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25 February 2015

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Dear Ms Wynn,

Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges

Thank you for the opportunity to make a submission to this inquiry. We do so in our capacity as members of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, University of New South Wales. We are solely responsible for the views and content in this submission.

Our submission identifies key areas of Australia's counter-terrorism legislation which unjustifiably encroach on traditional rights, freedoms and privileges. Since the terrorist attacks on New York and Washington on 11 September 2001, the Australian government has enacted 64 pieces of counter-terrorism legislation.¹ These laws create a range of offences for

¹ Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terror Laws and Trials: A Timely Examination of the Impact of Australia's Anti-Terror Laws After September 11 and the New 2014 Terror*

terrorism-related activity and grant intelligence and law enforcement agencies broad surveillance and investigative powers. The laws infringe several common law rights including those to freedom of speech, movement and association.

Given that the aim of this inquiry is to critically examine Commonwealth laws across a wide range of areas, including environmental regulation and workplace relations, our comments focus on the key areas of concern and are relatively brief. We explain the relevant laws, their impact on common law rights, and the reasons why we believe these infringements are unjustified. More detail on these laws and their impact on fundamental rights can be found in a large number of submissions and articles by members of our Centre.²

Several of the laws addressed below were introduced or amended in late 2014 in response to the threat of foreign fighters returning from Syria and Iraq. While this threat remains serious, the offences enacted in response impact significantly on the freedoms of movement and speech.³ The foreign fighters legislation also extended the operation of powers which had been discredited by major inquiries (namely control orders, preventative detention orders and ASIO's questioning and detention warrants).⁴

1. Declared Area Offence

Section 119.2 of the *Criminal Code Act 1995* (Cth) ('Criminal Code') makes it an offence punishable by 10 years' imprisonment to enter or remain in a declared area.⁵ The Minister for Foreign Affairs may declare an area of a foreign country as a 'declared area' if she is satisfied that a listed terrorist organisation is engaging in hostile activity in that area.⁶ It is a defence

Laws (NewSouth Press, 2015) 3. See also George Williams, 'The Legal Legacy of the War on Terror' (2013) 12 *Macquarie Law Journal* 3, 7; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1144.

² See in particular, Gilbert + Tobin Centre of Public Law, Submission No 3 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 1 October 2014 ('*Foreign Fighters Submission*'); Gilbert + Tobin Centre of Public Law, Submission to COAG Review of Counter-Terrorism Legislation, 21 September 2012; Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36 *Melbourne University Law Review* 415.

³ *Criminal Code Act 1995* (Cth), ss 80.2C, 119.2. See Gilbert + Tobin Centre of Public Law, *Foreign Fighters Submission*, above n 2, 8-11, 13-15.

⁴ See Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) 68 ('*COAG Review*'); Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 44, 67, 106 ('*INSLM 2012 Report*').

⁵ *Criminal Code Act 1995* (Cth), s 119.2(1).

⁶ *Criminal Code Act 1995* (Cth), s 119.3(1).

for the person to show that they entered or remained in the area *solely* for a legitimate purpose.⁷ The legislation provides a list of legitimate purposes, including bona fide family visits, making news reports and providing humanitarian aid.⁸

This offence clearly impacts on the right to freedom of movement as it prevents individuals from travelling to areas designated by the Foreign Minister as ‘no-go zones’. The offence does not technically reverse the onus or proof, and it is not an offence of strict or absolute liability. However, it has essentially the same effect, as criminal liability will be *prima facie* established wherever a person enters or remains in a declared area. No other physical elements are required for the offence to be made out. The prosecution need not establish, for example, that the person travelled to the area for the purpose of engaging in terrorism.⁹ This is problematic because it is that malicious purpose – rather than the mere fact of travel – which should render the conduct an appropriate subject for criminalisation.

