



Australian  
Human Rights  
Commission

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# COAG Review of Counter-Terrorism Legislation

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**AUSTRALIAN HUMAN RIGHTS COMMISSION  
SUBMISSION TO THE COAG REVIEW COMMITTEE**

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ABN 47 996 232 602  
Level 3, 175 Pitt Street, Sydney NSW 2000  
GPO Box 5218, Sydney NSW 2001  
General enquiries 1300 369 711  
Complaints info line 1300 656 419  
TTY 1800 620 241

Australian Human Rights Commission  
[www.humanrights.gov.au](http://www.humanrights.gov.au)

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## 1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Council of Australian Governments Review Committee (Review Committee) in its review of counter-terrorism legislation.
2. The Commission notes that the review covers provisions in 19 different Acts, across all nine Australian jurisdictions, and that the Review Committee will examine these laws and make recommendations as to whether they:
  - (1) are necessary and proportionate
  - (2) are effective against terrorism by providing law enforcement, intelligence and security agencies with adequate tools to prevent, detect and respond to acts of terrorism
  - (3) are being exercised in a way that is evidence-based, intelligence-led and proportionate, and
  - (4) contain appropriate safeguards against abuse.
3. The Commission's functions as Australia's national human rights institution are set out in s 11 of the *Australian Human Rights Commission Act 1986* (Cth), and include examining legislation in order to ascertain whether laws are inconsistent with, or contrary to human rights.
4. Consequently, the Commission's concern (and area of expertise) relates to whether the counter-terrorism laws the subject of this Review breach human rights standards or allow for the breach of human rights standards. Accordingly, the Commission limits its submission to consideration of criteria (1) and (4) mentioned above (that is, whether the laws are necessary and proportionate, and contain appropriate safeguards against abuse), as these criteria align with consideration of the human rights issues raised by the laws under review. The Commission interprets the term 'abuse' as including unjustifiable infringement of human rights.
5. The Commission will also limit its submission to consideration of the legislative provisions relating to control orders and preventative detention orders, as in the Commission's view these provisions raise the most significant concerns in terms of their impact on the rights and freedoms of persons within the territory and jurisdiction of Australia.

## 2 Summary

6. In summary, the following are the key concerns which the Commission wishes to emphasise to the Review Committee, in light of its review criteria numbers (1) and (4).
7. In terms of the control order provisions contained in Division 104 of the *Criminal Code Act 1995* (Cth), the Commission considers that the provisions contain inadequate safeguards against abuse. This lack of safeguards may result in arbitrary (that is, unnecessary and/or disproportionate) interference with a number of rights of those subjected to such orders. Such rights include

the rights to liberty and privacy, and the rights to freedom of movement, expression, and association (articles 9, 17, 12, 19 and 22 of the *International Covenant on Civil and Political Rights* (ICCPR) respectively).<sup>1</sup>

8. The Commission also considers the absence of a review mechanism in Division 104 is critical. Such a mechanism could provide an effective remedy for any violation of rights pursuant to a control order, as required by articles 9(4) and 2(3) of the ICCPR.
9. In relation to preventative detention orders (PDOs), the Commission is of the view that the legislation providing for the making of PDOs in several (if not all) Australian jurisdictions provides inadequate safeguards against abuse. In particular, there are inadequate safeguards to protect the right to freedom from arbitrary detention set out in article 9(1) of the ICCPR, due to:
  - the low threshold for the making of a PDO
  - the nature of the authority responsible for issuing a PDO
  - the maximum length of detention available under the PDO regime in each jurisdiction.
10. The Commission also has concerns about the lack of court involvement in (and consequently control of) the detention regime in a number of jurisdictions. Most notable in this regard is the Commonwealth PDO regime. The Commission is also concerned that the timing of court review of PDOs in some jurisdictions is too late (or uncertain).
11. Finally, the Commission notes that in almost all jurisdictions restrictions are placed both on any contact a detainee has with a lawyer, and the information made available to a detainee about the factual basis for his or her detention. These restrictions may prevent a detainee from being able to successfully challenge the legality of his or her detention, contrary to article 9(4) of the ICCPR.

### 3 Recommendations

12. The Commission recommends that:
13. **Recommendation 1: A court issuing a control order should be required to be satisfied that a control order (with the conditions sought) is also the least restrictive means of achieving the purpose of protecting the public from a terrorist act, in all the circumstances.**
14. **Recommendation 2: The Review Committee investigate options for more timely and effective judicial review of control orders, through consultation with experts in the area. This investigation should include consideration of judicial review under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* of decisions of the Attorney-General to consent to the making of an application for a control order.**

15. **Recommendation 3:** The issuing court for a control order should be required to satisfy itself that any *ex parte* application is warranted in the particular circumstances.
16. **Recommendation 4:** Division 104 of the *Criminal Code Act 1995* (Cth) should be amended to set out the minimum content to be included in the summary of the grounds to be provided to the subject. It should specifically require that the person be given sufficient material to alert him or her to the factual basis upon which the order was made, to enable him or her to identify whether there are grounds for revocation or variation.
17. **Recommendation 5:** The threshold in each jurisdiction for the making of PDOs, both on the preventative basis and the evidence basis, should include a requirement that the issuing authority be satisfied that detaining the person is the least restrictive way of preventing a terrorist act (for a preventative PDO) or preserving evidence of such an attack (for an evidence PDO).
18. **Recommendation 6:** The Review Committee assess whether a maximum of 14 days detention is necessary and proportionate in light of information about how PDOs have been utilised in practice. The Commission also recommends that all PDO legislation should contain clear and unambiguous statements as to the maximum length of detention possible under a PDO, including absolute limits on multiple orders.
19. **Recommendation 7:** Schedule 1 (dac) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 105.51(4) of the *Criminal Code Act 1995* (Cth) should be repealed to allow persons detained under a Commonwealth PDO to apply for judicial review under the former Act.
20. **Recommendation 8:** The relevant legislation in the Northern Territory, South Australia and Western Australia should be amended to require that as soon as practicable after or, *in any event, within 24 hours* of the person being brought into custody or detained under a PDO, the person the subject of a PDO must be brought before the Supreme Court for review of the order.
21. **Recommendation 9:** The restrictions which apply to contact with lawyers in all jurisdictions (except Queensland) should be amended to avoid imposing unnecessary constraints upon the provision of legal advice. A lawyer should be allowed to provide professional services to a person detained under a PDO in connection with any pressing, lawful, personal or business affairs.
22. **Recommendation 10:** The relevant PDO legislation in all jurisdictions should be amended to ensure that a detainee's contact with his or her lawyer may be visually monitored, but otherwise must remain private.
23. **Recommendation 11:** At the very least, the PDO legislation in each jurisdiction should set out the minimum requirements for the content of the 'summary' of the grounds on which any initial, final or extension of a

**PDO is made. The summary should be sufficient to alert the subject of the order to the factual basis upon which the order was made. Summaries should also be required in respect of any decision to refuse a revocation application.**

#### **4 Broad concerns about the necessity and proportionality of counter-terrorism measures**

24. The Commission notes that one of the over-arching questions for the Review Committee is whether the counter-terrorism measures contained in the laws under review are 'necessary and proportionate'.
25. In the absence of publicly available material regarding the current threat to Australia of a terrorist attack, the Commission is not in a position to conclude definitively whether the existence of such measures, broadly speaking, is a necessary and proportionate response to the threat to national security currently posed by terrorists.
26. The Commission provides the following general advice as to the relevance of international human rights standards to the assessment of necessity and proportionality.
27. The human rights standards against which the counter-terrorism laws should be reviewed are primarily contained in the ICCPR. Australia has acceded to and is bound by the ICCPR, and it has been incorporated into Australian domestic law.<sup>2</sup> Australia is also subject to the Covenant's enforcement mechanism, the Human Rights Committee.<sup>3</sup>
28. The need to attempt to achieve an appropriate balance between protecting individual rights and addressing legitimate national security concerns is inherent in human rights instruments such as the ICCPR. This was uppermost in the minds of the drafters and has been revisited often by the Human Rights Committee when hearing communications alleging breaches of the Covenant.
29. The drafters of the ICCPR clearly envisaged that there would be occasions when the human rights set out in the Covenant would be justifiably infringed by States 'in times of public emergency which threatens the life of the nation'.<sup>4</sup> It therefore set forth a procedure in article 4 of the ICCPR to be followed when a State is proposing to derogate from certain rights. The Commission notes that the Australian Government has not sought to use the procedure in article 4.
30. Where a State has not derogated from its obligations under the ICCPR, it may still take steps to protect national security in times of public emergency. Where there is express or implied flexibility allowed for in the application of a human right, the Human Rights Committee will take into account the fact that a public emergency exists. However, that flexibility has limits and the ICCPR is drafted so that after a particular point, a State is expected to utilise the derogation procedure in article 4, or the State will be in breach of the ICCPR.

