50.

54. The Commission acknowledges that a separate hoax offence may be justified in circumstances where the hoax is made with the intention of causing serious harm or damage to property and with the intention of coercing, intimidating or influencing either governments, public authorities or significant sections of the public. The Commission is however, concerned that the proposed offence will capture an extraordinary breadth of 'hoaxes' including those without any of the intention elements ordinarily required in relation to a terrorist act. The ambit of the proposed offence will potentially limit the right to freedom of expression provided for in article 19 of the *International Covenant on Civil and Political Rights* (ICCPR).[34] The offence may capture misguided pranks played on a single person or a very small section of the public where there is no resulting fear, harm or damage. For example teenagers playing a prank on their parents about a supposed terrorist act that has already occurred could be included. The Commission's view is that it is not appropriate to criminalise such conduct.

Recommendation 5: The hoax offence that is proposed to be inserted in the *Criminal Code* be amended so as to limit the nature of the conduct that is captured.

8 Definition of 'advocates' in respect of the doing of a terrorist act by an organisation – listing of terrorist organisations

55. Section 102.1 of the *Criminal Code* allows for an organisation to be proscribed as a terrorist organisation where it advocates doing a terrorist act. 'Advocates' includes praising a terrorist act in circumstances where there is a 'risk' that such praise might have the effect of leading a person to engage in a terrorist act. The provision limits the right to freedom of expression provided for in article 19 of the ICCPR.

56. The discussion paper proposes to amend 'risk' to 'substantial risk'.[35]

57. The amendment is proposed to overcome concerns recognised by the Sheller Committee and PJCIS regarding the breadth of the circumstances in which an organisation will be found to have advocated a terrorist act and therefore be liable for proscription under s102.1(2)(b) of the *Criminal Code.*[36]

58. The ambit of the section in its current form means that an organisation could be found to be advocating a terrorist act when there is the slightest risk that a person might engage in a terrorist act as a result of praise of a terrorist act.

59. The Commission supports the amendment so that the circumstances in which an organisation may be found to have advocated the doing of a terrorist act are more confined and the limitation placed on the right to freedom of expression is reduced.

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[34] International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).
[35] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 57.
[36] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 57.

9 Offences in relation to terrorist organisations

9.1 Offence of providing support to a terrorist organisation

60. In relation to the offence of providing support to a terrorist organisation in section 102.7 of the *Criminal Code*, the discussion paper proposes to amend the offence to require that the support provided must be 'material' support.[37] The Commission supports this amendment.

61. As it stands the potential meaning of the word 'support' in the context of this offence may be inappropriately broad. As 'support' is not defined in the *Criminal Code* it could include indirect support which could in turn include conduct such as the publication of views favourable to the organisation.[38] This may disproportionally restrict the right to freedom of expression. By requiring that the support is material support, the scope of the offence will be narrowed.

62. It is also proposed to insert a new subsection 102.7(aa) setting out that the material support must be provided by the person with the intention that the support help the organisation engage in a terrorist act. Currently there is no requirement that the person providing the support has such specific intention, giving the offence an unduly broad scope. The Commission also supports this amendment.

9.2 Offence of providing training to or receiving training from a terrorist organisation

63. Section 102.5 of the *Criminal Code* makes it an offence to provide training to a terrorist organisation. The discussion paper proposes amendments to address concerns that the offence may apply to legitimate activities such as those provided by humanitarian aid organisations.[39]

64. The amendment proposed is a scheme of ministerial authorisation for aid organisations. This will exempt those organisations from the offences and apply when the Attorney-General is satisfied that the benefits to the community outweigh any benefit that could be received by a terrorist organisation as a result of that aid.[40]

65. It is proposed that such authorisation can be revoked and cannot last for more than 3 years.

66. While the Commission recognises that the proposed scheme is an improvement on the current position, it has a number of significant concerns with the continued scope of the offence.

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[37] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 63.
[38] Sheller Committee, *Report of the Security Legislation Review Committee* (2006) [10.50].
[39] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 67.
[40] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 69.

