



Australian
Human Rights
Commission

everyone, everywhere, everyday

2008

**A HUMAN RIGHTS
GUIDE TO
AUSTRALIA'S
COUNTER-TERRORISM
LAWS**

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1 What is the guide about?

This guide provides a basic overview of Australia's counter-terrorism laws from a human rights perspective. It discusses the following questions:

- What impact can counter-terrorism laws have on human rights?
- What counter-terrorism provisions have been introduced into the Commonwealth Criminal Code?
- What counter-terrorism powers does the Australian Security Intelligence Organisation ('ASIO') have?
- What counter-terrorism provisions have been introduced into the Commonwealth Crimes Act?
- What information can be kept secret on national security grounds?
- What are some examples of counter-terrorism cases which raise human rights issues?
- What reforms would help ensure counter-terrorism laws uphold human rights?
- Where can I find out more about counter-terrorism laws?

2 What impact can counter-terrorism laws have on human rights?

2.1 *Human rights may be infringed by counter-terrorism laws*

Since the terrorist attacks on 11 September 2001, the Australian Government has introduced more than 40 new counter-terrorism laws. Click [here](#) to read a chronology of counter-terrorism laws introduced in Australia.

These laws have created new criminal offences, new detention and questioning powers for police and security agencies, new powers for the Attorney-General to proscribe (ban) terrorist organisations, and new ways to control people's movement and activities without criminal convictions.

Counter-terrorism laws can have a profound impact on fundamental human rights and freedoms, including:

- The right to a fair trial;¹
- The right to freedom from arbitrary detention and arrest;²
- The right not to be subject to torture;³

- The right to privacy;⁴
- The right to freedom of association and expression;⁵
- The right to non-discrimination;⁶
- The right to an effective remedy for a breach of human rights.⁷

These rights are protected under international human rights treaties including the [International Covenant on Civil and Political Rights](#) ('the ICCPR') and the [Convention Against Torture and Cruel, Inhuman and Degrading Treatment or Punishment](#) ('CAT').

Australia has voluntarily agreed to protect these rights by ratifying the ICCPR and the CAT. However, in the absence of an [Australian Charter of Rights](#) some fundamental human rights receive limited protection under Australian law.

2.2 Some human rights can be legitimately restricted. Other human rights must always be protected

In [submissions to counter-terrorism reviews](#) the Australian Human Rights Commission ('the Commission') has said that counter-terrorism laws must comply with Australia's international human rights obligations.⁸ The Commission has been critical of attempts to enact counter-terrorism laws without adequate scrutiny of their human rights implications.

Making sure counter-terrorism measures comply with Australia's human rights obligations involves correctly identifying which human rights are non-negotiable and which human rights can legitimately be restricted in certain circumstances.

This is because international law allows certain ('derogable') rights to be restricted but only if the restrictive measure is a necessary and proportionate way of achieving a legitimate purpose.

Article 4(2) of the ICCPR provides that the following 'non-derogable' rights can not be breached in any circumstances:

- the right to life;⁹
- freedom of thought, conscience and religion;¹⁰
- freedom from torture or cruel, inhuman or degrading punishment or treatment;¹¹
- the right to recognition everywhere as a person before the law;¹²
- the principles of precision and non-retroactivity of criminal law;¹³
- elements of the right to a fair trial;¹⁴

International human rights law recognises that other ‘derogable’ rights can be limited in two circumstances:

1. Derogable human rights can be limited in a state of ‘public emergency’. The threat of terrorism may constitute a public emergency in some circumstances. For example, in 2004, the UK House of Lords accepted that the threat of terrorism may constitute a ‘public emergency’.¹⁵ However, the Court also held that ‘measures taken by a member state in derogation of its obligations under the [European Convention on Human Rights] Convention should not go beyond what is strictly required by the exigencies of the situation’.¹⁶ Therefore, although the House of Lords agreed there was a ‘public emergency’, they found this state of emergency did not justify discriminatory counter-terrorism measures under which foreign nationals, but not British nationals, could be detained without trial.

2. Derogable human rights can be limited if the limitation is proportionate and necessary response to a threat to national security. For example, article 19 of the ICCPR protects the right to freedom of expression. International human rights law says that any law that limits a derogable human right must be proportionate and necessary to achieve its purpose (eg, preventing a terrorist act).¹⁷ In other words, counter-terrorism laws need to have ‘sufficient safeguards to stand the test of proportionality and fairness’.¹⁸ Article 19(3) enables this right to be restricted if the restrictions are necessary and proportionate to protect national security in a democratic society. If laws which limit freedom of expression are too broad or too vague it will be difficult to characterise the laws as necessary and proportionate to the purpose of protecting national security. But if laws are carefully targeted at expression which is ‘directly causally responsible for increasing the actual likelihood of a terrorist act occurring’¹⁹ then they are more likely to pass the proportionality test.

Factors to consider when assessing whether an action is proportionate are:

- Why is the action necessary?
- To what extent does the action impair the right?
- Could the purpose of the action be achieved through less restrictive measures?
- Do legal safeguards against abuse exist?

The proportionality test does not apply to non-derogable rights which can not be limited in any circumstances. For example, the right to be free from torture can not be breached in any circumstances.

2.3 *Human rights concerns about counter-terrorism laws*

Aspects of Australia’s counter-terrorism laws have been criticised for containing inadequate safeguards against potential human rights abuses.

Unlike the United Kingdom, Australia does not have a Charter of Rights. The Commission is concerned that some counter-terrorism laws (for example, ASIO's powers to detain and question non-suspects) do not have adequate safeguards against abuse or to correct mistakes.

The cases of David Hicks and Dr Mohamed Haneef have highlighted the injustices that can result if counter-terrorism measures do not comply with fundamental human rights standards (see further .

[The Commission's submissions to counter-terrorism reviews](#) have expressed concern that aspects of Australia's counter-terrorism laws contain inadequate safeguards against human rights abuses.

The following reviews of counter-terrorism laws have recommended important changes to existing laws.

1. The report of the Australian Law Reform Commission ('ALRC'), [Fighting Words: A Review of Seditious Laws in Australia](#), ('the Fighting Words Report').
2. [The Report of Security Legislation Review Committee](#) ('the SLRC Report').
3. [The report of Australian Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter-terrorism Legislation](#) ('the PJCIS Report').

A 2006 [report by the United Nations Special Rapporteur](#) on the promotion and protection of human rights and fundamental freedoms while countering terrorism criticised aspects of Australia's counter-terrorism laws.

The Special Rapporteur urged Australia to enact federal legislation which implements the ICCPR and provides remedies for breaches of rights and freedoms.

3 What counter-terrorism provisions have been introduced into the Criminal Code?

The main terrorism laws introduced after 11 September 2001 are contained in the [Criminal Code 1995 \(Cth\)](#) ('the Criminal Code') at Schedule 1, Part 5.3 (Terrorism), divisions 100-103.²⁰ Part 2.4 of the Criminal Code criminalises incitement to criminal acts including incitement to terrorism.

The *Security Legislation Amendment (Terrorism) Act 2002* amended the Criminal Code by:

- defining a 'terrorist act';
- introducing offences that criminalise acts involving the planning and committing of a terrorist act;

- introducing offences that criminalise a person's involvement or association with a terrorist organisation;
- giving the Attorney-General the power to proscribe (ban) a terrorist organisation.

