



public interest
ADVOCACY CENTRE LTD

**Express human rights compliance needed:
Submission in response to the Federal
Attorney-General's *National Security Legislation
Discussion Paper***

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work on national security legislation

PIAC has made submissions to the major inquiries into Commonwealth anti-terrorism legislation.¹ PIAC has also made submissions in respect of the NSW anti-terrorism legislation.²

¹ See, for eg, Patricia Ranald, *Submission to the Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills (2002)* <http://www.piac.asn.au/publications/pubs/antiterr_20020924.html> at 7 August 2009; Annie Pettitt, *Submission to the Inquiry into the Anti-Terrorism Bill 2004 (2004)* <<http://www.piac.asn.au/publications/pubs/PIACATsubmission%20April04.pdf>> at 20 July 2009; Annie Pettitt, *Supplementary Submission to the Inquiry into the Anti-Terrorism Bill (2004)* <[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(153683DB7E984D23214BD871B2AC75E8\)~04.05-Supp+Sub+re+Anti-Terror+Bill1.PDF/\\$file/04.05-Supp+Sub+re+Anti-Terror+Bill1.PDF](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(153683DB7E984D23214BD871B2AC75E8)~04.05-Supp+Sub+re+Anti-Terror+Bill1.PDF/$file/04.05-Supp+Sub+re+Anti-Terror+Bill1.PDF)> at 20 July 2009; Annie Pettitt and Robin Banks, *Submission to the Senate Legal and Constitutional Committee Inquiry into the Anti-Terrorism Bill (No 2) (2004)* <http://www.piac.asn.au/publications/pubs/submission_anti-terrorism_bill.pdf> at 20 July 2009; Annie Pettitt and Robin Banks, *Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD Review on the listing of Al Qa'ida, Jemaah Islamiyah, the Abu Sayyaf Group, the Armed Islamic Group, the Jamiat ul-Ansar, the Salafist Group for Call and Combat as terrorist organisations under section 102.1A of the Criminal Code (2005)* <<http://www.piac.asn.au/publications/pubs/Submission%20to%20PJC%20re%20terrorism%20groups.pdf>> at

PIAC remains of the view that these laws are unnecessary and constitute an unjustifiable breach of a range of human rights, including the right to liberty, the right to a fair trial and the right to privacy, freedom of speech and freedom of association. PIAC's view is supported by the findings of the International Commission of Jurists, which in its report, *Assessing Damage, Urging Action*,³ found that there is no justification for the anti-terrorism laws introduced globally following 11 September 2001 and that these laws have done much to damage both civil society and the international legal framework, including human rights.

1.3 Overview

In July 2009, the Federal Attorney-General initiated a comprehensive inquiry into Commonwealth national security and anti-terrorism legislation. As part of this inquiry public comment was sought on the proposals contained in the *National Security Discussion Paper (the Discussion Paper)*.

20 July 2009; Robin Banks and Jane Stratton, *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD Review of Division 3, Part III of the ASIO Act 1979 (Cth) – Questioning and Detention Powers* (2005) <<http://www.piac.asn.au/publications/pubs/Submission%20to%20PJC%20on%20ASIO%20question%20detain.pdf>> at 20 July 2009; Robin Banks & Jane Stratton, *Submission to the Senate Legal and Constitutional Committee on the inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005 (Cth)* (2005) <<http://www.piac.asn.au/publications/pubs/Submission%20on%20the%20National%20Security%20Information%20Legislation%20Amendment%20Bill.pdf>> at 20 July 2009; Robin Banks & Jane Stratton, *Supplementary submission – Review of Division 3, Part III of the ASIO Act 1979 (Cth)*(2005) <<http://www.piac.asn.au/publications/pubs/supplementary.pdf>> at 20 July 2009; Robin Banks and Jane Stratton, *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD on the relisting of Hizballah External Security Organisation, HAMAS' Izz al-Din al-Qassam Brigades; Lashkar-e-Tayyiba; and the Palestinian Islamic Jihad* (2005) <http://www.piac.asn.au/publications/pubs/terrorgsub_20050729.html> at 20 July 2009; PIAC, *Submission to the Senate Legal and Constitutional Legislation Committee on the Anti-Terrorism Bill (No 2) 2005 (Cth)* (2005) < http://www.piac.asn.au/publications/pubs/anti-terrorism_bill.pdf > at 20 July 2009; Robin Banks, *Inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005: Response to Questions on Notice and Transcript for proofing* (2005) <<http://www.piac.asn.au/publications/pubs/Senate%20re%20questions%20on%20notice.pdf>> at 20 July 2009; PIAC *Submission to the Security Legislation Review Committee* (2006) <<http://www.piac.asn.au/publications/pubs/06.01-Shellersub.pdf>> at 20 October 2009; Robin Banks and Vijaya Rahman, *Review of the Listing Provisions of the Criminal Code, Submission to the Parliamentary Joint Committee on Intelligence and Security* (2007) <<http://www.piac.asn.au/publications/pubs/07.01.15%20PIAC%20Sub-PJCIS.pdf>> at 20 July 2009; Joint Letter to the Commonwealth Attorney General, The Hon Robert McClelland MP, 21 November 2008.

² See Robin Banks and Jane Stratton, *Submission to NSW Parliamentarians on the Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005* (2005) <<http://www.piac.asn.au/publications/pubs/nswterrsub.pdf>> at 15 October 2009; Robin Banks and Jane Stratton, *Submission to the NSW Attorney General on the Terrorism (Police Powers) Act 2002 (NSW)* (2005) <<http://www.piac.asn.au/publications/pubs/NSW%20terror%20police%20powers%20sub.pdf>> at 15 October 2009; Robin Banks and Natasha Case, *The case for repeal: Submission to the Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002 (NSW)* (2007) <http://www.piac.asn.au/publications/pubs/sub2007071_20070703.html> at 20 July 2009; Letter from International Commission of Jurists, PIAC, Combined Community Legal Centres (NSW) Group, Australian Lawyers for Human Rights, Sydney Centre for International Law, NSW Council for Civil Liberties to The Hon. Nathan Rees MP, *Open Letter to the NSW Government*, 20 March 2009; Natasha Case, *Submission to the NSW Attorney General on the Review of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) and Terrorism (Police Powers) Act 2002 (NSW)* (2009).

³ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (2009).

In this submission, PIAC comments on the following parts of the Discussion Paper:

- Chapter 1, Parts 2, 3, and 4;
- Chapter 4, and
- Chapter 5.

PIAC endorses the views of the National Association of Community Legal Centres (NACLC) in respect of those parts of the Discussion Paper that are not addressed in this submission. PIAC contributed to the analysis underpinning the NACLC submission but does not share all of the concluding views of the NACLC on all topics.

PIAC congratulates the Federal Government on the work it has done to recognise and protect human rights since 2007, including the ratification of a number of international human rights instruments⁴ and the reform of domestic legislation to make it more consistent with human rights standards.⁵ The Federal Government's engagement with the reports of the Security Legislation Review Committee chaired by the Hon Simon Sheller QC (the Sheller Committee)⁶ and the Parliamentary Joint Committee on Intelligence and Security (PJCIS)⁷ is commended by PIAC as the appropriate response of government to such independent inquiries.⁸

PIAC takes this opportunity to urge the Government to adopt the recommendations of the Senate Finance and Public Administration Committee report on the National Security Legislation Monitor Bill 2009 (2009).⁹ In particular, PIAC urges the Government to include state and territory legislation within the ambit of the National Security Legislation Monitor's office.¹⁰ The National Security Legislation Monitor (NSLM), if that office is created in accordance with the recommendations of the Finance and Public Administration Committee, will enable independent testing, assessment and judgment on the questions of whether the anti-terrorism regime now in place across all Australian jurisdictions is necessary and proportionate to the alleged threat of terrorist attack. That regime is currently based on nothing more than assumption, including the assumption that the ordinary criminal law is not adequate to police terrorism-related activity.

