



Human Rights
Law Centre

**Review of Australia's Counter-Terrorism
and National Security Legislation**

**Submission to the
Independent National Security Legislation Monitor**

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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1. Introduction

1. This submission by the Human Rights Law Centre (**HRLC**) is provided to the Independent National Security Legislation Monitor (**Monitor**). The Monitor was appointed under the *Independent National Security Legislation Monitor Act 2010* (Cth) and is empowered to review and report on Australia's counter-terrorism and national security legislation, including its compliance with Australia's international human rights obligations.¹
2. This submission gives primary attention to provisions of Australia's counter-terrorism and national security legislation enacted since 2001 that impact on individuals' rights and raise concerns with compliance with international human rights obligations under relevant treaties to which Australia is a party.
3. The HRLC acknowledges that some of the recommendations made to previous reviews of Australia's counter-terrorism laws have already been adopted and so this submission therefore does not re-visit these submissions. However, we also note that previous reviews have not addressed some of the most problematic aspects of Australia's counter-terrorism laws insofar as human rights issues are concerned, including those relating to:
 - (a) the overbroad definition of "terrorist act";
 - (b) control orders;
 - (c) preventative detention;
 - (d) ASIO detention powers;
 - (e) the listing of "terrorist organisations"; and
 - (f) offences relating to association with a terrorist organisation.
4. This submission therefore seeks to address some of these major concerns.

2. Human Rights and Counter-Terror Laws

2.1 Human Rights Engaged by Counter-Terror Laws and Measures

5. The HRLC is concerned that Australia's counter-terrorism laws violate a number of Australia's international law obligations to respect, protect and fulfil human rights, in particular the rights set out in the *International Covenant on Civil and Political Rights (ICCPR)*. The counter-terrorism regime, as it currently exists, limits the following rights protected in the ICCPR:
 - (a) freedom from arbitrary detention (article 9);

¹ *Independent National Security Legislation Monitor Act 2010* (Cth), s 3(c)(i).

- (b) freedom of movement (article 12);
- (c) right to a fair trial (article 14);
- (d) right to privacy (article 17);
- (e) freedom of religion (article 18);
- (f) freedom of opinion and expression (article 19);
- (g) freedom of association (article 22);
- (h) equality and non-discrimination (articles 2(1) and 26); and
- (i) minority rights (article 27).

2.2 Permissible Limitations on Human Rights

6. None of the rights set out above are absolute. Under the ICCPR, each of the rights can be limited, but only in particular circumstances and to the extent necessary. A proportionality analysis is used to determine whether a right can be limited and the extent to which a limitation is lawful. That proportionality test for limitation of ICCPR rights can be stated in general terms (although strictly speaking under the ICCPR each of these rights is limited by words contained within the articulation of the right itself).²
7. Put broadly, general provisions setting out a proportionality analysis require that any limitation of rights be reasonable and demonstrably justified in a free and democratic society.³ This is a two stage process.
8. First, the purpose of the limitation on the right must be of sufficient importance to a free and democratic society to justify limiting the right.⁴ This might also be described as requiring a “pressing and substantial” objective,⁵ reflecting a need to balance the interests of society with those of individuals and groups. Examples of purposes for limitations that might accord with a free and democratic society include protection of public security, public order, public safety or public health.
9. Second, the means used by the state to limit rights must be proportionate to the purpose of the limitation. The most widely accepted test of proportionality is derived from the Canadian

² As Bell J stated in *Kracke v Mental Health Review Board* [2009] VCAT 646, [105], the internal limitations provisions in ICCPR rights “call up a proportionality analysis in various ways”.

³ Words to this effect are used in section 7 of the *Victorian Charter of Human Rights and Responsibilities Act*, section 1 of the *Canadian Charter of Rights and Freedoms*, section 5 of the *New Zealand Bill of Rights Act* and section 36 of the *South African Constitution*.

⁴ *R v Oakes* [1986] 1 SCR 103, [69] – [71] (Dickson CJ).

