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# Shadow Report to Australia's Common Core Document

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United Nations Human Rights Committee

29 August 2008

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## EXECUTIVE SUMMARY

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This Shadow Report responds to Australia's Common Core Document, prepared by the Howard Government and reporting on the period from June 1997 to June 2006. Where relevant, the Law Council's report will comment on developments occurring after June 2006. The Law Council acknowledges some positive measures introduced by the Rudd Government since its election in November 2007 and will draw attention to such developments where relevant.

### ***Protection and Promotion of Civil and Political Rights in Australia***

Australia's legal system and democratic institutions of government provide a strong, but far from comprehensive, foundation for the protection and promotion of basic rights.

Insufficient prominence is afforded to human rights within the existing legislative and executive federal framework, either as set of principles to which the arms of government must have regard or as a set of principles by which the arms of government are bound.

This lacuna of protection has been exacerbated by Australia's ambivalent, and at times dismissive, attitude towards the United Nations (UN) treaty body system and its authoritative role in determining whether States have adhered to their international human rights obligations.

The Law Council of Australia is disappointed that Australia's Common Core Document fails to candidly and comprehensively identify short-comings in Australia's approach to the implementation of its international human rights obligations.

In this Shadow Report, the Law Council will draw the UN Human Rights Committee's attention to the following concerns regarding the promotion and protection of civil and political rights in Australia:

### ***Article 1 – Right to Self-Determination***

The rights of Aboriginal and Torres Strait Islanders to self-determination have been undermined by a number of laws and policies introduced during the reporting period, including:

- a policy of objection to international accords, agreements and declarations which recognise the right of indigenous peoples to self-determination;
- the abolition of the Aboriginal and Torres Strait Islander Commission, a federal representative mechanism for Aboriginal and Torres Strait Islander people which facilitated indigenous participation in policy development and implementation;
- changes to the Northern Territory Aboriginal lands permit system, which limit the control exercised by Aboriginal people in the Northern Territory (NT) over who may enter their traditional lands; and
- amendments to legislation regulating the use of the Aboriginal Benefits Account, diminishing the ability of Aboriginal people to exercise control over their resources and pursue their economic development.

Recently developments in this area – including the Australian Government's formal apology to the victims of the Stolen Generation and an expression of support for the

*UN Declaration of the Rights of Indigenous Persons* - give rise to some optimism for change.

### **Article 2(1) – Non-discrimination and equality**

A number of features of the Australian legal system continue to discriminate against, disadvantage or inadequately protect the rights of indigenous Australians. These include:

- changes to the federal *Crimes Act 1914* (Cth) precluding Australian courts from considering an offender's cultural background or customary laws when making bail or sentencing decisions;
- the suspension of the federal *Racial Discrimination Act 1975* (Cth) and NT Anti-Discrimination laws from all actions carried out under the NT Emergency Response Legislation including:
  - the compulsory acquisition of Aboriginal townships in the NT;
  - weakening of the land permit system;
  - quarantining of welfare payments; and
- weakening the doctrine of native title by making native title land subordinate and subject to almost any other form of land title in Australia.

### **Article 2(2) – Giving effect to rights and remedies for breach**

Contrary to what is asserted in the Common Core Document, Australia's democratic institutions and specialist human rights agencies are not sufficiently or adequately empowered to protect human rights, or to provide effective remedies for human rights violations.

While specific remedies exist under domestic law for violations of a range of rights, Australian law still fails to provide the comprehensive coverage and adequate redress required to meet Australia's obligations under article 2(3).

Although Australia has a competent and independent judiciary of which to be proud, the ability of Australian courts to identify, prohibit and punish human rights violations is limited by the fact that in Australia, judicial decision making exists within a framework that makes little reference to international human rights law.

Despite their best efforts, specialist human rights bodies, like the Human Rights and Equal Opportunities Commission, lack both the formal power and mandate and the political influence necessary to ensure their findings and recommendations are acted upon.

The time is right for the Australian Government to follow the lead of the Australian Capital Territory (ACT) and Victoria and actively consider enacting a legislative or constitutional statement of human rights. There is a need for a specific instrument at the federal level to help Australia meet its obligations under this article.

### **Article 6 – Right to Life**

The Common Core Document fails to provide an accurate picture of Australia's progress towards meeting its international obligations to oppose the use of the death penalty overseas, particularly in the context of its mutual assistance and agency to agency assistance policies. This is evident by:

- the existence of imprecisely framed legislative provisions which allow the Commonwealth Attorney General a broad discretion to authorise the provision

- of formal assistance to foreign governments in the investigation and prosecution of offences that attract the death penalty;
- the vacuum of legislative or policy guidance on the circumstances in which Australian police can provide agency to agency intelligence and assistance to overseas law enforcement authorities which may lead to a person being charged with an offence that is punishable by death; and
- the confusion surrounding the nature and extent of Australia's international obligations in this area, as a party to both the ICCPR and the Second Optional Protocol.

The Law Council welcomes the Committee's guidance regarding the scope of Australia's international obligations in this area.

### **Article 9 – Right to Security and Liberty of Person**

A pervasive and persistent erosion of article 9 rights has occurred during the reporting period and in subsequent years, primarily due to the introduction of counter-terrorism measures following 11 September 2001.

Where a counter-terrorism measure has resulted in a restriction or limitation of a right protected under the ICCPR, the Australian Government has regularly failed to demonstrate that the restriction is *necessary* to protect the Australian community, or that the restrictive impact of the measure is *proportionate* to its protective aim.

The restrictive impact of the Australian Government's counter-terrorism measures on the right to liberty and security of person is evidenced by the introduction of:

- new terrorist related offences, such as engaging in a terrorist act or financing terrorism, that are dependent upon broad, imprecise definitions;
- new investigative powers for the federal police, authorising the detention of persons who are suspected of, but have not been charged with, a criminal offence, for an effectively, extended, undefined period;
- a system of control orders and preventative detention orders, authorising the detention or restriction of liberty of persons not charged with a criminal offence, for the purpose of preventing a potential terrorist related offence;
- changes to laws regulating bail where a person has been charged with terrorist related offences, reversing the long-held presumption that a person charged with a criminal offence is entitled to be released prior to trial;
- new powers for Australia's domestic intelligence agency, ASIO, to question and detain persons not charged with or suspected of a criminal offence but thought to have information relevant to the collection of intelligence in relation to a terrorist offence.

In addition to these anti-terror provisions, the Australian policy of mandatory immigration detention also continues to offend the right to liberty and security of person.

Amendments to the *Migration Act* made in 2005 broaden the Minister's discretion to grant visas and order alternative forms of detention, however, a system of mandatory detention of 'unlawful citizens' without adequate judicial oversight remains.

Recently announced reforms indicate a shift away from mandatory detention for all unauthorised arrivals and reflect a commitment to using detention as a last resort. However, under the new policy, mandatory detention will continue for some categories of unauthorised arrivals.

### ***Article 10 - Treatment in Detention***

Australia's immigration detention facilities, including off-shore facilities, often fail to live up to international standards of treatment in detention. Detention conditions, and the response to mental health problems arising from indefinite detention, continue to be reported as substandard, despite improvements being made in 2005. It is hoped recently announced reforms to Australia's immigration policy will result in the implementation of alternatives to detention and lead to improved mental health outcomes.

### ***Article 12 - Freedom of Movement***

New means of imposing restrictions on freedom of movement, such as control orders, were introduced during the reporting period, purportedly as a way of reducing the risk of terrorist activity.

The control orders regime, allows for a person's liberty to be restricted on the basis of evidence which does not amount to a criminal charge and which has only been established on the balance of probability.

### ***Article 13 – Expulsion of Aliens***

Some avenues for review exist allowing non-citizens to challenge a decision to expel them from Australia. However, non-citizens continue to face significant barriers when seeking access to the reasons for their expulsion and having their case reviewed by a competent legal authority.

### ***Article 14 – Right to Fair Trial***

Counter-terrorism measures introduced since 11 September 2001 have undermined the fair trial principles underlying the Australian criminal justice system. Key examples include:

- the control order and preventative detention order regime which allow for the pre-emptive deprivation or restriction of liberty of persons who have not been charged or convicted of a criminal offence and who have not been given a fair opportunity to understand the basis for nor to challenge the order made against them;
- the erosion of the right to silence and privilege against self-incrimination as a result of coercive information gathering powers vested in law enforcement and intelligence agencies;
- laws which limit access to independent legal representation by effectively requiring lawyers to be issued with a security clearance before participating in cases involving classified or security sensitive information; and
- laws which allow the Minister to definitively determine that the disclosure of certain evidence may be prejudicial to national security, in a manner that has the potential to impact on the right to a public trial.

Mandatory sentencing regimes, which continue to exist in Western Australia and under the Commonwealth *Migration Act*, violate Australia's obligations under article 14 by removing the court's discretion to decide a penalty which fits the individual circumstances of the offender and the crime.

Absent from the Common Core Document is any mention of a number of public criticisms of the judiciary and the manner in which the judiciary is appointed in Australia. Such criticisms, particularly when made by the executive Government, have the potential to undermine public confidence in the independence of the judiciary.

### ***Article 17 – Right to Privacy***

During the reporting period, law enforcement and intelligence agencies have been granted extended powers to intercept and access telecommunications made to or from a broad range of persons – including those who are not involved in, or associated with, the commission of a criminal offence. Appropriate safeguards and protections are not in place to ensure that the powers are only used when strictly necessary and only interfere with privacy rights to the extent required to achieve a clearly identified and legitimate aim.

### ***Article 19 – Freedom of Opinion and Expression***

New sedition offences were introduced as part of the Australian Government's counter-terrorism measures, making it an offence, for example, to 'urge another to engage in violence against the community'. Australia reports that these offences constitute a legitimate restriction on the freedom of opinion and expression contained in article 19. The Law Council disputes this view on the basis that the new offences:

- fail to satisfy the test of necessity in article 19(3) and are a disproportionately restrictive means of preventing new and emergency threats of terrorism;
- have a chilling effect on the publication of material relevant to the public debate on national security and terrorism; and
- rely on terms that are inadequately defined and overly broad, providing an unfettered discretion on prosecuting authorities to determine what conduct constitutes an offence.

Changes to the classification regime also threaten the enjoyment of the right to freedom of opinion and expression in Australia.

### ***Article 22 – Freedom of Association***

Under the counter-terrorism measures introduced following September 2001, it is an offence to be a member of or associate with a terrorist organisation. By shifting the focus of criminal liability from a person's conduct to their associations, the terrorist organisation offences unduly burden freedom of association and are likely to have a disproportionately harsh effect on certain sections of the population who, simply because of their familial, religious or community connections, may be exposed to the risk of criminal sanction.

The restrictive impact of these offences on freedom of association is compounded by the procedures in place for proscribing an organisation as a 'terrorist organisation'. The Minister may proscribe an organisation as a terrorist organisation by regulation. No Act of Parliament is required, no clear criteria for proscription have been publicly stated and members of the organisation are not afforded the opportunity to be heard. This gives rise to the dangerous perception that the proscription power is a convenient political device and potentially exposes a certain class of people to criminal liability without affording them natural justice.

### ***Article 26 – Freedom from Discrimination***

The Common Core Document fails to disclose the many Australian laws that discriminate against same sex couples and their children. These laws prevent same sex couples from accessing the same financial entitlements as heterosexual couples and pervade many aspects of everyday life. Key to this experience of discrimination is the exclusion of same sex couples from the legal definition of 'marriage'. The Australian Government is now committed to removing discrimination against same sex couples in federal laws, however retains the previous Government's position in respect of same-sex marriage.

## PROPOSED QUESTIONS FOR LIST OF ISSUES

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The Law Council's Shadow Report responds to Australia's Common Core Document, which reports on Australia's compliance with its ICCPR obligations from June 1997 to June 2006.

In light of the change of Federal Government in November 2007, it will be necessary for the Committee to direct its List of Issues to the Rudd Government when Australia appears before the Committee in March 2009.

The Law Council provides the following proposed questions to the Committee on this basis.

### **Article 1**

What measures are being undertaken to ensure Indigenous Australians are represented in the management and oversight of service delivery; have control over who may enter their land; and exercise control over funds derived from activities occurring on their land?

Please provide details of the Australian Government's plans to establish a federal representative body to enable Aboriginal and Torres Strait Islander people to engage in the process of government?

Noting the Australian Government's recent commitment to acknowledge and adhere to the provisions of the *UN Declaration on the Rights of Indigenous Peoples*, please provide details of the legislative or policy changes that will be required to do so?

Will the Australian Government undertake a comprehensive review of the *Native Title Act 1993 (Cth)* to ensure a greater balance is struck between the interests of the Australian Government, commercial interests and native title holders or claimants?

### **Article 2**

Will the Australian Government undertake to review and reform any existing laws that are racially discriminatory or prevent or restrict Indigenous Australians' access to the equal protection of the law?

Does the Australian Government intend to repeal the provisions of the Northern Territory National Emergency Response legislation that suspend the operation of the *Racial Discrimination Act*?

Does the Australian Government intend to respond to the concerns raised by the UN Race Discrimination Committee in respect of the 1998 amendments to the *Native Title Act 1993 (Cth)*?

Noting the Australian Government's commitment to consult the Australian community on how to best protect and promote human rights in Australia, please provide details of any mechanisms currently being considered by the Australian Government to provide for more comprehensive protection for human rights at the national level.

Is the Australian Government considering enacting legislation to incorporate the ICCPR into domestic law?

Please provide information about the steps currently being taken to raise public awareness of the ICCPR among judges, public officials, police and law enforcement officers and the public at large.

How does the Australian Government intend to respond to and address past findings of this Committee and other UN treaty bodies that Australia has been or continues to be in breach of its international human rights obligations?

Please provide details of the steps being undertaken by the Australian Government to improve legislative standards and increase public scrutiny of new laws.

### **Article 6**

Australia laws currently permit, in certain circumstances, the provision of foreign assistance under the *Mutual Assistance (Criminal Matters) Act* and agency to agency assistance to foreign authorities in matters involving the investigation and prosecution of offences that may lead to the use of the death penalty. Please explain how these laws comply with Australia's obligations under article 6 of the ICCPR and its Second Optional Protocol?

In light of observations of the Federal Court in *Rush v Commissioner of Police* [2006] FCA 12, what steps are being undertaken to ensure Australia's extradition, mutual assistance and agency to agency assistance laws and policies are consistent with Australia's obligations under article 6 of the ICCPR and the Second Option Protocol?

Please provide details of any proposals for reform currently being considered following the 2006 Review of Australia's extradition and mutual assistance laws.

### **Article 9**

Does the Australian Government intend to evaluate and review Australia's counter-terrorism measures within the framework outlined by the UN High Commissioner for Human Rights and consider whether those measures:

- are necessary for the protection of national security and public safety;
- are appropriate to achieve their protective function;
- conform with the principle of proportionality;
- constitute the least restrictive means of achieving their protective function;
- are prescribed by law and with precise criteria; and
- confer unfettered discretion on those charged with their execution?

Does the Australian Government intend to review or amend the definition of 'terrorist act' in the Commonwealth Criminal Code following the observations of the UN Special Rapporteur in 2006 that the current definition fails to conform to international standards?

Does the Australian Government consider Part 1C of the Crimes Act (the dead time provisions) and Division 105 of the Criminal Code (the preventative detention order regime), which authorise the indefinite detention of persons without criminal charge, to comply with Australia's obligations under Article 9? If so, please provide reasons why? If not, does the Australian Government intend to review these provisions to ensure compliance with Article 9?

Does the Australian Government intend to review or amend the provisions in Part 1C of the Crimes Act following the outcome of the Clarke Inquiry into the handling of the Haneef Case?

Does the Australian Government continue to support the view that the detention of non-suspects for the purposes of information gathering (such as the regime authorised by Part III Division 3 of the *Australian Security and Intelligence Organisation Act 1979 (Cth)*) is a necessary and proportionate restriction of article 9 rights? If so, please provide reasons why? If not, does the Australian Government intend to review these provisions to ensure compliance with article 9?

Please provide details of the instances in which questioning and detention warrants were issued under Part III Division 3 of the *ASIO Act*, and the impact such orders had on the successful prosecution of criminal offences.

Noting the important reforms to Australia's immigration detention policy announced by the Australian Government in July 2008, does the Australian Government intend to legislate to give effect to its policy changes? Are further reforms proposed to remove legislative provisions that authorise the mandatory detention of certain categories of unauthorised arrivals?

#### **Article 10**

Does the Australian Government plan to implement the Human Rights and Equal Opportunity Commission's (HREOC) 2007 recommendations to improve conditions of detention in Australian mainland detention centers?

What steps are being undertaken to improve conditions of detention in Australian mainland and off-shore immigration detention centres?

#### **Article 14**

In light of national and international criticism that Australia's anti-terrorism measures undermine fair trial rights, does the Australian Government intend to undertake a comprehensive review of Australia's anti-terrorism measures to ensure their compliance with Article 14 rights?

Does the Australian Government consider the control order and preventive detention order regimes contained in Divisions 104 and 105 of the Commonwealth Criminal Code, which authorise detention or restriction of liberty without charge, to comply with the fair trial rights protected in article 14. If so, please provide reasons why?

Does the Australian Government intend to review or reform Divisions 104 and 105 of the Commonwealth Criminal Code to ensure these provisions are consistent with Australia's obligations under article 14?

Does the Australian Government support the view that the system of security clearances for lawyers contained in the *National Security Information (Civil and Criminal Proceedings) Act 2004 (Cth)* is consistent with Australia's obligations under article 14(3)(d)? If so, on what basis is this view held?

Does the Australian Government plan to remove mandatory sentencing provisions from Commonwealth legislation and consider options for prohibiting the use of mandatory sentencing in other Australian jurisdictions?

Please provide details of the steps taken by the Australian Government to adopt a judicial appointment protocol that sets out the criteria on which judicial appointments are made?

Does the Australian Government plan to establish a judicial commission or formal complaints mechanism to determine genuine complaints against the judiciary?

#### **Article 17**

Does the Australian Government intend to review telecommunication interception laws that have an intrusive impact on the privacy rights of citizens to ensure they comply with Australia's obligations under article 17?

To what extent has the requirement to consider individual privacy in the telecommunications interception regime provided adequate protection for privacy rights contained in article 17? Please provide details of any instances where telecommunication interception warrants have been refused on the grounds of privacy considerations.

#### **Article 19**

Please explain why the sedition offences in Part 80 of the Commonwealth *Criminal Code* continue to constitute a necessary and proportionate restriction on freedom of expression and opinion in Australia?

Please provide details of any successful prosecutions of the sedition offences in Part 80 of the Commonwealth *Criminal Code*.

Please provide details of cases where classification has been refused on the basis that the material to be classified advocates a terrorist act. Has the new classification regime led to more classification refusals than the pre-existing regime?

#### **Article 22**

Please provide details of the current set of criteria used by the Australian Government when proscribing an organisation as a 'terrorist organisation' under Division 102 of the Commonwealth *Criminal Code*.

Does the Australian Government intend to introduce any mechanisms to circumscribe the Minister's broad discretion to proscribe an organisation as a terrorist organisation under the Criminal Code?

Terrorist organisation offences contained in Division 102 of the *Criminal Code* criminalise mere association with or membership of a proscribed organisation. Does the Australian Government consider this to be consistent with Australia's obligations to protect and promote freedom of association under article 22? If so, what is the basis for this view?

Does the Australian Government intend to review the offences in Division 102 of the *Criminal Code* to ensure these provisions comply with Australia's obligations under article 22? If not why not?

Please provide details of any successful prosecutions of the association offences in section 102.8 of the Criminal Code.

## **Article 26**

Noting the Australian Government's commitment to remove discrimination against same sex couples in federal laws, does the Government plan to amend the definition of 'marriage' in the *Marriage Act 1961* (Cth) to include same-sex couples? If not, what is the rationale for excluding same-sex couples from this definition?

Please provide details of the steps the Australian Government has undertaken to amend the 58 laws identified by HREOC and the additional laws subsequently identified by the Australian Government as having a discriminatory effect on same-sex couples and their families?

# 1. INTRODUCTION

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## 1.1 Role of the Law Council of Australia

The Law Council of Australia is pleased to present its Shadow Report to the Australian Government's Common Core Document, incorporating Australia's reports under the *International Covenant on Civil and Political Rights* ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').

The Law Council of Australia is the peak national body representing the legal profession in Australia. The Law Council has 17 constituent body members, comprising of professional associations of lawyers from around Australia, and represents around 50,000 legal practitioners.<sup>1</sup>

The Law Council of Australia's mission is to:

- represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues affecting the legal profession; and
- promote the administration of justice, access to justice and general improvement of the law.

The Law Council is respected in the Australian community as a source of expert legal advice on legislation and government policy as well as a commentator on contemporary legal issues occurring within Australia and overseas.

An important pillar of the Law Council's work is the promotion of adherence to the rule of law and observance of human rights - both in Australia and abroad.

## 1.2 Focus Areas of the Shadow Report

### 1.2.1 ICCPR Rights

The Law Council's Shadow Report is limited to addressing matters relevant to Australia's obligations under the ICCPR. Rights relating to procedural fairness, access to legal representation, equal treatment before the law and freedom from arbitrary detention are a particular focus of this Report. This limited focus reflects the limits of the Law Council's areas of expertise and activity. It is certainly not intended to suggest that those rights covered are of greater import than those which are not dealt with. The Law Council understands that the Committee will receive reports from a range of non-government organisations active in a variety of fields and is therefore confident that the Committee will be provided with adequate analysis of Australia's performance with respect to the full ambit of its human rights obligations.<sup>2</sup>

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<sup>1</sup> Further information on the role, functions and membership of the Law Council can be found at Attachment A or at [www.lawcouncil.asn.au](http://www.lawcouncil.asn.au).

<sup>2</sup> For example, see Joint NGO Report prepared by the Human Rights Law Resource Centre, the National Association of Community Legal Centres and Kingsford Legal Centre, *Freedom, Respect, Equality, Dignity: Action* (April 2008). This report was submitted to the UN Committee on Economic Social and Cultural Rights regarding Australia's implementation of the *International Covenant on Economic, Social and Cultural Rights*. The Report is available at [www.hrlrc.org.au/](http://www.hrlrc.org.au/).

## 1.2.2 Federal Law and Policies

As the Law Council is a national body concerned with laws and policies of national application and significance, this Shadow Report is confined to matters relating to Australia's federal jurisdiction.

## 1.2.3 Time Period Covered

Although the Common Core Document reports on the period from January 1997 to June 2006, a number of important developments have occurred since June 2006 that impact significantly on matters discussed in the Common Core Document, including:

- the conduct of a general federal election in November 2007;
- a change of Government from the Liberal Party and National Party Coalition led by Prime Minister Howard to the Australian Labor Party led by Prime Minister Rudd;
- the passage of many legislative Acts that have relevance to human rights;<sup>3</sup> and
- the introduction of a number of government policies that have relevance to human rights.

In light of these pertinent events, the Law Council's Shadow Report will include comments relating to developments occurring subsequent to June 2006.

## 1.2.4 Recent Measures Adopted by the Rudd Government

The Law Council is of the view that Australia must be duly assessed and held accountable for the performance of its obligations under the ICCPR during the reporting period. For this reason, the primary focus of the Law Council's Shadow Report is on Australia's compliance with its ICCPR obligations from January 1997 to June 2006, as reported in the Common Core Document prepared by the Howard Liberal Government.

However, a number of important developments have occurred since June 2006 that impact significantly on matters discussed in the Common Core Document, including the passage of many legislative Acts that have relevance to human rights;<sup>4</sup> and the introduction of a number of government policies that have relevance to human rights.<sup>5</sup>

Perhaps most significantly, a general federal election was held in November 2007 resulting in a change of Government from the Liberal Party and National Party Coalition led by Prime Minister Howard to the Australian Labor Party led by Prime Minister Rudd.

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<sup>3</sup> For example, see *Classifications (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth); *Northern Territory National Emergency Response Act 2007* (Cth); *AusCheck Act 2007* (Cth); *Telecommunications (Interception and Access) Amendment Act 2007* (Cth); *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth); *Defence Legislation Amendment Act 2006* (Cth).

<sup>4</sup> For example, see *Classifications (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth); *Northern Territory National Emergency Response Act 2007* (Cth); *AusCheck Act 2007* (Cth); *Telecommunications (Interception and Access) Amendment Act 2007* (Cth); *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth); *Defence Legislation Amendment Act 2006* (Cth).

<sup>5</sup> For example, the Northern Territory Intervention policy to child abuse of indigenous Australians in the Northern Territory.

Since its election in November 2007, the Rudd Government has taken a number of positive steps towards the realisation of ICCPR rights and the promotion of human rights generally. Recent measures include:

- issuing a formal apology to the victims of the Stolen Generation;
- committing to consult the Australian community on how to best protect and promote human rights at the national level;
- committing to more extensive and constructive engagement with the UN, including UN treaty bodies;
- committing to establish a national representative body for Indigenous Australians;
- indicating support for the Declaration on the Rights of Indigenous Peoples;
- introducing reforms which would begin to remove Australia's policy of mandatory immigration detention for all unlawful arrivals; and
- introducing reforms to Australia's superannuation laws to remove discrimination against same-sex couples.

While many of the observations in this Shadow Report continue to be pertinent to Australia's current laws and policies, the Law Council congratulates the Rudd Government on introducing a number of measures which have improved Australia's compliance with its obligations under the ICCPR.

Every effort will be made to draw attention to these and other important developments in the course of this Shadow Report.<sup>6</sup>

### **1.3 General Comments on the Reporting Process**

The Law Council regards the reporting process as an essential element in the continuing commitment of a State to respect, protect and fulfill the rights set out in the treaties to which it is a party. Reporting to treaty bodies provides an opportunity for Australia to reflect on the state of human rights protection within its jurisdiction and is an important aspect of future policy planning and implementation.

The Law Council is disappointed that the Common Core Document does not capitalise on the opportunity presented by the reporting process by failing to:

- acknowledge or engage with the extensive political and social debate surrounding fundamental human rights which took place in Australia during the reporting period;
- discuss how legislation or policies adopted in recent years have operated to protect or promote human rights in Australia's political, economic, social and cultural environment, rather than merely listing legislative statutes and policies without further explanation;
- provide adequate analysis of how the statistical information contained in the Report bears on Australia's progress or lack of progress in implementing its treaty obligations;
- discuss how the reporting process may be used for the purpose of policy planning and implementation;
- candidly and comprehensively identify problems and short-comings in Australia's approach to the implementation of Covenant rights; and
- provide any explicit responses to issues raised by the Human Rights Committee in its previous concluding observations on Australia.

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<sup>6</sup> The information contained in this Shadow Report represents the Law Council's views as at 29 August 2008.

## **2. GENERAL FRAMEWORK FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS**

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The Law Council acknowledges the many strengths of the Australian legal system in providing for the protection and promotion of human rights, and agrees that:

*Australia's strong democratic institutions, the Australian Constitution, the common law and current legislation, including anti-discrimination legislation at the Commonwealth, State and Territory levels, protect and promote human rights in Australia.*<sup>7</sup>

However, when referring to existing institutions, processes and special legislative machinery as an adequate source of human rights protection, the Common Core Document omits to discuss:

- the structural, functional and legal limitations which inhibit the ability of existing mechanisms to adequately protect and promote human rights in Australia; and
- the gaps present in the existing system, leading to circumstances where Australia's human rights obligations are not fully implemented.

In order to understand this 'lacunae of protection'<sup>8</sup> it is necessary to consider:

- the status of international human rights norms in Australia;
- the attitude of the institutions of government towards Australia's international human rights obligations; and
- the Australian Government's priority areas of focus in relation to human rights.

### **2.1 Acceptance of international human rights norms**

#### **2.1.1 Status of International Law in Australia**

In Australia, international treaties are not self-executing: incorporation into domestic legislation is required before legal effect can be given by the courts.

As a result, although Australia is party to the main human rights treaties,<sup>9</sup> at a federal level it has only specifically legislated to give effect to a limited range of its human rights obligations, for example those relating to the elimination of discrimination on the basis of race, disability, age or sex.<sup>10</sup>

However, treaty obligations that are not incorporated into domestic legislation may still have some influence on the interpretation and application of Australian law. For example, a principle of statutory interpretation exists which encourages the interpretation of ambiguous statutes in accordance with Australia's international

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<sup>7</sup> Common Core Document at [83].

<sup>8</sup> Human Rights Committee, *Concluding Observations: Australia*, UN Doc A/55/40, 506 (2001).

<sup>9</sup> For an up-to-date list of human rights treaties ratified by Australia see the *Australian Treaties Library* at [www.austlii.edu.au/au/other/dfat](http://www.austlii.edu.au/au/other/dfat).

<sup>10</sup> See *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth) and *Sex Discrimination Act 1984* (Cth).

treaties.<sup>11</sup> This principle is based on the presumption that the legislature does not intend to legislate in breach of international law or specific treaty obligations.

### 2.1.2 Effect of international law on administrative decision making

In the landmark High Court case of *Teoh*,<sup>12</sup> the majority of the Court held that although the provisions of the *Convention on the Rights of the Child* (CRC) had not been enacted into Australian domestic law, the ratification of the CRC gave rise to a legitimate expectation that administrative decision-makers would act in conformity with the Convention and treat the best interests of the child as a primary consideration. Chief Justice Mason and Justice Deane stated in their joint judgment:

*[R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act ... Rather, ratification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration".*

Although the *Teoh* decision has subsequently been questioned by the High Court and its future application remains uncertain,<sup>13</sup> the Government's reaction to this decision is illustrative of a dismissive attitude towards the binding nature of Australia's international human rights obligations.

On 10 May 1995, a month after the *Teoh* judgement was handed down, the then Minister for Foreign Affairs and the Attorney-General issued a joint statement making it clear that the Australian Government did not support the majority decision in *Teoh*. They stated:

*It is not legitimate, for the purposes of applying Australian law, to expect that the provisions of a treaty not incorporated by legislation should be applied by decision-makers.*<sup>14</sup>

Between 1995 and 1999 the former Keating and Howard Governments introduced a number of Bills into Parliament seeking to eliminate any expectation that government

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<sup>11</sup> See for example *Polites v Commonwealth* (1945) 70 CLR 60 at 68-9, 77, 80-1.

<sup>12</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ("*Teoh*").

<sup>13</sup> The scope of *Teoh* has been questioned in subsequent decisions by the High Court. For example, *Sanders v Snell* (1998) 196 CLR 329 at 351; *Victoria v Commonwealth* (1996) 187 CLR 416 at 480-482; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1. In *Lam* neither party challenged the correctness of *Teoh* however McHugh, Gummow and Callinan JJ expressed the view that the doctrine of legitimate expectation was limited to procedural rights and could not give rise to substantive rights. This view has been subsequently accepted in lower courts, see for example, *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62. For further discussion see Wendy Lacy, 'A Prelude to the Demise of *Teoh*: The High Court Decision in *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam*' in (2004) *Sydney Law Review* 7.

<sup>14</sup> Minister for Foreign Affairs and Attorney-General, 'International Treaties and High Court Decision in *Teoh*', Joint Statement, 10 May 1995.

decision makers were legally obliged to act in accordance with an international treaty obligation.<sup>15</sup> None of these Bills were enacted into legislation,<sup>16</sup>

In 2001, in its Concluding Observations on Australia, this Committee noted its concern with the proposed introduction of:

*... a Government bill which would provide that ratification of human rights treaties does not create legitimate expectations that government officials will use their discretion in a manner that is consistent with those treaties.*<sup>17</sup>

In the Common Core Document, Australia responds to the Committee's concern by stating that no such Bill is currently before Parliament. However, the Government also refers to a statement made by the Attorney-General on 25 February 1997 that:

*...under Australia's system of government, it is for the elected Australian government to change Australia's domestic law where required to implement treaty obligations. Consequently the act of entering into treaties does not itself give rise to legitimate expectations in administrative law. This is a domestic issue concerning the relationship and roles of the different arms of government.*<sup>18</sup>

The response highlights that Australia does not consider itself to be bound in any meaningful way by international obligations unless and until they are incorporated into domestic legislation. Rather than allay the Committee's concerns, the Government's response confirms that it believes it is legitimate for Australia to represent one position to the international community about its commitment to human rights, while maintaining a contrary position domestically in its dealings with citizens and those within its territory.

## **2.2 Australia's attitude towards the UN Treaty System**

The Law Council has been concerned for some time by Australia's ambivalent and at times dismissive attitude towards the UN treaty body system and its authoritative role in determining whether States have adhered to their international human rights obligations.

During the reporting period, the Australian Government continued to prefer its own view to that of various UN Committees when evaluating its performance of its international human rights obligations. The Australian Government frequently ignored or rejected the views of the international bodies whose competence it has recognised to interpret and monitor treaty compliance. Recent examples of this approach include:

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<sup>15</sup> *Administrative Decisions (Effect of International Instruments) Bill 1999* (Cth); *Administrative Decisions (Effect of International Instruments) Bill 1997* (Cth); *Administrative Decisions (Effect of International Instruments) Bill 1995* (Cth).

<sup>16</sup> The two earlier Bills lapsed prior to the calling of the 1993 and 1996 federal elections. The 1999 Bill passed through the House of Representatives, but was strongly opposed by the Democrats, a minority political party in Australian politics and eventually lapsed in April 2001. In 1995 South Australia enacted the *Administrative Decisions (Effect of International Instruments) Act 1995* (SA). No other states have enacted equivalent provisions.

<sup>17</sup> Human Rights Committee, *Concluding Observations: Australia*, UN Doc A/55/40, 506 (2001).

<sup>18</sup> Common Core Document at [66].

- In 1998 the UN Committee on the Elimination of Racial Human Rights (CERD Committee) found that the Government's amendments to the *Native Title Act 1993* (Cth) breached the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD).<sup>19</sup> The Government subsequently refused to suspend the 1998 amendments and as a result was subject to 'early warning' monitoring by the UN for acts of racial discrimination.<sup>20</sup> Following this encounter, the Australian Government issued a statement condemning the CERD Committee, and announced that it would reassess its relationship with the UN treaty body system. Australia announced that it was capable of monitoring its own human rights record.<sup>21</sup>
- In 2000 the CERD Committee observed that Australia's policy of mandatory sentencing was racially discriminatory and contrary to its obligations under CERD.<sup>22</sup> In response to these observations, the then Minister for Foreign Affairs Alexander Downer said that 'these committees need to be a good deal more professional than, frankly, I think they are if they are to make pronouncements about the policies of a liberal-democratic society' and that the 'Government believes that we'll work out our own destiny within our own shores'.<sup>23</sup> This high level criticism of the UN treaty body system was reiterated when the then Minister for Immigration and Multicultural and Indigenous Affairs Phillip Ruddock denied a request for members of the CERD Committee to visit Australia on the grounds that it was politically motivated and that such visits should only be to countries where 'grave human rights abuses were occurring'.<sup>24</sup>
- The Australian Government failed to object to the ongoing detention of Australian citizen David Hicks in Guantanamo Bay and his trial by ad hoc military commission, despite a statement by five independent Special Rapporteurs appointed by the UN Human Rights Commissioner<sup>25</sup> calling on the United States to immediately close the detention centre in Guantánamo Bay and bring all detainees before an independent and competent tribunal or release them.
- Australia has continued its policy of mandatory detention of asylum seekers despite five adverse findings by this Committee against Australia's detention regime in less than ten years.<sup>26</sup> The UN High Commissioner for Refugees

<sup>19</sup> Committee on the Elimination of Racial Discrimination (CERD), 53rd Session (1998).

<sup>20</sup> CERD, 54th Session (1999).

<sup>21</sup> Attorney-General and Minister for Immigration and Multicultural Affairs, 'Australian Government Responds to the United Nations Human Rights Committee' (Press Release, 17 December 1997). For further discussion see David Kinley and Penny Martin, "International Human Rights Law at Home: Addressing the Politics of Denial" (2002) *Melbourne University Law Review* 24.

<sup>22</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, 56th session, (2000).

<sup>23</sup> ABC Television, 'Government to Review Participation in UN Treaty Committee System', *The 7.30 Report*, (30 March 2000).

<sup>24</sup> Andrew Clennell, 'Ruddock Hits Back at UN Chairwoman', *Sydney Morning Herald* (3 April 2000).

<sup>25</sup> The five investigators were: the Chairman Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on freedom of religion or belief, and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

<sup>26</sup> The decision in *D & E v Australia* Communication No 1050/2002 (11 July 2006) is the fifth time since 1997 that the UN Committee has found against Australia regarding mandatory detention. See also HREOC, 'Migration laws must live up to Australia's human rights commitments' (Media Release, 6 August 2006).

has also held three times that Australia's policy of mandatory detention of asylum seekers is in breach of international human rights law.<sup>27</sup>

- The Australian Government sought to avoid its international obligations under the *Convention Relating to the Status of Refugees*, the ICCPR and the *Convention on the Rights of the Child (CRC)* by establishing a system of offshore processing of asylum seekers. This involved excising Australian territories, such as Christmas Island, from the Australian migration zone. This move attracted condemnation from a range of UN bodies, in particular from the UN High Commissioner for Refugees, who found the offshore processing of refugees to result in a deterioration of detention conditions and a denial of access to legal forums for asylum seekers to challenge their detention or assert their human rights.<sup>28</sup>

Australia's dismissive attitude to the opinions of UN treaty bodies has not gone unnoticed by the international community. As Committee member Elizabeth Evatt observed:

*In taking this attitude, and in promoting the idea that the international monitoring system is flawed, the government is discounting the role of the independent treaty bodies in interpreting the provisions of human rights treaties, and undermining the whole concept of an international system of human rights, under which states are accountable for their actions. ... Australia's reputation as a good international citizen has been badly dented by these events.*<sup>29</sup>

While the Law Council accepts that it is within the prerogative of the Australian Government to advocate for positive reforms to the way in which international bodies are structured and operate, it has an obligation to do this in a manner which does not undermine the authority of the UN treaty body system to monitor the observance of human rights law.

## 2.3 Government's priorities for human rights

In June 1993, the World Conference on Human Rights recommended that State Parties consider drawing up a National Action Plan, identifying ways in which States could improve the promotion and protection of human rights.

Australia first released its National Action Plan on Human Rights in 1994. The National Action Plan was later updated in 2004.<sup>30</sup>

The 2004 National Action Plan outlines the Australian Government's five priorities for human rights promotion in Australia. These are:

- promoting a strong, free democracy;

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<sup>27</sup> UN News Services, 'UN agency will ask Australia to change offshore refuge processing legislation, (12 May 2006), available at <http://www.un.org/apps/news/story.asp?NewsID=18450&Cr=australia&Cr1>.

<sup>28</sup> See statement by Erica Feller, Assistance High Commissioner for Refugees (12 May 2006). NB the Rudd Government has taken steps to end the off-shore processing of asylum seekers. Processing facilities on Manus Island and Nauru are no longer in operation. Processing continues to take place on Christmas Island.

<sup>29</sup> Elizabeth Evatt, 'Relaxed & dumbing down' (Media Statement, 2001) available at <http://evatt.labor.net.au/publications/papers/22.html>

<sup>30</sup> Attorney-General's Department, *Australia's National Action Plan on Human Rights*, (December 2004).

- human rights education and awareness;
- assisting disadvantaged groups to become more independent;
- supporting the family; and
- promoting human rights internationally.

While the Law Council supports the identification of human rights priorities, it is of the view that the National Action Plan generally reflects a narrow approach to the promotion and protection of human rights in Australia. The National Action Plan fails to tackle human rights issues the subject of significant public debate and, moreover, fails to reflect a commitment by Australia to:

- uphold and promote Australia's obligations under international human rights agreements;
- legislate, where necessary, to give effect to human rights treaties as they are signed and ratified; and
- play a more active role in supporting and promoting the UN Human Rights treaty system both in Australia and internationally.

In the absence of these elements, the general framework in which human rights are protected at the national level lacks the robustness and comprehensive coverage necessary to address Australia's obligations under the ICCPR and other human rights treaties.

### 3. ARTICLE 1 RIGHT TO SELF-DETERMINATION

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1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

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The right to self-determination is reflected under a number of international treaties, declarations and agreements. It is also regarded as a non-derogable *jus cogens* norm of customary international law, which should be observed by all States, regardless of which international conventions they are a party to.<sup>31</sup>

Recognition of this right in domestic law is subject to each State's interpretation. There is no internationally agreed definition of self-determination and no official interpretation as to how the right is to be observed.

In Australia, 'self-determination' is a term commonly used in relation to policies affecting Aboriginal and Torres Strait Islander people. The former Aboriginal and Torres Strait Islander Social Justice Commissioner described self-determination in the following terms:

*[E]ssential to the exercise of self-determination is choice, participation and control. As the International Court of Justice notes in its Advisory Opinion on Western Sahara, the essential requirement for self-determination is that the outcome corresponds to the free and voluntary choice of the people concerned.*<sup>32</sup>

In the Common Core Document, the Australian Government states that individuals and groups should be consulted about decisions likely to impact on them. Amongst other things this means they should be given the opportunity to participate in decision making through the formal and informal processes of democratic government, and be given the opportunity to exercise meaningful control over their affairs.

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<sup>31</sup> The right to self-determination is recognised in the *Universal Declaration of Human Rights*, G.A. Res. 217A (III)(1948), Art. 21; *International Covenant of Civil and Political Rights* (ICCPR), Art. 1; *International Covenant on Economic, Social and Cultural Rights* (ICESCR), Art. 1. It has also been recognised by the International Court of Justice as a fundamental principle of customary international law, see *Western Sahara Case*, 1975 International Court of Justice 12, 31. For further discussion of the right's *jus cogens* status see Karen Parker & Lyn Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 *Hastings Int. & Comp. L. Rev.* 411, 440 (1989), drawing on discussion of the right to self-determination in A. Critescu, *The Right to Self-determination*, U.N. Doc. E/CN.4/Sub.2/404/Rev. 1, U.N. Sales No. E.80.XIV.3 (1980) and H. Gros Espiell, *The Right to Self-Determination*, U.N. Doc. E/CN.4/Sub.2/405/Rev.1, U.N. Sales No. E.79.XIV.5 (1980).

<sup>32</sup> Prof Mick Dodson AO, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, (2002), p.20.

However, the Australian Government also makes it clear in the Common Core Document that it does not support an interpretation of self-determination that might threaten Australia's territorial integrity or sovereignty.<sup>33</sup>

### 3.1 Declaration on the Rights of Indigenous People

As a signatory to the ICCPR, Australia has traditionally given symbolic recognition to the right to self-determination for Aboriginal and Torres Strait Islander people. However, this position appeared to change around 1996-98, when the Australian Government adopted a policy of opposition to the use of the term 'self-determination' in the development of international agreements, declarations and discussions.

The starkest example of this policy has been Australia's objection to the *Declaration on the Rights of Indigenous People* (DRIP)<sup>34</sup> on the basis that the provisions protecting the right of indigenous peoples to self-determination may lead to the misconception that a separate 'Indigenous state' was possible.<sup>35</sup>

The Law Council is of the view that this understanding of the right to self-determination is at odds with the majority of the international community and incorrect, as a matter of law.

For example, the provisions of the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* (1970) (the Friendly Relations Declaration) expressly excludes any construction of the right to self-determination under the United Nations Charter:

*...as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.*

This has been interpreted as requiring that the constituent peoples of a properly formed sovereign nation express their aspirations through the national political system, not through the creation of new States.<sup>36</sup> Accordingly, it is only in the most extreme circumstances that the right to self-determination might be interpreted as providing a legitimate basis for a separate cultural group within a society to seek independence.<sup>37</sup>

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<sup>33</sup> Common Core Document at [202].

<sup>34</sup> On 13 September 2007, the DRIP was adopted by the UN General Assembly. 143 States voted in favour of adoption, with 11 abstentions and four votes against. Opposing its adoption were the United States, Australia, New Zealand and Canada, each citing a variety of reasons, including constitutional incompatibility and concern that the right to self-determination set out under the DRIP could endanger national sovereignty and territorial integrity.

<sup>35</sup> Alexander Downer MP, quoted in 'Downer fears phrase will split Australia', *The Age* 22 August 1998. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, (2007), p.15.

<sup>36</sup> Daes, E., *Explanatory note concerning the Draft Declaration on the Rights of Indigenous Peoples*, UN Doc: E/CN.4/Sub.2/1993/26/Add.1, (1993), [21].

