

REPORT NO. 5

**REVIEW OF CRIMES ACT 1914  
AND OTHER CRIMES LEGISLATION  
OF THE COMMONWEALTH**

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Report No. 3 *Testamentary Guardianship in the Australian Capital Territory* (April 1983)

Report No. 4 *Human Rights and the Deportation of Convicted Aliens and Immigrants* (June 1983)

Human Rights Commission  
G.P.O. Box 629  
Canberra, A.C.T. 2601


20 June 1983

The Hon. Lionel Bowen, M.P.  
Acting Attorney-General  
Parliament House  
Canberra, A.C.T. 2600

Dear Minister,

Pursuant to sections 9 (1) and 16 (1) of the *Human Rights Commission Act 1981* this report is presented to you following the Human Rights Commission's examination of the *Crimes Act 1914* and other Commonwealth crimes legislation.

Yours sincerely,

A handwritten signature in black ink on a light-colored rectangular background. The signature reads "Roma Mitchell" in a cursive, flowing script.

*Chairman*  
for and on behalf of the  
Human Rights Commission

**Members of the Human Rights Commission**

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## THE FUNCTIONS OF THE COMMISSION

Section 9 of the *Human Rights Commission Act 1981* reads:

9. (1) The functions of the Commission are—
- (a) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments are, or would be, inconsistent with or contrary to any human rights, and to report to the Minister the results of any such examination;
  - (b) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and
    - (i) where the Commission considers it appropriate to do so—endeavour to effect a settlement of the matters that gave rise to the inquiry; and
    - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect a settlement of those matters—to report to the Minister the results of its inquiry and of any endeavours it has made to effect such a settlement;
  - (c) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;
  - (d) when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument;
  - (e) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declarations or any other relevant international instrument, and to report to the Minister the results of any such examination;
  - (f) to promote an understanding and acceptance, and the public discussion, of human rights in Australia and the external Territories;
  - (g) to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting human rights and to coordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;
  - (h) to perform-
    - (i) any functions conferred on the Commission by any other enactment;
    - (ii) any functions conferred on the Commission pursuant to any arrangement in force under section 11; and
    - (iii) any functions conferred on the Commission by any State Act or Northern Territory enactment, being functions that are declared by the Minister, by notice published in the *Gazette*, to be complementary to other functions of the Commission; and

- (j) to do anything incidental or conducive to the performance of any of the preceding functions.
- (2) The Commission shall not—
  - (a) regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of paragraph ( 1) (a) or (b) by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons; or
  - (b) regard an act or practice as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) where the act or practice is done or engaged in solely for the purpose referred to in paragraph (a).
- (<sup>3</sup>) For the purpose of the performance of its functions, the Commission may work with and consult appropriate non-governmental organizations.



# I. INTRODUCTION

## Background

1. It is the function of the Commission under section 9 (1) (a) of the *Human Rights Commission Act 1981* (the Act) to examine enactments that may be inconsistent with, or contrary to, any human rights and to report to the Attorney-General the result of such an examination.

2. General legislation concerning crimes, including the Commonwealth legislation in this field, bears directly on the relationships between the individual and society and between the individual and government, and it is with these relationships that human rights are principally concerned. There is evident scope for inconsistency between the way some aspects of the relationships are governed at present by the criminal law and the way that they ought to be, in terms of human rights. With this in mind, the Commission decided to examine certain Commonwealth legislation concerning crime with a view to determining whether any of the provisions of that legislation infringe human rights.

3. The 'human rights' with which the Commission is concerned are the rights and freedoms recognised in the International Covenant on Civil and Political Rights (ICCPR) and three Declarations, namely the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons; all of these instruments are set out as Schedules of the Act.

4. While this review is principally concerned with identifying inconsistencies between Commonwealth crimes legislation and human rights, the Commission also takes the opportunity of drawing attention to the need for those involved in the application of that legislation to take account of the requirement to act consistently with human rights (as defined). For example, the Declaration on the Rights of Disabled Persons covers not only persons subject to a physical disability but also persons having a mental disability (Paragraph 1—see Appendix 5). As well, Paragraph 6 of the Declaration on the Rights of Mentally Retarded Persons (Appendix 4) requires that a mentally retarded person, if prosecuted for any offence, has the right to due process of law with full recognition being given to the person's degree of mental responsibility. Mentally retarded persons and other disabled persons are guaranteed, by Paragraph 6 of that Declaration, protection from abuse and degrading treatment. These considerations, and the tenor generally of the three Declarations mentioned in the last paragraph, should be kept in mind by those responsible for administering the criminal law at all its stages, before, during and after trial.

## Scope of review

5. The Commission has examined the *Crimes Act 1914* and in addition certain other Commonwealth legislation concerning crimes, namely:

- *Crimes (Aircraft) Act 1963*
- *Crimes (Protection of Aircraft) Act 1973*
- *Crimes (Hijacking of Aircraft) Act 1972*
- *Crimes at Sea Act 1979*
- *Crimes (Taxation Offences) Act 1980*
- *Crimes (Internationally Protected Persons) Act 1976*
- *Crimes (Foreign Incursions and Recruitment) Act 1978*

- *Crimes (Biological Weapons) Act 1976*
- *Crimes (Overseas) Act 1964*

with reference to the ICCPR and the three Declarations. The legislation has also been examined in the light of the Racial Discrimination Act which gives effect to the International Convention on the Elimination of All Forms of Racial Discrimination. This report has been prepared for the Commission by its Secretary, Fergus Thomson, assisted by Senior Legal Officer, Cynthia Cheney.

### **Method of Review**

6. The review was done in the following manner:

- (a) Each provision of each piece of legislation was reviewed separately in relation to each of the instruments named.
- (b) Provisions that infringe human rights were identified with the reasons for that infringement.
- (c) Proposals were developed for changing the provisions or modifying practice to bring them into conformity with human rights as defined.

7. Not all the legislation reviewed revealed infringements of human rights. In particular, the *Crimes (Internationally Protected Persons) Act 1976* and the *Crimes (Biological Weapons) Act 1976* did not contain any infringements of human rights. However, the *Crimes Act 1914* and most of the other crimes-related legislation contained a number of provisions that, in the Commission's view, on their face infringe human rights, and other provisions that, in the circumstances of a particular case, infringe.

8. It became apparent that there are six main areas of concern, namely:

- (1) detention of certain prisoners at the Governor-General's pleasure;
- (2) procedure for dealing with children and young persons who offend against Commonwealth law;
- (3) offences relating to unlawful associations;
- (4) disclosure of official information by Commonwealth officers;
- (5) reverse onus of proof and averment provisions;
- (6) procedures for arrest, detention and trial of persons charged with criminal offences.

9. The text of all the provisions of the *Crimes Act 1914* and other relevant Commonwealth legislation discussed in this Report is attached as Appendix 1. A reference to 'Article' is a reference to an Article of the ICCPR.

## II. REVIEW OF CRIMES ACT 1914

### Section 17

10. This section, which deals with habitual criminals, allows a judge, when sentencing an offender who has at least two previous convictions for indictable offences, to declare that the person is an habitual criminal and to order that, at the expiration of the sentence then being imposed, the offender be detained in prison 'during the pleasure of the Governor-General'. Section 17 requires the Governor-General to act with the advice of the Attorney-General. It does not otherwise regulate the power to determine the conditions, including the period attaching to the further detention. On the face of the statute, therefore, detention 'during the pleasure of the Governor-General' amounts to arbitrary detention and, to that extent, section 17 infringes Article 9.1 (Appendix 2). In this respect, section 17 may be compared with section 20B, discussed below. The Commission's recommendations with respect to section 20B apply, *mutatis mutandis*, in relation to this aspect of section 17.

11. The Commission has also considered section 17 in the light of Article 14.1 which, so far as is relevant, provides that 'All persons shall be equal before the courts and tribunals' (Appendix 2). A question is whether a person, liable to be declared a habitual criminal on the ground of two or more previous convictions for indictable offences, is, in relation to a person not so liable, equal before the courts. The Commission notes that courts frequently take account of previous convictions when passing sentence. However, in the ordinary case, any additional penalty flowing from previous convictions is fixed by the court. Where section 17 applies, the additional penalty is not so fixed; it is arbitrary and may be unduly harsh in its effect. The Commission is not prepared to say that section 17 infringes the letter of Article 14, but considers that the Article does bear upon the question whether section 17 is inconsistent with the general principle of equality and, in consequence, recommends that consideration be given to amending section 17 to bring it into line with that principle.

### Section 20B

12. This section provides for the procedures to be followed in relation to offenders against Commonwealth law who are found to be insane. So far as is relevant, it provides, in effect, that a person found to be unfit to be tried or who is acquitted, by reason of unsoundness of mind, is to be kept 'in strict custody until the pleasure of the Governor-General is known'.

13. As is the case with section 17, discussed above, the Governor-General is required to act with the advice of the Attorney-General. The power of the Governor-General to determine the conditions attaching to strict custody is not otherwise regulated to any substantial degree by the section. The Commission believes that 'strict custody' under section 20B amounts to arbitrary detention and, to that extent, section 20B infringes Article 9.1, which provides that no one shall be subjected to arbitrary detention (Appendix 2).<sup>2</sup>

14. Section 20B is also inconsistent with the Declaration on the Rights of Disabled Persons (Appendix 5). In its terms the Declaration covers persons with mental as well

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I. See also Article 26, which provides, in effect, that all persons are equal before the law and entitled without discrimination on the ground of status to the equal protection of the law.

2. We note that there are comparable provisions in the *Defence Force Discipline Act 1982*, in particular sections 194, 145, 158 and 164. The comments relating to section 20B of the *Crimes Act 1914* apply *mutatis mutandis* to those sections.

as physical disabilities and Paragraph 10 requires that disabled persons be protected against all treatment of a discriminatory nature. Further, Paragraph 4 of that Declaration provides that disabled persons have the same civil and political rights as other human beings and that Paragraph 7 of the Declaration on the Rights of Mentally Retarded Persons applies to any possible limitation of those rights for mentally disabled persons. Paragraph 7, so far as is relevant, provides that, whenever it becomes necessary to restrict or deny some or all of the rights of a mentally retarded person, the procedure used for the restriction or denial of rights must contain proper legal safeguards against every form of abuse and must be subject to periodic review and the right of appeal to higher authorities.'

15. Moreover, at present, section 20B (1) (b) does not take into account two different situations—on the one hand, a case where a person is permanently of unsound mind or suffering from a long-standing but curable mental illness and, on the other, a case where a person has suffered a temporary unsoundness of mind at the time of committing the offence. In the latter case, a person may be acquitted by reason of unsoundness of mind at the time of commission of the offence, although of sound mind at the time of the trial. However, the trial judge under section 20B (1) is, notwithstanding that the accused may be sane at the time of acquittal, obliged to direct that person to be kept 'in strict custody'. The Commission believes that there is a need to differentiate between the two types of cases and recommends that different provisions should therefore apply.