We believe this is unjustified because the offence criminalises a range of legitimate behaviours which are not sufficiently connected to the threat of foreign fighters. This is clear for two reasons. First, the list of specified defences does not include a range of other legitimate reasons why somebody might travel to a foreign country in a state of conflict – such as undertaking a religious pilgrimage, conducting business or commercial transactions, or visiting friends. Indeed, because the defence applies where a person travels to a declared area *solely* for a legitimate purpose,¹⁰ it would be a criminal act for a person to travel to a declared area for one of these purposes in addition to one of those specified in the legislation. More legitimate purposes such as conducting business transactions could be specified in the regulations,¹¹ but it would be impossible as a matter of practicality to specify *every* legitimate purpose for travel. Second, the offence may prevent individuals from travelling not only to Syria and Iraq,¹² but also areas of other countries where terrorist organisations operate and which might plausibly be designated as declared areas (such as in Israel and Indonesia).

⁷ *Criminal Code Act 1995* (Cth), s 119.2(3).

⁸ *Criminal Code Act 1995* (Cth), sub-ss 119.2(3)(a),(f),(g).

⁹ As in the offence of entering a foreign country with intention to engage in hostile activities: *Criminal Code Act 1995* (Cth), s 119.1.

¹⁰ *Criminal Code Act 1995* (Cth), s 119.2(3).

¹¹ *Criminal Code Act 1995* (Cth), s 119.2(3)(h).

¹² At the time of writing, the government has designated the al-Raqqa province in Syria as a declared area and is considering a second declaration for Mosul in Iraq’s Ninewa province. These are both key areas controlled by the Islamic State organisation. See Nick Pedley, ‘Foreign Minister Julie Bishop Declares It an Offence for Australians to Visit Syrian Province’, *ABC News (Online)*, 4 December 2014

2. Advocating Terrorism

Under s 80.2C of the Criminal Code, it is an offence to advocate the doing of a terrorist act or terrorism offence where the person is reckless as to whether another person will engage in that conduct as a result.¹³ A person ‘advocates’ terrorism if he or she counsels, promotes, encourages or urges the doing of a terrorist act or terrorism offence.¹⁴ The offence is punishable by five years’ imprisonment.

This offence directly infringes the right to freedom of speech as it limits the capacity for individuals to voice their views and opinions on terrorism and overseas conflicts. It also impacts on the right to freedom of religion, as it limits the capacity of individuals to express religious views which might be radical and controversial but cause no direct harm to the community. In these respects the offence is likely to have a significant chilling effect, as individuals may refrain from discussing their religious views and current events overseas out of fear they will be prosecuted.

While it should be (and is) an offence to incite criminal acts,¹⁵ this law goes beyond incitement in two respects: it criminalises the ‘promotion’ of terrorism, and it requires only that the person is ‘reckless’ as to whether their words will encourage another person to engage in terrorism (as opposed to *intending* this result).¹⁶ The offence could apply, for example, to a person who posts online that they support the beheadings of hostages by Islamic State. Such a comment would be highly disagreeable, and it could legitimately attract the attention of the security services and law enforcement to ensure that the person does not become involved in terrorism. However, the law has not traditionally treated such actions as criminal acts unless the person encourages another person to commit an unlawful act, and intends that the unlawful act should be committed.

<<http://www.abc.net.au/news/2014-12-04/bishop-declares-it-an-offence-for-australians-to-visit-al-raqa/5943094>>; ‘Prime Minister Tony Abbott’s Full National Security Statement’, *Sydney Morning Herald (Online)*, 23 February 2015 < <http://www.smh.com.au/federal-politics/political-news/prime-minister-tony-abbotts-full-national-security-statement-20150223-13m2xu.html>>.

¹³ *Criminal Code Act 1995* (Cth), s 80.2C(1).

¹⁴ *Criminal Code Act 1995* (Cth), s 80.2C(3).

¹⁵ *Criminal Code Act 1995* (Cth), s 11.4.