<sup>37</sup> This might arise, for example, where the government has ceased to be representative of the relevant group in any form, or where the relevant group is subject to oppression, institutional discrimination or

It must be noted that Australia's position since 1996 is a significant about-face, as it follows around 30 years of domestic and international policy in support of the right to self-determination. For example, Australia was one of the major proponents in support of the recognition of indigenous rights in international fora during the early 1990s and was a supporter of and actively involved in the elaboration of the Draft Declaration on the Rights of Indigenous Peoples.

In May 2008 the Minister for Indigenous Affairs indicated that the Rudd Government plans to acknowledge and adhere to the provisions of the DRIP. If such an approach is adopted, it is hoped that this will bring Australia back into line with the majority of the international community's understanding of the right to self-determination of indigenous peoples.

### **3.2 Abolition of the Aboriginal and Torres Strait Islander Commission**

The Aboriginal and Torres Strait Islander Commission (ATSIC), established in 1990 under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), was abolished by the former Australian Government in 2005.

The primary aim of ATSIC was to ensure that Aboriginal and Torres Strait Islander peoples could participate in decision-making processes at all levels of government on matters that affected them.<sup>38</sup>

The *Aboriginal and Torres Strait Islander Commission Act 1989* charged ATSIC with advancing the interests of Aboriginal and Torres Strait Islander people. The objects in the Act gave ATSIC the responsibility:

- to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them;
- to promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders;
- to further the economic, social and cultural development of Aboriginal persons and Torres Strait Islanders; and
- to ensure co-ordination in the formulation and implementation of policies affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State, Territory and local governments, without detracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents.

A review of ATSIC was commissioned by the Government in 2002, partly in response to concerns about governance issues at the Board level.<sup>39</sup> The review concluded

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state sanctioned violence and they have exhausted all other means to express their right to self-determination. See UNESCO, 'Conclusions and recommendations of the conference' in van Walt van Praag, M (Ed), *The implementation of the right to self-determination as a contribution to conflict prevention*, UNESCO Centre of Catalonia, Barcelona, 1999.

<sup>38</sup> Huggins J, Collins B, Hannaford J, *In the Hands of the Regions – a New ATSIC: Report of the Review into the Aboriginal and Torres Strait Islander Commission*, (2003) pp.5-6.

that ATSIC was in 'urgent need of structural change' but recommended that the organisation be retained and that it should remain the primary vehicle to represent Aboriginal and Torres Strait Islander peoples' views to all levels of government.<sup>40</sup>

Disregarding these recommendations, the Commonwealth Government announced the abolition of ATSIC shortly after the report produced by the review panel was released. Following its abolition, ATSIC was not replaced by any form of elected representative body at the Federal, State/Territory or Regional level. Instead, the National Indigenous Council (NIC) was appointed by the Australian Government, to advise the government on policies and initiatives affecting Indigenous Australians.

The Law Council is not aware of any consultation which preceded the appointment of individuals to the NIC. Despite this, the NIC became the primary body consulted by the Australian Government when devising and implementing policies and programs affecting Aboriginal and Torres Strait Islander people.<sup>41</sup>

The Law Council regards the lack of a national representative body for Aboriginal and Torres Strait Islander people as concerning.

In the absence of such a representative body it has not been possible for Australia to properly give effect to the right of self-determination for Aboriginal and Torres Strait Islander people in so far as that right requires mechanisms to be in place via which Indigenous Australians can actively participate in their own governance.

The absence of such a representative body is acutely felt in Australia because Indigenous Australians are given no constitutional recognition,<sup>42</sup> there are no dedicated seats in Parliament reserved for Indigenous Australians nor are there any special measures in place to promote the election of Aboriginal and Torres Strait Islander candidates to Commonwealth, State or Territory Parliaments.

The current Minister for Indigenous Affairs has recently announced that the Rudd Government will establish a new representative body for Indigenous Australians.<sup>43</sup>

### **3.3 Abolition of the NT Aboriginal lands permit system**

In 1976 the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the ALRA) established communal Aboriginal land ownership in Australian law, giving Aboriginal

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<sup>39</sup> Huggins J, Collins B, Hannaford J, *In the Hands of the Regions – a New ATSIC: Report of the Review into the Aboriginal and Torres Strait Islander Commission*, (2003).

<sup>40</sup> Huggins J, Collins B, Hannaford J, *In the Hands of the Regions – a New ATSIC: Report of the Review into the Aboriginal and Torres Strait Islander Commission*, (2003).

<sup>41</sup> The current Minister for Indigenous Affairs announced in January 2008 that it would not be reappointed following the expiry of its 4 year term in December 2007, but instead intended to establish a new representative body. See press release by Department of Families, Housing, Community Services and Indigenous Affairs, 'National Indigenous Council' (15 January 2008) available at [http://www.fahcsia.gov.au/Internet/jennymacklin.nsf/content/nic\\_14jan08.htm](http://www.fahcsia.gov.au/Internet/jennymacklin.nsf/content/nic_14jan08.htm)

<sup>42</sup> Although there is no constitutional recognition of prior Indigenous land ownership, the 1967 Constitutional referendum resulted in the constitutional amendment which removed the exception to making laws for Aboriginal peoples

<sup>43</sup> On 12 July the Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, released an issues paper outlining key considerations in the development of a new National Indigenous Representative Body entitled '*Building a sustainable National Indigenous Representative Body – Issues for consideration*' available at [http://www.hreoc.gov.au/Social\\_Justice/repbody/index.html](http://www.hreoc.gov.au/Social_Justice/repbody/index.html). See also the Australian Government's website on Consultations for the proposed National Indigenous Representative Body at <http://www.fahcsia.gov.au/internet/facsinternet.nsf/indigenous/repbody.htm>.

people in the Northern Territory unrestricted communal freehold title over their traditional lands. Title to land granted under the ALRA is held by a Land Trust on behalf of the traditional owners. Title is inalienable and equivalent to freehold title, but is held communally, reflecting the nature of Aboriginal land ownership.

The ALRA has been described as 'the classic example of land rights legislation based on self-determination'.<sup>44</sup> Under the ALRA Aboriginal people:

- must be fully consulted about all steps proposed to be taken in respect of their land rights;
- should have as much autonomy as possible in running their own affairs; and
- should be free to follow their traditional methods of decision-making.<sup>45</sup>

The ALRA came into force following the establishment of the Aboriginal Land Rights Commission in 1973. The Aboriginal Land Rights Commission identified the capacity of Aboriginal communities to control access to their lands as 'one of the most important proofs of genuine Aboriginal ownership'.<sup>46</sup> It also considered that laws against trespass were insufficient to enable Aboriginal people to protect and control entry to their lands, given the vastness of the Aboriginal estate and the lack of adequate police services in regional and remote communities. Accordingly, the Commission recommended that a permit system should be implemented to allow Aboriginal people to exclude from their lands those who are not welcome, with certain exceptions including police, health and emergency services and public officials.

The Commission's recommendation was implemented under the ALRA. The effect is that, until recently, all people who wished to enter and remain on Aboriginal land in the Northern Territory were required to apply for a permit, with the exception of persons belonging to a particular Aboriginal community or persons falling within specific exceptions under the ALRA.

The Australian Government announced a review of the Aboriginal lands permit system in October 2006. The review was announced against a backdrop of disturbing media reports and statements by the former Minister for Indigenous Affairs, to the effect that 'organised paedophile rings' were committing serious abuses against children in remote and regional Aboriginal communities.<sup>47</sup>

The Department of Families, Community Services and Indigenous Affairs released a consultation paper in October 2006 presenting five options to either change or abolish the permit system. The review, which concluded in February 2007, received 82 written submissions, of which 65 supported no change to the permit system, 11 supported amendment but not abolition and 6 supported complete abolition.<sup>48</sup> All Indigenous organisations and individuals consulted supported no change to the permit system. An additional 42 field consultations with Indigenous communities

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<sup>44</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, (2005).

<sup>45</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, (2005).

<sup>46</sup> Aboriginal Land Rights Commission, *Second Report*, (1974) [109].

<sup>47</sup> For example see ABC News Online, Break up Indigenous paedophile rings: Brough (17 May 2006); Sydney Morning Herald, Child sex abuse 'rampant' across NT, (15 June 2007); ABC News Online, 'River of alcohol must be dammed' (19 June 2007); ABC News Online, Sex abuse rife 'under Martin's nose' (10 July 2007).

<sup>48</sup> This information was obtained by the Law Council from the Department of Families, Community Services and Indigenous Affairs under the *Freedom of Information Act 1982* (Cth).

revealed unanimous support for no changes to the permit system among those communities visited.<sup>49</sup>

Notwithstanding the apparently unanimous view of Aboriginal people in the Northern Territory, the Australian Government announced changes to the permit system in June 2007, along with several other dramatic measures forming its response to what it declared to be a 'national emergency in the Northern Territory', following the release of the *Little Children Are Sacred* report<sup>50</sup> into child sexual abuse in Northern Territory Aboriginal communities.<sup>51</sup>

These changes to the permit system effectively gave unrestricted public access to Aboriginal townships and access roads. The Government claimed that the changes were consistent with the outcome of the review of the permit system conducted by the Department of Families, Community Services and Indigenous Affairs. However, as noted above submissions to the review reveal that Aboriginal people in the Northern Territory regard the Aboriginal lands permit system as a fundamental aspect of their right to govern their communities in that the system allows Aboriginal people to determine who may enter onto their land and to protect their communities from unwanted influences or exploitation. Accordingly, it is arguable that the partial or complete removal of the permit system constitutes a breach of the right of Indigenous Australians to self-determination.

The Rudd Government has now introduced legislation which will reinstate the permit system in the Northern Territory, although a broader class of people will be excluded from its operation.<sup>52</sup> This is an important initiative, in terms of restoring one aspect of Indigenous people's right to self-determination in the Northern Territory.

### 3.4 Aboriginal Benefits Account (ABA)

The Aboriginal Benefits Account (ABA) is a statutory trust account established to ensure that certain proceeds of mining activities taking place on Aboriginal land are applied 'to or for the benefit of Aboriginals living in the Northern Territory'.<sup>53</sup>

Under the ALRA, the Australian Government pays into the ABA an amount of money equal to the royalties paid to the Northern Territory and Federal Governments from mining on Aboriginal land. The ABA funds are to be used to meet the operational costs of Aboriginal Land Councils in the Northern Territory and to pay compensation

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<sup>49</sup> It is noted that these findings mirror the findings of earlier reviews of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The last public inquiry was conducted by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (the HORSCATSIA) in 1999. After taking submissions (oral and written) from a large number of Aboriginal communities and organisations, the HORSCATSIA concluded that every Aboriginal community it had taken submissions from wanted to retain the permit system. Remarkably, this finding put paid to the earlier recommendation of the *Review of the Aboriginal Land Rights (Northern Territory) Act*, conducted by John Reeves QC in 1998, that the permit system be abolished – although it is noted that the 1998 review did not refer to any consultation process supporting its recommendation.

<sup>50</sup> Northern Territory Government, *Ampe Akelyernemane Meke Mekarle (Little Children are Sacred): Report of the NT Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, (2007) ('*Little Children Are Sacred Report*').

<sup>51</sup> See further discussion at 4.2

<sup>52</sup> *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008* (Cth).

<sup>53</sup> *Financial Management and Accountability Act 1997* (Cth) s20

to traditional owners and other Aborigines living in the Northern Territory that have been affected by mining.<sup>54</sup>

Prior to 2006 the monies and interest held in the ABA trust fund were required to be distributed as follows:

- 40 per cent was required to be paid out for Land Council administrative costs and was distributed to the four existing Land Councils in accordance with their respective populations of Aboriginal people
- 30 per cent was required to be paid out to Land Councils for distribution to Aboriginal organisations in areas affected by mining, and
- the remainder was applied at the discretion of the Minister and could be used for grants for the benefit of Aboriginal people in the Northern Territory; extra payments to Land Councils; administration of the ABA; or increasing the equity of the ABA.

In 2006, the Australian Government added a new section 19A into the ALRA<sup>55</sup> to enable the establishment of 99-year leases over Aboriginal townships in the Northern Territory to the Commonwealth. The stated purpose was to promote development and business opportunities for Aboriginal people in the Northern Territory.

Under the ALRA, the new section 19A leases are managed by an Executive Director of Township Leasing appointed by the Commonwealth Government. Administrators are empowered to declare sub-leases over plots of land within the township to individuals and families.<sup>56</sup>

When these amendments were introduced, there was concern that the 99-year lease system would undermine Aboriginal communities' land rights and their ability to control resources generated by the use of land. In effect, by signing a 99 year lease, traditional land owners would transfer control over their land to the Commonwealth Government.<sup>57</sup> As noted by the Aboriginal and Torres Strait Islander Commissioner Tom Calma:

*International evidence demonstrates that individualising lease tenures on communal lands, such as those under section 19A of the [ALRA]1976 (Cth), leads to a loss of communal lands, and few, if any, economic benefits.*<sup>58</sup>

Also of concern was the fact that the 2006 amendments enabled funds from the ABA to be used for the acquisition or administration of leases granted over Indigenous townships or for the payment of rent under leases granted. This aspect of the 2006 amendments was thought to undermine the express purpose of the ABA. As Commissioner Calma explains:

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<sup>54</sup> For more information on the administration of the Aboriginal Benefits Account see the Department of Families, Housing, Community Services and Indigenous Affairs website <http://www.facsia.gov.au/internet/facsinternet.nsf/4b93590049083177ca256fa3001481ae/b36336ce2fad0e27ca2574020077ee1e?OpenDocument>

<sup>55</sup> *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth).

<sup>56</sup> See *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007* (Cth).

<sup>57</sup> Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Information Sheet 2 – 99-year leases on Indigenous land.

<sup>58</sup> Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Information Sheet 2 – 99-year leases on Indigenous land.

*The ABA is an account that contains Aboriginal mining royalty monies. The only express direction on the use of ABA is that it is to be used 'to or for the benefit of Aboriginals living in the Northern Territory.'*

*The use of ABA funds to pay for headleases is contrary to its purpose. The purpose of the ABA is to provide benefit to Indigenous people above and beyond basic government services. The administrative costs of land-leasing are basic government services..*<sup>59</sup>

In addition, the 2006 amendments removed the requirement in the ALRA that 40 per cent of payments from the ABA *must* go to Land Councils for their administrative costs. Instead, under the amended Act, the Minister is empowered to determine what percentage will be paid to each Land Council having regard to Land Council estimates, their expected income from fees and other services, and any existing surplus. In short, the amendments invested the Minister with greater discretion to determine how the ABA is to be distributed amongst Land Councils and for other purposes.

These concerns were heightened by the Australian Government's efforts to proactively encourage individual Aboriginal communities to enter into these 99 year leases, for example by offering significant investment in housing and schools to communities that were prepared to sign leasehold arrangements. It has been reported that these promised investments in housing and education were to be funded from the ABA itself – rather than from the Commonwealth or Northern Territory Government's general allocation of funds to ensure all Australian's can access essential services.<sup>60</sup>

It appears contrary to Australia's obligations under Article 1(2) for the Government to use ABA funds, held on trust for Aboriginal communities, to pay for administration costs of Government leases over Aboriginal land or other basic government services that the broader community takes for granted.

The Law Council is concerned that the broad discretion vested in the Minister by the 2006 amendments has the potential to undermine the intention of the ALRA and the ABA and diminishes Aboriginal communities' right under Article 1(2) of the ICCPR to freely dispose of their natural wealth and resources and freely pursue their economic development.

While the ABA was established as means of facilitating Aboriginal communities' right to self-determination, recent amendments have detracted from this aim and diminished the capacity of Indigenous Australians to exercise their rights under Article 1.

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<sup>59</sup> Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Information Sheet 2 – 99-year leases on Indigenous land.

<sup>60</sup> See for example Senate Estimates, Community Affairs Committee, Hansard, 30 May 2006 CA 39 and CA42. The Law Council also refers to a number reports in the media and anecdotal information provided by practitioners in the Northern Territory. For example, '\$10 million Tiwi Island school plan comes with a catch', Sam de Silva, Tiwi Island News, November 2006; see also 'Island held to ransom over land', The Courier Mail, 9 November 2006; 'The long held ambitions for a bad black land law', National Indigenous Times Issue 107, 15 June 2006.

## 4. ARTICLE 2(1) NON-DISCRIMINATION AND EQUALITY

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*Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

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In accordance with the UN Guidelines,<sup>61</sup> the Common Core Document includes a section entitled 'non-discrimination and equality before the law'. In this section, the Common Core Document refers to the measures the Australian Government has taken to ensure equality before the law and equal protection of the law for Indigenous Australians. These measures include:

- diversionary and preventative programs to address disproportionately high representation of Indigenous Australians in prison;
- the development and implementation of a National Indigenous Law and Justice Strategy;
- Indigenous Legal Aid Services; and
- Indigenous Night Patrols.

Positive action has also taken place at the state and territory level. For example, Aboriginal courts have been piloted in the ACT, New South Wales (NSW), Victoria, Queensland and South Australia, with positive outcomes, including reduced rates of recidivism, empowerment of Aboriginal elders and communities and flexibility in sentencing.<sup>62</sup>

Despite these positive measures, a number of features of the Australian legal system continue to discriminate against, disadvantage or inadequately protect the rights of Indigenous Australians. A number of significant examples have occurred subsequent to the end of the reporting period which highlight this deeply concerning trend.

### 4.1 Native Title Amendment Act 1998 (Cth)

In 1992, in the landmark decision of *Mabo v Queensland (No 2)*<sup>63</sup> the High Court of Australia established the doctrine of native title in Australia. The doctrine was further expanded in *Wik Peoples v Queensland*,<sup>64</sup> which confirmed that the granting of a pastoral lease, whether or not the lease had expired (or had otherwise been terminated), did not necessarily extinguish all native title rights and interests that might otherwise exist.

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<sup>61</sup> UN, *Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents*, UN Doc HRI/MC/2006/3 (2006).

<sup>62</sup> For further information on Aboriginal Courts and circle sentencing see Australian Institute of Criminology, *Trends & issues in crime and criminal justice*, No. 277: Indigenous courts and justice practices in Australia (May 2004) available at <http://www.aic.gov.au/publications/tandi2/tandi277t.html>.

<sup>63</sup> *Mabo v Queensland (No.2)* (1992) 175 CLR 1,

<sup>64</sup> *Wik Peoples v Queensland* (1996) 141 ALR 129.

The decision in *Wik* prompted the Australian Government to introduce the *Native Title Amendment Act 1998* (Cth), which reversed a number of the key elements of the *Wik* decision and substantially restricted the content of rights conferred under a native title declaration.

In response to these amendments the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Professor Mick Dodson AO, issued a communication to this Committee under the early warning notification procedures. The amendments were subsequently referred to the CERD Committee, resulting in Australia being the first Western nation placed on the CERD Committee's Early Warning and Urgent Action list.<sup>65</sup>

The Australian Government rejected the CERD Committee's reference and criticised their decision, effectively declaring that Australia had no case to answer in relation to the amendments.<sup>66</sup>

The Law Council considers that the *Native Title Act 1993* (Cth) is in serious need of review, to create a greater balance between the interests of Australian Government, commercial interests and native title holders or claimants. It has been reported that, under the Rudd Government, a review of the *Native Title Act* will be forthcoming.<sup>67</sup>

## 4.2 Crimes Amendment (Bail and Sentencing) Act 2006

In October 2006, the Australian Government introduced the *Crimes Amendment (Bail and Sentencing) Act 2006* precluding Australian courts from considering the cultural background or customary laws of an offender convicted of a federal crime in mitigation (or aggravation) of the offence when making bail and sentencing decisions.

The measures were specifically and expressly directed at Indigenous Australians.<sup>68</sup>

Prior to the amendments, considerable media attention had been brought to bear on a number of isolated cases in which an offender had received a sentence which was perceived to be 'light', where the facts of the cases concerned serious violent and sexual offences.<sup>69</sup> In some of the cases, the fact that the offender lived according to customary Aboriginal law had been a consideration for the court in sentencing the offender. In each case, the matter was appealed successfully by the Department of Public Prosecutions and a more severe sentence imposed.<sup>70</sup>

There are many Aboriginal communities in remote areas of Australia which continue to live according to customary law. Some of those communities continue to practice

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<sup>65</sup> Committee on the Elimination of Racial Discrimination, 53rd Session (1998).

<sup>66</sup> Attorney-General and Minister for Immigration and Multicultural Affairs, 'Australian Government Responds to the United Nations Human Rights Committee' (Press Release, 17 December 1997). For further discussion see David Kinley and Penny Martin, "International Human Rights Law at Home: Addressing the Politics of Denial" (2002) *Melbourne University Law Review* 24.

<sup>67</sup> ABC Radio AM Program, 'Macklin flags review of native title system', (22 May 2008).

<sup>68</sup> See S.H. Rimmer and C. Lormer, *Crimes Amendment (Bail and Sentencing) Act 2006*, Bills Digest, Parliamentary Library, Commonwealth of Australia. Available at <http://wopared.parl.net/library/Pubs/bd/2006-07/07bd056.pdf>

<sup>69</sup> See for example, "One Law For All", *The Australian*, 29 May 2006; 'Cultural law "manipulated by offenders"', *Sydney Morning Herald*, 27 June 2006.

<sup>70</sup> See *The Queen v GJ* [2005] NTCCA 20; *The Queen v Riley* [2006] NTCCA 10, *The Queen v Inkamala* [2006] NTCCA 11.

violent traditional punishment, arranged marriages and initiation, all of which have complex implications under both Australian and international law.<sup>71</sup> The existence of laws prohibiting such practices in Australia have not resolved or curbed these practices significantly.

The fact that such laws and customs are observed in some Aboriginal communities, where knowledge of Australian law is not well known, is a relevant consideration for the courts, which must distinguish between crimes carried out by those in full knowledge of their wrong-doing and those who commit crimes in the belief that their actions are sanctioned and endorsed by their community.

The *Crimes Amendment (Bail and Sentencing) Act 2006* has the serious potential to require courts to discriminate against Aboriginal and Torres Strait Islander people and those of different cultural backgrounds within the broader Anglo-Australian community. In effect, those of different cultural backgrounds from the 'mainstream' community will be at a disadvantage under Australia's criminal justice system as a result of these changes.

In September 2007, the Australian Government introduced similar changes to the criminal laws of the Northern Territory, along with a range of other measures forming part of the Commonwealth's 'national emergency' intervention (discussed below).

### **4.3 Northern Territory Emergency Intervention**

In June 2006, the Northern Territory commissioned an Inquiry into child sexual abuse and violence in Northern Territory Aboriginal communities. The Inquiry released its report entitled *Little Children Are Sacred* in June 2007.<sup>72</sup> The report outlined horrific details of drug and alcohol-fueled violence and sexual abuse in Aboriginal communities, and labeled the situation a 'national emergency'.

The Australian Government responded by declaring a national emergency in the Northern Territory and, in September 2007, after just one week of public consultations, the Government implemented a range of measures under a package of laws - referred to as the Northern Territory National Emergency Response legislation - including:

- compulsory acquisition of approximately 70 Aboriginal townships in the Northern Territory;
- bans on pornography and severe restrictions on alcohol sales in designated communities;
- weakening of the Aboriginal lands permit system (referred to above, at 3.3);
- quarantining of welfare payments to those living in designated areas; and
- suspension of the *Racial Discrimination Act 1975* (Cth) in relation to all actions carried out under the new powers created by the emergency response legislation.

The last of these features is particularly disturbing from a human rights perspective.

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<sup>71</sup> For further information see Megan Davis and Hannah McGlade, "International Human Rights Law and the Recognition of Aboriginal Customary Law", Law Reform Commission of Western Australia (March 2005).

<sup>72</sup> Northern Territory Government, *'Ampe Akelyernemane Meke Mekarle (Little Children are Sacred)'*: Report of the NT Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, (2007) ('Little Children Are Sacred Report').

The Law Council considers this suspension of the *Racial Discrimination Act* to be in direct contravention of its obligations under article 2(1) of the ICCPR, the United Nations Charter and the CERD.

The *Racial Discrimination Act* implements Australia's obligations as a signatory to the UN Convention on the Elimination of all forms of Racial Discrimination (the CERD). The Australia Government justified suspending the operation of the *Racial Discrimination Act* under the emergency response legislation on the basis that the measures were 'special measures' under the CERD.

The Law Council notes that the 'special measures' exception under the CERD is unlikely to be broad enough to cover a number of critical aspects of the emergency response legislation, including changes to the permit system, compulsory acquisition of Aboriginal townships and the changes to Northern Territory criminal statutes, banning consideration of the cultural background of an offender in sentencing and bail proceedings, as referred to above.

The Rudd Government has now introduced measures repealing changes to the permit system, implementing bans on narrow cast pornographic channels in designated areas and permitting carriage of prohibited material through designated areas.<sup>73</sup> Significantly, the Government has declared that the *Racial Discrimination Act* will not be suspended under these new measures.

A twelve-month review into the Northern Territory National Emergency Response intervention has also been announced.

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<sup>73</sup> *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008* (Cth).

## 5. ARTICLE 2(2) AND (3) GIVING EFFECT TO RIGHTS PROTECTED IN COVENANT AND ACCESS TO REMEDIES FOR BREACH

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2. *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*

3. *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.*

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The Common Core Document asserts that existing domestic institutions, such as an independent judiciary, a democratically elected parliament and a free media, operate to ensure Australia meets its obligations under article 2(2) and 2(3).<sup>74</sup>

The Law Council disputes this assertion.

While each of these institutions has a role to play in contributing to a culture of respect for human rights, none of these institutions either alone or with others are *sufficiently* compelled or empowered to give effect to Australia's human rights obligations in the manner envisaged by Article 2 or to provide effective remedies for violations of ICCPR rights.

### 5.1 Judiciary

The Common Core Document refers to the existence of an independent judiciary in Australia and the important role it plays in protecting fundamental rights and freedoms.<sup>75</sup> The Law Council certainly does not take issue with the submission that an independent judiciary is a fundamental element of any system of rights protection, nor with the submission that, relatively speaking, the Australian judiciary is indeed independent and operates without undue interference from the other arms of government.

However, the Law Council believes that it is perhaps disingenuous of the Government to cite the judiciary as a primary vehicle of rights protection in Australia when in the course of the reporting period the Government introduced a number of

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<sup>74</sup> Common Core Document at [56].

<sup>75</sup> Common Core Document at [48]-[49], [83]-[84].

legislative amendments which aimed to severely limit the extent to which executive decision making in certain areas is subject to judicial review

For example:

- Part IV of *Transfer of Prisoners Act 1983* (Cth), introduced by the *Anti-Terrorism Act 2004* (Cth), grants the Attorney-General the power to make an order for the transfer of a prisoner to another state or territory if the Attorney-General believes on reasonable grounds that the transfer is necessary in the interests of national security. Having made such a transfer order, the Attorney-General is also provided with a discretion not to make an order for a remand prisoner to be transferred back to the original jurisdiction to attend court, if again the Attorney believes on reasonable grounds that it is essential in the interests of security that the order not be made. Under these new provisions, decisions made by the Attorney-General under Part IV of the *Transfer of Prisoners Act* are excluded from the *Administrative Decisions (Judicial Review) Act 1977*.<sup>76</sup> As a result, the courts have limited power to review whether there is in fact a reasonable basis for the Attorney-General's decision to transfer a prisoner and whether in making the decision the Attorney has given proper consideration to the welfare of the prisoner and the administration of justice. .
- In 2001, in the context of heightened concern about strengthening border protection following the arrival of *MV Tampa* off the Australian coast, a privative clause was added to the *Migration Act 1958* (Cth).<sup>77</sup> The effect of the privative clause is that many administrative decisions made under the *Migration Act* are deemed to be 'final and conclusive' and cannot be 'challenged, appealed against, reviewed, quashed or called in question in any court'.<sup>78</sup> This significantly limits individuals' ability to challenge the legality or arbitrariness of certain decisions made under the *Migration Act*, including decisions that impinge on the enjoyment of human rights, such as those prolonging immigration detention or those ordering deportation.

By constraining judicial review of executive decision making, the legislature has limited the ability of the judiciary to safeguard against the unlawful or arbitrary exercise of power by the executive.

The other matter which the Common Core document does not address is the extent to which the rights protection role played by the Australian judiciary is circumscribed by the status of international law within the Australian legal system.

### 5.1.1 Lack of judicial engagement with international human rights law

In Australia, because of the status of international law within the domestic legal system, judicial decision making exists within a framework that makes little reference to international human rights laws and standards.

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<sup>76</sup> See *Administrative Decisions (Judicial Review) Act 1977*, Schedule 1, s3(xc).

<sup>77</sup> The privative clause was enacted as s474 of the *Migration Act 1958* (Cth) by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth).

<sup>78</sup> The High Court upheld the constitutional validity of s474 in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476. However, the High Court found that the s474 of the *Migration Act 1958* (Cth) does not totally exclude judicial review of decisions to which it applied.

This is not to suggest Australian courts' decision making is flawed or unprincipled. However, the Government's reliance on the courts to protect and promote internationally recognised human rights must be considered in light of the limited role international human rights law actually plays in the determination of cases in Australia.

A number of recent decisions illustrate why, without change to Australia's legal framework, Australian courts can not be relied upon to protect and promote internationally recognised human rights.

In *AB v Minister for Immigration and Citizenship*<sup>79</sup> the former Minister for Immigration and Multicultural Affairs had refused to exercise her discretion under subsection 501(1) of the *Migration Act* to grant the applicant a visa. The applicant sought judicial review of the Minister's decision in the Federal Court.

Prior to the decision to refuse the visa, the Department of Immigration had indicated to the applicant that, in making her decision, the Minister would consider whether refusing the visa would 'constitute a breach of Australia's international obligations under the *UN Convention Relating to the Status of Refugees* (the Refugee Convention), the *UN Convention Against Torture* (CAT) or the ICCPR.

Although the discretion conferred on the Minister by section 501 of the *Migration Act* is unfettered, the applicant submitted that once the Minister determined that she would take into account Australia's treaty obligations in exercising her discretion, she was obliged to apply the relevant obligations in accordance with their terms. It was argued that the Minister had misinterpreted Australia's obligations under the ICCPR and CAT and that this amounted to a jurisdictional error.

Justice Tracey held that although Australia's international treaty obligations are matters that decision-makers are entitled to have regard to when exercising their discretion under s 501 of the Act, in the absence of any legislative requirement, they are not bound to do so. Accordingly, if a decision maker chooses to have regard to a treaty obligation, but in some way misunderstands the full extent or purport of that obligation, this will not constitute jurisdictional error.

Another example of the tenuous position of international human rights in Australian judicial reasoning is the High Court's decision to uphold the constitutional validity of indefinite detention of asylum seekers in *Al-Kateb v Godwin*<sup>80</sup>

Mr Al-Kateb, was a stateless Palestinian. He arrived in Australia without a visa and was placed in immigration detention. His application for a protection visa was refused, a decision that was upheld by the Refugee Review Tribunal. His appeal to the Federal Court was unsuccessful. Stuck in detention and with his hopes of obtaining a visa exhausted, Mr Al-Kateb then asked to be removed from Australia.

However, as a result of Mr Al-Kateb's statelessness, the Australian Government was unsuccessful in making arrangements for his removal and repatriation.

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<sup>79</sup> [2007] FCA 910.

<sup>80</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562. Mr Al-Kateb's case was heard alongside *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664; *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.

Facing the prospect of indefinite immigration detention, Mr Al-Kateb sought relief from the Federal Court, which was denied, before appealing to the High Court.

The issue before the High Court in *Al-Kateb* was whether the *Migration Act* authorises indefinite detention of asylum seekers, and if so, whether the provision for indefinite administrative detention in that Act infringed Chapter III of the *Australian Constitution*.

According to the majority in *Al-Kateb*,<sup>81</sup> the *Migration Act* clearly and lawfully provided for the appellant's indefinite detention until his removal from the country.

Further, the majority held that under the Constitution, Parliament is empowered to make laws with respect to 'aliens', and that this may include laws which impose detention on non-citizens for as long as the government deems it necessary. Thus, it was held that, even if deportation were not possible, indefinite detention of failed asylum seekers was constitutionally valid.<sup>82</sup>

The Law Council does not seek to criticise the majority's reasoning in this case; but rather to emphasise that – until the human rights treaties to which Australia is a party are enshrined in domestic legislation – the court is unlikely to perceive and approach its role as that of defender and upholder of international human rights law.

Justice McHugh's reasons are illustrative of the majority's approach to the role of international law in constitutional interpretation in Australia. Justice McHugh emphasised that the High Court has never accepted that there is an implied principle of interpretation that requires the *Australian Constitution* be construed so as to conform to the rules of international law. On this basis, His Honour concluded that Australia's international obligations do not give rise to any implication of constitutional protection of human rights in Australia:

*It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.*<sup>83</sup>

On the majority's reasoning, the principles of international human rights law occupy little more than a sideline position in the interpretation of statutes and the determination of their constitutional validity. As Julie Curtin observes:

*A marked characteristic of the majority and minority judgments (with the notable yet unsurprising exception of Kirby J's reasoning) is a focus on the domestic text, both of the Migration Act and the Constitution, and an inattention to the wider context of the appellant's situation and of the Act itself — that being the norms and principles of international human rights law.*<sup>84</sup>

The lack of significance afforded to international law in statutory and constitutional interpretation means that Australia is left with a policy of immigration detention that

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<sup>81</sup> The majority was constituted by McHugh, Hayne, Callinan and Heydon JJ.

<sup>82</sup> In the case of *Behrooz*, the majority of the High Court found that, no matter how harsh or inhumane the conditions of remote Australian immigration detention facilities, such conditions could not provide a defence to a charge of escaping from immigration detention.

<sup>83</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at [75] per McHugh J.

<sup>84</sup> Julie Curtin, 'Never Say Never': *Al-Kateb v Godwin* (2005) Sydney Law Review 16.

has been adjudged by the High Court as legally valid at a domestic level, but which is in fact in violation of international human rights law.<sup>85</sup>

A further example of the limited role of international human rights law in judicial decision making can be seen in *Thomas v Mowbray*.<sup>86</sup> This case challenged the constitutional validity of the control order regime introduced into the *Crimes Act* as part of the former Australian Government's anti-terrorism measures.<sup>87</sup> Although he had not been convicted of any offence, the control order placed on Mr Thomas imposed a number of restrictions on his liberty, including restrictions prohibiting him from leaving Australia without notifying officials or from communicating with certain proscribed parties.

Mr Thomas challenged the validity of the control order regime in two key respects. First, he argued that the Commonwealth Parliament did not have legislative power to enact the control order regime because it was not connected to any of the subjects that the Commonwealth Parliament is permitted to legislate on. Secondly he contended that the regime required the judiciary to exercise a type of decision making power, (namely the power to decide whether restrictions should be imposed on the liberty of a person who has not been convicted of a criminal offence), that is inconsistent with the exercise of judicial power. Under the *Australian Constitution*, except where it is incidental to and consistent with the exercise of their judicial functions, it is considered a violation of the separation of powers doctrine for non-judicial functions to be conferred on federal judges.

The majority of the High Court upheld the validity of the control order regime. It found that an appropriate Commonwealth legislative power existed under the *Australian Constitution* to support the legislation, namely the power to make laws with respect to the defence of Australia, and that this included the power to make laws in response to international terrorism. The majority also found that the type of power the control orders regime vested in the judiciary was not contrary to the *Australian Constitution* as the judiciary already exercises similar powers to restrict an individual's liberty through, for example, bail and apprehended violence orders.

Mr Thomas' case, like Mr Al-Kateb's case is very revealing. Essentially, Mr Thomas was asking the Court:

*No evidence has been adduced against me to prove beyond reasonable doubt that I am guilty of any offence and yet I have been singled out by the State and my freedom of movement and association have been restricted – is that lawful?*

Mr Thomas' question has an obvious human rights dimension and yet the Court in Australia does not and cannot approach it as such. In answering Mr Thomas' question, the Court was forced to confine its reasoning to just two matters:

- Is this a subject area on which the Commonwealth Parliament has power to legislate? And
- Has the Parliament asked the judiciary to perform a task which is inconsistent with the special role reserved for the Judiciary under the Constitution?

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<sup>85</sup> Julie Curtin, 'Never Say Never': *Al-Kateb v Godwin* (2005) Sydney Law Review 16.

<sup>86</sup> *Thomas v Mowbray* (2007) 237 ALR 194.

<sup>87</sup> This regime will be discussed in detail later in this Report.

For the majority of the High Court Judges who presided in the case, international human rights law had little or no bearing on either of those two matters.

Thus, while Chief Justice Gleeson considered whether the power to restrict liberty exercised when making a control order was an incident of the exclusive judicial function of adjudging and punishing criminal guilt,<sup>88</sup> the Chief Justice did not refer to the right to freedom from arbitrary detention contained in article 9 of the ICCPR, or the fair trial rights contained in article 14 of the ICCPR. And although nearly all justices spoke of Australia's international obligations to fight terrorism following September 11,<sup>89</sup> very little was said about Australia's obligation to ensure counter-terrorism measures adhered to our human rights obligations.<sup>90</sup>

By citing the judiciary as an effective means of human rights protection in Australia, the Common Core Document fails to disclose the distinct limits of this form of protection.

The courts are primarily concerned with questions of lawfulness, which are often narrowly framed in a manner which takes no account of human rights compliance, even when the factual circumstances of the case have obvious human rights implications.

As a result, the Committee should be wary of the Government's reliance on the judiciary as an adequate form of protection of ICCPR rights in Australia.

## 5.2 Limited range of enforceable remedies

In Australia there is no opportunity or avenue to seek and obtain a remedy for a breach of ones' ICCPR rights *per se*.

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<sup>88</sup> *Thomas v Mowbray* (2007) 237 ALR 194 at [17]-[18] per Gleeson CJ.

<sup>89</sup> See for example *Thomas v Mowbray* (2007) 237 ALR 194 at [83]-[88] per Gummow and Crennan JJ; at [270] per Kirby J; at [399] per Hayne J.

<sup>90</sup> Kirby J, in minority in *Thomas v Mowbray* (2007) 237 ALR 194, was the only Justice to consider the control order regime in light of Australia's human rights obligations under international law. Justice Kirby J's dissenting judgment in *Thomas v Mowbray* provides a contrast to the predominant judicial approach to the role of international human rights law when determining cases involving individual rights. Justice Kirby found the control order regime to be unconstitutional. His Honour also found the regime to be contrary to international human rights law:

*The Australian Constitution should be read, so far as the text allows, in a way that is harmonious with the universal principles of the international law of human rights and not destructive of them. Australia has ratified and accepted those principles. They are upheld by other civilised nations. They are available to assist our understanding of the contemporary limits and requirements of the Australian Constitution. As such, they confirm the constitutional conclusions that I have already expressed.*

...

*Upon the fundamental requirements so stated, the Australian Constitution and the international law of human rights speak, in my view, with a consistent, clear voice and in identical terms. Courts must be independent and impartial. They must treat with essential equality all parties who come before them. [The control order regime] fails to do. The failure does not appear as a rare exception, capable of being judicially confined to very special and particular circumstances. It is stated as a systemic norm to be applied universally, whatever the facts of the given case.*

Expressing only a minority view, these observations have not generated a shift towards a more direct engagement with international human rights law by Australian courts.

However, remedies are available under Australian legislation and common law for a variety of human rights violations – even though the available cause of action may not always be specifically framed in human rights terms. For example,

- Specific Commonwealth legislation<sup>91</sup> prohibits discrimination on the grounds of race, national or ethnic origin, sex, marital status, pregnancy, family responsibilities; disability and age.<sup>92</sup> Under the legislation complaints of discrimination are initially referred to a process of conciliation. Where the complaint cannot be settled by conciliation, it may be referred to a court or tribunal for assessment. If the court or tribunal is satisfied that there has been unlawful discrimination, it may make a range of orders including compensation, reinstatement of employment or an apology.
- In each jurisdiction in Australia it is an offence to apprehend or detain a person unless authorised by statute or common law.<sup>93</sup> The remedy for unlawful arrest is the civil action of false imprisonment.<sup>94</sup> An action for false imprisonment is actionable *per se*. This means specific damage (in addition to infringement of the right) is not necessary and compensation may be awarded.<sup>95</sup>
- The common law of defamation provides individuals with protection for their reputation and goes some way to protecting the right to privacy. In addition, all states and territories have passed uniform defamation acts allowing persons to seek compensation for damage to personal reputation.<sup>96</sup>
- Under the federal *Privacy Act 1988* the Privacy Commissioner is given powers to investigate an act or practice alleged to constitute an interference with the privacy of an individual.<sup>97</sup> If the complaint is substantiated, the Commissioner may make a determination that the respondent redress any loss or damage suffered by the complainant; or pay compensation to the complainant.

Unfortunately the sum of these different types of available statutory and common law remedies does not add up to ensure an adequate remedy is available in every circumstance that an ICCPR right is violated.

Moreover, those remedies that are available remain so at the discretion of the parliament and may be withdrawn or limited at any time.

In essence, remedies are generally available under Australian law where a person is a victim of unlawful action rather than a victim of a human rights violation *per se*. The

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<sup>91</sup> *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and the *Sex Discrimination Act 1984* (Cth) and the *Age Discrimination Act 2004* (Cth).

<sup>92</sup> Also falling within the definition of 'unlawful discrimination' is offensive behavior based on racial hatred; sexual harassment; and harassment of people with disabilities.

<sup>93</sup> An arrest is unlawful if it is not for the purpose of bringing a before a court to be dealt with according to law. See for example *Crimes Act 1900* (NSW) s352; *Crimes Act 1958* (Vic) ss457-459.

<sup>94</sup> *Christie v Leachinsky* [1947] AC 573 at 587; per Viscount Simon.

<sup>95</sup> *Watson v Marshall* (1971) 124 CLR 621 (affirmed *Marshall v Watson* (1972) 124 CLR 640). *Attorney-General (St Christopher, Nevis and Anguilla) v Reynolds* [1980] AC 637; *Myer Stores Ltd v Soo* [1991] 2 VR 597.

<sup>96</sup> *Civil Law (Wrongs) Act 2002* (ACT); *Defamation Act 2006* (NT); *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (VIC); *Defamation Act 2005* (WA).

<sup>97</sup> *Privacy Act 1988* (Cth) Part 5.

result is that where the law does not specifically protect an ICCPR right, or more importantly, where the law itself in fact *authorises* the violation of an ICCPR right, no remedy will be available.

For example, common law rights to liberty and security of person can be easily displaced by legislation. Once a restriction of liberty is authorised by law, for example under the anti-terror control order regimes, there are no remedies available at common law or statute for the denial of the right to liberty, even if the law under which a person is detained is draconian and in itself violates the ICCPR.

Even where special Commonwealth legislation does provide specific protection to certain internationally recognised human rights, such as the *Racial Discrimination Act*, this legislation can be amended, repealed, suspended, restricted or excluded from operation by another Act of Parliament at any time. When this occurs, no remedy is readily available for breach of the rights contained therein. In short, the successful operation of this type of legislation depends on a high level of voluntary respect and reverence for its content by the executive and legislative arms of government. Such respect and reverence is not always forthcoming.<sup>98</sup>

## 5.3 Specialised human rights machinery

### 5.3.1 Human Rights and Equal Opportunity Commission

The Human Rights and Equal Opportunity Commission (HREOC) was established in 1986 by an Act of the Federal Parliament.<sup>99</sup> It is an independent statutory organisation responsible for administering Commonwealth legislation enacted to protect certain human rights, such as the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth). HREOC has the power to investigate and conciliate complaints of unlawful discrimination and can make recommendations to Parliament. It also has an important public awareness and educative role.

The Law Council acknowledges and supports the important role HREOC plays in promoting awareness of and respect for human rights in Australia.

In many key areas, HREOC has voiced concerns regarding the impact of Government policy or enacted legislation on the enjoyment of human rights. For example,<sup>100</sup> HREOC has:

- made submissions to the Parliamentary Joint Committee on Intelligence and Security Review regarding the power to proscribe terrorist organisations, recommending that the proscription process be made more transparent and

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<sup>98</sup> This level of respect can not always be counted on as was illustrated by the suspension of the operation of the Racial Discrimination Act in the Government's Northern Territory Emergency Intervention legislation.

The fact that the Australian Government was legally able, and politically willing, to propose a provision suspending the operation of the Racial Discrimination Act demonstrates the attitude of the former Australian Government to the protection of international human rights. Moreover, the passage of the emergency response legislation highlights the fragility of special Commonwealth legislation as a form of protection for human rights in Australia.

