

FREEDOMS INQUIRY

SUBMISSION ON ISSUES PAPER 46

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1 INTRODUCTION

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Dear Director,

RE: SUBMISSION ON ISSUE PAPER 46

The UNSW Law Society is the peak representative body for all of the students in the UNSW Faculty of Law. Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms.

We seek to develop UNSW Law students academically, professionally, personally and socially, and seek to assist UNSW Law students to aspire towards their professional and personal paths. The UNSW Law Society is proud to celebrate a rich diversity of students with a multiplicity of aims, backgrounds and passions.

We welcome the opportunity to make a submission to the Australian Law Reform Commission's Issues Paper, *Traditional Rights and Freedoms– Encroachments by*



Commonwealth Laws (Issue Paper 46). The submission below reflects the varied backgrounds, perspectives, values and opinions of the students of the UNSW Law Society.

Kind Regards,

UNSW Law Society



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2 - 1 FREEDOM OF SPEECH – GENERAL PRINCIPLES

Question 2-1 What general principles or criteria should be applied to help determine whether a law that interferes with the freedom of speech is justified?

A. **The Value of Freedom of Speech**

Freedom of speech, also referred to as freedom of expression or communication, is defined in international law as the right to hold an opinion without interference, and to impart, seek and receive information and ideas in any form.¹ The freedom is considered necessary for human dignity at an individual level and necessary at a societal level to enable citizens in Australia to properly participate in our representative democratic government.²

The freedom is not absolute and must be balanced with other rights, such as the right to privacy and freedom from discrimination, and public interests, such as secrecy for national security. Nevertheless, as a society committed to transparent, representative government, we should carefully scrutinise and define as clearly and narrowly as possible any restrictions on the freedom.

B. **Protection of the Freedom in Australia**

The *Australian Constitution* contains an implied right to freedom of political communication. This doctrine emerged from two landmark High Court cases in 1992, namely *Nationwide News Pty Ltd v Wills*³ ('Nationwide News') and *Australian Capital Television Pty Ltd v Commonwealth*⁴ ('Australian Capital Television'). In these cases the implied right to freedom of political communication was said to be

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19 ('ICCPR').

² *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, [73] ('Nationwide News').

³ (1992) 177 CLR 1.

⁴ (1992) 177 CLR 106.

'indispensable to the efficacy of the system of representative government.'⁵ Deane and Toohey JJ in *Nationwide News* highlighted that '[i]n implementing the doctrine of representative government, the Constitution reserves to the people of the Commonwealth the ultimate power of governmental control'.⁶ Such a doctrine was derived from the implications arising out of the text of the Constitution, particularly sections 7 and 24, which provide respectively, that the Senate and House of Representatives shall be 'directly chosen by the people'. Section 128 of the Constitution furthermore, refers to the amendment of the Constitution via popular referendum.

The constitutional freedom is not an individual right. Rather, it is a residual right which operates to limit on the powers of the Commonwealth. The freedom of political communication doctrine in Australia is narrower than freedom of speech in other democracies, such as the United States, South Africa or Canada, because unlike such countries, Australia does not have a Bill of Rights nor does it contain any express constitutional or legislative provisions, to protect this freedom.⁷

C. Principles to test if the freedom is unjustly encroached

The general principles that we will adopt to determine whether a law unjustly encroaches on the freedom of communication are:

- 1) Suitability – is there a legitimate goal that the law is trying to achieve?
- 2) Necessity – are there any practical and effective alternative means to reach this legitimate goal that are less restrictive to the freedom of communication? We will consider how specific the law is because, the

⁵ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 140.

⁶ *Nationwide News* (1992) 177 CLR 1, [71] (per Deane and Toohey JJ).

⁷ George Williams "Protecting Freedom of Speech in Australia" (2014) 39 *Alternative Law Journal* 4, p. 217, 218.

broader it is, the more likely it is to be unnecessarily restrictive. We will also consider what, if any, safeguards exist to protect the freedom.⁸

- 3) Appropriate – do the benefits of the law outweigh the detriments to the freedom of communication?

Our approach is broadly similar to the proportionality test currently used by the High Court. Despite dating back over two decades, the test developed in *Lange* to determine the validity of a law with regards to the implied freedom,⁹ still stands (albeit that it was slightly modified in *Coleman v Power*¹⁰ (*'Coleman'*). This test, as modified by *Coleman*, is:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?¹¹

The second limb of the High Court's approach is similar to our general approach because the Court examines whether there is a legitimate goal, which we cover in the "suitability" question. Though more controversial, the Court has at times considered if there are any less restrictive measures available to achieve the goal when determining whether the law was "reasonably appropriate and adapted", which is similar to our "necessity" question.¹² However, the Court usually avoids the benefit/detriment balancing exercise that we have adopted in our final step because it is considered to be a policy question best left to parliament,¹³ although judges have considered the adverse effects of a law when determining

⁸ Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008), 4.

⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, [567]-[568] (The Court), (*'Lange'*).

¹⁰ (2004) 220 CLR 1 (*'Coleman'*).

¹¹ *Lange* (1997) 189 CLR 520, [567]-[568] (The Court).

¹² See, eg, *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, [110].