⁴ For eg, ratification of the *Convention on the Rights of Persons with Disabilities* on 17 July 2008, accession to the *Optional Protocol to the Convention on the Elimination of all forms of Discrimination Against Women* on 24 November 2008, ratification of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* on 21 August 2009, and has, in January 2009, issued a standing invitation to UN human rights experts to investigate human rights in Australia.

⁵ For eg, by implementing the recommendations of the report by the Human Rights and Equal Opportunity Commission, *Same Sex: Same Entitlements* (2007).

⁶ Security Legislation Review Committee in the House of Representatives, Parliament of Australia, *Report of the Security Legislation Review Committee* (2006) (the Sheller Committee Report), <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~SLRC+Report-+Version+for+15+June+2006\[1\].pdf/\\$file/SLRC+Report-+Version+for+15+June+2006\[1\].pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~SLRC+Report-+Version+for+15+June+2006[1].pdf/$file/SLRC+Report-+Version+for+15+June+2006[1].pdf)> at 28 July 2009.

⁷ Parliamentary Joint Committee on Intelligence and Security, Commonwealth Parliament, *Review of Security and Counter Terrorism Legislation* (2006) (PJCIS report) <<http://www.aph.gov.au/house/committee/pjcis/securityleg/report.htm>> at 28 July 2009.

⁸ See, eg, Government Response to Recommendations of the Parliamentary Joint Committee on Intelligence and Security "Review of Security and Counter-Terrorism Legislation", tabled in Parliament of Australia on 4 December 2006 (December 2008).

⁹ Senate Finance and Public Administration Committee, Parliament of Australia, *Senate Finance and Public Administration Committee: National Security Legislation Monitor Bill 2009* (2009) <http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/report/report.pdf> at 15 October 2009.

¹⁰ *Ibid*, recommendation 7.

PIAC broadly agrees with many of the recommendations in the Discussion Paper. However, PIAC takes the view that the Attorney-General's Discussion Paper is a minimum response to the recommendations raised by the PJCIS, Sheller Review and MJ Clarke QC's *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008) (the Clarke inquiry). Many critical issues are either avoided entirely or hived off to the National Security Legislation Monitor or Council of Australian Governments (COAG). In some cases, different parts of a single provision are referred to two other bodies. For example, the terrorist organisation listing provisions section 102.5 of the *Criminal Code 1995* (Cth) are in part dealt with in the Discussion Paper, partly referred to COAG and partly referred to the NSLM. PIAC does not consider this to be an effective approach to law reform. The orthodox approach to statutory interpretation is to read legislation as a whole and in the context, including in the context of any scheme created by a suite of legislation or particular provisions within a single enactment. The Government's approach can only result in the fragmentation of debate, and a partial perspective by review bodies. PIAC urges the Government to ensure that a holistic approach reflecting orthodox principles of statutory construction is taken to the review of anti-terrorism legislation.

Further, the Attorney-General should approach the review of anti-terrorism legislation in accordance with the principle that Australian law should be consistent with international law, in particular human rights standards. This job should not be left to the NSIM alone. Rather, the whole of the Government, and all governments in Australia, are responsible for recognising and protecting the fundamental human rights of all people within their jurisdiction.

The Discussion Paper does not expressly provide a human rights analysis of the legislation it reviews. This has not prevented the Attorney-General from making a range of recommendations that improve the protection of human rights within the legislation. However, it does not prevent the Attorney-General from seeking to interfere with judicial power in a way which has a negative impact on the enjoyment of individual human rights, in particular the right to a fair trial.

2. Response to Chapter 1, Part 2 of the Discussion Paper: proposed amendments to the ‘urging violence’ offences in section 80 of the *Criminal Code 1995* (Cth)

Part 2 of the Discussion Paper contains proposed amendments to the sedition offences in section 80.2 of the *Criminal Code Act 1995* (Cth) (Criminal Code). Despite the title, Part 2 also contains numerous amendments to Part IIA of the *Crimes Act 1914* (Cth) (Crimes Act), which deals with offences not related to national security.

2.1 Amendments to section 80.2 of the *Criminal Code*

2.1.1 Definition of ‘urging’

One of PIAC’s concerns in relation to the sedition offences is that the current legislation provides no definition of ‘urging’. The amendments provide no indication as to how the term ‘urging’ should be interpreted by those applying the relevant provisions. The term ‘urging’ is not used in any other legislation and there is therefore no judicial interpretation available to assist in the interpretation of this term. PIAC is of the view that such a lack of clarity allows room for abuse and creates a climate of misunderstanding in the community.

PIAC is therefore of the view that any changes to the existing legislation should address this issue and define the term ‘urging’.

It would be extremely difficult to determine when an opinion or a comment might be one that in its delivery or content would amount to the act of ‘urging’ without any guidance from the legislation.

Recommendation

1. *That the meaning of ‘urging’ in section 80.2 of the Criminal Code Act 1995 (Cth) be clarified by including both an element of intention and a definition of the term ‘urge’.*

2.1.2 Urging the overthrow of the *Constitution* or Government

The proposed amendments repeal the existing sedition offence in subsection 80.2(1) and replace it with a new offence called ‘Urging the overthrow of the *Constitution* or Government by force or violence’.

The Discussion Paper also clarifies that the fault element required in committing an offence under subsection 80.2(1) is ‘intention’. In addition, the proposed amendments include an additional element in paragraph 80.2(1)(b), which requires the person to intend that force or violence will occur as a result of the person intentionally urging the force or violence

PIAC supports the above proposals, which make explicit reference to ‘force or violence’ in the heading of subsection 80.2(1) of the *Criminal Code* and require that a person must have intended the urged force or violence to occur. It also supports the inclusion of the word ‘intentionally’ in section 80.2 and believes that this inclusion is an important clarification of the fault element applicable to the prohibited action of ‘urging’.

2.1.3 Urging interference in parliamentary elections or constitutional referenda by force or violence

PIAC supports the proposed amendments in this part of the Discussion paper, which would repeal the existing sedition offence of urging interference in parliamentary elections (subsection 80.2(3) of the *Criminal Code*) and replace it with a new offence that makes explicit reference to 'force or violence': 'Urging interference in parliamentary elections or constitutional referenda by force or violence'.

In addition, PIAC supports the proposal to extend the offence to include urging interference by force or violence with lawful processes for a referendum. PIAC agrees with the Discussion Paper that the fault element needs to be clearly stated within the offence to ensure clarity and understanding of the operation of the offence, and hence agrees with the insertion of the word 'intentionally' in the section. PIAC also supports the inclusion of an additional fault element to the offence under section 80.2(3).

2.1.4 Urging violence against groups or group members

PIAC supports the proposal to repeal subsection 80.2(5) of the *Criminal Code*. However, in light of the proposal to create two new offences, PIAC urges the Government to consider the complete removal of group-based violence offences from the *Criminal Code* in order to avoid such offences being conflated with the use of force or violence against the institutions of government. It is submitted that the nature of inter-group violence is distinctly different in nature and this difference should be recognised in the location of these provisions in the relevant legislation.