67. First, the offence continues to apply to all training, even where such training is not connected with, intended or likely to assist with the commission of terrorist acts. It therefore covers medical or humanitarian training.

68. The Sheller Committee recommended that the offence in s 102.5 be urgently redrafted and that it should be an element of the offence that training is either connected with a terrorist act or that the training is such that it would reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act.[41] The Commission supports that recommendation as it would ensure that the offence is properly limited.

69. Second, the ministerial authorisation scheme is unlikely to enable other than well-recognised intentional aid organisations to be so authorised. Many aid organisations will not be willing or able to make application and submit information sufficient to satisfy the minister of the nature and character of their aid delivery. There may be a number of reasons for this, including concerns about ensuring the safety of personnel working in communities in which terrorist organisations may also be present. Aid organisations may also be reluctant to raise the presence of a terrorist organisation in communities in which they provide humanitarian training for fear of exposing themselves to prosecution for such work.

70. Third, the proposed authorisation scheme adds complexity to what is already recognised to be a complex section.[42] Accordingly, the Commission submits that it is preferable that it be redrafted to focus on training that supports terrorist activities.

Recommendation 6: Section 102.5 of the *Criminal Code* be redrafted so that it is not an offence to provide training to a terrorist organisation if that training does not have any connection with a terrorist act.

9.3 Offences regarding terrorist organisation not dealt with by the discussion paper or scheduled for review

71. There are a number of provisions relating to terrorist organisation offences about which concerns have previously been raised and recommendations made, which have not been addressed in the discussion paper.

72. Although the government has supported some of the recommendations of the PJCIS and SLRC in relation to the offences relating to terrorist organisations, there are a number of recommendations of both of these committees to which the government has either not responded or is opposed.[43] These provisions are also not scheduled for review.

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[41] Sheller Committee, *Report of the Security Legislation Review Committee* (2006) [10.42].
[42] Parliamentary Joint Committee on Intelligence and Security *Report on Review of Security and Counter-Terrorism Legislation* (2006) [5.79].
[43] Government Response to the Parliamentary Joint Committee on Intelligence and Security, *Report on Review of Security and Counter-Terrorism Legislation.* Tabled December 2008. At http://www.ag.gov.au (viewed 17 September 2009).Whilst the Government has not responded directly to the Sheller report, in its response to the PJCIS Review it noted the report had taken into account the recommendations made by the Sheller Committee.

73. The Commission is particularly concerned that recommendations concerning the following offences are not dealt with in the discussion paper and not scheduled for review:

    - intentionally being a member of a terrorist organisation[44]
    - training or receiving training from a terrorist organisation[45]
    - getting funds to or from a terrorist organisation[46]
    - providing support to a terrorist organisation[47]
    - financing a terrorist organisation.[48]

The Commission believes that the recommendations of the Sheller Committee and the PJCIS in relation to these offences should be implemented as soon as possible.

10 Pre-charge detention

10.1 Threshold for state of mind of arresting officer

74. The discussion paper seeks comment on the inconsistency between the state of mind of that is required to be held by the relevant officer in ss 3W(1), 23C(2)(b) and s23CA(2)(b) of the *Crimes Act 1914* (Cth) (Crimes Act).

75. Section 3W(1) allows an officer to arrest a person without warrant if the officer believes on reasonable grounds that the person committed the offence. Sections 23C(2)(b) and s23CA(2)(b) provide a power to an arresting officer to continue to hold a person under arrest where they reasonably suspect that the person committed an offence other than the one for which they were arrested.

76. There does not appear to be any valid reason to distinguish between the power to arrest without warrant (under s 3W(1)) in relation to the first offence and the power to maintain that arrest (under s23C(2)(b) and s23CA(2)(b)), still without warrant, for the second offence.