⁵ The Supreme Court in *Canada (Attorney-General) v Hislop* [2007] 1 SCR 429, [44]. See also *R v Oakes* [1986] 1 SCR 103, cited with approval by Bell J in *Kracke v Mental Health Review Board* [2009] VCAT 646, [145].

case *R v Oakes*.⁶ In that case, the Supreme Court of Canada set out the three components of a proportionality test:

There are three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance.”⁷

10. The onus of establishing that a limitation is reasonable and demonstrably justified rests on the party seeking to rely on the limitation, which will usually be the government.⁸ The standard of proof is generally the balance of probabilities, although it may change in given circumstances, requiring “a degree of probability which is commensurate with the occasion”.⁹ That is, the more serious the infringement of rights, the more important the objective of the limitation of those rights must be to a free and democratic society, and the higher the standard of proof will be for the State.¹⁰
11. Finally, the state may only take measures that derogate (or suspend) the enjoyment of these particular rights in times of a public emergency which threatens the life of the nation, and in those circumstances only to the extent strictly required by the exigencies of the situation.¹¹

3. Amendments to the *Criminal Code*

3.1 Definition of “Terrorist Act”

Criminal Code Act 1995 (Cth), section 100.1(1)

12. The HRLC remains concerned about the excessively broad definition of “terrorist act” contained in the *Criminal Code Act 1995 (Cth)* (***Criminal Code***), which goes beyond internationally accepted definition of terrorism. Given the serious consequences associated with terrorism related offences, it is crucial that the definition of “terrorist act” is reasoned, proportionate and adapted to risks arising in Australia.

⁶ [1986] 1 SCR 103.

⁷ [1986] 1 SCR 103, 43.

⁸ *Ibid*, 66. *Kracke v Mental Health Review Board* [2009] VCAT 646, 108

⁹ See Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009), [147] citing *Bater v Bater* [1950] 2 All ER 458, 459 (Lord Denning).

¹⁰ See Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009), [150].

¹¹ Article 4, ICCPR.

13. The United Nations Human Rights Committee and the United Nations Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism have both expressed concern with definition of “terrorist act” in the *Criminal Code*. In December 2006, the Special Rapporteur released a report on Australia's counter-terrorism law and practice and strongly urged Australia to reconsider its broad definition of a “terrorist act”, which fails to clearly distinguish between terrorist conduct and ordinary criminal conduct. The Special Rapporteur was of the view that:

The definition goes beyond the UN Security Council's characterisation of the type of conduct which should be targeted in countering terrorism, as it criminalises activity without requiring an element of intention ‘to cause death or serious bodily injury, or the taking of hostages.’¹²

14. In 2009, the Human Rights Committee expressed similar concerns to those of the Special Rapporteur. In its Concluding Observations, the Committee recommended that Australia address “the vagueness of the definition of terrorist act in the Criminal Code Act 1995, in order to ensure that its application is limited to offences that are indisputably terrorist offences.”¹³
15. The HRLC is concerned that “threat of action” remains in the definition of a “terrorist act”. This means that any act preparatory to or in planning for a *threat* would be an offence and could potentially result in thoughts and conversations being criminalised. The inclusion of “threat” in the definition may therefore result in a disproportionate restriction on freedom of expression and undermine democratic principles. Conduct should not be criminalised within a counter-terrorism framework unless accompanied by an element of intention as identified by the UN Security Council.¹⁴

3.2 Proscription of Terrorist Organisations

Criminal Code Act 1995 (Cth), sections 102.1(2) and 102.1(1A)(c)

16. Section 102.1(2) of the *Criminal Code* gives the Attorney-General broad power to proscribe an organisation as a “terrorist organisation” on the basis that it, among other things, directly advocates the doing of a terrorist act.¹⁵ The HRLC considers that the broad definition of “advocates” is unworkable and problematic as it enables the Attorney-General to proscribe an organisation without any need for the organisation to be actively involved in a terrorist act. This concern was identified by the Sheller Committee, as well as the risk that innocent

¹² Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006), [15].

¹³ UN Human Rights Committee, *Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), [11].

¹⁴ UN Security Council resolution 1566 (2004) on “Threats to international peace and security caused by terrorist acts”.

¹⁵ *Criminal Code 1995 (Cth)*, s 102.1(1A).

members of organisations may be caught by the loosely framed definition.¹⁶ The proscription of an organisation as a “terrorist organisation” may unjustifiably infringe the right of freedom of religious and political expression and the right to freedom of association protected in the ICCPR.