You can read the Commission's submissions on the *Security Legislation Amendment (Terrorism) Bill 2002* [here](#).

The *Anti-Terrorism Act (No.2) 2005* further amended the Criminal Code by introducing control orders, preventative detention orders and new seditious offences. This Act also introduced new police counter-terrorism 'stop and search' powers into the *Crimes Act 1914* (Cth). You can read the Commission's submissions on the *Anti-Terrorism Bill (No.2) 2005* [here](#).

3.1 Defining a terrorist act

Section 100.1 of the Criminal Code defines a terrorist act as 'an action or threat of action' which is done or made with the intention of:

- advancing a political, religious or ideological cause; **and**
- coercing, or influencing by intimidation, the government of the Commonwealth, State or Territory or the government of a foreign country or intimidating the public or a section of the public.

Action will only be defined as a terrorist act if it:

- causes serious physical harm or death;
- seriously damages property;
- endangers a person's life;
- creates a serious risk to public health or safety; or
- seriously interferes with, seriously disrupts, or destroys, an electronic system.

Action will not be a terrorist act if it is advocacy, protest, dissent or industrial action **and** is not intended to cause serious physical harm or death, endanger the lives of others or create a serious risk to the public health or safety.

The definition of a terrorist act has been criticised as being so broad its meaning is unclear.²¹

3.2 Criminalising terrorist acts

Under Division 101 of the Criminal Code it is an offence to:

- engage in a terrorist act;²²

- provide or receive training connected with the preparation for, the engagement of a person in or assistance in a terrorist act;²³
- possess a thing connected with the preparation for, the engagement of a person in or assistance in a terrorist act;²⁴
- collect or make documents connected with the preparation for, the engagement of a person in or assistance in a terrorist act;²⁵
- do any act in preparation for, or planning a terrorist act.²⁶

These offences apply even where a terrorist act does not actually happen, the offences are not done in connection with a specific terrorist attack, or the offence is done in connection with more than one terrorist attack. Criticisms that these offences were too broad were rejected by the SLRC and Parliamentary Joint Committee on Intelligence and Security ('PJCIS') reports.²⁷

As well as the offences in Division 101, the Criminal Code also criminalises attempts to commit these offences, the incitement of these offences and the use of an innocent agent to commit the offences.²⁸

3.3 Proscribing a terrorist organisation

A terrorist organisation is defined in s 102.1(1) of the Criminal Code as:

- 'an organisation that is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)' **or**
- an organisation that is listed in the terrorist organisation regulations in accordance with a proscription process set out in ss 102.1(2), (3) and (4).

The Attorney can proscribe a 'terrorist organisation' under s 102.1(2) of the Criminal Code if he or she is satisfied on reasonable grounds that:

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

The Attorney can decide to repeal the listing of ('delist') a proscribed terrorist organisation. An individual or organisation (including the proscribed organisation) can apply to the Attorney to be de-listed.

While the Attorney has to consider the application, he or she has absolute discretion as to the matters that he or she considers in deciding whether to de-list an organisation.

As a consequence of proscription, a person who is connected with a terrorist organisation may be charged and convicted of serious criminal offences. A person who is being prosecuted for an offence involving his or her connection with a terrorist organisation can not deny in Court that the proscribed organisation is in fact a terrorist organisation.²⁹

To date, 19 organisations have been listed as 'terrorist organisations'. Eighteen of these organisations self-identify as Islamic organisations.

(a) The definition of 'advocates' should be amended

Section 102.1(1A) of the Criminal Code states an organisation advocates the doing of a terrorist act if the organisation:

- (a) ... directly or indirectly counsels or urges the doing of a terrorist act; or
- (b) ...directly or indirectly provides instruction on the doing of a terrorist act;
- or
- (c) ...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 ... that the person might suffer) to engage in a terrorist act.

The Commission believes that this definition of 'advocates' is too broad and could possibly result in breaches of the right to freedom of expression. The SLRC Report recommended paragraph (c) be deleted or, if it was not, that the word 'risk' be replaced with 'substantial risk'.³⁰

(b) The process of proscription should be reformed

The SLRC Report recommended that the process of proscription be reformed in order to create a fairer, more transparent system.³¹ The Commission supports this recommendation. The Commission is concerned about the current proscription process because of:

- the lack of clear criteria to guide the use of the Attorney's proscription powers;
- the lack of opportunities to oppose the proposed proscription; and
- the lack of opportunity to seek independent merits review of the decision to proscribe a terrorist organisation.

The Commission believes that the proscription process should be a judicial rather than executive process. Alternatively, if the Attorney remains responsible for proscribing terrorist organisations, the process would be fairer if there was independent merits review of the Attorney's decision to proscribe an organisation. You can read the Commission's submissions on the proscription of terrorist organisations [here](#).

3.4 Criminalising relationships with terrorist organisations

Once an organisation is listed as a terrorist organisation, a person who has certain relationships with that ‘terrorist organisation’ may face criminal charges under the Division 102 of Criminal Code. Sections 102.2 to 102.8 make it an offence to:

- direct the activities of a terrorist organisation;³²
- be a member of a terrorist organisation;³³
- recruit a person to join or participate in the activities of a terrorist organisation;³⁴
- provide training to or receive training from a terrorist organisation;³⁵
- receive funds from or make funds available to a terrorist organisation;³⁶
- provide support or resources that would help a terrorist organisation directly or indirectly engage in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs);³⁷
- on two or more occasions associate with a member or person or promotes or directs activities of a terrorist organisation.³⁸

The Commission is concerned that some of these offences are so broad it is not clear what conduct they criminalise. For example, the offence of association with a terrorist organisation (s 102.8) does not pass the proportionality test. Significantly, the SLRC Report recommended that the offence of association with a terrorist organisation be repealed, stating ‘the interference with human rights [created by the offence] is disproportionate to anything that could be achieved by way of protection of the community if the section were enforced’.³⁹

The SLRC Report and the PJCIS Report both recommended clarifying the scope of some of the ‘terrorist organisation’ offences. The charging of Dr Mohamed Haneef with an offence contrary to s 102.7 (providing support or resources that would help a terrorist organisation) of the Criminal Code has renewed criticism that the offences in Division 102 are too broad and should be amended so they can be defined with certainty.⁴⁰ The charge against Dr Haneef was later dropped. You can read more about the case of Dr Haneef below at [4.1].

3.5 Criminalising sedition

The *Anti-Terrorism Act 2005 (No.2)* introduced new offences of sedition and repealed the old sedition offences contained in the Crimes Act. The sedition offences have provoked public debate about how freedom of expression should be protected.

The five sedition offences in s 80.2 make it an offence for a person to:

1. urge another person to overthrow by force or violence the Constitution or the Government of the Commonwealth, a State or a Territory;⁴¹
2. urge another person to interfere by force or violence in parliamentary elections;⁴²
3. urge a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or groups, where that would threaten the peace, order and good government of the Commonwealth;⁴³
4. urge another person to assist an organisation or country that is at war with the Commonwealth (whether declared or undeclared);⁴⁴
5. urge another person to assist those engaged in armed hostilities with the Australian Defence Force.⁴⁵

The first three offences contain recklessness as a fault element in relation to some of the elements of the offence. This means that for a person to commit an offence of sedition the person must:

- *intentionally* urge another person to engage in the prohibited conduct, and
- be reckless as to the consequences of that action.