¹⁶ Definitions of incitement usually capture a range of speech acts including ‘urging’, ‘encouraging’ and ‘stimulating’ but not ‘promoting’: *R v Chonka* [2000] NSWCCA 466 [77]. The person must also intend that an unlawful act be committed: *Criminal Code Act 1995* (Cth), s 11.4(2). See Gilbert + Tobin Centre of Public Law, *Foreign Fighters Submission*, above n 2, 13-14.

We believe that the broader approach adopted in the offence of advocating terrorism is unjustified because of its significant impact on free speech, and because it may contribute to a sense of alienation and discrimination in Australia's Muslim communities if they feel like the government is not willing to have an open discussion about issues surrounding terrorism and Islam. In this respect, the offence raises similar issues to the sedition offences introduced by the Howard government in 2005, which were heavily criticised by the ALRC.¹⁷

3. Proscription Regime

Under div 102 of the Criminal Code, an organisation may be proscribed by the Governor-General as a terrorist organisation where it (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or (b) advocates the doing of a terrorist act.¹⁸ An organisation will advocate the doing of a terrorist act where it promotes, encourages or urges the doing of a terrorist act; provides instruction on the doing of a terrorist act; or 'directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person ... to engage in a terrorist act'.¹⁹ Listing an organisation on one of these grounds triggers a range of offences, including membership of the organisation, training with the organisation, and providing support or resources to the organisation.²⁰

The ability to proscribe organisations for advocating terrorism infringes the rights to freedom of speech and religion in a similar way to the advocacy offence outlined above. Members of an organisation may be exposed to serious criminal offences for expressing radical and controversial (but not necessarily harmful) views about terrorism and religion. An organisation may be proscribed on the basis of views expressed by some of its members, which means that other individuals may be exposed to liability when they do not even agree with those views. Indeed, an organisation may even be proscribed on the basis that the views it expresses might encourage a person with a severe mental illness to engage in terrorism.²¹

¹⁷ *Anti-Terrorism Act (No. 2) 2005* (Cth), sch 7; Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (2006).

¹⁸ *Criminal Code Act 1995* (Cth), s 102.1(2).

¹⁹ *Criminal Code Act 1995* (Cth), s 102.1(1A).

²⁰ *Criminal Code Act 1995* (Cth), ss 102.3 (membership), 102.5 (training), 102.7 (support).

²¹ *Criminal Code Act 1995* (Cth), s 102.1(1A)(c).

The significant problems with this have been noted in major inquiries into Australia's counter-terrorism laws. In 2006, the Security Legislation Review Committee (Sheller Committee) recommended that the advocacy ground be repealed or substantially revised because it was likely to contribute to a sense of fear and alienation in Australia's Muslim communities.²² More recently, the COAG Review of Counter-Terrorism Legislation (COAG Review) described the power as having the capacity to 'cast something of an Orwellian blanket over free and democratic discussion'.²³ The COAG Review recommended that the grounds for advocacy be restricted to the urging or counselling the doing of a terrorist act, or providing instruction on the doing of a terrorist act.²⁴ This would be a valuable amendment, as it would restrict the power to proscribe organisations on the grounds of advocacy to those organisations which directly incite or aid the doing of a terrorist act.

A particularly problematic offence triggered by the proscription power is the association offence in s 102.8 of the Criminal Code. This offence will be made out where a person intentionally associates on two or more occasions with a member of a terrorist organisation.²⁵ The offence has never been prosecuted, and given the wide range of other terrorism offences available, it is difficult to see how it could serve any real purpose in helping to prevent terrorist acts. Any potential practical benefit of the offence is outweighed by its direct and significant impact on the right to freedom of association.

4. ASIO's Questioning and Detention Warrants

The questioning and detention warrant powers of the Australian Security Intelligence Organisation (ASIO) are an extraordinary power not held by the security service of any comparable nation.²⁶ They allow ASIO to question individuals for up to 24 hours,²⁷ and to

²² Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 5-6. The advocacy ground was amended in 2010 in accordance with one of the Committee's recommendations (that an organisation should only be proscribed for praising terrorism where there was a 'substantial risk', as opposed to merely a 'risk', that a person might engage in terrorism as a result): *National Security Legislation Amendment Act 2010* (Cth), sch 2 cl 1.