17. There is also a concern about the discriminatory way in which the proscription of “terrorist organisations” has occurred. To date, 19 organisations have been listed as “terrorist organisations”,¹⁷ with all but one being self-identified Islamic organisations.
18. Furthermore, there is no option to review the factual merits of the Attorney-General's decision to proscribe an organisation as a “terrorist organisation”. Judicial review is confined to review of the legal process by which the decision was made. The absence of merits review is particularly concerning given the serious consequences of proscription, including potential infringement of fundamental rights such as freedom of expression and the potential criminalisation of association.
19. The process of proscription should be reformed to provide notification (if practicable) to a person or organisation affected when the proscription of an organisation is proposed, as recommended by the Sheller Committee in 2006.¹⁸ Such notification should also provide the means and right for persons and organisations to be heard in opposition and to provide for the establishment of a committee to advise the Attorney-General on cases that have been submitted for proscription of an organisation.

3.3 Association with a Terrorist Organisation

Criminal Code Act 1995 (Cth), section 102.8

20. Under section 102.8 of the Criminal Code, it is an offence to associate with a member of a terrorist organisation or a person who promotes or directs the activities of such an organisation. The breadth of this offence directly limits freedom of association protected in article 21 of the ICCPR and, in certain circumstances, may do so unreasonably or disproportionately. This may particularly be the case where association with an organisation is purely an innocent association. The HRLC recommends that section 102.8 be repealed, as has previously been recommended by the Sheller Committee.¹⁹

¹⁶ Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006), 190 (the “Sheller Committee” report).

¹⁷ Commonwealth Attorney-General's Department, *National Security: What Governments are Doing*, <<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>> at 26 October 2011.

¹⁸ Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, [9.34].

¹⁹ *Ibid* [10.77].

3.4 Intentionally Providing Support or Resources to a Terrorist Organisation

Criminal Code Act 1995 (Cth), section 102.7

21. Under section 102.7 of the Criminal Code, it is an offence to intentionally provide support or resources to an organisation that would help that organisation to engage in preparing, planning, assisting in or fostering the doing of a terrorist act. The HRLC submits that the word “material” should be inserted before “support” in order to clarify that the level of support required to commit the offence goes beyond mere support. Further, the section should be amended to ensure that the word “support” cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objectives.

3.5 Training Offences

Criminal Code Act 1995 (Cth), section 102.5

22. Under section 102.5 of the Criminal Code, it is an offence for a person to intentionally provide training to or receive training from a terrorist organisation. This offence is a strict liability offence, which effectively means that a person cannot contest the factual merits of whether an organisation is a terrorist organisation. Strict liability under section 102.5(3) should be repealed.
23. The penalty of imprisonment for 25 years for intentionally providing training to or receiving training from a terrorist organisation is completely disproportionate to the fault element of the offence, which is mere recklessness as to whether the organisation is a terrorist organisation. The HRLC therefore recommends that section 102.4(1)(c) be amended to require a person to have actual knowledge that the organisation is a terrorist organisation.
24. The HRLC also recommends that the training offence in section 102.5 of the *Criminal Code* be redrafted so that it is an element of the offence that the training is either connected with a terrorist act or is such as could reasonably prepare the organisation, or the person receiving the training, to engage in or assist with a terrorist act.

3.6 Control Orders

Criminal Code Act 1995 (Cth), Division 104

25. A control order imposes restrictions on a person for the purpose of protecting the public from a terrorist act²⁰ (eg by house arrest or use of an electronic tracking device). It is an offence to contravene the terms of a control order, rendering the person liable to imprisonment for up to

²⁰ *Criminal Code 1995 (Cth)*, s 104.1.

five years.²¹ Control orders are valid for up to 12 months,²² but can be subsequently be renewed for further periods up to 12 months.

26. The HRLC is concerned that the process for obtaining a control order, where it is based on secret information, lacks safeguards of transparency, due process and regular review. The issue of an order is based on a civil standard of proof.
27. A number of recent court decisions in the United Kingdom have considered the impact of control orders on the right to a fair trial, including that control orders cannot be based entirely on undisclosed evidence and that individuals must be given sufficient information to effectively answer the allegations against them.²³
28. The HRLC emphasises the importance of control orders being proportionate and strictly necessary and that they should not cumulate in a way that amounts to detention. Orders should not unduly interfere with rights to family, employment and education, and the imposition of house arrest must be subject to safeguards. The control order regime should be reviewed immediately in order to bring the provisions in line with Australia's international human rights obligations.