Under the Criminal Code it is a defence to a charge of sedition that the acts in question were done 'in good faith'. For example, public comments made in good faith pointing out mistakes in government policy or urging people to lawfully change laws or policies will not be caught by the sedition provision. This defence also allows the publication in good faith of a report or commentary about a matter of public interest.

The ALRC report, [*Fighting Words: A Review of Sedition Laws in Australia*](#), recommended 30 changes to the sedition laws in order to draw 'a bright line between freedom of expression – even when exercised in a challenging or unpopular manner – and the reach of the criminal law'.

The ALRC recommended that for a person to be guilty of any of the offences in ss 80.2(1), (3) and (5) of the Criminal Code, the person must *intend* that the urged force or violence will occur. By removing the element of recklessness, the ALRC sought to:

...help remove from the ambit of the offences any rhetorical statements, parody, artistic expression, reportage and other communications that the person does not intend anyone will act upon, and it would ensure there is a more concrete link between the offences and force or violence.⁴⁶

The rationale behind the ALRC's recommendations is that the only speech which should be criminalised is speech that is *intended* to provoke violence.

3.6 Control orders

The *Anti-Terrorism Act (No.2) 2005* (Cth) gave federal courts the power to make control orders under division 104 of the Criminal Code in response to a request from the Australian Federal Police ('AFP').

A control order can allow a variety of obligations, prohibitions and restrictions to be imposed on a person for the purpose of protecting the public from a terrorist act. For example, a control order can require a person to stay in a certain place at certain times, prevent a person from going to certain places or talking to certain people, or wear a tracking device. These restrictions can impact on fundamental rights and freedoms including the rights to liberty, privacy, freedom of association, freedom of expression and freedom of movement.

To obtain an 'interim control order' a senior AFP Officer may (with the consent of the Attorney-General) seek such an order from the Federal Court, Family Court or Federal Magistrates Court. The court may make an interim control order if it is satisfied, on the balance of probabilities that:

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

Interim control orders are to be issued *ex parte* (the person against whom the control order is sought is not present in court) in all cases. This is unusual. Normally it is up to the courts to decide whether there are exceptional circumstances that mean that it is necessary for the proceedings to be conducted *ex parte*.

If the AFP wish to confirm the control order, they must go back to court and seek a confirmed order. The court will make a decision after hearing evidence from both parties.

The person who is the subject of the interim control order must be given 48 hours notice of the confirmation hearing, a summary of the grounds on which the interim control order was made, and the documents given to the Attorney-General in order to obtain his or her consent to seek an interim control order.

However, the information provided to the person upon whom the interim control order has been imposed will not include any information which is considered to prejudice national security or jeopardise police operations. This

means the person subject to the order may not be aware of some of the evidence against him or her.

Australia's control order scheme is partly based on the scheme in the United Kingdom but there are significant differences, notably that the UK scheme is structured around the *Human Rights Act 1998* (UK). Click [here](#) to read a comparison between control orders in Australia and in the United Kingdom.

Criticisms of Australia's control order scheme have focused on the lack of safeguards to ensure the restrictions imposed by control orders do not breach basic human rights, and the ex-parte nature of interim control order hearings.⁴⁷

In 2007, the High Court upheld the constitutional validity of control orders (see below at [10.1(b)]).

3.7 Preventative detention orders

The *Anti-Terrorism Act (No.2) 2005* (Cth) established Preventative Detention Orders ('PDOs') under division 105 of the Criminal Code. Like control orders, PDOs represent a fundamental departure from the long-held principle that a person should not be detained without trial.

There are two types of PDOs:

- **An initial PDO** permits detention for up to 24 hours and can be granted by a senior member of the AFP on application by another AFP officer.
- **A continued PDO** may be made after an initial PDO has been granted and allows detention to continue for another 24 hours. A continued PDO must be made by a federal judge or federal magistrate, acting in his or her personal capacity.

To make or extend any order, the issuing authority must be satisfied on the basis of information provided by the AFP that there are reasonable grounds to suspect that the person:

- will engage in a terrorist act, or
- possesses something connected with the preparation for, or the engagement of a person in, a terrorist act, or
- has done or will do an act in preparation for, or in planning a terrorist act.

Disclosing the existence of a PDO is an offence and can be punishable by up to 5 years imprisonment. While a detainee is allowed to contact a lawyer, this contact is monitored by police.

4 What counter-terrorism provisions have been introduced into the Crimes Act?

4.1 Police powers to detain and question terrorist suspects

In 2004, the *Anti-Terrorism Act 2004* (Cth) introduced special powers for the Australian Federal Police ('AFP') to question terrorism suspects without charge into Part 1C, Division 2 of *Crimes Act 1914* (Cth) ('the Crimes Act'). These powers mean that upon arrest for a terrorism offence a person can be detained without charge for the purpose of investigating whether the person committed the terrorism offence for which he or she was arrested and/or another terrorism offence that an investigating official reasonably suspects the person committed.⁴⁸

Under ss 23CA(4) of the Crimes Act a person can only be detained for four hours, unless a magistrate extends the period of detention under s 23DA. Under s 23DA(7) the magistrate can not extend the period of detention for more than 20 hours. Therefore, the maximum period of time that a person can be detained for questioning is 24 hours.

However, this 24 hour cap is not a safeguard against indefinite detention because it excludes 'dead time'.⁴⁹ What will count as dead time is set out in the Crimes Act and can include contacting a lawyer, meal breaks and times when the suspect is sleeping. The broad scope of what can count as 'dead time' means that it can be difficult to predict how long a person may be detained. This became obvious in the case of Dr Haneef (see below).

The Commission is concerned that pre-charge detention under Part 1C of the Crimes Act permits violations of:

- the prohibition on arbitrary detention (Article 9(1) of the ICCPR);
- the right of an individual to be informed, at the time of arrest, of the reasons for his or her arrest and be promptly informed of any charges against him or her (Article 9(2) of the ICCPR); and
- the right of any person arrested or detained to be brought promptly before a judge or other officer authorised to exercise judicial power to rule on the lawfulness of that detention (Article 9(3) of the ICCPR).

The powers under Part 1C, Division 2 of the Crimes Act were used in the case of Dr Mohamed Haneef. Click [here](#) to read why the Commission considers this case highlights the problems with Part 1C, Division 2 of the Crimes Act.

Case Study – the case of Dr Mohamed Haneef

On 2 July 2007 Dr Haneef, who was working as a doctor in Queensland, was

arrested by the AFP. His arrest followed the attempted terrorist car bombings at Glasgow International Airport on 30 June 2007.

Dr Haneef was detained and questioned without charge by the police for 12 days under Part 1C, Division 2 of the *Crimes Act*. Although the *Crimes Act 1914 (Cth)* states people can only be detained and questioned for 24 hours, the use of the 'dead time' provisions meant that Dr Haneef was detained for much longer.