<sup>99</sup> *Human Rights and Equal Opportunity Act 1986* (Cth).

<sup>100</sup> For further examples, see HREOC's website: <http://www.hreoc.gov.au/>.

provide organisations, and other persons affected, with notification, and with the right to be heard in opposition;

- made submissions to the Senate Committee on Legal and Constitutional Affairs in response to the Northern Territory National Emergency Response legislation, expressing serious concerns regarding the exclusion of the operation of the *Racial Discrimination Act* to the proposed intervention measures; and
- conducted an Inquiry into the rights of same sex couples and found that 58 federal laws discriminated against more than 20,000 same sex couples.<sup>101</sup>

Despite HREOC's best efforts, information and guidance provided in its advisory capacity was generally not afforded great priority by the Australian Government during the reporting period. Without significant explanation or justification, other considerations appear to have consistently outweighed concerns expressed by HREOC about draft legislation and existing policies and practices.

In addition, HREOC's ability to provide effective remedies for breaches of human rights is limited by the nature of the rights protected in the legislation it is charged with administering. Although HREOC's conciliation powers have resulted in positive outcomes for many complainants, they do not provide comprehensive protections or remedies for individuals who have been subject to a violation of their human rights by the Australian Government,. As observed by the Federal Court in *Minogue v HREOC*:

*Although the HREOC Act was enacted to secure the fulfilment of Australia's obligations under the ICCPR, the Act does not make the provisions of the ICCPR directly enforceable in Australian courts.*<sup>102</sup>

Thus, while HREOC forms an important part of the legal framework for the protection of human rights, its functions and powers – and the way in which these functions and powers have been treated by the institutions of government – are an inadequate form of protection against the violation of human rights in Australia and fail to provide the type of protection contemplated in article 2(3).

### 5.3.2 Aboriginal and Torres Strait Islander Social Justice Commissioner

Similar comments apply to the Aboriginal and Torres Strait Islander Social Justice Commissioner.

The Law Council praises the efforts of past and present Commissioners to bring to the attention of Parliament the laws and policies impacting on the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islanders.

However, the Law Council is concerned that by listing the existing functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner in the Common Core Document as part of the special machinery for the protection of human rights,

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<sup>101</sup> HREOC, *Same-Sex: Same Entitlements Inquiry* (2007). As will be discussed later in this Report, the Rudd Government has committed to removing discrimination against same sex couples in federal law. See discussion at Article 26.

<sup>102</sup> *Minogue v Human Rights & Equal Opportunity Commission* [1999] FCA 85 [36], [38]

Australia is glossing over the limited impact the Commissioner's reports and advice have had on the development of government policy in relation to the rights of Indigenous people.

For example, in his 2006 the Commissioner recommended that the government adopt a 'human rights approach' to development in Indigenous communities and ensure meaningful consultation with Indigenous communities on policy developments affecting their lives. Both these recommendations were blatantly ignored, despite protest from many sectors of the Australian community including the Law Council and HREOC, in the implementation of the Northern Territory National Emergency Response legislation.

## 5.4 An alternative source of human rights protection? The Bill of Rights Debate

This Committee has noted that it is generally up to State parties to determine the method of implementation of their obligations under the ICCPR in their own territories, within the framework set out in the article 2.<sup>103</sup> However, this Committee has raised the concern that:

*in the absence of a constitutional Bill or [sic] Rights, or a constitutional provision giving effect to the Covenant, there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.*

*[Australia] should take measures to give effect to all Covenant rights and freedoms and to ensure that all persons to whose Covenant rights and freedoms have been violated have an effective remedy.*<sup>104</sup>

Although not mentioned in the Common Core Document, there has been substantial public debate during the reporting period as to whether Australia needs a constitutionally protected Bill of Rights or, as an alternative, a legislative Charter of Rights.

The possible enactment of a federal bill or charter received growing media attention in the lead-up to the 2007 Federal Election. This debate has been fuelled by the enactment of two State Human Rights Acts in Victoria and the Australian Capital Territory (ACT).

On 2 March 2004, the ACT Legislative Assembly passed the *Human Rights Act 2004*. The majority of the human rights protected in the Act are based on the civil and political rights contained in the ICCPR. Under the Act, courts and tribunals are required to interpret ACT laws in a manner that is compatible with the *Human Rights Act* 'so far as it is possible to do so consistently with its purpose'. The Act also empowers the ACT Supreme Court to issue a non-binding 'declaration of incompatibility' when a law is not consistent with the rights contained in the *Human Rights Act*<sup>105</sup> and requires pre-enactment scrutiny of all legislation, including a

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<sup>103</sup> Human Rights Committee, *General Comment No 3: Implementation at the national level (Art 2)* (1981).

<sup>104</sup> Human Rights Committee, *Concluding Observations: Australia*, UN Doc A/55/40, 506 (2001).

<sup>105</sup> *Human Rights Act 2004 (ACT)* s32.

statement from the Attorney-General about whether legislation is compatible with the Act. The ACT Act also establishes a Human Rights Commissioner to review existing legislation and conduct education programs relating to human rights.

The Victorian *Charter of Human Rights and Responsibilities Act* was passed by the Victorian Parliament on 25 July 2006.<sup>106</sup> Like the ACT Act, the majority of the human rights enshrined in Part 2 of the Charter are based on those protected in the ICCPR. A primary purpose of the Charter is to require that all Bills introduced into parliament be tabled with a statement of compatibility, which outlines the extent of its consistency with human rights.<sup>107</sup> The Scrutiny of Acts and Regulations Committee must then report to Parliament on whether a Bill is incompatible with human rights.<sup>108</sup> The Charter also gives the Supreme Court of Victoria the power to make a declaration of inconsistent interpretation where a statutory provision is incompatible with a human right.<sup>109</sup> This does not affect the validity of the provision, however, Parliament must formally respond to such a declaration. In addition the Charter provides that Courts and tribunals are required to interpret legislation consistently with human rights and, so far as possible, in accordance with the purpose of the legislation.<sup>110</sup> Public authorities must also act in a manner consistent with human rights and give relevant human rights due consideration during decision making.<sup>111</sup>

Following the lead of Victoria and the ACT, other State jurisdictions are considering enacting specific legislation to protect human rights.<sup>112</sup>

The Law Council is of the view that there is a need for specific human rights protection at the federal level. The time is right for the matter to be thoroughly investigated by the Federal Government and be the subject of wide community consultation.

This view appears to be shared by the Rudd Government, which has indicated a willingness to engage in public consultation on how to best protect and promote human rights at the federal level.

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<sup>106</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* The Act came into force on 1 January 2007. Divisions 3 and 4 of Part 3 of the Act (concerning obligations of public authorities and powers of the court) did not commence until January 2008.

<sup>107</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, Part 3, Division 1.

<sup>108</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s30.

<sup>109</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s36.

<sup>110</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* Part 3, Division 3.

<sup>111</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* Part 3, Division 4.

<sup>112</sup> For example see Report of the Consultation Committee for a proposed WA Human Rights Act, *A WA Human Rights Act*, November 2007 available at [http://www.humanrights.wa.gov.au/final\\_report.htm](http://www.humanrights.wa.gov.au/final_report.htm)

## 6. ARTICLE 6 RIGHT TO LIFE

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1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

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The Common Core Document does not explicitly address Australia's obligations under article 6 of the ICCPR, however it does refer to the following relevant aspects of Government policy:

- Australia's ratification of the Rome Statute of the International Criminal Court (ICC) in 2002 and the incorporation of offences of genocide, crimes against humanity, war crimes and crimes against the administration of justice of the ICC into domestic legislation<sup>113</sup> and
- extradition, mutual assistance and police to police assistance in death penalty cases.<sup>114</sup>

### 6.1 The Death Penalty

Australia has ratified the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty* (Second Optional Protocol) and has complied with its obligation to abolish the death penalty within its own jurisdiction. Since 1973 and the passage of the *Death Penalty Abolition Act 1973* (Cth), the death penalty has not applied in respect of offences under the law of the Commonwealth and Territories.

However, Australia's international obligations to oppose the use of the death penalty are not limited to the passage of domestic legislation.

The preamble to the Second Optional Protocol indicates that it is ratified by State parties which are "*desirous to undertake hereby an international commitment to abolish the death penalty.*" Clearly it is intended that State parties, in ratifying the Protocol, commit themselves not only to the abolition of the death penalty within their borders but to working towards global abolition. This assumes that State parties to the Second Optional Protocol will, at the very least, be consistent in their principled opposition to the death penalty wherever and whenever it is opposed.

Further, article 2(1) of the ICCPR provides that each state must respect and protect the ICCPR rights of persons within their jurisdiction and territory. This Committee has interpreted this obligation as including a broader duty not to expose a person within a State party's jurisdiction to the real risk that their ICCPR rights will be violated by returning them to another jurisdiction where their rights are under threat.<sup>115</sup>

As this Committee held in *Judge v Canada*, this gives rise to an obligation on State parties which have abolished the death penalty not to return a person to a jurisdiction

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<sup>113</sup> Common Core Document at [207]-[208].

<sup>114</sup> Common Core Document at [98]-[102].

<sup>115</sup> Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligations Imposed on State Parties to the Covenant*, (2004), [12].

where they face criminal proceedings which may result in the imposition of the death penalty.<sup>116</sup>

The Law Council is concerned that the Common Core Document does not provide an accurate picture of Australia's progress towards meeting these broader obligations both to work cooperatively towards global abolition of the death penalty and to protect against exposing people to capital punishment in foreign jurisdictions.

## 6.2 An Equivocal Policy of Opposition

Australia has traditionally taken a strong principled stance against capital punishment.

Australia has demonstrated its opposition to the death penalty at the international level on a number of occasions, most recently as a co-sponsor of the landmark UN resolution calling for an immediate moratorium on executions as a first step towards the universal abolition of the death penalty.<sup>117</sup>

However, the public position adopted by the former Australian Government on this issue was less than resolute. For example, following the incident known as the 'Bali bombings',<sup>118</sup> where 88 Australians were killed in a terrorist attack on a Bali nightclub, former Prime Minister Howard publicly stated that the Bali bombers:

*...should be dealt with in accordance with Indonesian law. ...and if [the death penalty] is what the law of Indonesia provides, well, that is how things should proceed. There won't be any protest from Australia.*<sup>119</sup>

In contrast, when Australian citizen Nguyen Tuong Van was executed in Singapore in December 2005 following conviction for drug related offences, the use of the death penalty was loudly condemned.<sup>120</sup>

The question of whether Australia should oppose the death penalty in all circumstances became a matter of public interest in the lead up to the 2007 Federal Election.

During the election campaign, the then Shadow Foreign Affairs Minister Robert McClelland signalled that, if elected, the Rudd Government would adopt a principled and consistent approach to opposing death sentences – wherever and whenever imposed. It was also said that a Rudd Government would initiate a regional coalition against the death penalty by drawing abolitionist states together.<sup>121</sup>

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<sup>116</sup> *Judge v Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (1998) at 10.4.

<sup>117</sup> This resolution was passed by a majority of General Assembly on 20 December 2007.

<sup>118</sup> On 12 October 2002 a number of bombs were detonated in a Bali night club by Al-Qaeda-linked terrorist group, Jemaaah Islamiyah. 202 people were killed, including 88 Australians. It was later found that the incident was a deliberate attempt by the terrorist group to target Western tourists in Indonesia.

<sup>119</sup> Australian Television Channel 7, 'Interview with John Howard (Part 2)', *Sunday Sunrise*, 16 February 2003.

<sup>120</sup> For example, on 5 November 2003 the Department of Foreign Affairs issued a Media Release publishing the then Foreign Affairs Minister's letter to the Minister for Foreign Affairs and Minister for Law Republic of Singapore, urging the Singaporean Government not to execute Nguyen Tuong. See also *The Age* Newspaper, 'Death of compassion', (3 December 2005); *Sydney Morning Herald*, 'The first Australian to be executed in 12 years' (2 December 2005).

<sup>121</sup> Robert McClelland expressed these comments at the Wentworth Human Rights Forum titled 'Human rights in 21st century Australia', Sydney, 8 October 2007.

The then Opposition Leader, now Prime Minister, Kevin Rudd was quick to distance himself from this commitment, citing a desire not to offend the families of those Australians killed or injured in the Bali bombings.<sup>122</sup>

The position of the current Australian Government on this issue remains unclear and would benefit from clarification prior to Australia's examination by this Committee in March 2009.

## **6.3 Extradition, Mutual Assistance and Agency to Agency Assistance**

### 6.3.1 Extradition

Under Australian law, the Attorney-General has the authority to determine who will be extradited from Australia. Under the *Extradition Act 1988* (Cth), the Attorney-General may only authorise the extradition of a person to a foreign country to face trial for an offence punishable by death if that country has provided an undertaking that:

- the person will not be tried for the offence;
- if the person is tried for the offence, the death penalty will not be imposed on the person; or
- if the death penalty is imposed on the person, it will not be carried out.<sup>123</sup>

It has been held by the Federal Court of Australia that the *Extradition Act* does not require that the undertaking relied on by the Attorney-General “*be effective to prevent the execution of the fugitive offender*”, only that such an undertaking is made.<sup>124</sup> Once an undertaking is given, and that undertaking conforms to the provisions of the Act, the court has no role in examining whether that undertaking will in fact be honoured.

Thus, the effectiveness of the provisions of the *Extradition Act* in meeting Australia's obligations under Article 6 and the Second Optional Protocol depends on the strength and nature of the undertakings that the Attorney-General insists on receiving from foreign jurisdictions prior to extradition.

### 6.3.2 Mutual Assistance

The legislative provisions governing the circumstances in which the Australian government and its agencies may assist another government and its agencies in investigating and prosecuting a capital offence are even more equivocal than those relating to extradition.

The *Mutual Assistance in Criminal Matters Act 1987* (the Mutual Assistance Act) regulates the provision of assistance to foreign governments to assist in criminal investigations and prosecutions.

Mutual assistance requests can be made at various stages of the law enforcement process, starting from investigation, through prosecution to sentencing and appeal.

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<sup>122</sup> See for example, ABC TV Lateline Program, 'Rudd rebukes McClelland for death penalty blunder' (9 October 2007); Sydney Morning Herald, 'No mercy for terrorist: Rudd', (9 October 2007).

<sup>123</sup> *Extradition Act 1988* (Cth) s22(3).

<sup>124</sup> *McCrea v Minister for Customs & Justice* [2004] FCA 1273 [17] (North J).

Under Australian law, the principles governing the provision of mutual assistance in a death penalty case vary depending on whether the matter is at the investigation stage or whether charges have already been laid.

Subsection 8(1A) of the Mutual Assistance Act provides:

*A request by a foreign country for assistance under this Act must be refused if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.*

'Special circumstances' is not defined within the Mutual Assistance Act. In the Second Reading Speech for the *Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996*, which introduced the current subsection 8(1A), the then Commonwealth Attorney General and Minister for Justice stated that:

*The discretion for the Attorney-General to take into account special circumstances of the case would allow, for example, assistance to be granted where the assistance may be of an exculpatory nature and may assist the defendant in the foreign country to meet the charges.*

The Law Council is concerned that inclusion of the broad 'special circumstances' exception to Australia's policy against providing assistance in death penalty cases opens the Australian Government to the charge that Australia's policy in this area is not absolute, and is therefore open to negotiation.

If the discretion afforded by subsection 8(1A) is intended to allow assistance to be given only in cases where it may aid the defendant or where an undertaking has been given not to impose the death penalty, then those limitations on the discretion should be clearly spelt out.

If section 8(1A) is intended to operate more broadly, then the Law Council is concerned that it is inconsistent with Australia's obligations as a party to the Second Optional Protocol. These concerns appear to be confirmed by documents obtained under Freedom of Information laws suggesting that in 1999, the then Justice Minister adopted a broad definition of what constitutes 'special circumstances' in mutual assistance cases by stating that Australia would no longer require a death penalty undertaking, but would instead rely on the advice of the foreign Government that there is no reason to expect that the death penalty would be carried out.<sup>125</sup>

These concerns are amplified when the effect of section 8(1B) is considered.

Section 8(1B) of the Mutual Assistance Act covers death penalty cases where assistance is requested of the Australian Government at a point in the investigation *before anyone has been charged or convicted*. The section provides that the Attorney-General or the Minister for Home Affairs *may* refuse the request if he or she:

- believes that the provision of the assistance may result in the death penalty being imposed on a person; and

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<sup>125</sup> For further information regarding the documents obtained under Freedom of Information Laws by the NSW Council for Civil Liberties see The NSW Council of Civil Liberties, *Australia and the Death Penalty: A guide to confidential government documents obtained under FOI* (4 February 2008) available at <http://www.nswccl.org.au/docs/pdf/dpfoi%20guide.pdf>.

- after taking into consideration the interests of international criminal co-operation, is of the opinion that in the circumstances of the case the request should not be granted.

The manner in which the section is worded clearly leaves open the very real possibility that Australia will provide assistance to overseas investigations, even where the Government has formed a belief that the provision of that assistance may expose a person to the risk of execution.

Given the lack of public information regarding Australia's bilateral mutual assistance arrangements, it is not clear whether Australia has previously acceded to requests for mutual assistance in death penalty cases during the reporting period. However, documents obtained under Freedom of Information laws suggest that on at least two occasions during the reporting period, the Australian Government has considered requests for mutual assistance in cases where there was a real risk that provision of that assistance may expose a person to the risk of execution.<sup>126</sup> This suggests that the effectiveness of the provisions of the Mutual Assistance Act in meeting Australia's obligations under article 6 depends on the strength and nature of the assurances demanded by the Minister from the foreign country.

The Law Council is concerned that this approach is at odds with Australia's obligations under article 6 and the Second Optional Protocol.

### 6.3.2 Agency-to-Agency Assistance

The Mutual Assistance Act only applies to formal requests for government to government assistance in criminal investigations and prosecutions. It does not cover requests for information and assistance made directly to an Australian agency, like the Australian Federal Police (AFP), from an agency in another jurisdiction.

In Australia arrangements for agency-to-agency cooperation are included in bilateral agreements, including treaties and Memorandums of Understanding (MOUs) or are set out in broader policy documents. One such policy document is the *Australia Federal Police Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (Death Penalty Charge Guide).

The Death Penalty Charge Guide provides that:

*[T]he AFP can assist foreign countries on a police-to-police basis where no charges have been laid, regardless of whether the foreign country may be investigating offences that attract the death penalty.*

*Where charges have been laid in the foreign country, and the offences carry the death penalty, the AFP cannot provide assistance on a police-to-police basis unless the Attorney-General or the Minister for Home Affairs approves the provision of the assistance.*<sup>127</sup>

<sup>126</sup> For further information regarding the documents obtained under Freedom of Information Laws by the NSW Council for Civil Liberties see The NSW Council of Civil Liberties, *Australia and the Death Penalty: A guide to confidential government documents obtained under FOI* (4 February 2008) available at <http://www.nswccl.org.au/docs/pdf/dpfoi%20guide.pdf>.

<sup>127</sup> Attorney-General's Department, *Fact Sheet on Mutual Assistance in Death Penalty Matters*, available at [http://www.ag.gov.au/www/agd/agd.nsf/page/Extradition\\_and\\_mutual\\_assistance](http://www.ag.gov.au/www/agd/agd.nsf/page/Extradition_and_mutual_assistance).

The Guide is silent about the terms upon which the AFP may provide unsolicited assistance, such as criminal intelligence, to foreign countries, including in circumstances where the provision of that assistance may expose a person to the risk of the death penalty.<sup>128</sup>

The effect of the Death Penalty Charge Guide is that the AFP are able, without restraint, to work cooperatively with foreign police to gather evidence and build a case against a suspect right up until the point that a charge is laid, even where it is known that the offences for which the suspect is being investigated attract the death penalty. In many legal systems, charges are not laid until a very advanced stage of the investigation. The Death Penalty Charge Guide therefore potentially allows the AFP to play an instrumental role in securing the conviction and death sentence of a person abroad – notwithstanding Australia's opposition to the death penalty and purported committed to its international abolition.

The former Justice Minister has confirmed that on a number of occasions the AFP have been authorised to provide assistance to foreign authorities in the investigation and prosecution of persons suspected of offences punishable by death.<sup>129</sup>

The Law Council believes that allowing Australian government agencies to proactively work with their foreign counterparts, without restriction, to secure the arrest, charge and conviction of people for offences which attract the death penalty, is fundamentally inconsistent with Australia's international obligations under the Second Optional Protocol and article 6 of the ICCPR.

### 6.3.3 Case Study - 'Bali 9'

These concerning features of Australia's agency-to-agency assistance policies are illustrated by the case of the 'Bali 9'.

In April 2005, nine young Australians ('the Bali 9') were detained in Indonesia after it was alleged they had attempted to smuggle 10.9 kilograms of heroin onboard a flight from Indonesia to Sydney. They were each were charged and eventually convicted of drug related offences. Six were sentenced to death (three have subsequently had their death sentences commuted).

The AFP had provided crucial assistance and information to the Indonesian authorities in relation to the case against the Bali 9.<sup>130</sup> According to reports, the arrests were the culmination of a 10-week joint operation between Australian and Indonesian police.<sup>131</sup>

Legal representatives acting on behalf of four members of the Bali 9 commenced proceedings against the AFP in the Federal Court of Australia.<sup>132</sup> The four applicants

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<sup>128</sup> *Rush v Commissioner of Police* [2006] FCA 12 at [73].

<sup>129</sup> For example, in a letter to the New South Wales Council for Civil Liberties (CCL) from then Justice Minister David Johnston in August 2007, the Justice Minister confirmed that the federal government authorised AFP to cooperate in three cases *after* capital charges were laid. The cases were in Indonesia, Malaysia and Tonga. This was said to adhere to the AFP Death Penalty Charge Guide. See [http://www.nswccl.org.au/docs/pdf/reply%20from%20Johnston%20\(8%20Aug%202007\).pdf](http://www.nswccl.org.au/docs/pdf/reply%20from%20Johnston%20(8%20Aug%202007).pdf)

<sup>130</sup> This was confirmed in the Federal Court Proceedings *Rush v Commissioner of Police* [2006] FCA 12.

<sup>131</sup> Australian Television, ABC, 'AFP under scrutiny for handling of Bali Nine', *7.30 Report*, (26 October 2005)

<sup>132</sup> *Rush v Commissioner of Police* [2006] FCA 12.

sought declaratory and other relief against the AFP officers on the grounds that the officers:

- acted without lawful authority in making decisions and taking actions which exposed the applicants to the death penalty in Indonesia; and/or
- failed to satisfy the applicants' legitimate expectation that, as Australian citizens, the Australian Government, its agencies and public officers would not act in such a way as to expose them to the risk of the imposition of the death penalty.

The Federal Court Judge hearing the matter, Finn J, dismissed the applicant's claims and found that the AFP had acted within lawful authority. His Honour also dismissed the claim that the AFP were under a legal duty not to expose the members of the Bali 9 to the use of the death penalty.

In the course of his reasons, Finn J made a number of relevant observations about the appropriateness of Australia's mutual assistance and police-to-police assistance arrangements in cases where investigations involve offences attracting the death penalty. In the opening of His Honour's judgment, Finn J observed:

*The circumstances revealed in this application for preliminary discovery suggest there is a need for the Minister administering the Australian Federal Police Act 1979 (Cth) ('the AFP Act') and the Commissioner of Police to address the procedures and protocols followed by members of the [AFP] when providing information to the police forces of another country in circumstances which predictably could result in the charging of a person with an offence that would expose that person to the risk of the death penalty in that country. Especially is this so where the person concerned is an Australian citizen and the information is provided in the course of a request being made by the AFP for assistance from that other country's police force.*<sup>133</sup>

Finn J's observations suggest that many aspects of Australia's mutual assistance and agency-to-agency assistance policies sit uncomfortably with Australia's commitment to work towards the international abolition of the death penalty. For example, Finn J's observed that:

- The *Mutual Assistance Act* only applies to a formal request for government to government assistance, and does not cover requests made directly to the Australian police by an overseas agency. In the case of the Bali 9, no request for assistance was made by the Governments of either Australia or Indonesia under the Act. Therefore the protections provided by that Act, such as they are, did not come into effect in the Bali 9 case.
- The Death Penalty Charge Guide only imposes restrictions on the provision of police-to-police cooperation where a person *has been charged* with an offence. Where a request for assistance or information is made *prior to charge*, the AFP can supply information as required irrespective of whether the investigation may later result in charges being laid which may attract the death penalty.
- In relation to the Bali 9, the request for police to police cooperation occurred prior to charge and therefore the protections provided for by the Death Penalty Charge Guide, such as they are, did not come into effect.

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<sup>133</sup> *Rush v Commissioner of Police* [2006] FCA 12 at [1].

- Instead, the provision of assistance in the Bali 9 case was regulated by a Police Memorandum of Understanding signed by Australia and Indonesia and made under the *Mutual Assistance Treaty* between those two countries. Article 4.2(d) of the Treaty contemplates that assistance *might* be refused if a request relates to the prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed or carried out, but retains a general discretion to provide such assistance.
- The precise text of the Police Memorandum of Understanding signed by Australia and Indonesia is not publicly available and therefore cannot be tested for compliance with international law.

Commenting more broadly on Australia's policy of opposing the death penalty, Finn J observed:

*It may be possible to discern in Australian legislation, treaties, official guides, etc a declared antipathy to the death penalty. That antipathy, though, has not been pursued unqualifiedly in our legislation and guides in relation to dealings with foreign countries in respect of matters which could attract the imposition of the death penalty:....*<sup>134</sup>

Following the outcome of the Federal Court proceedings, the Minister for Justice and Customs announced a review of Australia's extradition and formal mutual assistance operations.<sup>135</sup> Unfortunately, the scope of the review excluded consideration of agency-to-agency assistance. Although the review is complete, its findings have not been made public and it is yet to result in any positive legislative or policy reform. In the meantime, the precise nature of Australia's international obligations under the ICCPR and Second Optional Protocol, and the manner in which these are understood by the Australian Government remain unclear.

While it is understood that the Australian Government has received legal advice regarding its international obligations in respect of extradition and mutual assistance in death penalty cases, that advice has not been publicly released.

The Law Council believes that many members of the Australian Community would welcome a statement from this Committee clarifying what consequences, if any, flow from Australia's ratification of the Second Optional Protocol in terms of how Australia provides assistance, both formally and informally, in overseas criminal investigations which relate to offences attracting the death penalty.

This would help overcome the current impasse in public debate whereby the Government claims that its legal obligations under the Second Optional Protocol are confined to a duty to abolish the death penalty domestically and to refrain from extraditing a person to face the death penalty abroad, while others argue Australia has a broader obligation not to knowingly and willingly act in a manner which directly exposes a person to the risk of execution.

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<sup>134</sup> *Rush v Commissioner of Police* [2006] FCA 12 at [78].

<sup>135</sup> Attorney-General's Department Discussion Paper, *A better mutual assistance system, A review of Australia's mutual assistance law and practice* (2006) available at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Extraditionandmutualassistance\\_Mutualassistance\\_Mutualassistancereviewpaper](http://www.ag.gov.au/www/agd/agd.nsf/Page/Extraditionandmutualassistance_Mutualassistance_Mutualassistancereviewpaper).

## 7. ARTICLE 7 FREEDOM FROM TORTURE

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*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

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As a signatory of the *Convention against Torture* (CAT), Australia is obliged to report to the UN Committee Against Torture (CAT Committee) on its compliance with its obligations under the Convention.

The CAT Committee considered Australia's most recent report at its 40th Session in April 2008.<sup>136</sup> In its Concluding Observations, the CAT Committee made a number of recommendations, including that Australia:<sup>137</sup>

- ensure that torture is adequately defined and specifically criminalised both at the Federal, State and Territory levels;
- continue consultation with regard to the adoption of a Bill of Rights to ensure a comprehensive constitutional protection of basic rights at the federal level;
- ensure the increased powers of detention of ASIO are in compliance with the right to a fair trial and the right to take proceedings before a courts to determine the lawfulness of the detention;
- guarantee that both preventative detention and control orders are imposed in manner that is consistent with Australia's human rights obligations;
- ensure that accused remand prisoners are separated from convicted persons and are subject to separate treatment appropriate to their status as unconvicted persons;
- consider abolishing its policy of mandatory immigration detention for those entering irregularly Australia's territory;
- explicitly incorporate into domestic legislation, the prohibition whereby no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture, and implement it in practice. Australia should no longer rely solely on the Minister's discretionary powers to meet its non-refoulement obligations under the CAT.

The Law Council welcomes the recommendations contained in the CAT Committee's Report.

The Law Council has recently provided a submission to the Attorney-General's Department recommending that Australia accede to the Optional Protocol to the CAT and is currently preparing a submission in response to the CAT Committee's recommendations.<sup>138</sup>

In light of these developments, the Law Council will not comment on Australia's performance of its obligations under article 7 of the ICCPR in this Shadow Report.

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<sup>136</sup> Australia's Third Report under the *Convention against Torture* was sent to the CAT Committee on 25 May 2005. Australia was due to be examined on the contents of that report in November 2007 however Australia's appearance was adjourned until April 2008.

<sup>137</sup> Committee Against Torture, *Concluding Observations – Australia*, CAT/C/AUS/CO/1, 15 May 2008.

<sup>138</sup> These submissions are available at <http://www.lawcouncil.asn.au/submissions.html>.

## 8. ARTICLE 9 RIGHT TO LIBERTY AND SECURITY OF PERSON

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1. *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.*

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

3. *Anyone 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. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*

4. *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.*

5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

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In the Common Core Document, Australia reports on a range of security measures introduced since 11 September 2001 which are relevant to Article 9 compliance including:

- the introduction of the *Anti-Terrorism Act (No 2) 2005 (Cth)*;
- amendments to the *Financial Transaction Reports Act 1988 (Cth)*;
- amendments to the *Australian Security Intelligence Organisation Act 1979 (Cth)*;
- changes to the presumption in favour of bail; and
- new powers conferred on law enforcement and intelligence agencies for the purpose of investigating terrorism offences.<sup>139</sup>

The Common Core Document also discusses immigration detention and relevant changes to the *Migration Act 1958*. Deprivation of liberty, prison conditions and young offenders in detention are also covered.

These issues have been the subject of considerable public debate in Australia and have been an area of focus for the advocacy and advisory work of the Law Council.

It is not possible to canvass all of the Law Council's concerns regarding the former Australian Government's policies in this area. However, a number of specific areas will be addressed in this section of the Shadow Report to demonstrate the pervasive and persistent erosion of article 9 rights that has occurred within the reporting period and subsequent years.

A number of the issues discussed in relation to article 9 reflect the emergence of a general trend during the reporting period towards new and expanded forms of criminal liability and the introduction of ever greater law enforcement and intelligence

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<sup>139</sup> See Common Core Document Parts I and M.

gathering powers. The introduction of such powers has, in general, not been accompanied by the introduction of corresponding safeguards, accountability mechanisms or other protections necessary to protect individual rights from unwarranted interference.

## 8.1 Security measures introduced since 2001 - Overview

In July 2002 the Australian Government introduced its first package of counter-terrorism legislation including:

- *Security Legislation Amendment (Terrorism) Act 2002*
- *Border Security Legislation Amendment Act 2002*
- *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*
- *Suppression of the Financing of Terrorism Act 2002*
- *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*
- *Crimes Amendment Act 2002*
- *Criminal Code Amendment (Offences Against Australians) Act 2002* and
- *Telecommunications Interception Legislation Amendment Act 2002.*

Further counter-terrorism measures were introduced during 2004 including:

- *Anti-Terrorism Act 2004*
- *Anti-Terrorism Act (No. 2) 2004*
- *Anti-Terrorism Act (No. 3) 2004*
- *Surveillance Devices Act 2004*
- *Australian Federal Police and Other Legislation Amendment Act 2004*
- *Anti-Terrorism Act (No. 2) 2005*

This legislation was enacted, at least in part, to give effect to Australia's international obligations to combat global terrorism in the wake of the September 11, 2001 attacks.<sup>140</sup> Australia is a party to 11 of the 12 UN extant terrorism-related conventions<sup>141</sup> and has supported a number of terrorism-related resolutions, including UN Security Council Resolution 1566 which requires member States to cooperate fully in the fight against terrorism and to prevent and punish acts that have the following characteristics:<sup>142</sup>

- acts committed with the intention of causing death or serious bodily including;
- acts committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a government or an international organisation to do or to abstain from doing any act; and
- acts that fall within the scope of offences defined in the international conventions and protocols relating to terrorism.

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<sup>140</sup> For example, to give effect to obligations arising from Security Council Resolution 'Threats to international peace and security caused by terrorist acts' Resolution No 1373 (2001).

<sup>141</sup> For example, Australia is a party to: International Convention for the Suppression of the Financing of Terrorism; International Convention for the Suppression of Terrorist Bombings; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; International Convention against the Taking of Hostages. For further information on Conventions to which Australia is a party see <http://www.austlii.edu.au/au/other/dfat/subjects/>.

<sup>142</sup> Security Council resolution 1566 *Threats to international peace and security caused by terrorist acts* (2004).

Australia's response to the threat of international terrorism must be guided by relevant international instruments, which include international conventions, Security Council resolutions and protocols relating **both** to terrorism and to international human rights norms. International law requires Australia's counter-terrorism measures to be proportionate to Australian circumstances and necessary to address the real security risks which exist in Australia.<sup>143</sup>

On 29 November 2001, the UN High Commissioner for Human Rights urged States 'to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent' in the enactment of anti-terrorism laws.<sup>144</sup> A similar sentiment was conveyed a month later when 17 independent experts of the Commission on Human Rights reminded States of their obligation under international law to uphold human rights and fundamental freedoms when implementing counter-terrorism measures:

*We call upon States to limit the measures taken to the extent strictly required by the exigencies of the situation. Public policies must strike a fair balance between on the one hand the enjoyment of human rights and fundamental freedoms by all and on the other hand legitimate concerns over national and international security. The fight against terrorism must not result in violations of human rights as guaranteed under international law.*<sup>145</sup>

To assist States to meet their human rights obligations in the context of the threat of international terrorism, the UN High Commissioner for Human Rights provided the following statement of criteria to be followed:

*3. Where, in limited and specific circumstances the limitation of some rights is permitted, the laws authorizing restrictions:*

- (a) should use precise criteria; and*
- (b) may not confer unfettered discretion on those charged with their execution.*

*4. For limitations of rights to be lawful, they must:*

- (a) be prescribed by law;*
- (b) be necessary for public safety or public order;*
- (c) not impair the essence of the right;*
- (d) be interpreted strictly in favour of the rights at issue;*
- (e) be necessary in a democratic society;*
- (f) conform to the principle of proportionality;*
- (g) be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function;*
- (h) be compatible with the objects and purposes of human rights treaties;*
- (i) respect the principle of non-discrimination; and*

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<sup>143</sup> See for example, United Nations Human Rights Committee, 'Terrorism and human rights' Resolution 2002/24; Joint statement with the Secretary-General of the Council of Europe and the Director of the OSCE Office for Democratic Institutions and Human Rights (29 November 2001); UN High Commissioner for Human Rights, 'Statement of Criteria', UN Doc. /CN.4/2002/18, Annex, 27 February 2002.

<sup>144</sup> Joint Statement by UN High Commissioner for Human Rights, the Secretary-General of the Council of Europe and the Director of the OSCE Office for Democratic Institutions and Human Rights (29 November 2001).

<sup>145</sup> Message by 17 independent experts of the Commission on Human Rights on the occasion of Human Rights Day, 10 December 2001, UN Doc E/CN.4/2002/137, Annex 1.

(j) not be arbitrarily applied.<sup>146</sup>

The Law Council believes that Australian laws do not meet these criteria.

Where the adoption of a counter-terrorism measure has resulted in a restriction of a human right, the Australian Government has regularly failed to demonstrate that the restriction is necessary for a legitimate end, or that its restrictive impact on the right is proportionate to - that is the least restrictive means of achieving - that legitimate end.<sup>147</sup>

### 8.1.1 No demonstrated necessity for measures introduced

The Law Council is not convinced that the Government has demonstrated that each and every one of the counter-terrorism measures introduced following September 11, 2001 are *necessary* to protect the Australian community from the threat of international terrorism.

Prior to the introduction of the first package of counter-terrorism measures in 2002, there already existed a wide range of Commonwealth and State and Territory offences relating to murder, kidnap, conduct likely to involve serious risk to life or personal injury and damage to property,<sup>148</sup> as well as offences covering conduct generally associated with terrorism.<sup>149</sup> For example, prior to September 2001 laws were in place making it an offence to:

- engage in treason, treachery, sabotage, sedition, espionage, or disclose official secrets, or possess weapons of mass destruction or be in a prohibited place;<sup>150</sup>
- engage in 'politically motivated violence',<sup>151</sup> which includes acts or threats of violence or harm for the purpose of influencing domestic or foreign

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<sup>146</sup> UN High Commissioner for Human Rights, 'Statement of Criteria', UN Doc. /CN.4/2002/18, Annex, 27 February 2002.

<sup>147</sup> When enacting its counter-terrorism measures, Australia has not explicitly sought to rely on the derogation of certain rights permitted in cases of national emergency (Article 4(1) of the ICCPR). The Law Council is of the view that the threat of terrorism faced by Australia does not constitute a "time of public emergency threatening the life of the nation" required for derogations under Article 4(1). In order to fall within Article 4(1), Australia would need to officially proclaim the existence of a public emergency and authorise the use of emergency powers. As Article 4 derogations have not been raised in the Common Core Document, this Shadow Report proceeds on the basis that Australia's counter-terrorism measures have not been sought to be justified under Article 4(1) of the ICCPR.

<sup>148</sup> For example, see Part 3 of the *Crimes Act 1900* (NSW) which contains offences against the person, including murder, acts causing danger to life or bodily harm and kidnapping and Part 4 of the *Crimes Act 1900* (NSW), which contains offences against property. Similar offence provisions exist in all other State and Territories in Australia.

<sup>149</sup> For a comprehensive discussion of pre-2002 measures see Department of the Parliamentary Library's Information and Research Services' Research Paper No.12, 2001-02 '*Terrorism and the Law in Australia: Legislation, Commentary and Constraints*'.

<sup>150</sup> See for example *Crimes Act 1914* (Cth) (which contained offences including treason, treachery, sabotage, sedition, unlawful drilling, espionage, official secrets, being in a prohibited place, harbouring spies, taking unlawful soundings, computer related acts, postal and telecommunications offences); *Air Navigation Act 1921*; *Public Order (Protection of Persons and Property) Act 1971*; *Crimes (Biological Weapons) Act 1976*; *Nuclear Non-Proliferation (Safeguards) Act 1984*; *Crimes (Hostages) Act 1989*; *Crimes (Aviation) Act 1991*; *Crimes (Ships and Fixed Platforms Act) Act 1992*; *Chemical Weapons (Prohibition) Act 1994*; *Weapons of Mass Destruction (Prevention of Proliferation) Act 1994*.

<sup>151</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) ss4, 8A, *Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence)* (1992).

- governments or overthrowing or destroying a domestic government or constitutional system;
- be a member of, or provide funds to, a prohibited association;<sup>152</sup> and
- recruit people, or to train and organise in Australia, for armed incursions or operations on foreign soil.<sup>153</sup>

In addition to these substantive offences, under the Commonwealth *Criminal Code*, liability already extended to cover secondary liability offences, making it an offence, for example, to attempt or procure a criminal offence, or to aid, abet or counsel another to commit an offence or to conspire with another to commit an offence.<sup>154</sup> These secondary liability offences already allowed law enforcement agencies to take action proactively to prevent offences from occurring.

Accompanying this broad range of criminal offences, law enforcement and intelligence agencies also already had powers to collect intelligence inside and outside Australia regarding security threats and take action to address those threats. Some of these agencies had the power to engage in telecommunications interception,<sup>155</sup> use listening and tracking devices, gain access to computers<sup>156</sup> and engage in undercover operations.<sup>157</sup>

A National Crime Authority also existed with power to investigate and combat serious organised crime on a national basis and to analyse and disseminate relevant criminal information and intelligence to law enforcement agencies.<sup>158</sup> The Government also had the power to amend the *Migration Regulations 1994* to exclude from Australia government officials from a particular country based on that country's complicity in acts of terrorism.<sup>159</sup>

On 28 September 2001, in its first report to the UN Counter-Terrorism Committee on the implementation of Security Council resolution 1373 and prior to the introduction of the first package of counter-terrorism measures, Australia stated that it had:

*a highly coordinated domestic counter-terrorism response strategy incorporating law enforcement, security and defence agencies... [and] already had in place extensive measures to prevent in Australia the financing of, preparation and basing from Australia of terrorist attacks on other countries ...*<sup>160</sup>

It was also reported that Australia had an 'extensive network' of law enforcement liaison officers and bilateral treaties on extradition and mutual legal assistance 'to facilitate cooperation with other countries in the prevention, investigation and prosecution of terrorist acts'.<sup>161</sup>

<sup>152</sup> *Crimes Act 1914* (Cth) Part 11A concerning unlawful associations.

<sup>153</sup> *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).

<sup>154</sup> *Criminal Code Act 1995* (Cth) Division 11.

<sup>155</sup> *Telecommunications (Interception) Act 1979* (Cth).

<sup>156</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth).

<sup>157</sup> *Crimes Act 1914* (Cth).

<sup>158</sup> *National Crime Authority Act 1984* (Cth).

<sup>159</sup> See *Migration (Republic of Sudan - UN Security Council Resolution No. 1054) Regulations 1996*.

<sup>160</sup> Report of Australia to the Counter-Terrorism Committee of the UN Council pursuant to paragraph 6 of Security Council Resolution 1373 (28 September 2001).

<sup>161</sup> Report of Australia to the Counter-Terrorism Committee of the UN Council pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001.

Given the wealth of legislative and administrative measures already in place in Australia to pre-empt, prevent or punish any planned or executed mainland terrorist incident, there was a heavy onus on the former Australian Government to justify the necessity for the creation of new statutory offences and the introduction of increased law enforcement and intelligence gathering powers, which further restrict a person's right to liberty.

The Law Council does not believe that the Australian Government succeeded in discharging this burden when it introduced its raft of 'anti-terror' reforms.

## **8.2 Security measures introduced since 2001 - New Terrorism Offences**

In 2002<sup>162</sup> and again in 2004<sup>163</sup> the former Australian Government introduced a range of new terrorist-related offences into Part 5.3 of the Commonwealth *Criminal Code*.

Under Part 5.3 it is an offence to:

- engage in a terrorist act (s101.1 – penalty of life imprisonment);
- provide or receive training connected with a terrorist act (s101.2 – imprisonment for 15 years);
- possess things connected with terrorist acts (s101.4 – imprisonment for 15 years);
- collect or make documents likely to facilitate terrorist acts (s101.5 – imprisonment for 10 or 15 years, depending on knowledge);
- do another act in preparation for or planning a terrorist act (s101.6 – life imprisonment);
- provide support or resources that would help a terrorist organisation engage in preparation for, planning, assisting or fostering of the doing of a terrorist act (102.7 – imprisonment for up to 25 years)
- on two or more occasions associate with a member of a terrorist organisation or a person who promotes or directs the activities of a terrorist organisation in circumstances where that association will provide support to the organisation and is intended to help the organisation expand or continue to exist. (102.8 – imprisonment for 3 years)
- finance terrorism (s103.1 – life imprisonment).

It is a requirement of each of these new offences that the physical element of the offence must be undertaken in the performance of, or in preparation for, or in connection with a 'terrorist act'.

### **8.2.1 Definition of 'terrorist act'**

The *Security Legislation Amendment (Terrorism) Act 2002* (Cth) introduced a new definition of 'terrorist act' into section 100.1 of the Commonwealth *Criminal Code*. This definition has had important ramifications for the investigation and prosecution of terrorist-related criminal activity in Australia.

Pursuant to section 100.1 a 'terrorist act' is an action or threat of action done:

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<sup>162</sup> *Security Legislation Amendment (Terrorism) Act 2002* (Cth).

<sup>163</sup> *Anti-Terrorism Act (No 2) 2004* (Cth).

- with the intention of advancing a political, religious or ideological cause; and
- with the intention of coercing, or influencing by intimidation, a government of Australia or the Australian public.