77. The Commission therefore recommends that the 23C(2)(b) and s23CA(2)(b) be amended to provide that the relevant officer must believe on reasonable grounds

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[44] Sheller Committee, *Report of the Security Legislation Review Committee* (2006) Recommendation 11 and Parliamentary Joint Committee on Intelligence and Security *Report on Review of Security and Counter-Terrorism Legislation* (2006) Recommendation 15.
[45] Sheller Committee, *Report of the Security Legislation Review Committee* (2006) Recommendation 12 and Parliamentary Joint Committee on Intelligence and Security *Report on Review of Security and Counter-Terrorism Legislation* (2006) Recommendation 16.
[46] Sheller Committee, *Report of the Security Legislation Review Committee* (2006) Recommendation 13.
[47] Sheller Committee, *Report of the Security Legislation Review Committee* (2006) Recommendation 14.
[48] Sheller Committee, *Report of the Security Legislation Review Committee* (2006) Recommendation 16 and Parliamentary Joint Committee on Intelligence and Security *Report on Review of Security and Counter-Terrorism Legislation* (2006) Recommendation 21.

that the person committed the other offence. The higher standard is preferable to ensure the least interference with the right to freedom from arbitrary detention provided for in article 9(1) of the ICCPR.

10.2 Length of investigation period

78. Part 1C, Division 2 of the Crimes Act contains various provisions in relation to the powers of detention of persons arrested for Commonwealth offences. Prior to the introduction of Part 1C of the Crimes Act, the common law required that once a person was arrested, police had no power to detain that person while they conducted further investigations. That meant, the investigations had to be conducted prior to the arrest. Once arrested, the person had to be charged. The common law position was modified, by the introduction of Part 1C, in order to assist law enforcement.

79. Pursuant to article 9(1) of the ICCPR, a person has the right not to be arbitrarily detained. In order to avoid violation of this right, the length of time for which a person can be detained must be limited and proportionate.

80. Pursuant to s 23CA of the Crimes Act a person arrested for a terrorism offence can be detained until the 'investigation period' expires. Under s 23CA(4) of the Crimes Act the investigation period expires 4 hours after the arrest, unless it is extended under s 23DA.

81. Section 23DA allows an officer to apply for an extension of the investigation period. Section 23DA(7) provides that any number of applications can be made for extension of the investigation period but the total time by which the investigation period can be extended is 20 hours.

82. Therefore, the maximum investigation period is 24 hours. However, certain categories of time are disregarded when calculating when the 24 hours expires. These categories of time are set out in s 23CA(8)(a) to (m). They include such things as time in which a person sleeps, receives medical attention, is intoxicated etc.[49] It also includes time in which certain forensic activities and other investigations are conducted.[50] Under s23CA(8)(m) time can be disregarded if it is time during which questioning of the person is reasonably suspended or delayed and is within a period specified under s 23CB of the Crimes Act.

83. Section 23CB allows an officer to bring an application to have time specified by a magistrate as disregarded time. At present, there is no limit to the amount of time which can be disregarded nor on the number of times an application can be made.

84. This means that in fact the investigation period is currently unlimited.

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[49] *Crimes Act 1914* (Cth) s 23CA(8)(d), (e) and (j)
[50] *Crimes Act 1914* (Cth) s 23CA(8)(g), (k) and (l)

85. The discussion paper proposes to limit the total amount of time which can be specified by a magistrate under s23CA(8)(m) to a maximum of 7 days. It does not propose to place a limit on the other types of disregarded time in s 23CA.[51]

86. Whilst the period of 7 days proposed as a cap appears to have arisen as a result of a comment in the Clarke report,[52] the comment was made in the context of a much broader discussion. As the Clarke report identifies, the time provided for in s 23CA(8)(m) is entirely different in character to that in s 23CA(8)(a) – (l). It is 'additional investigation time'.[53]

87. The Commission is of the view that there is duplication between an application under the s 23CB and s 23DA in that both are applications for further time in which to conduct investigations. This was recognised in the Clarke report where was proposed that 's23CA(8)(m) and 23CB should be removed from the Crimes Act: in lieu thereof all applications for extended time would be made under s 23DA, with a reconsideration of the time limit'.[54]

88. The reasoning in the Clarke report in relation to the nature of the time provided for in subparagraph 23CA(8) (m) can equally be applied to subparagraphs 23CA(8)(f), (g), (h), (i), (k) and (l) which relate to time in which various other forensic and investigation activities occur. These are all in the nature of extensions to the investigation period, and should be contrasted against the subparagphs 23CA(8)(a), (b), (c), (d), (e) and (j) which relate to time to allow the arrested person to do certain things or access certain services.