16. Section 20B makes no provision requiring review of an order directing a person to be kept in strict custody. In 1981, the European Court of Human Rights held, in *X v. United Kingdom*,<sup>3</sup> that Article 5 (4) of the European Convention on Human Rights (which is comparable to Article 9.4 of the ICCPR) entitled such a person to take proceedings at reasonable intervals before a court to put at issue the lawfulness of his detention, whether that detention was ordered by a court or some other authority. The Court cited the earlier case of *Winterwerp v. The Netherlands*<sup>4</sup> in which it was emphasised that:

- . . . it would be contrary to the object and purpose of Article 5. . . to interpret paragraph 4
- . . . as making this category of confinement immune from subsequent review of lawfulness merely provided that the initial decision issued from a court. The very nature of the deprivation of liberty under consideration would appear to require a review of lawfulness to be available at reasonable intervals.

17. The Commission recommends that, consistently with the Covenant and the two Declarations just mentioned, section 20B be amended to provide, either within the section or by regulation, for the conditions under which a person may be kept in strict custody. These provisions should differentiate between the two classes of cases discussed above and should include the requirement for a periodic review of the circumstances of a person held in strict custody and for a right of appeal against any decision made from time to time, on review, that the person in strict custody should be retained in custody. To avoid questions of the constitutional validity of attaching conditions to the exercise of the Governor-General's discretion in this connection the Commission recommends that the procedure of being kept in strict custody at the pleasure of the Governor-General be replaced by another procedure not involving vice-regal discretions.

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3. c.f. the discussion and recommendations relating to mentally ill offenders contained in the First Report of the Criminal Law and Penal Methods Reform Committee of South Australia on Sentencing and Corrections, July 1973, paragraph 3.15, pp. 94-8.

4. (1981) 4 E.H.R.R. 188.

5. (1979) 2 E.H.R.R. 387.

## Section 20C (1)

18. Section 20C (1) concerns the procedure for dealing with children and young persons who are charged with or convicted of offences against Commonwealth law. In effect it provides that the offender may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory in which the offence is committed. Thus there are two classes of juvenile offenders against Commonwealth law covered by section 20C: those who are charged with or convicted of the offence in a State and those who are charged or convicted in a Territory. (The Commission has a related interest in the procedures for dealing with juvenile offenders against a law of the Australian Capital Territory.) The Commission is aware that, with respect to the Australian Capital Territory, the Law Reform Commission in its report on child welfare in that Territory has noted uncertainties surrounding the operation of section 20C (1) and has made proposals for new legislation in the A.C.T. designed to overcome those uncertainties.<sup>6</sup> It is evident that the question of the manner in which young offenders should be treated is complex and an analysis of it in relation to section 20c (1) is beyond the scope of this report. However, the Commission draws attention to Article 14.4 (Appendix 2) and Principle 2 of the Declaration of the Rights of the Child (Appendix 3). The Article requires, in effect, that in the determination of a criminal charge against a young person, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. The Principle requires the child to be given special protection by law.

19. The Commission recommends that any legislation operating in the Australian Capital Territory and concerning the manner in which a juvenile offender is to be dealt with be framed so as to take account of the requirements of Article 14.4 (Appendix 2) and Principle 2 (Appendix 3). This would be necessary, of course, not only in the case of a juvenile offender against Commonwealth law in respect of whom section 20C applies but also in the case of a juvenile offender against a law of the Australian Capital Territory. Moreover the Commission notes that, under the Australian reservations and declarations made upon ratification of the ICCPR, the implementation of those provisions of the ICCPR over whose subject matter the States have jurisdiction is a matter for the States. With respect to the operation of section 20C (1) in relation to offences by young persons in a State, the Commission recommends that the effect of its operation be examined, as appropriate in consultation with States, with a view to ensuring that section 20C, in its application with respect to an offence committed in a State, does not infringe that Article or Principle.

20. The Commission notes, incidentally, the development in some places in Australia of the concept of 'diversion' in relation to the treatment of juvenile offenders. The term 'diversion' may be used to apply to diversion into procedures other than court procedures or it may apply to diversion, after court adjudication, to measures other than those ordinarily applied by the courts in relation to offenders generally. One argument against diversion of juvenile offenders away from the courts has been stated as follows:

Diversion from the court deprives an alleged offender of the protections offered by the long established and tested procedures of a criminal trial. In such a trial guilt or innocence is judicially determined according to rules of evidence, and, in the case of a finding of guilt, there is a right of appeal. A system which emphasises diversion increases the possibility that children will admit, and have recorded against them, offences in respect of which a court hearing would have resulted in an acquittal.<sup>7</sup>

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6. The Law Reform Commission, Report No)18, *Child Welfare*, 1981, paras 90 and 91 and para. I p. 394.

7. *Ibid.*, para. 121.

Insofar as any diversion procedure may be applicable in the Australian Capital Territory, or in any of the States, in relation to a juvenile offender against Commonwealth law who is being dealt with pursuant to section 20C, the Commission notes the desirability of preserving, in that procedure, so far as is appropriate, the safeguards contained in Article 14 (Appendix 2).

### **Section 30AA**

21. This section makes provision for an application to be made to the Federal Court to declare an association to be unlawful. Other related provisions create offences with respect to persons involved with an unlawful association.<sup>8</sup> The Commission notes that sub-section (3) of section 30AA provides that a summons may contain averments setting out facts relied upon in support of such an application and that the provisions of section 30R, which relate to the effect of averments of the prosecutor, shall apply. The Commission notes that this approach is in conflict with Recommendation 4 of the Report of the Senate Standing Committee on Constitutional and Legal Affairs entitled *The Burden of Proof in Criminal Proceedings (1982)* (Appendix 6), to the extent that the use of averments precludes a respondent from examining witnesses against him as required by Article 14.3 (e) (Appendix 2). Although Article 14 relates to criminal proceedings and the application for a declaration under section 30AA is not directly a criminal proceeding, such a declaration may have criminal consequences under section 30B, which makes it an offence, amongst others, for a person to be a member or officer of an unlawful association (see paragraph 30 and following for discussion of averment provisions generally and the Commission's recommendations).

### **Section 30AB**

22. This section allows the Attorney-General to require the furnishing of information and inspection of documents if it is believed that a person has possession of information or documents relating to an unlawful association. Failure to comply is an offence under the section. It appears, therefore, that section 30AB has scope for allowing arbitrary interference with a person's privacy, contrary to Article 17 (Appendix 2). The section is inconsistent with ordinary practice under which the courts determine whether it is necessary and appropriate for a search warrant to be issued in order to obtain documents. The present section does not protect against arbitrary interference by an Attorney-General with a person's privacy. The Commission does not assert that an Attorney-General would act arbitrarily under section 30AB, but that, in principle, the section should not admit of that possibility. The Commission can see no reason why the courts should not be able to determine the question whether information or documents should be furnished for the general purposes of Part IIA of the *Crimes Act 1914* and recommends that section 30AB be amended accordingly.

### **Section 30D**

23. This section makes it an offence for a person to give or solicit contributions of money or goods to an unlawful association. By virtue of section 30A (1) (a), any association which is affiliated with an unlawful association is itself also an unlawful association for the purposes of the Act. Section 30D does not require that there be knowledge on the part of the offender that the affiliated association is, in law, an unlawful association. The situation could arise, e.g. in which a person gives a donation of money to an

8. The Commission considered whether this and related sections infringe Articles 22 or 18, which provide, so far as is relevant, for the right to freedom of association and the right to freedom of thought and conscience respectively. It concluded that, to the extent that those sections may otherwise have infringed the Articles mentioned, the restrictions on the rights concerned come within the classes of restrictions allowed by the Articles and were therefore permissible.

association not knowing that it is affiliated with an unlawful association and is, therefore, an unlawful association itself. Under section 30D, that person is liable to a penalty of six months' imprisonment. The Commission is not prepared to assert that this provision directly infringes any human right, but brings the matter to attention on the basis that the tenor of Article 14 is such as to require fairness in the disposal of criminal charges, and provisions creating offences that, on their face, do not require proof of intent to be given during that process are generally inconsistent with that principle.<sup>9</sup> The Commission recommends that section 30D be amended to limit its application to persons who had, at all relevant times, knowledge that the association was an unlawful association.

### **Section 30FD**

24. This section provides, in effect, that a person who is a member of the committee or executive of an association declared under Part HA of the *Crimes Act 1914* to be an unlawful association shall be disqualified from voting at an election for the Senate or House of Representatives for a period of seven years. The Commission considers that, where the member of the committee or executive concerned was not aware of the matter giving rise to the association's being declared unlawful, but is nevertheless caught by section 30FD, disqualification for an arbitrary period of seven years amounts to an unreasonable restriction on the right to vote, contrary to Article 25 (b) (Appendix 2). The position is made worse, in the Commission's view, in the case of a person who is a member of the committee or executive of an organisation which is affiliated with a declared unlawful association. Such an affiliated organisation is itself, by virtue of section 30A, declared to be an unlawful association, but again this may reasonably not be within the knowledge of the person concerned.

25. For the reasons discussed in relation to Article 30D, the Commission recommends that section 30FD be amended to limit its application to persons who had, at all relevant times, knowledge of the matter giving rise to the association's being declared to be an unlawful association.

### **Section 70**

26. This section provides, in effect, that any Commonwealth officer, or former Commonwealth officer, is guilty of an offence if he discloses any information that he knows of or possesses by virtue of his office and which it is his duty not to disclose. The Commission considers that, in its present form, this section could operate in a manner inconsistent with Article 19 (Appendix 2). Article 19 protects the right to freedom of expression, which includes the right to impart information. The exercise of such a right is, however, subject to certain restrictions, as set out in Article 19.3. These restrictions may only be such as are provided by law and are necessary for the respect of the rights or reputations of others and for the protection of national security or of public order or of public health or morals. Section 70 proscribes the disclosure of any information acquired by virtue of office and, therefore, may restrict a person's right to impart information that has no bearing on the matters in respect of which restrictions may, under Article 19.3, be imposed. The Commission recommends that section 70 be amended to limit its operation to the kinds of information in respect of which restrictions may be imposed under Article 19.3.

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9. In a prosecution for an offence against section 30D, proof that the accused knew that the association concerned was an unlawful association is probably unnecessary: see *Proudman v. Dayman*, (1944) 67 C.L.R. 536.