31. The United Nations High Commissioner for Human Rights in her report dated 27 February 2002 included a statement entitled 'General Guidance: Criteria for the Balancing of Human Rights Protection and the Combating of Terrorism'.<sup>5</sup> In this statement the High Commissioner advised that counter-terrorism laws authorising restrictions on human rights should use precise criteria and may not confer unfettered discretion on those charged with their execution.<sup>6</sup>
32. The High Commissioner also advised that for limitations of rights to be lawful, they must:
  - be prescribed by law
  - be necessary for public safety or public order, the protection of public health or morals, or for the protection of the rights and freedoms of others, and serve a legitimate purpose
  - not impair the essence of the right
  - be interpreted strictly in favour of the rights at issue
  - be necessary in a democratic society
  - conform to the principle of proportionality
  - be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function
  - be compatible with the objects and purposes of human rights treaties
  - respect the principle of non-discrimination
  - not be arbitrarily applied.<sup>7</sup>
33. It is with these principles in mind that the Commission provides the following comments on some of the counter-terrorism laws the subject of the Review.

## **5 Control orders under Division 104 of the *Criminal Code Act 1995 (Cth)***

### **5.1 Legislative framework**

34. Division 104 of Part 5.3 of the *Criminal Code Act 1995 (Cth)* provides for the making of control orders. A control order is an order issued by a court (either the Federal Court, Family Court or Federal Magistrates Court), at the request of a member of the Australian Federal Police (AFP), to allow obligations, prohibitions and restrictions to be imposed on a person, for the purpose of protecting the public from a terrorist act.<sup>8</sup>
35. These prohibitions or restrictions may prevent the person from:
  - being at specified areas or places
  - leaving Australia
  - communicating or associating with specific individuals

- accessing or using specified types of telecommunications, including the internet
  - possessing or using specified articles or substances
  - carrying out specified activities (including in respect to their work or occupation).<sup>9</sup>
36. Control order terms may also require the person to:
- remain at specific premises at particular times of the day
  - wear a tracking device
  - report to specified persons at specified times and places
  - allow him or herself to be photographed and have fingerprint impressions taken
  - participate in specified counselling or education (only if they agree to do so).<sup>10</sup>
37. A control order may only be sought with the prior permission of the Attorney-General,<sup>11</sup> unless the AFP officer makes an application for an ‘urgent interim control order’.<sup>12</sup> For an urgent interim order, the Attorney-General’s consent must be obtained no later than four hours after the request for the urgent order is made.<sup>13</sup> However, no conditions are placed upon the giving of the Attorney-General’s consent to any type of control order.
38. If the Attorney-General consents, the AFP officer may seek an ‘interim control order’ from the Federal Court, Family Court, or Federal Magistrates Court. The court may make such an order if it is satisfied, on the balance of probabilities, that:
- making the order would substantially assist in preventing a terrorist act; or
  - the person has provided training to, or received training from, a listed terrorist organisation; and (in either case)
  - each of the obligations, prohibitions, and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.<sup>14</sup>
39. Interim control orders are issued *ex parte* (that is, in the absence of the person against whom the order is sought).<sup>15</sup> However, the interim control order must specify a day, at the latest 72 hours after it was made, on which the person who is the subject of the order can attend court to challenge the making of the order.<sup>16</sup> If the AFP wishes to confirm the control order, it must go back to court on that date and seek a confirmed order.
40. The person who is the subject of the interim control order must be given 48 hours’ notice of the confirmation hearing, and be provided with certain information about why the interim order was made (discussed below).<sup>17</sup> The court will make a decision after hearing evidence from both parties. The court may declare an interim control order void, revoke it, or confirm it (including

with variations). A confirmed control order can last up to 12 months, after which it can be renewed.<sup>18</sup>

## **5.2 *Inadequate safeguards against arbitrary interference with a number of rights***

41. The Commission has previously considered the control orders available under the *Criminal Code Act 1995* (Cth), and has raised a number of concerns about aspects of these provisions in terms of their compatibility with Australia's human rights obligations.<sup>19</sup>
42. It is evident from the types of prohibitions and restrictions which can be placed upon a person that these orders potentially infringe upon a number of human rights, including:
  - the right to liberty (article 9(1) of the ICCPR)
  - the right to freedom of movement (article 12 of the ICCPR)
  - the right to privacy (article 17 of the ICCPR)
  - the right to freedom of expression (article 19 of the ICCPR)
  - the right to freedom of association (article 22 of the ICCPR).

### *(a) Right to liberty*

43. Article 9(1) of the ICCPR provides that:

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.

44. Control orders, although they do not explicitly provide for the 'detention' of a person, may raise issues under article 9(1). The effect of a control order may be such as to qualify as a deprivation of liberty for the purposes of the ICCPR if the order includes a requirement that the person remain at specified premises between specified times each day, or on specified days.
45. The Human Rights Committee has observed that 'detention' is not to be narrowly understood, and that article 9 applies to all forms of detention or deprivations of liberty, whether they are criminal, civil, immigration, health, or vagrancy related.<sup>20</sup>
46. The distinction between measures which constitute a 'deprivation of' liberty, as opposed to those which only impose a 'restriction upon' liberty, is one of degree or intensity, and not one of nature or substance. Nor does it depend in any way upon the labelling of something as 'detention'. Rather, it will depend upon criteria such as the type, duration, effects, and manner of implementation of the measure in question.<sup>21</sup>
47. Although the restrictions available under the control order provisions may amount to a form of detention, the wording of article 9(1) makes it clear that

the right to liberty is not an absolute right; it can be subject to limitations. The article does allow a State to detain a person for the purposes of public security.<sup>22</sup> However, such detention must not be 'arbitrary'. The Human Rights Committee has clearly stated that detention can be arbitrary even though it is provided for by law; arbitrariness in this context includes concepts of 'inappropriateness, injustice and lack of predictability'.<sup>23</sup>

48. The Human Rights Committee has also stressed that to be compatible with article 9(1) detention must meet the requirement of 'proportionality'.<sup>24</sup> In Australia the Full Federal Court in the matter of *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* similarly concluded that 'the text of Art 9... requires that arbitrariness is not to be equated with "against the law" but is to be interpreted more broadly, and so as to include a right not to be detained in circumstances which, in the individual case, are "unproportional" or unjust'.<sup>25</sup>
49. Therefore, in order for the detention of a person not to be considered arbitrary, his or her detention must not only be lawful, but also reasonable and necessary in all the circumstances.<sup>26</sup> A lack of proportionality between a decision to detain a person and the aims sought to be achieved by the State can result in such detention violating article 9(1).<sup>27</sup>

(b) *Rights to privacy and freedom of movement, expression and association*

50. Like the right to liberty in article 9(1), the other rights which potentially may be infringed by the making of a control order, depending upon the particular restrictions and prohibitions which are attached to such an order, are not absolute. Generally, each of these rights may legitimately be subject to restrictions, if those restrictions meet certain criteria.
51. Article 17(1) of the ICCPR prohibits 'arbitrary or unlawful' interference with a person's privacy, family, or correspondence. The Human Rights Committee has held that the concept of arbitrariness in Article 17(1) is 'intended to guarantee that even interference provided for by law should be...reasonable in the particular circumstances'.<sup>28</sup>
52. Article 12 expressly provides that the right to liberty of movement may be subject to restrictions, as long as those restrictions are provided by law, are necessary for certain purposes (including to protect national security), and are consistent with the other rights recognised in the ICCPR. The right to freedom of expression in article 19 may also be subject to restrictions which are lawful and necessary to protect national security.
53. Finally, article 22 of the ICCPR provides that the right to freedom of association may be subjected to such restrictions as are prescribed by law and are 'necessary in a democratic society in the interests of national security or public safety'.