²³ *COAG Review*, above n 4, 24.

²⁴ *Ibid* 23.

²⁵ *Criminal Code Act 1995* (Cth), s 102.8(1).

²⁶ Burton, McGarrity and Williams, above n 2, 417.

²⁷ *Australian Security Intelligence Organisation Act 1979* (Cth), s 34R(6)

detain them for up to a week for that purpose,²⁸ without the person being suspected of any involvement in terrorism.²⁹

The power for ASIO to detain individuals for questioning clearly infringes the right to freedom of movement and the idea that individuals should not be held in custody without at least a reasonable suspicion of involvement in criminal activity.³⁰ The powers abrogate client legal privilege, as all communication between the detainee and the lawyer must be monitored.³¹ They also remove the privilege against self-incrimination, as a person must answer any question put to them by ASIO or face five years in prison.³² Problems such as these were recognised at the time the powers were introduced. The Parliamentary Joint Committee on ASIO, ASIS and DSD reported that the powers ‘would undermine key legal rights and erode the civil liberties that make Australia a leading democracy’.³³

The infringement of these rights and privileges is unjustified not only on principled grounds, but also because the provisions appear to have little practical benefit in preventing terrorism. After repeatedly questioning government agencies as to why ASIO’s warrant powers are necessary, the Independent National Security Legislation Monitor (INSLM) was presented with ‘[n]o scenario, hypothetical or real ... that would require the use of a QDW [questioning and detention warrant] where no other alternatives existed to achieve the same purpose’.³⁴ He recommended that ASIO’s questioning power be retained, but its detention power be repealed.³⁵

²⁸ *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34G(4)(c), 34S.

²⁹ The grounds for issuing a questioning and detention warrant are that there are reasonable grounds for believing detention would ‘substantially assist in the collection of intelligence that is important in relation to security’; that ‘other methods of collecting that intelligence would be ineffective’; and that the person may alert a person involved in a terrorism offence, not appear for questioning, or destroy a record or thing they may be requested to produce in accordance with the warrant: *Australian Security Intelligence Organisation Act 1979* (Cth), s 34F(4).

³⁰ For example, the power to arrest an individual without a warrant for a terrorism offence requires suspicion on reasonable grounds that the person has committed or is committing the offence: *Crimes Act 1914* (Cth), s 3W.

³¹ *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZQ(2).

³² *Australian Security Intelligence Organisation Act 1979* (Cth), s 34L(2).

³³ Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) vii.

³⁴ *INSLM 2012 Report*, above n 4, 105.

³⁵ *Ibid* 70, 106.

5. Control Orders

The control order provisions in Division 104 of the Criminal Code allow a range of restrictions to be placed on an individual's liberty for the purpose of preventing terrorist acts. For example, an individual subject to a control order may be required to remain in a specified place at specified times and to wear an electronic monitoring device. They may also be prohibited from being in certain areas or from communicating or associating with specified individuals.³⁶ The person need not be suspected of any involvement in criminal activity, as a control order may be confirmed where an issuing court is satisfied on the balance of probabilities that the order would 'substantially assist in preventing a terrorist act'.³⁷ An alternative ground, enacted in late 2014 in response to the threat of foreign fighters, is that the order would substantially assist in preventing support or the facilitation of terrorism.³⁸

Control orders clearly infringe the rights to freedoms of movement and association. They undermine the idea that individuals should not be subject to severe constraints on their liberty without a finding of criminal guilt by a court.³⁹

Only four control orders have ever been issued,⁴⁰ and serious questions have been raised about their effectiveness as a crime prevention tool. The INSLM, after reviewing the confidential material on which control order applications were based, concluded that the powers were 'not effective, not appropriate and not necessary'.⁴¹ This was because other more appropriate powers (such as for surveillance and criminal investigation) are available, and because an individual subject to a control order is not likely to engage in any further activity that could form the basis for a conviction.⁴² The INSLM also described control orders as 'striking because of their provision for restraints on personal liberty without there being any criminal conviction or even charge'.⁴³

³⁶ For a full list of possible restrictions, see *Criminal Code Act 1995* (Cth), s 104.5(3).