After being detained and questioned, on 14 July Dr Haneef was charged with having intentionally provided support, while being reckless as to whether the organisation was a terrorist organisation. Facts said to support the charge were that Dr Haneef had given a SIM Card to his second cousin, SabeEl Ahmed, who was involved in the attack on Glasgow International Airport.

On 16 July 2007 Dr Haneef was granted bail by a Queensland magistrate. Although s 15AA of the *Crimes Act* provides that, where a person is charged with certain terrorism offences (including an offence under s 102.7 of the *Criminal Code*) bail can only be granted in exceptional circumstances, in Dr Haneef's case the Magistrate found that there were exceptional circumstances in favour of granting bail.

Immediately after bail was granted, the then Minister for Immigration and Citizenship, Kevin Andrews, cancelled Dr Haneef's visa on 'character grounds'. The decision to cancel Dr Haneef's visa on 'character grounds' was made under s 501(3) of the *Migration Act 1956 (Cth)* on the basis that Dr Haneef had or had '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', namely the Dr Sabeel Ahmed and Dr Kafeel Ahmed. The practical effect of this decision was that while a judicial decision secured Dr Haneef's immediate liberty, the exercise of executive discretion returned him to (immigration) detention.

On 27 July 2007, the criminal charges against Dr Haneef were dropped due to lack of evidence. On application for judicial review, a single judge of the Federal Court quashed the Minister of Immigration's decision to revoke Dr Haneef's visa.⁵⁰ This decision was upheld on appeal to the Full Federal Court.⁵¹

The Full Federal Court unanimously upheld Justice Spender's decision that the Minister had misinterpreted the character test and incorrectly applied a test that was too wide. The Full Court concluded that the 'association' referred to in the *Migration Act 1956 (Cth)* must involve some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation with whom the visa holder is said to have associated. The association must have *some* bearing upon the person's character. You can read the Full Court's decision [here](#).

On 13 March 2008, the Government announced that former judge, John Clarke, would be conducting an Inquiry into the handling of Dr Haneef's case. The Inquiry is due to report in September 2008. You can read the Commission's submission to the Inquiry [here](#).

4.2 Reversal of onus of proof for granting bail in terrorism matters

The *Anti-Terrorism Act 2004 (Cth)* also introduced s 15AA of the *Crimes Act* which provides that, where a person is charged with certain terrorism

offences, bail must not be granted unless the bail authority is satisfied that exceptional circumstances exist to justify granting bail. This provision reverses the presumption in favour of granting bail, and creates a presumption against granting bail where a person is charged with a terrorism offence.

The UN Special Rapporteur has expressed concern about the reversal of the onus for granting bail, stating that 'each case must be assessed on its merits, with the burden upon the State for establishing reasons for detention'.⁵²

4.3 Police powers to stop, search and seize in terrorist investigations

The *Anti-Terrorism Act (No.2) 2005* expanded the powers of the AFP, and State and Territory police to stop, question and search persons for the purposes of investigating and preventing terrorism by introducing ss 3UA to 3UK of the Crimes Act.

Under these provisions the Attorney has the power to declare a 'prescribed security zone' if the Attorney considers that this will help prevent a terrorist act or help respond to a terrorist act. The police can use their stop, search, questioning and seizure powers on anyone in the prescribed security zone, **regardless of whether the police officer has a reasonable suspicion** that the person has committed, is committing or is planning to commit a terrorist act.

A police officer can also use the stop, search, questioning and seizure powers in a Commonwealth place that has not been declared a 'prescribed security zone', but only if the police officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act.

The Attorney is not required to publish reasons explaining why it was necessary to declare a prescribed security zone and there is no mechanism for independent review of the use of these powers.

The UN Special Rapporteur has expressed concern that the duration of the declaration of a prescribed security zone (28 days) could lead to potentially unnecessary or disproportionate interferences with liberty and security and could impact on the right to undertake lawful demonstrations.⁵³

5 What powers does ASIO have under counter-terrorism laws?

The *ASIO Legislation Amendment (Terrorism) Bill 2002* was introduced in March 2002 with the purpose of expanding the powers of ASIO to collect intelligence concerning the threat of terrorism. It provoked widespread concern that rights – such as the right not to be detained without charge and the right to remain silent – that had previously been respected as inviolable were being eroded.

The Parliamentary Joint Committee on ASIO, ASIS and DSD unanimously described the initial Bill as ‘the most controversial piece of legislation ever reviewed by the Committee’. The Committee found it would ‘undermine key legal rights and erode the civil liberties that make Australia a leading democracy’ and recommended significant amendments.⁵⁴

As a result of fierce debate the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* was significantly different from the original 2002 Bill. However, the 2003 Act was still highly controversial.

The 2003 Act gave ASIO special powers under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (‘the ASIO Act’) to seek two kinds of special warrants:

- a warrant which authorises the questioning of a person; and
- a warrant which authorises detention and questioning of a person.

Since 2003, 15 questioning warrants have been issued. No detention warrants have been issued.

A warrant to detain and question a person is issued on the application of the Director General of ASIO, who has the Attorney General’s consent to apply. The detention authorised by the ASIO Act is not limited to persons who are suspected of being involved in committing or planning to commit a terrorist offence. The detention and question warrants can apply to anyone who is able to ‘substantially assist in the collection of intelligence that is important in relation to a terrorism offence’.

Because a question and detention warrant can authorise the detention of a person for up to seven days, this means that a person who is **not suspected** of a terrorism offence can be detained for longer than a terrorist suspect who is questioned by the Australian Federal Police under the Crimes Act 1914.

The former High Court Chief Justice, Sir Gerard Brennan, described the process for obtaining a detention or questioning warrant as follows:

The warrant [to detain or question a person] may be issued once the issuing authority is satisfied ASIO Act 1979, ss 34E(1)(b), 34G(1)(b) ‘that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence’. A semblance of legality is provided by limiting the issuing authorities to Federal Magistrates and Judges who consent to being appointed by the Minister. They do not act in a judicial capacity but as *personae designatae* exercising executive authority. The procedure for obtaining a warrant does not resemble standard judicial procedure. The ASIO application is made *ex parte* and the subject is not informed of the grounds advanced for the warrant. If the subject should want to challenge the sufficiency of the grounds on which the warrant is issued, his or her legal adviser is not entitled to see any document other than the warrant itself ASIO Act 1979, s 34ZQ(4)(b). In any event, contact with that legal adviser, if permitted at all, is monitored by a person exercising authority under the warrant ASIO Act 1979, s34ZQ(1). Unless the warrant

allows a person who is being detained, either by the warrant or by a 'prescribed authority' ASIO Act 1979, s34K(1)(d) to contact somebody, he or she can be prevented from contacting anyone ASIO Act 1979, s 34K(10). In summary, a person may be detained in custody, virtually incommunicado, without even being accused of involvement in terrorist activity, on grounds which are kept secret and without effective opportunity to challenge the basis of his or her detention.⁵⁵

The UN Special Rapporteur also expressed concern that although a person detained under the ASIO legislation can make a complaint to the Inspector-General of Security Intelligence, a detained person 'has no right to seek a judicial review of the validity, or terms, of an issuing authority's warrant [and] ... no right to be brought before any judicial body other than a prescribed authority'. The Special Rapporteur said 'the absence of these rights is of grave concern ...offending the right to a fair hearing and the right to have the legality of one's detention determined by an independent and competent authority'.⁵⁶

Under the ASIO Act it is an offence to disclose 'operational information' obtained directly or indirectly through a questioning warrant or a questioning and detention warrant within 2 years of the warrant expiring. It is also an offence to disclose that someone is subject to the warrant and there are no exceptions for reporting by journalists, even if the report seeks to expose abuse or misuse of the warrant system.