(c) *Conclusion as to the absence of adequate safeguards against arbitrary interference with rights*

54. From the above discussion it can be seen that in order for a State placing restrictions on the rights mentioned above to avoid breaching the ICCPR, those restrictions must not be arbitrary (in terms of being disproportionate), must be necessary, and must be reasonable in all the circumstances.
55. It is the case under Division 104 that before an issuing court can make an interim control order it must be satisfied that every one of the obligations, prohibitions, and restrictions to be imposed on the person is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.<sup>29</sup> However, the Commission considers that given the extraordinary nature of a control order, and in light of the criteria proposed by the United Nations High Commissioner for Human Rights, a stricter test of proportionality would be appropriate. A stricter test of proportionality would provide a stronger safeguard against abuse, in terms of unnecessary (and therefore unjustified) interference with the human rights mentioned above.
56. **Recommendation 1: The Commission recommends that a court issuing a control order should be required to be satisfied that a control order (with the conditions sought) is also the least restrictive means of achieving the purpose of protecting the public from a terrorist act, in all the circumstances.**

**5.3 *Lack of safeguard of effective review and (in the event of abuse) remedy***

57. The Commission has concerns about the restricted ability of persons the subject of control orders to oppose the legality of their treatment, to have the legality reviewed and, in the event of abuse, to secure an effective remedy.
58. As discussed above, the restrictions placed on a person's freedom of movement pursuant to a control order may amount to a form of detention for the purposes of article 9 of the ICCPR. If this is the case, article 9(4) will apply, which entitles anyone who is deprived of his or her liberty detention 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.
59. The procedural right conferred by article 9(4) is a specific manifestation of the overarching right to an 'effective remedy' for violations of any of the rights in the ICCPR, which is recognised by article 2(3).<sup>30</sup> Therefore articles 9(4) and 2(3) translate into requirements that States provide adequate safeguards against unlawful and/or arbitrary interference with the rights in the ICCPR, in the form of judicial review.
60. As noted above, both interim control orders and urgent interim control orders may be made *ex parte*. The person the subject of those orders has no right to appear before the court prior to them being made. Nor does Division 104 of

the *Criminal Code Act 1995* (Cth) impose any requirement upon the AFP or the court to consider whether the circumstances of the case are such that the person may be given such an opportunity without endangering national security.

61. Division 104 does provide for a hearing involving both parties after the interim control order has been served, at which the person the subject of the control order, and his or her legal representative, may make submissions and adduce evidence.<sup>31</sup> After considering the material before it, the court is empowered to revoke the order, or declare it void. However, this hearing can be up to 72 hours after the interim control order was made, meaning that severe restrictions, for example of a person's freedom of movement, may have been in place for days before the person can oppose the legality of these restrictions.
62. After a control order has been confirmed, the subject of a control order can bring an application for revocation or variation of the order, provided he or she has given written notice of the application and the grounds upon which revocation is sought to the Commissioner of the AFP.<sup>32</sup>
63. However, there is a difficulty with the review of control orders under Division 104, in terms of access to information. Under that Division, a person who is subjected to an interim control order must be given: a copy of that order (including a summary of the grounds on which it was made);<sup>33</sup> the documents given to the Attorney-General in order to obtain his or her consent to the application for the interim control order, and 'any other details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order'.<sup>34</sup>
64. However, these requirements do not oblige the AFP to give the person information if the disclosure of that information is considered likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)) or jeopardise police operations.<sup>35</sup> The term 'national security' is given a very broad definition in that Act,<sup>36</sup> and includes interests such as 'ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies'.<sup>37</sup> Therefore, in practice, the information given to a person about why a control order was made against them may only consist of information of a general nature, devoid of specific factual references.
65. A number of consequences follow from this. Firstly, a person the subject of a control order may find it difficult or impossible to comply with the requirement to give written notice to the AFP Commissioner of the grounds upon which the revocation or any variation of the order is sought. The person may not have the information in their possession which would enable them to identify the grounds on which the order was made, which in turn would enable them to argue that those grounds are not (or no longer) present.
66. Secondly, the court conducting a confirmation, revocation or variation hearing would presumably be able to rely upon the usual range of compulsory powers

to require the AFP to produce relevant documentary material. However, this will inevitably result in delays, during which time a person may be effectively subjected to a form of detention. The current approach in Division 104 therefore increases the likelihood that a person may be subject to arbitrary detention or violation of one of the other human rights referred to above for a longer period.

67. Even if a court does compel production of relevant material, the Attorney-General could invoke the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)*. As noted above, the use of that procedure may result in information being withheld (through orders for redaction or non-disclosure). It will also delay any determination as to whether the control order should be revoked or varied. Again, this raises the possibility of delay in correcting mistaken exercises of power and thus ending the violations of the human rights of those subjected to control orders.
68. The Commission notes that Division 104 of the *Criminal Code Act 1995 (Cth)* does not purport to oust the original jurisdiction of the High Court or Federal Court to grant judicial review. However, such a process of review is unlikely to be a sufficient remedy, in terms of ending the violation (that is, the detention or other infringement of a right), given the time it would potentially take to approach a court for relevant relief.
69. The Commission therefore has concerns about the lack of an effective review mechanism for control orders which could provide an adequate safeguard against abuse of the control order powers, and a remedy for any potential violations of the wide range of rights which could be impacted by such an order.
70. **Recommendation 2: The Commission recommends that the Review Committee investigate options for more timely and effective judicial review of control orders, through consultation with experts in the area. This investigation should include consideration of judicial review under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* of decisions of the Attorney-General to consent to the making of an application for a control order.**
71. In any event, the Commission considers that the *ex parte* nature of applications for interim control orders, and the restrictions upon the information provided to persons the subject of control orders regarding the basis for the order, need to be addressed.
72. **Recommendation 3: The Commission recommends that the issuing court for a control order should be required to satisfy itself that any *ex parte* application is warranted in the particular circumstances.**
73. **Recommendation 4: The Commission recommends that Division 104 of the *Criminal Code Act 1995 (Cth)* should be amended to set out the minimum content to be included in the summary of the grounds to be provided to the subject. It should specifically require that the person be given sufficient material to alert him or her to the factual basis upon**

which the order was made, to enable him or her to identify whether there are grounds for revocation or variation.