3.7 Preventive Detention Orders

Criminal Code Act 1995 (Cth), Division 105

29. Preventative detention orders, which allow for detention of a person for up to 48 hours²⁴ (renewable by judicial officer for a further 48 hours)²⁵ may be issued where:
 - (a) there are reasonable grounds to suspect an imminent threat to commit a terrorist act, including where the person is in possession of materials for such purposes or had acted in furtherance of that purpose; and
 - (b) the person's detention would substantially assist in preventing a terrorist act from occurring; and
 - (c) detaining the person is reasonably necessary for preventing a terrorist act from occurring.²⁶

²¹ *Criminal Code 1995 (Cth)*, s 104.27.

²² *Criminal Code 1995 (Cth)*, s 104.5.

²³ See, eg *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28 (10 June 2009)

²⁴ *Criminal Code 1995 (Cth)*, s 105.9(2).

²⁵ *Criminal Code 1995 (Cth)*, s 105.12(5).

²⁶ *Criminal Code 1995 (Cth)*, s 105.4.

30. The HRLC has a number of concerns with various aspects of the preventative detention regime, namely:
- (a) an individual can be detained on virtually untested bases and information;
 - (b) a preventative detention warrant can be made by a senior member of the Australian Federal Police with no requirement of judicial authorisation;²⁷
 - (c) there is no ability to appeal or challenge the detention;
 - (d) an individual subject to a preventative detention order is held in circumstances of extreme secrecy and may effectively be held incommunicado, except for limited contact with family; and
 - (e) contact with a lawyer may be prohibited through a "prohibited contact order".²⁸
31. The HRLC is concerned over the potential use, in the making of preventive-detention orders, of secret information, as the use of such information is potentially contrary to the right to a fair trial.

3.8 Public Order Offences

Criminal Code Act 1995 (Cth), sections 80.2A and 80.2B

32. The public order offences in sections 80.2A(1) and 80.2B(1) of the *Criminal Code* cover, to a large degree, conduct that could be prosecuted under sections 80.2(1) and (3) as offences that have an intention to incite violence against an authority.
33. It is not clear that there is any need for provisions in the *Criminal Code* that prohibit intergroup violence that threatens the peace, order and good government of the Commonwealth and the government should articulate the need for these laws. If the provisions are retained, they should require an express intention that the urging of group violence was done with the intention of threatening the peace, order and good government of the Commonwealth, and not merely that the force or violence had that effect.

²⁷ *Criminal Code 1995 (Cth)*, ss 105.7 and 105.8.

²⁸ *Criminal Code 1995 (Cth)*, ss 105.14A, 105.15, 105.16.

4. Amendments to the *Crimes Act 1914*

4.1 Detention of Persons Without Charge

Crimes Act 1914 (Cth), sections 23, 23C, 23D, 23CA

34. Suspects can be detained without charge for questioning in relation to terrorism and other serious Commonwealth offences. Non-terrorism suspects may be held for four hours,²⁹ which can be extended by another eight hours³⁰ (ie 12 hours in total). Terrorism suspects can initially be held for four hours,³¹ which can be extended by another 20 hours³² (ie 24 hours in total). The fact that an individual can be detained for longer if accused of a terror-related offence raises concerns regarding the right to be free from arbitrary detention.
35. The actual time spent in detention may be significantly longer than these limits, however, because up to seven days of “dead time” may be disregarded from the investigation period.³³ The HRLC is concerned that in some circumstances the length of pre-charge detention may not be proportionate, which is incompatible with obligations under article 9(1) of the ICCPR.
36. The HRLC recommends that the reasonable “dead time” exclusionary power should be repealed and a cap placed on pre-charge detention of 48 hours.

4.2 Stop, Search and Question Powers

Crimes Act 1914 (Cth), sections 3UA to 3UK

37. There are provisions granting powers to the Australian Federal Police (AFP) to stop, question and search a person where it is reasonably suspected that the person might have just committed, might be committing or might be about to commit, a terrorist act or where a person is in a “prescribed security zone” (as declared by the Attorney-General).³⁴
38. Where an area is declared as a prescribed security zone by the Attorney-General, the declaration has a life of 28 days.³⁵ This imposes a potentially unnecessary or disproportionate interference upon liberty and security and could impact on the right to express political opinions through lawful demonstrations. The HRLC recommends that declarations sunset after 14 days.

²⁹ *Crimes Act 1914 (Cth)*, s 23C(4).

³⁰ *Crimes Act 1914 (Cth)*, s 23DA(7).

³¹ *Crimes Act 1914 (Cth)*, s 23DB(5).

³² *Crimes Act 1914 (Cth)*, s 23DF(7).