PIAC is of the view that the operation of the new provisions, sections 80.2A and 80.2B, substantially overlaps with state and territory anti-discrimination regimes. For example, in relation to the incitement of violence on the ground of race, section 20D of the *Anti-Discrimination Act 1977* (NSW) (*Anti-Discrimination Act*) provides that it is an offence to incite others to threaten physical harm to persons or groups on the ground of race:

- (1) A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:
 - (a) threatening physical harm towards, or towards any property of, the person or group of persons, or
 - (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.¹¹

In contrast, however, serious racial vilification is not an offence under federal discrimination law. The provisions of the *Racial Discrimination Act 1975* (Cth) that seek to prohibit acts that 'offend, insult, humiliate or intimidate' a person or group of persons on the basis of 'race, colour or national or ethnic origin' are merely civil provisions.¹²

It appears that by criminalising the act of urging violence against racial groups, sections 80.2A and 80.2B of the *Criminal Code* attempt to fill the gap in federal racial vilification law in the context of national security and anti-terrorism measures. This is evident from the commentary to the proposed reforms in the

¹¹ See also *Anti-Discrimination Act 1991* (Qld) s 124; *Racial Vilification Act 1996* (SA) s 4; *Discrimination Act 1991* (ACT) s 67; *Criminal Code* (WA), ss 77, 78. Tasmania has no criminal racial vilification provisions.

¹² *Racial Discrimination Act 1975* (Cth) s 18C(1).

Discussion Paper where it states: 'These amendments ensure that criminal sanctions apply to any urging of force or violence against a person or group on the basis of race, religion, nationality, national origin or political opinion.'

In principle, PIAC supports the introduction of criminal penalties for inciting violence on the basis of race, nationality, political opinion and religion. As noted by Dr Ben Saul, '[c]riminalising incitement to violence against religious groups sends a strong message to the community that religious hatred is unacceptable, and hopefully shapes social behaviour'.¹³ Such laws are also welcomed by PIAC to the extent that they give effect to Australia's human rights treaty obligations.¹⁴

However, PIAC submits that the manner in which the Government proposes to criminalise the inciting violence offences, ie, by dealing with incitement to group violence through counter-terrorism provisions, is ill conceived. It conflates the outdated notion of sedition, with its reliance on subversion of political authority, with the rights of all groups to be afforded protection from serious racial vilification.

The proper course for the Government to take would be to expand the federal racial and other vilification laws so as to make it an offence to incite violence in accordance with international human rights treaties. The creation of new criminal offences for urging group-based violence under the guise of anti-terrorism legislation is an inappropriate means of supplementing existing federal discrimination laws.

In light of the above, PIAC urges the Government to consider the complete removal of group-based violence offences from the *Criminal Code*, and contends that this problem should be addressed through existing anti-discrimination legislation.

Recommendation

2. *That vilification not be criminalised in the context of the Criminal Code Act 1995 (Cth) but in the context of the Racial Discrimination Act 1975 (Cth).*

Notwithstanding the recommendations made by PIAC, if the Government retains the urging group-based violence offences in the *Criminal Code*, PIAC supports the proposed amendment to insert the word 'intentionally' before the word 'urges' to clarify the fault element applicable to urging. PIAC also supports the addition of 'national origin' to the distinguishing features of the group against whom violence is being urged.

Recommendation

3. *That group-based offences be removed from the Criminal Code Act 1995 (Cth) altogether. However, if these offences are not eliminated, the proposed addition of an element of intention to these offences should be supported.*

2.1.5 Repealing offences in subsections 80.2(7), (8) and (9) of the *Criminal Code* and the good faith defence

Subsections 80.2(7) and (8) of the *Criminal Code* contain the offences of urging another person to assist an organisation or country at war with the Commonwealth or urging a person to assist an organisation or

¹³ Dr Ben Saul, 'It's essential to clean up the mess', *Sydney Morning Herald* (Sydney) 14 December 2005, 17.

¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993), Art 20(2).

country engaged in armed hostilities with the Australian Defence Force. Subsection 80.2(9) provides for a defence to these offences in relation to humanitarian aid.

PIAC supports the proposed amendments, which seek to repeal these offences, and concurs with the proposition in the Discussion Paper that the treason offences in the amended section 80.1 and proposed section 80.1AA adequately criminalise action taken by a person to assist an enemy engaged in hostilities against the Commonwealth and the Australian Defence Force.

Each of the defences in paragraphs 80.3(1)(a)-(f) requires that the conduct be 'in good faith'. However, the *Criminal Code* fails to provide any guidance on the meaning of good faith in the context of sedition offences. Furthermore, the case law on this area of law is of little help as the meanings provided in the cases often vary.

In *Mid Density Developments Pty Ltd v Rockdale Municipal Council*,¹⁵ Gummow Hill and Drummond JJ discussed the concept of 'good faith' at length and stated:

'Good faith' in some contexts identifies an actual state of mind, irrespective of the quality or character of its inducing causes; something will be done or omitted in good faith if the party was honest, albeit careless... On the other hand, 'good faith' may require that exercise of caution and diligence to be expected of an honest person of ordinary prudence.

In *Siano v Helvering*,¹⁶ Clark J noted that the term 'good faith' has 'two divergent meanings'. The first encompasses a subjective element of the 'actual state of mind,' whilst the second considers objective factors such as reasonable caution and diligence.

The wording of the 'good faith' clause in section 80.3 is also more limited than comparable provisions in the *Anti-Discrimination Act* in regard to defences provided against racial vilification. The *Anti-Discrimination Act* allows for acts:

... done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.¹⁷

PIAC submits that in order to achieve adequate protection under this provision, the meaning of the term 'good faith' should be further clarified under the proposed legislation.

PIAC supports the inclusion of the proposed new subsection 80.3(3), which lists a number of additional matters to which a court may have regard when considering the good faith defence. The proposed subsection sets out much more clearly the relevant considerations in determining whether or not the person intended force or violence to be used.

Whilst PIAC commends this proposed amendment, it is concerned that the amended provisions do not give sufficient guidance on what weight should be given to the factors listed in the new subsection 80.3(3). It also fails to state how these factors might be considered in determining the intention of a person.

¹⁵ (1993) 116 ALR 460.

¹⁶ (1936) 13 F Supp 776 at 780.

¹⁷ *Anti-Discrimination Act 1977* (NSW) s 20C(c).

Although PIAC supports this proposal in principle, it is of the view that the Government should further clarify the application of the new subsection.

2.1.6 The Attorney-General's consent

PIAC supports the proposal to remove the requirement of the Attorney-General's consent for commencement of proceedings for an offence under Division 80. PIAC concurs with the findings of the Australian Law Reform Commission, which indicated that, although the provision was designed to provide an additional safeguard for a person charged with an offence within Division 80, the existence of the provision adds to the perception that there may be a political element to the decision whether or not to prosecute.

Recommendation

4. *That the meaning of 'good faith' be clarified, in particular the element of intention or mens rea required to support this defence.*

2.2 Repealing outdated offences in section 30 of the *Crimes Act*

The proposed amendments repeal sections 30A, 30AA, 30AB, 30B, 30C, 30D, 30E, 30F, 30FA, 30FC, 30FD, 30G, 30H and 30R of the *Crimes Act*. With the exception of section 30C, all of these offences relate to unlawful associations.

2.2.1 Unlawful associations

PIAC supports the proposal to repeal the provisions relating to unlawful associations in the *Crimes Act*. In light of the existing provisions of the *Criminal Code*, the unlawful association provisions of the *Crimes Act* serve no legitimate purpose.

PIAC submits that the existence of such provisions in the *Crimes Act* are an extraordinary restriction of freedom of speech guaranteed in the *International Covenant on Civil and Political Rights* (ICCPR)¹⁸ and have a significant impact on the community by creating a climate of heightened fear of breaking the law whether or not it is well founded. The Government is to be commended for repealing these provisions and taking a step towards compliance with human rights standards.

2.2.2 Advocating and inciting to commit a crime

PIAC concurs with the proposal in the Discussion Paper to repeal the offence of advocating or inciting to crime contained in section 30C of Part IIA of the *Crimes Act*. This provision was made redundant by the enactment of subsection 80.2(1) of the *Criminal Code*, which is virtually identical to section 30C.