## 6 Preventative detention orders

### 6.1 *Inadequate safeguards against arbitrary detention*

#### (a) *Introduction*

74. In all nine Australian jurisdictions there is legislation in place which provides for the making of preventative detention orders (PDOs).<sup>38</sup> These orders enable a person to be taken into custody and detained for up to 14 days without that person being charged, convicted, or even suspected of having committed a criminal offence.
75. As with control orders, a key concern of the Commission with regard to the PDOs in all jurisdictions is that they may allow for arbitrary detention, in violation of article 9(1) of the ICCPR. As discussed above, in order for detention not to be arbitrary it must be proportionate to the aims sought to be achieved by such detention.
76. In order to assess the risk of persons being detained under a PDO when such detention is not a proportional response in all the circumstances, it is necessary to examine the main safeguards against arbitrary use of PDOs which are contained in the relevant legislation. The safeguards examined are:
- the threshold set by the legislation for the making of a PDO
  - the nature of the body or person responsible for determining whether this threshold for making an (initial) PDO has been met
  - the limits on the maximum amount of time a person can be detained under each PDO regime.

#### (b) *Threshold for making a PDO*

77. In each of the jurisdictions there are two distinct bases for making a PDO. The first is in order to prevent a terrorist act that is imminent and in any event is expected to happen within 14 days (the 'preventative basis'). The wording of the criteria in each jurisdiction for a PDO to be issued on this basis varies slightly, but generally the authority issuing the PDO must be satisfied that there are reasonable grounds to suspect (or in Western Australia (WA), must be satisfied on reasonable grounds) that the subject:
- will engage in/intends and has the capacity to carry out a terrorist act, or
  - possesses/has under the person's control (solely or jointly with another person) a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act, or
  - has done (or under the Commonwealth regime, alternatively will do), an act in preparation for, or planning, a terrorist act.<sup>39</sup>

78. In all jurisdictions except the Australian Capital Territory (ACT), to make a PDO on the preventative basis the issuing authority must also be satisfied (in the Northern Territory (NT), South Australia (SA), Tasmania (Tas), Victoria (Vic), and WA, on reasonable grounds) that making the order would substantially assist in preventing a terrorist act occurring, and that detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for this purpose.<sup>40</sup>
79. In the ACT there is a stricter test for the making of a PDO on the preventative basis, as in addition to being satisfied of the criteria listed in paragraph 77 above, the issuing authority must be satisfied on reasonable grounds that:
- it is reasonably necessary to detain the person to prevent a terrorist act
  - detaining the person under the order is the least restrictive way of preventing the terrorist act, and
  - detaining the person for the period for which the person is to be detained under the order is reasonably necessary to prevent the terrorist act.<sup>41</sup>
80. The second basis for the making of a PDO is in order to preserve evidence of, or relating to, a terrorist act that has already occurred (the 'evidence basis'). In all jurisdictions except the ACT, to make a PDO on the evidence basis the issuing authority must be satisfied (in the NT, SA, Tas, Vic and WA, on reasonable grounds) that:
- a terrorist act has occurred within the last 28 days
  - it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act, and
  - detaining the subject for the period for which the person is to be detained under the order is reasonably necessary in order to achieve the above purpose.<sup>42</sup>
81. Again, in the ACT a slightly stricter test is applied, as before an issuing authority can make a PDO on the evidence basis it must be satisfied on reasonable grounds that:
- a terrorist act has happened within the last 28 days
  - it is reasonably necessary to detain the person to preserve evidence in the ACT or elsewhere of, or relating to, the terrorist act, and
  - detaining the person under the order is the only effective way of preserving the evidence, and
  - detaining the person for the period for which the person is to be detained under the order is reasonably necessary to preserve the evidence.<sup>43</sup>
82. In each jurisdiction, therefore, there is some scrutiny of proportionality before a PDO is issued; at a minimum the issuing authority must be satisfied that detention for the period requested is 'reasonably necessary' to achieve the purpose for which it is sought.

83. However, the Commission considers that a more stringent proportionality test would appropriately reflect the fact that PDOs, like control orders, are exceptional orders and should only be made in exceptional circumstances. The higher the threshold for making an order is set, the less likely that a PDO will be made, and a person deprived of their liberty, unnecessarily.

**84. Recommendation 5: The Commission recommends that the threshold in each jurisdiction for the making of PDOs, both on the preventative basis and the evidence basis, should include a requirement that the issuing authority be satisfied that detaining the person is the least restrictive way of preventing a terrorist act (for a preventative PDO) or preserving evidence of such an attack (for an evidence PDO).**

(c) *Nature of the person/body responsible for making an (initial) PDO*

85. In each Australian jurisdiction there are two 'stages' of PDOs. These stages can take different forms. For example, under the Commonwealth regime and in Queensland (Qld), the legislation provides for two separate types of PDOs. In the first stage, interim (or 'initial') orders can be issued by a senior police officer, but these orders only permit detention for up to 24 hours.<sup>44</sup> If the police wish to retain the person in detention for longer than a day, an application must be made to a different issuing authority for a final (or 'continued') order (the second stage).

86. In other jurisdictions, such as in SA and WA, in the first stage an application for a PDO is made to a particular issuing authority: in SA a judge or, in urgent circumstances, a senior police officer, and in WA a current or former judge.<sup>45</sup> If a PDO is issued, it must then be reviewed by the Supreme Court in the respective States, and after this review the Court can confirm, vary, or revoke the PDO.<sup>46</sup> The confirmation of the PDO by the Court constitutes the beginning of the second stage of PDOs in these jurisdictions.

87. In Victoria and New South Wales (NSW), the system is different again. In those jurisdictions, the Supreme Courts in those states have a discretion as to whether or not to issue an interim PDO, pending the hearing and final determination of an application for a PDO.<sup>47</sup> Therefore, in those jurisdictions, there may be one or two stages of PDOs, depending on the circumstances.

88. Analysis of the provisions in the various Acts which relate to the second stage of PDOs will be dealt with below, in the section concerning judicial control of detention. For present purposes, the focus of the discussion is the first stage, when the order is first made allowing a person to be taken into custody and detained.

89. The nature of the person or body responsible for first making a PDO is important, as this process provides the check against abuse of (initial) PDO powers by police officers. In order to provide an effective check, the person or body responsible should be completely independent from the organisation seeking the order, and impartial arbiters of whether the threshold for making a PDO has been met.

90. From this viewpoint, the systems in jurisdictions such as the Commonwealth, Qld, SA and Tas are problematic. Under the legislation in force in those jurisdictions, an initial PDO is (or can be) made by a senior member of the police force, usually on an *ex parte* basis.<sup>48</sup> Therefore, the person responsible for deciding whether the (low) threshold for detention has been met is a senior member of the same organisation as the officer seeking the order, and the former makes this decision solely based on the evidence he or she receives from the officer seeking the order. The person the subject of the application (or his or her lawyer) has no opportunity to argue that the PDO should not be made, and to provide the issuing authority with evidence which might conflict with the information held by police.
91. The Commission considers that such a situation does not provide an appropriate safeguard against arbitrary detention of individuals under PDOs. The Commission suggests that the Review Committee investigate whether it would be possible to amend the relevant legislation to require that, in every jurisdiction, any PDO, including any interim PDOs, only be issued by an appropriate court in the relevant state or territory (or, in the case of the Commonwealth regime, a federal court), as is currently the case in the ACT, NSW, and Victoria.<sup>49</sup>
- (d) *Maximum length of detention under the PDO regime*
92. In the assessment of whether the detention of a person under a PDO is arbitrary and contrary to article 9(1) of the ICCPR, the length of time that person is detained is a relevant factor. The Human Rights Committee has stated that even if a decision to detain someone can be considered a proportional response in light of a particular aim, 'in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification'.<sup>50</sup>
93. The Commonwealth PDO legislation only permits detention for a total of 48 hours, including any extensions.<sup>51</sup> In all eight other Australian jurisdictions, detention under a (final) PDO, made on either the preventative basis or the evidence basis, can continue (or be extended) for up to 14 days.<sup>52</sup>
94. This long period of possible detention is of considerable concern to the Commission. When combined with the fact that, as discussed above, the legislation in all the jurisdictions sets a very low threshold for detention (in that the person need not even be suspected of having committed a criminal offence), a period of 14 days' detention on its face raises questions about proportionality.
95. However, whether 14 days is in fact the maximum amount of time a person can be detained under the PDO powers available in each jurisdiction depends on the restrictions placed on the making of multiple (consecutive) PDOs in relation to the same person. Most jurisdictions place restrictions on the making of multiple PDOs in relation to the same person, on the same basis (that is, the preventative basis or evidence basis).<sup>53</sup>