³³ *Crimes Act 1914 (Cth)*, s 23DF(11).

³⁴ *Crimes Act 1914 (Cth)*, s 3UB.

³⁵ *Crimes Act 1914 (Cth)*, s 3UJ(3).

4.3 Powers of Entry Without a Warrant

Crimes Act 1914 (Cth), sections 3UEA, 3J(2)(aa), 3JA

39. Under section 3UEA of the *Crimes Act*:

- (a) the AFP is given broad power to enter private premises without a warrant if the police officer suspects on reasonable grounds that a “thing” is on the premises that is relevant to a terrorism offence, it is necessary to prevent the “thing” from being used in connection with a terrorism offence and there is a serious and imminent threat to a person's life, health or safety;
- (b) upon entering the premises, the police have additional powers to secure the premises if “another thing” is discovered and it is reasonably suspected that it is relevant to an indictable or summary offence and to seize any other “thing” or do anything to make the premises safe;
- (c) the police may use such assistance or use such force against persons or things as is necessary and reasonable in the circumstances; and
- (d) the occupier of the premises must be notified within 24 hours or, if it is not practicable to notify the occupier, written notice must be left at the premises.

40. Further, under sections 3J(2)(aa) and 3JA of the *Crimes Act*, police have powers of re-entry for up to one hour after leaving premises, which can be extended to 12 hours in emergency situations.

41. The HRLC is extremely concerned about the broad power granted to the AFP to search without warrant and to re-enter premises, particularly in the absence of any judicial or other oversight. No evidence has been provided that such extended powers are required to protect public safety and, accordingly, these rights granted to the AFP raise concerns with the right to privacy protected by article 17 of the ICCPR. While states may take measures derogating from their obligations under the ICCPR (including obligations under article 17) in times of public emergency, such interferences with the right to privacy should only be permitted by an authority designated under the law and on a case by case basis. The legislation should ensure that decision makers do not possess overly wide discretion in authorising interferences with the right to privacy. If the government wishes to limit the right to privacy, it must state the overriding public interest in limiting the right and establish that the means used in each instance are reasonable, necessary and proportionate.

42. The HRLC is particularly concerned that:
- (a) the term “thing” is not defined, which makes the offence vague and ambiguous and can lead to unpredictability in its implementation;
 - (b) the threshold of reasonable suspicion is inadequate given the serious consequences that wrongful exercise of the power can cause; and
 - (c) the level of discretion granted to individual officers is disproportionate to the power of being able to enter private premises.
43. The HRLC agrees with the Law Council of Australia's analysis that “poorly defined, overly broad offence provisions can never be justified on the basis that, despite their potentially wide application, they are intended to be utilised by the authorities in the most limited and serious circumstances”³⁶ and recommends that these provisions be reformed.

5. Sedition Offences

Criminal Code Act 1995 (Cth), section 80.2

44. Section 80.2 of the *Criminal Code* deals with the offences previously known as “sedition” offences. Despite previous amendments made to that section, there are still significant problems with these provisions. Although the word “sedition” has been removed from the legislation, the substantial purpose of these laws continues to be to criminalise and punish sedition. Sedition laws are outdated and respond to anachronistic notions of governmental institutions being embodiments of the sovereign. There is very little evidence of the need for the laws in today's society.
45. The provisions impose limitations on human rights, particularly the right to freedom of expression, as protected in article 19 of the ICCPR. Pursuant to article 19(3) of the ICCPR, restrictions on freedom of expression may only be such as are provided by law and are necessary for the protection of national security or of public order or of public health or morals. While state parties are obliged to adopt necessary legislative measures to prohibit actions giving rise to any propaganda for war, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, it is unlikely that limitations are permissible on communication of information or ideas that merely “offend, shock or disturb”, because “such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society”.³⁷

³⁶ Law Council of Australia, *Submission on Anti-Terrorism Laws Reform Bill 2009*, 8.

³⁷ *Handyside v United Kingdom* [1976] 1 EHRR 737, commenting on the right to freedom of opinion and expression under article 10 of the *European Convention on Human Rights*. See also *Arbeiter v Austria* [2007] ECHR Application No 3138/04 (25 January 2007); *Livingstone v The Adjudication Panel for England* [2006] EWHC 2533 (Admin), [36].