³⁷ *Criminal Code Act 1995* (Cth), s 104.4(1)(c)(i).

³⁸ *Criminal Code Act 1995* (Cth), s 104.4(1)(c)(vi).

³⁹ See *INSLM 2012 Report*, above n 4, 6, 10.

⁴⁰ In December 2014, control orders were issued against two men arrested in Sydney as part of Operation Appleby: Dan Box and Michael McKenna, 'Sydney Men Placed Under Tougher Control Orders After Raids', *The Australian*, 20 December 2014. Previously, control orders had only been issued against David Hicks and Joseph 'Jihad Jack' Thomas.

⁴¹ *INSLM 2012 Report*, above n 4, 4.

⁴² *Ibid* 13, 36.

⁴³ *Ibid* 6.

If control orders are to be retained, they should be substantially amended to require prior conviction for a terrorism offence and some finding as to the ongoing dangerousness of the person.⁴⁴ At the very least, control orders should only be available for the purpose of preventing terrorist acts, and not for preventing the support or facilitation of terrorism.⁴⁵ Given their extraordinary nature, control orders should only be available for the purpose of protecting the community from direct harm, and not for the purpose of preventing support or facilitation of terrorism as ends in themselves.

The control order provisions also raise issues for the rights to procedural fairness and a fair trial. A control order may initially be issued *ex parte*,⁴⁶ and significant information about the order may be withheld from the individual under the provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('NSIA').⁴⁷ Some problems with the NSIA are considered further below.

6. Preventative Detention Orders

Division 105 of the Criminal Code provides that a person may be detained under a preventative detention order (PDO) for up to 48 hours in order to prevent an imminent terrorist act from occurring or to preserve evidence relating to a recent terrorist act.⁴⁸ This period of detention can be extended up to a maximum of two weeks under state legislation.⁴⁹ For a PDO to be issued to prevent a terrorist act, an issuing court must be satisfied, on application by an Australian Federal Police (AFP) officer, that there are reasonable grounds to suspect that a person will engage in a terrorist act, possesses a thing connected with preparation for a terrorist act, or has done an act in preparation for a terrorist act.⁵⁰ The detainee is not entitled to contact any person except a family member, employer or similar

⁴⁴ *Ibid* 37.

⁴⁵ *Criminal Code Act 1995* (Cth), ss 104.1(b), 104.4(1)(c)(ii).

⁴⁶ *Criminal Code Act 1995* (Cth), ss 104.5(1)(e), 104.5(1A), 104.12(1). See *INSLM 2012 Report*, above n 4, 8.

⁴⁷ *Criminal Code Act 1995* (Cth), ss 104.2(3A), 104.5(2A), 104.12A(3), 104.23(3A). See *INSLM 2012 Report*, above n 4, 8-9. See generally Andrew Lynch, Tamara Tulich and Rebecca Welsh, 'Secrecy and Control Orders: The Role and Vulnerability of Constitutional Values in the United Kingdom and Australia', in David Cole, Federico Fabbrini and Arianna Vidaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar, 2013) 154.

⁴⁸ *Criminal Code Act 1995* (Cth), ss 105.1, 105.4(4)-(6), 105.14(6).

⁴⁹ See, eg, *Terrorism (Police Powers) Act 2002* (NSW), s 26K(2).