Recommendation 7: Part 1C, Division 2 of the Crimes Act be amended so that:

1. Disregarded time be limited in nature to that in which the person under arrest is accessing services such as**;** legal representation, interpreters and medical practitioners and time in which the arrested person is resting, recuperating, eating, sleeping etc and time related to these times**;**

2. The maximum time by which the investigation period can be extended pursuant to s23DA(7) is 4 days.

89. In the alternative to the above recommendation, the Commission recommends that there be a 3 day cap on all time disregarded under s 23CA(8).

90. One further amendment that is proposed in the discussion paper is to require that an application to either have time specified as disregarded time or to extend the investigation period must be brought before a magistrate. Currently, a justice of the peace or a bail justice may also hear the applications. The Commission supports the recommendation to amend the legislation to ensure that the

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[51] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 127.
[52] The Hon. John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008) 249.
[53] The Hon. John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008) 246.
[54] The Hon. John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008) 246.

application is heard by a magistrate. This change offers better protection of the prohibition on arbitrary detention in article 9(1) of the ICCPR.

11 Entry to premises without warrant

91. Part 3 of the discussion paper inserts a new power of entry to premises. The new section, 3UEA of the Crimes Act allows a police officer to enter premises if they suspect on reasonable grounds that a thing relevant to a terrorism offence is on the premises, it is necessary to search for and seize the thing to prevent it from being used in connection with a terrorism offence and it is necessary to do this without a warrant because there is a serious and imminent threat to a persons life, health or safety.[55]

92. The new section further empowers the officer to:

    a. secure the premises until they can obtain a warrant if, during the course of their search, they find another thing that the officer suspects on reasonable grounds to be relevant to another offence; and

    b. seize any other thing if the officer suspects on reasonable grounds that it is necessary to seize it to protect a persons life, health or safety and without warrant because the circumstances are serious and urgent.[56]

93. The proposed new power is a significant infringement on an individual's right to freedom from arbitrary interference with his privacy, family and home set out in article 17 of the ICCPR.

94. The Commission recognises that there may be circumstances where the Australian Federal Police will need to enter premises where they would not have time to make application for a warrant, such as cases of emergency in order to prevent death or serious injury. The discussion paper gives two examples of laws which authorise entry to premises without warrant in such circumstances. Both of these laws require that the officers hold a belief as to the relevant circumstances.[57]

95. The Commission does not agree that such entry should be allowed on the basis of a reasonable suspicion held by the officer but rather should require the officer to hold a reasonable belief that the relevant circumstances exist. Whilst it may be appropriate in the circumstances of obtaining a warrant to enable an officer to swear the information on the basis of a suspicion, it is not acceptable in a situation where there is no independent scrutiny of that information.

96. As noted in the discussion paper, the State Laws referred to do not allow for the officers to search the premises once entered, nor do they allow the officers to

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[55] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 152-153.
[56] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 152.
[57] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 151.

secure the premises until they have obtained a warrant in relation to evidence of other offences found during that search.[58]

97. The ambit of the proposed section is, in that regard, significantly broader than those in NSW and ACT laws and should be narrowed to at least the same ambit as those provisions.

Recommendation 8:

1. That the proposed section regarding entry to premises without warrant be amended as follows:

   a. 'suspect' in subparagraph (1) be changed to 'belief';

   b. subparagraphs (3) and (4) be deleted; and

   c. amend subparagraph (5) to refer to a 'serious and imminent threat to a persons life, health and safety'.

2. A mechanism be established whereby the Police report on each use of this power, in the nature of a retrospective warrant application, such applications to be reviewed by the newly named PJC-Law Enforcement.