46. Given that the offences in section 80.2 of the *Criminal Code* impose limitations on the right to freedom of expression, the government must articulate an evidence-based justification for restricting the freedom and must prove that the law is necessary. It is not clear that there is a compelling need for the offences in section 80.2 at all, particularly bearing in mind that Australian democratic institutions are well established, our society is multicultural, there has been no successful prosecution of sedition offences in decades and the right to freedom of speech is now acknowledged as being fundamental to our system of representative democracy.
47. Further, these laws overlap with other offences in the criminal law, such as incitement to violence offences, which supports the HRLC's position that these offences are not needed and the provisions should be repealed.

6. ASIO Powers

6.1 Expansion of ASIO Investigative Powers

Australian Security Intelligence Organisation Act 1979 (Cth), Part 3, Division 3

48. ASIO has enhanced powers to detain and question under warrant persons who may have information on terrorist activities. The *Australian Security Intelligence Organisation Act 1979 (Cth) (ASIO Act)* requires a person to provide information and answer questions where a warrant for questioning is issued.³⁸ Provisions in the ASIO Act allow a person to be detained without charge for up to 168 hours³⁹ (seven days) and allow for further seven day warrants to be issued if justified by new material. Therefore a person may be held in detention indefinitely for rolling periods of seven days without any charge having been made out against them in accordance with conventional criminal procedure.
49. Under the legislative provisions:
- (a) the detained person may be prohibited and prevented from contacting anyone at any time while in custody;
 - (b) the detained person may be questioned in the absence of a lawyer;
 - (c) the detained person's lawyer may be denied access to information regarding the reasons for detention and also in relation to the conditions of detention and treatment of the person;
 - (d) the detained person is prohibited from disclosing information relating to his/her detention at risk of five years imprisonment; and

³⁸ *Australian Security Intelligence Organisation Act 1979 (Cth)*, s 34G.

³⁹ *Australian Security Intelligence Organisation Act 1979 (Cth)*, s 34S.

- (e) the detained person's lawyer, parents and/or guardian may be imprisoned for up to five years for disclosing any information regarding the fact or nature of the detention.
50. These powers raise concerns with the right to a fair hearing and the right to take proceedings to a court to have the legality of a person's detention determined by an independent and competent authority,⁴⁰ as individuals have no right to seek judicial review of a warrant's validity or terms or be brought before any judicial body (other than a prescribed authority appointed by the Minister). Further, the powers provide for the detention of people who have not been charged (including those who may not be suspects) for up to seven days, which could amount to arbitrary detention.
51. These provisions restrict access to legal counsel and the secrecy provisions prevent the media, academics and human rights advocates from independently monitoring the use of ASIO questioning and detention powers, which has the potential to allow human rights violations to go unnoticed in a climate of impunity.⁴¹
52. Further, the use of information obtained by ASIO under warrant is not restricted to intelligence and the HRLC is concerned about the potential "derivative use" of such information. That is, there is concern that where police are present at an ASIO hearing, information provided at that hearing may lead to the police pursuing a line of inquiry that would not otherwise have been pursued and using the information provided during that hearing in order to further their own investigations. In those circumstances, an individual's privilege against self-incrimination, which is recognised under international law, is not protected. The HRLC recommends that police officers should be restricted from attending ASIO hearings and that "derivative use" immunity should be applied to the information to maintain a clear demarcation between intelligence gathering and criminal investigation.
53. ASIO's detention powers should be reviewed to ensure that they comply with the right to a fair trial and are free from arbitrary detention. Section 34S of the ASIO Act should be amended such that a person may not be detained for more than 48 hours without independent judicial review. Sections 34F(6) and 34G(2) of the ASIO Act should be repealed to prevent detention periods being extended indefinitely through "rolling warrants". Secrecy provisions in the ASIO Act should also be repealed.

⁴⁰ UN Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/1 (2008), [10].

⁴¹ Amnesty International Australia, *Concerns Regarding the ASIO Legislation Amendment Bill 2003* (2003).

6.2 Lack of Enforcement Provisions for Torture or Ill-Treatment

Australian Security Intelligence Organisation Act 1979 (Cth), section 34J(2)

54. Although the ASIO Act provides that a detainee should be treated with humanity, respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment,⁴² there is no provision for any offence or penalties for contravening conduct. The only means of recourse is for the detainee to make a complaint to the Inspector-General of Intelligence and Security, the Commonwealth Ombudsman or a State/Territory complaints agency. The lack of enforcement provision for a breach of the prohibition against torture or ill-treatment is manifestly inadequate.