⁵⁰ *Criminal Code Act 1995* (Cth), ss 105.4(4).

person to let them know that they are ‘safe but ... not able to be contacted for the time being.’⁵¹

The power to detain individuals incommunicado on the grounds that they are reasonably suspected of involvement in terrorism is extraordinary and does not exist in any comparable nation.⁵² Division 105 clearly infringes the rights to freedom of movement and association and the right to freedom from arbitrary detention. It also infringes client legal privilege as any communication between the person and a lawyer must be monitored.⁵³

The infringement of these rights is unjustified on both principled and practical grounds. The INSLM described the powers as being ‘at odds with our normal approach to even the most reprehensible crimes’.⁵⁴ The COAG Review remarked that such powers ‘might be thought to be unacceptable in a liberal democracy’.⁵⁵ Both recommended that the power be repealed,⁵⁶ but not only for these reasons. Multiple submissions by federal, state and territory police forces to the INSLM and COAG Review inquiries indicated that law enforcement is unlikely to use the PDO provisions because other, more suitable, detention powers are available.⁵⁷ In addition, both inquiries noted that the powers would prove counter-productive to preventing terrorist acts as detainees cannot be questioned.⁵⁸ While the PDO regime was used for the first time in September 2014 during the Operation Appleby raids, we do not believe that these conclusions are outdated.

7. NSIA

The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSIA) sets out a process by which classified information may be used in the courtroom – either in criminal proceedings for terrorism offences or in civil proceedings such as appeals against control orders.⁵⁹ Where classified information is to be given in evidence, either in a document

⁵¹ *Criminal Code Act 1995* (Cth), s 105.35(1).

⁵² *INSLM 2012 Report*, above n 4, 47; *COAG Review*, above n 4, 64

⁵³ *Criminal Code Act 1995* (Cth), s 105.38(1).

⁵⁴ *INSLM 2012 Report*, above n 4, 47.

⁵⁵ *COAG Review*, above n 4, 68.

⁵⁶ *INSLM 2012 Report*, above n 4, 67; *COAG Review*, above n 4, 68.

⁵⁷ See *INSLM 2012 Report*, above n 4, 56; *COAG Review*, above n 4, 68-70.

⁵⁸ *INSLM 2012 Report*, above n 4, 56-59; *COAG Review*, above n 4, 70.

⁵⁹ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), pts 3, 3A; *Criminal Code Act 1995* (Cth), s 104.14.

or orally, the Attorney-General must be notified as soon as is practicable.⁶⁰ The Attorney-General may then issue a non-disclosure certificate,⁶¹ and a closed hearing will be held to determine whether and how the information will be admitted into evidence.⁶² The judge or magistrate may exclude the defendant and his or her lawyer from these closed hearings.⁶³ Depending on the outcome of the hearing, the information may be either excluded from the proceedings altogether, or admitted in redacted or summary form.⁶⁴

The government's need to protect classified information when admitting evidence in court is understandable, but it is clear that the NSIA poses significant challenges for a defendant's rights to procedural fairness and a fair trial. As the NSIA allows evidence to be admitted in redacted or summary form, the defendant may not know all significant evidence led against them. In particular, the NSIA requires that the judge or magistrate give the 'greatest weight' to national security matters in determining whether information should be disclosed.⁶⁵

The NSIA survived a constitutional challenge on the grounds that it infringed the right to procedural fairness,⁶⁶ but this does not mean that its impact on procedural fairness is justified or appropriate. The court's decision-making process should be rebalanced to give equal weight to procedural fairness and national security considerations, and it should require that information be excluded from the proceedings altogether if admitting it in summary or redacted form would undermine the defendant's right to a fair trial. Consideration could also be given to implementing a special advocate regime along the lines of that found in Canada, New Zealand and the United Kingdom.⁶⁷ Special advocates are security-cleared lawyers who can access classified information and make submissions on a defendant's behalf.

⁶⁰ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 24-25.

⁶¹ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 26, 38F.

⁶² *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 27, 38G.

⁶³ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 29(3), 38I(3).

⁶⁴ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 31, 38L.

⁶⁵ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 31(8), 38L(8).

⁶⁶ *R v Lodhi* (2006) 163 A Crim R 448, 464-5; *Lodhi v The Queen* (2007) 179 A Crim R 470, 487.