## **Section 78**

27. This section relates to espionage and similar activities. The Commission notes that a person may be convicted of an offence under section 78 in circumstances that fall short of the prosecution proving a required element of the offence, namely, that the act is intended to be prejudicial to national security. Sub-section (2) (a) provides, in effect, that it is not necessary to prove that the accused is guilty of a particular act tending to show that purpose, but that it is sufficient if, from the circumstances or from the accused's conduct or known character, it appears that the purpose of the accused was prejudicial. The Commission considers that this considerably erodes the principal contained in Article 14.2 (Appendix 2) that a person charged with a criminal offence has the right to be presumed innocent. The Commission notes that certain safeguards are built into sub-sections (3) and (4), but those safeguards are not sufficient, in the Commission's view, to maintain the integrity of the principle in relation to a charge brought under section 78. The Commission recommends that section 78 be amended by omitting sub-section (2) (a). Moreover, sub-section 78 (2) (b) has the effect of reversing the onus of proof in a prosecution under that section. The comments at paragraph 30 apply equally in relation to sub-section 78 (2) (b).

## **Section 79**

28. This section relates to official secrets. The same considerations relating to the erosion of the presumption of innocence which applied to section 78 (discussed earlier) also apply to section 79 which contains a provision in the same terms as section 78 (2) (a) (see section 79 (7)).

## **Sections 82 (4) and 84A (2)**

29. These sub-sections provide, in effect, that in relation to the matters covered by the section concerned, a female shall not be searched except by a female. To the extent that no similar provision is made in relation to the searching of a male by a male, the sub-sections are inconsistent with Articles 3, 7, 17 and 26 (Appendix 2). Article 3 ensures the equal rights of men and women. Article 7 provides that no one shall be subjected to degrading treatment. Article 17 protects an individual from arbitrary and unlawful interference with privacy. Article 26 requires that the law guarantee to all persons equal protection against discrimination on any ground, including sex. The Commission recommends that sections 82 (4) and 84A (2) should be amended to take account of these Articles and that provision should be made in general for persons to be searched by persons of the same sex, with provision that the wishes of the individual, wherever possible, be respected. In the case of children, their rights and wishes are especially relevant as they are guaranteed 'special protection' by Principle 2 of the Declaration of the Rights of the Child (Appendix 3).

## **Reverse Onus of Proof and Averment Provisions**

30. The Commission notes that there are a number of provisions of the *Crimes Act 1914* that, in effect, place the persuasive burden of proof on the defendant to a criminal charge—in effect reversing the general rule that the prosecution carries the burden of proving the guilt of an accused beyond reasonable doubt.<sup>10</sup> Some examples and comments follow, drawn from a recent report of the Senate Standing Committee on Constitutional and Legal Affairs.<sup>11</sup> Section 21C imposes on the defendant the burden of proving that an act was done with lawful authority, excuse or permission; the effect of placing such a persuasive burden on a defendant is to create the possibility that a person can, and under the law must, be convicted even though there may be reasonable doubt of his guilt. Section 14 provides that if a person is charged before a court of summary



jurisdiction with an offence against the law of the Commonwealth and pleads a statutory excuse to that offence, he is obliged to prove that excuse on a balance of probabilities.

31. The desirability of avoiding, as far as practicable, reversing the onus of proof was considered by the Senate Committee. In particular, the Committee considered the question in connection with the need for a fair trial. It stated in paragraph 5.28 as follows:

The principle that the prosecution has the task of proving every ingredient of a criminal charge beyond reasonable doubt is deeply embedded in the Australian system of justice, and the criminal process has been developed around this particular requirement. Once that principle is removed, the position of the accused is drastically altered, leaving the trial process structured firmly in favour of the prosecution.

32. The Committee concluded that there was a need for reform. It stated in paragraph 5.31:

The Committee is of the view that the large number of provisions presently existing in Commonwealth legislation (including the Crimes Act) which place the persuasive burden of proof on defendants cannot be justified by any rigorous requirements of special circumstances justifying an exception.

Further at paragraph 5.34:

The Committee is of the opinion that no policy considerations have been advanced which warrant an erosion of what must surely be one of the most fundamental rights of a citizen: the right not to be convicted of a crime until he has been proved guilty beyond reasonable doubt. While society has the role by means of its laws to protect itself, its institutions and the individual, the Committee is not convinced that placing a persuasive burden of proof on defendants plays an essential or irreplaceable part in that role.

33. The Committee also considered averment provisions in Commonwealth statutes." For example, under section 30R, the averments of the prosecutor contained in an indictment shall be *prima facie* evidence of the matters averred. The effect of such a provision is to place on the accused the evidential burden of proof with regard to the matter averred.

34. The evidential burden is to be distinguished from the persuasive burden in that, so far as the accused is concerned, it refers to the need for the accused to adduce sufficient evidence to enable a particular issue to be left to the jury." The Committee concluded that there should be restrictions on the use of averment provisions by prosecutors and made recommendations to that effect and as to the circumstances in which they should be allowable.

35. To the extent that certain provisions do, in effect, reverse the persuasive burden of proof and place it upon the defendant, they are inconsistent with the presumption of innocence principle contained in Article 14.2 (Appendix 2). They are, moreover, in their effect contrary to the concept of a fair trial in the Australian system of justice (see paragraph 31), and are therefore inconsistent with the requirement of Article 14.1 (Appendix 2) that 'in the determination of any criminal charge . . . everyone shall be entitled to a fair. . . hearing'. The Commission considers that the interpretation of the expression 'fair. . . hearing' must have regard to the optimum standards applicable in

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10. *Crimes Act 1914—sections 14, 21c, 30R, 65, 68, 69, 70, 78, 79, 83, 85A, 89, 89A, 90.*

11. Senate Standing Committee on Constitutional and Legal Affairs, *The Burden of Proof in Criminal Proceedings, 1982*; see especially paragraphs 4.9, 4.10, 5.9 and 5.17.

12. See Report, Chapter 7—Averments.

13. See also Report, paragraph 2.2

the country concerned, so that any derogation from those standards is *prima facie* inconsistent with article 14.1. (The Commission acknowledges, of course, that in some countries the prevailing optimum standards may not meet the requirements of Article 14.1). The Commission recommends, therefore, consistently with recommendations in the Report of the Senate Standing Committee on Constitutional and Legal Affairs (Appendix 6), that the provisions referred to above which reverse the persuasive burden of proof and place it upon defendants, should be replaced with provisions which place only an evidential burden of proof upon defendants.

**36** Moreover, if it is accepted that, as the Committee suggests, potential exists for mis-use of averment provisions by prosecutors<sup>14</sup>, there is equal potential for infringement of the 'fair trial' requirement in Article 14.1 (Appendix 2). Accordingly, the Commission supports generally the recommendations of the Committee (Appendix 6) proposing that averment provisions be kept to a minimum and that legislation be enacted controlling their use by prosecutors, and recommends that they be implemented accordingly.

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14. Report, paragraph 7.12.

### III. REVIEW OF CRIMES (AIRCRAFT) ACT 1963

#### Sections 13, 15 and 29

37. Sections 13 and 15 relate to serious offences carrying the penalty of death. The Commission is aware that under the *Death Penalty Abolition Act 1973* a person is not liable to the punishment of death for any offence; the penalty of life imprisonment is, in effect, substituted in lieu. The Commission notes that this is in accord with Article 6.6 (Appendix 2), which is aimed at promoting the abolition of capital punishment. Section 29, which is a procedural section applicable when a person is liable to the death penalty under the Act, ceased to be relevant by virtue of the *Death Penalty Abolition Act 1973*.

#### Section 25

38. Section 25 (1) enables the arrest without warrant by an aircraft commander of an offender or suspected offender against Part IV of the *Crimes (Aircraft) Act 1963* and the holding of that person in custody until he can be brought before proper authority to be dealt with at law. There is no requirement in the section that the detained person be brought promptly before proper authority. Article 9.3 (Appendix 2) requires that a person arrested or detained on a criminal charge be brought promptly before a judicial authority for trial or release. The Commission, whilst recognising that the circumstances of arrest under section 25 may be such that it may be difficult or impossible to bring a detained person before a judicial authority without delay, nevertheless considers that an obligation ought to be placed on the detaining authority to act promptly in bringing the offender before proper authority. This would be consistent with section 11 of the *Crimes (Hijacking of Aircraft) Act 1972* and section 8 of the *Crimes (Protection of Aircraft) Act 1973* which, so far as is relevant, require that a person taking an offender into custody shall cause the offender to be brought before a magistrate as soon as practicable. The Commission recommends accordingly.

39. Section 25 (2) enables an aircraft commander to place under restraint or in custody a person on board the aircraft, or to remove a person from an aircraft on the ground, where he considers it necessary to do so to prevent the commission of an offence or to avoid danger. There is no requirement in this sub-section that the commander must have reasonable grounds for considering it necessary to take the action envisaged (cf section 25 (1), which requires that the commander reasonably suspect that a person has committed an offence before arresting that person). Article 9.1 (Appendix 2) requires that no one shall be subjected to arbitrary arrest or detention. The Commission, while acknowledging the possibly disastrous consequences that may flow from certain offences under this Act, and also the likely need in many cases for action to be taken swiftly, nevertheless considers it desirable that sub-section (2) should require the commander to act on a reasonable basis. This would clearly not inhibit action needing to be taken in the agony of the moment, but would operate to ensure that a person was not liable to be subjected to arbitrary detention—perhaps, in the event, in a strange country. The Commission recommends accordingly.

40. Moreover, section 25 (2) does not require that a person placed in restraint or in custody be brought promptly before a judicial authority. The comments above with respect to this aspect of section 25(1) apply equally here.

## Section 26

**41.** Section 26 enables an aircraft commander or an authorised person to search any person on or about to board an aircraft in relation to a suspected offence under the relevant part of the *Crimes (Aircraft) Act 1963*. Provision is also made for a female to be searched only by a female. The Commission considered this aspect of search in relation to sections 82 (4) and 84 A (2) of the *Crimes Act 1914* (see paragraph 29). The comments made there apply equally here. These were, in essence, that to avoid inconsistency with certain Articles of the ICCPR and Principle 2 of the Declaration of the Rights of the Child, the section should be amended to ensure that in general, persons are searched by persons of the same sex and that the wishes of the individual (especially the child), wherever possible, are respected.

## IV. REVIEW OF CRIMES (PROTECTION OF AIRCRAFT) ACT 1973

### Section 9

42. Sections 9 (2) and 9 (3) of the *Crimes (Protection of Aircraft) Act 1973* are somewhat similar in terms to sections 25(1) and 25 (2) of the *Crimes (Aircraft) Act 1963* (discussed above at paragraphs 38 and 39). The comments made in relation to section 25 with regard to the need for detaining action by an aircraft commander to be taken on reasonable grounds, and to the need for a detained person to be brought promptly before a judicial authority, apply with equal force to sections 9 (2) and 9 (3) of the *Crimes (Protection of Aircraft) Act 1973*.