When it was enacted, the ASIO Act included a three year sunset clause. In 2006, Parliament extended the sunset clause on the ASIO legislation by 10 years to 22 July 2016.

6 What information can be kept secret for national security reasons?

Under the *National Security Information (Criminal and Civil Proceedings) Act 2004* ('the NSIA') evidence in terrorism trials can be admitted in a closed hearing from which the defendant may be excluded, at least for part of the evidence.

Even the defendant's lawyer may be excluded from hearing the evidence if they have not been given a security clearance and the court decides it is likely that national security may be prejudiced by letting the defence have access to the information.

Under the NSIA, if the Attorney-General-General is of the view that:

- information will be disclosed which will prejudice national security; or
- the mere presence of a person whom a party intends to call as a witness will disclose information that would prejudice national security

the Attorney-General may issue a certificate, which prevents or restricts disclosure of the information or prevents the calling of a witness.

Any certificate issued by the Attorney-General must be considered by the court in a closed hearing.

After the closed hearing, the court must make an order about whether the information may be disclosed or, in the case of a witness whose mere presence would prejudice national security, whether that person can be called in proceedings.

In making this decision, the court is required to consider whether the order would have 'a substantial adverse effect' on the defendant's right to a fair hearing. However, the court must give the greatest weight to the Attorney-General's certificate.

Under the Act the Attorney-General's certificate is treated as conclusive evidence that 'the disclosure of the information is likely to prejudice national security'.

While national security concerns must be considered, this test weights this discretion in favour of the Attorney-General. Former High Court Justice Michael McHugh observed:

It is no doubt true in theory the National Security Information (Criminal and Civil Proceedings) Act does not direct the court to make the order which the Attorney-General wants. But it does as close as it thinks it can. It weights the exercise of the discretion in favour of the Attorney-General and in a practical sense directs the outcome of the closed hearing. How can a court make an order in favour of a fair trial when in exercising its discretion, it must give the issue of fair trial less weight than the Attorney-General's certificate.⁵⁷

In 2005, the NSIA was expanded to cover civil proceedings.

In the UK and Canada 'Special Advocates' have been used to try to make the court process fairer where a person (and his or her lawyer) is prevented from viewing security sensitive information.

A Special Advocate is a specially appointed security cleared lawyer who acts in the interests of a party to proceedings when that party, and his or her legal representative, have been excluded, on security grounds, from attending closed hearings or from accessing material.

A Special Advocate's relationship with the accused is different from the relationship between an ordinary lawyer and his or her client. While the Special Advocate can access security sensitive information and represent the interests of the person, the Special Advocate is not allowed to reveal this information to the person.

7 What are some counter-terrorism cases that raise human rights issues?

To date, four people have been convicted of terrorism and terrorism-related offences in Australia. According to the Attorney-General's Department's

website more than 20 defendants are currently before Australian courts on terrorism-related charges. More information about Australian counter-terrorism cases is available [here](#).

Two counter-terrorism cases that resulted in public debate about the impact of counter-terrorism measures on fundamental human rights were the cases of Joseph Thomas and David Hicks. Both of these cases involved multiple legal proceedings.

7.1 The case of Joseph Thomas

(a) Evidence obtained under duress is not admissible

In January 2003, an Australia citizen called Joseph Thomas was detained by Pakistani authorities at Karachi. In June 2003, he was released and returned to Australia. In 2004, Mr Thomas was arrested and charged with a number of offences. On the 26 February 2007, he was convicted of the offences of receiving funds from a terrorist organisation and of possessing a falsified Australian passport.

The trial which led to these convictions was controversial because, despite claims that evidence obtained from Mr Thomas when he was in a Pakistani military prison was obtained under duress, the judge held the evidence was admissible.

Mr Thomas successfully appealed against the convictions. In August 2006, the Victorian Court of Appeal overturned the convictions on the basis that admissions he made in his interview with the AFP were not voluntary.⁵⁸

The Court concluded that nothing occurred in the AFP interview itself that resulted in Mr Thomas' will being overborne. However, in the context of his detention in Pakistan, the inducements and threats that were made to Mr Thomas by Australian, American and Pakistani authorities, including the prospect of indefinite detention, the Court concluded that Mr Thomas' choice to participate in the AFP interview was not made freely. In accordance with the common law principle that a confessional statement made out of court by an accused person is not admissible unless it was made voluntarily, the Court ruled that the evidence obtained in Mr Thomas' AFP interview was not admissible.

On 20 December 2006, the Victorian Court of Criminal Appeal decided Mr Thomas should be re-tried on the basis of new evidence that came to light in a media interview with Mr Thomas. Mr Thomas' lawyers made an unsuccessful application to the High Court for leave to appeal against a decision to refuse their application to set aside the orders for a retrial.

On 23 October 2008, a 12-member Victorian Supreme Court jury, hearing the re-trial, found Mr Thomas not guilty of the charge of receiving funds from a terrorist organisation. He was found guilty of possessing a falsified passport.

(b) *Australia's first control order imposed on Mr Thomas*

In August 2006, an interim control order was issued against Mr Thomas on grounds related to allegations Mr Thomas had trained with Al'Qaida and had links with extremists. This was the first control order issued in Australia. The UN Special Rapporteur expressed concern about the timing of the order stating:

The imposition of a control order should never substitute for criminal proceedings and the Special Rapporteur expresses concern that the order imposed against Thomas came just days after a state Court of Appeal quashed a terrorist financing conviction against him. Where criminal proceedings can not be brought, or a conviction maintained, a control order might (depending on the facts and conditions of that order) be justifiable where new information or the urgency of a situation call for action to prevent the commission of a terrorist act. Transparency and due process must always be maintained in such cases, with the order regularly reviewed to ensure it remains necessary.⁵⁹

Mr Thomas challenged the constitutionality of the control order legislation in the High Court.

In *Thomas v Mowbray*⁶⁰ the majority of the High Court (Kirby and Hayne J dissenting) upheld the validity of the control order legislation. The majority held:

- The control order provisions do not confer non-judicial power contrary to Chapter III of the *Constitution*. The standard of 'reasonably necessary' and 'reasonably appropriate and adapted' for the purpose of protecting the public is not inherently too vague for use in judicial decision-making. A court can make predictions about the danger to the public in terrorist threats in a similar way to the way it does when it issues apprehended violence orders.
- The control order provisions do not require the Court to exercise judicial power in a manner that is contrary to Chapter III. The Court said the interim control orders have all the usual indicia of the exercise of judicial power. The fact that control orders are issued on the balance of probabilities is not inconsistent with Chapter III and nor was the fact applications for interim control orders are heard ex-parte.
- The control order provisions are supported by the Defence power. Therefore, it was unnecessary to consider whether they were also supported by the external affairs power or the implied power to protect the nation.

The control order issued against Mr Thomas expired in August 2007.