To be a 'terrorist act' such an action or threat of action must also:<sup>164</sup>

- cause death or serious physical harm to a person or endanger a person's life; or
- cause serious damage to property; or
- create a serious risk to the health or safety of the public or a section of the public; or
- seriously interfere with, seriously disrupt, or destroy, an electronic system such as a telecommunications system or a transport system.

However, an action will not be a terrorist act if it is advocacy, protest, dissent or industrial action and is not intended:<sup>165</sup>

- to cause death or serious physical harm to a person or endanger life; or
- to create a serious risk to the health or safety of the public or a section of the public.

The Law Council is concerned that the new definition of 'terrorist act' goes beyond internationally accepted definitions of terrorism. In 2006 the definition was reviewed by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.<sup>166</sup> The Special Rapporteur took the view that the definition of 'terrorist act' in subsection 100.1(2) of the *Crimes Act* oversteps the Security Council's characterisation by including acts the commission of which go beyond an intention of causing death or serious bodily injury, or the taking of hostages.<sup>167</sup> It was observed that the acts defined in subsections 100.1(2)(b),(d),(e) and (f) (such as actions that cause serious damage to property or serious interference with or disruption to an electronic system) include actions not defined in the international conventions and protocols relating to terrorism. The Special Rapporteur observed:

*... although it is permissible to criminalize such conduct it should not be brought within a framework of legislation intended to counter international terrorism unless that conduct is accompanied by an intention to cause death or serious bodily injury.*

*The Government of Australia reports that Australia has been identified by jihadist groups as a terrorist target and that authorities consider that a terrorist attack within Australia could well occur, possibly without notice, thus assessing the level of alert as 'medium' (a terrorist act could occur).*

*To go beyond the cumulative restrictions of resolution 1566 (2004), however, there must be a rational link between threats faced by Australia and the types of conduct proscribed in its legislation that go beyond proscriptions within the*

<sup>164</sup> See s100.1(2) of the *Criminal Code* (Cth).

<sup>165</sup> See s100.1(3) of the *Criminal Code* (Cth).

<sup>166</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Australia: Study on Human Rights Compliance while Countering Terrorism*, A/HRC/4/26/Add.3 (14 December 2006) at [10]-[16].

<sup>167</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Australia: Study on Human Rights Compliance while Countering Terrorism*, A/HRC/4/26/Add.3 (14 December 2006) at [15].

*universal terrorism-related conventions. Australia must clearly distinguish terrorist conduct from ordinary criminal conduct.*

*It is also relevant to note that the definition of a terrorist act includes not just action on the part of a person, but also a 'threat of action' (sect. 101.1 (1)). The Special Rapporteur calls for caution in this respect, in order to ensure compliance with the requirements of legality.<sup>168</sup>*

As will be discussed later in this Report, the broad scope of the definition of 'terrorist act' in the *Criminal Code*, that goes beyond the scope of the internationally accepted definition, has significant consequences for the nature and scope of law enforcement and intelligence agencies powers – the limits of which are often informed by this broad definition of 'terrorist act'.

### 8.2.2 Imprecise offences result in an invalid restriction on Article 9 Rights

As noted by the UN High Commissioner for Human Rights, where laws are enacted for the purpose of preventing, investigating and prosecuting terrorist activity, and these laws have a restrictive impact on human rights, they:

- must be clearly drafted in precise language;
- may not confer unfettered discretion on those charged with their execution;
- must conform to the principle of proportionality;
- must be appropriate to achieve their protective function; and
- must be the least intrusive instrument of those which might achieve that protective function.<sup>169</sup>

The Law Council is concerned that the preliminary nature of many of the terrorist offences, which give rise to a real risk of loss of liberty, fail to comply with the above criteria by extending criminal responsibility beyond the generally accepted limits of criminal law and placing an unfettered discretion in the hands of law enforcement and prosecutorial authorities.

Many of the offences in Part 5.3 of the *Criminal Code* relate to preliminary acts – such as 'possessing a thing' or 'preparing a document' - which may in themselves be innocuous. Under Part 5.3, these preliminary acts become an offence where it is alleged that such acts are done in connection with or in preparation for a terrorist act, regardless of whether they are related to any specific terrorist act or whether any terrorist act actually occurs.<sup>170</sup>

For example, under section 101.4 a person commits an offence if they:

- possesses a thing; and
- the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and

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<sup>168</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Australia: Study on Human Rights Compliance while Countering Terrorism*, A/HRC/4/26/Add.3 (14 December 2006) at [16].

<sup>169</sup> UN High Commissioner for Human Rights, 'Statement of Criteria', UN Doc. /CN.4/2002/18, Annex, 27 February 2002.

<sup>170</sup> For example s101.4 of the *Criminal Code* makes it an offence to possess things connected with terrorist acts; s101.5 makes it an offence to collect or make documents likely to facilitate terrorist act and s101.6 makes it an offence to do another act in preparation for or planning a terrorist act.

- the person *knows* of that connection.<sup>171</sup>

A person will also be guilty of a lesser offence if they were *reckless* as to the existence of that connection.<sup>172</sup>

This offence will be committed even if:

- a terrorist act does not occur;
- or the thing is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act;
- or the thing is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.<sup>173</sup>

These types of offences, which invoke criminal liability for actions performed before the person has formed a definite plan to commit a criminal act, represent a departure from common forms of criminal liability. As noted by Chief Justice Spigelman in *Lodhi v The Queen*:

*Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier state than is usually the case for other kinds of criminal conduct ...*<sup>174</sup>

In the case of the offences in sections 101.4 to 101.6 of the *Criminal Code*, this extension of criminal responsibility requires prosecutorial and law enforcement authorities to engage in a degree of speculation when determining when a generally innocuous preliminary act becomes criminal by virtue of its connection with 'preparation for, the engagement of a person in, or assistance in a terrorist act'.

Unlike common forms of criminal liability, there is nothing inherently culpable about the commission of the physical element of the offence (such as 'possess a thing' or 'collect a document'), rather culpability attaches to what *might be done* following the preliminary act (such as preparation of a terrorist act).

The broad prosecutorial and enforcement discretion arising from the preliminary nature of these offences is further extended by the ambiguity surrounding each of the key terms (such as 'thing', 'preparation' and 'assistance'), and the concerns raised above in respect of the definition of 'terrorist act'.

Some may argue that little harm is done by the creation of broad-based terrorism offences, as ultimately the prosecutorial authorities are unlikely to lay charges of terrorism without evidence of the existence of the most serious of acts or the most dangerous and threatening of organisations. However, the Law Council is vigorously opposed to the conferral on prosecutorial authorities of such sweeping and arbitrary powers in the characterisation of offences and laying of charges. Such conferral of

<sup>171</sup> *Criminal Code Act 1914* (Cth) s101.4(1). Penalty for this offence is 15 years imprisonment.

<sup>172</sup> *Criminal Code Act 1914* (Cth) s101.4(2). Penalty for this offence is 10 years imprisonment.

<sup>173</sup> *Criminal Code Act 1914* (Cth) 101.4(3). NB, pursuant to s101.4(5) it is a defence, with an evidential burden placed on the defendant, if the possession of the thing or was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act'.

<sup>174</sup> *Lodhi v The Queen* [2006] NSWCCA 121 at [66].

power is contrary to the prohibition of arbitrary arrest and detention in article 9(a) of the ICCPR which provides that:

*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 procedures as are established by law.*

In 1990, this Committee confirmed in the case of *Van Alphen v The Netherlands* that 'arbitrariness' must be interpreted broadly to include elements of inappropriateness, injustice and lack of predictability.<sup>175</sup> This means that deprivation of liberty provided for by law must not be manifestly disproportionate, unjust or unpredictable. In other words, when creating forms of serious criminal liability, precise language must be used to define and limit the scope of criminal offences and to restrict the exercise of discretion of prosecutorial authorities. This is inherently difficult to achieve when criminalising preliminary acts without requiring the person to form a clear plan or intention to commit a criminal act. These difficulties are exacerbated when reliance is placed on ambiguous and broadly defined terms.

The Law Council considers that an unacceptable element of arbitrariness and unpredictability arises when determining whether or not a person is charged with a terrorist offence under Part 5.3 of the *Criminal Code*, (a determination which has profound implications in terms of the onus of proof, available defences, stigma of conviction and heaviness of penalties), is left to the unfettered discretion of prosecutorial authorities.

Given their potential for broad, arbitrary application, the terrorism offences described above can not be said to be a proportionate means of achieving their protective function and thus do not constitute a valid restriction of article 9 rights.

### 8.2.3 Financing terrorism

Under section 103 of the *Criminal Code* it is an offence for a person to finance terrorism.<sup>176</sup> Section 103 provides that a person commits an offence if:

- (a) *the person provides or collects funds; and*
- (b) *the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act.*

A person commits this offence even if a terrorist act does not occur; or the funds will not be used to facilitate or engage in a specific terrorist act; or the funds will be used to facilitate or engage in more than one terrorist act. The maximum penalty for this offence is imprisonment for life.

The Law Council considers this provision to be unacceptably imprecise for an offence which carries life imprisonment. The offence created by section 103.1 contains no requirement that the prosecution prove that a person charged had *actual knowledge* of circumstances indicating connection with a terrorist act or *intended* to provide funds to be used to facilitate or engage in a terrorist act. Rather the intention

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<sup>175</sup> *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990) at [5.8].

<sup>176</sup> This offence was introduced by the *Suppression of the Financing of Terrorism Act 2002* (Cth).

element of the offence will be satisfied if it can be shown that the person was reckless as to whether the funds he or she provided *will be used to facilitate or engage in a terrorist act*.

When introducing this new offence, the Australian Government stated that section 103.1 implements article 2 of the *Convention for the Suppression of the Financing of Terrorism* and paragraph 1b of United Nations Security Council resolution 1373, and draws on the language used in those international instruments.<sup>177</sup>

Article 2 of the Convention, however, contains a requirement of specific intention when attributing criminal liability for the financing of terrorism. Article 2(1) provides that a person commits an offence within the meaning of the convention if that person by any means 'directly or indirectly, unlawfully and wilfully, provides or collects funds with *the intention that they should be used or in the knowledge that they are to be used, in full or in part...*'.

Further, paragraph 1b of UN Security Council resolution 1373, provides that State parties shall:

*Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.*<sup>178</sup>

Accordingly, unlike the offence in section 103.1, both international instruments contain a clear requirement of specific intent.

Further amendments made in 2005 introduced a new offence into section 103.2 of the *Criminal Code*.<sup>179</sup> This offence is titled 'financing a terrorist' as opposed to 'financing terrorism'. Under section 103.2 it is an offence to intentionally make funds available to another person or collect funds (whether directly or indirectly) for or on behalf of another person reckless as to whether the funds will be used by that person to facilitate or engage in a terrorist act. The offence is committed notwithstanding that no terrorist act occurs, that the funds will not be used for a specific terrorist act, or that they will be used for a number of terrorist acts.

The Law Council believes that this offence unnecessarily extends the initial offence of financing terrorism.

### **8.3 Security measures introduced since 2001 – new investigative and law enforcement powers**

In addition to enacting new offences, Australia has also granted its law enforcement and intelligence agencies a range of additional powers to assist in the investigation and prosecution of terrorist-related activity, including powers to arrest, question and detain.

The Law Council is of the view that a number of these new powers:

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<sup>177</sup> Explanatory Memorandum to the *Suppression of Financing of Terrorism Bill 2002* (Cth) available at [http://www.austlii.edu.au/au/legis/cth/bill\\_em/sotfotb2002453/memo1.html](http://www.austlii.edu.au/au/legis/cth/bill_em/sotfotb2002453/memo1.html).

<sup>178</sup> UN Security Council Resolution 1373 (2001) 28 September 2001 at para 1(b).

<sup>179</sup> *Anti-Terrorism Act (No 2) 2005* (Cth).

- are unnecessary to combat the threat of terrorism faced in Australia;
- can be exercised arbitrarily and without judicial oversight; and
- disproportionately restrict the right to security and liberty of person.

In this section of the Report the Law Council will focus on the powers to detain persons without charge conferred on the Australian Federal Police (AFP) and the questioning and detention powers conferred on the Australian Security and Intelligence Organisations (ASIO).

### 8.3.1 Detention without charge – the AFP and the ‘dead time’ provisions

The *Anti-Terrorism Act 2004* (Cth) introduced section 23CA into Part IC of the *Crimes Act*. That section provides that once a person has been arrested for a terrorism offence, he or she may be detained for the purpose of investigating (a) whether the person committed the offence for which he or she was arrested and/or (b) whether the person committed another terrorism offence that an investigating official reasonably suspects the person to have committed.<sup>180</sup>

The maximum period for which a person may be detained without charge under section 23CA is called the ‘investigation period’. If the person is detained, they must be released (either unconditionally or on bail) within the investigation period or brought before a judicial officer within that period.

The maximum length of the investigation period in terrorism cases is set at four hours,<sup>181</sup> unless a magistrate extends the period. A magistrate may extend the investigation period any number of times, but the total of the periods of extension cannot be more than 20 hours.<sup>182</sup>

The means that the maximum allowable length of the investigation period in relation to terror suspects is 24 hours.

This is considerably longer than the maximum allowable length of the investigation period for ordinary suspects. In the case of ordinary crimes, the initial four hour investigation period may only be extended once, and only for a period not exceeding eight hours. This means that the maximum allowable length of the investigation period for ordinary suspects is 12 hours.

In either case, the calculation of the investigation period does not take into account so called “dead time” during which police are unable to, or choose not to, question the suspect they have in detention.

Subsection 23CA(8) of the *Crimes Act* lists all the activities which are deemed to be dead time and are thus excluded from the calculation of the investigation period in terrorism cases. This list includes: time taken to transport the suspect to the place of questioning, time taken for the suspect to sleep, time taken for the suspect to talk with his or her lawyer or to await the arrival of his or her lawyer; time taken to conduct an identification parade or conduct a forensic procedure; time taken to make certain

<sup>180</sup> See s23CA of the *Crimes Act 1914* (Cth).

<sup>181</sup> Unless the person in custody is a minor or aboriginal or Torres Strait islander in which case the maximum period is 2 hours.

<sup>182</sup> See s23DA of the *Crimes Act 1914* (Cth).

applications to the Court and any time during which the suspect can not be questioned because he is intoxicated or receiving medical attention.

All these activities are also regarded as dead time for the purposes of calculating the investigation period in relation to ordinary criminal cases.

However the last item on the subsection 23CA(8) dead time list, at sub-paragraph (m), is unique to terrorism cases.

Sub-paragraph 23CA(8)(m) provides that that the investigation period in terrorism cases does not include any "reasonable time", approved by a magistrate or justice of the peace, during which the questioning of a person is "reasonably suspended or delayed".

To exclude time from the investigation period on this ground, the police must make an application to a magistrate under section 23CB stating the length of time that should be specified as dead time and why it is reasonable that it should be declared as such. Under sub-paragraph 23CB(5)(c), the reasons which may be given include the following:

- the need to collate and analyse information relevant to the investigation from sources other than the questioning of the person;
- the need to allow authorities in or outside Australia time to collect information relevant to the investigation on the request of the investigating official;
- the fact that the investigating official has requested the collection of information relevant to the investigation from a place outside Australia that is in a time zone different from the investigating official's time zone;
- the fact that translation is necessary to allow the investigating official to seek information from a place outside Australia and/or be provided with such information in a language that the official can readily understand.

The magistrate or justice of the peace may then issue the certificate specifying a period of allowable dead time if he or she is satisfied that:<sup>183</sup>

- it is appropriate to do so, having regard to the application and the representations (if any) made by the person, or his or her legal representative, about the application, and any other relevant matters; and
- the offence is a terrorism offence; and
- detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence; and
- the investigation into the offence is being conducted properly and without delay; and
- the person, or his or her legal representative, has been given the opportunity to make representations about the application.

The time taken to make or dispose of such an application is also counted as dead time.<sup>184</sup> This means that the if the judicial officer hearing the dead time application adjourns the matter, even for a period of days, then this adjournment period itself automatically counts as dead time.

No cap is placed on the maximum allowable period of dead time.

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<sup>183</sup> *Crimes Act 1914* (Cth) s23CB(7).

<sup>184</sup> *Crimes Act 1914* (Cth) s23CA(h).

When first introduced into Parliament, the dead time provisions were said to be needed to take account of time zone differences and the impact different time zones have on the length of investigation periods in Australia.<sup>185</sup> It was proposed that the period of dead time permitted when investigating terrorism cases be capped at ‘a period that does not exceed the amount of the time zone difference.’ However, no time cap was included in the enacted provisions.

The Law Council is concerned that the dead time provisions in Part 1C of the *Crimes Act* are inconsistent with Australia’s obligations under article 9 of the ICCPR, primarily because they allow for an indefinite period of detention without charge. Once police have arrested a suspect in relation to a terrorist offence, Part 1C effectively allows police to seek an unlimited number of extensions to the lawful detention period. The threshold test that police need to satisfy in order to obtain an extension of the detention period is inordinately low. The conduct of ongoing routine investigative activities is enough to justify prolonged detention.

The Law Council’s concerns with the dead time provisions were confirmed in the case of Dr Mohamed Haneef.

### 8.3.2 Case Study – Detention of Dr Haneef<sup>186</sup>

The ‘dead time’ provisions were first used in the case of Dr Mohamed Haneef. On the evening of Monday 2 July 2007, Dr Haneef was arrested at Brisbane airport on the basis that police had a reasonable suspicion he had committed a terrorism offence.

By the time Dr Haneef had been charged with a criminal offence he had been detained without charge for over 12 days, during which time he had been interrogated for over 20 hours.

The exact timeline of events in the Haneef case is difficult to discern from publicly available information.<sup>187</sup> However, it is clear that the police made two successful applications to a magistrate under section 23DA to have the initial investigation period of four hours extended. It also appears that on two occasions police successfully applied to a magistrate to have a period of 48 hours and then later a period of 96 hours declared as reasonable dead time during which Dr Haneef

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<sup>185</sup> Explanatory Memorandum to the *Anti-Terrorism Bill 2004*, available at [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/FBB770363CE89F1CA256F720031198A/\\$file/04052em.rtf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/FBB770363CE89F1CA256F720031198A/$file/04052em.rtf).

<sup>186</sup> On 13 March 2008 the Attorney-General, the Hon Robert McClelland MP, announced the appointment of the Hon John Clarke QC to conduct an inquiry into the case of Dr Mohamed Haneef (“the Inquiry”). As part of its Terms of Reference, the Inquiry is to examine and report on the arrest, detention, charging, prosecution and release of Dr Haneef and any deficiencies in the relevant laws or administrative and operational procedures and arrangements surrounding his arrest and detention. The Inquiry is due to report on its findings on 30 September 2008. For more information, see <http://www.haneefcaseinquiry.gov.au/>. The Law Council has made a detailed submission to this Inquiry, available at <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/RWP7E8B9817D98B7C87CA257481001C2414>.

<sup>187</sup> Counsel for Dr Haneef prepared a time line of events in their submission to the Clarke Inquiry. This submission is available at <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/RWP7E8B9817D98B7C87CA257481001C2414>. Submissions from relevant Government Departments also shed light on this time line, and where publicly available, these submissions can also be found at the above website.

remained in detention but the clock was not running down on the investigation period.

Dr Haneef was eventually charged with providing support to a terrorist organisation. However, it was later found that there was insufficient evidence to pursue the charge.

Dr Haneef's case confirms the Law Council's primary concern with the dead time provisions – namely that they authorise a system of indefinite detention without charge, which is inconsistent with the general principles of Australian criminal law and contrary to Australia's obligations under article 9. In particular, the Haneef case demonstrates that:

- A person arrested for a terrorism-related offence can be held without charge for an indefinite amount of time. The length of the investigation period allowed under sections 23CA and 23DA is capped at 24 hours. However, this does not operate as a safeguard against prolonged detention without charge because allowance for reasonable dead time means that the 24 hours of questioning may be spread out over a period of weeks.
- There is no clear limit on how many times police can approach a judicial officer to specify certain time periods as dead time. In the Haneef case, the result was that even after the magistrate, upon each application, declared a finite period of allowable dead-time, the maximum period of Dr Haneef's detention without charge remained unknown. This was because the possibility of further successful applications was never foreclosed.
- The time taken to make and dispose of a dead time application automatically further extends the dead time. Therefore, if the judicial officer hearing a 'dead time' application fails to make a decision on the spot, and instead adjourns the matter, even for a period of days, then this time itself counts as 'dead time'. An adjournment, by default, becomes an extension of the investigation period. This is what occurred in the Haneef case between 11 July and 13 July 2007.

This creates the real risk that detained suspects or their legal representatives may be deterred from raising points of law or challenging evidence on the basis that it may delay the presiding judicial officer's pronouncement on the application.

- Given the absence of a limit on the maximum period of detention without charge, there is no incentive for law enforcement officers to charge a suspect, even if at the time of arrest or after initial questioning police form an opinion that they have sufficient information to warrant a terror-related charge. This can have serious consequences for a person's liberty because while a person is detained under section 23CA they have no opportunity to apply for and be released on conditional bail. In Dr Haneef's case it appears that police held him in custody for 12 days before charging him on the basis of information that was available to them on the first day of his arrest. Thus, in this case, section 23CA operated to effectively deny Dr Haneef a timely bail hearing.
- The involvement of a judicial officer in determining what is 'reasonable' dead time can not substitute for a finite limit on how long a person can be held without charge. This is due in part to the difficulty a detained suspect

faces in attempting to properly challenge assertions made by police and also to the low threshold test required to establish that the period of dead time sought is reasonable.

- The suspect's right to be heard in a dead time application can be circumvented in practice. In the period before Dr Haneef was legally represented the police appeared before a magistrate and a dead time extension was granted without Dr Haneef being heard from. Even after Dr Haneef was legally represented, his lawyer was not permitted to hear the evidence presented by police in support of their dead time application. Therefore, Dr Haneef's lawyer could not possibly effectively respond to that evidence.
- The policy reasons behind the introduction of the dead time provisions to Parliament - that they were only needed to take account of time zone differences - have been abandoned without adequate explanation.

Dr Haneef's case illustrates the corrosive impact the questioning and detention provisions of Part 1C can have on freedom from arbitrary detention in Australia.

### 8.3.3 Control orders and preventative detention

The *Anti-Terrorism (No 2) Act 2005* (Cth) introduced a system of preventative detention and control orders into the Commonwealth *Criminal Code* (Division 105 and 104 respectively) that depart from the ordinary principles of the Australian criminal justice system. Under Divisions 104 and 105, a person's liberty can be controlled or restricted *without* the person being charged or convicted of or even suspected of committing a criminal offence.

Control orders allow for a person's liberty, freedom of movement and freedom of association to be limited in the following ways:<sup>188</sup>

- 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; and

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<sup>188</sup> *Criminal Code* (Cth) s104.5(3).

- a requirement that the person participate in specified counselling or education.

All these restrictions may be imposed on a person for up to 12 months (with the possibility of renewal).<sup>189</sup>

A control order is made by an issuing court (for example a Federal Court).<sup>190</sup> Before making an order, the court must be satisfied either:<sup>191</sup>

- that the order would substantially assist in preventing a terrorist act; or
- that the person who is to be subject of the control order has provided training to or received training from a terrorism organisation.

Interim control orders are obtained first on application of an AFP officer after obtaining the consent of the Attorney-General.<sup>192</sup> This may be done *ex parte* without having to notify the person subject to the order of the application.<sup>193</sup> If the AFP officer elects to confirm the order, the person subject to the order must be notified and informed of the effect of the order and may appear and give evidence before the issuing court.<sup>194</sup> The issuing court may then revoke, confirm or vary the interim control order.<sup>195</sup> If the order is to be confirmed, the person subject to the order must be notified and may appear and give evidence before the issuing court.<sup>196</sup>

A preventative detention order enables a person to be taken into custody and detained by the AFP in a State or territory prison or remand centre for an initial period of up to 24 hours, with an option to have the order continued for a total period not exceeding 48 hours.<sup>197</sup>

Preventative detention orders can be issued where there are reasonable grounds to suspect that the person will engage in a terrorist act or engage in the preparation or planning of a terrorist act.<sup>198</sup>

There are two types of preventative detention orders (1) initial preventative detention orders of up to 24 hours, issued by senior members of the AFP<sup>199</sup> and (2) continued preventative detention orders and extensions of continued preventative detention orders, which may last for a further period that is not more than 48 hours from the time the person was first taken into custody.<sup>200</sup>

Preventative detention orders are issued by issuing authorities (i.e. judges and Federal Magistrates acting in their personal capacity, members of the Administrative Appeals Tribunal or retired judges).<sup>201</sup> Although the issuing authority is required to consider certain matters, there is no hearing and the person subject to the order

<sup>189</sup> *Criminal Code* (Cth) s104.5(3).

<sup>190</sup> An issuing court is defined in s101.1 *Criminal Code* (Cth) to include the Federal Court, the Federal Family Court or the Federal Magistrates Court.

<sup>191</sup> *Criminal Code* (Cth) s104.4 (interim order); s104.16 (confirmed order).

<sup>192</sup> *Criminal Code* (Cth) 104.2.

<sup>193</sup> *Criminal Code* (Cth) 104.3.

<sup>194</sup> *Criminal Code* (Cth) s104.12.

<sup>195</sup> *Criminal Code* (Cth) s104.14.

<sup>196</sup> *Criminal Code* (Cth) s101.16.

<sup>197</sup> *Criminal Code* (Cth) ss 105.8 and 105.12

<sup>198</sup> *Criminal Code* (Cth) s105.4.

<sup>199</sup> *Criminal Code* (Cth) s 105.8(1).

<sup>200</sup> *Criminal Code* (Cth) s 105.14.

<sup>201</sup> *Criminal Code* (Cth) s 105.12 and 105.18(2).

receives only a summary (rather than details) of the grounds on which the order was made.<sup>202</sup>

An issuing authority<sup>203</sup> can make an initial preventative detention order on application of an AFP officer if satisfied that:

- there are reasonable grounds to suspect that the person will engage in a terrorist act, possesses a thing that is connected with the preparation for, or the engagement of a person in a terrorist act; or has done an act in preparation for or planning a terrorist act; and
- making the order will substantially assist in preventing a terrorist act occurring; and
- detaining the subject for the period of the order is reasonably necessary.

The Australian Government considers that these restrictions on the right to liberty are necessary to empower police to act to prevent terrorist related activity from occurring.<sup>204</sup> The Law Council appreciates the need for police to have certain pre-emptive powers to assist in the prevention of criminal activity. However, for the following reasons, the Law Council is of the view that the control order and preventative detention order regime is an unnecessary and disproportionate means of achieving that protective end:

- At the time the control order and preventative detention orders were introduced no fewer than thirty-one Commonwealth Acts had provisions which provided for the prevention and prosecution of terrorist acts. For example, under the *Criminal Code* it is an offence to attempt, procure, incite or conspire to commit any offence, including terrorist related offences,<sup>205</sup> and such offences incur the same penalties as the completed offence. Each of these offences allows police to take pre-emptive action to prevent the commission of a terrorist act. However, unlike the control order and preventative detention order regimes they require police to establish a connection between a suspect and the planned commission of a particular offence before action can be taken to arrest and charge a person.
- The extremely broad scope of the control order and preventative detention order regime can effectively target any person suspected of involvement, even peripheral involvement, in terrorist activity. For example, there is no need to demonstrate a link between the person subject to the order and any particular or likely terrorist offence. A person can be detained under the regime in the knowledge that no relevant offence has been committed.
- The regime displaces the safeguards inherent in the Australian criminal justice system and authorises the imprisonment and restriction of freedoms of people in relation to whom there is insufficient evidence to prosecute for a criminal offence. A person's liberty may be removed or restricted before the person is told of the allegations against him or her or afforded the opportunity to challenge that restriction of liberty.

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<sup>202</sup> *Criminal Code* (Cth) ss 105.8, 105.12 and 105.18

<sup>203</sup> A Judge, Federal Magistrate, Administrative Appeals Tribunal member or retired judge.

<sup>204</sup> See Hon. J. Howard (Prime Minister), *Counter-Terrorism Laws Strengthened*, media release, Canberra, 8 September 2005; 4 Hon. J. Howard (Prime Minister), *Anti-Terrorism Bill*, media release, Canberra, 2 November 2005. See further Patrick Walters, 'Radical youths in fear of arrest as law passed', *The Australian*, 4 November 2005.

<sup>205</sup> Part 2.4 of the *Criminal Code* (Cth).

- The control orders regime effectively renders some individuals, namely those who have trained with a listed terrorist organisation, at constant risk of having their liberty curtailed. Once branded a risk, a person remains forever vulnerable to executive intrusion, since there is no obvious expiration date on a person's 'potential terrorist' status.

For example, when former Guantanamo Bay prisoner, David Hicks, was released from prison, he was placed under a control order. The order was issued on the basis that Mr Hicks, having allegedly trained with a terrorist organisation and once expressed support for a violent ideology, represents an unacceptable risk to the community. All the evidence relied upon to establish that risk was more than six years old. Mr Hick's long period of incarceration at Guantanamo Bay, his willingness to assist police and other authorities during his detention, and his purported change of views did not dissuade the authorities from applying for a control order.<sup>206</sup>

The control order and preventative detention order regimes represent a marked departure from the ordinary principles of criminal justice. They permit detention and other restrictions on liberty not on the basis that a person is suspected to have committed or is alleged to have committed or has been proven to have committed a particular offence, but rather on the basis that they *might* commit or facilitate the commission of an offence. To the extent that both regimes allow for a person's liberty to be restricted on the basis of a very imprecise and speculative risk assessment exercise, the Law Council believes that the restriction they impose on a person's liberty may well be regarded as arbitrary.

The Law Council understands that States need to be empowered to prevent terrorist acts before they occur. It is not enough that perpetrators may be charged and prosecuted after the event. However, the Law Council believes that allowing the State the power to restrict the liberty of a person before it can be established that that person has any plans or intent to commit a particular offence is a disproportionate response to the need to pre-empt and prevent terrorist acts.

#### 8.3.4 Changes to bail presumptions

In Australia, there is a long held presumption in favour of bail. This presumption recognises that even when a person has been charged with a criminal offence, the right to liberty must be respected. In respect of most criminal charges, the person charged is entitled to be released on bail unless the police demonstrate to the court particular grounds on which bail should be refused.<sup>207</sup> Detention prior to conviction is generally seen as an unnecessary and disproportionate restriction on the right to liberty. This approach accords with article 9(3) of the ICCPR, which provides that it shall not be the general rule that persons awaiting trial should be detained in custody.

The presumption in favour of bail is not a guarantee that bail will be granted in every case. Generally, the court retains the discretion to refuse bail where the court is satisfied that detention of the accused is necessary to protect witnesses or preserve

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<sup>206</sup> The control order placed on Mr Hicks will be discussed in more detail in relation to articles 12 and 14.

<sup>207</sup> For example, the *Bail Act 1978* (NSW) prescribes a general rule that persons have a right to release on bail for minor offences (s8) and are entitled to a presumption in favour of bail for certain offences (s9). For certain more serious offences, the *Bail Act* provides for a presumption against bail (ss8A-D) and there are some sub-categories of offences prescribed as exceptions to the more general category of offences which are otherwise entitled to a presumption in favour of bail.

evidence, to protect the community from the commission of further offences or to ensure that the accused does not abscond prior to trial.<sup>208</sup> The Law Council is of the view that this strikes the appropriate balance between respect for liberty and community protection.

As part of Australia's counter-terrorism measures, the presumption in favour of bail in terrorism cases has been reversed. The *Anti-Terrorism Act 2004* introduced section 15AA, in to the Commonwealth *Crimes Act*. Section 15AA provides that, in relation to persons charged with terrorism offences<sup>209</sup> bail is not to be granted unless the bail authority is satisfied that exceptional circumstances exist to justify bail.

In essence, section 15AA inverts the presumption in favour of bail and presumes that the restriction of liberty will be necessary and proportionate when a person is charged with a terrorism related offence.

No evidence was adduced by the Australian Government to demonstrate why the reversal of the presumption in favour of bail was necessary to aid in the investigation or prosecution of terrorist related offences. No evidence has been put forward, for example, to suggest that persons charged with terrorism offences are more likely to abscond while on bail, re-offend, threaten or intimidate witnesses or otherwise interfere with the investigation

As noted, prior to the introduction of s15AA, the existing bail provisions already provided the court with the discretion to refuse bail on a range of grounds, and to take into account the seriousness of the offence in considering whether those grounds are made out. No reason was given as to why these existing provisions were inadequate to guard against any perceived risk to the community in terrorism cases.

## 8.4 ASIO Compulsory Questioning and Detention Powers

As part of the counter-terrorism measures introduced in 2002, new questioning and detention powers were invested in Australia's Security Intelligence Organisation (ASIO).<sup>210</sup> These questioning and detention powers allow ASIO to obtain a warrant to:

- require a specified person to appear before a prescribed authority (such as a Judge or AAT member) for questioning; or<sup>211</sup>
- authorise a specified person to be taken into custody by a police officer, be brought before a prescribed authority immediately for questioning and be detained under arrangements made by a police officer.<sup>212</sup>

Questioning warrants and questioning and detention warrants are issued by a Federal Magistrate or Judge.<sup>213</sup> Before applying for such a warrant, ASIO must first obtain the consent of the Minister.<sup>214</sup>

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<sup>208</sup> See for example, Bail Act 1978 (NSW) s32;

<sup>209</sup> Other than the offence of associating with a terrorist organisation.

<sup>210</sup> Introduced by the *Australian Security and Intelligence Organisation Amendment (Terrorism) Act 2003(Cth)*.

<sup>211</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) s34 E

<sup>212</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) s34G.

<sup>213</sup> See *Australian Security and Intelligence Organisation Act 1979* (Cth) s34AB.

<sup>214</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34D, 34F

The Minister may authorise ASIO to seek a questioning warrant when he or she is satisfied that:<sup>215</sup>

- there are reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence; and
- relying on other methods of collecting that intelligence would be ineffective.

The Minister may authorise ASIO to seek a questioning and detention warrant when he or she is satisfied that:<sup>216</sup>

- there are reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence; and
- relying on other methods of collecting that intelligence would be ineffective; and
- 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; or
  - may not appear before the prescribed authority; or
  - may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

Once the Minister's consent has been given and an application for a warrant made to an issuing authority for either a questioning or a questioning and detention warrant, in order to issue the warrant the issuing authority need only be satisfied that there are '*reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence*'.<sup>217</sup> The issuing authority is not required to consider whether other methods are available for gathering the information or whether it is necessary to detain the person in order to question them. These are matters which are only considered by the Minister.

While in detention, the person is prevented from contacting anyone not specified in the warrant.<sup>218</sup> Contact is permitted, however, with the Inspector-General of Intelligence and Security and the Ombudsman. Further, the warrant may specify that the person may contact 'his or her lawyer' or someone with a particular familial relationship, such as 'his or her spouse' without naming that person as such.<sup>219</sup>

The person subject to a questioning or detention warrant does not need to be charged with or even suspected of committing a criminal offence.

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<sup>215</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) s34D.

<sup>216</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) s34F.

<sup>217</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34E, 34G

<sup>218</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34F(5),(6).

<sup>219</sup> The right to legal representation when questioned by ASIO is discussed later in this Report, in relation to Article 14.

### 8.4.1 Detention of non-suspects for the purposes of information gathering

ASIO's questioning and detention powers have been subject to review by the Senate Legal and Constitutional Review Committee (SLCRC)<sup>220</sup> and the Parliamentary Joint Committee on Intelligence and Security (PJCIS).<sup>221</sup> Both Committees have noted the controversial nature of the powers, with the SLCRC observing the legislation introducing the powers was the 'most controversial piece of legislation ever reviewed by the Committee'. It was further noted that 405 of the submissions received during its inquiry either objected to parts of the Act or expressed outright opposition to the Act as a whole. The SLCRC reported:

*The proposed detention provisions provoked the most critical comment. In particular, the concept that a person who is not suspected of having committed an offence may be detained incommunicado for questioning and held without charge for up to a week is seen by almost all as incompatible with the rights and freedoms enjoyed by this country.*<sup>222</sup>

The maximum period a person can be detained for the purpose of questioning by ASIO is 168 hours, or seven days.<sup>223</sup>

The Law Council accepts the need, in principle, to provide intelligence, security and law enforcement authorities with adequate powers to effectively investigate and obtain evidence in relation to appropriately defined terrorism offences. However, if the Australian Government seeks to justify restriction of liberty on the basis of the need to pre-empt and prevent terrorist activity, it must ensure that its legislative response is the least restrictive means of achieving that protective purpose. As this Committee has observed:

*... if so-called preventive 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 court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5)..*<sup>224</sup>

For the following reasons, the Law Council is of the view ASIO's questioning and detention powers fail to meet this criteria:

- The basis for detention is so broad in scope that it gives rise to arbitrary application.

The Law Council is concerned that the ASIO Act authorises the questioning and detention of a person, even though they are not suspected of any involvement in a terrorist offence, simply because they *may* have some

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<sup>220</sup> Senate Legal and Constitutional Review Committee, *Report on the ASION Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002.

<sup>221</sup> Parliamentary Joint Committee on Intelligence and Security, *Report on ASIO's Questioning and Detention Powers*, November 2005.

<sup>222</sup> Senate Legal and Constitutional Review Committee, *Report on the ASIO Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002 at p. xix/

<sup>223</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) s34G(4).

<sup>224</sup> UN Human Rights Committee, General Comment on Article 9, General Comment No 8, 30/06/82.

knowledge about the commission or possible commission of a terrorist related offence.

The alarming prospect of the detention of a 'non suspects' for the purpose of information gathering is exacerbated when one considers what the term 'terrorism offence' encompasses. Such offences encompass much more than the commission or planned commission of a terrorist act. They include, for example being an 'informal member of a terrorist organisation' or 'associating with a terrorist organisation'. This means that a person may be detained for up to a week merely on the basis that they have knowledge about someone who has possibly associated with a terrorist organisation, which as discussed below includes a very wide range of organisations.

- The secrecy surrounding the detention makes it very difficult for the detained person to both know and challenge the grounds for their detention.

Division 3 of the *ASIO Act* authorises the arrest of individuals for the purpose of questioning but provides no mechanism by which the person arrested 'shall be informed, at the time of arrest, of the reasons for his arrest' as required by article 9(2). While the prescribed authority is required to inform the detained person of the effect of the warrant, there is no obligation to inform the person of the reason the warrant was issued. In fact, a copy of the warrant itself is the only document required to be provided to the person's nominated legal advisor.

The absence of any requirement to inform the person detained of the grounds upon which the warrant was issued also impedes the right under article 9(4) to 'take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.

Under the *ASIO Act* the prescribed authority is required to inform the person being questioned of his or her right to seek a remedy from a federal court, but that safeguard is rather hollow in the circumstances. ASIO is exempt from the statutory grounds of judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. The only real mechanism for judicial review is the prerogative writ of habeas corpus. In any event, it is likely that habeas corpus proceedings would be unsuccessful unless the detained person could demonstrate that the relevant opinions of the Minister and issuing authority were not genuinely entertained or that the relevant opinions were wholly unreasonable. It is unlikely that such an argument could be mounted when the person detained only has access to the warrant itself, and no other information specifying the grounds supporting the warrant. As a result, there is in reality almost no effective means by which a person who has been detained can attempt to persuade an independent court that his or her detention is not lawful.

- A person may be detained in order to gather evidence about a wide variety of offences – many of which do not relate to imminent or even latent threats to public safety.

The broad range of activities and associations encapsulated by the term 'terrorism offence' extends well beyond those activities threatening public security or safety and extends to preliminary acts (such as the possession of a thing connected with the preparation of a terrorist act) or mere association with persons who are members of terrorist organisations.

Moreover, the detention persons for the purpose of questioning lacks a direct connection to public safety or security when the person detained is not suspected of any criminal activity.

For these reasons, the Law Council is firmly of the view that the detention powers invested in ASIO constitute an invalid and arbitrary restriction of the right to liberty and security of person protected under article 9.

## 8.5 Immigration detention<sup>225</sup>

The *Migration Act 1958* (Cth) currently provides that all non-citizens who are unlawfully in Australia must be detained.<sup>226</sup> Unless they are given permission to remain in Australia, unlawful non-citizens must be removed as soon as practicable. In the Common Core Document, Australia states that this policy reflects Australia's sovereign right under international law to determine which non-citizens are permitted to remain in Australia and if not, the conditions under which they may be removed.<sup>227</sup>

Under the *Migration Act* the detention of unlawful non-citizens is mandatory, automatic and indiscriminate. It is affected by the operation of law and not by an order of a court or administrative authority. The decision to detain is made prior to an assessment of the particular circumstances of each individual. The policy establishes an irrefutable presumption that each unlawful non-citizen represents a danger to the community and must be detained.

Australia's automatic and indiscriminate policy of detention of all unauthorized arrivals, the potentially indefinite period of detention and the absence of judicial oversight of the legality of the detention is incompatible with fundamental human rights principles.

These concerns were heightened in the context of Australia's system of offshore processing of asylum seekers, where persons detained were excluded from accessing Australia Courts or tribunals and lack access to any appropriate legal forums to challenge the legality of their detention.

### 8.5.1 International condemnation

Australia's immigration detention policy has received wide-spread criticism and has attracted the attention of this Committee, both in the Committee's recommendations following Australia's last report under the ICCPR and in a number of

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<sup>225</sup> NB Reforms have recently been announced to Australia's immigration detention policy, discussed below at 8.5.4.

<sup>226</sup> See ss189 and 196 of the *Migration Act 1958* (Cth). For some useful summaries regarding Australia's immigration and detention policy see Justice AM North and P Declé, 'Courts and Immigration Detention: The Australian Experience', Address to the Conference of the International Association of Refugee Law Judges, Wellington, New Zealand, October 2002; D McMaster, *Asylum Seekers: Australia's Response to Refugees*, Melbourne University Press, Melbourne, 2001, ch3; A Schloenhardt, 'Australia and the Boat-People: 25 Years of Unauthorised Arrivals', *University of New South Wales Law Journal*, vol 23, no3, 2000, p33; US Committee for Refugees, 'Sea Change: Australia's New Approach to Asylum Seekers', February 2002.

<sup>227</sup> Common Core Document at [261].

Communications.<sup>228</sup> The UN High Commissioner for Refugees ('Commissioner for Refugees') has also criticised the policy and opposes the detention of asylum seekers, particularly when detention is prolonged.<sup>229</sup>

This Committee considered Australia's policy of mandatory detention of unlawful citizens in Communication *A v Australia*.<sup>230</sup> There it was reasoned that to detain unlawful non-citizens is not, in itself, arbitrary. The Committee recognised the need for immigration authorities to check the identity of unlawful citizens and to undertake initial immigration screening that may require their temporary detention. However, the Committee also observed that *any deprivation of liberty must be proportionate to the aims pursued* and a fair balance must be struck between the conflicting interests of the State to protect the community against illegal immigration on the one hand, and the fundamental right to liberty of unlawful entrants on the other. In *A v Australia* the Committee observed:

*Legitimate State security concerns must be addressed in a way that balances them with the rights of individuals, consistent with human rights instruments, including the Refugee Convention. In the particular case of refugees, their human suffering in fleeing persecution should not be exacerbated by their treatment upon arrival in the country of asylum.*<sup>231</sup>

In 2006, in Communication *D & E v Australia*,<sup>232</sup> this Committee confirmed that Australia's mandatory immigration detention regime is a violation of article 9(1). *D & E v Australia* concerned a family of Iranian asylum seekers who were kept in mandatory immigration detention for over three years. The Committee observed:

*[Australia] has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with [Australia's] immigration policies by resorting to, for example, the imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for the authors, including two children, for [three years and two months], without any appropriate justification, was arbitrary and contrary to article 9, paragraph 1 of the Covenant.*<sup>233</sup>

### 8.5.2 Need for judicial oversight

The Law Council maintains its long held view that the detention of any person should be subject to judicial oversight. This position is in line with Australia's obligations

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<sup>228</sup> See for example, Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add.79, 10 Oct 1997, para 20; Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism, UN Doc A/HRC/4/26/Add.3 (2006), [62], [72]; Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention: Visit to Australia* (24 October 2002) UN Doc. E/CN.4/2003/8/Add.2, [14]. For examples of Communications to this Committee see *C v Australia* (2002) UN Doc CCPR/C/76/D/900/1999; *Madafferi v Australia* (2004) UN Doc CCPR/C/81/D/1011/2001; *Danyal Shafiq v Australia*, CCPR/C/88/D/1324/2004 (13 November 2006).