¹⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

3. Response to Chapter 1 Part 3 of the Discussion Paper: proposed amendments to the terrorist act definition and offences in Divisions 100 and 101 of the *Criminal Code*

3.1 Definition of a 'terrorist act'

The Sheller Committee recommended that the reference to 'physical' harm be deleted from the definition, so that the phrase a 'terrorist act' could also apply to psychological harm.¹⁹ This recommendation was not accepted by the PJCIS, which indicated that it thought that the addition of psychological harm went beyond the accepted international definition of terrorism.²⁰ Martin Scheinin, United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, commented in his 2006 report on Australia's human rights compliance, that the Australian definition of a 'terrorist act' went beyond the United Nations Security Council's characterisation of terrorist activities by including acts, which go beyond the intention of causing death or serious bodily injury in paragraphs 100.1(2)(b), (d), (e) and (f) of the *Criminal Code*.²¹

Any broadening extension of the definition of a 'terrorist act' should be resisted. For the reasons set out below, PIAC maintains that the definition of a 'terrorist act' is already excessive and ambiguous. Therefore, any amendment to further extend the scope of the phrase 'terrorist act' should only be included in the legislation if it is strictly necessary and justifiable. PIAC is uncertain of the practical value that the proposed addition of psychological harm would add to the existing definition, as it seems to PIAC that any terrorist act that threatened a person with psychological harm would inevitably involve a threat of physical harm or some other kind of harm already specified in subsection 100.1(2) of the *Criminal Code*. Accordingly, PIAC submits that the Government should not amend the definition by deleting the words 'that is physical harm'.

PIAC also has serious reservations about the Government's proposal to add the words 'likely to cause' to paragraphs 100.1(2)(a)-(e) of the *Criminal Code*. The Government's proposal to insert these words is meant to deal with the difficulties that the Sheller Committee²² and PJCIS²³ identified arising from including the 'threat of action' in the definition of a 'terrorist act'. Adding these words to the definition of a terrorist act significantly broadens the definition, as it lowers even further the evidentiary burden that needs to be established in order to prosecute someone for a terrorist offence.

PIAC takes the view that the better solution is to adopt the proposal recommended by both the Sheller Committee and the PJCIS, namely that the 'threat of action' be deleted from the definition of a 'terrorist act' and the threat of committing a terrorist act should become a separate offence provision in Division 101 of the *Criminal Code*.²⁴ PIAC submits that creating a separate offence has the advantage of being more certain,

¹⁹ Security Legislation Review Committee, above n 6, 50.

²⁰ Parliamentary Joint Committee on Intelligence and Security, above n 7, 61-62.

²¹ M 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 General Assembly, Human Rights Council, Fourth Session, UN Doc, A/GRC/4/26/Add.3, 8 2006.

²² Security Legislation Review Committee, above n 6, 50-53.

²³ Parliamentary Joint Committee on Intelligence and Security, above n 7, 62.

²⁴ Security Legislation Review Committee, above n 6, 52-53; Parliamentary Joint Committee on Intelligence and Security, above n 7, recommendation 10.

unambiguous and is a more proportionate response to concerns that the Government may have about individuals making threats to commit terrorist acts.

Finally, PIAC has no objection to the government's proposal to amend subsection 100.1(1) by clarifying that the United Nations might be a target of terrorist violence and PIAC takes this opportunity to congratulate the Government on retaining paragraphs 100.1(1)(b) and (3) of the *Criminal Code*.

Recommendation:

5. *That the Government not proceed with its proposal to amend the definition of 'terrorist act' by deleting the phrase 'that is physical', or by inserting the words 'likely to cause' into the definition of a terrorist act contained in section 100.1 of the Criminal Code Act 1995 (Cth).*

3.2 General comments about sections 100 and 101 of the *Criminal Code*

More generally, PIAC continues to take the view that sections 100 and 101 are excessively broad and imprecisely defined. For example, the offence of collecting documents connected with the preparation of a terrorist act could be interpreted to include the actions of a person studying or reporting on the Bali bombing. This offence is punishable by up to 15 years imprisonment.

Furthermore, these sections create absolute liability. It is not relevant whether the defendant intended to commit a terrorist act or that the thing in their possession would contribute to a terrorist act. In light of the seriousness of the penalty for conviction, it seems extraordinary that conviction could be on such a basis. PIAC remains concerned that the definition of a 'terrorist act' and the offences that are based on this definition create offences that are too easily committed; they are committed regardless of whether a terrorist act occurs and regardless of any causal connection between the alleged conduct of a particular person and any terrorist act. For many offences, recklessness will suffice to found the offence. There is no requirement of knowledge or positive intent.²⁵

Finally, PIAC is unconvinced of the necessity of these special terrorism provisions. In this respect PIAC notes the comments of the UN Special Rapporteur that some of the acts covered by the definition in section 100.1 of the *Criminal Code* are clearly already covered by criminal laws, such as risks to safety of the public and interference with information systems.²⁶

Recommendation:

6. *That the Government give further consideration to repealing some or all of the provisions contained in section 101 of the Criminal Code Act 1995 (Cth)*

²⁵ PIAC, *Submission to the Senate Legal and Constitutional Legislation Committee on the Anti-Terrorism Bill (No 2) 2005 (Cth)* (2005) < http://www.piac.asn.au/publications/pubs/anti-terrorism_bill.pdf > at 28 July 2009, 26.

²⁶ Scheinin, above n 10, 9.

4. Response to Chapter 3 Part 4 of the Discussion Paper: proposed amendments to the terrorist organisation listing provisions and offences in Division 102 of the *Criminal Code*

In this section PIAC comments on the operation of certain provisions of Chapter 5 of the *Criminal Code* if they are amended as proposed in the Discussion Paper.

In particular, PIAC comments on the proposed amendments to:

1. the definition of 'advocates' (subsection 102.1(1A)) embedded in the broader definition of terrorism (section 102.1); and
2. the organisational listing provisions, including:
 - a. the period for which an organisation can be listed as a terrorist organisation without review (subsection 102.1(3)); and
 - b. the introduction of a new 'declaration' and 'listing' of aid organisations, regional aid organisations (section 102.8A), and associated exemption from the 'training' offence (section 102.5).

PIAC has noted in previous submissions touching on these provisions²⁷ that they are likely to breach human rights to freedom of speech and association guaranteed by Articles 19 and 22 of the *International Covenant on Civil and Political Rights*. While the Discussion Paper does not use the language of human rights, it is clear that while some of the reforms it proposes provide greater protection for human rights, others, including those considered in this section, would benefit from human rights analysis to improve their compliance with human rights standards.

4.1 Advocates: subsection 102.1(1A)

If the Minister is satisfied that an organisation 'advocates the doing of a terrorist act' (subsection 102.1(1A)) it may be listed as a proscribed organisation in regulations made by the Governor-General (subsections 102.1(2)-(4)).

The Discussion Paper proposes to amend the definition of 'advocates the doing of a terrorist act' to raise the level of risk in the definition of 'advocates' from *mere* risk to *substantial* risk. This amendment is consistent with the Sheller Report's alternative recommendation 9 (its first recommendation was to remove 'advocates' from the definition of terrorism entirely) and is consistent with recommendation 14 of the PJGIS Report 2007.

The introduction of this provision in 2004 was an unjustifiable breach of the human rights to freedom of speech and association. PIAC considers this amendment to be a step in the right direction, albeit one that still does not ensure the adequate protection of these human rights. This matter is scheduled to be further reviewed by COAG in 2010.²⁸ On that occasion, PIAC will again be advocating the repeal of this provision. In the meantime, PIAC recommends that section 102 should be referred to the National Security Legislation Monitor.