96. There is an issue, however, with the wording of some of the provisions which purport to restrict the making of multiple PDOs on the same basis, against the same person. For example, in NSW and the NT, the relevant legislation provides that multiple detention orders made against a person 'in relation to the same terrorist act' cannot result in that person being detained for more than 14 days.<sup>54</sup> However, the legislation also provides that 'a terrorist act ceases to be the same terrorist act if there is a change in the date on which the terrorist act is expected to occur'.<sup>55</sup>
97. The adoption of this definition of 'the same terrorist act' leaves open the possibility that a person could be detained under multiple consecutive (14 day) PDOs, potentially indefinitely, if police speculation about the future date of an expected terrorist act changes.
98. The Commission considers that it is crucial that the legislation in each jurisdiction place a clear and effective limit on the total length of time that a person can be detained under the PDO powers, including if multiple orders are made. If the end date of detention is open-ended, the risk that a person's detention will continue beyond the point where it can be justified increases substantially. A clear upper limit is an important safeguard against arbitrary detention.
99. **Recommendation 6: The Commission recommends that the Review Committee assess whether a maximum of 14 days detention is necessary and proportionate in light of information about how PDOs have been utilised in practice. The Commission also recommends that all PDO legislation should contain clear and unambiguous statements as to the maximum length of detention possible under a PDO, including absolute limits on multiple orders.**

## **6.2 Lack of safeguard of effective court control of detention**

### *(a) Introduction*

100. As with control orders, the Commission has concerns about the restricted ability of persons the subject of PDOs to have the legality of their treatment effectively (and impartially) reviewed and, if warranted, remedied, as they are entitled to under articles 9(4) and 2(3) of the ICCPR.
101. The Human Rights Committee has explicitly stated that article 9 of the ICCPR requires that adequate safeguards be put in place if any system of 'preventative' detention is used by a State party in relation to persons not charged with any criminal offence. In *General Comment 8* the Committee commented that article 9 requires that:

[I]f so-called preventative detention is used, for reasons of public security, it ... must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4).<sup>56</sup>

(b) *Provision for court control or review of detention*

102. The levels (and institutions) of review available for persons who are detained pursuant to a PDO vary widely across the different jurisdictions. For example, in the ACT and NSW there are three opportunities for court control of the detention built into the PDO regime, as in both jurisdictions the Supreme Court:
- issues any interim PDO
  - holds a (mandatory) hearing (in which the detainee has a right to be involved) and makes a (final) PDO
  - can hear applications from the person the subject of a PDO for revocation or setting aside of that order.<sup>57</sup>
103. A similar regime of multiple court reviews of PDOs is in place in Victoria, with the exception that a person the subject of a PDO can only apply to the Victorian Supreme Court for revocation (or variation) of that order with leave of the Court.<sup>58</sup>
104. At the other end of the spectrum, under the Commonwealth regime, there is no court control or review of PDOs built into the PDO regime. Initial PDOs are issued by a senior member of the AFP.<sup>59</sup> Continued PDOs are made by an 'issuing authority' (who is a Judge, Federal Magistrate, AAT member or retired judge, acting in a personal capacity).<sup>60</sup> Both applications will be decided *ex parte*. There is no provision allowing a person the subject of a Commonwealth PDO to apply to any body for revocation of that order.
105. The Commonwealth PDO legislation does expressly provide that a person may bring legal proceedings in a court in order to obtain a remedy in relation to a PDO or the treatment of a person in connection with that person's detention under a PDO.<sup>61</sup> However, the Commonwealth Act restricts access to avenues of court review which would usually be available to a person who wants to challenge a decision made by a government official.
106. Applications for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of decisions relating to Commonwealth PDOs are excluded,<sup>62</sup> as is the jurisdiction of state and territory courts.<sup>63</sup>
107. In addition, while, under the Commonwealth regime, a person detained under a PDO can apply to the Administrative Appeals Tribunal for a review of the merits of the decision to make that PDO, such an application cannot be made while the PDO is in force.<sup>64</sup> This essentially confines the AAT to issuing a remedy after the fact; the AAT cannot release a person who is wrongly detained under a PDO.
108. The remaining option for court review of a Commonwealth PDO is to make an application for judicial review to the Federal Court under s 39B of the *Judiciary Act 1903* (Cth) or to the High Court under s 75(v) of the *Constitution*. However, these processes do not allow for an investigation of the facts or of the reasonableness and proportionality of the detention; the grounds upon which the decision to make a PDO can be challenged in this type of review are very

limited. In addition, such applications are unlikely to be made, heard, and determined quickly enough to end any unlawful detention.

109. The Commission considers that the lack of effective court control of the detention of persons under the Commonwealth PDO regime violates the right to court review required by article 9(4) of the ICCPR. It also breaches the right to an effective remedy in article 2(3) of the ICCPR, as in the context of a regime of preventative detention, a remedy which is 'effective' must be one which enables a person who is wrongfully detained or being ill-treated to obtain redress before the wrongful detention or ill-treatment comes to an end.
110. There are a number of ways in which the Commonwealth PDO regime could (and should) be amended to insert safeguards of court review. As mentioned above in paragraph 91, the Commission suggests that the Review Committee consider whether the functions of issuing interim and continued PDOs could be transferred to a federal court, and/or whether the Commonwealth legislation could be amended to provide that a person the subject of PDO, or his or her lawyer, can make an (urgent) application to a federal court for revocation of that order.
111. The Commission notes that the Review Committee has been asked to review schedule 1 (dac) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), which currently excludes all decisions made in relation to Commonwealth PDOs from the review mechanism created under that Act. The Commission recommends that, in addition to considering the changes to the Commonwealth PDO regime mentioned directly above, the exclusion of these decisions from this avenue of review should be removed.
- 112. Recommendation 7: The Commission recommends that Schedule 1 (dac) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 105.51(4) of the *Criminal Code Act 1995* (Cth) should be repealed to allow persons detained under a Commonwealth PDO to apply for judicial review under the former Act.**
113. A further issue, which arises in those jurisdictions in which there is some form of court review of the detention built into the PDO regime, is the timing of this review. Article 9(4) of the ICCPR entitles a person to have a court decide 'without delay' whether his or her detention is lawful, and to order release of the person if the detention is not lawful.
114. The Human Rights Committee has not stated what period will constitute a delay for the purposes of article 9(4). However, in *Hammel v Madagascar* the Committee found that there had been a violation of article 9(4) because the complainant had been detained and unable to bring proceedings before a court to determine the lawfulness of his arrest for a period of three days.<sup>65</sup>
115. The Commission is concerned that in the NT and WA the relevant Acts do not clearly identify how long a person can be detained under a PDO (made by an issuing authority who is not a court) before the Supreme Court can review his or her detention. In both jurisdictions, the legislation only provides that the person the subject of a PDO must be brought before the Supreme Court 'as soon as practicable' after that person is first taken into custody or detained

under the PDO.<sup>66</sup> The NT legislation (unlike the WA legislation) does allow the person detained under a PDO to apply to the Supreme Court for revocation of the order, but the detainee can only make such an application **after** the PDO has been confirmed by the Supreme Court.<sup>67</sup>