### Section 11

43. Section 11 enables the holding by a magistrate of an inquiry into the facts relating to an alleged offence under this Act. The section provides that evidence may be taken by the magistrate as though the witness were giving evidence on a charge for an indictable offence. Evidence may be taken in the absence of a person charged although there is provision requiring that the evidence shall not be so taken unless the magistrate is satisfied that there is good reason. Evidence taken is recorded, certified and sent to the Attorney-General. That section is linked to section 15, which provides that a record of evidence sent by a magistrate to the Attorney-General is admissible in certain criminal proceedings but shall not be admitted unless it appears to the magistrate or court that in all the circumstances it would be contrary to the interests of justice not to do so. That provision, on its face, allows a situation in which an accused person may not be able himself to examine witnesses against him as required by Article 14.3(e) and, to that extent, is an infringement of that part of Article 14. Nevertheless, the Commission, noting that this Act is designed to give effect in Australia to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and acknowledging the possibly extraordinary circumstances of offences against the Act, considers that the safeguards incorporated in sections 11 (4) and 15 (3) operate to ensure the general aim of Article 14 which is, in essence, that everyone shall be entitled to a fair hearing. The Commission accordingly makes no recommendation for changing sections 11 and 15 in the human rights context.

## V. REVIEW OF CRIMES (HIJACKING OF AIRCRAFT) ACT 1972

### **Section 12**

44. Sections 12 (2) and 12 (3) of the *Crimes (Hijacking of Aircraft) Act 1972* are comparable in terms with sections 9 (2) and 9 (3) of the *Crimes (Protection of Aircraft) Act 1973* and sections 25 (1) and 25(2) of the *Crimes (Aircraft) Act 1963* (discussed above at paragraphs 38 and 39). As with the relevant sections of the *Crimes (Protection of Aircraft) Act 1973*, the Commission's views in relation to sections 25 (1) and 25 (2), concerning the need for detaining action by an aircraft commander to be taken on reasonable grounds, and the need for a detained person to be brought promptly before a judicial authority, apply with equal force to the relevant sections of the *Crimes (Hijacking of Aircraft) Act 1972*.

### **Sections 14 and 18**

45. Sections 14 and 18 of the *Crimes (Hijacking of Aircraft) Act 1972* are comparable with sections 11 and 15 respectively of the *Crimes (Protection of Aircraft) Act 1973*, as discussed above at paragraph 43. The Commission's observations on those latter sections, and its conclusion in relation to the operation of those sections in light of Article 14 (Appendix 2) (noting that the *Crimes (Hijacking of Aircraft) Act 1972* is designed to give effect in Australia to the Convention for the Suppression of Unlawful Seizure of Aircraft) apply equally here.

### **Section 17**

46. This section provides that laws in force in a State or Territory relating to conditions under which persons charged with offences against the law of that State or Territory are held in custody, their treatment while in custody and transfer from one prison to another, apply to persons charged with offences under this Act. The Commission is aware that conditions in prisons and other places of confinement vary from State to State or Territory. This raises a question relating to the operation, in relation to persons convicted for offences against Commonwealth law, of Article 26 (Appendix 2), which provides, in effect, for the right of each person to equal treatment in the application of the law. However, at present, the Commission considers that this question would best be looked at in connection with its proposed inquiry concerning Commonwealth prisoners and, accordingly, offers no comment at this stage on section 17.

## VI. REVIEW OF THE CRIMES AT SEA ACT 1979

47. The effect of this Act is to apply the criminal laws of an appropriate State or Territory to offences on or from Australian ships on overseas, interstate and Territory voyages, and in certain carefully circumscribed cases to offences on or from foreign ships beyond the territorial sea. Also, the Commonwealth Act applies the criminal laws of the adjacent State or Territory to offences in off-shore areas beyond the territorial sea that come under Australian jurisdiction, for example, on off-shore installations.' Section 3 (1) defines 'criminal laws' to mean 'any laws, whether written or unwritten and whether substantive or procedural . . . that make provision for or in relation to offences . . . (indictable or summary) . . . or for or in relation to the investigation of offences or punishment of offenders . . .' The criminal laws so applied are those of a State or Territory with which the ship is connected, by registration or in some other prescribed manner.

48. As is evident, an examination of all relevant aspects of the disparate bodies of criminal law so applied to offences at sea is beyond the scope of this review. The Commission does, however, reiterate what is said in paragraph 4: there is a need for those involved in the application of Commonwealth crimes legislation to take account of the requirement to act consistently with human rights. That principle is equally relevant to the treatment of persons charged with offences under the *Crimes at Sea Act 1979*.

## VII. REVIEW OF THE CRIMES (TAXATION OFFENCES) ACT 1980

49. The *Crimes (Taxation Offences) Act 1980* relates to certain offences concerning taxation. Section 4 provides that section 16 of the *Income Tax Assessment Act 1936* and section 10 of the *Sales Tax Assessment Act (No. 1) 1930* operate, in effect, as parts of the *Crimes (Taxation Offences) Act 1980*. Those two sections have to do with the preservation (subject to certain exceptions) of the secrecy of information relating to the affairs of a person obtained or acquired in relation to the provisions of the two taxation statutes. These sections, as applied by section 4, are generally consistent in their operation with Articles 17 and 19 (Appendix 2) which are concerned, respectively, with a person's privacy and the right to freedom of expression. The Commission, accordingly, makes no recommendation for amendment of this Act.

## VIII. REVIEW OF THE CRIMES (INTERNATIONALLY PROTECTED PERSONS) ACT 1976

50. The *Crimes (Internationally Protected Persons) Act 1976* gives effect, in Australia, to the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents. The Commission did not identify any provisions of this Act that infringe or are inconsistent with any human rights and, accordingly, makes no recommendation for amendment of it.

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I. c.f. Second Reading Speech on Crimes at Sea Bill 1979, House of Representatives Hansard, 27 February 1979, p. 399.

## IX. REVIEW OF THE CRIMES (FOREIGN INCURSIONS AND RECRUITMENT) ACT 1978

**51.** The *Crimes (Foreign Incursions and Recruitment) Act 1978* relates to incursions into foreign countries and recruitment for service in armed forces in foreign countries. The Commission was not able to identify any provisions of this Act that infringe or are inconsistent with any human rights. Some provisions (sections 7 (1) (c) and (d) and sections 9 (1) (b) and (c) ) on their face infringe against Articles 22 (freedom of association) and Article 19 (freedom of expression) but the restrictions in each provision come within the restrictions to those two rights that may, under those Articles, be imposed in the interests of national security. The Commission therefore makes no recommendation for change to any of the provisions of the Act.

## X. REVIEW OF THE CRIMES (BIOLOGICAL WEAPONS) ACT 1976

**52.** The *Crimes (Biological Weapons) Act 1976* gives effect in Australia to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction. The Commission did not identify any provisions of this Act that infringe or are inconsistent with any human rights and accordingly makes no recommendation for change to the Act.

## XI. REVIEW OF THE CRIMES (OVERSEAS) ACT 1964

**53.** This Act makes provision for offences committed by certain persons outside Australia. By virtue of section 4 certain persons who do or omit to do an act which, if done or omitted to be done in the Australian Capital Territory, would have been an offence against certain provisions of the criminal law in force in that Territory are guilty of an offence against this Act and punishable accordingly. The Act makes provision for the arrest and procedure after arrest of offenders. So far as arrest and custody of offenders is concerned the laws applicable are the laws of a State or Territory in force in the State or Territory where the trial takes place. As is the case with the *Crimes at Sea Act 1979*, and examination of relevant provisions of the various bodies of law so applied in relation to offenders under this Act is beyond the scope of this review. Once again, however, the Commission draws attention to what is said in paragraph 48, that those involved in the application of Commonwealth crimes legislation must take account of the requirement to act consistently with human rights. That principle is equally relevant to the treatment of persons charged with offences under the *Crimes (Overseas) Act 1964*.



## XII. RECOMMENDATIONS

54. Pursuant to sections 9 (1) (a) and 16 (1) of the *Human Rights Commission Act 1981*, the Commission makes the following recommendations following its examination of the *Crimes Act 1914* and the other Commonwealth crimes legislation:

### *Crimes Act 1914*

- (1) Those persons involved in the application of Commonwealth crimes legislation should take account of the requirement to act consistently with human rights (as defined) at all stages, before, during and after trial (paragraph 4).
- (2) Section 17 should be amended to cover the conditions, including periodic review with a right of appeal, under which a 'habitual criminal' may be kept in strict custody. Further, section 17 should be considered for amendment to bring it into line with the principle of equality before the courts contained in Article 14.1 (paragraphs 10, 11 and 17).
- (3) Section 20B should be amended:
  - (a) to cover the conditions, including periodic review with a right of appeal, under which a person dealt with on the basis of unsoundness of mind may be kept in strict custody;
  - (b) to cover the two different classes of persons who may be subject to being kept in strict custody--on the one hand, those who are permanently of unsound mind or are suffering from a long-standing but curable mental illness and, on the other, those who, although of sound mind at the time of the trial, are acquitted by reason of unsoundness of mind at the time of the offence;
  - (c) to replace the procedure of being kept in strict custody at the pleasure of the Governor-General by another procedure not involving vice-regal discretions (paragraphs 12-17) .
- (4) (a) Any legislation to operate in the Australian Capital Territory and concerning the manner in which a juvenile offender is to be dealt with should be so framed as to take account of relevant human rights (as defined); this would be necessary both in the case of a juvenile offender against Commonwealth law in respect of whom section 20C (1) applies and also in the case of a juvenile offender against the law of the Australian Capital Territory.
  - (b) The effect of the operation of section 20C (1) in relation to juvenile offenders in a State should be examined, as appropriate in consultation with States, with a view to ensuring that it does not infringe any relevant human rights (as defined) (paragraphs 18-20).
- (<sup>5</sup>) Section 30AB, which allows the Attorney-General to require provision of information of furnishing of documents in certain circumstances, should be amended to enable only the courts to determine whether the material concerned should be provided (paragraph 22).
- (6) Section 30D, which concerns giving support to unlawful associations, should be amended to limit its application to persons who had, at all relevant times, knowledge that a relevant association was an unlawful association (paragraph 23).
- (<sup>7</sup>) Section 30FD, which concerns disqualification from voting of certain persons associated with an unlawful association, should be amended to limit its application to persons who had, at all relevant times, knowledge of the matter giving

rise to the relevant association being declared to be an unlawful association (paragraphs 24-5).

- (8) Section 70, which creates the offence of disclosing certain official information in certain circumstances, should be amended to limit its operation to the kinds of information in respect of which restrictions may be imposed under Article 19, which concerns *inter alia* the right to freedom of expression (paragraph 26).
- (9) Section 78, which relates to espionage and similar activities, should be amended to bring it into line with the principle in Article 14.2 that a person charged with a criminal offence has the right to be presumed innocent (paragraph 27).
- (10) Section 79, which relates to official secrets, should be amended for the same purpose as the proposed amendment of section 78 (paragraph 28).
- (11) Sections 82 (4) and 84A (2), which relate to the searching of females by females, should be amended to provide that, in general, persons are to be searched by persons of the same sex and that the wishes of the individual be respected wherever possible; and that the rights and wishes of children, in particular, are covered (paragraph 29).
- (12) Certain provisions in effect reverse the persuasive burden of proof and place it upon the defendant; those provisions should, consistently with the Report of the Senate Standing Committee on Constitutional and Legal Affairs, be amended to place only an evidential burden of proof upon the defendant (paragraphs 30-5).
- (13) The recommendations of the Senate Standing Committee referred to in recommendation (11) (above), proposing that averment provisions be kept to a minimum and that legislation be enacted controlling their use by prosecutors, be implemented (paragraph 36).