²⁷ See above, n 1.

²⁸ Government Response to recommendations of Parliamentary Joint Committee on Intelligence and Security *Review of Security and Counter-Terrorism Legislation*, tabled 4 December 2006 (2008).

4.2 Proscription period: subsection 102.1(3)

The Discussion Paper proposes to extend the period for which organisations remain on the list of terrorist organisations from two years to three years. PIAC does not have any particular view on this proposal. The proscription criteria for consideration of proscribing an organisation (or lack thereof), the process of proscription and the lack of merits review for proscription decisions is of far greater concern to PIAC than the time for which proscription is effective.²⁹

PIAC submits that the lack of statutory proscription criteria, the secret aspect of the proscription process and the question of whether merits review of proscription decisions should be available should be referred to the National Security Legislation Monitor, together with other provisions that are not the subject of any recommendations in the Discussion Paper, in particular the material support and financial offences.

4.3 Training a terrorist organisation: subsection 102.5, and exemption for declared aid organisations: section 102.8A

The complex 'training' offence provision (section 102.5) has been the subject of much criticism and several recommendations for amendment,³⁰ principally because it appears to combine both strict liability and fault elements in a single offence, and imposes an 'evidential burden' on the defendant. The Discussion Paper notes that the strict liability aspect of this provision will be referred to the National Security Legislation Monitor when an appointment is made to that office. PIAC looks forward to that opportunity to comment and anticipates that it will be advocating for substantial reform to this provision in accordance with its previous submissions.³¹

In the meantime, the Discussion Paper proposes to amend the provision to address the further criticism that this provision tends to catch innocent acts, particularly those of aid organisations, by creating a list of approved aid organisations. This proposed amendment does not adopt any of the recommendations in the Sheller Committee Report and PJCIS Report (recommendations 12 and 16, respectively), both of which recommended that the offence itself be narrowed by defining its terms more precisely.³²

The proposed regime gives the Minister the power to declare, if 'satisfied on reasonable grounds' that an organisation is a declared aid organisation or a declared regional aid organisation if:

- (a) an organisation is providing humanitarian aid; and
- (b) the benefit to the 'community' outweighs any benefit to a terrorist organisation (subsection 102.8A(2)).

The similarity between this provision and the much-criticised proscription provisions described above is obvious. Essentially, it is proposed to create a list of organisations whose actions will, upon listing, be deemed innocent. The potential injustice to organisations whose applications are refused, or which are too timid to make an application, is immediately apparent, as is the potential for discriminatory application of the provisions.

²⁹ Banks and Raman, *Security and counter terrorism legislation review: Submission to the Parliamentary Joint Committee on Intelligence and Security*, above n 1.

³⁰ Security Legislation Review Committee, above n 6, Recommendation 12; Parliamentary Joint Committee on Intelligence and Security, above n 7, Recommendation 16.

³¹ PIAC, *Submission to the Security Legislation Review Committee* (2006) <<http://www.piac.asn.au/publications/pubs/06.01-Shellersub.pdf>> at 21 October 2009

³² Letter from Lex Lasry QC to Parliamentary Joint Committee on Intelligence and Security Review of Counter Terrorism Legislation Inquiry, 17 July 2006, pars 12-16.

The proposed amendment uses words with wide meanings, including 'community' and 'humanitarian aid' and does not provide any guidelines or criteria by which to confine those meanings. Similarly, the indices by which 'benefits' to a community are to be measured against the 'risk of benefiting terrorist organisations' are not detailed. The use of the words such as 'community', 'humanitarian aid', 'benefit' and 'risk' confers too broad a discretion on the executive with too little guidance as to how to exercise that discretion. There is therefore a high risk of inconsistent application of the test.

This provision does not provide any test for the existence or presence of terrorist organisations. Rather, it assumes that terrorist organisations are always present, everywhere. No justification for this assumption is provided in the Discussion Paper. It is not clear who would have the benefit of the exemption. There is a logical problem with drafting a provision that applies to individuals by reference to organisations. An organisation is an artificial, incorporeal 'person' not, apparently, capable of committing the training offences in section 102.5.³³ Presumably, then, the exemption applies to individuals such as employees and other associates of declared organisations. This is a very broad exemption and one not particularly well-suited to achieving the stated objectives of either the amendment or the training offence provisions themselves.

Some comfort can be drawn from the availability of judicial review from legal error under the *Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act)* because review might result in the development of a criteria test or similar mechanism for guiding and containing executive power. However, it would be better to develop a test that meets the objects of the provision, which is apparently to provide a more nuanced and more certain regime within which legitimate charitable work may proceed.

However, judicial review for legal error is only one mechanism available for review of administrative decisions affecting rights. It is submitted that review should extend to merits review by the Administrative Appeals Tribunal (AAT). PIAC refers to its submissions to the Sheller Committee and the PJCS to the effect that listing decisions should be the subject of transparent and reviewable procedures and submit that AAT review should be available for all listing decisions.

In PIAC's view, the analogy drawn in the Discussion Paper between the proposed humanitarian aid organisation regime and those set out in section 9 of the *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)* and section 22 of the *Charter of the United Nations Act 1945 (Cth)* are flawed. Both purportedly analogous provisions are far narrower in scope than the proposed humanitarian aid organisation exemption, the former by reference to particular advertisements, the latter by reference to applications for permission to engage in particular dealings. The analogy would be more accurate if the proposed scheme for humanitarian aid organisations contemplated, for example, that particular projects be the subject of an exemption (thus necessitating the repeated declarations by the Minister). However, what is contemplated is far broader, demonstrating the problems with the proposal that have already been identified as problems with the existing offence provisions.

It is submitted that the proposed 'humanitarian aid' exemption in section 102.8A be abandoned as unworkable and the existing provision be amended in accordance with the recommendations in the Sheller Committee Report and the PJCS Report.

³³ Contrast with s21(2C) *Charter of the United Nations Act 1945 (Cth)* s 21(2c), which attaches corporate criminal responsibility, notwithstanding the fraught and complex nature of such liability.

Recommendations

7. *That sections 102.1, 102.2 and 102.5 of the Criminal Code Act 1995 (Cth) be referred to The National Security Legislation Monitor as a matter of urgency in order to develop a comprehensive reform strategy in time for the Council of Australian Governments meeting scheduled for 2010.*
8. *That review of listing decisions, whether prescriptive or proscriptive, extend to merits review by the Administrative Appeals Tribunal.*
9. *That the proposed 'humanitarian aid' exemption in section 102.8A of the Criminal Code Act 1995 (Cth) be abandoned as unworkable and the existing provision be amended in accordance with the recommendations in the Sheller Committee Report and the PJCIS Report.*

5. Response to Chapter 4 of the Discussion Paper: proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)*

PIAC's review of the proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (NSI Act)* has uncovered a number of serious concerns relating to:

1. the breadth of the information caught;
2. the regime covering permitted disclosure;
3. departures from the principle of open justice;
4. the standing of non-parties, in particular agencies of the executive government, to intervene;
5. the position of legal practitioners, in particular those retained as defence Counsel; and
6. penalties.

Without attempting to be exhaustive — nor to tie each comment to every specific provision to which it is capable of applying — PIAC's main concerns are addressed below.

5.1 What information is caught?

The *NSI Act* already throws an extraordinarily broad net by including information already in the public domain involving Australia's defence, security, international relations or law enforcement interests. Consistent with this definition, information already in the public domain relating to Australia's political and economic relations with foreign governments — even with international organisations — is characterised, perhaps counter-intuitively, as 'national security' information. Information relating to 'law enforcement interests', a term that is the subject of its own non-exhaustive definition which includes 'avoiding disruption to national and international efforts relating to law enforcement', is also subsumed within the definition of 'national security information'.