<sup>229</sup> UNHCR spokesperson Kris Janowski – at the press briefing, on 25 January 2002, at the Palais des Nations in Geneva.

<sup>230</sup> *A v Australia* (560/1993) 30 March 1997, UN Doc. CCPR/C/59/D/560/1993.

<sup>231</sup> *A v Australia* (560/1993) 30 March 1997, UN Doc. CCPR/C/59/D/560/1993.

<sup>232</sup> *D & E v Australia* Communication No 1050/2002 (11 July 2006).

<sup>233</sup> *D & E v Australia* Communication No 1050/2002 (11 July 2006).

under article 9(4) of the ICCPR and is also consistent with Australia's obligations under the *Convention Relating to the Status of Refugees* and the *Protocol Relating to the Status of Refugees*.

Currently, section 189(1) of the *Migration Act* requires a Department of Immigration officer or a police officer to detain any person they know or *reasonably suspect* to be an unlawful non citizen. Section 196(1) provides that an unlawful non citizen detained under section 189(1) must be kept in immigration detention until removed from Australia, deported or granted a visa.

In this regard, the Australian Government's policy fails to balance considerations of efficacy with fairness and proper safeguards to individual liberty. The seriousness of taking away a person's liberty demands that the person be accorded fair and balanced treatment from a judicial officer before being sent to detention. There is a real risk that this cannot be achieved where Departmental officers and police officers are authorised to detain any persons they *reasonably suspect* to be an unlawful citizen. In particular, the low threshold test of 'reasonably suspects' gives rise to a risk that a person could be detained on the basis of an insufficient or an erroneous suspicion that a person is an unlawful non-citizen. In the absence of judicial oversight, these decision making processes may go unchecked. The result is that citizens or valid visa holders may be wrongfully detained for lengthy periods.

A number of high profile cases of wrongful immigration detention, such as the detention of Australian citizens Cornelia Rau and Vivian Alvarez and over 200 other wrongful detention cases, demonstrate the urgent need to reintroduce judicial oversight at the front end of the detention process.<sup>234</sup>

### 8.5.3 The 2005 amendments

A number of high profile wrongful detention cases, coupled with the 'Tampa incident',<sup>235</sup> where a boat of people seeking asylum in Australia was intercepted and turned away from Australian shores, have ensured Australia's immigration detention policy has remained an area of public contestation and debate.

In response to the controversy generated by these cases and the growing public criticism of the Australian Government's immigration detention policy, in May 2005 the then Immigration Minister referred more than 200 cases of possible wrongful immigration detention to former federal police chief Mick Palmer to examine (known as the 'Palmer Inquiry').<sup>236</sup>

The Palmer Inquiry made a number of findings, including that:

- there is no automatic process of review sufficient to provide confidence to the Government, to the Secretary of DIMIA or to the public that the power to

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<sup>234</sup> For background to these matters see M. Palmer, *Inquiry into the circumstances of the Immigration detention of Cornelia Rau: Report*. Commonwealth of Australia, Canberra, July 2005. Chapter 8 contains an examination of the Vivian Alvarez matter.

<sup>235</sup> For more information on the so-called 'Tampa incident' - where an Indonesian vessel was intercepted by HMAS *Adelaide* within Australian waters reportedly 120 nautical miles off Christmas Island, on or about 6 October 2001 - see the Report of the Select Senate Committee on 'A Certain Maritime Incident' released on 23 October 2002 and available at [http://www.aph.gov.au/senate/Committee/maritime\\_incident\\_cte/report/index.htm](http://www.aph.gov.au/senate/Committee/maritime_incident_cte/report/index.htm).

<sup>236</sup> M. Palmer, *Inquiry into the circumstances of the Immigration detention of Cornelia Rau: Report*. Commonwealth of Australia, Canberra, July 2005

detain a person on reasonable suspicion of being an unlawful non-citizen under section 189(1) of the Commonwealth's *Migration Act 1958* is being exercised lawfully, justifiably and with integrity;

- many of the departmental officers who were interviewed and who used the detention powers under section 189(1) of the *Migration Act* had little understanding of what, in legal terms, constitutes 'reasonable suspicion' when applying it to a factual situation; and
- there did not appear to be (even at senior management level) an understanding of the distinction between the discretionary nature of the exercise of 'reasonable suspicion' and the mandatory nature of the detention that must follow the forming of a 'reasonable suspicion'.

Following the findings of the Palmer Inquiry, two private members Bills were introduced.<sup>237</sup> The Bills called for the detention of new asylum seekers to be limited to 90 days, access to judicial review and an end to families and children being detained. The Bills were not passed into legislation.

On 17 June 2005, the former Prime Minister announced changes to the Government's immigration policy which he presented as preserving the broad framework and principle of mandatory detention, but with a 'softer edge'. Under the 2005 amendments:

- the Minister has the discretion to place families with children in community detention arrangements;
- time limits of three months apply to both the primary decision and the merits appeal decision by the Refugee Review Tribunal; and
- Ombudsman's reports and recommendations on people held in immigration detention longer than two years must be tabled in Parliament, and
- the immigration minister's discretionary powers to grant visas were extended.

Although maintaining a system of mandatory detention without providing for judicial oversight, the 2005 amendments were a welcome step towards improving the treatment of refugees and asylum seekers. Of particular import was the affirmation by Parliament that as a matter of principle minors should only be detained as a measure of last resort. It is encouraging that the powers granted to the Minister under the Act are not limited in their application to families with minor children. Indeed, the 2005 amendments give the Minister new and extremely broad powers to grant a visa to any person who is in immigration detention, or to allow any such person to reside at a specified place rather than being held in a detention centre.

It must be noted, however, that even if the Minister exercises his discretion in this way, until the policy of mandatory detention without judicial oversight is removed from the provisions of the *Migration Act*, the Law Council will continue to hold concerns that Australia's immigration policy is inconsistent with its obligations under article 9 of the ICCPR.

#### 8.5.4 Recently Announced Reforms

On 29 July 2008 the Minister for Immigration and Citizenship announced a suite of reforms to Australia's immigration detention system, including a commitment that

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<sup>237</sup> *Migration Amendment (Act of Compassion) Bill 2005; Migration Amendment (Mandatory Detention) Bill 2005*. Both Bills were introduced into the Senate by Senators Bob Brown and Kerry Nettle. Neither Bill was passed.

“detention in immigration detention centres will only be used as a last resort and for the shortest practicable time.”<sup>238</sup>

The Rudd Government’s new policy has been described as a ‘risk-based approach’ to detention – persons who pose no danger to the community will be able to remain in the community while their visa status is resolved.<sup>239</sup> Further, the Department of Immigration and Citizenship will have to justify why a person should be detained and once in detention, a detainee’s case will be reviewed every three months to ensure that the further detention of the individual is justified.

The Law Council welcomed the announcement of these reforms<sup>240</sup> but is keenly aware that they do not completely remove the mandatory aspects of Australia’s immigration policy, nor do they appease the full range of human rights concerns previously raised by the Law Council and highlighted by this Committee.

For example, under the proposed reforms, mandatory detention will remain in the following situations:

- all unauthorised arrivals, for management of health, identity and security risks to the community;
- unlawful non-citizens who present unacceptable risks to the community; and
- unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

This places Australia at risk of continuing to breach its treaty obligations, including those under the ICCPR, the CAT, and the *Convention Relating to the Status of Refugees*.

In light this, the Law Council urges the Australian Government to move quickly to address all the mandatory and arbitrary features of Australia’s immigration policy as currently provided for in the *Migration Act* and remove the punitive character of immigration detention in Australia.<sup>241</sup>

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<sup>238</sup> Media Release, Minister for Immigration and Citizenship, ‘Labor unveils new risk-based detention policy’ (29 July 2008) available at <http://www.minister.immi.gov.au/media/media-releases/2008/ce08072.htm>. See also Senator Evans, Minister for Immigration and Citizenship, “New Directions in Detention, Restoring Integrity to Australia’s Immigration System”, speech delivered to Centre for International and Public Law, Australian National University, 29 July 2008.

<sup>239</sup> Media Release, Minister for Immigration and Citizenship, ‘Labor unveils new risk-based detention policy’ (29 July 2008) available at <http://www.minister.immi.gov.au/media/media-releases/2008/ce08072.htm>.

<sup>240</sup> Media Release, Law Council of Australia, ‘LCA Welcomes the Beginning of the End for Australia’s Immigration Detention Policy’ (29 July 2008) available at <http://www.lawcouncil.asn.au/read/2008/2455358992.html>.

<sup>241</sup> The Law Council recently endorsed a joint submission prepared by the Law Institute of Victorian, The Justice Project and Liberty Victoria to the Joint Committee on Migration Matters’ Inquiring into Immigration Detention in Australia. That submission contains further recommendations as to the steps that ought to be taken to ensure Australia’s immigration detention policy is consistent with its international human rights obligations. It is anticipated that this submission will be shortly made available on the Inquiry’s website <http://www.aph.gov.au/house/committee/mig/detention/subs.htm>.

## 9. ARTICLE 10 TREATMENT IN DETENTION

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1. *All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*

2. (a) *Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;*

(b) *Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.*

3. *The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*

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The Common Core Document addresses article 10 in the context of reporting on immigration detention, Aboriginal deaths in custody, deprivation of liberty and prison conditions, and young offenders in detention.<sup>242</sup>

The Australian Government reports on a number of positive developments in relation to the areas described above. For example, the 2005 amendments to the *Migration Act* are cited as a positive development in respect of Australia immigration detention policy.

Despite the 2005 amendments, serious concerns remain regarding the conditions of persons in immigration detention in Australia and whether these conditions meet the standards prescribed by article 10(1) of the ICCPR.

### 9.1 Immigration detention

This Committee has explained that article 10 applies to ‘anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals, particularly psychiatric hospitals, detention camps or correctional institutions or elsewhere’.<sup>243</sup> The Committee specified that this applies not only to State-run detention institutions, but also privately run facilities that fall within the jurisdiction of the State.

As a result, article 10, in conjunction with article 2(1),<sup>244</sup> imposes an obligation on Australia to ensure all persons in detention, regardless of their status as citizens, refugees or unlawful entrants, are treated with humanity and with respect for the inherent dignity of the human person.

In Australia the operation of the immigration detention facilities has been outsourced to private companies under a public tender scheme. However, contracting out the

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<sup>242</sup> Common Core Document at [270].

<sup>243</sup> UN Human Rights Committee, General Comment on Article 10, General Comment No 21 (10/04/92).

<sup>244</sup> UN Human Rights Committee General Comment No 31 on the Nature of General Legal Obligations on State Parties to Covenants (26/05/04) at [10] provides that State parties obligations extend to those seeking asylum in their jurisdiction.

management of immigration detention centres does not alleviate Australia's burden to ensure compliance with human rights standards, including those relating to the conditions of detention.

This has been confirmed in *Betran v Australia*<sup>245</sup> where the Committee observed that:

*the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve the State party of its obligations under the Covenant, notably articles 7 and 10.*<sup>246</sup>

The Law Council is concerned that the outsourcing of the management of immigration detention facilities in Australia has led to a general deterioration of conditions of detention. The Department of Immigration has promulgated a set of standards, the Immigration Detention Standards (IDS) that regulate the conditions to be observed by the Service Provider in the provision of services in detention centres.<sup>247</sup> The schedule to the contract between Global Solutions Limited and the Department of Immigration contains the IDS performance standards and measures.<sup>248</sup>

Despite the inclusion of IDS in government contracts for the management of immigration detention centres, HREOC, the Commonwealth Ombudsman, Committees of Federal Parliament and numerous other bodies have drawn attention to the sub-standard conditions of detention and have reported, for example, on the use of inappropriate force to subdue detainees, the use of isolation to address 'behaviour problems' and the general lack of access to educational or recreation activities or appropriate information and facilities to understand and assert their legal rights.<sup>249</sup>

The first impressions of Justice P.N. Bhagwati, appointed to by the UN High Commissioner for Human Rights to report on the treatment of asylum seekers in detention in Australia, reflect these findings:

*Justice Bhagwati was considerably distressed by what he saw and heard in Woomera IRPC. He met men, women and children who had been in detention for several months, some of them even for one or two years. They were prisoners without having committed any offence. Their only fault was that they had left their native home and sought to find refuge or a better life on the Australian soil. In virtual prison-like conditions in the detention centre, they lived initially in the hope that soon their incarceration will come to an end but with the passage of time, the hope gave way to despair. When Justice*

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<sup>245</sup> *Cabal and Pasini Betran v Australia* Communication No. 1020/2001, U.N. Doc. CCPR/C/78/D/1020/2001 (2003).

<sup>246</sup> *Cabal and Pasini Betran v Australia* Communication No. 1020/2001, U.N. Doc. CCPR/C/78/D/1020/2001 (2003) at [7.2].

<sup>247</sup> Department of Immigration and Multicultural and Indigenous Affairs, Annual Report (2003-2004) p. 94 available at [http://www.immi.gov.au/about/reports/annual/2003-04/\\_pdf/annual-report-full.pdf](http://www.immi.gov.au/about/reports/annual/2003-04/_pdf/annual-report-full.pdf)

<sup>248</sup> Department of Immigration and Multicultural and Indigenous Affairs, Media Release 'Group 4 To Manage Immigration Detention Facilities' (27 August 2003).

<sup>249</sup> For example, HREOC has produced over 8 reports on the human rights implications of Australia's immigration detention regime, such as *National Inquiry into Children in Immigration Detention* (May 2004); *Human Rights and International Law implications of Migration Bills* (September 2001) *Human rights violations at the Port Hedland Immigration Processing Centre* (November 2000); and *Those who've come across the seas: Detention of unauthorised arrivals* (May 1998) and engaged in a number of inspections of immigration detention facilities. In 2001 the Joint Standing Committee on Foreign Affairs, Defence and Trade conducted a review of immigration detention centres and the treatment of detainees and tabled a report in Parliament.

*Bhagwati met the detainees, some of them broke down. He could see despair on their faces. He felt that he was in front of a great human tragedy. He saw young boys and girls, who instead of breathing the fresh air of freedom, were confined behind spiked iron bars with gates barred and locked preventing them from going out and playing and running in the open fields. He saw gloom on their faces instead of the joy of youth. These children were growing up in an environment, which affected their physical and mental growth and many of them were traumatized and led to harm themselves in utter despair.*<sup>250</sup>

There is ample information on the public record to suggest that immigration detention causes harm to the mental health of detainees.<sup>251</sup> A report by the HREOC following visits to Australian immigration detention facilities by the Human Rights Commissioner in 2001, found that the effects of indefinite detention had caused some detainees to resort to acts of self-harm, and even to attempt suicide.<sup>252</sup>

Many mental health professionals have expressed the view that it is not possible to properly treat the mental health problems suffered by most immigration detainees without removing the primary cause of the problem – the detention itself.<sup>253</sup>

The negative effect of indeterminate immigration detention on detainee's mental health has also been found to constitute a breach of article 10.

In *Madafferi v Australia*<sup>254</sup> this Committee found that the decision to send Mr Madafferi to immigration detention when Australian officials knew he had mental health problems was in violation of article 10(1) of the ICCPR. Mr Madafferi was an Italian tourist in Australia who had overstayed his visa and was subsequently refused residency on the basis of bad character. He was sent to a Melbourne immigration detention centre while he challenged the decision to refuse his residency application. Madafferi's mental health declined in the detention centre. At the request of the UN, Mr Madafferi was transferred to home detention. When Mr Madafferi's court challenges had all failed, immigration officials took him back to the immigration detention centre. Three months later he was committed to a psychiatric hospital.

While the 2005 amendments to the *Migration Act* and other policy changes have gone some way to meet Australia's human rights obligations, Australia's immigration detention policy continues to contain a number of elements that sit uncomfortably with Australia's obligations under article 10.

In December 2007 HREOC released a report of observations following the inspection of mainland Immigration Detention facilities in Australia.<sup>255</sup> HREOC noted a general improvement in the approach and attitude of staff running immigration centres. In particular, there were improvements in the conditions at certain detention centres,

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<sup>250</sup> Report of Justice P. N. Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, Mission to Australia 24 May to 2 June 2002.

<sup>251</sup> See for example Lynda Crowley-Cyr, 'Contractualism, Exclusion and 'Madness' in Australia's 'Outsourced Wastelands' (2005) *Macquarie Law Journal* 5; Procter, Nicholas G 'A call for deeper scrutiny of mental health care for people in Australian immigration detention centres' (2005) 14(2) *International Journal of Mental Health Nursing* p. 70

<sup>252</sup> HREOC, A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner. (2001).

<sup>253</sup> HREOC Summary of Observations following the Inspection of Mainland Immigration Detention Facilities 2006

<sup>254</sup> *Madafferi v Australia* (2004) UN Doc CCPR/C/81/D/1011/2001 (26 August 2004)

<sup>255</sup> HREOC, *Observations on Mainland Immigration Detention Facilities 2007*, December 2007.

such as the Northern Immigration Detention Centre, Maribyrnong Immigration Detention Centre, Sydney Immigration Residential Housing and the new Perth Immigration Residential Housing. However, there were a number of areas in which HREOC was 'greatly disappointed' by the lack of the progress made to address human rights concerns arising from the conditions of immigration detention in mainland Australia.

HREOC noted that although the provision of mental health care in detention centers appears to have improved over the past few years, the fundamental reasons for mental health problems in immigration detention remain the same - the fact of detention itself. It is the long periods of detention; uncertainty regarding the length of detention; uncertainty regarding the future and exacerbation of past torture and trauma that give rise to mental health problems experienced in immigration detention. Release from detention is a critical pre-condition for adequate or effective treatment.<sup>256</sup>

HREOC found that mental health staff working in detention centres continue to feel constrained. They feel like they have to wait until a person's mental health situation becomes very severe before they can make recommendations of transfer or release to the Department.<sup>257</sup> One staff member said that most people in the facility had mental health problems and many of those problems could be solved by prompt resolution of their visa situation and release from detention.<sup>258</sup> Staff shortages, lack of resources and lack of appropriate facilities also continue to constrain the work of mental health staff.

HREOC reiterated its 1998 and 2002 recommendations that the average length of immigration detention remains unacceptable.<sup>259</sup> It recommended that alternative options be considered to help alleviate the serious health and mental health issues which often arise from long term detention and that more be done to ensure detainees are aware for their various options for placement under alternative arrangements.<sup>260</sup>

The Law Council strongly supports the implementation of these recommendations as a means to bring Australia closer to meeting its obligations under article 10. It is hoped that the recently announced reforms to Australia's immigration policy will explore alternatives to immigration detention and lead to improved mental health outcomes for detainees.

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<sup>256</sup> HREOC, *Observations on Mainland Immigration Detention Facilities 2007*, December 2007 at 6.1.

<sup>257</sup> HREOC, *Observations on Mainland Immigration Detention Facilities 2007*, December 2007 at 6.1.

<sup>258</sup> HREOC, *Observations on Mainland Immigration Detention Facilities 2007*, December 2007 at 6.1.

<sup>259</sup> HREOC, *Observations on Mainland Immigration Detention Facilities 2007*, December 2007 at 6.1. See also See for example, Report of the National Inquiry into Children in Immigration Detention, *A last resort?*, (2004); Report of an inquiry into the detention of unauthorised arrivals, *Those who've come across the seas*, (1998).

<sup>260</sup> HREOC, *Observations on Mainland Immigration Detention Facilities 2007*, December 2007 at 6.1. See for example, Report of the National Inquiry into Children in Immigration Detention, *A last resort?*, (2004); Report of an inquiry into the detention of unauthorised arrivals, *Those who've come across the seas*, (1998).

## 10. ARTICLE 12 RIGHT TO LIBERTY OF MOVEMENT

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1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
  2. *Everyone shall be free to leave any country, including his own.*
  3. *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*
  4. *No one shall be arbitrarily deprived of the right to enter his own country.*
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Article 12 of the ICCPR protects liberty of movement, including the freedom to choose one's residence, the right to leave any country and the right to enter one's own country.

In its General Comment on article 12 this Committee explained that liberty of movement is 'an indispensable condition for the free development of a person' and 'interacts with several other rights in the Covenant'.<sup>261</sup> For limitations on article 12 rights to be permissible, they must be provided by law, conform to the principle of proportionality, be appropriate to achieve their protective function, and consistent with other rights recognised in the ICCPR.

### 10.1 Control orders

The control order regime has been discussed earlier in this report in respect of article 9, and is also discussed later in this Report in respect of article 14. In this section of the Report, the Law Council wishes to draw to the attention to the way in which control orders unnecessarily and disproportionately impinge upon article 12 rights.

As noted above, a control order can restrict a person's movement in a number of ways.<sup>262</sup> For example, it can:

- confine a person to their home or to specified localities;
- require a person to wear a tracking device;
- restrict their use of technology;
- prohibit participation in specified activities;
- prohibit them from leaving Australia; and
- require them to report to specific persons.

A control order may exist for a period of 12 months and successive control orders may be made.

As noted above, control orders can impose extensive restrictions on a person's right to liberty of movement, *without* requiring that the person be charged or convicted of a

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<sup>261</sup> UN Human Rights Committee, General Comment on Article 12, General Comment No 27 (2/11/1999).

<sup>262</sup> *Criminal Code* (Cth) s104.5(3).

criminal offence. As will be discussed later in this Report, an interim control order can be made without affording the person subject to the order the opportunity to challenge either the necessity for or the legality of the interim order. An interim control order may be subsequently confirmed and become a final order without the person subject to the order being given full access to the information adduced to support the confirmation.

The cumulative result of these features is an invalid restriction on the right to liberty of movement. This can be seen in the in the case of former Guantanamo Bay prisoner, David Hicks.

In the weeks prior to 29 December 2007, the date Mr Hicks was due to be released from custody in Australia, the AFP sought an interim control order against Mr Hicks. An interim order was granted by Federal Magistrates' Court of Australia on 21 December 2007. The terms of the interim control order included a 'curfew' at an approved address between midnight and 6am each day, reporting to South Australian police three times a week, fingerprinting, prohibition from leaving Australia, a ban on communicating with members of terrorist organisations, a prohibition on acquiring or possessing weapons or military training materials, and bans on using telecommunications services (including mobile telephones, internet and voice-over-internet) not approved by the AFP.<sup>263</sup>

The confirmation hearing for the interim control order was held on 18 February 2008. Federal Magistrate Donald confirmed the control order, and made minor changes to its terms.<sup>264</sup> For example, under the confirmed control order Mr Hicks is required to report to police twice a week instead of three times and his overnight curfew has been cut by two hours a night. Mr Hicks is also permitted to live anywhere in Australia, not just in South Australia, provided the location is approved by the Australian Federal Police. He is still required to submit to fingerprint testing and is barred from possessing any explosives, firearms or any material related to weapons, combat skills or military tactics. The confirmed control order will expire on 21 December 2008.

The order was issued on the basis that Mr Hicks, having allegedly trained with a terrorist organisation and once expressed support for a violent ideology, represents an unacceptable risk to the community.<sup>265</sup> All the evidence relied upon to establish that risk was more than six years old. The fact that Mr Hicks had been incarcerated for the past six years, expressed a willingness to assist authorities and recanted his past expressions of support for any terrorist organisation or activity did not appear to influence the assessment of the risk Mr Hicks posed to the Australian community or dissuade the authorities from seeking a control order against him.

This is because the control order regime does not require the existence of a *real and current risk* that the person subject to the order is planning to commit or is likely to commit any particular terrorist act. Rather, a control order can be issued when the issuing court is satisfied on the balance of probabilities:<sup>266</sup>

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<sup>263</sup> The full text of the interim control order can be read at *Jabbour v Hicks* [2007] FMCA 2139 (21 December 2007), <http://www.austlii.edu.au/au/cases/cth/FMCA/2007/2139.html>.

<sup>264</sup> *Jabbour v. Hicks* [2008] FMCA 178 (19 February 2008), <http://www.austlii.edu.au/au/cases/cth/FMCA/2008/178.html>

<sup>265</sup> *Jabbour v. Hicks* [2008] FMCA 178 (19 February 2008), <http://www.austlii.edu.au/au/cases/cth/FMCA/2008/178.html>. See also ABC Radio PM Program, 'One year control order for David Hicks' (21 December 2007).

<sup>266</sup> *Criminal Code* (Cth) s104.4 (interim order); s104.16 (confirmed order).

- that making the order would substantially assist in preventing a terrorist act;  
**or**
- that the person has provided training to or received training from, a listed terrorist organisation.

The Court must also 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 purpose of protecting the public from a terrorist act.<sup>267</sup>

Although these provisions use the language of proportionality, that is they use terms 'reasonably necessary' and 'reasonably appropriate and adapted',<sup>268</sup> the Law Council believes that in practice the provisions cannot be applied in a proportionate manner.

In the absence of any specific evidence that the person who is to be the subject of the order has committed a particular terrorist act or is planning to commit a particular terrorist act or is even likely to commit a particular terrorist act, the court is asked to consider what measures are necessary and reasonably appropriated and adapted to prevent them from doing so.

The process that follows can only be flawed and arbitrary.

This is because in the circumstances, the Court is forced to engage in a decision making process that involves weighing the possibility of a worst case scenario and entirely hypothetical terrorist attack against the appropriateness of placing a precautionary curfew or some other restriction on the person who has been speculatively assessed as a risk.

This is not a true application of principles of proportionality and the resultant restrictions placed on a person's freedom of movement are not likely to be genuinely grounded in necessity.

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<sup>267</sup> *Criminal Code* (Cth) s104.4 (interim order); s104.16 (confirmed order).

<sup>268</sup> For example see *Criminal Code* (Cth) s104.4(1)(d).

## 11. ARTICLE 13    EXPLUSION OF ALIENS

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*An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

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As noted in the Common Core Document,<sup>269</sup> a number of independent tribunals exist in Australia, such as the Administrative Appeals Tribunal, the Refugee Review Tribunal and the Migration Review Tribunal, that offer asylum seekers and non-citizens limited rights of review if a decision has been made to refuse to grant a visa or where a visa has been cancelled or revoked.<sup>270</sup>

Despite these avenues for review, non-citizens continue to face significant difficulties when seeking to contest a visa cancellation.<sup>271</sup> In particular, non-citizens encounter significant difficulties when:

- seeking to access the information upon which the decision to expel the person is made; and
- even where information is provided, seeking to challenge the validity of relying upon that information as a grounds for expulsion.

For these reasons, available avenues for review often prove to be hollow forms of redress for a person seeking to exercise their article 13 right to submit reasons against expulsion and to have his or her case reviewed by a competent authority.

### 11.1 Case Study 1 – Scott Parkin

Scott Parkin, a citizen of the United States of America, entered Australia in June 2005 on a tourist visa that permitted him to remain in the country for six months.<sup>272</sup> In early September 2005, ASIO contacted Mr Parkin and invited him to speak to them. Mr Parkin declined this invitation.<sup>273</sup> ASIO staff then prepared a security assessment of Mr Parkin.<sup>274</sup> The security assessment was adverse and included a recommendation that the Minister for Immigration revoke Mr Parkin's visa in accordance with section 116 of the *Migration Act 1958* (Cth).<sup>275</sup>

Section 116 of the *Migration Act* vests the Minister with the power to cancel a visa in certain circumstances. One such circumstance is where the holder of the visa has been assessed by ASIO to be a direct or indirect risk to security.<sup>276</sup> In fact, under

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<sup>269</sup> Common Core Document at [299]- [301].

<sup>270</sup> In some cases review of the merits of the decision is permitted. In other cases, such as the cancellation of a visa on "character grounds", review of the decision is only available on the grounds that decision maker made an error of law.

<sup>271</sup> A person in Australia who has their visa cancelled or revoked becomes an unlawful non-citizen and is liable to be detained and removed from Australia.

<sup>272</sup> *Parkin v O'Sullivan* (2006) 162 FCR 444 at [2].

<sup>273</sup> *Parkin v O'Sullivan* (2006) 162 FCR 444 at [3].

<sup>274</sup> *Parkin v O'Sullivan* (2006) 162 FCR 444 at [4].

<sup>275</sup> *Parkin v O'Sullivan* (2006) 162 FCR 444 at [5].

<sup>276</sup> *Migration Regulations 1994* (Cth) R2.43(1)(b).

section 116(3) of the *Migration Act*, once the Minister has received an adverse security assessment he has no discretion but to cancel the visa.

On 10 September 2005, the Minister cancelled Mr Parkin's visa.<sup>277</sup> He was then apprehended, held in detention for five days and subsequently removed from Australia and returned to the United States on 15 September.<sup>278</sup> Details of his security assessment were never provided to Mr Parkin or his legal representatives.<sup>279</sup>

As a result, Mr Parkin was denied the right to challenge the reasons for his expulsion or to have his case reviewed by a competent authority. He also had no way of challenging whether the decision to revoke his visa was a decision reached in accordance with law.

A significant degree of public disquiet was expressed about Mr Parkin's adverse security assessment and subsequent removal from Australia. In general terms, concern was expressed that the reason for Mr Parkin's removal was his activities as a non-violent political activist and in particular his stand against the war in Iraq. These complaints raised the possibility of external influence on ASIO in preparing the adverse security assessments. However, when the complaints were investigated by the Inspector-General of Intelligence and Security, it was concluded that Mr Parkin's security assessment was based on credible and relevant information and there was no evidence or reason to think that ASIO was influenced by external bodies.<sup>280</sup>

Even though Mr Parkin had already been removed from Australia, lawyers acting for Mr Parkin lodged a Federal Court challenge seeking to quash the adverse security assessment made by ASIO and the decision to provide that security assessment to the Minister. During the proceedings, Mr Parkin's lawyers sought an order requiring ASIO to produce the contents of the security assessment and other information on which the assessment was based. ASIO argued that the release of the security assessment would cause 'irreparable harm' to Australia's national security. The Federal Court ordered discovery of the documents detailing the allegations against Mr Parkin and observed:

*The primary difficulty that [Mr Parkin] faces in bringing his claim is that he has not seen his adverse security assessment and alleges that he does not know the facts or reasons by which the Director-General made the adverse security assessment. Without this material it will be difficult, if not impossible, for [Mr Parkin] to make out [his] claim that the adverse security assessment was not made in accordance with law.*<sup>281</sup>

The Court found that Mr Parkin was:

*entitled to call on the aid of the Court to assist [him] in determining if [he is] right and, if so, the detail of those claims. [He] should not be shut out just*

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<sup>277</sup> *Parkin v O'Sullivan* (2006) 162 FCR 444 at [5].

<sup>278</sup> *Parkin v O'Sullivan* (2006) 162 FCR 444 at [6].

<sup>279</sup> Part IV Division 2 of the *ASIO Act 1979 (Cth)* concerns the furnishing of security assessments. It provides, ss37 and 38 read together, that the agency to which a security assessment has been furnished is to provide its subject a notice to which a copy of the assessment is attached and certain prescribed information concerning rights of review. However, there is an exemption to this requirement in subs 38(2). This sub-s permits the Attorney General to certify either that withholding notice to the subject of the assessment is "essential to the security of the nation" or that disclosure to any person of the statement of grounds would be prejudicial to the insets of security.

<sup>280</sup> *Parkin v O'Sullivan* (2006) 162 FCR 444 at [7] – [8].

<sup>281</sup> *Parkin v O'Sullivan* (2006) 162 FCR 444 at [18].

*because [his] claim involves the denial of a state of affairs [he] cannot explain, as opposed to a positive averment. No sufficient reason has been advanced why discovery should not be ordered.*<sup>282</sup>

The Court ordered that the appellant make discovery of specified documents, or categories of documents. In each case, the documents required to be discovered included the adverse security assessment. They included also any other document relied upon by the appellant in making the adverse security assessment and any other document upon which the appellant intended to rely at trial.<sup>283</sup>

The Court made it clear that an order for discovery did not necessary mean the entire content of the security assessment would be produced to Mr Parkin, however, the production of the security assessment was not ruled out.

ASIO appealed this decision to the Full Bench of the Federal Court. In a judgment delivered on 18 July 2008, the Full Bench upheld the lower Court's decision, opening the way for Mr Parkin to apply to access his adverse security assessment.<sup>284</sup> However, the decision does not preclude the possibility that ASIO will not in fact be compelled to produce the security assessment on the grounds of national security.<sup>285</sup>

Mr Parkin's case demonstrates the difficulties inherent in seeking to challenge a visa cancellation in Australia where that visa cancellation has been made on the basis of an adverse security assessment produced by ASIO.

## **11.2 Case Study 2 – Dr Haneef**<sup>286</sup>

Dr Haneef, an Indian citizen, was working as a physician in Australia on a work visa. On 2 July 2007 he was arrested at Brisbane Airport on suspicion of terror-related activities, relating to failed terrorist bombings in London and an attack on Glasgow airport on 30 June 2007.

After being detained for 12 days, Dr Haneef was finally charged with providing support to a terrorist organisation.<sup>287</sup> Dr Haneef applied for and was granted bail. However, before an attempt to post bail was made, the former Minister for Immigration, the Hon. Kevin Andrews MP, cancelled Dr Haneef's work visa under subsection 501(3) of the *Migration Act*.

The decision to cancel Dr Haneef's visa made him an unlawful non-citizen in the migration zone,<sup>288</sup> which in turn meant that even if Dr Haneef posted bail and was released from custody he would be immediately placed in immigration detention.<sup>289</sup> In the circumstances, Dr Haneef decided not to post bail.

On 27 July 2007, the Commonwealth Director of Public Prosecutions reviewed the case against Dr Haneef and came to a view that there was no prospect of

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<sup>282</sup> *Parkin v O'Sullivan* (2006) 162 FCR 444 at [47].

<sup>283</sup> *O'Sullivan v Parkin* [2008] FCAFC 134 at [13].

<sup>284</sup> *O'Sullivan v Parkin* [2008] FCAFC 134.

<sup>285</sup> *O'Sullivan v Parkin* [2008] FCAFC 134 at [35].

<sup>286</sup> As noted above, the handling of the case of Dr Haneef is now the subject of a public inquiry..

<sup>287</sup> *Criminal Code Act 1995* (Cth) s102.7(2). See also earlier discussion on AFP and 'dead time' provisions at 8.3.1.

<sup>288</sup> *Migration Act 1985* (Cth) s15.

<sup>289</sup> *Migration Act 1985* (Cth) s189.

successfully prosecuting Dr Haneef either on the basis of the available information or the information likely to be produced from pending investigations. The charge against Dr Haneef was therefore dropped.

The Immigration Minister stated that these developments made no difference to his previous decision to cancel Dr Haneef's visa and declined to reinstate it.

The Minister said he had revoked Dr Haneef's visa on the grounds that he 'reasonably suspected' that Dr Haneef had an association with people involved in terrorism and for that reason Dr Haneef failed to satisfy the character test in subsection 501(6) of the *Migration Act 1958* (Cth).<sup>290</sup>

Under section 501(6), a person is taken *not* to pass the character test if:

- the person has a substantial criminal record;
- the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct;
- having regard to the person's past and present criminal conduct or the person's past and present general conduct the person is not of good character; or
- in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would: engage in criminal conduct in Australia, incite discord in the Australian community or in a segment of that community; or represent a danger to the Australian community.

Specifically, the Minister cancelled Dr Haneef's visa because he reasonably suspected that Dr Haneef had an association with someone else, namely Sabeel and Kafeel Ahmed, (Dr Haneef's second cousins), whom the Minister reasonably suspected had been involved in criminal conduct.

Dr Haneef appealed the Minister's decision to cancel his visa in the Federal Court on the basis that the Minister had misunderstood the test to be applied by him under subsection 501(6).<sup>291</sup>

In respect of decisions made by the Minister under section 501 of the *Migration Act*, the grounds for appeal to the Federal Court are very limited. To succeed, an applicant must establish that the Minister made a jurisdictional error in making the decision. For example, it must be demonstrated that the Minister misunderstood the nature of the jurisdiction to be exercised, misconceived his or her duty, or misunderstood the nature of the opinion which he or she is to form.<sup>292</sup> The Act makes it clear that a failure to observe natural justice cannot be the basis for establishing jurisdictional error.<sup>293</sup> The Federal Court has no jurisdiction to review the merits of the Minister's decision.

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<sup>290</sup> Sub-section 501(3) of the *Migration Act* gives the Minister the power to cancel a person's visa if the Minister reasonably suspects that the person does not pass the character test; and is satisfied that the cancellation is in the national interest.

<sup>291</sup> The *Migration Act* provides that a cancellation decision made under subs 501(3) can not be reviewed by the Administrative Appeal or the Federal Magistrates Court. See ss 500(1)(b)) and 476(2)(c) of the *Migration Act 1985* (Cth). Therefore, if a person wishes to challenge a cancellation decision under s 501(3), their only options are to request the Minister to reconsider the decision under s 501C or to apply to the Federal Court. Pursuant to s 476A of the *Migration Act*, the Federal Court has original jurisdiction to review a s 501 decision made personally by the Minister.

<sup>292</sup> See *Re Patterson; Ex parte Taylor* [2001] HCA 51; (2001) 182 ALR 657 at [82]- [83] per Gaudron J.

<sup>293</sup> *Migration Act 1958* (Cth) s501(3).

In attempting to challenge a Minister's decision under subsection 501(3), applicants face the further hurdle that they may be refused access to the information on which the Minister's decision was based. Section 503A of the Migration Act, for example, protects from disclosure confidential information provided to the Minister by law enforcement agencies or intelligence agencies to assist the Minister in making a decision under section 501. The Minister can choose to disclose the information despite the operation of section 503A, but he or she can not be compelled to do so.

Justice Spender of the Federal Court found in favour of Dr Haneef and quashed the Minister's decision.<sup>294</sup> Justice Spender found that the Minister had misconstrued the association limb of the character test and therefore failed to apply it correctly. His Honour found that there must be some nexus between the visa holder and the criminal conduct suspected of the person or group with whom the visa holder has an association. His Honour stated:

*it seems to me impossible to conclude that Parliament would have intended that a person fail the character test where the relationship of a visa holder with a person, group or organisation was utterly remote from the criminality of that person, group or organisation.*<sup>295</sup>

The Minister appealed Spender J's decision to the Full Bench of the Federal Court. The appeal was rejected and Dr Haneef's visa reinstated.

The Law Council welcomed the decisions of the Federal Court and Full Federal Court. The Law Council believes that no public purpose is served by vesting in the Minister an unfettered discretion to cancel a visa based on an association that ended many years ago, or was only fleeting, or only reflected a familial connection, or was the product of a purely professional relationship.

Nonetheless, the decisions of the Federal Court and the Full Federal Court have far from remedied all the problems with the operation of section 501 of the *Migration Act*. Those affected by an adverse decision still have no rights to merits review and therefore have no opportunity to challenge the veracity and accuracy of the information on which the decision against them was based. Likewise, those affected by an adverse decision may never even have access to the information on which the decision against them was based.

In Dr Haneef's case for example, certain protected information was never released to Dr Haneef or the Court. The inherent unfairness of this was underlined when the Minister, having not disclosed this protected information to the court, nonetheless chose to release selected parts of it to the media. Justice Spender was rightfully very critical of this approach. His Honour observed that the Minister had released information to the media which he had chosen not to disclose to the court, thus denying Dr Haneef a proper opportunity to challenge that information in a meaningful way.<sup>296</sup>

For these reasons, the Law Council has recommended that the *Migration Act* be amended to allow all those affected by an adverse decision under section 501 the opportunity to seek merits review before the Administrative Appeals Tribunal. The Law Council has further recommended that section 503A be repealed to ensure that

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<sup>294</sup> *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273.

<sup>295</sup> *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 at [188].

<sup>296</sup> *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 at [326] to [327].

those affected by an adverse decision are not arbitrarily denied access to the information on the basis of which the decision against them was taken.

Without these amendments, persons facing expulsion as a result of a decision by the Minister under section 501 of the *Migration Act* will encounter significant difficulties when seeking to exercise their article 13 rights.

## 12. ARTICLE 14 RIGHT TO FAIR TRIAL

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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.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

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A large proportion of the work of the Law Council is concerned with the protection and promotion of the rule of law and the right to a fair trial.

Under the headings 'Security measures since September 2001' and 'Procedural guarantees' the Common Core Document reports on a number of developments that impact on the enjoyment of article 14 rights in Australia, such as the introduction of new terrorism offences, new investigative powers for police and intelligence officers, preventative detention and control orders and mandatory sentencing regimes.

Each of the topics reported in the Common Core Document will be covered in this section of the Shadow Report. In addition the Law Council wishes to draw attention to the following relevant developments:

- threats to the right to silence and the privilege against self incrimination;
- the Australian Crime Commission's (ACC) coercive powers;
- the requirement of security clearances for lawyers; and
- the creation of the Australian Military Court.

## 12.1 Security measures since September 2001

The right to a fair trial is a fundamental principle of international human rights law and has attained the status of international customary law.<sup>297</sup>

Although article 14 is not listed in article 4(2) as a non-derogable right, this Committee has stated that 'the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception'.<sup>298</sup>

The right to a fair trial, and the notion of procedural fairness, is also entrenched as a central pillar of the Australian criminal justice system.

The security measures introduced since September 2001 have threatened these principles, undermining both Australia's international obligations and the notion of separation of powers enshrined in the *Australian Constitution*. As HREOC President John von Doussa observed:

*One of the most concerning trends of counter-terrorism laws in Australia is the expansion of executive power without corresponding checks and balances. Decisions that were traditionally the preserve of the criminal justice system - such as depriving a person of his or her liberty - are now moving into the hands of the executive.*<sup>299</sup>

The Law Council believes that many of the counter-terrorism measures introduced are contrary to the very notion of a fair trial and have contributed to a general erosion of respect for the principle of rule of law in Australia.

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<sup>297</sup> This was recently acknowledged in *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of State* 548 U.S.(2006) where the United States Supreme Court held that the Geneva Conventions' requirement to afford *all the judicial guarantees which are recognised as indispensable by civilised peoples* 'must be understood to incorporate at least the barest of those trial protections that have been recognised in customary international law'. In particular, the Court found that the right of an accused 'absent disruptive conduct or consent, [to] be present for his trial and ... privy to the evidence against him' is 'indisputably part of the customary international law'

<sup>298</sup> See *Communication No 263/1987, M Gonzalez de Rio v Peru* GAOR, A/48/40 (vol II) p. 20.

<sup>299</sup> The Hon. John von Doussa QC, President, HREOC, *Criminal Justice in a Climate of Fear -- Reflections on the legal response to terrorism*, Address delivered at the 10th International Criminal Congress, Perth, Australia on 19 October 2006 available at [http://www.hreoc.gov.au/about/media/speeches/speeches\\_president/2006/criminal\\_justice\\_in\\_a\\_climate\\_of\\_fear.html](http://www.hreoc.gov.au/about/media/speeches/speeches_president/2006/criminal_justice_in_a_climate_of_fear.html)

## 12.2 Control Orders and Preventative Detention Orders

As previously noted, control orders and preventative detention orders are designed to monitor, restrict the movement of and detain people who have not been charged with or found guilty of any criminal offence.

### 12.2.1 Control Orders

Control orders are made following application by the police, where the court is satisfied that the order would substantially assist in preventing a terrorist act or that the person has provided training or received training from a terrorist organisation.<sup>300</sup> The court must also 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 purpose of protecting the public from a terrorist act.<sup>301</sup>

Earlier in this Shadow Report, the Law Council has drawn attention to the manner in which the control order regime invalidly restricts freedom of liberty and movement. In this section of the Report, the Law Council highlights the manner in which the control order regime abrogates the right to fair trial in article 14 by:

- Removing the right to be presumed innocent until proved guilty according to law.

Control orders allow for a person's liberty, freedom of movement and freedom of association to be limited in a wide variety of ways, for example by prohibiting or restricting the person being at specified areas or places; communicating or associating with specified individuals; possessing or using specified articles or substances; and carrying out specified activities (including in respect of his or her work or occupation),<sup>302</sup> All these restrictions may be imposed on a person for up to 12 months (with the possibility of renewal) even where there is not enough evidence against the person to support a criminal charge, let alone secure a criminal conviction.