#### *Crimes (Aircraft) Act 1963*

- (14) Section 25 (1), which enables the arrest without warrant and holding in custody by an aircraft commander of certain offenders or suspected offenders in relation to aircraft should be amended to require that the person arrested be brought before a magistrate as soon as practicable (paragraph 38).
- (15) Section 25 (2), which enables an aircraft commander to restrain or remove a person in or from an aircraft in certain circumstances, should be amended to require that the commander operate on a reasonable basis and that a person placed in restraint or in custody be brought promptly before a judicial authority (paragraphs 39 and 40).
- (16) Section 26, which enables an aircraft commander or authorised person to search persons in relation to aircraft and in certain circumstances, including the circumstance that a female may be searched only by a female, should be amended to provide that, in general, persons are to be searched by persons of the same sex; and that the wishes of the individual (especially the child) be respected wherever possible (paragraph 41, see also paragraph 29).

#### *Crimes (Protection of Aircraft) Act 1973*

- (17) Sections 9 (2) and 9 (3), which are comparable in terms of sections 25 (1) and 25 (2) of the *Crimes (Aircraft) Act 1963* should be amended along the lines proposed for amendment of those latter sections (paragraph 42, and see recommendations (14) and (15)).

*Crimes (Hijacking of Aircraft) Act 1972*

- (18) Sections 12 (2) and 12 (3), which are comparable in terms with sections 9 (2) and 9 (3) of the *Crimes (Protection of Aircraft) Act 1973* and sections 25(1) and 25 (2) of the *Crimes (Aircraft) Act 1963*, should be amended along the lines proposed for amendment of those other comparable provisions (paragraph 44, and see recommendations (14), (15) and (17) ).

## APPENDIX 1

### *Crimes Act 1914*

#### (Relevant Sections)

**14.** Where any person is charged, before a court of summary jurisdiction, with an offence against the law of the Commonwealth, any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the section of the law creating the offence, may be proved by the person charged, but need not be specified or negatived in the information, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant.

**17. (1)** Where a person convicted of an indictable offence against the law of the Commonwealth has been previously convicted on at least 2 occasions of indictable offences against the law of the Commonwealth, or of a State, or of a Territory, the court before which he is convicted may declare that he is a habitual criminal, and may direct, as part of his sentence, that on the expiration of the term of imprisonment then imposed upon him, he be detained in prison during the pleasure of the Governor-General.

(2) The court, before passing sentence, may, if it thinks fit, hear evidence to enable it to determine whether or not the person so convicted should be declared a habitual criminal.

(3) For the purposes of this section, "the Governor-General" means the Governor-General of the Commonwealth, or the person for the time being administering the government of the Commonwealth, acting with the advice of the Attorney-General.

**20B. (1)** Where a person has been charged with an indictable offence against the law of the Commonwealth and—

- (a) the person is unfit to be tried by reason of unsoundness of mind; or
- (b) the person is acquitted by reason of unsoundness of mind at the time of the commission of the offence,

the court shall direct that the person be kept in strict custody until the pleasure of the Governor-General is known.

(2) Where a court has, under sub-section (1) directed that a person be kept in strict custody until the pleasure of the Governor-General is known, the Governor-General may, by writing under his hand, order that the person be detained in safe custody in such place and in accordance with such directions, if any, as the Governor-General specifies in the order.

(3) The Governor-General may, from time to time, by writing under his hand, vary an order under sub-section (2), either as to the place specified in the order or the directions so specified, or as to both, in such manner as he thinks fit.

(4) The Governor-General may, by writing under his hand, order that a person detained in safe custody in pursuance of an order made under sub-section (2) (being a person who, by reason of unsoundness of mind, has been acquitted of the offence with which he was charged) be released from custody either unconditionally or subject to such conditions as are specified in the order.

(5) Where the Governor-General orders that a person be released from custody subject to conditions, the Governor-General may, at any time, by writing under his hand—

- (a) vary or revoke any or all of the conditions or impose additional conditions; or
- (b) revoke the order.

(6) Where an order made in respect of a person under sub-section (4) is revoked or the person fails to comply with a condition of such an order, the person may, without warrant, be arrested by any constable and may be detained in safe custody in accordance with the order made in respect of the person under sub-section (2) as if the order under sub-section (4) had not been made.

(7) Upon the Governor-General making an order under sub-section (4) that a person be released from custody unconditionally or upon the Governor-General revoking all the conditions subject to which a person has been released from custody in pursuance of an order made under that sub-section, the order made under sub-section (2) in respect of the person ceases to have effect.

(8) Where an order is made under sub-section (2) in respect of a person who, by reason of unsoundness of mind, is unfit to be tried, he shall be detained until the Governor-General is satisfied by the certificate in writing of not less than 2 duly qualified medical practitioners that the person has become of sound mind and is fit to be tried, and, upon the Governor-General being so satisfied, the Governor-General may, by writing under his hand, order the removal of the person to such custody as is specified in the order so that he may be tried for the offence with which he was charged.

(9) For the purposes of the preceding provisions of this section, "the Governor-General" means the Governor-General of the Commonwealth, or the person for the time being administering the government of the Commonwealth, acting with the advice of the Attorney-General.

20C. (1) A child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory.

(2) Where a person under the age of 18 years is convicted of an offence against a law of the Commonwealth that is punishable by death, he shall not be sentenced to death but the court shall impose such other punishment as the Court thinks fit.

21C. Where under any law of the Commonwealth any act, if done without lawful authority, or without lawful authority or excuse, or without permission, is an offence against that law, the burden of proving that the act was done with lawful authority, or with lawful authority or excuse, or with permission (as the case may be), shall be on the person accused.

30A. (1) The following are hereby declared to be unlawful associations, namely:

- (a) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages-
  - (i) the overthrow of the Constitution of the Commonwealth by revolution or sabotage;
  - (ii) the overthrow by force of violence of the established government of the Commonwealth or of a State or of any other civilized country or of organized government; or

(iii) the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States,

or which is, or purports to be, affiliated with any organization which advocates or encourages any of the doctrines or practices specified in this paragraph;

(b) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise, advocates or encourages the doing of any act having or purporting to have as an object the carrying out of a seditious intention as defined in section 24A.

(1A) Without limiting the effect of the provisions of sub-section (1), any body of persons, incorporated or unincorporated, which is, in pursuance of section 30AA, declared by the Federal Court of Australia to be an unlawful association, shall be deemed to be an unlawful association for the purposes of this Act.

(2) Any branch or committee of an unlawful association, and any institution or school conducted by or under the authority or apparent authority of an unlawful association, shall, for all the purposes of this Act, be deemed to be an unlawful association.

30AA. (1) The Attorney-General may apply to the Federal Court of Australia for an order calling upon any body of persons, incorporated or unincorporated, to show cause why it should not be declared to be an unlawful association.

(2) An application under sub-section (1)—

(a) shall be made on the ground that the body of persons to which it relates is one which is described in sub-section 30A (1); and

(b) shall be by summons which may contain averments setting out the facts relied upon in support of the application.

(3) The provisions of section 30R shall apply in relation to averments contained in the summons as if they were averments of the prosecutor in a prosecution for an offence under this Part.

(4) Service of a summons under this section upon the body of persons specified in the summons may be effected by publication of the summons in the Gazette and in a daily newspaper circulating in the city or town in which the head office in Australia of that body is stated in the summons to be situate, but the Court may order such further or other service as it thinks fit.

(5) Any officer or member of the body of persons specified in any summons issued under this section may appear on behalf of that body to show cause.

(7) If cause to the contrary is not shown to the satisfaction of the Court, it may make an order declaring the respondent body of persons to be an unlawful association.

(8) Any person who is an interested person in relation to any declaration made under this section may, within 14 days after the making of any such declaration, apply to the Federal Court of Australia for the setting aside of the order.

(9) Any application made under sub-section (8) shall be heard by a Full Court of the Federal Court of Australia, and upon the hearing of the application the Court may affirm or annul the order.

**30AB. (1)** If the Attorney-General believes that any person has in his possession any information or documents relating to an unlawful association, he may require the

person, or, in the case of a corporation, any person holding a specified office in the corporation—

- (a) to answer questions;
- (b) to furnish information; and
- (c) allow the inspection of documents belonging to, or in the possession of, that person or that corporation, as the case may be,

relating to—

- (d) any money, property or funds belonging to or held by or on behalf of an unlawful association, or as to which there is reasonable cause to believe that they belong to or are held by or on behalf of an unlawful association;
- (e) any payments made directly or indirectly by, to, or on behalf of, an unlawful association, or as to which there is reasonable cause to believe that they are so made; or
- (f) any transactions to which an unlawful association is or is reasonably believed to be a party.

(2) Any person failing or neglecting to answer questions, furnish information or produce documents as required in pursuance of this section, shall be guilty of an offence.

Penalty: Imprisonment for 6 months.

**30B.** Any person over the age of 18 years who is a member of an unlawful association, and any person who occupies or acts in any office or position in or of an unlawful association, or who acts as a representative of an unlawful association, or who acts as a teacher in any institution or school conducted by or under the authority or apparent authority of an unlawful association, shall be guilty of an offence.

Penalty: Imprisonment for 1 year.

**30D. (1)** Any person who—

- (a) gives or contributes money or goods to an unlawful association; or
- (b) receives or solicits subscriptions or contributions of money or goods for an unlawful association,

shall be guilty of an offence.

Penalty: Imprisonment for 6 months.

(2) For the purposes of this section the printer and the publisher of a newspaper or periodical which contains any solicitation of subscriptions or contributions of money or goods for an unlawful association, or any notification or indication as to places where or persons to whom payment or delivery may be made of subscriptions or contributions of money or goods for an unlawful association, shall be deemed to solicit subscriptions or contributions of money or goods for an unlawful association.

**30FD.** Any person who, at the date of any declaration made by a court under this Part declaring any body of persons to be an unlawful association, is a member of the Committee or Executive of that association, shall not for a period of 7 years from that date be entitled to have his name placed on or retained on any roll of electors for the Senate or House of Representatives, or to vote at any Senate election or House of Representatives election unless so entitled under section 41 of the Constitution.

**30R. (1)** In any prosecution for an offence under this Part, or for an offence to which any provision of this Part is material, the averments of the prosecutor contained in the information or indictment shall be prima facie evidence of the matter or matters averred.