7.2 The case of David Hicks

(a) The right to a fair trial

The treatment of David Hicks, who was detained without trial in Guantanamo Bay for over five years, violated the right to a fair trial protected by article 14 of the ICCPR and the prohibition on arbitrary detention and arrest in article 9 of the ICCPR. Mr Hicks was denied the fundamental right of *habeas corpus* ('the right to challenge the lawfulness of his detention') and the right to be presumed innocent until proven guilty.

Mr Hicks is an Australian citizen who was captured among Taliban forces in Afghanistan in 2001. On 11 January 2002, he was taken to Guantanamo Bay where he was detained without charge as an 'unlawful combatant'. In July 2003, President George W. Bush decided that Mr Hicks and five other Guantanamo Bay detainees were eligible for trial by Military Commission.

Mr Hicks was charged on 10 June 2004 with conspiracy to commit war crimes, attempted murder and aiding the enemy. In a hearing before a US Military Commission in August 2004, he pleaded not guilty to all the charges. In August 2004, Mr Hicks signed an affidavit alleging that he was repeatedly beaten while blindfolded and handcuffed, shackled, deprived of sleep, held in solitary confinement for approximately nine months, and threatened with firearms and other weapons.

In June 2006, in [Hamdan v Rumsfeld](#)⁶¹ the US Supreme Court decided that the military commissions established by the President to try Guantanamo Bay detainees were not of the type authorised to be set up by Congress and were therefore unconstitutional. This was because Congress had only authorised the establishment of military commissions that comply with the common law of war and common article 3 to the Geneva Conventions.

In response to the decision in *Hamdan v Rumsfeld*, the US Congress passed the *Military Commissions Act 2006* which established new military commissions and opened the way for new hearings. In 2007, Mr Hicks was charged for a second time under the *Military Commissions Act 2006* (US), this time with providing material support for terrorism and attempted murder. A 2007 [report](#) by the Law Council of Australia was highly critical of the retrospective charges brought against Mr Hicks under the *Military Commissions Act 2006* and the then Australian government's failure to protect Mr Hicks' rights and seek to have him returned home. The report said that the then government's support of the Military Commission process was 'obviously at odds with the Rule of Law'.

Mr Hicks was sentenced by a US Military Commission to seven years imprisonment after pleading guilty to the charge of material support for terrorism. All but nine months of this sentence was suspended in accordance with the terms of the plea bargain. As a condition of the plea bargain agreement, Mr Hicks signed a document stating that he had never been mistreated by US officials and renouncing all previous claims of torture or ill-

treatment. Under the plea bargain, Mr Hicks returned to Australia in May 2007 to serve out the remainder of his nine month sentence in a South Australian prison.

On 21 December 2007, Mr Hicks became the second person in Australia to be the subject of an interim control order. The control order required that Mr Hicks report at least three times per week to a police station, and be fingerprinted. Mr Hicks was subject to a curfew between midnight and 6am. The order also imposed restrictions on where Mr Hicks could live, with whom he could associate, where he could travel and his ability to communicate via email, telephone and the internet. On 29 December 2007, Mr Hicks was released from prison. The control order imposed on Mr Hicks was confirmed on 20 February 2008, although some of its conditions were relaxed.⁶²

(b) *The right not to be subject to torture or cruel, inhuman or degrading treatment or punishment*

A 2006 report by the UN Commission on Human Rights on [The Situation of detainees in Guantanamo Bay](#) concluded that detention practices at Guantanamo Bay breached international prohibitions on torture and cruel, inhuman and degrading treatment. The right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment is contained in article 7 of the CAT. This right is also protected by article 7 and article 10 of the ICCPR.

During the time Mr Hicks and another Australian citizen, Mamdouh Habib, were detained in Guantanamo Bay both men alleged they were subjected to extended periods of solitary confinement, regular beatings, routine sleep deprivation and were forced to take unknown medicine.

Mr Habib also alleges he was tortured in Egypt for seven months before he was transferred to Guantanamo Bay and that Australian officials were present while he was tortured. The Commonwealth denies these allegations. Click [here](#) to read about this [case](#). Mr Habib's claims are now the subject of legal proceedings in the Federal Court of Australia. The matter is listed for hearing by the Full Federal Court on 26 November 2008. At a recent hearing, Mr Habib's lawyers sought access to the document filed by the Commonwealth in defence of Mr Habib's claims. The Commonwealth refused to release the document without a formal application and suggested it may call evidence against releasing the material. Click [here](#) to read about this recent development.

7.3 The case of Abdul Nacer Benbrika

On 15 September 2008 in *R v Benbrika & Ors* a Victorian Supreme Court jury found Mr Abdul Nacer Benbrika guilty under the the Criminal Code of the following offences:

- being a member of a terrorist organisation (s102.3(1));

- directing the activities of a terrorist organisation (s102.2(1)); and
- possessing a thing connected with the preparation for a terrorist act (s101.4(1)).

Six of Mr Benbrika's followers were found guilty of a number of offences including being a member of a terrorist organisation, making funds available to a terrorist organisation and intentionally providing resources to a terrorist organisation. The jury found four other accused not guilty on all charges and did not make a finding against one accused. Information about trial is available from the [Commonwealth Attorney- General's website](#).

In an earlier hearing in the Benbrika case, the defendants applied to have their trial stayed on grounds of unfairness. They claimed that the general conditions under which they were being held in detention and transported to court each day was having a detrimental effect on their psychological and physical well-being. The defendants were held in the a maximum security outside of Melbourne. Prior to trial, all of the accused had spent at least two years in custody. For the first year, the defendants spent up to 23 hours a day in their cell. They were transported to court in vans divided into small box-like steel compartments with padded steel seats, lit only by artificial light. The defendants were strip-searched prior to their departure from and upon their return to the prison.

Bongiorno J held that the conditions under which the defendants were being held and transported rendered the trial unfair and should be stayed unless the unfairness was remedied. Bongiorno J order that the Secretary of the Department of Justice be joined to the case as an intervener and be required to depose an affidavit that the following minimum alterations to the Defendants conditions of incarceration and travel had been made to remove the unfairness currently affecting this trial:

- The Defendants be incarcerated for the rest of the trial at the Metropolitan Assessment Prison, Spencer Street.
- The Defendants be transported to and from court directly from and to the MAP without any detour.
- The Defendants be not shackled or subjected to any other restraining devices other than ordinary handcuffs not connected to a waist belt.
- The Defendants not be strip searched in any situation where they have been under constant supervision and have only been in secure areas.
- That the Defendants out of cell hours on days when they do not attend court be not less than ten.
- That the Defendants otherwise be subjected to conditions of incarceration not more onerous than those normally imposed on ordinary remand prisoners, including conditions as to professional and personal visitors.

The decision can be read [here](#).

8 What reforms would help ensure counter-terrorism laws comply with human rights?

Some counter-terrorism laws have been enacted with haste and without adequate assessment of their impact on fundamental rights and freedoms.

In 2006, the SLRC report expressed concern that government agencies sometimes '... passed over the invasive effect of particular legislation on human rights, and said little about particular steps that might have been taken by their agencies to alleviate such effects.'⁶³

The following steps could help ensure that Australia's counter-terrorism laws comply with international human rights standards now and in the future.