7. Persons Charged with Terrorism Offences

7.1 Provisions for Bail Except in Exceptional Circumstances

Crimes Act 1914 (Cth), section 15AA

55. Under section 15AA(1) of the *Crimes Act*, a bail authority must not grant bail to a person charged with, or convicted of, certain terrorism offences unless “exceptional circumstances” exist for offences listed under s. 15AA(2), including terrorism offences. This reverses the burden of establishing the need for detention and places a very high threshold on an accused or convicted person to establish “exceptional circumstances”. Concern has been expressed by the UN Human Rights Committee in its 2009 Concluding Observations about the reversal of the burden of proof contrary to the right to be presumed innocent.⁴³
56. In placing the onus on an accused or convicted person to satisfy that “special circumstances” exist, the provision is incompatible with international law, which requires states to affirmatively establish the need for detention. This provision raises concerns regarding the right to be free from arbitrary detention, the presumption of innocence and the right to a fair hearing. The HRLC recommends that the presumption against bail under s. 15AA is repealed.

7.2 Detention in Maximum Security

57. There is a practice in Australia of remanding persons charged with terrorism offences in maximum security prisons. This is contrary to several international instruments emphasising the principle of segregation of untried accused persons from convicted persons, including article 10 of the ICCPR and the UN Standard Minimum Rules for the Treatment of Prisoners.

⁴² *Australian Security Intelligence Organisation Act 1979 (Cth)*, s 34T(2).

⁴³ UN Human Rights Committee, *Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009) [12].

58. Each remand prisoner should be the subject of an individual risk assessment, with appropriate avenues available for the remanded person to seek an independent review of the classification. Further, segregating persons convicted of terrorism offences should only be permitted when strictly necessary (to prevent the recruitment of inmates into a terrorist organisation) and if the person has been convicted of a "terrorist" offence in respect of which a proper definition of "terrorism" has been applied.

8. Evidence Obtained under Torture

Uniform Evidence Act 1995 (Cth), section 138

Foreign Evidence Act 1994 (Cth), section 26

59. Australian law contains a number of exceptions to the provision under the UN Convention against Torture that statements made as a result of torture must not be invoked as evidence in any proceeding,⁴⁴ including:
- (a) section 138 of the *Uniform Evidence Act 1995 (Cth)*, which provides that evidence obtained improperly or in contravention of Australian law may be admitted where, in the opinion of the trial judge, the desirability of admission outweighs the undesirability of excluding it; and
 - (b) section 26 of the *Foreign Evidence Act 1994 (Cth)*, which applies to evidence obtained from a foreign country for use in Australian and provides that in matters relating to terrorism and national security, evidence may only be excluded where it would have a substantial adverse effect on the right of a defendant to a fair hearing.
60. These provisions should be amended to ensure that statements made as a result of torture must not be invoked as evidence in any proceeding.

9. Disclosure of National Security Information

9.1 Requirement for Legal Representatives to Obtain Security Clearance

National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), section 39

61. Under section 39 of the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (NSI Act)*, legal representatives may be required to obtain security clearance where an issue is likely to arise relating to a disclosure of information that is likely to prejudice national security. This severely restricts the right of defendants to access legal counsel of their choosing, as a defendant will be denied the right to obtain a lawyer of his/her choosing where his/her lawyer does not obtain a security clearance.

⁴⁴ United Nations Convention against Torture, article 15.

62. Under international law, Australia has committed to guarantee the right of the defendant to be tried in his/her presence, to defend himself/herself and to have and obtain the attendance and examination of witnesses. Although the European Court of Human Rights and the House of Lords have acknowledged that this right can be limited in the public interest, this must be counterbalanced so that the detainee can effectively challenge the allegations made. Where the undisclosed material is to be heavily relied upon and the accused will not be able to answer allegations made against him or her, there is likely to be a breach of the right to a fair hearing. The HRLC therefore recommends reform of section 39 of the NSI Act.