(2) Sub-section ( 1) shall apply to any matter so averred although—

- (a) evidence in support or rebuttal of the matter averred or of any other matter is given by witnesses; or
- (b) the matter averred is a mixed question of law and fact, but in that case the averment shall be prima facie evidence of the fact only.

(3) Any evidence given by witnesses in support or rebuttal of a matter so averred shall be considered on its merits and the credibility and probative value of such evidence shall be neither increased nor diminished by reason of this section.

(4) This section shall not lessen or affect any onus of proof otherwise falling on the defendant.

(5) Any book, periodical, pamphlet, handbill, poster or newspaper purporting to be issued by or on behalf of, or in the interests of, an association shall, unless the contrary is proved, be deemed to be so issued.

**70. (1)** A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he is authorized to publish or communicate it, any fact or document which comes to his knowledge, or into his possession, by virtue of his office, and which it is his duty not to disclose, shall be guilty of an offence.

(2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him), any fact or document which came to his knowledge, or into his possession, by virtue of his office, and which, at the time when he ceased to be a Commonwealth officer, it was his duty not to disclose, shall be guilty of an offence.

Penalty: Imprisonment for 2 years.

**78. (1)** If a person for a purpose intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions—

- (a) makes a sketch, plan, photograph, model, cipher, note, document or article that is likely to be, might be or is intended to be directly or indirectly useful to an enemy or a foreign power;
- (b) obtains, collects, records, uses, has in his possession or communicates to another person a sketch, plan, photograph, model, cipher, note, document, article or information that is likely to be, might be or is intended to be directly or indirectly useful to an enemy or a foreign power; or
- (c) approaches, is in the neighbourhood of, is in, enters, inspects or passes over a prohibited place,

he shall be guilty of an indictable offence.

Penalty: Imprisonment for 7 years.

(2) On a prosecution under this section—

- (a) it is not necessary to show that the accused person was guilty of a particular act tending to show a purpose intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions and, notwithstanding that such an act is not proved against him, he may be convicted if, from the circumstances of the case, from his conduct or from his known character as proved, it appears that his purpose was a purpose intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions; and
- (b) if any sketch, plan, photograph, model, cipher, note, document, article or information relating to or used in a prohibited place, or anything in such a place, was made, obtained, collected, recorded, used, possessed or communicated by



ny person other than a person acting under lawful authority, it shall, unless the contrary is proved, be deemed to have been made, obtained, collected, recorded, used, possessed or communicated for a purpose intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions.

(3) On a prosecution under this section, evidence is not admissible by virtue of paragraph 2 (a) if the magistrate exercising jurisdiction with respect to the examination and commitment for trial of the defendant, or the judge presiding at the trial, as the case may be, is of the opinion that that evidence, if admitted—

- (a) would not tend to show that the purpose of the defendant was a purpose intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions; or
- (b) would, having regard to all the circumstances of the case and notwithstanding sub-section (4), prejudice the fair trial of the defendant.

(4) If evidence referred to in sub-section (3) is admitted at the trial, the judge shall direct the jury that the evidence may be taken into account by the jury only on the question whether the purpose of the defendant was a purpose intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions and must be disregarded by the jury in relation to any other question.

79. (1) For the purposes of this section, a sketch, plan, photograph, model, cipher, note, document, or article is a prescribed sketch, plan, photograph, model, cipher, note, document or article in relation to a person, and information is prescribed information in relation to a person, if the person has it in his possession or control and—

- (a) it has been made or obtained in contravention of this Part;
- (b) it has been entrusted to the person by a Commonwealth officer or a person holding office under the Queen or he has made or obtained it owing to his position as a person-
  - (i) who is or has been a Commonwealth officer;
  - (ii) who holds or has held office under the Queen;
  - (iii) who holds or has held a contract made on behalf of the Queen or the Commonwealth;
  - (iv) who is or has been employed by or under a person to whom a preceding sub-paragraph applies; or
  - (v) acting with the permission of a Minister,

and, by reason of its nature or the circumstances under which it was entrusted to him or it was made or obtained by him or for any other reason, it is his duty to treat it as secret; or

- (c) it relates to a prohibited place or anything in a prohibited place and-
    - (i) he knows; or
    - (ii) by reason of its nature or the circumstances under which it came into his possession or control or for any other reason, he ought to know,
- that it should not be communicated to a person not authorized to receive it.

(2) If a person for a purpose intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions—

- (a) communicates a prescribed sketch, plan, photograph, model, cipher, note, document or article, or prescribed information, to a person, other than-
  - (i) a person to whom he is authorized to communicate it; or

(ii) a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his duty to communicate it, or permits a person, other than a person referred to in sub-paragraph (i) or (ii), to have access to it;

- (b) retains a prescribed sketch, plan, photograph, model, cipher, note, document or article in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it; or
- (c) fails to comply with a direction given by lawful authority with respect to the retention or disposal of a prescribed sketch, plan, photograph, model, cipher, note, document or article,

he shall be guilty of an indictable offence.

Penalty: Imprisonment for 7 years.

(3) If a person communicates a prescribed sketch, plan, photograph, model, cipher, note, document or article, or prescribed information, to a person other than—

- (a) a person to whom he is authorized to communicate it; or
- (b) a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his duty to communicate it,

or permits a person, other than a person referred to in paragraph (a) or (b), to have access to it, he shall be guilty of an offence.

Penalty: Imprisonment for 2 years.

(4) If a person—

- (a) retains a prescribed sketch, plan, photograph, model, cipher, note, document or article in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it;
- (b) fails to comply with a direction given by lawful authority with respect to the retention or disposal of a prescribed sketch, plan, photograph, model, cipher, note, document or article; or
- (c) fails to take reasonable care of a prescribed sketch, plan, photograph, model, cipher, note, document or article, or prescribed information, or to ensure that it is not communicated to a person not authorized to receive it or so conducts himself as to endanger its safety,

he shall be guilty of an offence.

Penalty: Imprisonment for 6 months.

(5) If a person receives any sketch, plan, photograph, model, cipher, note, document, article or information, knowing or having reasonable ground to believe, at the time when he receives it, that it is communicated to him in contravention of section 78 or sub-section (2) of this section, he shall be guilty of an indictable offence unless he proves that the communication was contrary to his desire.

Penalty: Imprisonment for 7 years.

(6) If a person receives any sketch, plan, photograph, model, cipher, note, document, article or information, knowing or having reasonable ground to believe, at the time when he receives it, that it is communicated to him in contravention of sub-section (3), he shall be guilty of an offence unless he proves that the communication was contrary to his desire.

Penalty: Imprisonment for 2 years.

(7) On a prosecution under sub-section (2) it is not necessary to show that the accused person was guilty of a particular act tending to show a purpose intended to be



prejudicial to the safety or defence of the Commonwealth of a part of the Queen's dominions and, notwithstanding that such an act is not proved against him, he may be convicted if, from the circumstances of the case, from his conduct or from his known character as proved, it appears that his purpose was a purpose intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions.

(8) On a prosecution under this section, evidence is not admissible by virtue of sub-section (7) if the magistrate exercising jurisdiction with respect to the examination and commitment for trial of the defendant, or the judge presiding at the trial, as the case may be, is of the opinion that that evidence, if admitted—

- (a) would not tend to show that the purpose of the defendant was a purpose intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions; or
- (b) would, having regard to all the circumstances of the case and notwithstanding sub-section (9), prejudice the fair trial of the defendant.

(9) If evidence referred to in sub-section (8) is admitted at the trial, the judge shall direct the jury that the evidence may be taken into account by the jury only on the question whether the purpose of the defendant was a purpose intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions and must be disregarded by the jury in relation to any other question.

(10) A person charged with an offence against sub-section (2) may be found guilty of an offence against sub-section (3) or (4) and a person charged with an offence against sub-section (5) may be found guilty of an offence against sub-section (6).

**82. (1)** If a Justice of the Peace is satisfied, by information on oath, that there is reasonable ground for suspecting that an offence against this Part has been, is being or is about to be committed, he may grant a search warrant.

(2) A search warrant granted under this section authorizes any constable or Commonwealth officer who is named in, or is lawfully in possession of, the warrant, with such assistance as he thinks necessary, to—

- (a) enter, if necessary by force, at any time, any premises or place named or described in the warrant;
- (b) search the premises or place and every person found therein and every person whom he reasonably believes to be about to enter or to have recently left the premises or place;
- (c) break open and search any cupboard, drawer, chest, trunk, box, package or other receptacle, whether a fixture or not, in the premises or place;
- (d) seize anything that he finds on the premises or place or on any such person, and which he has reasonable grounds to believe is evidence of or otherwise relates to any offence or suspected offence which has been, is being or is about to be committed against this Part;
- (e) make extracts from or copies of any book, document or paper liable to seizure under the warrant; and
- (f) take such action as he considers expedient to prevent the commission of an offence against this Part.

(3) Where a search warrant is granted under this section—

- (a) the person who applied for the grant of the warrant shall forward to the Attorney-General a report of all the circumstances relating to the granting of the warrant; and

(b) the constable or Commonwealth officer who executes the warrant shall forward to the Attorney-General a report of all the circumstances relating to the execution of the warrant.

(4) A female shall not be searched under this section except by a female.

**84A. (1)** If a Commonwealth officer or a constable, while acting in the course of his duty or employment, has reasonable ground for suspecting that a person who—

(a) is about to enter or leave the Commonwealth;

(b) has been in or near, or has passed over, a prohibited place; or

(c) is behaving or has behaved in a suspicious manner,

is in possession of evidence of an offence against this Part, the officer or constable may cause the person, his belongings and any bag or other article in his possession to be searched, and may, without warrant, detain the person for that purpose.

(2) A female shall not be searched under this section except by a female.

*Crimes (Aircraft) Act 1963*  
(Relevant Sections)

13. A person who destroys an aircraft to which this Part applies with intent to cause the death of a person or with reckless indifference to the safety of the life of a person is guilty of an indictable offence punishable by death.

15. A person who does an act or thing capable of prejudicing the safe operation of a aircraft to which this Part applies—

- (a) with intent to prejudice the safe operation of that aircraft; and
- (b) with intent to cause the death of a person or with reckless indifference to the safety of the life of a person,

is guilty of an indictable offence punishable by death.

25. (1) The person in command of an aircraft to which Part II or Part III applies may, on board the aircraft, with such assistance as is necessary, arrest without warrant a person whom he finds committing, or reasonably suspects of having committed, or of having attempted to commit, an offence against that Part, and that person in command or a person authorized by him may hold the person so arrested in custody until he can be brought before a Justice of the Peace or other proper authority to be dealt with in accordance with law.