On the existing definition, information relating to the high profile Operation Wickenby investigation into overseas tax fraud, already widely published in the national press, could be 'national security' information, as could information emanating from Senate Estimates Committee hearings relating to involvement of the Australian Defence Force (ADF) in handling of prisoners, detainees or captives during the recent Operation Slipper.

The commentary to the proposed changes suggests that the even broader definition in subsection 7(a), by which even information which relates to national security (as defined above), is caught by the *NSI Act*, will be used in the Act 'primarily in relation to the notice provisions, sections 24, 25, 38D and 38E,' and that 'the second category of information' (subsection 7(b)) is used when the Attorney-General is deciding whether to issue a non-disclosure certificate or witness exclusion certificate'. PIAC can find no such distinction in the wording of the *NSI Act*. It is notorious that the words 'relate to' are capable of extremely broad interpretation.

Recommendation:

10. *PIAC submits, given the highly intrusive and cumbersome regime — backed by the sanction of imprisonment — which the National Security Information Act establishes, that:*
- a. *the definition of 'national security' should be brought into line with the definition of 'security' in the Australian Security Intelligence Organisation Act 1979 (Cth);*
 - b. *the paragraph 7(a) be deleted from the draft amendments, so that the definition catches information the disclosure of which may affect — as opposed to merely relating to — national security (properly defined);*
 - c. *the definition of 'information' in the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) should be amended to exclude information already in the public domain.*

5.2 Who decides when disclosure is permitted?

The proposed changes in section 16 of the *NSI Act* radically curtail any right to disclose 'national security' information, whether by a party with security clearance in closed court, as under the existing subsection 16(aa) of the *NSI Act* or by a legal representative of a party who has been given a security clearance and discloses the information in the course of his duties in relation to the proceedings (subsection 16(ac) *NSI Act*). The proposed amendments would replace these entirely appropriate exceptions with a scheme under which the Attorney-General would have complete discretion as to the circumstances in which, and the conditions under which, such information might be disclosed.

To suggest that entirely conventional and unexceptionable exemptions are so wide that (to quote the Discussion Paper commentary) they potentially 'undermine the protection accorded to national security information' is unsupported by any fair reading of the provisions themselves. The suggestion that the proposed amendments would 'give the Attorney-General greater flexibility to define the circumstances in which national security information could be disclosed' is somewhat of an understatement: they in fact give the Attorney-General *carte blanche* to permit or forbid disclosure.

PIAC opposes the proposed changes to section 16 and, in particular, the proposal to provide the Attorney-General with a further wide and unfettered discretion to forbid disclosure of 'national security' information - even by security cleared legal practitioners in closed court.

Recommendation:

11. *That the proposed changes to section 16 of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) and, in particular, the proposal to provide the Attorney-General with a further wide and unfettered discretion to forbid disclosure of 'national security' information, even by security-cleared legal practitioners in closed court, be rejected.*

5.3 Departures from open justice

The expressed intention of the proposed changes to section 19 is, according to the Discussion Paper, to enable wide-ranging orders, including general non-disclosure and suppression orders of the kind normally reserved for superior courts of record, to be made by inferior courts. The wording of the proposed subsection 19(1A) does not involve any consideration of necessity. In this the proposal is clearly at odds with the common law.³⁴ The Discussion Paper in fact notes that 'the only restriction on the court is that their orders must be in the interests of national security and consistent with the *NSI Act* or *NSI Regulation*'.

³⁴ *John Fairfax Publications Pty Limited v Police Tribunal* (1986) 5NSWLR 465.

PIAC submits that, where considerations of open justice are concerned, a subjective test of what the court considers 'appropriate', as opposed to an objective test based on necessity of the orders sought, is out of line with the existing law, and likely to be productive of what McHugh J (as he then was) described in *John Fairfax Publications Pty Limited v Police Tribunal*³⁵ as 'the spectre of secret tribunals' and thus capable of undermining public trust in the due administration of justice.

Recommendation:

12. *That the proposed proposed subsections 19(1A) and 19 (3A) of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) not be enacted.*
13. *That if, contrary to PIAC's primary submission, proposed subsections 19(1A) and 19(3A) of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) are enacted, their wording should be amended to reflect the existing law, to read as follows:*
In addition to the powers of a court under this Act in a federal criminal proceeding, the court may make such orders as are necessary in relation to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information if:
 - (a) *the court is satisfied on the basis of evidence that it is necessary in the interest of national security in the particular case to make such orders; and*
 - (b) *the orders are not inconsistent with this Act or regulations made under this Act; and*
 - (c) *the information is not already in the public domain; and*
 - (d) *the public interest in making the order outweighs other relevant public interests, including the overriding public interest in the open administration of justice.*

5.4 Who is entitled to be heard? Division 1A

Key provisions of the proposed changes create a broad and unfettered power for the Attorney-General or his/her representative to intervene in any civil or criminal case in which any issue as to the disclosure of 'national security' information arises. The Discussion Paper goes further, in suggesting that a 'representative' of the Attorney-General 'could include an officer from a law enforcement or intelligence and security agency'. How — as is suggested in the commentary — this 'will assist in ensuring the appropriate protection for national security while still allowing a court to run a proceeding in an efficient manner' must be open to question. There is no substantive argument or discussion in the Discussion Paper to establish why such an extraordinarily broad intervention power is required, nor any attempt to explain why the current intervention power under section 30 of the *NSI Act* is insufficient.

One significant vice of the new proposal is that it opens up the prospect of members of the intelligence and security agencies having a right of appearance, and a right to remain in court and be privy to (if not to also give) evidence, and to make submissions on issues going to the exclusion of evidence and witnesses, in the absence of the accused and their legal representatives. From the perspective of maintaining public trust in the due administration of justice, such a proposal is seriously flawed.

Recommendations:

14. *That proposed Division 1A of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) be rejected as contrary to the public interest in the due administration of justice. In the event that PIAC's primary submission is not accepted, PIAC submits that section 20A should be amended by deleting subsection 20A(c), which gives standing to 'any other representative'. The*

³⁵ Ibid.

proposed change would have the added virtue of bringing the standing provisions in subsection 20A of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) into line with those in section 21.

5.5 Who can agree disclosure arrangements?

The existing *NSI Act* provides that arrangements can be entered into, as between prosecution and defence, as to an appropriate regime to govern disclosure of information that may affect national security. The proposed changes are ambiguous, and on one reading requires the Attorney-General to be party to all such agreements. If that is the intention of the proposed changes, it is most unusual, and will render court proceedings unwieldy in the extreme. If it is not the intention of the legislation, section 22 needs to be re-drafted.

Recommendation

15. *That proposed section 22(38B) of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) is unclear and needs to be redrafted.*

5.6 Legal practitioners

The overview of the proposed amendments to the *NSI Act* set out in chapter 4 of the Discussion Paper suggests — somewhat confusingly — that the proposed changes do not impose further obligations on defence representatives, while at the same time insisting that the sole purpose of the proposed amendments is to ‘clarify’ whether certain existing requirements apply to them. It is hard to see how the changes can satisfy both descriptions at the same time. If the former statement is to be taken at face value, the proposed changes must be taken to go further than the drafters intended.

5.6.1 Section 24(3)

It is quite plain that the changes impose a new suite of obligations on legal representatives, in particular defence legal representatives, in Commonwealth criminal matters. These changes expose defence legal counsel to the jeopardy of imprisonment for a range of offences, including under subsection 24(3) for failing to provide the Attorney-General with a statement in advance of any ‘national security’ evidence which it is believed will be given by a person to be called by the defence.