9.2 Closed Court Proceedings

National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), section 31

63. Where a national security information disclosure issue arises during the course of proceedings, the proceedings are to be adjourned and closed court proceedings are required to be held (from which the defendant and his/her legal representative may be excluded) to enable the court to consider whether and how national security information may be disclosed during the proceedings or whether a witness should be called. Section 31 of the NSI Act requires the court to consider the effect of disclosure on national security, the adverse effects of an order on the defendant's right to receive a fair hearing and any other relevant factors, but provides that the court is to give greatest weight to national security considerations.⁴⁵
64. The HRLC is concerned that the NSI Act does not contain fundamental safeguards to comply with the right to a fair trial. Closed court hearings impact on the right to a fair trial by allowing the defendant to be excluded from part of his/her trial. Further, the weighting of discretion against a defendant's right to a fair trial and in favour of national security expressly undermines human rights. This conflicts with Australia's commitment to guarantee the right of defendants to be tried in their presence and to defend themselves (article 14(3)(d) of the ICCPR) and the right of a defendant to have and obtain the attendance and examination of witnesses (article 14(3)(e) of the ICCPR).
65. These infringements on the right to a fair trial are unnecessary, as the doctrine of public interest immunity can ordinarily be used by the government to object to disclosures of national security legislation. The HRLC recommends that the NSI Act should be repealed and the disclosure of national security information should be dealt with according to the doctrine of public interest immunity.

⁴⁵ *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)*, s 31(7)-(8).

10. Impacts of Counter-Terrorism Laws

66. The HRLC is also concerned about the disproportionate impact of Australia's counter-terrorism laws on particular groups within Australian society. Although the various pieces of counter-terrorism legislation are not discriminatory on their face, in practice the increase in police powers and prosecutions under the new laws has been felt adversely and disproportionately by Muslim, Kurdish, Tamil and Somali communities in Australia.
67. One concern is that intelligence gathering agencies use the existence of the laws to coerce co-operation with investigations from particular communities, without needing to resort to actually exercising powers under the laws. The indirect effect of the laws is therefore that intelligence officers reportedly use powers to leverage individuals into informal interviews. Community legal centre lawyers in Melbourne have reported that ASIO officers request an informal 'chat' accompanied by an indication that they could obtain a questioning warrant.⁴⁶
68. Community lawyers in Melbourne have also reported that the Australian Federal Police and ASIO, when investigating instances of political violence, focus disproportionately on Australians with Tamil, Pakistani, Arab and East African ties through their families or countries of origin.⁴⁷ This is supported by anecdotal evidence from these communities. For example, the Islamic Council of Victoria has catalogued the following practices in relation to the Somali community whereby often unidentified but presumably federal policing/intelligence agents acting without providing any warrant:
- (a) constantly harass community members without disclosing the nature of the questioning;
 - (b) repeatedly question community members at all hours of the day;
 - (c) arrange but then do not attend meetings;
 - (d) prohibit people from speaking to others or else face charges; and
 - (e) inform Muslim men that their wives are required for questioning.⁴⁸
69. While rarely used, where prosecutions under counter-terrorism laws have been pursued, all have been made against racial and religious minorities, namely Muslim people and Tamils.⁴⁹

⁴⁶ Western Suburbs Legal Service, *Is Community A Crime?* (2009), 7.

⁴⁷ *Ibid.*

⁴⁸ Islamic Council of Victoria, *Submission to the Federal Attorney-General's National Security Legislation Discussion Paper* (18 September 2009), [12], available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(966BB47E522E848021A38A20280E2386\)~SLB+-+Islamic+Council+of+Victoria+October+2009.pdf/\\$file/SLB++Islamic+Council+of+Victoria+October+2009.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(966BB47E522E848021A38A20280E2386)~SLB+-+Islamic+Council+of+Victoria+October+2009.pdf/$file/SLB++Islamic+Council+of+Victoria+October+2009.pdf)

⁴⁹ See, eg, *R v Mallah* (2003); *R v Thomas* (2004); *R v Lodhi* (2006); *R v Khazal* (2006); *R v ul-Haque* (2006); *R v Benbrika* (2006). Charges have also been brought against two alleged members of the Liberation Tigers of Tamil

70. These concerns were also shared by the UN Committee on the Elimination of Racial Discrimination in its recent Concluding Observations on Australia, in which the Committee underlined Australia's obligation to "ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin".⁵⁰
71. The HRLC suggests that in reviewing Australia's counter-terrorism laws that the National Security Legislation Monitor also considers the racially discriminatory impact of the exercise of such powers.

Eelam: *R v Vinayagamoorthy & Yathavan*. Only one other charge, unrelated to membership of a political or religious group, appears to have been brought: *R v Amundsen* (2006).

⁵⁰ UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on Australia*, UN Doc CERD/C/AUS/CO/15-17 (2010), [12].