(2) The person in command of an aircraft to which Part II or Part III applies may, where he considers it necessary so to do in order to prevent an offence against that Part or to avoid danger to the safety of the aircraft or of persons on board the aircraft, with such assistance as he thinks necessary—

- (a) place a person who is on board the aircraft under restraint or in custody; and
- (b) if the aircraft is not in the course of a flight—remove a person from the aircraft.

26. (1) If, in relation to an aircraft to which Part II or Part III applies, the person in command of the aircraft or an authorized person reasonably suspects that an offence against that Part has been, is being or may be committed on board or in relation to the aircraft, he may, with such assistance as is necessary, search or cause to be searched—

- (a) the aircraft and any person, luggage or freight on board the aircraft; and
- (b) in the case of an aircraft to which Part III applies and which is not engaged in a flight—any person who is about to board the aircraft and any luggage or freight that is about to be placed on board the aircraft.

(1A) If an authorized person reasonably suspects that an offence against Part IIIA has been, is being or may be committed in respect of a Commonwealth aerodrome, or Commonwealth air navigation facilities, within the meaning of that Part, he may, with such assistance as is necessary, search or cause to be searched—

- (a) any person, luggage, freight or vehicle found within the limits, or in the vicinity, of that aerodrome or those facilities; or
- (b) any area in the vicinity of that aerodrome or those facilities.

(2) A female shall not be searched under this section except by a female.

29. (1) Where a person is convicted of an offence against this Act punishable by death—

- (a) the sentence of the court shall be that the convicted person shall suffer the punishment of death; and

(b) the court may give directions with respect to the holding in custody of the convicted person until the sentence is executed or directions of the Governor-General under sub-section (3) with respect to his custody take effect.

(2) Subject to the next succeeding sub-section, a sentence of death passed by a court in pursuance of this Act shall be carried into execution in accordance with the law of the State or Territory in which the offender is convicted.

(3) The Governor-General may, in any case (including a case in which the law of the State or Territory in which the offender is convicted does not provide for the execution of sentences of death), give directions for and in relation to the carrying into execution of a sentence of death passed by a court in pursuance of this Act and, where such directions are given, the sentence shall be carried into execution accordingly.

## *Crimes (Protection of Aircraft) Act 1973*

### (Relevant Sections)

8. (1) Where an authorized person has reasonable grounds to suspect that a person has committed an act by reason of which Article 6 of the Convention applies to Australia in respect of him, or is otherwise guilty of an offence against this Act, the authorized person—

- (a) may cause that person to be taken into custody; and
- (b) shall cause a person so taken into custody-
  - (i) to be brought before a Magistrate as soon as practicable, to be dealt with in accordance with section 12; and
  - (ii) to be held in custody until he can be so brought before a Magistrate.

(2) Nothing in this section prevents the arrest of a person for an offence against this Act in accordance with the law relating to the arrest of offenders against the laws of the Commonwealth.

(3) Where a person is required to be brought before a Magistrate in accordance with this Act and, but for this sub-section, that person would also be required to be brought before a Magistrate in accordance with the *Civil Aviation (Offenders on International Aircraft) Act 1970*, he shall be brought before a Magistrate in accordance with this Act only and shall be dealt with accordingly.

9. (1) This section applies to—

- (a) an Australian aircraft, whether in or outside Australia; or
- (b) any other aircraft, while it is in Australia or engaged in a prescribed flight.

(2) The person in command of an aircraft to which this section applies may, with such assistance as is necessary, arrest without warrant a person whom he finds committing, or reasonably suspect of having committed, an offence against this Act on board the aircraft, and that person in command or a person authorized by him may hold the person so arrested in custody until he can be taken into other custody in accordance with section 8 or brought before a Justice of the Peace or other proper authority to be dealt with in accordance with law.

(3) The person in command of an aircraft to which this section applies may, where he considers it necessary so to do in order to prevent an offence against this Act on board the aircraft, with such assistance as he thinks necessary—

- (a) place a person who is on board the aircraft under restraint or in custody and keep him under restraint or in custody until the next landing of aircraft; and
- (b) remove a person from the aircraft at any place at which the aircraft is on the ground.

(4) Nothing in this section prevents the arrest of a person in accordance with any other law.

**11. (1)** Where a person is taken into custody in accordance with section 8, or has been arrested on a charge of a Convention offence, the Minister or an authorized person may, if he considers that an inquiry of the kind authorized by this section is appropriate to the circumstances, by notice in writing, authorize a Magistrate to hold an inquiry into the facts relating to the alleged offence.

(2) Upon receipt of the notice, the Magistrate shall

- (a) take the evidence of each witness appearing before him to give evidence in the inquiry in like manner as if the witness were giving evidence on a charge



against a person for an indictable offence against the law in force in the State or Territory of which he is a Magistrate;

- (b) cause a record in writing to be made of the evidence and certify at the end of the record that the evidence was taken by him; and
- (c) cause the record so certified to be sent to the Attorney-General.

(3) The evidence of such a witness may be taken in the presence or absence of the person taken into custody or charged with the offence and the certificate by the Magistrate under sub-section (2) shall state whether that person was present or absent when the evidence was taken.

(4) The evidence shall not be taken in the absence of the person unless the Magistrate is satisfied that there is good reason why that person cannot be present or should not be permitted to be present or that that person has declined to be present.

(5) The Minister or authorized person authorizing an inquiry in accordance with this section may, in appropriate circumstances, direct that the inquiry in accordance with this section and an inquiry that is or has been authorized (whether by him or by another person) in accordance with section 10 of the *Civil Aviation (Offenders on International Aircraft) Act 1970* shall be conducted as the one inquiry.

**15. (1)** This section applies to proceedings—

- (a) under section 12;
- (b) in respect of an offence against this Act, the *Crimes (Aircraft) Act 1963* or the *Crimes (Hijacking of Aircraft) Act 1972*;
- (c) under the *Extradition (Commonwealth Countries) Act 1966-1973*; or
- (d) under the *Extradition (Foreign States) Act 1966-1973*.

(2) A document certified by the Attorney-General to be a record of evidence sent to him under sub-section 11(2) is admissible in evidence in proceedings to which this section applies and, when admitted, the evidence recorded in it is evidence in the proceedings.

(3) In proceedings in respect of an offence against this Act or another Act referred to in paragraph (1) (b), the Magistrate or court hearing the proceedings, shall not admit in evidence a document referred to in sub-section (2), or a part of such a document, unless it appears to the Magistrate or court that, having regard to all the circumstances, it would be contrary to the interests of justice not to do so.

## *Crimes (Hijacking of Aircraft) Act 1972*

(Relevant Sections)

**11. (1)** Where an authorized person has reasonable grounds to suspect that a person has committed an act by reason of which Article 6 of the Convention applies to Australia in respect of him, or is otherwise guilty of an offence against this Act, the authorized person—

- (a) may cause that person to be taken into custody; and
- (b) shall cause a person so taken into custody—
  - (i) to be brought before a Magistrate as soon as practicable, to be dealt with in accordance with section 15 of this Act; and
  - (ii) to be held in custody until he can be so brought before a Magistrate.

(2) Nothing in this section prevents the arrest of a person for an offence against this Act in accordance with the law relating to the arrest of offenders against the laws of the Commonwealth.

(3) Where a person is required to be brought before a Magistrate in accordance with this Act and, but for this sub-section, that person would also be required to be brought before a Magistrate in accordance with the *Civil Aviation (Offenders on International Aircraft) Act 1970*, he shall be brought before a Magistrate in accordance with this Act only and shall be dealt with accordingly.

**12. (1)** This section applies to—

- (a) an Australian aircraft, whether in or outside Australia; or
- (b) any other aircraft, while it is in Australia or engaged in a prescribed flight.

(2) The person in command of an aircraft to which this section applies may, with such assistance as is necessary, arrest without warrant a person whom he finds committing, or reasonably suspects of having committed or of having attempted to commit, an offence against this Act on board the aircraft, and that person in command or a person authorized by him may hold the person so arrested in custody until he can be taken into other custody in accordance with the last preceding section or brought before a Justice of the Peace or other proper authority to be dealt with in accordance with law.

(3) The person in command of an aircraft to which this section applies may, where he considers it necessary so to do in order to prevent an offence against this Act on board the aircraft, with such assistance as he thinks necessary—

- (a) place a person who is on board the aircraft under restraint or in custody and keep him under restraint or in custody until the next landing of the aircraft; and
- (b) remove a person from the aircraft at any place at which the aircraft is on the ground.

(4) Nothing in this section prevents the arrest of a person in accordance with any other law.

**14. (1)** Where a person is taken into custody in accordance with section 11 of this Act, or has been arrested on a charge of a Convention offence, the Minister or an authorised person may, if he considers that an inquiry of the kind authorized by this section is appropriate to the circumstances, by notice in writing, authorize a Magistrate to hold an inquiry into the facts relating to the alleged offence.

(2) Upon receipt of the notice, the Magistrate shall—

- (a) take the evidence of each witness appearing before him to give evidence in the inquiry in like manner as if the witness were given evidence on a charge against a person for an indictable offence against the law in force in the State or Territory of which he is a Magistrate;
- (b) cause a record in writing to be made of the evidence and certify at the end of the record that the evidence was taken by him; and
- (c) cause the record so certified to be sent to the Attorney-General.

(3) The evidence of such a witness may be taken in the presence or absence of the person taken into custody or charged with the offence and the certificate by the Magistrate under the last preceding sub-section shall state whether that person was present or absent when the evidence was taken.

(4) The evidence shall not be taken in the absence of the person unless the Magistrate is satisfied that there is good reason why that person cannot be present or should not be permitted to be present or that that person has declined to be present.

(5) The Minister or authorized person authorizing an inquiry in accordance with this section may, in appropriate circumstances, direct that the inquiry in accordance with this section and an inquiry that is or has been authorized (whether by him or by another person) in accordance with section 10 of the *Civil Aviation (Offenders on International Aircraft) Act 1970* shall be conducted as the one inquiry.

17. The laws in force in a State or Territory with respect to—

- (a) the conditions under which persons charged with offences against the law of that State or Territory are held in custody on remand;
- (b) the treatment of such persons while so held in custody; and
- (c) the transfer of such person from one prison or other place of confinement to another,

apply, so far as they are capable of application, in relation to persons who are held in custody on remand, in accordance with an order under sub-section (2) of section 15 of this Act, in the prisons or other places of confinement of the State or Territory.

**18. (1)** This section applies to proceedings—

- (a) under section 15 of this Act;
- (b) in respect of an offence against this Act or the *Crimes (Aircraft) Act 1963*;
- (c) under the *Extradition (Commonwealth Countries) Act 1966-1972*; or
- (d) under the *Extradition (Foreign States) Act 1966-1972*.

(2) A document certified by the Attorney-General to be a record of evidence sent to him under sub-section (2) of section 14 of this Act is admissible in evidence in proceedings to which this section applies and, when admitted, the evidence recorded in it is evidence in the proceedings.