8.1 Introduce an Australian Charter of Human Rights

In Australia there is no Charter of Rights which requires the Parliament or the Courts to consider whether counter-terrorism laws comply with human rights principles.

The Commission believes that in the future, the best way to ensure that efforts to protect national security comply with Australia's international human rights obligations is to enact an Australian Charter of Rights. An Australian Charter of Human Rights could mean that in the future counter-terrorism measures are assessed within a human rights framework. A Charter of Human Rights could – depending on its content – ensure that:

- non-derogable human rights are identified and protected;
- counter-terrorism bills are accompanied by a human rights compatibility statement and legitimate restrictions on derogable human rights must be justified;
- government agencies consider the human rights impact of counter-terrorism measures;
- Courts act as a safeguard against executive overreach in individual counter-terrorism cases.⁶⁴

A Charter of Human Rights could help foster a human rights culture within government. Government agencies with responsibility for national security could be encouraged to incorporate human rights principles into policy development and implementation. Staff in these agencies should also have human rights training and the human rights impact of national security measures should be reviewed on a regular basis.

8.2 Implement the recommendations of major reports on counter-terrorism laws and establish an independent reviewer of counter-terrorism laws

Australia's existing counter-terrorism laws could be improved by implementing the recommendations to:

- clarify the unduly broad scope of offences relating to terrorist organisations;
- create an independent reviewer of terrorism laws; and
- amend the sedition laws contained in the Criminal Code.

The SLRC Report and PJCIS Report have recommended that an Independent Reviewer of Counter-terrorism laws be established to report on the operation of counter-terrorism laws. This reviewer should have the ability to set their own agenda and access all necessary information to report to Parliament.

Establishing an independent reviewer of counter-terrorism laws is important because of the potential of some counter-terrorism laws to infringe fundamental rights and the limited opportunity - in the absence of an Australian Charter of Rights - for a person to challenge decisions which do not comply with human rights.

The Commission believes an Independent Reviewer should:

- have the power to obtain information from any agency or person that he or she considers is relevant to the review, including intelligence agencies; and
- be required to consider the human rights impacts of counter-terrorism laws.

In the UK, an independent reviewer has the mandate to review the implementation of terrorism laws and report annually to Parliament.⁶⁵

There has been no formal government response to the recommendation to introduce an independent reviewer. In March 2008, a private members bill, the *Independent Reviewer of Terrorism Laws Bill 2008 [No.2]* ('the Bill'), was introduced to establish an independent reviewer of terrorism laws. On 2 September 2008 the Senate referred the Bill to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report by 14 October 2008.

Information about the Bill and the inquiry can be found [here](#). On 12 September 2008, the Commission made a submission to the Inquiry. The Commission's submission supported the introduction of an Independent Reviewer of Terrorism Laws. The Commission recommended that the Bill be amended to require the Independent Reviewer to consider the human rights impacts of laws relating to terrorist acts and to strengthen the Independent Reviewer's information gathering powers. To read this submission click [here](#).

8.3 Counter discrimination and promote social inclusion

In 2004, a report by the Commission called *Ismaε–Listen: National consultations on eliminating prejudice against Arab and Muslim Australians* ('the *Ismaε*Report') found that since the terrorist attacks on 11 September 2001 and the October 2002 Bali Bombings, members of Muslim and Arab communities have been experiencing increasing levels of discrimination. The *Ismaε*Report identified three main trends within the Muslim and Arab communities:

- an increase in fear and insecurity;
- the alienation of some members of the community; and
- a growing distrust of authority.

A key recommendation from the *Ismaε* report is to enact federal legislation that makes discrimination and vilification on the basis of religion unlawful. This recommendation has not been implemented. You can read the *Ismaε*Report [here](#).

The impact of the new security environment on Muslim and Arab Australians was discussed in the SLRC and PJCIS Reports. The SLRC Report expressed 'serious concern' about the way in which counter-terrorism legislation is perceived by some members of Muslim and Arab communities.

The PJCIS Report found that 'one of the damaging consequences of the terrorist bombing attacks in the US, the UK, Europe and Indonesia has been a rise in prejudicial feelings towards Arab and Muslim Australia'. It also expressed concern about 'reports of increased alienation attributed to new anti-terrorist measures, which are seen as targeting Muslims and contributing to a climate of suspicion'.⁶⁶

Both the SLRC and PJCIS Reports supported remedying these problems through measures which promote social inclusiveness and counter discrimination. To read about the Commission's important work in this area click [here](#).

9 Where can I find more information about Australia's counter-terrorism laws?

9.1 Books

- Andrew Lynch, Edwina MacDonald, George Williams (eds), *Law and Liberty in the War on Terror*, Federation Press (2007).
- Andrew Lynch & George Williams, *What Price Security? Taking Stock of Australia's Anti-terror Laws*, University of New South Wales Press (2006).

- Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, Oxford, (2006).
- Leigh Sales, *Detainee 002: the Case of David Hicks*. Melbourne University Press, (2007).

9.2 **Online resources**

- [Counter-terrorism cases](#) in Australian Courts.
- A [chronology of counter-terrorism laws](#) introduced in Australia
- [United Nations Action to counter-terrorism](#)
- [Submissions by the Human Rights and Equal Opportunity Commission](#)
- [Discussion Paper on Material that advocates terrorist acts](#) .
- [The Gilbert and Tobin Public Law Centre counter-terrorism resources](#)

Reports

- Australia 2020 Summit, *Final Report*, Chapter 9, [Australia's future security and prosperity in a rapidly changing region and world](#).
- [Report by the United Nations Special Rapporteur](#) on Australia's human rights compliance while counter-terrorism.
- [Fighting words: A Review of Sedition Laws in Australia](#). Report by the Australian Law Reform Commission.
- The [Report of the Sheller Committee](#) Security Legislation review.
- [The Australian Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter-terrorism Legislation](#)
- The Commission [Isma report](#) .

9.3 **Principal Legislation**

- [Criminal Code Act 1995 \(Cth\)](#)
 - Part 5.3 (Terrorism), divisions 100-103. Incitement to criminal acts (including incitement to terrorism) is contained in Part 2.4.
- [Criminal Code Regulations 2002](#).
 - Schedule 1 contains the list of proscribed terrorist organisations.
- [Australian Security Intelligence Organisation Act 1979 \(ASIO Act\)](#)

- Sections 34A+ deal with ASIO's special powers relating to terrorism offences.
- [Crimes Act 1914 \(Cth\)](#)
 - Part 1AA, Division 3A: Powers to stop, question and search persons in relation to terrorist acts.
 - Division 4B- Power to obtain information and documents in terrorism investigations.
 - Part 1AE: Video link evidence in proceedings for terrorism offences.
 - Section 15AA: Bail not to be given for terrorist offences.
 - Section 19AG: Non-parole periods for terrorist offenders. Part 1C, Division 2: Powers of arrest for terrorist suspects.
 - Part II: Offences against Government & Part IIA: Unlawful associations.
- [National Security Information \(Criminal and Civil Proceedings\) Act 2004](#)

¹ Article 14 of the *International Covenant of Civil and Political Rights* (ICCPR).

² Article 9 of the ICCPR.

³ Article 7 and 15 of the CAT.