⁶⁷ See, eg, 'Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73(5) *Modern Law Review* 824; John Ip, 'The Rise and Spread of the Special Advocate' (2008) (Winter) *Public Law* 717. In *R v Lodhi*, Whealy J held that such a scheme would not be incompatible with the NSIA: *R v Lodhi* [2006] NSWSC 586 [28].

8. Adverse Security Assessments

Part IV of the *Australian Security Intelligence Organisation Act 1979* (Cth) provides that one of ASIO's key functions is to conduct security assessments. An adverse security assessment is a security assessment issued by ASIO which recommends that some administration action be taken against the interests of an individual (such as cancelling a passport, or denying employment at an airport).⁶⁸

Citizens can challenge the merits of these assessments in the Security Appeals Division of the Administrative Appeals Tribunal (AAT).⁶⁹ However, they face an enormously difficult task as the Attorney-General may issue public interest certificates to withhold sensitive national security information from the applicant.⁷⁰ The constitutionality of the Attorney-General's power has been upheld but remains questionable, as the tribunal is essentially required to 'rubber stamp' the Attorney's decision.⁷¹ As such, the merits review process in the Security Appeals Division infringes the right to procedural fairness as individuals are not given an opportunity to hear all significant evidence led against them. Consideration should be given as to how the fairness of this process could be improved, such as by including factors for the Attorney-General to consider when issuing a public interest certificate.⁷²

Greater consideration should also be given to improving the opportunities for non-citizens to challenge adverse security assessments issued by ASIO. Non-citizens cannot challenge these assessments in the AAT,⁷³ and so they face the very difficult task of challenging the lawfulness of an assessment in the courts.⁷⁴ The office of the Independent Reviewer of Adverse Security Assessments was created in 2012, which helped to ease some of these

⁶⁸ *Australian Security Intelligence Organisation Act 1979* (Cth), s 35(1).

⁶⁹ *Australian Security Intelligence Organisation Act 1979* (Cth), s 54(1).

⁷⁰ *Australian Security Intelligence Organisation Act 1979* (Cth), s 38(2); *Administrative Appeals Tribunal Act 1975* (Cth), s 36. See generally Keiran Hardy, 'ASIO, Adverse Security Assessments and a Denial of Procedural Fairness' (2009) 17(1) *Australian Journal of Administrative Law* 39, 44-45; Ben Saul, 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds Under International Human Rights Law' (2012) 13 *Melbourne Journal of International Law* 685; Ben Saul, "'Fair Shake of the Sauce Bottle': Fairer ASIO Security Assessment of Refugees' (2012) 37(4) *Alternative Law Journal* 221; Ben Saul, 'The Kafka-Esque Case of Sheikh Mansour Leghaei: The Denial of the International Human Right to a Fair Hearing in National Security Assessments and Migration Proceedings in Australia' (2010) 33(3) *University of New South Wales Law Journal* 629.

⁷¹ *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241, [151]. See Hardy, above n 69, 47-48.

⁷² *Ibid.* This would open up the possibility of seeking judicial review of the Attorney-General's decision to issue a certificate.

⁷³ *Australian Security Intelligence Organisation Act 1979* (Cth), s 36.

⁷⁴ See Hardy, above n 69, 40-43.

concerns. However, that office has no statutory backing, tenure or powers.⁷⁵ If the right to seek merits review of adverse security assessments is not to be extended to non-citizens, consideration should be given to strengthening the tenure and powers of this office.

Yours sincerely,

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⁷⁵ In contrast to the offices of the INSLM and the Inspector-General of Intelligence and Security (IGIS), the office of the Independent Reviewer of Adverse Security Assessments only exists by virtue of Terms of Reference issued by the Attorney-General: *Independent National Security Legislation Monitor Act 2010* (Cth); *Inspector-General of Intelligence and Security Act 1986* (Cth); cf Attorney-General's Department, *Independent Reviewer of Adverse Security Assessments* <<http://www.ag.gov.au/NationalSecurity/Counterterrorism/mlaw/Pages/IndependentReviewofAdverseSecurityAssessments.aspx>> (last accessed 25 February 2015).