(3) In proceedings in respect of an offence against this Act or the *Crimes (Aircraft) Act 1963*, the Magistrate or court hearing the proceedings shall not admit in evidence a document referred to in the last preceding sub-section, or a part of such a document, unless it appears to the Magistrate or court that, having regard to all the circumstances, it would be contrary to the interests of justice not to do so.

### *Crimes at Sea Act 1979*

(Relevant Section)

**3. (1)** In this Act, unless the contrary intention appears

• . . 'criminal laws' means any laws, whether written or unwritten and whether substantive or procedural, and as in force from time to time, that make provision for or in relation to offences (whether punishable on conviction on indictment or on summary conviction) or for or in relation to the investigation of offences or punishment of offenders, and includes any laws providing for the interpretation of those laws;

### *Crimes (Taxation Offences) Act 1980*

(Relevant Section)

**4. (1)** Section 16 of the *Income Tax Assessment Act 1936* has effect as if this Act were part of that Act.

**(2)** Section 10 of the *Sales Tax Assessment Act (No. 1) 1930* (including that section as having effect for the purposes of any of the other Sales Tax Assessment Acts) has effect as if this Act were part of Part II of the *Sales Tax Assessment Act (No. 1) 1930*.

*Crimes (Foreign Incursions and Recruitment) Act 1978*

(Relevant Sections)

7. (1) A person shall not, whether within or outside Australia—
- (a) do any act preparatory to the commission of an offence against section 6, whether by that person or by another person;
  - (b) accumulate, stockpile or otherwise keep arms, explosives, munitions, poisons or weapons for the purpose of the commission of an offence against section 6, whether by that person or by another person;
  - (c) train or drill or participate in training or drilling, or be present at a meeting or assembly of persons with intent to train or drill or to participate in training or drilling, any other person in the use of arms or explosives, or the practice of military exercises, movements or evolutions, for the purpose of preparing that other person to commit an offence against section 6;
  - (d) allow himself to be trained or drilled, or be present at a meeting or assembly of persons with intent to allow himself to be trained or drilled, in the use of arms or explosives, or the practice of military exercises, movements or evolutions, for the purpose of the commission of an offence against section 6;
  - (e) give money or goods to, or perform services for, any other person or any body or association of persons for the purpose of supporting or promoting the commission of an offence against section 6;
  - (f) receive or solicit money or goods, or the performance of services, for the purpose of supporting or promoting the commission of an offence against section 6; or
  - (g) being the owner, lessee, occupier, agent or superintendent of any building, room, premises or place, knowingly permit a meeting or assembly of persons to be held in the building, room, premises or place for the purpose of committing, or supporting or promoting the commission of, an offence against this section.

(2) A person shall not be taken to have committed an offence against this section in respect of the doing of an act outside Australia unless—

- (a) at the time of the doing of that act, the person
  - (i) was an Australian citizen; or
  - (ii) not being an Australian citizen, was ordinarily resident in Australia; or
- (b) at any time during the period of one year immediately preceding the doing of that act, the person was present in Australia for a purpose connected with that act.

Penalty: Imprisonment for 10 years.

9. (1) A person shall not, in Australia—

- (a) recruit another person to serve in any capacity in or with an armed force in a foreign country, whether the armed force forms part of the armed forces of the government of that foreign country or otherwise;
- (b) publish an advertisement for the purpose of recruiting persons to serve in any capacity in or with such an armed force;
- (c) publish an advertisement containing any information-
  - (i) relating to the place at which, or the manner in which, persons may make applications to serve, or obtain information relating to service, in any ca-

capacity in or with such an armed force; or

(ii) relating to the manner in which persons may travel to a foreign country for the purpose of serving in any capacity in or with such an armed force; or

(d) do any other act or thing for the purpose of facilitating or promoting the recruitment of persons to serve in any capacity in or with such an armed force.

Penalty: \$10,000 or imprisonment for 5 years.

(2) If the Minister has, by instrument signed by him and published in the *Gazette*, declared that it is in the interests of the defence or international relations of Australia to permit the recruitment in Australia, either generally or in particular circumstances, of persons to serve in or with a specified armed force, or to serve in or with a specified armed force in a particular capacity, sub-section (1) does not apply, or does not apply in those circumstances, as the case may be, to or in relation to recruitment to serve, or the publication of an advertisement containing information with respect to service, in or with that armed force, or in or with that armed force in that capacity, as the case may be.

(3) If a person recruits another person to enter into a commitment or engagement to serve in any capacity in or with an armed force, he shall be taken, for the purposes of this section, to recruit that other person to serve in or with that armed force whether or not the commitment or engagement is legally enforceable and whether or not it constitutes a legal or formal enlistment in that force.

(4) The provisions of section 48 (except paragraphs (1) (a) and (b) and sub-section (2)) and of section 49 of the *Acts Interpretation Act 1901* apply, by force of this section, to a declaration made under sub-section (2) of this section in like manner as those provisions apply to regulations.

(5) For the purposes of this section, the publication of an item of news shall be deemed to constitute the publication of an advertisement if the publication was procured by the payment of, or by a promise to pay, money or by the provision of, or by a promise to provide, any other consideration.

*Crimes (Overseas) Act 1964*

(Relevant Section)

4. If—

- (a) a person to whom this Act applies does or omits to do an act in a country outside Australia;
- (b) under arrangements between the United Nations and the government of that country, that person was not, on the date on which the act or omission took place, to be subject to proceedings in the courts of that country in respect of the act or omission; and
- (c) the act or omission, if it had taken place in the Australian Capital Territory, would have been an offence against—
  - (i) a law of the Commonwealth in force in that Territory;
  - (ii) the Crimes Act, 1900 of the State of New South Wales, in its application to that Territory, as amended or affected by Ordinances from time to time in force in that Territory; or
  - (iii) the *Police Offences Ordinance 1930-1961* of that Territory, as amended from time to time,

that person is guilty of an offence against this Act and is punishable by the same penalty as that by which he would have been punishable if he had been guilty of the first-mentioned offence.



## APPENDIX 2

### International Covenant on Civil and Political Rights

(Relevant Articles)

#### *Article 3*

The States Parties to the present Covenant undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

#### *Article 6*

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

#### *Article 7*

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

#### *Article 9*

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons of his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled

to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

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

#### *Article 14*

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered facts shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

#### *Article 17*

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

#### *Article 19*

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

#### *Article 25*

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

#### *Article 26*

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

## **APPENDIX 3**

### **Declaration of the Rights of the Child**

(Relevant Principle)

#### *Principle 2*

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

## **APPENDIX 4**

### **Declaration on the Rights of Mentally Retarded Persons**

(Relevant Paragraphs)

6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.

7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.

## **APPENDIX 5**

### **Declaration on the Rights of Disabled Persons**

(Relevant Paragraphs)

1. The term "disabled person" means any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities.

4. Disabled persons have the same civil and political rights as other human beings; paragraph 7 of the Declaration on the Rights of Mentally Retarded Persons applies to any possible limitation or suppression of those rights for mentally disabled persons.

10. Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.

## APPENDIX 6

### **Report of the Senate Standing Committee on Constitutional and Legal Affairs, 'The Burden of Proof in Criminal Proceedings'**

(Recommendations)

The persuasive burden

1. Parliament should enact a Bill, entitled the Evidence (Burden of Proof) Bill, which reduces all persuasive burdens on defendants to evidential ones. Its major provision should be:

(1) Where by virtue of any rule of law or existing enactment there falls on the accused in any proceedings any burden of proof with respect to a matter relevant to his guilt or innocence, then—

- (a) unless there is sufficient evidence to raise an issue with respect to that matter, that matter shall be taken as proved against him; but
- (b) if there is sufficient evidence to raise an issue with respect to that matter, the court or jury, in determining whether he is guilty of the offence charged, shall decide by reference to the whole of the evidence whether the prosecution has proved that matter against the accused, drawing such inferences from the evidence as appear proper in the circumstances.

(2) Sub-section (1) above shall have effect not only in relation to enactments saying in terms that proof of any matter is to lie on the accused, or that it shall be for the defence to prove (or show, or satisfy the court or jury of) any matter, or providing for a presumption adverse to the accused that can be displaced by proof (or evidence) of the contrary, or the like, but also in relation to any enactment, however framed or worded, whereby there falls on the accused a burden of proof of whatever nature or extent.

(3) In this section 'existing enactment' means any enactment passed before this Act; but—

- (a) in any enactment other than an existing enactment, provisions relating to the burden of proving any matter in proceedings shall, unless the enactment specifically refers to this section and excludes its operation, be construed as having the like effect as those provisions would have by virtue of this section if they were contained in an existing enactment; and
- (b) this section shall apply in relation to provisions contained in an instrument made under an Act of Parliament as it would apply if those provisions were enacted in that Act (and were or were not 'existing enactments' accordingly) (para. 5.41).

2. If our recommendation to reduce persuasive burdens on the accused to evidential burdens is adopted, an accused person who wishes to raise the defence of insanity at his trial should be precluded from so doing, without the leave of the court, unless he has given written notice to the prosecution at some appropriate time before the date fixed for the hearing of his trial (para. 5.49).

The evidential burden

3. (a) As a matter of legislative policy, provisions imposing an evidential burden of proof on defendants should be kept to a minimum.

- (b) In order to enable this legislative policy to be achieved, such provisions should be imposed only in the following circumstances:
  - (i) where the prosecution faces extreme difficulty in circumstances where the defendant is presumed to have peculiar knowledge of the facts in issue; or
  - (ii) where proof by the prosecution of a particular matter in issue would be extremely difficult or expensive but could be readily and cheaply provided by the defence.
- (c) A detailed review of Commonwealth legislation imposing evidential burdens, and in particular licensing provisions, should be made to ensure that evidential burdens do not rest on defendants unless the considerations referred to in recommendation (b) above apply (para. 6.13).

#### Averments

4. (a) As a matter of legislative policy averment provisions should be kept to a minimum.
  - (b) The Parliament should enact legislation to ensure that existing and future averment provisions are only resorted to by prosecutors in the following circumstances:
    - (i) where the matter which the prosecution is required to prove is formal only and does not in itself relate to any conduct on the part of the defendant; or
    - (ii) where the matter in question relates to conduct of the defendant alleged to constitute an ingredient in the offence charged and is peculiarly within the defendant's knowledge.
  - (c) When seeking to rely upon averment provisions, prosecutors should have regard to the following criteria:
    - (i) averments should be so stated that they are sufficient in law to constitute the charge;
    - (ii) the facts and circumstances constituting the offence should be stated fully and with precision;
    - (iii) the Crown should not aver matters of law or matters of mixed fact and law;
    - (iv) averments should not amend or alter the rules of pleading or those regulating the statement of the offence;
    - (v) averments should be restricted to the ingredients of the charge and informations should not contain evidentiary material (para. 7.16).