- Limiting the right of the person subject to the order to challenge the legality of the order by restricting access to relevant information.
  - The ability of the person subject to a control order to challenge the confirmation of the order is limited by their restricted access to information. In circumstances where it is claimed that the release of information might prejudice national security, the person subject to the order may be excluded from accessing information relied upon by police to support the control order application. The person subject to the order is only entitled to a summary of the grounds upon which the interim order was made. This restriction applies to an appeal against, or review of, a decision made at a confirmation hearing; and

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<sup>300</sup> *Criminal Code* (Cth) s104.4 (interim order); s104.16 (confirmed order).

<sup>301</sup> *Criminal Code* (Cth) s104.4 (interim order); s104.16 (confirmed order).

<sup>302</sup> *Criminal Code* (Cth) s104.5(3).

- Allowing a person to be subject to severe restrictions of their liberty on the basis of evidence only established ‘on the balance of probabilities’:
  - Section 104.4 of the *Criminal Code* provides that a court may issue a control order if 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
    - 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 purpose of protecting the public from a terrorist act.

### 12.2.2 Preventative Detention Orders

Preventative detention orders can be issued where there are reasonable grounds to suspect that the person will engage in a terrorist act or engage in the preparation or planning of a terrorist act.<sup>303</sup> Initial preventative detention orders of up to 24 hours can be issued by senior members of the AFP,<sup>304</sup> while continued preventative detention orders, which may last for a further period that is not more than 48 hours from the time the person was first taken into custody,<sup>305</sup> are issued by issuing authorities.<sup>306</sup> In respect of both forms of preventative detention orders, the individual has no right to appear personally or through legal representation so as to challenge the issuing of an order.<sup>307</sup>

The preventative detention order regime abrogates the right to fair trial in article 14 by:

- Removing the right to be presumed innocent until proved guilty according to law.
  - Preventative detention orders deprive persons of their liberty without a finding of guilt being made by a judge or jury on the basis of evidence proved beyond reasonable doubt. A preventative detention order can be made where there are *reasonable grounds to suspect* that the person subject to the order
    - will engage in a terrorist act; or
    - possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
    - has done an act in preparation for, or planning, a terrorist act; and
    - making the order would substantially assist in preventing a terrorist act occurring; and
    - detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the above purposes.<sup>308</sup>

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<sup>303</sup> *Criminal Code* (Cth) s105.4.

<sup>304</sup> *Criminal Code* (Cth) s 105.8(1).

<sup>305</sup> *Criminal Code* (Cth) s 105.14.

<sup>306</sup> ie Judges and Federal Magistrates acting in their personal capacity, members of the Administrative Appeals Tribunal or retired judges see *Criminal Code* (Cth) s 105.12 and 105.18(2).

<sup>307</sup> *Criminal Code* (Cth) ss 105.8, 105.12 and 105.18.

<sup>308</sup> *Criminal Code* (Cth) s104.4(4). NB pursuant to s101.4(6), a person meets the requirements of s104.4(4) if: a terrorist act has occurred within the last 28 days; and it is necessary to detain the subject

- Not permitting the person to attend and present his or her case at the determination of the application for a preventative detention order.
  - Although a person subject to a preventative detention order is able to access legal advice and representation,<sup>309</sup> the application for either an initial or continued preventative detention order is made *ex parte* by members of the AFP.<sup>310</sup>
  - In relation to continued preventative detention orders, the AFP member making the application must put before the issuing authority 'any material in relation to the application' that the person the subject of the order has given the AFP member. However, the person subject to the order has no right to appear personally or through legal representation so as to challenge the issuing of an order.
  
- Restricting detainees' right to legal representation by only allowing detainees access to legal representation for the limited purpose of obtaining advice or giving instructions regarding the issue of the order or the treatment of the subject while in detention.<sup>311</sup>
  - Contact with a lawyer for any other purpose is not permitted. In addition, both the content and the meaning of communication between a lawyer and a detained person can be monitored.

The preventative detention order provisions of the *Criminal Code* interact with state and territory provisions which also allow preventative detention for a maximum period of up to 14 days.<sup>312</sup>

The control order and preventive detention order regime run counter to the long standing common law principle, reflected in article 14(1), that orders restricting liberty should only be made following an independent and impartial trial by a judge and jury. As Andrew Lynch and George Williams explain:

*Both schemes represent an attempt to avoid the accepted judicial procedures for testing and challenging evidence in criminal trials that are normally applied before a person is deprived of their liberty. This is clearly so in respect of the preventative detention orders, which may be issued by an individual officer simply on the basis of reasonable suspicion, but also applies to the use of a lower standard of proof by courts charged with issuing control orders. The broad scope of the latter – as well as their longer duration – makes this concern particularly strong.*<sup>313</sup>

As can be seen from the two occasions in which control orders have been issued in Australia, such orders effectively provide the executive government with a 'second

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to preserve evidence of, or relating to, the terrorist act; and detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the above purposes.

<sup>309</sup> *Criminal Code* (Cth) s 105.37

<sup>310</sup> *Criminal Code* (Cth) ss 105.7 and 105.11.

<sup>311</sup> *Criminal Code* (Cth) s105.37.

<sup>312</sup> See Part 2A of *Terrorism (Police Powers) Act 2002 (NSW)*; *Terrorism (Preventative Detention) Act 2005 (Qld)*; *Terrorism (Preventative Detention) Act 2005 (SA)*; *Terrorism (Preventative Detention) Act 2005 (Tas)*; *Terrorism (Community Protection) (Amendment) Act 2006 (Vic)*; *Terrorism (Preventative Detention) Act 2005 (WA)*; *Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)*; *Part 2B of Terrorism (Emergency Powers) Act (NT)*.

<sup>313</sup> Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (UNSW Press, 2006).

chance' to restrict the liberty of persons of interest where there is insufficient evidence to convict them of a criminal offence.

### 12.2.3 Constitutional Challenge - *Thomas v Mowbray*

The first time control orders were used was to restrict the liberty of terrorist suspect Jack Thomas. Mr Thomas was placed under a control order immediately after being acquitted of terrorist related charges on appeal.

The second time control orders were issued they were used to restrict the movements of former Guantanamo Bay prisoner David Hicks when he was released from an Australian prison. Mr Hicks was never charged with committing an offence under Australian law and indeed the Government concedes that he has not done so. The control order was issued against Mr Hicks on the basis that he had previously received training from a terrorist organisation.

In 2007 Mr Thomas challenged the legality of the control order regime.<sup>314</sup> Amongst other claims, Mr Thomas submitted that the control order regime seeks to confer non-judicial power on a federal court contrary to Chapter III of the Commonwealth Constitution and insofar as it confers judicial power on a federal court, authorises the exercise of that power in a manner contrary to Chapter III of the Constitution.

It is implicit in the structure of the Australian Constitution that the judicial arm of government must only exercise judicial power or power incidental or ancillary thereto, and not power that would usually be exercised by the executive arm of government. Pursuant to Chapter III of the *Australian Constitution* an essential feature and defining characteristic of judicial power is that it is exercised in accordance with judicial process, which includes the application of the rules of natural justice.

Mr Thomas submitted that the control order regime requires a judicial officer to *create rights and obligations* rather than *determine a controversy* about existing rights or liabilities.<sup>315</sup> It was said that the rights created by the control order regime involved the deprivation of people's liberty and required an exercise of power that could only be described as legislative or executive, not judicial. It was also argued that several features of control orders were incompatible with the exercise of federal judicial power because they were incompatible with the notion of natural justice, such as the *ex parte* nature of proceedings and proof on the balance of probabilities.<sup>316</sup>

The majority of the High Court upheld the constitutional validity of the control order regime.<sup>317</sup> The majority said the power vested in the courts by the control order regime did not offend the principle in Chapter III of the *Australian Constitution*.<sup>318</sup>

The majority found that even though the power vested in the judiciary under the control order created rights and obligations rather than adjudicated rights, it could be compatible with the exercise of judicial power if it was exercised according to legal principle or by reference to an objective standard or test such as that prescribed by

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<sup>314</sup> *Thomas v Mowbray*. (2007) 237 ALR 194. See discussion at 5.1.2.

<sup>315</sup> *Thomas v Mowbray*. (2007) 237 ALR 194 at [15]–[17].

<sup>316</sup> *Thomas v Mowbray*. (2007) 237 ALR 194 at [15]–[17].

<sup>317</sup> The majority in this case comprised Gleeson CJ; Gummow, Crennan, Callinan and Heydon JJ.

<sup>318</sup> For example see *Thomas v Mowbray*. (2007) 237 ALR 194 at [71]–[79] per Gummow and Crennan JJ. For an accurate summary of the decision see Justin Gleeson SC, *Thomas v Mowbray* (2007) 237 *Australian Law Review* 194.

the control order regime.<sup>319</sup> It was noted that there was nothing particularly unique about the fact that control orders resulted in a restriction of liberty as Australian Courts have historically made orders impinging on a person's liberty without a finding of criminal guilt, for example the making of apprehended violence orders.<sup>320</sup>

For example, Gleeson CJ reasoned that there were a number of features of the control order regime that were compatible with the principles of natural justice. For example:<sup>321</sup>

- applications for control orders must be heard in open court;
- the burden of proof lies with the police, and the rules of evidence apply;
- a person who is the subject of an application for a control order must, prior to the confirmation hearing, be given the documents that were relied upon for the application for the interim control order, together with any other details required to enable the person to understand and respond to grounds asserted in support of the confirmation order;
- the confirmation hearing involves evidence, cross-examination and argument;
- the court has a discretion whether to revoke or vary or confirm the order;
- an appeal lies in accordance with the ordinary appellate process that governs the issuing court's decisions; and
- the outcome of each case is to be determined on its individual merits. There is nothing to suggest that the issuing court is to act as a mere instrument of government policy.

Only two of the seven judges, Justices Hayne and Kirby, found that the provisions were in breach of Chapter III of the *Australian Constitution* and that the making of control orders was not a proper exercise of judicial power.<sup>322</sup>

As noted at 5.1.2 of this Report, in *Thomas v Mowbray* the High Court did not consider the control order regime within the context of Australia's obligations under article 14 of the ICCPR, although the principles of Australian domestic law discussed in that case have relevance to the right to a fair trial.

The Law Council remains of the view that a number of elements of the control orders and preventative detention regimes appear to abrogate article 14. The Law Council would welcome further pronouncement from the Committee regarding the control order regime's consistency with Australia's obligations under article 14.

## 12.3 Right to silence and privilege against self-incrimination

Article 14(3)(g) of the ICCPR provides that in the determination of any criminal charge, everyone shall be entitled to the right not to be compelled to testify against him or herself or to confess to guilt.

In its General Comment on article 14, this Committee stated:

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<sup>319</sup> For example, see *Thomas v Mowbray* (2007) 237 ALR 194 per Gleeson at [29]-[31]. For an accurate summary of the decision see Justin Gleeson SC, *Thomas v Mowbray* (2007) 237 *Australian Law Review* 194.

<sup>320</sup> For example see *Thomas v Mowbray*. (2007) 237 ALR 194 at [79] per Gummow and Crennan JJ.

<sup>321</sup> *Thomas v Mowbray* (2007) 237 ALR 194 per Gleeson at [29]-[31].

<sup>322</sup> *Thomas v Mowbray* (2007) 237 ALR 194 [157] per Kirby J at [157]; per Hayne J at [500], [516]-[517].

*Subparagraph 3(g) [of article 14] provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.*<sup>323</sup>

The Law Council is concerned that the coercive powers vested in ASIO and the Australian Crime Commission (ACC), as part of the Government's counter-terrorism measures and measures to combat serious and organised crime, have significantly intruded upon the right to silence and privilege against self-incrimination in Australia.

### 12.3.1 Questioning and Detention powers of ASIO

The questioning and detention scheme set out in the ASIO Act, which allows ASIO to compel persons to answer questions and to produce relevant records or things, is contrary to the principles enounced by this Committee in its General Comment on article 14.

Under the provisions of the ASIO Act, a person subject to a questioning warrant or a questioning and detention warrant who does not appear before the prescribed authority,<sup>324</sup> or appears but fails to give any information or to produce any record or thing requested in the warrant, is subject to a penalty of five years imprisonment.<sup>325</sup> The fact that answering a question may require a person to incriminate him or herself is no defence. The right to silence cannot be claimed.

Section 34L of the ASIO Act compels a person named in a warrant to give information and items to ASIO regardless of whether doing so might tend to incriminate the person or make them liability to a penalty.

Although information obtained by ASIO under a questioning and detention warrant is not admissible in evidence against the person in other criminal proceedings (known in Australian law as 'use immunity'),<sup>326</sup> there is no such bar on the use of further information or evidence subsequently revealed as a result of the information obtained (known in Australian law as 'derivative use immunity').

Hence, any evidence obtained directly or indirectly as a result of information or items provided by the person under a questioning and detention warrant is capable of being used to prove that person has committed a criminal offence. The mandatory presence of a policy officer throughout questioning, required by ASIO's Statement of Procedures, ensures law enforcement agencies have ready access to information and material provided to ASIO by the detained, and thus increases the likelihood of derivative use of information the detained person has been compelled to divulge.<sup>327</sup>

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<sup>323</sup> UN Human Rights Committee, General Comment on Article 14, General Comment No 23 (13/04/84).

<sup>324</sup> A prescribed authority is a person appointed by the Minister in accordance with s 34B of the ASIO Act and includes judges of superior courts and members of the Administrative Appeals Tribunal.

<sup>325</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34G(1), (3) & (6).

<sup>326</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34L.

<sup>327</sup> Office of the Inspector General of Intelligence and Security, *Statement of procedures - warrants issued under Division 3 of Part III, Australian Security Intelligence Organisation Act 1979* (Dated 16 October 2006) at [7] available at [http://www.igis.gov.au/annuals/06-07/annex\\_4\\_statement\\_of\\_procedures.cfm](http://www.igis.gov.au/annuals/06-07/annex_4_statement_of_procedures.cfm).

### 12.3.2 ACC and Coercive Powers

The ACC has also been given a range of special coercive powers designed to be used where ordinary law enforcement methodologies are ineffective.<sup>328</sup> These powers can only be exercised by an ACC examiner in the context of a special operation or investigation approved by the ACC Board.<sup>329</sup>

The ACC's coercive powers include the power to compel a person to attend an examination and give evidence under oath or affirmation, and the power to compel the production of documents. Penalties for failing to comply with the ACC's coercive powers include fines and imprisonment. The fact that answering a question may require a person to incriminate him or herself is no defence. The right to silence cannot be claimed.

Again, use immunity applies to prevent the answers given to the ACC during questioning being used in criminal proceedings against the person. However no derivative use immunity is provided, meaning information gathered *as a result of* information obtained under the coercive powers can be used against the person in subsequent criminal proceedings.

This in itself is in clear contravention of the right to silence under article 14(3)(g) of the ICCPR and contrary to Australia's common law tradition protecting the right to silence and freedom from self-incrimination.

It is particularly problematic in the context of the ACC because a person can be compelled to attend and answer questions while they are subject to criminal charges or proceedings that are already underway.

There is a real risk that an accused person's right to a fair trial will be compromised if he or she is subjected to an ACC examination while facing criminal proceedings. An accused person should not be forced to divulge his or her position prior to trial or to assist law enforcement officers in gathering supplementary information to aid in his or her prosecution.

This issue has been the focus of the discussion before the Parliamentary Joint Committee on Intelligence and Security. In 2005 the Joint Parliamentary Committee recommended that the Attorney-General's Department and the ACC:

*develop legislation as a matter of urgency to ensure that a person summonsed by the ACC, at time when they are subject to criminal or confiscation proceedings, may only be examined in relation to matters quarantined from those material to the pending proceeding.*<sup>330</sup>

The ACC coercive questioning powers have been justified on the basis that these special powers were necessary to fight complex and organised crime. It was said that without these powers, the ACC would not be able to collect the evidence necessary to prosecute serious criminal activity. In response to community

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<sup>328</sup> *Australian Crime Commission Act 2002* (Cth) Part II.

<sup>329</sup> *Australian Crime Commission Act 2002* (Cth)

<sup>330</sup> Parliamentary Joint Committee on the Australian Crime Commission, Report on the Review of the Australian Crime Commission Act (2005) at [3.49].

concerns, the Government reassured the community that the ACC's special questioning powers would only be used to investigate very serious crimes and it was envisaged that only experienced criminals would be subject to ACC questioning.

It remains doubtful whether these promised limits on the exercise of ACC coercive powers have been observed in practice.

Having reviewed information contained in recent ACC Annual Reports,<sup>331</sup> the Law Council is concerned that the focus of the ACC's operations and the use of its coercive powers may not have been confined to '*complex criminal activity engaged in by highly skilled and resourceful criminal syndicates*'. For example, although convictions for serious offences are recorded in the Annual Reports with commensurately lengthy prison terms, there are also numerous less serious offences listed, in relation to which the named offender has received a straight fine or prison sentence of less than twelve months, often wholly or partially suspended.<sup>332</sup>

The Law Council does not suggest that these Annual Report conviction statistics provide a comprehensive picture of how the ACC has employed its coercive powers. Nonetheless, the information provided at least raises questions about the extent to which, contrary to the initial intention of Parliament, the ACC is in fact also targeting "simple street level" criminals.

A similar and related concern is that there has been 'leakage' of the coercive powers into ordinary police investigations.<sup>333</sup> The use of the ACC's coercive powers is circumscribed by the Act. First the ACC Board must issue a determination which authorises the use of the powers in the context of a particular operation or investigation. Secondly, the discretion to use the powers rests with the ACC examiners, who stand apart from the police officers and other members of the ACC directly tasked with undertaking investigations and intelligence gathering operations.

Despite these safeguards, the Law Council is concerned that given the scope of the Board's determinations and the broad-ranging questioning to which witnesses at an examination may be subjected,<sup>334</sup> there is still a significant degree of risk that the coercive powers will be utilised to assist in ordinary police investigations.

Since the ACC was first created in 2002 its powers have been expanded incrementally by numerous amendments to the *Australian Crime Commission Act*. For example, in 2007 amendments were made to the ACC Act broadening its mandate to bring indigenous violence and child abuse within the lawful scope of the ACCs intelligence gathering and investigative operations.<sup>335</sup>

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<sup>331</sup> The ACC's Annual Reports contain information about the previous year's court results for operations and investigations conducted by the ACC. The information provided includes the names of people charged, the offence type, the outcome of the prosecution and any sentence imposed on conviction. Recent Annual Reports are available at [http://www.crimecommission.gov.au/html/pg\\_publications.html](http://www.crimecommission.gov.au/html/pg_publications.html).

<sup>332</sup> Australian Crime Commission, Annual Report 2006-2007, Appendix A: Court Results at p. 146 available at [http://www.crimecommission.gov.au/html/pg\\_annual\\_rep\\_06-07.html](http://www.crimecommission.gov.au/html/pg_annual_rep_06-07.html).

<sup>333</sup> Parliamentary Joint Committee on the Australian Crime Commission, Report on the Review of the Australian Crime Commission Act paragraph 3.22 – 3.35

<sup>334</sup> Pursuant to s28 of the Act, a summons to appear before an ACC examiner is accompanied only by a copy of the relevant Board determination and a statement about the "*general nature of the matters in relation to which the examiner intends to question the person*". Even then, the examiner is not restrained from asking questions about other matters, provided they relate to a special ACC operation or investigation.

<sup>335</sup> These amendments were introduced by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other*

At the time the amendments were introduced, the Law Council expressed concern that this expansion of the ACC's mandate signalled a retreat from the assurance given by the Australian Government that the ACC would not be utilised to investigate ordinary criminal activity but rather would be used exclusively to address serious and organised crime.

The Law Council does not trivialise in any way the serious nature of family violence and child abuse wherever it may occur, and accepts that preventing, detecting and prosecuting family violence and child abuse present particular challenges for law enforcement agencies. However, none of those matters alters the fact that indigenous violence and child abuse are not the type of criminal activity that the ACC was established to address.

As noted above, ACC's coercive powers were always intended as an extraordinary measure to be used in the investigation of sophisticated, organised and often cross-jurisdictional criminal activity which is difficult to detect and monitor using traditional law enforcement techniques. The coercive powers were not intended to be used where criminal activity had proved difficult to detect and monitor, not because of its level of sophistication but because the requisite relationship of trust and cooperation does not exist between the community and law enforcement agencies tasked with protecting them.

The 2007 amendments send a clear message that the ACC's mandate is not fixed or finite. It sets a concerning precedent that if any matter is deemed serious and worthy of a so-called crisis response, then the ACC and the coercive powers at its disposal must be deployed. The Law Council fears that this practical and legislative expansion of the scope of the ACC's coercive powers results in a corresponding contraction of the enjoyment of article 14 rights in Australia.

## 12.4 Security clearances for lawyers

The Law Council is strongly opposed to any system requiring lawyers and judges to be issued with security clearances before participating in cases involving, or which might involve, classified or security sensitive information.

In 2004 the Australian Government introduced the *National Security Information (Civil and Criminal Proceedings) Act 2004* for the purpose of restricting the disclosure of classified or security sensitive information in the course of civil and criminal proceedings.

The Act provides that, during a federal criminal proceeding, a legal representative of a defendant may receive written notice from the Secretary of the Attorney-General's Department that an issue is likely to arise relating to the disclosure of information in the proceedings that is likely to prejudice national security.<sup>336</sup> A person who receives such a notice must apply to the Secretary for a security clearance.<sup>337</sup> They must do so within 14 days of receiving a notice. If they do not apply for such a clearance, or if they are unsuccessful in obtaining such a clearance, then it is likely that they will not be able to view all the relevant evidence in the case and thus they will not be able to

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*Measures) Act 2007 (Cth)* which formed part of the Australian Government's Northern Territory Emergency Response Legislation discussed earlier in this Report.

<sup>336</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004 (Cth)* s39(1).

<sup>337</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004 (Cth)* s39(2)

continue to effectively represent their client.<sup>338</sup> In the circumstances the Court may recommend that the defendant retain a different legal representative.<sup>339</sup>

A security clearance system for the legal profession threatens the rights protected in article 14 in two ways:

- it restricts a person's right to a legal representative of his or her choosing, as protected by article 14(3)(d), by limiting the pool of lawyers who are permitted to act in cases involving classified or security sensitive information; and
- it threatens the independence of the legal profession by allowing the executive arm of government to effectively 'vet' and limit the class of lawyers who are able to act in matters which involve, or which might involve, classified or security sensitive information. By undermining the independence of the legal profession in this way, the right to an impartial and independent trial with legal representation of one's choosing is similarly undermined.

In addition to these concerns, the Law Council is not convinced that a system of security checks for lawyers is a necessary or effective response to the need to protect classified and security sensitive information.

Moreover, the Law Council is not persuaded that the existence of a pool of security-cleared lawyers would promote state security or reduce the likelihood that sensitive information would leak into the community. For example, although legal representatives are subject to a security check process, jurors and court officials are not. It is difficult to see how such a system would protect sensitive information or promote state security when key personnel involved in the process with no security clearance status could receive such information.

No evidence provided by the former Government indicates that lawyers frequently, or even infrequently, breach requirements of confidentiality imposed either by agreement or by the Courts.

In the absence of a plausible justification for the security clearance system, perceptions arise that the primary purpose of the system is to provide the executive arm of government with the ability to select the legal representatives permitted to appear in matters involving classified or security sensitive information.

If the Government considers the security clearance system to be necessary for the protection of sensitive or classified information, then the judiciary should be the body that controls the assessment and award of security clearance for lawyers. This may allay some concerns about unwarranted executive interference with the independence of the profession.

The system of security clearances for lawyers provided by *National Security Information (Civil and Criminal Proceedings) Act 2004* also has implications for persons applying for legal aid funding in Commonwealth matters. Pursuant to the *Commonwealth Legal Aid Guidelines* (March 2008), a legal representative acting for a legally aided person cannot maintain carriage of a matter referred to in a security notification unless they already have or can quickly apply for a security clearance.<sup>340</sup>

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<sup>338</sup> If the person does not obtain the security clearance, anyone who discloses relevant information to the person will, except in limited circumstances, commit an offence. *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s39(3).

<sup>339</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* s39(5)(b)(ii).

<sup>340</sup> *Commonwealth Legal Aid Guidelines* (March 2008) accessed on 28 August 2008. These guidelines are available at <http://www.ag.gov.au/www/agd/rwpattach.nsf>. Guideline No 7 provides:

If the legal representative does not have or obtain a security clearance, then a Legal Aid Commission can only continue to pay the legal representation for 14 days from the date a security notification was issued. The effect on the legally aided person is to disbar a legal representative from acting for them in proceedings unless that representative is eligible to obtain a national security clearance. This detracts significantly from the guarantee in article 14(3) that all persons have access to a legal representative of their choosing, and that such representation be provided by the State in cases where the person does not have sufficient means to pay for it.

## 12.5 Closed hearings

The Law Council is also concerned that Part 3 of the *National Security Information (Civil and Criminal Proceedings) Act 2004* disproportionately restricts the right to a public trial protected by article 14(1).

Under the Act, prosecutors and defendants in criminal proceedings must notify the Attorney-General if they know that one of the witnesses they intend to call will disclose sensitive information in the course of the proceedings.<sup>341</sup> When this occurs, the Attorney-General may issue a certificate of non-disclosure, preventing, for example, a particular witness from giving evidence on the grounds that it would be prejudicial to national security.<sup>342</sup>

Where a certificate has been issued, and the proceedings relate to a trial or extradition proceedings, the court must hold a closed hearing to determine whether it will maintain, modify or remove the ban on disclosure or calling of witnesses.<sup>343</sup> Under the Act, the defendant and the defendant's legal representatives can be excluded from this hearing.

Before considering whether to make a non-disclosure order, the court must consider whether the relevant information is admissible according to the normal rules of evidence and if so,<sup>344</sup> whether:<sup>345</sup>

- the disclosure of the information or presence of the witness would constitute a risk of prejudice to national security, having regard to the Attorney-General's certificate;
- an order to prevent disclosure or calling of a witness would have a substantial adverse effect on the defendant's right to a fair hearing, and
- any other matters it considers relevant.

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(2) In a matter relating to Australia's national security, payment in respect of assistance, under or in accordance with a Grant of Legal Assistance, after the date on which national security notification is given in the matter may only be made in respect of assistance provided by a legal representative if the assistance was provided at a time:

- (a) no later than 14 days after national security notification was given in the matter; or
- (b) when the representative had lodged, and was awaiting the determination of, an application for a security clearance mentioned in:
  - (i) if the matter is a criminal proceeding — subsection 39 (2) of the NSI Act; or
  - (ii) if the matter is a civil proceeding — subsection 39A (2) of the NSI Act; or
  - (c) when the representative had been given a security clearance mentioned in subparagraph (b) (i) or (ii) as the case may be.

<sup>341</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) ss24-25.

<sup>342</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s26(2).

<sup>343</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s28(4) - (5).

<sup>344</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s31(7).

<sup>345</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s31(1)-(4).

When considering whether the disclosure would constitute a risk to national security, the court must consider the certificate of non-disclosure issued by the Attorney-General as *conclusive evidence* that disclosure of the information in the proceedings is likely to be prejudicial to 'national security'.<sup>346</sup> Once a court has made a non-disclosure or witness exclusion order, it becomes an offence to contravene the order.<sup>347</sup>

These provisions appear to abrogate a number of fair trial rights protected in article 14 of the ICCPR.

First, they remove the court's discretion to determine whether proceedings should be closed to the public, resulting in a disproportionate restriction on the right to a public trial protected by article 14(1). By requiring the court to balance the threat to national security posed by the disclosure of the sensitive information (as evidenced conclusively by the Attorney-General's certificate) against any *substantial adverse effect* on the rights of the accused, there is a risk that the court will give greater weight to the possible prejudice to national security than the possible unfairness suffered by the defendant. This risk is particularly grave if the defendant and his or her legal representative can be excluded from the hearing of this determination.

Secondly, they permit the exclusion of a defendant or legal representative from the hearing to determine whether certain information should be banned from disclosure. This offends against the right of the accused to be present at the hearing of matters concerning his or her criminal liability, protected by article 14(3)(g).

Thirdly, the relevant provisions of the Act restrict the defendant's right to access information that may be used against him or her in criminal proceedings, contrary to article 14(3)(g). The Attorney-General's certificate bans the disclosure of the information until the court has conducted its closed hearing. This can occur at the beginning of the trial at the earliest. This precludes the use of the information in several important pre-trial steps in the criminal process, including applications for bail, committal hearings and pre-trial disclosure.

While it may be necessary for the court to restrict public access to a hearing in the interest of national security, the Law Council is of the view that restricting a party or their legal representative from examining and making representations to the court about the prosecution's attempts to restrict access to certain information goes beyond that which is necessary in the interests of national security.

## 12.6 Mandatory sentencing

Mandatory sentencing regimes provide that once a defendant has been convicted of a particular offence, he or she *must* be sentenced to a certain minimum term of imprisonment. The sentencing authority has no discretion to consider factors otherwise relevant to sentencing, such as age, prospects for rehabilitation, cultural background or mental illness. The system also limits the review of the sentence imposed by a higher court.

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<sup>346</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) ss27(1) and (2). NB 'National security' is defined very broadly in the *National Security Information (Civil and Criminal Proceedings) Act 2004* as "Australia's defence, security, international relations, law enforcement interests or national interests". It encompasses political, military, economic, intelligence, policing, technological and scientific interests.

<sup>347</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s42.

As noted in the Common Core Document, although mandatory sentencing for property offences and offences committed by juveniles have been repealed in the Northern Territory, mandatory sentencing laws are still in effect in Western Australia.<sup>348</sup> Mandatory sentencing provisions also exist under the *Migration Act 1958* (Cth) in respect of persons convicted of people smuggling offences.<sup>349</sup>

The Western Australian mandatory sentencing provisions law came into effect in November 1996 through amendments to the Criminal Code. Section 401(4) provides that a person convicted for a third time of entering a home without permission and who commits an offence in 'circumstances of aggravation', or who intends to commit such an offence, must be sentenced to at least 12 months imprisonment.<sup>350</sup>

The Law Council has long been concerned that mandatory sentencing legislation violates the internationally recognised right to a fair trial.

Mandatory sentencing is fundamentally inconsistent with the right to a fair hearing before an independent and impartial tribunal as it removes all discretion from the sentencing court and allows the legislature to prescribe the sentence to be imposed. This restricts the court's capacity to ensure that the punishment fits the individual circumstances of the crime and of the offender.

As a result of this removal of discretion, mandatory sentencing laws appear to have a disproportionate impact on the vulnerable and disadvantaged members of the Australian community. For example mandatory sentencing laws appear to impact most harshly on:

- Indigenous offenders, particularly Indigenous women; and young people.<sup>351</sup> For example in Western Australia, in the four months after the legislation came into force, an average of seven young people per month received mandatory sentences and since then on average one young person per month has received a mandatory sentence;
- those with mental illness or intellectual disabilities by requiring the imposition of a deterrent sentence which is not usually appropriate in dealing with a person with mental illness or intellectual disability.

Mandatory sentencing also impinges upon the right of a person convicted of a crime to have his or her conviction and sentence reviewed by a higher tribunal according to

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<sup>348</sup> Common Core Document at [163]-[164].

<sup>349</sup> The *Border Protection (Validation and Enforcement Powers) Act 2001* provides for mandatory minimum sentences of five years for a first offence, and eight years for further offences, with mandatory non parole periods of three and five years respectively, for what have become colloquially known as "people smuggling" offences under the *Migration Act 1958*. The mandatory sentencing provisions do not apply if it is established, on the balance of probabilities, that the offender was under 18 at the time the offence was committed.

<sup>350</sup> Section 400(1) defines "circumstances of aggravation" as including being armed with a dangerous weapon, being in company with other persons, causing bodily harm, and threatening to kill or injure. The section is specifically extended to juveniles. If the offender is a young person (as defined in the *Young Offenders Act 1994*), the offender may be sentenced either to at least 12 months' imprisonment or to a term of at least 12 months' detention.

<sup>351</sup> For example on 31 December 2000, 77% of juveniles in detention in the Northern Territory and 64% in Western Australia were Indigenous. This compares to a national average of 40%. In December 1998, Indigenous prisoners represented 73% of the Northern Territory adult prison population, 32% of the Western Australian adult prison population and 19% of the prison population nationally. There was a 223% increase in the number of Indigenous women incarcerated in the first year of operation of the Northern Territory mandatory sentencing provisions. At 30 June 1999, Indigenous women made up 91% of all women prisoners in the Northern Territory.

law, as it severely restricts the possibility of review of sentence by a higher court. This is because a higher court cannot entertain a sentence below the mandatory minimum sentence.

Australia's mandatory sentencing laws have been examined by this Committee, the Committee on the Rights of the Child, the CERD Committee and the Committee Against Torture.<sup>352</sup> Each has concluded that the laws violate Australia's obligations under article 14 of the ICCPR.

Mandatory sentencing regimes are also likely to violate Australia's obligation to prohibit arbitrary detention under article 9 of the ICCPR and Australia's obligations under the CRC, which require that courts should have the best interests of the child as the primary consideration in sentencing.

## 12.7 Double jeopardy reform

Article 14(7) of the ICCPR provides:

*No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*<sup>353</sup>

In Australia this is known as the freedom from double jeopardy. The freedom from double jeopardy protects a person from being tried more than once in relation to an offence for which they have already been finally acquitted.<sup>354</sup> This principle is protected to varying degrees by statutory provisions in each jurisdiction in Australia.<sup>355</sup>

As noted in the Common Core Document, during the reporting period moves have been made to implement nationally consistent provisions in respect of double jeopardy.<sup>356</sup>

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<sup>352</sup> For example, in July 2000, the Human Rights Committee observed that mandatory sentencing schemes raised a "serious issue of compliance" with the ICCPR. In 2000 the Committee against Torture recommended that Australia "keep under careful review legislation imposing mandatory minimum sentences, to ensure that it does not raise questions of compliance with its international obligations under the Convention and other relevant international instruments, particularly with regard to the possible adverse effect upon disadvantaged groups", Committee against Torture, Conclusions and Recommendations: Australia, CAT/C/XXV/Concl.3 (21 January 2000) Recommendation 7(h).

<sup>353</sup> A similar provision is found in Protocol 7, Article 4(1) of the *European Convention on Human Rights* (ECHR). In May 2008 the Committee Against Torture released its Concluding Observations on Australia, recommended that Australia "Abolish mandatory sentencing due to its disproportionate and discriminatory impact on the indigenous population". See UN Committee Against Torture, *Concluding Observations: Australia*, CAT/C/AUS/CO/3 (22 May 2008) p. 8.

<sup>354</sup> A conviction quashed by an appellate tribunal is regarded as an acquittal and the defendant may plead autrefois acquit should he or she be subsequently indicted for the same offence. An appeal by the prosecution against a decision of an intermediate appellate court overturning a conviction does not amount to double jeopardy since decisions at different levels of the court hierarchy are not a final acquittal or conviction.

<sup>355</sup> See *Evidence Act 1995 (Cth)* s 93; *Crimes Act 1900 (ACT)* s 283; *Criminal Code (NT)* ss 18-20; *Criminal Procedure Act 1986 (NSW)* s 156; *Criminal Code (QLD)* s 17. See also *R v Carroll* (2002) 213 CLR 635; *Criminal Law Consolidation Act 1935 (SA)* s 285; *Criminal Code (Tas)* s 11 (stated not to apply where the person causes unlawful death where the death occurs after the person had been punished once); *Crimes Act 1958 (Vic)* s 394; *Criminal Code (WA)* s 17.

<sup>356</sup> Common Core Document at [161] – [162].

In 2004 government representatives from the various Australian jurisdictions considered a series of model amendments to the rule against double jeopardy. The model provisions envisaged that:<sup>357</sup>

- The Court of Criminal Appeal in each jurisdiction would be empowered to order the retrial of an acquitted person for a 'very serious offence' where fresh and compelling evidence was available, and where it would be in the interests of justice to make such an order.
- The Court of Criminal Appeal would have a similar power to order a retrial of an acquitted person for a 'very serious offence' where:
  - the person who had been acquitted of a very serious offence had subsequently been convicted of an administration of justice offence, (such as perjury, or bribing a juror);
  - the Court of Criminal Appeal was satisfied that it was highly likely that but for the commission of the administration of justice offence the acquitted person would have been convicted, and
  - it was in the interests of justice to order a retrial.
- The Attorney General or the Director of Public Prosecutions would be able to appeal from a directed acquittal or acquittal by a judge sitting without a jury on a ground that involved a question of law alone, and, in the event the appeal was successful, the Court of Criminal Appeal would be empowered to quash the conviction and order a retrial.

The model provisions also contained a number of safeguards, including the requirement that police seek the consent of the prosecutor before commencing an investigation in connection with a possible retrial and the prosecutor seek an order from the Court of Criminal Appeal allowing a retrial promptly after charging the previously acquitted person.<sup>358</sup>

Recently, there has been a push for each State and Territory to amend their laws in line with these model provisions. This has already occurred in New South Wales<sup>359</sup> and Queensland.<sup>360</sup> Although there are a number of key differences between the model provisions and the New South Wales and Queensland Acts, they all allow for a person to be retried for a 'serious offence' where the original acquittal was tainted or where fresh and compelling evidence has become available after the original trial.

Legislation broadly based on the model provisions was recently passed by the South Australian Parliament.<sup>361</sup> Other jurisdictions have indicated varying degrees of willingness to amend their laws to allow for similar exceptions to the rule against double jeopardy.

The Law Council has traditionally been completely opposed to reform of double jeopardy laws. In the absence of any pressing need for change, the Law Council has

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<sup>357</sup> Model Criminal Code Officers Committee, *Discussion Paper on Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, (November 2003) available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~Double+Jeopardy+Report+25+Mar.pdf/\\$file/Double+Jeopardy+Report+25+Mar.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~Double+Jeopardy+Report+25+Mar.pdf/$file/Double+Jeopardy+Report+25+Mar.pdf)

<sup>358</sup> Model Criminal Code Officers Committee, *Discussion Paper on Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, (November 2003).

<sup>359</sup> *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 (NSW)*.

<sup>360</sup> *Criminal Code (Double Jeopardy) Amendment Act 2007 (Qld)*.

<sup>361</sup> *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008 (SA)*.

cautioned against interfering with a long standing principle specifically designed to protect citizens from potential state oppression and harassment.

The Law Council also questions whether the proposed model provisions (already introduced in New South Wales and Queensland) adhere to Australia's international obligations under article 14 of the ICCPR.

This Committee has commented in the past that the *resumption* of a criminal case may be justified 'in exceptional circumstances', but that the *reopening* of a criminal case is strictly prohibited in accordance with the principle of *ne bis in idem*.<sup>362</sup>

Exceptions to the rule against double jeopardy can now be found in the United Kingdom<sup>363</sup> and New Zealand.<sup>364</sup> Under the United Kingdom's *Criminal Justice Act 2003*, retrials are allowed if there is 'new' and 'compelling' evidence for crimes, including murder, but also manslaughter, kidnapping, rape, armed robbery, and serious drug crimes. All cases must be approved by the Director of Public Prosecutions, and the Court of Appeal must agree to quash the original acquittal.<sup>365</sup> In doing so, the Court of Appeal must consider whether there is 'new and compelling' evidence and whether 'the interests of justice' are met.

When double jeopardy reform was being considered in the United Kingdom, extensive discussion ensued regarding whether the proposed reforms would result in a breach of the United Kingdom's human rights obligations. The United Kingdom Government eventually arrived at the conclusion that their reforms did not violate their obligations under Protocol 7 article 4 of the European Convention on Human Rights.<sup>366</sup>

While the Law Council maintains an in principle commitment to protecting the freedom from double jeopardy, we welcome the Committee's views on whether the proposed model provisions conform to Australia's international obligations under article 14(7).

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<sup>362</sup> UN Human Rights Committee, *General Comment 13* (1984) [19].

<sup>363</sup> For example In the United Kingdom ss 54 to 57 of *Criminal Procedure and Investigations Act 1996* allow for an acquittal for any offence to be set aside if the acquittal is "tainted". The UK changes followed a Review of the Rule by the Law Commission of England and Wales March (2001), and the Review of the Criminal Courts of England and Wales (the Auld Report 2002).

<sup>364</sup> There was a Review by the New Zealand Law Commission who published their Report: "*Acquittal following Perversion of the course of justice*" in 2001.

<sup>365</sup> The double jeopardy provisions of the 2003 Act came into force in April 2005. The law change only applies to England and Wales. In Scotland the previous double jeopardy rule still applies.

<sup>366</sup> The interpretation of Article 4(1) of the Seventh Protocol adopted in the case of *Oliveira v Switzerland* (App. no. 25711/94, RJD 1998-V) is that successive prosecutions will not violate Article 4 if they relate to "a single act constituting various offences", so that if the offence charged in the second trial is different, even if based on the same facts, there is no breach. The alternative interpretation, in *Gradinger v Austria* (App. no. 15963/90, A 328-C, 1995), is that the second prosecution is forbidden if it arises out of the same or substantially the same facts regardless of its legal properties. Under Article 4(2), the reopening of a case must be under judicial authority and in the circumstances there specified. It was further noted that several European states allow retrials and that a new protocol to the European Convention on Human Rights specifically endorses retrials where new evidence emerges.

## 12.8 A competent and independent judiciary

### 12.8.1 Threats to the independence of the judiciary

Public confidence in the independence of the judiciary is fundamental to the enjoyment of the right to a fair trial and a necessary precondition to the realisation of the rights contained in article 14(1).

During the reporting period, there has been a degree of criticism of the judiciary from some quarters designed to suggest that certain judges are inclined to frustrate the intent of the legislature in applying the law, in favour of giving effect to their own views and principles.

The Law Council regards full and frank public debate regarding the performance of each arm of government, including the judiciary, as part of a healthy democratic process. However, the Law Council is concerned by a growing trend among the executive government to accuse the judiciary of deliberately thwarting its policy agenda. It has been suggested that these kinds of claims by the executive have been 'fuelled by the frustrations of the executive not getting its way in the face of competing priorities such as the rule of law and international obligations'.<sup>367</sup> It is of concern that the inappropriate nature, timing and source of some criticisms have the tendency to undermine public confidence in the independence of the judiciary, particularly when those criticisms come from members of the Executive Government.

The former Minister for Immigration and Multicultural and Indigenous Affairs has a particularly concerning record of making such criticisms, for example:

- In a speech to the House of Representatives in 1998, the Minister accused some Federal Court judges of going on a "frolic of their own" in interpreting laws regarding migration cases, when the High Court has given the Federal Court "some guidance in these matters".<sup>368</sup> The Minister also suggested that some Federal Court judges are using error of law to reintroduce merits review of migration matters, rather than using Federal Court hearings to simply find whether lower tribunals have properly applied the law. These comments were made in the context of the Federal Government introducing its Migration Legislation Amendment (Judicial Review) Bill 1998, which limits judicial review of immigration-related decisions.
- In an article published in 2000, the Minister for Immigration and Multicultural and Indigenous Affairs, argued that the courts ought not be involved in review of migration matters because the judiciary is 'ill-suited' to deal with these matters.<sup>369</sup> The Minister asserted that courts with their emphasis on protecting individual rights are not in a position to weigh the relative influence of other values in the refugee determination system. He

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<sup>367</sup> Speech by Dr Katharine Gelber at the 2004 Constitutional Law Conference, 'Judicial Activism and Judicial Restraint: Where Does the Balance Lie? A Political Science Perspective', Sydney, 20 February 2004 available at [http://www.gtcentre.unsw.edu.au/publications/papers/docs/2004/59\\_KathGelber.doc](http://www.gtcentre.unsw.edu.au/publications/papers/docs/2004/59_KathGelber.doc).

<sup>368</sup> ABC Radio AM Program, 'Former Chief Justice Brennan places Ruddock on notice' (6 October 2003); Law Council of Australia Media Release, 'Immigration Minister's Comments "Appalling", Says Law Council' (7 December 1998).