This is just one example of the imposition of potential criminal liability on defence counsel. It is acknowledged that the provision may have the result of forcing the defence to disclose aspects of their defence, in a serious departure from the principle that an accused person is entitled to reserve their defence, which (as the Discussion Paper notes) is ‘contrary to normal practice in the conduct of criminal prosecutions’.

There is little, if any, explanation in the Discussion Paper of how the provision would work in practice, given the wide-ranging proposal that the Attorney-General be given standing to attend and be heard in all civil and criminal proceedings alleged to involve ‘national security’ information. The distinction sought to be made between a requirement that a defendant disclose the defence to the prosecution, and that the very same information be disclosed to the Attorney-General so that a decision may be made, *inter alia*, as to whether to issue a certificate under which defence evidence or witnesses are sought to be excluded, will inevitably be productive of doubt concerning the fairness of the trial process.

5.6.2 Section 39(1A)

A further disturbing element of the proposed changes is contained in the new subsection 39(1A), which provides that it is only the nature of the information to be disclosed, and not the ‘character’ of the recipient, which is to be taken into determining whether a disclosure of any information, claimed to be ‘national

security' information, would be likely to prejudice national security. Both the status of the recipient as a legal practitioner or counsel, and the circumstances of any possible disclosure (being for the purpose of court proceedings) subject the recipient not only to the duties that officers of the court hold to the due administration of justice, but to the implied undertaking not to use or deal with information so acquired except for the purposes of the proceedings, are material factors to the making of such a determination.

The intended result would appear to be to compel any and all legal practitioners who expect to come into contact (in the course of civil or criminal proceedings) with any information that could be characterised — under the extremely broad and counter-intuitive meaning the *NSI Act* gives — as 'national security information', to a vetting process by an agency of the executive government. In terms of securing public confidence in the due and impartial administration of justice in such a highly contested area, this is a wholly bad proposal.

Recommendation

16. *That the wording of proposed section 39A of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) be amended to read as follows:*
- (1A) *When considering, for the purposes of subsection (1), whether a disclosure of the information would be likely to prejudice national security, the Secretary is to consider, except in the case of persons to whom subsection (1)(a) applies, the nature of the information itself, and not the character of the person to whom it is to be disclosed.*
 - (1B) *When considering, for the purposes of subsection (1)(a), whether a disclosure of the information would be likely to prejudice national security, the Secretary is to consider:*
 - (a) *the nature of the information;*
 - (b) *the status of the recipient as a legal practitioner;*
 - (c) *the circumstances in which, and the conditions under which, disclosure has taken or is expected to take place.*

5.7 Offence provisions

A particularly glaring example of the imposition of further obligations on defence representatives is to be found in proposed section 45A, which introduces a new criminal offence — punishable by up to six months' imprisonment — of contravening regulations relating to the storage, handling or destruction of information, irrespective of any actual or potential threat to security. The sole justification for such criminalisation by regulation is said to be deterrence.

In general policy terms, it is highly undesirable that criminal liability be imposed for breach of delegated legislation, particularly in circumstances in which the fault element consists solely of conduct. PIAC opposes this proposal in the strongest possible terms. While PIAC opposes the introduction of criminal liability under regulation as a matter of principle, if it is nevertheless proposed to introduce it, liability needs be conditioned on at least recklessness, rather than mere inadvertence. In addition, it ought to be required as an element of the offence that the act or omission in question actually caused a substantial risk of damage to Australia's security interests.

Recommendation

17. *That proposed section 45A of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) be rejected. In the alternative, that liability be conditioned on recklessness, rather than mere inadvertence and that an element of the offence be that the act or omission actually caused a substantial risk of damage to Australia's security interests.*

6. Response to Chapter 5 of the Discussion Paper: Proposed Parliamentary Joint Committee on Law Enforcement

In earlier submissions, PIAC consistently called for increased public accountability and independent scrutiny of the anti-terrorism legislation and its implementation,³⁶ and PIAC therefore supports the Government's proposal to create a new Parliamentary Joint Committee on Law Enforcement (PJCLE) with oversight of the Australian Federal Police (AFP) as well as the Australian Crime Commission (ACC), subject to the comments below regarding sensitive operational material.

While PIAC accepts that there may be good reasons for ensuring that the PJCLE cannot publicly disclose sensitive operational material in its reports, PIAC is concerned that the PJCLE may not be able to adequately discharge its mandate to comment on the broad operations and effectiveness of the AFP or ACC if it is excluded from even viewing sensitive operational material. In light of recent events, particularly the investigations into Dr Mohamed Haneef, PIAC takes the view that the PJCLE should be able to independently assess sensitive material in cases where that will assist and inform the PJCLE's reports on the operations and effectiveness of the AFP and ACC. On the other hand, PIAC accepts that this should be subject to controls to ensure that it is not disclosed to the world at large and suggest that the Parliamentary Joint Committee on Law Enforcement Bill 2009 (Cth) (PJC Bill) be amended by adding a clause similar to clause 7, Schedule 1, *Intelligence Services Act 2001* (Cth) stating that the PJCLE must not disclose in a report to a House of Parliament operationally sensitive information.

Similarly, PIAC is concerned by the provisions of the PJC Bill that empower the Chief Executive Officer of the ACC or the Commissioner of the AFP to refuse to provide the PJCLE with evidence on the basis that the information is sensitive and the prejudicial consequences of releasing the material outweigh any public interest in releasing the material, particularly as the CEO or Commissioner (or Minister) would not be required to provide any reasons for his/her decision.

The Attorney-General has suggested that this power should only be relied on in exceptional circumstances and that other options such as conducting private hearings or releasing the material on the basis that it not be included in the PJCLE's reports are available to the PJCLE under section 6. However, based on PIAC's experience of the overuse of Ministerial certificates under freedom of information legislation, PIAC is concerned that there is a risk that the ACC or AFP will routinely refuse to disclose material using this provision rather than employing these other alternatives. PIAC therefore takes the view that it is preferable to expressly include these alternatives in the legislation itself.

³⁶ See, eg, PIAC, above n 14.

Recommendations:

18. *That clause 7(2)(c) of the Parliamentary Joint Committee on Law Enforcement Bill 2009 (Cth) be deleted.*
19. *That a new clause 7A be inserted into the Parliamentary Joint Committee on Law Enforcement Bill 2009 (Cth) along the lines of clause 7, Schedule 1 of the Intelligence Services Act 2001 (Cth), to the effect that the must not disclose in a report to a House of the Parliament operationally sensitive information or operational methods of the Australian Crime Commission or Australian Federal Police.*
20. *That clause 8(2) of the Parliamentary Joint Committee on Law Enforcement Bill 2009 (Cth) be amended so that if the Chief Executive Officer of the Australian Crime Commission is of the view that the information requested is (a) sensitive information; and (b) the public interest would be served by giving the information to the Parliamentary Joint Committee on Law Enforcement is outweighed by the prejudicial consequences that might result from giving the information, then the Chief Executive Officer can require that the information may not be included in the Parliamentary Joint Committee on Law Enforcement's public report and/or will only be provided in a private hearing.*
21. *That subclauses 8(3)-(5) of the Parliamentary Joint Committee on Law Enforcement Bill 2009 (Cth) be consequentially amended so that the Committee can refer a decision of the Chief Executive Officer of the Australian Crime Commission to the Minister.*
22. *That clause 9(2) of the Parliamentary Joint Committee on Law Enforcement Bill 2009 (Cth) be amended so that if the Chief Executive Officer of the Australian Crime Commission is of the view that the information requested is (a) sensitive information; and (b) the public interest would be served by giving the information to the Parliamentary Joint Committee on Law Enforcement is outweighed by the prejudicial consequences that might result from giving the information, then the Chief Executive Officer can require that the information may not be included in the Parliamentary Joint Committee on Law Enforcement's public report and/or will only be provided in a private hearing.*
23. *That subclauses 9(3)-(5) of the Parliamentary Joint Committee on Law Enforcement Bill 2009 (Cth) be consequentially amended so that the Committee can refer a decision of the Chief Executive Officer of the Australian Crime Commission to the Minister.*