116. It appears that the same problem attends the PDO regime used in SA, when the PDO is issued by a judge (acting in a personal capacity).<sup>68</sup>
117. The Commission considers that the requirement of 'as soon as practicable' is not a sufficient safeguard against arbitrary detention, as it leaves the police officers detaining a person under a PDO with a discretion to determine at what point the person is brought before a court and, accordingly, at what point the person can first challenge the legality of his or her detention. The Commission's view is that a requirement that a detained person be brought before a court 'as soon as practicable' is not sufficient to secure that person's entitlement to judicial review of the legality of their detention 'without delay'.
- 118. Recommendation 8: The Commission recommends that the relevant legislation in the Northern Territory, South Australia and Western Australia should be amended to require that as soon as practicable after or, in any event, within 24 hours of the person being brought into custody or detained under a PDO, the person the subject of a PDO must be brought before the Supreme Court for review of the order.**

(c) *Restrictions on access to and contact with legal advisers*

119. A further issue which the Commission wishes to raise in relation to the effectiveness of court (or other) review of a person's detention under a PDO is a detainee's right to contact a lawyer. Although article 9(4) of the ICCPR does not expressly include a right to access a lawyer, the Human Rights Committee has recognised that a detainee must have access to legal representation if the entitlement to challenge the lawfulness of his or her detention in article 9(4) is to have any meaning.<sup>69</sup>
120. In all jurisdictions a person detained pursuant to a PDO has a right to contact a lawyer, but in all jurisdictions except Qld, the contact between the person and his or her lawyer is restricted to certain subject matters (such as mounting a challenge to the legality of the PDO), and must be conducted in such a way that it can be monitored.<sup>70</sup> Also, in all jurisdictions, 'prohibited contact orders' may be made, which may affect the choice of the particular lawyer with whom a detainee is permitted contact.<sup>71</sup>
121. The *United Nations Basic Principles on the Role of Lawyers* provide (at paragraph 8) that:
- All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, **without delay, interception or censorship and in full confidentiality**. Such consultations may be within sight, but **not within the hearing**, of law enforcement officials.<sup>72</sup>
122. The restrictions placed upon the contact a person detained under a PDO may have with a lawyer, including the condition of monitoring, raise the prospect of interference with the provision of legitimate legal advice to that person,

contrary to the requirements of the *Basic Principles*. Such interference is problematic in that it may undermine the provision of full and comprehensive legal advice necessary for the detainee to effectively exercise his or her rights to challenge the legality of his or her detention and/or seek a remedy for any arbitrary detention (or other violation of rights by persons exercising PDO powers).

123. For example, the restrictions on a detainee's contact with a lawyer under the Commonwealth PDO regime would not seem to permit the person to instruct his or her lawyer to seek to have a terrorist organisation 'de-listed' under s 102.1(17) of the *Criminal Code Act 1995* (Cth). Given that a person's association with a terrorist organisation may form a central part of a decision to issue a PDO for that person, such a constraint on lawyer/client communications could be particularly significant.
124. The Commonwealth restrictions would also appear to prevent a lawyer advising a person about possible criminal charges which may be brought against the detained person, and to prevent the detainee from instructing a lawyer to attend to pressing personal or business matters on the detained person's behalf.
125. Additionally, the monitoring of any discussions between the detainee and his or her lawyer raises issues in terms of the detainee's right to privacy under article 17 of the ICCPR.
126. The Commission considers that the restrictions placed on the contact between a person detained under a PDO and his or her lawyer, in terms of limiting such contact only to certain listed subject matters, are too strict, and may obstruct the effective exercise of the detainee's rights under articles 9(4) and 2(3) of the ICCPR.
127. The Commission also considers that it is appropriate that monitoring of lawyer/detainee contact under PDO regimes should be limited to visual monitoring. This would be consistent with the recommendation of the Senate Legal and Constitutional References Committee in relation to the provisions in the *Australian Security Intelligence Organisation Act 1979* (Cth) concerning monitoring of contact between a lawyers and a person detained under Division 3 of Part III of that Act.<sup>73</sup>
- 128. Recommendation 9: The Commission recommends that the restrictions which apply to contact with lawyers in all jurisdictions (except Queensland) should be amended to avoid imposing unnecessary constraints upon the provision of legal advice. A lawyer should be allowed to provide professional services to a person detained under a PDO in connection with any pressing, lawful, personal or business affairs.**
- 129. Recommendation 10: The Commission recommends that the relevant PDO legislation in all jurisdictions should be amended to ensure that a detainee's contact with his or her lawyer may be visually monitored, but otherwise must remain private.**

(d) *Restrictions on disclosure of information to the detainee*

130. A final issue of concern to the Commission in relation to the practical effectiveness of court or other reviews of PDOs are the restrictions placed on the information which is provided to the detainee about the reasons for detention.
131. In all Australian jurisdictions except the ACT<sup>74</sup> and Qld,<sup>75</sup> after a PDO has been made, the only information which is required to be provided to the person as to the reason for his or her detention, or the factual basis for the making of the order, is a 'summary of the grounds' on which the order was made. In some jurisdictions this summary is set out by the relevant issuing authority in the PDO itself,<sup>76</sup> and in others it is a separate document provided to the detainee.<sup>77</sup>
132. The legislation in these jurisdictions does not set out any minimum content for these summaries. The material provided to the detainee therefore could be very general in nature, and in fact could state no more than the fact that the PDO was made on a preventative or evidential basis (using the wording of the threshold from the relevant Act).
133. Further, in these seven jurisdictions, the legislation expressly provides that this general summary of the grounds for an order, which is provided to the detainee, need not include any information which is 'likely to prejudice national security'.<sup>78</sup> Given the expansive way in which this term is usually interpreted,<sup>79</sup> and the types of intelligence likely to form the basis for a request for a PDO, this proviso may exclude a great deal of substance from any summary provided to the detainee.
134. The problem created by the giving of such limited information to a person detained under a PDO is that this can make it practically impossible for the detainee (or his or her lawyer) to mount an effective challenge to the legality of the person's detention, because they do not know the factual basis on which the order was made. Without disclosure of sufficient information about why the order was made, the detainee, or his or her legal representative, cannot actively participate in any court (or other) review of his or her detention, or provide any basis for an application for revocation.
135. The Human Rights Committee has acknowledged that the giving of sufficient information to a detainee about the reasons for his or her detention is a necessary precondition to the exercise of that person's right to challenge (and have a court review) the legality of that detention. That is why the Committee stated in *General Comment 8* that article 9 includes a requirement that if preventative detention is used, 'information of the reasons [for the detention] must be given'.<sup>80</sup>
136. The Commission considers that a detainee's access to information regarding the basis for his or her detention in the jurisdictions discussed above do not meet the requirement of article 9(4).
- 137. Recommendation 11: The Commission recommends that, at the very least, the PDO legislation in each jurisdiction should set out the minimum requirements for the content of the 'summary' of the grounds on which any initial, final or extension of a PDO is made. The summary should be sufficient to alert the subject of the order to the factual basis upon which the order was made. Summaries should also be required in respect of any decision to refuse a revocation application.**

138. The Commission accepts that there will be some classes of security sensitive information which will require protection. To the extent possible, the police in each jurisdiction should be required to consider whether the information can be provided in an altered form (which is the approach adopted under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)).