<sup>369</sup> Ruddock, "Refugee Claims and Australian Migration Law: A Ministerial Perspective", (2000) 23(3) *University of New South Wales Law Journal* 1. Cf Speech by the Hon Justice McHugh AC at the Australian Bar Association Conference, 'Tensions between the Executive and the Judiciary', Paris, 10 July 2002.

explained that many disciplines, such as political and organisational theory, and social psychology impinge on administrative law. Associated with these disciplines are values other than legal norms such as the rule of law. These values include public accountability, fiscal responsibility, administrative efficiency and, in the migration area, international comity. The Minister said that the:

*task of assigning priorities to the numerous competing values inherent in the refugee determination system properly falls to the Parliament.*<sup>370</sup>

- In 2001 the Minister publicly criticised the judges of the Federal Court, claiming that they had been too generous in their determination of applications for asylum and refugee cases, particularly in cases involving applicants from Iraqi.<sup>371</sup> This criticism was unfounded. In fact the Minister's own department and the Refugee Review Tribunal (RRT) recognise claims of asylum by Iraqi refugees in over 90 percent of cases. Of all the refugee claims rejected by the RRT, lawyers confirm that very few succeed in the Courts. This is because the Federal Court's powers have been severely truncated by changes to federal legislation relating to refugee applications. It is almost as difficult to succeed in the High Court because of the intricacies of the writ system that refugee claimants have to negotiate in that court to succeed.

By criticising the judiciary in this way, the Minister gave a misleading impression to the Australian community that the Federal Court judges had misapplied the law relating to refugees in order to give effect to their own personal sympathies or ideologies.

Another example of unjustified executive criticism of the judiciary is Senator Bill Heffernan's allegations concerning High Court Justice Michael Kirby. On 13 March 2002, Senator Bill Heffernan alleged in Parliament that Justice Kirby was unfit to be a judge because he had engaged in various deeds of misconduct including criminal offences.<sup>372</sup>

Senator Heffernan's sources were found to be fabricated and his attack focused on irrelevant criteria such as Justice Kirby's sexual orientation. Senator Heffernan's allegations were raised under parliamentary privilege and, as a result, could not form the basis of a defamation hearing.

These types of unjustified complaints can be very damaging to the reputation of judicial officers and threaten to undermine public confidence in the competence and independence of the judiciary.

Senator Heffernan's allegations have led to consideration of whether there are sufficient safeguards against an inappropriate use of parliamentary privilege to make an unwarranted attack on a member of the judiciary or indeed any member of the public. No reforms have been initiated to date.

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<sup>370</sup> Ruddock, "Refugee Claims and Australian Migration Law: A Ministerial Perspective", (2000) 23(3) *University of New South Wales Law Journal* 1 at 7-8.

<sup>371</sup> See Law Council of Australia Press release 'Immigration Minister's Criticism of Judiciary Misleading' issued 7 May 2001, available at <http://www.lawcouncil.asn.au/read/2001/1957321121.html>.

<sup>372</sup> See Law Council of Australia Press release 'Justice Michael Kirby' issued 13 March 2002 available at <http://www.lawcouncil.asn.au/read/2002/2096047411.html>.

The Law Council believes that the judiciary must be permitted to carry out its duties free from political interference. Executive Government criticism of the judiciary in the media does nothing to imbue respect for the rule of law in Australia, nor does it demonstrate a commitment to fulfilling Australia's obligations under article 14(1).

### 12.8.2 Mechanisms to ensure public confidence in the competency of the judiciary

At the Commonwealth level there is no forum to receive and determine complaints about the judiciary. The only way a judge can be removed from office is by the Governor General, following an address from both Houses of Parliament, calling for the removal of the judge on the grounds of proven misbehavior or incapacity.<sup>373</sup>

The Law Council has suggested that the establishment of an Australian Judicial Commission could be one way of preserving public confidence in the federal judiciary and ensuring the maintenance of the integrity of federal judicial officers.<sup>374</sup> A Judicial Commission could investigate complaints against judicial officers and provide education and training services to judges and magistrates.

In some state jurisdictions, such Judicial Commissions already exist.<sup>375</sup> For example, in New South Wales the Judicial Commission is generally seen as an effective and important body to the NSW judiciary. New South Wales Chief Justice Spigelman explained the need for such bodies as follows:

*The preservation of the rule of law is the basic reason for establishing mechanisms for dealing with judicial misconduct, whether it takes the form of corruption or less serious forms of misbehaviour. The rule of law consists of numerous interlocking principles. One such principle is the right to a fair trial. Judicial misconduct in the context of litigation denies that right. The rule of law is also best served where there is a high level of public confidence in the judiciary. Judicial misconduct, whether within or beyond the litigation context, adversely affects such confidence.*<sup>376</sup>

Spigelman CJ further stated that:

*...there was judicial criticism at the time that the Judicial Commission was established. Fears were expressed that an official body with the function of dealing with complaints about judges would make judges vulnerable to harassment and pressure, that litigants could act on the basis of ulterior motives, such as ensuring media attention to a complaint in circumstances where they wish the judge to step aside. Fears about the implications for judicial independence extended to concerns about giving disciplinary powers to*

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<sup>373</sup> For the removal of High Court Judges see s 72(ii) of the *Australian Constitution*; for Federal Court Judges see s 6(1)(b) of the *Federal Court of Australia Act 1975 (Cth)*; for Family Court Judges see s 22(1)(b) of the *Family Law Act 1975 (Cth)*. A similar procedure is followed for the removal of judges on the Supreme Courts of most Australian States.

<sup>374</sup> For example see Press Released issued by the Law Council of Australia, "Law Council in Favour of a Federal Judicial Commission" (5 February 2006) available at <http://www.lawcouncil.asn.au/read/2006/2420784739.html>.

<sup>375</sup> For example, Judicial Commissions exist in the Australian Capital Territory, see *Judicial Commission Act 1994 (ACT)* and in New South Wales, see *Judicial Officers Act 1986 (NSW)*.

<sup>376</sup> Spigelman Hon JJ (CJ), 'Dealing with Judicial Misconduct', Speech, 5<sup>th</sup> *World Wide Common Law Judiciary Conference*, 8 April 2003, available at: [http://www.lawlink.nsw.gov.au/sc%5Csc.nsf/pages/spigelman\\_080403](http://www.lawlink.nsw.gov.au/sc%5Csc.nsf/pages/spigelman_080403).

*the heads of jurisdiction collectively or individually. It was feared this could introduce hierarchical elements into a collegial environment... [However] the manner in which complaints have been dealt with over a long period of time has appeased the original concerns. After fifteen years of operation I am not aware that any New South Wales judge is critical of the system.*<sup>377</sup>

The Law Council believes that by providing a formal mechanism for the management and resolution of complaints against members of the federal judiciary, a national judicial commission could help:

- reinforce public confidence in judicial accountability and the judiciary as a whole;
- make available to the public an easily recognisable and transparent process for resolution of complaints about the conduct of Federal judicial officers; and
- uphold the integrity and status of the office of a Federal judicial officer, and in particular, provide a forum for such officers to defend themselves against inaccurate and baseless slurs against their character.

### 12.8.3 Ensuring judicial appointments are fair and transparent

In Australia, judges are generally appointed by the Governor or Governor General, on the advice of the executive arm of Government.<sup>378</sup> In the case of Justices of the High Court, who are appointed by the Governor General, the Attorney-Generals of each state must be consulted prior to the appointment being made.<sup>379</sup> Other than these requirements, there is no national protocol or set of criteria that is used to guide the judicial appointment process.<sup>380</sup>

The Australian judicial appointment process is vulnerable to criticism on the grounds that the process lacks transparency, does not mandate any form of community consultation, does not mandate minimum criteria for appointment and affords the Executive significant and largely unfettered control over the make-up of the judiciary.

Criticisms have also been levied that the current appointment process has resulted in a judiciary which is not representative of the broader community and on which certain groups of the community, such as women and persons of ethnic minorities, are particularly under-represented.<sup>381</sup>

In order to safeguard public confidence in the judicial appointment process and avoid any perception of improper Executive manipulation of the makeup of the judiciary, the Law Council supports the development of a judicial appointment process that clearly

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<sup>377</sup> Spigelman Hon JJ (CJ), "Dealing with Judicial Misconduct", Speech, 5<sup>th</sup> World Wide Common Law Judiciary Conference, 8 April 2003.

<sup>378</sup> See for example *Australian Constitution* s72(1); *Federal Court of Australia Act 1976 (Cth)* s6(1)(a); *Family Law Act 1975 (Cth)* s22(1)(a).

<sup>379</sup> *High Court of Australia Act 1979 (Cth)* s6

<sup>380</sup> In some State jurisdictions there is a requirement that the candidate have been admitted as a barrister or solicitor of that court for a certain number of years, or that he or she has practiced as a barrister or solicitor for a certain time. See for example the *Supreme Court Act 1970 (NSW)* s26(1); *Supreme Court Act 1935 (SA)* s9(1); *Supreme Court Act 1935 (WA)* s6.

<sup>381</sup> See for example Jocelyne A. Scutt, 'Invisible Women? Projecting White Cultural Invisibility on Black Australian Women' (1990) *Aboriginal Law Bulletin* 39; Rachel Davis and George Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) *Melbourne University Law Review* 32; Leslie J Moran, 'Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings' (2004) 28 *Sydney Law Review* 565.

states the criteria on which judicial candidates are assessed, such as the essential knowledge, experience and professional and personal qualities desirable for appointment.

It appears this view is shared by the Rudd Government, which since its election has expressed a commitment to adopt a more transparent, consultative approach to judicial appointments. A panel for the appointment of Federal Court Justices, tasked with assessing candidates against a set of published criteria, has also been established.<sup>382</sup>

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<sup>382</sup> See Media Release by the Hon Attorney-General Robert McClelland, 'Three New Judges Appointed to the Federal Court' (25 June 2008) available at [http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases\\_2008\\_SecondQuarter\\_25June2008-ThreeNewJudgesAppointedtotheFederalCourt](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_SecondQuarter_25June2008-ThreeNewJudgesAppointedtotheFederalCourt)

## 13. ARTICLE 17 RIGHT TO PRIVACY

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1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

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During the reporting period, five Australian jurisdictions introduced privacy legislation protecting personal information held by the public sector. The remaining States have administrative schemes in place. At the Commonwealth level, the *Privacy Act 1988* (Cth) and the Privacy Principles contained therein protect personal information when handled by public sector agencies.

Despite these positive developments, there remain a number of areas within which individual privacy is under threat in Australia. In this section of the Shadow Report the Law Council will draw the Committee's attention to the telecommunication interception measures introduced during the reporting period and their impact on the enjoyment of article 17 rights in Australia.

### 13.1 Telecommunication Interception

Australian law enforcement and intelligence agencies have long had the power to intercept telecommunications when investigating serious criminal offences or when necessary for the protection of national security.<sup>383</sup> During the reporting period a number of legislative developments significantly broadened these powers.

#### 13.1.1 B-Party Warrants

One of the most concerning developments in the area of telecommunications interception is the introduction of the B-Party warrant system.<sup>384</sup>

B-Party warrants effectively authorise the interception of telecommunications made to or from a person who is *not a suspect* and *has no knowledge or involvement in a crime*, but who may be in contact with someone who does.

Under a B-Party warrant telecommunication interception can be authorised where a third party (a 'B-Party') is believed to be in communication with another person and that other person is engaged in, or is reasonably suspected of being engaged in, activities prejudicial to national security or involved in the commission of a serious criminal offence.<sup>385</sup>

The introduction of B-Party warrants represents the first time in Australia's history that law enforcement agencies have been given power to intercept telecommunications made or received by people who are not suspects.

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<sup>383</sup> See for example, *Telecommunications (Interception) Act 1979* (Cth), enacted in 1979.

<sup>384</sup> B-Party warrants were introduced by the *Telecommunications (Interception) Amendment Act 2006* (Cth).

<sup>385</sup> See *Telecommunications (Interception and Access) Act 1979* (Cth) ss 9(1)(a)(i)(ia), 46(1)(d)(ii).

In the view of the Law Council, the B-Party warrant system is a disproportionate response to the need to investigate threats to national security and serious criminal offences and is contrary to Australia's obligations under article 17 of the ICCPR.

As noted by the UN High Commissioner for Human Rights, where a State seeks to restrict human rights such as the rights to privacy for legitimate and defined purposes, the principles of necessity and proportionality must be applied.

*The measures taken must be appropriate and the least intrusive to achieve the objective. The discretion granted to certain authorities to act must not be unfettered.*<sup>386</sup>

The Law Council is firmly of the view that the B-party warrant system is not the least restrictive means available of investigating serious criminal offences and subjects a indeterminately broad range of private communications by non-suspects to interception by law enforcement and intelligence agencies.

Under a B-Party warrant, the scope for intercepting telecommunications made to or from innocent third parties is disturbingly wide. The test applied for determining a 'B-party' is 'a person who sends communication from or to a suspect.'<sup>387</sup> The nature of the communication is not specified nor is the method by which the law enforcement agency discovers that the communication occurred. It can include an innocent communication which has nothing to do with the commission of a crime.

A B-Party warrant also authorises law enforcement or intelligence officers to monitor and intercept communications made by *every person around the suspect*. For example, subparagraph 9(1)(a)(ia) of the *Telecommunications (Interception and Access) Act 1979* (Cth) ('the TIA Act') authorises certain intelligence officers to intercept communications from a telecommunications service that is or is likely to be 'the means by which a person receives or sends a communication from or to another person who is engaged in, or reasonably suspected by the Director-General of Security of being engaged in, or of being likely to engage in [proscribed activities].'

This could include the family of the suspect, members of the suspect's religious group, and teachers at the suspect's children's school. It can even extend to communications made within confidential relationships, such as those between a doctor and patient, and between clergy and parishioner and lawyer and client.

A further problem with the B-Party warrant system, is that there are insufficient safeguards against the misuse or overuse of the warrants by law enforcement and intelligence authorities. For example, under the TIA Act the Attorney-General has the power to issue ASIO officers with a B-Party warrant without seeking authorisation from a court or tribunal.<sup>388</sup>

The seriousness of infringing a persons' right to privacy combined with the inability of the person to detect the intrusion and therefore challenge the State's action, ought to mean that B-Party warrants are only issued by an independent judicial officer. As the Victorian Privacy Commissioner observed:

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<sup>386</sup> Commission on Human Rights, *Statement by the United Nations High Commissioner for Human Rights, Fifty-eight session, Summary Record of the first meeting*, UN Doc E/CN.4/2002 SR.1(25 March 2002), [14].

<sup>387</sup> See *Telecommunications (Interception and Access) Act 1979* (Cth) ss 9(1)(a)(i)(ia) and s46(1)(d)(ii).

<sup>388</sup> NB Law enforcement agencies seeking a B-Party warrant must receive authorisation by the court, *Telecommunications (Interception and Access) Act 1979* (Cth) s46(1)(d)(ii).

*Telecommunication is one of the common means by which many individuals discuss their most private and intimate thoughts, as well as the ordinary daily details of their lives. They may also engage in political discourse, discuss business ventures, seek legal and other professional advice. People have a legitimate and reasonable expectation that the State will not listen surreptitiously to these conversations. Accordingly, any such interception has been subject to strict regulation under law, with oversight.*<sup>389</sup>

Under a B-Party warrant, a vast range of every-day private communications made or received by persons not charged with or suspected of criminal activities can be intercepted – sometimes without the warrant being considered or authorised by a court. The Law Council is of the view that unless a system of judicial oversight for the issue of all B-Party warrants is introduced, and limits placed on the types of persons and communications authorised to be intercepted under a B-Party warrant, the intrusive impact that regime has on individual privacy can not be said to be proportionate to the legitimate aim of the interception regime.

### 13.1.2 Access to stored communications

Under the TIA Act there is a general prohibition on enforcement agencies accessing stored communications (such as emails, voicemail messages and text messages) without a warrant. However, there are two broad exemptions to this general rule: (1) access to stored communications by government agencies without the knowledge of either party to the communication under a warrant (covert access) and (2) access to stored communications with the knowledge of one party to the communication (overt access).

Concerns arise in both instances that access to and use of such communications may constitute a disproportionate interference with the right to privacy.

#### 13.1.2.1 *Covert access to stored communications*

When an enforcement agency seeks to *covertly* access a stored communication a warrant is required. Stored communications warrants may be issued to certain government agencies if the information likely to be obtained would assist in connection with an investigation of ‘serious offences’ and ‘serious contraventions’.

Stored communication warrants are issued in respect of a *person*, rather than a particular telecommunications service, and are able to authorise access to stored communications sent or received via more than one telecommunication service.

The Law Council is concerned that the stored communication warrant regime:

- permits access to stored communications by an unduly large range of agencies.
  - The agencies that can apply for a stored communication warrant include law enforcement agencies responsible for investigating criminal matters, *as well as* agencies responsible for administering a law imposing a pecuniary penalty or administering a law relating to the protection of

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<sup>389</sup> Office of the Victorian Privacy Commissioner, *Submission to the Commonwealth Parliament’s Senate Legal and Constitutional Committee on its inquiry into the Provision of the Telecommunication (Interception) Amendment Bill 2004*, 12 March 2004, page 2.

public revenue, such as the Australian Tax Officer or the Australian Customs Services.

- allows access to communications for the investigation of a broad range of minor offences.<sup>390</sup>
  - The offences for which a stored communications warrant may be issued are significantly less serious than those for which the telecommunication interception warrants are available<sup>391</sup>. No convincing case was mounted for why a lower threshold should apply to stored communications which can contain information just as private, sensitive or intimate.

### 13.1.2.2 Overt access to stored communications

The concerns above relate to the warrant process required for *covert* access to stored communications. However, this is not the only way stored communications can be intercepted.

Under section 108(1)(b) of the TIA Act, stored communications can be accessed *without* a warrant provided *one* party to the communication has *knowledge* of the access.

Subparagraph 1018(1A) provides that a person is taken to have knowledge of the access if '*written notice of an intention to do the act*' is given to the person.<sup>392</sup> Subparagraph 108(1A) was inserted in the TIA Act in 2006.<sup>393</sup>

This means that law enforcement and intelligence agencies are able to gain access to stored communications without judicial oversight provided written notice has been given to only *one party*, regardless of whether the party receiving the notice *consents* or gives *permission* to access the stored communication.<sup>394</sup> In other words, the limited privacy protections under the TIA that apply to *covert* access by enforcement agencies provide no protection for privacy where one party to the communication is given written notice of access.

The Law Council is of the view that this form of access to stored communications, - which fails to include an element of judicial oversight, impose any meaningful limits on the use that may be made of any information obtained or impose any restrictions on secondary disclosure – represents an unwarranted intrusion on the right to privacy protected by article 17.

In order to protect individual privacy from arbitrary and overly intrusive interference by law enforcement agencies, the Law Council believes that access to stored communications should be governed by the TIA Act whether the access is covert or overt. The TIA Act should clearly set out the circumstances in which such access is permitted, the relevant authorisation process, the use that may be made of any information obtained, the restrictions on secondary disclosure, the obligation to

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<sup>390</sup> The offences to which the access to store communications regime relates are described as "serious contraventions and defined in s 5F *Telecommunications (Interception and Access) Act 1979* to include offences punishable by a fine.

<sup>391</sup> These offences are described as 'serious offences' which attract penalties of at least 7 years.

<sup>392</sup> For giving notice, see section 28A of the *Acts Interpretation Act 1901*.

<sup>393</sup> *Telecommunications (Interception and Access) Amendment Act 2006* (Cth).

<sup>394</sup> For further discussion see Simon Bronitt and James Stellios, 'Regulating Telecommunications Interception and Access in the Twenty-first Century: Technological Evolution or Legal Revolution?' (2006) (24) 4 *Prometheus* 413, 420.

destroy irrelevant material or no longer useful material and corresponding record keeping obligations.

### **13.1.3 Access to telecommunications data on a prospective basis**

In 2007 amendments to the *Telecommunications (Interception and Access) Act* introduced provisions regulating access by law enforcement and intelligence officers to telecommunications data on a prospective basis.<sup>395</sup>

Although telecommunications data does not include the content or substance of a person's private communications, it nonetheless can reveal highly personal information about a persons' associations and their whereabouts. For example, in the case of mobile phones, telecommunications data includes information about who the user has communicated with, when and for how long; and includes accurate information about the user's location. For this reason, the Law Council is concerned that real-time access to telecommunications data by law enforcement and intelligence agencies can result in the use of such data for 'tracking' purposes.

The 2007 amendments allow ASIO or law enforcement officers to require telecommunications carriers to disclose to them telecommunications data, on a near real-time, ongoing basis for a period up to 90 days.<sup>396</sup> In order to issue such an authorisation to a telecommunications carrier, the eligible person within ASIO need only be satisfied that the disclosure would be in connection with the performance of ASIO's functions.<sup>397</sup> Law enforcement officers need only be satisfied that the disclosure of the telecommunications data would assist in the investigation of a criminal offence which is punishable by imprisonment for at least three years.<sup>398</sup>

In the Explanatory Memorandum to the 2007 amendments it was acknowledged that there are 'increased privacy implications' in authorising the disclosure of telecommunications data on a near real-time, ongoing basis.<sup>399</sup> For that reason, before an authorisation for disclosure is issued, the authorising officer 'must have regard to how much the privacy of any person or persons would be likely to be interfered with by the disclosure'.<sup>400</sup>

Nonetheless, the Law Council believes that this requirement to consider privacy does not provide an adequate safeguard against abuse or overuse of the intrusive power to access telecommunications data on a prospective basis. As can be seen by the analogous experience with a similar provision under the *Surveillance Devices Act*,<sup>401</sup> even where issuing officers are required to have regard to the extent to which the privacy of any person is likely to be affected, in practice there is little evidence to suggest due consideration is given to privacy in the application and authorisation process.<sup>402</sup> The Law Council believes that the privacy consideration requirement in

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<sup>395</sup> See *Telecommunications (Interception and Access) Act 2007 (Cth)* Schedule 1.

<sup>396</sup> See ss 176 and 180 of the *Telecommunications (Interception and Access) Act 1979*. Authorisation is limited to 45 days for law enforcement officers.

<sup>397</sup> See s176(4) of the *Telecommunications (Interception and Access) Act 1979*.

<sup>398</sup> See s180(4) of the *Telecommunications (Interception and Access) Act 1979*.

<sup>399</sup> Explanatory Memorandum to *Telecommunications (Interception and Access) Amendment Act 2007 (Cth)*.

<sup>400</sup> See s180(5) of the *Telecommunications (Interception and Access) Act 1979*.

<sup>401</sup> *Surveillance Devices Act 2004 (Cth)* s16(2)(c).

<sup>402</sup> Commonwealth Ombudsman, *Report to the Attorney-General on the results of inspections of records under s 55 of the Surveillance Devices Act 2004*, February 2007, p. 5.

the TIA Act is likely to be equally ineffective in compelling law enforcement officers to properly weigh privacy concerns against the necessity and actual utility of authorising the disclosure of prospective telecommunications data.

Given the invasion of privacy it represents, the Law Council believes that criminal law-enforcement agencies and ASIO should require a warrant in order to access prospective telecommunications data. Before a warrant is issued, the issuing officer should be satisfied on reasonable grounds that the likely benefit to the criminal investigation which will result from the disclosure substantially outweighs the extent to which the disclosure is likely to interfere with the privacy of any person or persons. This would help ensure that the issue of privacy was directly and transparently addressed in the authorisation process. It would avoid the situation where the authorising officer could effectively just tick a box to indicate that he or she 'had thought about privacy' without demanding more.

Access to telecommunications data on a prospective basis provides law enforcement and intelligence agencies with the power to effectively track the whereabouts of persons on a near real time basis. The implications for individual privacy are significant and must be given serious consideration in the authorisation process. Unless the requirement to consider privacy consideration is strengthened, the Law Council is of the view that access to telecommunications data on a prospective basis constitutes a disproportionate restriction on the enjoyment of article 17 rights in Australia.

## 14. ARTICLE 19 FREEDOM OF OPINION AND EXPRESSION

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1. *Everyone shall have the right to hold opinions without interference.*
  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.*
- 

During the reporting period new sedition offence provisions were introduced into the Commonwealth *Criminal Code* as part of the former Australian Government's counter-terrorism measures.<sup>403</sup> These offences, which criminalise certain forms of expression, have a direct impact on the enjoyment of article 19 rights in Australia.

In the Common Core Document, the Australian Government states that it considers the sedition offences to constitute a legitimate restriction of the freedom contained in article 19:

*The Australian Government is satisfied that restrictions on communication imposed by the measures outlined above are necessary for the protection of national security. The Australian Government is also satisfied that the defence of "good faith" will adequately ensure that people who make comments without seeking to incite violence or hatred will not be deprived of the freedom of speech. Indeed, subsection 80.25(5) is in part implementation of article 20 of the ICCPR which requires State parties to prohibit advocacy that incites violence, discrimination or hostility.*<sup>404</sup>

In this section of the Shadow Report the Law Council challenges this view.

The Law Council will also draw the Committee's attention to the new legislative provisions relating to the classification of terrorist material and their impact on freedom of opinion and expression in Australia.

### 14.1 Sedition Laws

#### 14.1.1 The new offences

In November 2005, the Australian Government rushed the *Anti-Terrorism Bill 2005* through federal Parliament. When the Bill was enacted, new offences were

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<sup>403</sup> The new sedition offences were contained in Schedule 7 of the *Anti-Terrorism Act (No 2) 2005* (Cth). They introduced new offences in Division 80 of the Commonwealth *Criminal Code*.

<sup>404</sup> Common Core Document at [323].

introduced into Division 80 of Commonwealth *Criminal Code*, making it an offence to urge:

- another person to overthrow by force or violence the *Australian Constitution*, the Government of the Commonwealth, a State or a Territory or the lawful authority of the Australian Government;
- another person to interfere by force or violence with lawful processes for an election of a member or members of a House of the Parliament;
- a group or groups to use force or violence against another group or other groups and the use of the force or violence would threaten the peace, order and good government of the Commonwealth;
- another person to assist the enemy of Australia; or
- another person to assist those in armed hostilities.

Each of these offences carries a maximum penalty of seven years imprisonment.

Section 80.3 of the *Criminal Code* provides for specific defences to these offences where the acts in question were done in 'good faith'. Under section 80.3, comments made in good faith, such as comments that point out mistakes in government policy, or urge people lawfully to change laws or policies, will not constitute sedition. Section 80.3(1)(f) also allows the publication in good faith of a report or commentary about a matter of public interest.

In deciding whether an act was done in good faith, the court may look to matters such as whether the act was done with a purpose intended to be prejudicial to the safety or defence of the Commonwealth, to assist an enemy of Australia, or with the intention of causing violence or creating public disorder or a public disturbance.<sup>405</sup>

#### 14.1.2 An invalid restriction of Article 19 rights

Under article 19(3), a restriction on a person's right to express himself or herself freely is permissible only if that restriction is provided by law and necessary for respect of the rights or reputations of others or for the protection of national security or of public order or of public health or morals.

When introducing the new offences to Parliament, the Attorney-General noted that the provisions were necessary:

*to ensure that we have the toughest laws possible to prosecute those responsible should a terrorist attack occur.*

*Second and of equal importance, the bill ensures we are in the strongest position possible to prevent new and emerging threats, to stop terrorists carrying out their intended acts.*

...

*The bill also addresses those in our community who incite terrorist acts. It does this by expanding upon the Australian government's ability to proscribe terrorist organisations that advocate terrorism and also updates the sedition offence.*

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<sup>405</sup> *Criminal Code (Cth)* s 80.3

*The updated sedition offence will address problems with those who incite directly against other groups within our community.*<sup>406</sup>

The need for the new sedition offences to protect against the threat of a terrorist attack came under challenge when a Senate Committee conducted an inquiry into the Bill. The Senate Committee received many submissions relating to the sedition provisions, all of which (with the exception of those received from the Attorney-General's Department and the AFP), 'indicated strong opposition to the sedition offences from all sectors of the community'.<sup>407</sup> For example, it was submitted that:

- the sedition offences have the potential to restrict the expression of views that ought to be permitted in a liberal democracy such as Australia;
- there is a risk that the sedition offences will be applied unfairly or in a discriminatory manner against certain groups in the Australian community;
- there are inadequate safeguards to prevent an overly broad interpretation of the offence provisions;
- the offence provisions give inadequate protection to established media organisations in carrying out their functions of news reporting and the dissemination of bona fide comment on matters of public interest; and
- the sedition provisions are likely to 'chill' free artistic expression by forcing artists and authors to engage in self-censorship or risk facing prosecution.

The Senate Committee acknowledged these concerns and recommended that the sedition provisions be removed from the Bill in their entirety.<sup>408</sup> The Committee also recommended that the provisions be examined by the Australian Law Reform Commission (ALRC) before any legislative vehicle dealing with sedition was introduced.<sup>409</sup>

These recommendations were rejected by the Australian Government. The then Attorney-General stated that the sedition provisions should be immediately passed and that he would 'have a look next year to review the sedition provisions to further update, if necessary, the language used to describe them'.<sup>410</sup> The Bill was passed through Parliament with the sedition provisions included.

Almost three months later, the sedition provisions were referred to the ALRC for review.<sup>411</sup> The ALRC's report identified a number of concerns with the provisions as passed, similar to those identified in the Senate Committee's original report. For example, the ALRC stated that 'the offences in section 80.2(7)–(8) are inappropriately broad' and recommended that they be repealed.<sup>412</sup> The Attorney-General rejected this and many other ALRC recommendations.

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<sup>406</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (P Ruddock—Attorney-General), 102-103.

<sup>407</sup> Report of the Senate Legal and Constitutional Legislation Committee on the Provisions of the Anti-Terrorism Bill (No. 2) 2005 at 5.167.

<sup>408</sup> Report of the Senate Legal and Constitutional Legislation Committee on the Provisions of the Anti-Terrorism Bill (No. 2) 2005 Recommendation 27.

<sup>409</sup> Report of the Senate Legal and Constitutional Legislation Committee on the Provisions of the Anti-Terrorism Bill (No. 2) 2005 Recommendation 28.

<sup>410</sup> Hansard, 29 November 2005, pg 88.

<sup>411</sup> Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* Report No 104, (July 2006).

<sup>412</sup> Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* Report No 104, (July 2006) at 3.29.

The Law Council supports the recommendations of the ALRC and the Senate Committee, and for the following reasons, is of the view that the new sedition offences do not constitute a valid restriction of article 19 rights:

- The offences in Division 80 are unnecessary.

The stated aims of the legislation introducing the sedition offences, namely to protect the Australian community from new and emerging threats of terrorism,<sup>413</sup> are already adequately addressed by those sections of the *Criminal Code* that deal with ancillary offences such as inciting, conspiring, aiding, abetting, counselling or procuring the commission of an offence.<sup>414</sup> For example, under subsection 11.4(1) of the *Criminal Code* a person who urges the commission of an offence, such as a person who urges another to commit or prepare for terrorist act, is guilty of the offence of incitement.

- The offences in Division 80 are indeterminate in scope and fail to meet the requirement of being 'prescribed in law'.

The new offences lack the clarity and precision necessarily to enable citizens to foresee the consequences of their conduct on the basis of the law. For example, each of the new offences is made out if the accused person *urges* another person to do the prescribed act. The concept of 'urging' another person is undefined and the nexus required between the speaker and the actor is unclear. It is unclear, for example, whether the work of broadcasters, publishers, journalists and media commentators could be categorised as 'urging' another to do a proscribed act. It is also unclear whether 'urging another' could potentially be construed to include the activities of peace activists and protestors demonstrating, for example, against Australia's involvement in armed hostilities overseas.

The use of the term *assists* in the sedition offences also gives rise to an unacceptable degree of ambiguity regarding the element of intention required to prove the criminal offences contained in sections 80(7) and (8) and fails to meet the requirement in article 19(3) of the ICCPR that any restriction on freedom of expression be 'provided by law'. This concern was one of the factors underlying the ALRC's recommendations to repeal section 80.2(7)–(8), and to modify the equivalent provisions in section 80.1(1)(e)–(f) to provide that, for a person to be guilty of any of the offences the person must intend that the urged force or violence will occur. The ALRC observed:

*the use of the term 'assist' in s 80.2(7)–(8) may result in the offences being interpreted so broadly as to encompass non-violent criticism of the Australian Government and others. Such an interpretation would run a significant risk of falling foul of art 19 of the ICCPR. As stated earlier, the restrictions on freedom of expression permitted by art 19(3) are narrow. The equivalent jurisprudence relating to art 10 of the ECHR emphasises that any restriction on freedom of expression must be proportionate to the legitimate objective that the legislature is seeking to achieve. An anti-terrorism measure must not, for instance, jeopardise the jurisdiction's fundamental democratic principles. Similarly, in the Australian context, it has been stated that in 'reconciling the interests of national security and the freedom of the individual' it is necessary*

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<sup>413</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (P Ruddock—Attorney-General), 102-103.

<sup>414</sup> *Criminal Code* (Cth) Part 2.4 -- Extensions of criminal responsibility.

to recognise 'freedom of legitimate political dissent' as one of the 'essential requirements of democracy'.<sup>415</sup>

- The offences in Division 80 have a corrosive impact on free speech and expression in Australia

The broad scope of the prohibition imposed by the new sedition offences threatens free and uninhibited reporting of news by media outlets. The mere existence of the new sedition offences has the effect of making people cautious about publishing material that may potentially be regarded as seditious, even where there is no attempt to prosecute or no successful prosecution. This chilling effect not only encourages self-censorship on the part of writers, artists and others, but may inspire editors, publishers, curators, sponsors and funding bodies to withdraw the support necessary for artists and writers to gain exposure for their endeavours.

The existence of the 'good faith defence' does little to appease these concerns. The fact that a court may exercise its discretion to find that a particular act that attracted a charge of sedition falls within the limited 'good faith' exception after the fact, does not dilute the fear of criminal liability experienced by those engaged in publishing or reporting on matters that could potentially fall within the broad scope of the new offences.

For these reasons, the Law Council disputes the view advanced in the Common Core Document that the sedition offences in Division 80 of the *Criminal Code* constitute a valid restriction of Article 19 rights.

## 14.2 Classification of Terrorist Material

The Law Council also holds concerns regarding the impact of new classification provisions, also introduced as part of the former Government's counter-terrorism measures, on freedom of expression in Australia.<sup>416</sup>

Under the amended classification regime, certain types of publications, films and computer games must be refused classification if they 'advocate the doing of a terrorist act'.<sup>417</sup> Materials which fall into this 'refused classification' category are banned from public distribution. This is because under State and Territory laws it is prohibited to sell, distribute or publicly exhibit materials which have been refused classification.<sup>418</sup>

Material will be regarded as 'advocating' the doing of a terrorist act and refused classification if it:

- directly or indirectly counsels or urges doing a terrorist act; or
- directly or indirectly provides instruction on doing a terrorist act; or

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<sup>415</sup> Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* Report No 104, (July 2006) at 5.55.

<sup>416</sup> These new provisions were introduced by Schedule 1 of the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007 (Cth)*.

<sup>417</sup> See s9A(1) *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*.

<sup>418</sup> See for example s6 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW)*; ss16 and 25 of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic)*.

- directly praises doing a terrorist act where there is a risk that such praise might lead a person (regardless of his or her age or any mental impairment) to engage in a terrorist act.

'Terrorist act' has the meaning given by section 100.1 of the *Criminal Code*.<sup>419</sup>

Material will *not* be regarded as advocating the doing of a terrorist attack if it depicts or directly describes a terrorist act but the depiction or description could reasonably be considered to have been done merely as part of public discussion or debate or as entertainment or satire.<sup>420</sup>

### 14.2.1 Failure to Demonstrate a Need for the Amendments

Prior to 2007, the classification regime provided that material must be refused classification if, amongst other things, it *promotes, incites or instructs in matters of crime or violence*.<sup>421</sup>

The 2007 amendments to the classification regime were justified on the basis that the existing provisions were not sufficiently clear to ensure that the Classification Board and the Classification Review Board would strike the correct balance with respect to material that advocates terrorist acts.<sup>422</sup>

At the time the 2007 amendments were introduced, neither the Second Reading Speech nor the Explanatory Memorandum made any positive case for why the expansion of Australia's classification regime was necessary. For example, no details were provided of:

- particular cases where problematic materials regarded as 'advocating terrorist acts' had received classification under the pre-existing classification regime;
- any examples of material which would not be considered to promote, incite or instruct in matters of crime or violence but which should be banned on the basis that it advocates the doing of a terrorist act.

The Law Council believes that the test under the pre-existing provisions was already appropriate and sufficient to ensure that materials with a real potential to increase the risk of a terrorist act were denied classification.

For example, the Law Council is of the view that under both the current provisions and the previous provisions *praise* for an act of crime or violence might lead to a refusal to provide classification. The difference being that under the previous provisions the critical question would have been *whether the 'praise' was such that it promoted or incited crime or violence*, while under the new regime, the critical question is *whether the 'praise' creates the mere risk that a person (regardless of age or mental impairment) might be influenced to commit a terrorist attack*.

The Law Council is not alone in its concerns regarding the necessity for the new provisions. For example, HREOC, recommended that the proposal to amend the censorship provisions be reconsidered on the basis that it was 'not convinced of the

<sup>419</sup> See s9A(4) *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*.

<sup>420</sup> See s 9A(3) *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*.

<sup>421</sup> See *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* Schedule 1.

<sup>422</sup> See Explanatory Memorandum to *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007 (Cth)*.

necessity for tighter censorship laws in order to combat incitement and/or glorification of terrorism.<sup>423</sup>

#### 14.2.1 Broad and ambiguous nature of amendments

As well as being unnecessary, the breath and discretionary nature of the 2007 amendments unduly burden public debate in a manner which is incompatible with freedom of expression. This is largely due to the use of ambiguous and imprecise terms and the confusing nature of the tests for refusing classification.

First, the use of the term ‘*advocates* a terrorist act’ as a ground for refusing classification sets an unacceptably low standard of what material should be refused classification. For example, according to the 2007 amendments, material ‘advocates’ the doing of a terrorist act if it ‘directly praises doing a terrorist act where there is a risk that such praise might lead a person (regardless of his or her age or any mental impairment) to engage in a terrorist act.’<sup>424</sup>

This appears to require decision makers to consider the lowest societal common denominator when considering how material will be processed, comprehended and acted upon by the public – an almost impossible test to apply.

The Law Council believes that assessing material on the basis of how it *might* be received and understood by the most suggestible or disturbed members of the community, even where it is not specifically designed to target or play upon their vulnerabilities, creates a unacceptably wide net in which a broad range of material could potentially fall. The Law Council is of the view that the ability of people to participate in public debate, both by receiving and imparting information, should not be unduly circumscribed by prohibitions based on speculation about how certain actors *may* respond to certain material.

Secondly, the lack of precision in the term ‘advocates’ effectively provides the Classification Boards with unfettered discretion to determine which material should be banned from the Australian community. The term is defined to include ambiguous and imprecise notions such as ‘counsels or urges doing a terrorist act’, without requiring the actual existence, or even real risk, that a person would engage in a terrorist act.

The problematic nature of this definition of ‘advocates’ has been noted by the Security Legislation Review Committee and the Senate Legal and Constitutional Affairs Committee in other contexts.<sup>425</sup> Both Committees recommended that, at the very least, paragraph (c) of the definition should be amended to require a *substantial* risk that the material in question might lead someone to engage in terrorism.

The definition of ‘advocates’ was also reviewed by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism who considered the term in the context of proscribing terrorist organisations. The Special Rapporteur expressed concern that:

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<sup>423</sup> Submission of the Human Rights and Equal Opportunity Commission to the Attorney-General's Department on the Material that Advocates Terrorist Acts Discussion Paper, (29 May 2007) p. 3.

<sup>424</sup> See s9A(2) of the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*.

<sup>425</sup> See Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at [8.6]; Report of Senate Legal and Constitutional Affairs Committee Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007 (30 July 2007);

*this definition lacks sufficient precision and has the potential to cover statements which, in a very generalized or abstract way, somehow support, justify or condone terrorism.*<sup>426</sup>

Thirdly, the test to be applied when determining whether to refuse classification to material that advocates a terrorist act is internally inconsistent and confusing to apply.

The new classification provisions provide that material will not be regarded as advocating the doing of a terrorist attack if it depicts or directly describes a terrorist act, but the depiction or description could reasonably be considered to have been done as part of public discussion or debate or as entertainment or satire.

At the same time, the provisions require that when classifying material, decision makers must *not* consider the *intent of the creator*, and are instead required to focus on the possible effect that the material might have on a person exposed to it.

It is difficult to see how these concepts can be reconciled. On the one hand, decision makers are instructed to consider how material *might* be received and interpreted by the most impressionable and to decide whether the material is potentially 'dangerous' on that basis. On the other hand, decision makers are instructed that, if the material was produced *with the intention* of participating in public discussion or debate or as entertainment or satire, then any inadvertent impact is immaterial. The end result is a test that is confusing to apply and unacceptably broad in scope, investing decision makers with a wide discretion to ban material from publication.

These factors combine to raise serious concerns regarding the classification regime's compliance with Australia's obligations under article 19.

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<sup>426</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Australia: Study on Human Rights Compliance while countering Terrorism*, A/HRC/4/26/Add.3 (14 December 2006) p. 12

## 15. ARTICLE 22 FREEDOM OF ASSOCIATION

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1. Everyone 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. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

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A number of legislative developments have occurred during the reporting period that impact on the enjoyment of freedom of association in Australia.

One of the areas reported on in the Common Core Document is the introduction of the new offence of associating with a member of a terrorist organisation.<sup>427</sup> In this section of the Shadow Report the Law Council will outline its concerns regarding the association offence and related concerns regarding the way in which 'terrorist organisations' are proscribed.

### 15.1 Proscribing organisations as 'terrorist organisations'

The Law Council has a number of concerns with the current process for proscribing an organisation by regulation as a 'terrorist organisation'.

The Law Council believes that the Executive's largely unfettered power to outlaw an organisation and expose to criminal liability those individuals associated with the organisation has significant consequences for the right to freedom of association in Australia.

#### 15.1.1 Unfettered executive discretion to proscribe terrorist organisations

Terrorist organisations are defined and regulated under Division 102 of the *Criminal Code*.<sup>428</sup> A 'terrorist organisation' is relevantly defined in section 102.1(1) of the *Criminal Code* as:

- (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 a terrorist act occurs); or*

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<sup>427</sup> Common Core Document at [326]-[327].

<sup>428</sup> Division 102 of the *Criminal Code* was introduced by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth). It was subsequently amended in 2003 and 2004 by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth) and the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

*(b) an organisation that is specified by the regulations for the purposes of this paragraph*

According to section 102.1(2), before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition above, the Attorney General must be satisfied on reasonable grounds that the organisation to be listed:

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

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 instructions on the doing of a terrorist act; or*
- (c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of s 7.3) that the person might suffer) to engage in a terrorist act.*

Neither the *Criminal Code* nor the Regulations contain any further or more detailed criteria to guide and circumscribe the exercise of the Attorney General's proscription powers. For example, it is no longer a legislative requirement, as it was prior to the *Criminal Code Amendment (Terrorist Organisations) Act 2004 (Cth)*, that in order for an organisation to be proscribed under the Regulations, it must first have been designated as a terrorist organisation by the UN Security Council.

On the basis of the broad definition contained in s 102.1(2), a considerable number of organisations across the globe are therefore potentially eligible for proscription under the Regulations. Nonetheless, only 19 organisations have been listed to date.<sup>429</sup> The rationale behind how and why those organisations in particular have been chosen and the order in which their proscription has been pursued is difficult to discern. Likewise information is not publicly available about other organisations which have been considered for proscription, but ultimately not listed, or about organisations which are currently under consideration for listing.

In the context of past parliamentary committee reviews, ASIO has provided the Parliamentary Joint Committee on Intelligence and Security (PJCIS) with the criteria it purportedly uses in selecting and assessing entities for proscription under the *Criminal Code*.<sup>430</sup> Those criteria include the following factors:

- engagement in terrorism;
- ideology and links to other terrorist groups/networks;
- links to Australia;
- threat to Australian interests;
- proscription by the UN or like-minded countries; and

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<sup>429</sup> For an up-to-date list of listed terrorist organisations see the Australian Government's National Security website at <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>.

<sup>430</sup> Parliamentary Joint Committee on Intelligence and Security, 'Review of the listing of the Kurdistan Workers' Party (PKK)', Canberra, April 2006.

- engagement in peace/mediation processes.<sup>431</sup>

However, ASIO has also explained to the PJCIS that these criteria represent a guide only and that it is not necessary that all elements of the criteria be satisfied before a decision is taken to list an organisation. For that reason, where the criteria have been departed from in the past, ASIO and the Attorney-General's Department have not considered it necessary to advance evidence of special overriding circumstances which justified the listing of the organisation, notwithstanding the fact that the criteria were not met.<sup>432</sup>

The result is that while both the Attorney General's Department and ASIO have acknowledged that it is neither possible nor desirable to list every organisation in existence which meets the broad definition of a 'terrorist organisation' under the *Criminal Code*, neither agency has been willing to promulgate binding criteria for singling out particular organisations for listing under the *Code*.