7. Summary of recommendations

7.1 Recommendations in relation to Chapter 1 Part 2 of the Discussion Paper: proposed amendments to the 'urging violence' offences in division 80 of the *Criminal Code 1995* (Cth)

1. *That the meaning of 'urging' in section 80.2 of the Criminal Code Act 1995 (Cth) be clarified by including both an element of intention and a definition of the term 'urge'.*
2. *That vilification not be criminalised in the context of the Criminal Code Act 1995 (Cth) but in the context of the Racial Discrimination Act 1975 (Cth).*
3. *That group-based offences be removed from the Criminal Code Act 1995 (Cth) altogether. However, if these offences are not eliminated, the proposed addition of an element of intention to these offences should be supported.*
4. *That the meaning of 'good faith' be clarified, in particular the element of intention or mens rea required to support this defence.*

7.2 Recommendations in relation to Chapter 1 Part 3 of the Discussion Paper: proposed amendments to the terrorist act definition and offences in Divisions 100 and 101 of the *Criminal Code 1995* (Cth)

5. *That the Government not proceed with its proposal to amend the definition of 'terrorist act' by deleting the phrase 'that is physical', or by inserting the words 'likely to cause' into the definition of a terrorist act contained in section 100.1 of the Criminal Code Act 1995 (Cth).*
6. *That the Government give further consideration to repealing some or all of the provisions contained in section 101 of the Criminal Code Act 1995 (Cth)*

7.3 Recommendations in relation to Chapter 3 Part 4 of the Discussion Paper: proposed amendments to the terrorist organisation listing provisions and offences in Division 102 of the *Criminal Code*

7. *That sections 102.1, 102.2 and 102.5 of the Criminal Code Act 1995 (Cth) be referred to The National Security Legislation Monitor as a matter of urgency in order to develop a comprehensive reform strategy in time for the Council of Australian Governments meeting scheduled for 2010.*
8. *That review of listing decisions, whether prescriptive or proscriptive, extend to merits review by the Administrative Appeals Tribunal.*
9. *That the proposed 'humanitarian aid' exemption in section 102.8A of the Criminal Code Act 1995 (Cth) be abandoned as unworkable and the existing provision be amended in accordance with the recommendations in the Sheller Committee Report and the PJCIS Report.*

7.4 Recommendations in relation to Chapter 4 of the Discussion Paper: proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)*

10. *PIAC submits, given the highly intrusive and cumbersome regime — backed by the sanction of imprisonment — which the National Security Information Act establishes that,*
 - a. *the definition of ‘national security’ should be brought into line with the definition of ‘security’ in the Australian Security Intelligence Organisation Act 1979 (Cth);*
 - b. *the paragraph 7(a) be deleted from the draft amendments, so that the definition catches information the disclosure of which may affect — as opposed to merely relating to — national security (properly defined);*
 - c. *the definition of ‘information’ in the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) should be amended to exclude information already in the public domain.*
11. *That the proposed changes to section 16 of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) and, in particular, the proposal to provide the Attorney-General with a further wide and unfettered discretion to forbid disclosure of ‘national security’ information, even by security-cleared legal practitioners in closed court, be rejected.*
12. *That the proposed proposed subsections 19(1A) and 19 (3A) of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) not be enacted.*
13. *That if, contrary to PIAC’s primary submission, proposed subsections 19(1A) and 19(3A) of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) are enacted, their wording should be amended to reflect the existing law, to read as follows:*

In addition to the powers of a court under this Act in a federal criminal proceeding, the court may make such orders as are necessary in relation to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information if:

 - (a) the court is satisfied on the basis of evidence that it is necessary in the interest of national security in the particular case to make such orders; and*
 - (b) the orders are not inconsistent with this Act or regulations made under this Act; and*
 - (c) the information is not already in the public domain; and*
 - (d) the public interest in making the order outweighs other relevant public interests, including the overriding public interest in the open administration of justice.*
14. *That proposed Division 1A of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) be rejected as contrary to the public interest in the due administration of justice. In the event that PIAC’s primary submission is not accepted, PIAC submits that section 20A should be amended by deleting subsection 20A(c), which gives standing to ‘any other representative’. The proposed change would have the added virtue of bringing the standing provisions in subsection 20A of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) into line with those in section 21.*
15. *That proposed section 22(38B) of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) is unclear and needs to be redrafted.*
16. *That the wording of proposed section 39A of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) be amended to read as follows:*
 - (1A) When considering, for the purposes of subsection (1), whether a disclosure of the information would be likely to prejudice national security, the Secretary is to consider, except in the case of*

persons to whom subsection (1)(a) applies, the nature of the information itself, and not the character of the person to whom it is to be disclosed.

(1B) When considering, for the purposes of subsection (1)(a), whether a disclosure of the information would be likely to prejudice national security, the Secretary is to consider:

(a) the nature of the information;

(b) the status of the recipient as a legal practitioner;

(c) the circumstances in which, and the conditions under which, disclosure has taken or is expected to take place.

17. *That proposed section 45A of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) be rejected. In the alternative, that liability be conditioned on recklessness, rather than mere inadvertence and that an element of the offence be that the act or omission actually caused a substantial risk of damage to Australia's security interests.*

7.5 Recommendations in relation to Chapter 5 of the Discussion Paper: Proposed Parliamentary Joint Committee on Law Enforcement

18. *That clause 7(2)(c) of the Parliamentary Joint Committee on Law Enforcement Bill 2009 (Cth) be deleted.*

19. *That a new clause 7A be inserted into the Parliamentary Joint Committee on Law Enforcement Bill 2009 (Cth) along the lines of clause 7, Schedule 1 of the Intelligence Services Act 2001 (Cth), to the effect that the must not disclose in a report to a House of the Parliament operationally sensitive information or operational methods of the Australian Crime Commission or Australian Federal Police.*

20. *That clause 8(2) of the Parliamentary Joint Committee on Law Enforcement Bill 2009 (Cth) be amended so that if the Chief Executive Officer of the Australian Crime Commission is of the view that the information requested is (a) sensitive information; and (b) the public interest would be served by giving the information to the Parliamentary Joint Committee on Law Enforcement is outweighed by the prejudicial consequences that might result from giving the information, then the Chief Executive Officer can require that the information may not be included in the Parliamentary Joint Committee on Law Enforcement's public report and/or will only be provided in a private hearing.*

21. *That subclauses 8(3)-(5) of the Parliamentary Joint Committee on Law Enforcement Bill 2009 (Cth) be consequentially amended so that the Committee can refer a decision of the Chief Executive Officer of the Australian Crime Commission to the Minister.*

22. *That clause 9(2) of the Parliamentary Joint Committee on Law Enforcement Bill 2009 (Cth) be amended so that if the Chief Executive Officer of the Australian Crime Commission is of the view that the information requested is (a) sensitive information; and (b) the public interest would be served by giving the information to the Parliamentary Joint Committee on Law Enforcement is outweighed by the prejudicial consequences that might result from giving the information, then the Chief Executive Officer can require that the information may not be included in the Parliamentary Joint Committee on Law Enforcement's public report and/or will only be provided in a private hearing.*

23. *That subclauses 9(3)-(5) of the Parliamentary Joint Committee on Law Enforcement Bill 2009 (Cth) be consequentially amended so that the Committee can refer a decision of the Chief Executive Officer of the Australian Crime Commission to the Minister.*