⁴ Article 17 of the ICCPR.

⁵ Article 19 of the ICCPR.

⁶ Article 26 and Article 2(1) of the ICCPR.

⁷ Article(2) of the ICCPR.

⁸ This approach is consistent with the United Nations Security Council Resolution 1373 which provides that Australia has an obligation to take action that is necessary to prevent and prosecute terrorism but only if such action conforms with international human rights, humanitarian and refugee law. *Resolution on Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373 (2001).

⁹ Article 6 of the ICCPR.

¹⁰ Article 18 of the ICCPR.

¹¹ Article 7 of the ICCPR.

¹² Article 16 of the ICCPR.

¹³ Article 15 of the ICCPR.

¹⁴ Article 14 of the ICCPR.

¹⁵ *A (FC) and others (FC) v Secretary of State for the Home Department* [2004] UKHL 56.

¹⁶ *A (FC) and others (FC) v Secretary of State for the Home Department* [2004] UKHL 56, 30.

¹⁷ The UN Human Rights Committee has stated that proportionality is a fundamental test that must be met for any form of restriction on human rights under the ICCPR: UN Human Rights Committee, General Comment No. 29 - States of Emergency (Article 4), [4]

¹⁸ Security Legislation Review Committee ('SLRC'), *Report of the Security Legislation Review Committee* (2006), 3.

- ¹⁹ Joint declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005.
- ²⁰ Part 5.3 of the Criminal Code was subsequently amended by the *Anti-Terrorism Act (No.2) 2004* (Cth), the *Anti-Terrorism Act 2005* (Cth) and the *Anti-Terrorism Act 2005 (No.2)* (Cth).
- ²¹ Both the SLRC Report and the PJCIS report recommended that ‘threat’ of an act of terrorism be removed from the definition of terrorism and dealt with as a separate criminal offence. Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter-terrorism Legislation*, December 2006, Recommendation 10; SLRC, *Report of the Security Legislation Review Committee* (2006); see also 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), [10].
- ²² *Criminal Code Act 1995* (Cth) s 101.1.
- ²³ *Criminal Code Act 1995* (Cth) s 101.2.
- ²⁴ *Criminal Code Act 1995* (Cth) s 101.4.
- ²⁵ *Criminal Code Act 1995* (Cth) s101.5.
- ²⁶ *Criminal Code Act 1995* (Cth) s 101.6.
- ²⁷ The PJCIS did recommend that a separate hoax offence be adopted with a penalty that reflects the less serious nature of hoax as compared to a threat of terrorism: Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter-terrorism Legislation*, December 2006, Recommendation 13.
- ²⁸ *Criminal Code Act 1995* (Cth) see ss11.1, 11.4, 11.3.
- ²⁹ SLRC, *Report of the Security Legislation Review Committee* (2006), 4.
- ³⁰ SLRC, *Report of the Security Legislation Review Committee* (2006) Recommendation 9.
- ³¹ SLRC, *Report of the Security Legislation Review Committee* (2006) Recommendation 3-4.
- ³² *Criminal Code Act 1995* (Cth) s 102.2.
- ³³ *Criminal Code Act 1995* (Cth) s 102.3.
- ³⁴ *Criminal Code Act 1995* (Cth) s 102.5.
- ³⁵ *Criminal Code Act 1995* (Cth) s 102.6.
- ³⁶ *Criminal Code Act 1995* (Cth) ss 103.1 and 103.2. See also SLRC, *Report of the Security Legislation Review Committee* (2006) Recommendation 13.
- ³⁷ *Criminal Code Act 1995* (Cth) s 102.7.
- ³⁸ *Criminal Code Act 1995* (Cth) s 102.8.
- ³⁹ SLRC, *Report of the Security Legislation Review Committee* (2006), 5, Recommendation 15; A senate review committee was also unpersuaded that the offence was ‘need[ed] in the in the first place, given the already wide ambit of terrorism offences under current law in Australia, the breadth of the definition of ‘terrorist organisation’ contained in the Criminal Code, and other existing laws such as the law of conspiracy and accessory liability’. This committee also expressed apprehension about the tendency towards ‘legislative overreach’ in relation to counter-terrorism measures in Australia: see Legal and Constitutional Legislation Committee, *Provisions of the Anti-terrorism Bill (No. 2) 2004*, August 2004, [3.113]
- ⁴⁰ See, for e.g., HREOC’s submission to the Clarke Inquiry on the Case of Dr Mohamed Haneef, May 2008.
- ⁴¹ *Criminal Code Act 1995* (Cth) s. 80.2(1)
- ⁴² *Criminal Code Act 1995* (Cth) s 80.2(4)
- ⁴³ *Criminal Code Act 1995* (Cth) s.80.2(5)
- ⁴⁴ *Criminal Code Act 1995* (Cth) s 80.2(7)
- ⁴⁵ *Criminal Code Act 1995* (Cth) s 80.2(8)
- ⁴⁶ Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report 104, July 2006.
- ⁴⁷ See further Bronwen Jagers, ‘Anti-terrorism control orders in Australia and the United Kingdom: a comparison’, *Australian Parliamentary Library Research Paper*, 29 April 2008, no. 28, 2007–08, ISSN 1834-9854.
- ⁴⁸ *Crimes Act 1914* (Cth) s 23CA(1).
- ⁴⁹ *Crimes Act 1914* (Cth) s 23CA(8).
- ⁵⁰ *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 (21 August 2007).
- ⁵¹ *Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203 (21 December 2007)

⁵² 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), [34].

⁵³ 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), [30].

⁵⁴ The Bill was reviewed by both the Parliamentary Joint Committee on ASIO ASIS and DSD and the Senate Committee on Legal and Constitutional Affairs.

⁵⁵ The Hon Sir Gerard Brennan, AC, KBE, 'The Law and Justice Address', 2007 Justice Awards Parliament House, Sydney 31 October 2007.

⁵⁶ 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), [47].

⁵⁷ Hon Michael McHugh AC QC, 'Terrorism Legislation and the Constitution' (2006) 28 *Australian Bar Review* 117.

⁵⁸ [2006] VSCA 165 (18 August 2006).

⁵⁹ 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), [38].

⁶⁰ [2007] HCA 33

⁶¹ *Hamdan v Rumsfeld*, 126 S.Ct 2749 (2006).

⁶² *Jabbour v Hicks* [2008] FMCA 178 (19 February 2008)

⁶³ SLRC, *Report of the Security Legislation Review Committee* (2006) [5.2].

⁶⁴ A 2006 review of the *Human Rights Act 1998* (UK) found that it has had a significant, and beneficial, effect on policy formation for three reasons: (1) formal procedures for ensuring compatibility with human rights improved transparency and parliamentary accountability; (2) the dialogue between the judiciary and the parliament led to laws and policies which are inconsistent with human rights being changed; and (3) public authorities were more likely to behave in conformity with human rights. See further the United Kingdom Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006) [4]. The Review also concluded that decisions of the courts under the Act had not negatively impacted on the government's ability to achieve its objectives in relation to crime, terrorism or immigration.

⁶⁵ See *Terrorism Act 2000* (UK) s 126; *Prevention of Terrorism Act 2005* (UK) ss 14 (3).

⁶⁶ Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, Canberra, [3.3], [3.5].