The absence of transparent criteria has inevitably made it difficult to allay public fears that the proscription power might be utilised for politically convenient ends rather than to address law enforcement imperatives.

The Law Council believes that conferring a broad Executive discretion to ban a particular organisation is not acceptable in circumstances where the consequences of outlawing the group are to limit freedom of association and expression and to expose people to serious criminal sanctions.

According to Australia's obligations under article 22 of the ICCPR restrictions on the freedom of association are only permissible where they are prescribed by law and are necessary and proportionate to the achievement of a legitimate and identified aim.

In a submission to the PJCIS on the proscription of terrorist organisations under the *Criminal Code*, the HREOC explained in more detail what it means for a limitation on a right to be provided by or prescribed by law:

*The [United National Human Rights Committee] has stated that the expression 'provided by law' in the context of article 19(3) [right to freedom of expression] and 'prescribed by law' in the context of article 22(2) [right to freedom of association] requires that the law which sets out the limiting measure must be clearly set out, and not so vague as to permit too much discretion and unpredictability in its implementation.*

*The Human Rights Committee has stated that laws which authorise the restriction of rights 'should use precise criteria and may not confer an unfettered discretion on those charged with their execution'. A provision which gives the executive an unfettered discretion may not constitute a restriction prescribed by law and may result in an arbitrary interference with ICCPR rights.*<sup>433</sup>

<sup>431</sup> Parliamentary Joint Committee on Intelligence and Security, 'Review of the listing of the Kurdistan Workers' Party (PKK)', Canberra, April 2006, p. 11.

<sup>432</sup> Minority Report of Parliamentary Joint Committee on Intelligence and Security, above n 431. at p. 36.

<sup>433</sup> HREOC submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Power to Proscribe Terrorist Organisations, February 2007, paragraph 23 – 24.

The Law Council believes that the current provisions providing for the proscription of terrorist organisations in Division 102 do not comply with the requirements of precision and certainty necessary to justify a restriction of article 22 rights.

### 15.1.2 Attribution of characteristics to a group

The lack of precision arising from the absence of clear criteria is exacerbated by the manner in which the proscription process seeks to attribute particularly criminal characteristics to a group of individuals.

In the absence of a constitution, corporate plan or some other statement of an organisation's goals and mandate, the attribution of defining characteristics to a group or organisation of people inevitably requires assumptions to be made, based on the statements or activities of certain individuals within the group, about the existence of a commonly shared motive or purpose.

For example, one of the grounds on which the Attorney-General may list an organisation as a terrorist organisation is if the organisation *advocates* the doing of a terrorist act.<sup>434</sup>

As noted above, section 102.1(1A) of the *Criminal Code* defines what advocacy means in this context, but does not specify when the 'advocacy' of an individual member of a group will be attributable to the organisation as a whole.

The result is that, under the *Criminal Code*, a person who is a member of an organisation could be prosecuted for a criminal offence if another member of that group 'praises' a terrorist act, even when the person who praised the terrorist act is not the leader of the group, or when the statement is not accepted by other members as representing the views of the group.<sup>435</sup>

As the Law Council has often pointed out, the issue of attribution is significant because the members of any organisation are rarely a homogenous group who think and talk as one. On the contrary, although possibly formed around a common interest or cause, organisations are often a battleground for opposing ideas, and may represent a forum in which some members' tendencies towards violent ideology can be effectively confronted and opposed by other members.

With a few exceptions, so called criminal groups or organisations are likely to be relatively fluid, amorphous associations, without a clearly stated purpose or finite membership list. Attempting to attribute to such a collection of individuals a shared motive and purpose, will inevitably require that the knowledge or intent of one or some members of the group is imputed to all others. The result is likely to be the legitimisation of a process of guilt by association. As the Senate Legislative Review Committee concluded:

*[Proscription on the basis of 'advocacy'] could lead to a proscription of an organisation which was in no way involved in terrorism because a person identified as connected with the organisation praises a terrorist act, although that person had no intention to provoke a terrorist act. The consequences*

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<sup>434</sup> *Criminal Code Act 1995* (Cth), s 102.1(2).

<sup>435</sup> Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at [8.10].

*could be a heavy penalty imposed on a member innocent of any connection with terrorism.*<sup>436</sup>

The Law Council is of the view that this approach results in a disproportionate restraint on freedom of association.

### 15.1.3 Denial of natural justice

In addition to the concerns expressed above, the current process of proscribing terrorist organisations set out in Division 102 does not afford affected parties the opportunity to be heard *prior to an organisation* being listed or to effectively challenge the listing of an organisation after the fact, without exposing themselves to prosecution.

If an organisation is proscribed by regulation as a terrorist organisation there is no opportunity for the members of the community who might be affected by the listing to make a case against the listing *before* the regulation comes into effect.

There are avenues for review *after* an organisation has been listed, however the Law Council remains of the view that this form of after the fact review is an inadequate protection for the rights of persons who might be affected by the proscription process. For example:

- Review by the Parliamentary Joint Committee on Intelligence and Security

Section 102.1A of the *Criminal Code* stipulates that the PJCIS *may* review a regulation proscribing an organisation within 15 sitting days of the regulation being laid before the House. The PJCIS has noted that 'since Parliament is able to disallow a regulation, the Parliament should have the clearest and most comprehensive information upon which to make any decision on the matter.'<sup>437</sup> Accordingly, as part of its review the PJCIS may seek submissions from Australian members of the relevant organisation and from other interested parties. The PJCIS is also permitted access to all material (including classified material) upon which the Minister's decision was based.

Although the Parliament is likely to rely upon the judgement of the PJCIS in deciding whether to disallow the proscribing regulation; particularly where classified material is involved,<sup>438</sup> the primary problem with PJCIS review is that it is not mandatory and it takes place after a decision to proscribe an organisation has been made and come into effect.

Further, while the PJCIS has been diligent in reviewing listings, robust in its questioning of relevant government officers, and critical of some aspects of current listing process, it has not succeeded in forcing the Executive to commit to a fixed set of criteria for selecting organisations for listing or to address its reasons for listing to those criteria.<sup>439</sup>

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<sup>436</sup> Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at [8.6].

<sup>437</sup> Parliamentary Joint Committee on ASIO ASIS and DSD, 'Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the *Criminal Code Amendment Act 2004*', Tabled 16 June 2004.

<sup>438</sup> Because such material will not be available to Parliament generally.

<sup>439</sup> For example the PJCIS has indicated that it requires pre-identified criteria to use as a basis for testing a listing and it has adopted for that purpose the criteria provided by ASIO. However, as was

Moreover, the reality of party politics in Australia dictates that there is often insufficient distinction between the Executive and the Parliament to suggest the latter can be relied upon to provide independent supervision of the former.

- Consultation with States and Territories

Mandatory consultation on a proposed new listing with State and Territory leaders, pursuant to the Inter-Governmental Agreement on Counter-Terrorism laws,<sup>440</sup> has provided only doubtful additional accountability. It is difficult to accept that consultation of this type acts as a genuine safeguard. Further, there is no basis for the assumption that representatives of the Executive at the State and Territory level are concerned with policing the misuse or unnecessary use of executive power at the federal level, except to the extent that it involves a Commonwealth incursion into State matters.

- Judicial Review

While there is the opportunity for judicial review of a decision to proscribe an organisation, it extends only to the legality of the decision and not its merits. Further, as noted above, judicial review is only available after the decision has come into effect.

In order to be proportionate, laws authorising the restriction of article 22 rights must use *precise criteria*, be *proscribed by law* and may not confer *unfettered discretion* on those charged with their execution. Without procedures to ensure persons affected by the proscription process can effectively challenge that proscription, the proscription provisions cannot be said to meet the test of proportionality required for a valid restriction of article 22.

## 15.2 Terrorist Organisation Offences

As noted above, the purpose of outlawing terrorist organisations is to impose criminal liability on the members of those organisations, and the individuals who support, fund or associate with those organisations.

Division 102 of the *Criminal Code*, which was introduced by the *Security Legislation Amendment (Terrorism) Act 2002* and later amended in 2003<sup>441</sup> and 2004,<sup>442</sup> contains a number of what are generally described as 'terrorist organisation offences'.

These offences relate to the conduct of a person who is in some way connected or associated with a 'terrorist organisation'. Under the Division it is an offence to:

- direct the activities of a terrorist organisation (102.2)

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revealed in the review of the listing of the Kurdistan Workers Party (PKK), the Executive regards the ASIO criteria only as a rough, non-binding guide. Therefore it is difficult for the PJCIS to employ a consistent and rigorous framework for review. See Parliamentary Joint Committee on ASIO ASIS and DSD, 'Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the *Criminal Code Amendment Act 2004*', Tabled 16 June 2004.

<sup>440</sup> Inter-Governmental Agreement on Counter-Terrorism laws was signed by the Prime Minister, Premiers and Chief Ministers on 24 October 2002. The text of the agreement is available at [http://www.coag.gov.au/meetings/250604/iga\\_counter\\_terrorism.pdf](http://www.coag.gov.au/meetings/250604/iga_counter_terrorism.pdf).

<sup>441</sup> See *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

<sup>442</sup> See *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

- be a member of a terrorist organisation (102.3)
- recruit a person to join or participate in the activities of a terrorist organisation (102.4)
- receive or provide training to a terrorist organisation (102.5)
- receive funds from or make funds available to a terrorist organisation (102.6)
- provide support or resources that would help a terrorist organisation engage in, plan, assist or foster the doing of a terrorist act (102.7)
- on two or more occasions associate with a member of a terrorist organisation or a person who promotes or directs the activities of a terrorist organisation in circumstances where that association will provide support to the organisation and is intended to help the organisation expand or continue to exist. (102.8)

At the time Division 102 was introduced into the *Criminal Code*, and each time it has been subsequently expanded and refined by amendment, it has attracted considerable criticism, including from the Law Council.<sup>443</sup>

The Law Council is particularly concerned that by shifting the focus of criminal liability from a person's conduct to their associations, the terrorist organisation offences unduly burden freedom of association and are likely to have a disproportionately harsh effect on certain sections of the population who, simply because of their familial, religious or community connections, may be exposed to the risk of criminal sanction.

The problems inherent in the terrorist organisation offences are exacerbated by the manner in which terrorist organisations are proscribed. As noted above, the broad executive discretion to proscribe an organisation as a terrorist organisation can give rise to serious criminal liability by executive decree.

In this section of the report, the Law Council will focus on the two most concerning terrorist organisation offences: membership of a terrorist organisation and association with a terrorist organisation.

### 15.2.1 Criminalisation of membership

Section 102.3 of the *Criminal Code* makes membership of a terrorist organisation an offence carrying a penalty of ten years imprisonment. In order to prove this offence, the prosecution must establish beyond reasonable doubt that the person *knew* that the organisation was a terrorist organisation.

Membership of an organisation is defined in section 102.1 as including:

- a person who is an informal member of an organisation; and
  - a person who has taken steps to become a member of the organisation;
- and

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<sup>443</sup> See Report of the Senate Legal and Constitutional Affairs Inquiry into the *Security Legislation Amendment (Terrorism) Bill 2002 [No.2]*, Recommendation 4 and pages 45 – 59. See also the Law Council submission to this inquiry, available at <http://www.lawcouncil.asn.au/get/submissions/2110877939.pdf>

Criticism of the further expansion of Division 102 can be found in the Report of the Senate Legal and Constitutional Affairs Inquiry into the provisions of the *Anti-Terrorism Bill 2004*, on pages 35 – 38 which summarize a number submissions critical of the provisions. See also: The Report of the Security Legislation Review Committee (the Sheller Review), June 15 2006, Chapters 7 to 10; The Parliamentary Joint Committee on Intelligence and Security's Review of Security and Counter Terrorism Legislation, December 2006, pp67 – 84; Report of the Parliamentary Joint Committee on Intelligence and Security's Inquiry into the proscription of terrorist organisations under the Australian Criminal Code, September 2007.

- in the case of an organisation that is a body corporate, a director or an officer of the body corporate.

The membership offence does not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.

The Law Council has a number of concerns with this membership offence.

First, criminalising membership of a group assumes the existence of a formal membership process whereby it can be clearly determined, at any particular point in time, whether or not a specific person is a member of that group or organisation. Such formal membership structures may not exist in terrorist or criminal groups. As a result, the potential class of persons that fall within the definition of “membership” is indeterminately wide.

The scope of persons falling within the ‘membership’ category is further extended by the broad definition of membership in the *Criminal Code*, which includes ‘informal members’ and any person who has taken ‘steps to become a member’. These terms potentially capture any person tangentially connected with the organisation.

The difficulty in determining with precision who is a member of a group and when membership begins or ends, has significant implications for those persons seeking to rely on the defence to the membership offence set out in sub-paragraph 102.2(2). That sub-paragraph provides a defence where:

*the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation*

Discharging this burden is likely to prove very difficult in circumstances where there is no formal resignation process and no membership or subscription fees which can be cancelled. ‘Ceasing to be a member’ may equate to little more than subtly withdrawing and absenting oneself from the group’s activities – without announcement or fanfare of any sort.

This concern has been voiced by the House of Lords which found that a similar legal burden placed on a defendant in criminal proceedings was contrary to the presumption of innocence.<sup>444</sup> The House of Lords’ concerns were in turn shared by the Security Legislative Review Committee<sup>445</sup> which commented as follows:

*the decision of the House of Lords is sufficient to raise a doubt about the proportionality of overriding the presumption of innocence by imposing upon a person, charged with the offence of membership of a terrorist organisation, carrying a maximum penalty of ten years imprisonment, the legal burden of proving, if he or she is to be exonerated, on the balance of probabilities, that*

<sup>444</sup> *Sheldrake v Director of Public Prosecutions, Attorney-General’s Reference (No 4 of 2002)* [2005] 1 AC 264.

<sup>445</sup> The Attorney-General established the independent Security Legislation Review Committee on 12 October 2005 under the Chairmanship of the Honourable Simon Sheller AO QC (the Sheller Committee). The Sheller Committee was made up of representatives of major stakeholder organisations. It conducted a public inquiry, receiving 29 submissions and taking evidence from 18 witnesses over 5 days of hearings in Melbourne, Sydney, Canberra and Perth. The Committee reported to the Attorney-General and the PJCIS. The report was tabled by the Attorney-General on 15 June 2006 and is available at: [www.ag.gov.au/agd](http://www.ag.gov.au/agd) (the Sheller Report).

*he or she took all reasonable steps to cease to be member as soon as practicable after he or she knew that the organisation was a terrorist organisation. The difficulty the defendant might have in proving this might result in the conviction of an innocent person and the incarceration of that person unjustly.*<sup>446</sup>

### 15.2.2 Criminalisation of association

The association offence in section 102.8 of the *Criminal Code* magnifies the objectionable features of the membership offence described above.

Under this provision, it is an offence to, on two or more occasions, associate with a member of a listed terrorist organisation or a person who promotes or directs the activities of a listed terrorist organisation in circumstances where that association will provide support to the organisation and is intended to help the organisation expand or continue to exist.<sup>447</sup> This offence attracts a penalty of 3 years imprisonment.

Limited exemptions exist for certain types of association, such as those with close family members or legal counsel, and are contained in subsection 102.8(4). Subsection 102.8(6) also provides that the offence provision in section 102.8 does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

At the time section 102.8 was introduced into the *Criminal Code*, the Government considered the association offence to be necessary to address what is said to be the:

*fundamental unacceptability of terrorist organisations of themselves by making associating with such organisations in a manner which assists the continued existence or expansion of the organisation illegal.*<sup>448</sup>

When reviewing the association offence in section 102.8 the Security Legislation Review Committee concluded:

*The breadth of the offence, its lack of detail and certainty, along with the narrowness of its exemptions, has led the SLRC to conclude that considerable difficulties surround its practical application. Some of these difficulties include the offences' potential capture of a wide-range of legitimate activities, such as some social and religious festivals and gatherings and the provision of legal advice and legal representation. Further, the section is likely to result in significant prosecutorial complications.*<sup>449</sup>

The Law Council shares the view of the Security Legislative Review Committee. The Law Council believes the association offence is neither a necessary or proportionate means of preventing terrorist activity in Australia. Given the elements of the association offence are so difficult to define and the scope of the offence so broad, it applies indiscriminately to large sections of the community without any clear justification.

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<sup>446</sup> Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, (2006), para 10.20.

<sup>447</sup> *Criminal Code (Cth)* section 102.8(2).

<sup>448</sup> See Explanatory Memorandum to the *Anti-Terrorism Bill (No 2) 2004*.

<sup>449</sup> Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at para [10.75].

The existence of the exemptions in sub-sections 102.8(4) and 102.8(6) do little to allay these concerns. For example, the 'assurance' offered by 102.8(6) that the offence does not apply to the extent (if any) that it would infringe the constitutional doctrine of freedom of political communication, offers little practical guidance as to the limits of the offence. The sub-section appears to suggest that the offence provision could be applied in a manner which breaches the implied freedom and that the actual ambit of the offence can only be determined by challenging its constitutionality.<sup>450</sup>

The Security Legislative Review Committee recommended that section 102.8 be repealed. The Law Council strongly supports this recommendation. The current offence in section 102.8 criminalises mere association without clearly or precisely identifying any particular conduct worthy of attracting criminal punishment. It does not constitute an effective means of 'disrupting mechanisms which support the existence and expansion of terrorist organisations'<sup>451</sup> and fails to meet the requirements of a valid restriction of article 22 rights.

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<sup>450</sup> Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at [10.66].

<sup>451</sup> This was cited as the legislative intention behind the membership and association offences in Security Legislation Review, Attorney-General's Department Submission No 2, Response to Questions on Notice taken on notice during Hearing on 3 February 2006 (March 2006) p 3 available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(153683DB7E984D23214BD871B2AC75E8\)~Security+Legislation+Review+Committee+\\_Sheller+Review\\_+r.PDF/\\$file/Security+Legislation+Review+Committee+\\_Sheller+Review\\_+r.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(153683DB7E984D23214BD871B2AC75E8)~Security+Legislation+Review+Committee+_Sheller+Review_+r.PDF/$file/Security+Legislation+Review+Committee+_Sheller+Review_+r.PDF).

## 16. ARTICLE 25 RIGHT TO TAKE PART IN PUBLIC AFFAIRS AND VOTE

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*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

*(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*

*(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*

*(c) To have access, on general terms of equality, to public service in his country.*

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The right to vote and to take part in political affairs is protected by article 25. Article 25 does not create an absolute right for every person to vote in periodic elections, however, it does provide that any restriction of the right to vote must not be unreasonable.

In its General Comment on the article, this Committee observed:

*In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.<sup>452</sup>*

As noted in the Common Core Document, Australia's electoral system is based upon the democratic principle of universal adult suffrage; however certain restrictions to voting rights apply.<sup>453</sup>

For example, since 1902, Commonwealth legislation has provided that certain prisoners were not entitled to vote. Until 1983, persons sentenced or subject to be sentenced for an offence punishable by imprisonment for one year or longer could not vote. From 1983 to 1995, the relevant period of imprisonment was three years. From 1995 to 2004, the relevant period was altered to refer to those serving a sentence of five years or longer. From 2004 to 2006, the threshold was reduced to three years.

In 2006, the *Commonwealth Electoral Act* was amended to provide that people serving *any sentence of imprisonment* were disqualified from voting in federal elections. The Common Core Document reports:

*Legislation passed in June 2006<sup>454</sup> provides that prisoners serving a sentence of full time detention for an offence against a law of the*

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<sup>452</sup> In General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) 12/07/96.

<sup>453</sup> Common Core Document at [171]-[174].

<sup>454</sup> *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*

*Commonwealth or a State or Territory are not entitled to vote, but may remain on the roll, or if unenrolled, apply for enrolment. Those serving alternative sentences such as periodic or home detention, as well as those serving non-custodial sentences or who have been released on parole, are eligible to both enrol and vote. Prior to this legislation, a prisoner serving a sentence of three years or more was not entitled to vote.*<sup>455</sup>

The 2006 amendments to the *Electoral Act* attracted criticisms from a number of sectors of the Australia community. The amendments were thought to constitute an unreasonable restriction on the right to take part in federal elections and an unjustifiable expansion of the pre-existing restrictions.<sup>456</sup> In addition, it was thought to be contrary to the *Australian Constitution* and therefore invalid.<sup>457</sup>

In the lead up to the 2007 federal election, Vickie Lee Roach challenged the validity of the 2006 amendments.<sup>458</sup> Ms Roach was convicted in Victoria in 2004 on charges relating to robbery and serious injury and was sentenced to a total of six years' imprisonment with a four-year non-parole period. She challenged the 2006 amendments and the previous prisoner disenfranchise provisions of the *Electoral Act* on the grounds that they were:<sup>459</sup>

- contrary to section 7 and 24 of the *Australian Constitution*, which require that the Senate and the House of Representatives be 'directly chosen by the people';
- beyond the legislative powers of the Commonwealth;
- inconsistent with the implied rights to freedom of political participation and communication and not reasonably appropriate or adapted to a legitimate end; and
- incompatible with Chapter III of the *Australian Constitution* in that they amount to punishment.

By a 4-2 majority, the High Court held that the 2006 amendments were inconsistent with the system of representative democracy established by the *Australian Constitution*. The majority held that voting in elections lies at the heart of that system of representative government.<sup>460</sup> It found that disenfranchisement of a group of adult citizens without a substantial reason would be inconsistent with this constitutional principle.

The majority held that the 2006 amendments did not sufficiently distinguish more culpable conduct from conduct that was still criminal but less culpable.<sup>461</sup> For example, the amendments made no distinction between persons sentenced to long periods of imprisonment as a result of serious criminal activity and those persons imprisoned for a few days or imprisoned for committing offences of strict liability.

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<sup>455</sup> Common Core Document at [174].

<sup>456</sup> See Report of Senate Finance and Public Administration Committee Inquiry into *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005* (28 March 2006) available at [http://www.aph.gov.au/Senate/committee/fapa\\_ctte/completed\\_inquiries/2004-07/electoral\\_integrity/report/report.pdf](http://www.aph.gov.au/Senate/committee/fapa_ctte/completed_inquiries/2004-07/electoral_integrity/report/report.pdf). See also Australian Lawyers for Human Rights Media Release, 'Australian government removes the right to vote of Australian prisoners', (8 February 2006).

<sup>457</sup> Report of Senate Finance and Public Administration Committee Inquiry into *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005* (28 March 2006) p. 26.

<sup>458</sup> *Roach v Electoral Commissioner* (2007) 239 ALR 1.

<sup>459</sup> *Roach v Electoral Commissioner* (2007) 239 ALR 1 at [40]-[43].

<sup>460</sup> For example see *Roach v Electoral Commissioner* (2007) 239 ALR 1 at [77]–[83] per Gummow, Kirby and Crennan JJ.

<sup>461</sup> For example see *Roach v Electoral Commissioner* (2007) 239 ALR 1 at [93] per Gummow, Kirby and Crennan JJ.

Justice Gummow, Kirby and Crennan concluded that:

*The legislative pursuit of an end which stigmatises offenders by imposing a civil disability during any term of imprisonment takes [the 2006 amendments] beyond what is reasonably appropriate and adapted (or "proportionate") to the maintenance of representative government. The net of disqualification is cast too wide .... The result is that [the 2006 amendments] are invalid ....*<sup>462</sup>

The Court found that in contrast to the 2006 amendments, the three-year criterion in the pre-2006 legislation sufficiently distinguished between serious criminal culpability and less serious but still reprehensible conduct, and therefore were constitutionally valid.<sup>463</sup>

The Law Council welcomed the *Roach* decision as an important legal development that brings Australia into line with its obligations under article 25.

However, although the decision produced a positive result from the perspective of international human rights law, the case was determined without reference to article 25.

Instead, the outcome in the *Roach* case turned entirely on constitutional principles. While some members of the Court referred to decisions of courts in overseas jurisdictions, including the European Court of Human Rights,<sup>464</sup> any reference to international human rights law was extrinsic, rather than determinative, to the Court's reasons.

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<sup>462</sup> *Roach v Electoral Commissioner* (2007) 239 ALR 1 at [95] per Gummow, Kirby and Crennan JJ.

<sup>463</sup> For example see *Roach v Electoral Commissioner* (2007) 239 ALR 1 at [98]–[103] per Gummow, Kirby and Crennan JJ.

<sup>464</sup> For example *Roach v Electoral Commissioner* (2007) 239 ALR 1 at [16] per Gleeson CJ; at [100] per Gummow, Kirby and Crennan JJ

## **17. ARTICLE 26 FREEDOM FROM DISCRIMINATION**

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*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

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Freedom from discrimination and equality before the law have already been addressed earlier in this report in the context of the rights of Indigenous Australians and in respect of the general legal framework in which human rights are protected and promoted in Australia.

In this section of the Shadow Report, the Law Council will focus on discrimination experienced by same sex couples in Australia.

### **17.1 Discrimination Against Same Sex Couples**

#### **17.1.1 Exclusion of same sex couples from definition of “marriage”**

In August 2004 amendments were made to the *Marriage Act 1961* reinforcing the common law position in Australia that a legally valid marriage can only exist between one man and one woman to the exclusion of all others. The Common Core Document described these amendments as follows:

*The Australian Government believes that same-sex relationships should not be given the same legal status as [traditional] marriage. The Australian Government believes overwhelmingly in the institution of marriage and, in 2004, acted to define in legislation the common understanding in our community of marriage which is ‘the union of a man and a woman, to the exclusion of all others, voluntarily entered into for life’. Accordingly amendments were made to the formal definition of marriage in the Marriage Act 1961 and were passed with bi-partisan support in 2004. The amendments also confirm that Australia will not recognise as valid same-sex marriages entered into in another country.<sup>465</sup>*

According to the Explanatory Memorandum to the *Marriage Amendment Bill 2004*, the intention of the amendments was ‘to give effect to the Government’s commitment to protect the institution of marriage by ensuring that marriage means a union of a man and a woman and that same-sex relationships cannot be equated with marriage’. The consequence of the 2004 amendments is that for a sector of the Australian population, the full range of legal recognition conferred by marriage will, without further action, remain unattainable.

This policy of preserving marriage as ‘a union between a man and a woman’ not open to same sex couples was vigorously pursued by the Commonwealth Government when the Australian Capital Territory (ACT) Parliament passed the *Civil*

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<sup>465</sup> Common Core Document at [335].

*Unions Act 2006*. The *Civil Unions Act* enabled couples including same-sex couples to enter into and register a 'civil union' which is defined as a legally recognised relationship that may be entered into by two people regardless of sex. The Act did not mention marriage but provided an alternative vehicle for state recognition of relationships, whether same-sex or otherwise. On 13 June 2006, the Commonwealth Government acted to invalidate the *Civil Union Act* which it believed 'compromised the unique status of marriage'.<sup>466</sup>

Following the federal election in November 2007, the ACT Government remained determined to pursue its civil unions legislation. In May 2008 the ACT Government passed the *Civil Partnerships Act 2008* (ACT) which allows same sex couples to register their relationship as a civil partnership but excludes any legally binding 'civil ceremony'. The ACT had been forced to abandon plans to legally recognise same-sex civil union ceremonies after the new Commonwealth Government gave the ACT Government clear advice that it intended to override the *Civil Union Act* if reintroduced in ACT Parliament. This time the Commonwealth Government objected to the proposed ACT law on the grounds that it 'mimicked marriage'.<sup>467</sup>

The Law Council is of the view that the determination of the Australian Government (past and present) to preserve a privileged class of 'state sanctioned' relationships, which is not open to same sex couples, is inherently discriminatory and offends against article 26 of the ICCPR.

Exclusion of same sex couples from the definition of marriage permeates many other spheres of social interaction and results in wide-spread inequality between same sex and opposite-sex couples.

### 17.1.2. Article 23 and same sex marriage

In the Common Core Document, Australia reports on its amendments to the *Marriage Act 1961* (Cth) and the continued exclusion of same sex couples from the definition of 'marriage', under the heading "Right to marry and found family, protection of the family and mother and child".

The right to marriage in Article 23(2) refers to the right of "*men and women ... to marry and to found a family*". In 2002 this Committee considered whether this right gave rise to an obligation on state parties to protect same sex marriage in the case of *Joslin v New Zealand*.<sup>468</sup> The Committee found that under Article 23(2) states are only required to recognise marriage between a man and a woman. This is not, however, an unequivocal position as international jurisprudence, state practice and other international instruments demonstrate that this issue remains unresolved.

To interpret Article 23 in isolation would be to ignore developments in international law since the ICCPR was drafted. For example, the *Hague Convention on the Recognition and Celebration of Marriages*<sup>469</sup> to which Australia is a signatory

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<sup>466</sup> See Common Core Document at [335]. As explained in the Common Core Document at [30], under the Australian Constitution the Commonwealth Parliament retains the legislative power to make laws in respect of the Territories, including the ACT. This extends to the power to revoke or amend law making powers of the Parliaments of the Territories.

<sup>467</sup> ABC News Online, 'Assembly passes civil unions law' (9 May 2008).

<sup>468</sup> *Joslin v New Zealand* (2002) Communication No 902/1999.

<sup>469</sup> Opened for signature, 14 March 1978, [1991] ATS 16, entered into force for Australia and generally on 1 May 1991.

deliberately avoids a definition of marriage, with the intent that the term 'marriage' should be understood in its 'broadest international sense'.<sup>470</sup>

Moreover, Article 23 can only be understood meaningfully if it is interpreted in light of other ICCPR rights – including the right to freedom from discrimination.

The right to non-discrimination, equality before the law and the equal protection of the law are protected by Article 26 of the ICCPR and are accepted as fundamental principles of human rights law. Decisions of the this Committee have made it clear that the obligation in Article 26 extends to an obligation to prevent discrimination in the law, such as on the grounds of sexual preference, in the application of the law or in any action under the authority of the law.<sup>471</sup> This suggests that a narrow interpretation of marriage which only recognises a particular sector of Australian society is inherently discriminatory. This approach was recognised by two members of this Committee in the case of *Joslin*, where it was observed that, if states parties deny marriage to same-sex couples, they must extend marriage-like rights to same-sex couples under a separate regime. The absence of an equivalent national civil alternative to marriage, providing same-sex couples the opportunity to publicly affirm their commitment to each other, denies formal recognition of their relationships and status as a family units under Article 23.

It may also be arguable that the continued prevention of same-sex marriage constitutes an arbitrary interference with the family unit, which is protected by article 17 of the ICCPR.<sup>472</sup>

It can be seen that when Article 23 is considered in the context with other rights provided under the ICCPR Australia owes an obligation to ensure all Australians enjoy equality before the law and equal protection of the law, including same-sex couples.

### 17.1.3 Evolving concept of family and marriage

The Law Council is of the view that Australia's obligations in respect of Article 23 should be considered in the context of the evolving concept of marriage in secular, pluralistic societies around the world and the growing body of international jurisprudence acknowledging the legitimacy of the right to marry for same-sex couples.<sup>473</sup>

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<sup>470</sup> A Malmstrom, *Explanatory Report, Actes et Documents de la XIIIe Session 1976*, Tome III, p41, cited in 'HREOC Submission to the Senate Legal and Constitutional Legislation Committee on The Provisions of the Marriage Legislation Amendment Bill 2004', 26 August 2004.

<sup>471</sup> See for example *Young v Australia* (2002) Communication No 941/2000.

<sup>472</sup> James Hathaway's four-tiered analysis of human rights law places the right to privacy in the second tier – a right which cannot be derogated from except in a state of emergency. James Hathaway, *The Law of Refugee Status*, 1991, (Butterworths, Toronto); cited in Kristen Walker, 'The Importance of Being Out: Sexuality and Refugee Status', Vol 18, *Sydney Law Review*, 568, at 582. He has used this fact to argue, for example, that the criminalisation of sexual activity amounts to persecution and a violation of this right. In 1994 in *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) the UNHRC confirmed that it considers the criminalisation of gay male sex amounts to a violation of the right to privacy.

<sup>473</sup> For example, the legitimacy of the right to marry for same-sex couples has been recognised in Canada. In *M. v. H., M. v. H.*, [1999] 2 S.C.R. 3, (1999), 171 D.L.R. (4th) 577, per Justices Cory and Iacobucci the Supreme Court of Canada upheld the right of a person to seek spousal support from a same-sex partner with whom that person had cohabited. A similar conclusion was reached in May 2008 by the Supreme Court of California in *Re Marriage Cases* (2008) S147999 [Super. Ct. S.F. City & County, No. 4365]. where the Court held that there was no express prohibition. In coming to its decision,

In the Californian case of *re Marriage Cases*, the Court opined that the core substantive rights of marriage include:

*the opportunity of an individual to establish — with the person with whom the individual has chosen to share his or her life — an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage. As past cases establish, the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own — and, if the couple chooses, to raise children within that family — constitutes a vitally important attribute of the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for the benefit of both the individual and society.*<sup>474</sup>

A large number of countries have chosen to recognise that marriage is not limited to a union between heterosexual couples. For example, same-sex marriages are now legally recognised in jurisdictions including the Netherlands, Belgium, Spain, Canada, South Africa, Massachusetts and most recently in California. There is also legal recognition of the union of same-sex couples in a number of other foreign jurisdictions including France, Germany, New Zealand, Denmark, Finland, Norway, Portugal, Sweden, Switzerland, the United Kingdom and the Czech Republic.<sup>475</sup>

In Australian jurisprudence, the High Court has also foreshadowed that the concept of marriage may evolve. McHugh J, in *Re Wakim; Ex parte McNally* said:

*.. in 1901 'marriage' was seen as meaning a voluntary union of life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same-sex marriages, although arguably 'marriage' now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.*<sup>476</sup>

A number of state and territory governments have also recognised the evolving concept of marriage within Australian society and have addressed the issue within the scope of their power.<sup>477</sup> For example, in Tasmania, the *Relationships Act 2003* granted couples including same-sex couples the opportunity to register a deed of relationship in relation to a 'significant or caring relationship' It fell short only of calling those relationships 'marriage', though for all intents and purposes the outcome was intended to be the same.

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the Court reasoned that the concept of marriage is imbued with basic substantive rights and attributes that are integral to an individual's personal liberty and autonomy.

<sup>474</sup> *Re Marriage Cases* (2008) S147999 [Super. Ct. S.F. City & County, No. 4365].

<sup>475</sup> *Young v Australia* (2000) Communication No 941/00 at [10.4]; *Toonen v Australia* (1992) Communication No 488/1992.

<sup>476</sup> *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553.

<sup>477</sup> See for example *Civil Partnerships Act 2008* (ACT); *Relationships Act 2003* (Tas); *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA); *Relationships Act 2008* (Vic); *Statutes Amendment (Domestic Partners) Act 2006* (SA).

#### 17.1.4 Discrimination against Same Sex Couples

In 2007 HREOC reported that over 20,000 couples in Australia experience systematic discrimination on a daily basis.<sup>478</sup> Discriminatory laws act to deny same sex couples and their families basic financial and work-related entitlements which opposite-sex couples and their families take for granted. People who suffer discrimination on the grounds of their sexuality are often left with no effective remedy under federal law.<sup>479</sup>

The existence of laws and policies discriminating against same sex couples in Australia has been recognised by the international community as a breach of the freedom from discrimination contained in article 26 of the ICCPR.

On 4 September 2003 this Committee determined that the Australian Government had breached the human rights of a Sydney man by refusing his application for a veteran's dependant pension on the grounds that same-sex relationships are not recognised in Federal law.<sup>480</sup> The Committee concluded that as Australia had failed to demonstrate reasonable and objective grounds for distinguishing between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, Australia was in violation of article 26.

The Australian community has also acknowledged the existence of discriminatory laws and policies that operate unfairly on same sex couples. The high incidence of discrimination against same sex couples was publicly highlighted by the findings of HREOC's *Same-Sex: Same Entitlements Inquiry* conducted in 2007.

The *Same-Sex: Same Entitlements Inquiry* found that 58 federal laws<sup>481</sup> breached the human rights of more than 20,000 same-sex couples in Australia.

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<sup>478</sup> HREOC, *Same-Sex: Same Entitlements Inquiry* (2007). Report available at [www.hreoc.gov.au/Human\\_Rights/samesex/report/index.html](http://www.hreoc.gov.au/Human_Rights/samesex/report/index.html)

<sup>479</sup> Discrimination on the basis of sexual orientation is not listed as a specific ground of unlawful discrimination under federal anti-discrimination laws. The *Workplace Relations Act 1996* (Cth) s 659 makes it unlawful to dismiss someone because of their sexual preference, or for reasons which include their sexual preference. While this provides an effective remedy for a person who is dismissed on the grounds of their sexual orientation, the remedy is limited to discrimination in the context of dismissal from employment.

<sup>480</sup> *Young v Australia* (2000) Communication No 941/2000:

<sup>481</sup> *A New Tax System (Family Assistance) Act 1999* (Cth), *Aboriginal Councils and Associations Act 1976* (Cth) *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) *Aged Care Act 1997* (Cth) *Australian Meat and Live-Stock Industry Act 1997* (Cth) *Bankruptcy Act 1966* (Cth) *Broadcasting Services Act 1992* (Cth) *Child Support (Assessment) Act 1989* (Cth) *Civil Aviation (Carriers' Liability) Act 1959* (Cth) *Corporations Act 2001* (Cth) *Defence Act 1903* (Cth) *Defence Force (Home Loans Assistance) Act 1990* (Cth) *Defence Force Retirement and Death Benefits Act 1973* (Cth) *Diplomatic Privileges and Immunities Act 1967* (Cth) *Education Services for Overseas Students Act 2000* (Cth) *Family Law Act 1975* (Cth) Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006 (seeking to amend the *Federal Magistrates Act 1999* (Cth) *Financial Sector (Shareholdings) Act 1998* (Cth) *Foreign Acquisitions and Takeovers Act 1975* (Cth) *Foreign Acquisitions and Takeovers Regulations 1989* (Cth) *Foreign States Immunities Act 1985* (Cth) *Fringe Benefits Tax Assessment Act 1986* (Cth) *Governor-General Act 1974* (Cth) *Health Insurance Act 1973* (Cth) *Higher Education Funding Act 1988* (Cth) *Higher Education Support Act 2003* (Cth) *Income Tax Assessment Act 1936* (Cth) *Income Tax Assessment Act 1997* (Cth) *Income Tax Regulations 1936* (Cth) *Insurance Acquisitions and Takeovers Act 1991* (Cth) *International Organisations (Privileges and Immunities) Act 1963* (Cth) *Judges' Pensions Act 1968* (Cth) *Judicial and Statutory Officers (Remuneration and Allowances) Act 1984* (Cth) *Life Insurance Act 1995* (Cth) *Medicare Levy Act 1986* (Cth) *Members of Parliament (Life Gold Pass) Act 2002* (Cth) *Migration Regulations 1994* (Cth) *Military Rehabilitation and Compensation Act 2004* (Cth) *Military Superannuation and Benefits Trust Deed* (made under s 5(1) of the *Military Superannuation and Benefits Act 1991* (Cth)) *National Health Act 1953* (Cth) *Parliamentary*

The primary cause of the discrimination against same-sex couples was found to lie in the definitions those laws use to describe a couple or a family. Broadly speaking, those definitions can be grouped into the following categories:

- definitions using the words 'opposite sex' to describe a couple;
- definitions using the words 'husband or wife' to describe a couple;
- definitions using the words 'spouse' or 'de facto spouse' to describe a couple; and
- definitions using the words 'marriage-like relationship' to describe a couple.

Each of these definitions includes an opposite-sex couple, whether or not they are married. None of those definitions includes a same-sex couple. The consequence of these narrow definitions and interpretations is that a genuine same-sex couple cannot access the financial and work-related rights and entitlements available to an opposite-sex couple.

The HREOC Inquiry also found that children of same-sex couples are excluded from some definitions describing parent-child relationships. This is because legislative definitions used to describe the relationship between a child and his or her parents generally only recognise a birth mother and birth father as legal parents. The legal status of a lesbian co-mother or gay co-father(s) of a child is extremely uncertain.

As a result, a same-sex family will often have more difficulty accessing financial and work-related benefits, which are intended to support children, than an opposite-sex family. This may mean that the best interests of a child born to a same-sex couple will be compromised.

HREOC also found that same-sex couples and their families face direct discrimination in terms of financial and work-related entitlements when compared to opposite-sex couples and their families. For example, under current Australia laws a same-sex partner:

- is not guaranteed the same carer's, parental or compassionate leave as an opposite-sex partner;
- is not adequately protected from discrimination in the workplace on the grounds of sexual orientation; and
- is not entitled to lump sum workers' compensation death benefits available to an opposite-sex partner.

There are also a number of areas of social security law where there is clearly a negative impact, and therefore discrimination against same-sex couples. For example, a same-sex partner cannot access the parental allowance, bereavement benefits, widow allowance, concession card benefits, income support supplement or widow's pension entitlements available to an opposite sex partner.

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*Contributory Superannuation Act 1948 (Cth) Parliamentary Entitlements Act 1990 (Cth) Passenger Movement Charge Collection Act 1978 (Cth) Pooled Development Funds Act 1992 (Cth) Proceeds of Crime Act 2002 (Cth) Remuneration Tribunal Determination 2006/14: Members of Parliament – Travelling Allowance Remuneration Tribunal Determination 2006/18: Members of Parliament – Entitlements Retirement Savings Accounts Act 1997 (Cth) Safety, Rehabilitation and Compensation Act 1988 (Cth) Seafarers Rehabilitation and Compensation Act 1992 (Cth) Social Security Act 1991 (Cth) Superannuation (Public Sector Superannuation Accumulation Plan) Trust Deed (made under s 10 of the Superannuation Act 2005 (Cth)) Superannuation Act 1976 (Cth) Superannuation Act 1990 (Cth) Superannuation Industry (Supervision) Act 1993 (Cth) Superannuation Industry (Supervision) Regulations 1994 (Cth) Veterans' Entitlements Act 1986 (Cth) Workplace Relations Act 1996 (Cth).*

The HREOC Inquiry recommended that the Australian Government amend the 58 discriminatory laws identified by the Inquiry to ensure that same-sex and opposite-sex couples enjoy the same financial and work-related entitlements and ensure that the best interests of children in same-sex and opposite-sex families are equally protected.

On 30 April 2008 the Rudd Government announced plans to introduce legislation during the 2008 sittings of Parliament to eliminate discrimination against same sex couples in over 100 areas of Commonwealth law. This includes the 58 areas identified by HREOC in its 2007 report and many further areas identified by additional Government research.

In May 2008 the first bundle of legislative reforms were introduced, which if passed, will begin to address discrimination against same sex couples in the area of superannuation, defence force benefits, judges pensions and parliamentary superannuation and pension schemes.<sup>482</sup>

The Law Council welcomes this commitment from the Rudd Government towards eliminating discrimination against same sex couples. If each of the laws identified as discriminatory can be amended, a significant component of legal discrimination against same sex couples will be eliminated. However, unless the Australian Government also takes steps to amend the provisions of the *Marriage Act* that preserve a special class of state-sanctioned relationship which is closed to same-sex couples, discrimination will persist.

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<sup>482</sup> See *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008*.

## **Attachment A – Profile of Law Council of Australia**

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The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

## **Attachment B – List of Acronyms**

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AAT – Administrative Appeals Tribunal

ABA - Aboriginal Benefits Account

ACC – Australian Crime Commission

ACT - Australian Capital Territory

AFP – Australian Federal Police

ALRA - *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*

ALRC – Australian Law Reform Commission

AMC – Australian Military Court

ASIO – Australian Security and Intelligence Organisation

ATSIC - Aboriginal and Torres Strait Islander Commission

CAT Convention against Torture

CERD - *Convention on the Elimination of All Forms of Racial Discrimination*

CERD Committee - UN Committee on the Elimination of Racial Human Rights

CRC - Convention on the Rights of the Child

DRIP - *Declaration on the Rights of Indigenous People*

HREOC – Human Rights and Equal Opportunity Commission

ICC – International Criminal Court

ICCPR International Covenant on Civil and Political Rights

IDS – Immigration Detention Standards

MOU – Memorandum of Understanding

NIC -National Indigenous Council

NSW - New South Wales

PJCIS - Parliamentary Joint Committee on Intelligence and Security

RRT – Refugee Review Tribunal

TIA Act – *Telecommunications (Interception and Access) Act 1979 (Cth)*

UN – United Nations