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- <sup>1</sup> Opened for signature 16 December 1966, 999 United Nations Treaty Series 171; entered into force on 23 March 1976 (except article 41, which came into force 28 March 1979); ratified by Australia on 13 August 1980 (article 41 ratified by Australia on 28 January 1993).
- <sup>2</sup> See schedule 2 of the *Australian Human Rights Commission Act 1986* (Cth).
- <sup>3</sup> Australia acceded to the first Optional Protocol to the ICCPR, which established the Human Rights Committee's jurisdiction to receive and consider individual communications concerning violations of the rights in the Convention, on 25 September 1991.
- <sup>4</sup> *International Covenant on Civil and Political Rights*, art 4.
- <sup>5</sup> See Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights - Human rights: a uniting framework*, UN Doc. E/CN.4/2002/18 (2002), Annex. At [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=2800](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=2800) (viewed 25 September 2012).
- <sup>6</sup> Commission on Human Rights, above.
- <sup>7</sup> Commission on Human Rights, above.
- <sup>8</sup> *Criminal Code Act 1995* (Cth) s 104.1.
- <sup>9</sup> See *Criminal Code Act 1995* (Cth) ss 104.5(3) and 104.16(1)(c).
- <sup>10</sup> *Criminal Code Act 1995* (Cth) ss 104.5(3) and 104.16(1)(c).
- <sup>11</sup> *Criminal Code Act 1995* (Cth) s 104.2.
- <sup>12</sup> *Criminal Code Act 1995* (Cth) s 104.6(2)
- <sup>13</sup> *Criminal Code Act 1995* (Cth) s 104.10.
- <sup>14</sup> *Criminal Code Act 1995* (Cth) s104.4(i)(c) and(d).
- <sup>15</sup> See *Criminal Code Act 1995* (Cth) s 104.4.
- <sup>16</sup> *Criminal Code Act 1995* (Cth) s 104.5(1)(e) and (1A).
- <sup>17</sup> *Criminal Code Act 1995* (Cth) ss 104.12(1) and 104.12A.
- <sup>18</sup> *Criminal Code Act 1995* (Cth) s 104.16.
- <sup>19</sup> See Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Legislation Committee, Inquiry into the Anti-Terrorism Bill (No 2) 2005* (11 November 2005). At [http://humanrights.gov.au/legal/submissions/terrorism\\_sub\\_12-11-2005.html](http://humanrights.gov.au/legal/submissions/terrorism_sub_12-11-2005.html) (viewed 25 September 2012). See also the Background Paper prepared by the Commission on human rights concerns raised by Australia's counter-terrorism laws, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008). At [http://humanrights.gov.au/legal/publications/counter\\_terrorism\\_laws.html](http://humanrights.gov.au/legal/publications/counter_terrorism_laws.html) (viewed 25 September 2012).
- <sup>20</sup> United Nations Human Rights Committee, *General Comment No 8: Right to liberty and security of persons (Art. 9)* (1982), [1].
- <sup>21</sup> See, in the context of the *European Convention on Human Rights*, *Amuur v France* (1992) 22 EHRR 533, [42].
- <sup>22</sup> United Nations Human Rights Committee, *General Comment No 8: Right to liberty and security of persons (Art. 9)* (1982) [4].
- <sup>23</sup> United Nations Human Rights Committee, *Van Alphen v Netherlands*, Communication No. 305/1988, views adopted 23 July 1990 [5.8].
- <sup>24</sup> See e.g. United Nations Human Rights Committee, *A v Australia*, Communication No. 560/1993, views adopted 3 April 1997, [9.2]. See also Manfred Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary* NP Engel (1993) p 172.
- <sup>25</sup> (2003) 126 FCR 54 at [152].
- <sup>26</sup> United Nations Human Rights Committee, *Van Alphen v Netherlands*, Communication No. 305/1988, views adopted 23 July 1990, [5.8].
- <sup>27</sup> United Nations Human Rights Committee, *A v Australia*, Communication No. 560/1993, views adopted 3 April 1997, [9.2].
- <sup>28</sup> United Nations Human Rights Committee, *General Comment No 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)* (1988) [4].

- <sup>29</sup> *Criminal Code Act 1995* (Cth) s 104.4(d).
- <sup>30</sup> See e.g. United Nations Human Rights Committee, *Massiotti and Baritussio v Uruguay*, Communication No 25/1978, views adopted 26 July 1982, [13].
- <sup>31</sup> *Criminal Code Act 1995* (Cth) s 104.14(1).
- <sup>32</sup> *Criminal Code Act 1995* (Cth) s 104.18.
- <sup>33</sup> *Criminal Code Act 1995* (Cth) s 104.5(1)(h).
- <sup>34</sup> *Criminal Code Act 1995* (Cth) ss 104.12 and 104.12A
- <sup>35</sup> *Criminal Code Act 1995* (Cth) s 104.12A(3).
- <sup>36</sup> See *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 8 to 11.
- <sup>37</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 11(d).
- <sup>38</sup> *Criminal Code Act 1995* (Cth) div 105; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Police Powers) Act 2002* (NSW) pt 2A; *Terrorism (Emergency Powers) Act 2003* (NT) pt 2B; *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic) (Part 2A); *Terrorism (Preventative Detention) Act 2006* (WA).
- <sup>39</sup> *Criminal Code Act 1995* (Cth) s 105.4(4)(a); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 18(4); *Terrorism (Police Powers) Act 2002* (NSW) s 26D(1); *Terrorism (Emergency Powers) Act 2003* (NT) s 21G(1)(a); *Terrorism (Preventative Detention) Act 2005* (Qld) s 8(3)(a); *Terrorism (Preventative Detention) Act 2005* (SA) s 6(3)(a); *Terrorism (Preventative Detention) Act 2005* (Tas) s 7(1)(a); *Terrorism (Community Protection) Act 2003* (Vic) s 13E(1)(a); *Terrorism (Preventative Detention) Act 2006* (WA) ss 9(1)(a) and 13(1)(a).
- <sup>40</sup> *Criminal Code Act 1995* (Cth) s 105.4(4)(b) and (c); *Terrorism (Police Powers) Act 2002* (NSW) s 26D(1); *Terrorism (Emergency Powers) Act 2003* (NT) s 21G(1)(a); *Terrorism (Preventative Detention) Act 2005* (Qld) s 8(3)(b) and (c); *Terrorism (Preventative Detention) Act 2005* (SA) s 6(3)(b); *Terrorism (Preventative Detention) Act 2005* (Tas) s 7(1)(a); *Terrorism (Community Protection) Act 2003* (Vic) s 13E(1)(a); *Terrorism (Preventative Detention) Act 2006* (WA) ss 9(1)(b) and 13(1)(b).
- <sup>41</sup> *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 18(4).
- <sup>42</sup> *Criminal Code Act 1995* (Cth) s 105.5(6); *Terrorism (Police Powers) Act 2002* (NSW) s 26D(2); *Terrorism (Emergency Powers) Act 2003* (NT) s 21G(1)(b); *Terrorism (Preventative Detention) Act 2005* (Qld) s 8(5); *Terrorism (Preventative Detention) Act 2005* (SA) s 6(5); *Terrorism (Preventative Detention) Act 2005* (TAS) s 7(1)(b); *Terrorism (Community Protection) Act 2003* (Vic) s 13E(1)(b); *Terrorism (Preventative Detention) Act 2006* (WA) ss 9(3) and 13(1).
- <sup>43</sup> *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 18(6).
- <sup>44</sup> *Criminal Code Act 1995* (Cth) s 105.8; *Terrorism (Preventative Detention) Act 2005* (QLD) ss 7(1) and 17(5).
- <sup>45</sup> *Terrorism (Preventative Detention) Act 2005* (SA) ss 4 and 6; *Terrorism (Preventative Detention) Act 2006* (WA) ss 7 and 11.
- <sup>46</sup> *Terrorism (Preventative Detention) Act 2005* (SA) s 17; *Terrorism (Preventative Detention) Act 2006* (WA) s 22.
- <sup>47</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26H; *Terrorism (Community Protection) Act 2003* (Vic) s 13E(4).
- <sup>48</sup> *Criminal Code Act 1995* (Cth) s 105.8; *Terrorism (Preventative Detention) Act 2005* (QLD) ss 7(1), 13 and 17; *Terrorism (Preventative Detention) Act 2005* (SA) s 4; *Terrorism (Preventative Detention) Act 2005* (Tas) ss 5(3), 6(5) and 7.
- <sup>49</sup> *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 20; *Terrorism (Police Powers) Act 2002* (NSW) s 26H; *Terrorism (Community Protection) Act 2003* (Vic) s 13E(4).
- <sup>50</sup> United Nations Human Rights Committee, *C v Australia*, Communication No. 900/1999, views adopted 28 October 2002, [8.2].
- <sup>51</sup> *Criminal Code Act 1995* (Cth) ss 105.12(5) and 105.14(6).
- <sup>52</sup> *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 21(3)(b); *Terrorism (Police Powers) Act 2002* (NSW) s 26K; *Terrorism (Emergency Powers) Act 2003* (NT) s 21K; *Terrorism (Preventative Detention) Act 2005* (Qld) s 12(2); *Terrorism (Preventative Detention) Act 2005* (SA) s 10(5)(b); *Terrorism (Preventative Detention) Act 2005* (Tas) s 9(2); *Terrorism (Community Protection) Act 2003* (Vic) s 13G(1); *Terrorism (Preventative Detention) Act 2006* (WA) s 13(3).
- <sup>53</sup> See *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 12; *Terrorism (Preventative Detention) Act 2005* (Qld) s 12; *Terrorism (Preventative Detention) Act 2005* (SA) s 8; *Terrorism (Preventative Detention) Act 2006* (WA) s 15(4).