12 Oversight of the Australian Federal Police by the PJC-Law Enforcement

98. Chapter 5 of the discussion paper provide for the establishment of a Parliamentary Joint committee on Law Enforcement with the aim of enabling the committee to provide broad oversight of the Australian Federal Police and the Australian Crime Commission and examine trends and changes in criminal activities. It is proposed to achieve this by extending the functions of the existing Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC).[59]

99. The Commission supports the proposal to extend the function of the PJC-ACC to include oversight of the Australian Federal Police in the manner proposed.

13 National Security Legislative provisions not dealt with by the discussion paper

100. A number of crucial provisions of the national security legislation regime do not form part of the proposed amendments. It is recognised that many of those provisions which have not been considered in the discussion paper have had alternative review mechanisms identified. These include:

[58] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 151.
[59] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 323.

a. preventative detention orders - proposed to be reviewed by the Council of Australian Governments (COAG);[60]

b. control orders - proposed to be reviewed by COAG;[61]

c. police powers to stop, search and seize in 'prescribed security zones' and Commonwealth places - proposed to be reviewed by COAG;[62]

d. proscription of terrorist organisations – proposed to be reviewed by COAG;[63]

e. the powers of ASIO to collect intelligence concerning the threat of terrorism (including warrants to detain and question a person) – sunset clause for expiration in 2016;[64]

f. the offence of associating with terrorist organisations – proposed to be reviewed by the Legislation Monitor once established;[65] and

g. strict liability provisions applied to serious criminal offences that attract the penalty of imprisonment and terrorist organisation offences - proposed to be reviewed by the Legislation Monitor once established.[66]

101. The Commission is concerned that the ASIO powers to detain and question a person to collect intelligence are not due for review until 2016. The Commission recommends that these provisions be referred to the Legislation Monitor for review as soon as possible.

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[60] Details and process for Council of Australian Governments' (COAG) review of counter-terrorism legislation', Council of Australian Governments' Meeting (10 February 2006), Attachment G. At http://www.coag.gov.au/coag_meeting_outcomes/2006-02-10/docs/attachment_g_counter_terrorism.rtf (viewed 31 August 2009).
[61] COAG, above.
[62] COAG, above.
[63] Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations 'under the Australian Criminal Code.* (September 2007) Recommendation 7, accepted by Government in its Response to that report. Government Response to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations 'under the Australian Criminal Code.* Tabled December 2008. At http://www.ag.gov.au (viewed 17 September 2009).
[64] *Australian Security Intelligence Organisation Act* 1979 (Cth) s 34ZZ.
[65] Parliamentary Joint Committee on Intelligence and Security *Report on Review of Security and Counter-Terrorism Legislation* (2006) Recommendation 19. Accepted by the government in its response to that report. Government Response to the Parliamentary Joint Committee on Intelligence and Security, *Report on Review of Security and Counter-Terrorism Legislation.* Tabled December 2008. At http://www.ag.gov.au (viewed 17 September 2009).
[66] Parliamentary Joint Committee on Intelligence and Security *Inquiry into the proscription of 'terrorist organisations 'under the Australian Criminal Code.* (September 2007) Recommendation 5. Accepted by the government in its response to that report. Government Response to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations 'under the Australian Criminal Code.* (September 2007). Tabled December 2008. At http://www.ag.gov.au (viewed 17 September 2009) and Parliamentary Joint Committee on Intelligence and Security *Report on Review of Security and Counter-Terrorism Legislation* (2006) Recommendation 19. Accepted by the government in its response to that report. Government Response to the Parliamentary Joint Committee on Intelligence and Security, *Report on Review of Security and Counter-Terrorism Legislation.* Tabled December 2008. At http://www.ag.gov.au (viewed 17 September 2009).

102. There are a number of provisions of the national security legislation regime that are not currently set down for review. Of most concern in this regard are the offences relating to terrorist organisations. In particularly, membership of, receiving training from, getting funds to or from, providing support to and financing of. The Commission recommends that these measures also be referred to the Legislation Monitor for review as soon as possible.