- <sup>54</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26K(2); *Terrorism (Emergency Powers) Act 2003* (NT) s 21K.
- <sup>55</sup> *Terrorism (Police Powers) Act 2002* (NSW) s 26K(7)(a); *Terrorism (Emergency Powers) Act 2003* (NT) s 21B(1).
- <sup>56</sup> United Nations Human Rights Committee, *General Comment No 8: Right to liberty and security of persons* (Art. 9) (1982) [4].
- <sup>57</sup> *Terrorism (Police Powers) Act 2002* (NSW) ss 26H, 26I and 26M; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss 18, 20 and 31.
- <sup>58</sup> *Terrorism (Community Protection) Act 2003* (Vic) ss 13E and 13N.
- <sup>59</sup> *Criminal Code Act 1995* (Cth) s 105.8.
- <sup>60</sup> *Criminal Code Act 1995* (Cth) ss 105.12 and 105.18(2).
- <sup>61</sup> *Criminal Code Act 1995* (Cth) s 105.51(1).
- <sup>62</sup> *Criminal Code Act 1995* (Cth) s 105.51(4) and *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 (dac).
- <sup>63</sup> *Criminal Code Act 1995* (Cth) s 105.51(2).
- <sup>64</sup> *Criminal Code Act 1995* (Cth) s 105.51(5).
- <sup>65</sup> United Nations Human Rights Committee, *Hammel v Madagascar*, Communication No. 155/1983, views adopted 3 April 1987, [18.2] and [20].
- <sup>66</sup> *Terrorism (Emergency Powers) Act 2003* (NT) s 21P; *Terrorism (Preventative Detention) Act 2006* (WA) s 22.
- <sup>67</sup> *Terrorism (Emergency Powers) Act 2003* (NT), s 21S(1)(a).
- <sup>68</sup> See *Terrorism (Preventative Detention) Act 2005* (SA) ss 10(b), 16(2) and 17.
- <sup>69</sup> United Nations Human Rights Committee, *Berry v Jamaica*, Communication No. 330/1988, views adopted 7 April 1994, [11.1].
- <sup>70</sup> *Criminal Code Act 1995* (Cth) ss 105.37 and 105.38; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss 52 and 56(2); *Terrorism (Police Powers) Act 2002* (NSW) ss 26ZG and 26ZI; *Terrorism (Emergency Powers) Act 2003* (NT) ss 21ZK and 21ZM; *Terrorism (Preventative Detention) Act 2005* (Qld) ss 58-59A; *Terrorism (Preventative Detention) Act 2005* (SA) ss 37 and 38; *Terrorism (Preventative Detention) Act 2005* (Tas) ss 34 and 35; *Terrorism (Community Protection) Act 2003* (Vic) ss 13ZF and 13ZG; *Terrorism (Preventative Detention) Act 2006* (WA) ss 43 and 44(2).
- <sup>71</sup> *Criminal Code Act 1995* (Cth) ss 105.15, 105.16 and 105.40; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss 32 and 57; *Terrorism (Police Powers) Act 2002* (NSW) ss 26N and 26ZJ; *Terrorism (Emergency Powers) Act 2003* (NT) ss 21Q, 21R and 21ZN; *Terrorism (Preventative Detention) Act 2005* (Qld) ss 32, 33 and 63; *Terrorism (Preventative Detention) Act 2005* (SA) ss 13-14 and 40; *Terrorism (Preventative Detention) Act 2005* (Tas) ss 14-15 and 37; *Terrorism (Community Protection) Act 2003* (Vic) ss 13L, 13M and 13ZI; *Terrorism (Preventative Detention) Act 2006* (WA) ss 17, 18 and 40(3).
- <sup>72</sup> United Nations, *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 7 September 1990, [8] (emphasis added). At <http://www2.ohchr.org/english/law/lawyers.htm> (viewed 25 September 2012).
- <sup>73</sup> Senate Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002, p 142 (recommendation 9). At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=legcon\\_ctte/completed\\_inquiries/2002-04/asio\\_2/report/contents.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2002-04/asio_2/report/contents.htm) (viewed 25 September 2012).
- <sup>74</sup> In the ACT, a person detained under an interim PDO must be given a copy of the application for a (final) PDO 'as soon as possible' after he or she is detained, or in any event before the Supreme Court can make any final PDO: See *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss 18(2)(a) and 21(7)(a). The application must include the 'facts and other grounds on which the officer considers a preventative detention order should be made for the person': s 17(d)).
- <sup>75</sup> In Queensland, in addition to providing a summary of the grounds on which the order was made, the issuing authority must give (and the detainee must receive) reasons for the decision to make the order: See *Terrorism (Preventative Detention) Act 2005* (Qld) s 51.
- <sup>76</sup> *Criminal Code Act 1995* (Cth) ss 105.8(6)(e), 105.12(6)(d) and 105.32; *Terrorism (Police Powers) Act 2002* (NSW) ss 26J(1)(e) and 26ZB; *Terrorism (Preventative Detention) Act 2005* (SA) ss 10(6)(e) and 32; *Terrorism (Community Protection) Act 2003* (Vic) ss 13F(4)(h) and 13ZA.

<sup>77</sup> *Terrorism (Emergency Powers) Act 2003* (NT) s 21ZF; *Terrorism (Preventative Detention) Act 2005* (Tas) s 29; *Terrorism (Preventative Detention) Act 2006* (WA) s 37.

<sup>78</sup> *Criminal Code Act 1995* (Cth) ss 105.8(6A) and 105.12(6A); *Terrorism (Police Powers) Act 2002* (NSW) s 26J(2); *Terrorism (Emergency Powers) Act 2003* (NT) s 21ZF(2); *Terrorism (Preventative Detention) Act 2005* (SA) s 10(6A); *Terrorism (Preventative Detention) Act 2005* (Tas) s 29(2); *Terrorism (Community Protection) Act 2003* (Vic) s 13F(5); *Terrorism (Preventative Detention) Act 2006* (WA) s 37(2).

<sup>79</sup> See, for example, the broad definition given to the term 'national security' in sections 8 to 11 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (particularly the way the concept is expanded by s 11).

<sup>80</sup> United Nations Human Rights Committee, *General Comment No 8: Right to liberty and security of persons* (Art. 9) (1982) [4].