¹³ *Coleman* (2004) 220 CLR 1, [49] (McHugh J).

proportionality.¹⁴ The balancing exercise that we have adopted is successfully used in Germany, which also has a constitutional separation of the legislature and judiciary.¹⁵ We have adopted this step because we believe that it is preferable to expressly state what considerations are being weighed when deciding whether the law is appropriate, rather than merely stating that the law is proportionate, or “reasonably adapted” as a conclusion.

2 - 2 FREEDOM OF SPEECH – APPLICATION

Question 2-2 Which Commonwealth laws unjustifiably interfere with the freedom of speech, and why are these laws unjustified?

A. Unauthorised Disclosure

Section 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth), as inserted by the *National Security Legislation Amendment Act (No. 1) 2014* (Cth),¹⁶ states that it is an offence to disclose information relating to a special interest operation ('SIO'). An SIO is an operation that has been granted the appropriate authority by the Minister and is carried out as part of ASIO's special intelligence function.¹⁷ The lesser disclosure offence carries a maximum penalty of 5 years imprisonment where the person was “reckless” as to whether the information related to an SIO.¹⁸ There is a further offence with a maximum penalty of 10 years imprisonment where either the person intended to, or the disclosure did in fact, endanger the health or safety of any person, or prejudice the conduct of the SIO.¹⁹

¹⁴ See, eg, *Castlemain Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473; *Uebergang v Australian Wheat Board* (1980) 145 CLR 226, 303-307 (Mason and Stephen JJ).

¹⁵ See Justice Susan Kiefel, “Proportionality: A rule of reason” (2012) 23 *Public Law Review* 85, 87.

¹⁶ *National Security Legislation Amendment Act (No. 1) 2014* (Cth) sch 3.

¹⁷ *Australian Security Intelligence Organisation Act 1979* (Cth) s 4 ('ASIO Act'), as amended by *National Security Legislation Amendment Act (No. 1) 2014* (Cth) sch 3.

¹⁸ *ASIO Act* s 35P(1).

¹⁹ *ASIO Act* s 35P(2).

The unauthorised disclosure offences impose a practical burden on the freedom of political communication because they criminalise any reporting relating to SIOs, with no exception for reports that reveal incompetence or wrongdoing by the authorities.²⁰

1. *Is encroachment justified - application of the proportionality test*

2. *Suitability – legitimate goals?*

The offences were created for the legitimate goals of protecting those participating in SIOs and to ensure the integrity of operations related to national security.²¹ While it is unlikely that an unspoken purpose of the new offences is to avoid government embarrassment or weakened public trust due to disclosure of incompetence relating to SIOs, it should be noted that such a goal would not be a purpose compatible with the constitutionally prescribed representative government.²²

3. *Necessity – less restrictive means available?*

The lesser offence under s 35P(1) unnecessarily restricts the freedom of communication, for the following reasons.

First, and most importantly, there is no public interest defence for unauthorised disclosure, which is likely to restrict legitimate scrutiny of security agencies.²³ The SIO provisions were modelled broadly in line with the provisions for protection for control orders conducted by the Australian Federal Police (AFP), which also contain

²⁰ See, eg, Williams, above n 7, 221; George Williams and Keiran Hardy, 'National Security Reforms Stage One: Intelligence Gathering and Secrecy' (2014) *Law Society Journal* 68, 68.

²¹ Revised Explanatory Memorandum, *National Security Legislation Amendment Bill (No. 1) 2014* (Cth) 22.

²² Lange (1997) 189 CLR 520, [567]-[568] (The Court); Coleman (2004) 220 CLR 1, [50] (McHugh J); see also, Katherine Larsen and Julia Atcherley, 'Freedom of expression-based restrictions on the prosecution of journalists under state secrets laws: a comparative analysis' (2013) *Journal of International Media and Entertainment Law* 49, 52.

²³ Matthew Knott, "Freedom Commissioner Tim Wilson opposes new national security laws that could jail journalists" Sydney Morning Herald (online) 28 September 2014 <<http://www.smh.com.au/federal-politics/political-news/freedom-commissioner-tim-wilson-opposes-new-national-security-laws-that-could-jail-journalists-20140928-10n9bv.html>>. See also, Human Rights Watch, *World Report 2015*, (2015), 89; Department of Parliamentary Services (Cth), Bills Digest, No 19 of 2014-15, Parliamentary Library, Bill Digest, No 19, 2014-15, 28 August 2014.

no such public interest defence for authorised disclosure.²⁴ However, the AFP is subject to a more robust accountability framework, whereas ASIO is not a law enforcement body and its activities are largely kept secret.²⁵ In the explanatory memorandum, it was considered that sufficient scrutiny was afforded through the exception for disclosure to the Inspector General of Intelligence and Security (IGIS), who provides an independent review of the agency's operations.²⁶ While this exemption provides an important avenue for accountability, it leaves no avenue whatsoever to provide any information to the Australian public on ASIO's performance of its functions where there is a risk that such information relates to an SIO.

Secondly, the lesser offence under s 35P(1) has too broad a scope because there is no harm element. The prosecution has to prove that the accused was reckless as to whether the information related to an SIO, and consequently a person can face up to 5 years imprisonment for disclosure that does not endanger lives or prejudice the SIO operation.²⁷ It should be noted that a person would not be liable if they had no knowledge that the information disclosed related to an SIO, because the recklessness requirement would not have been made out.²⁸

A less restrictive alternative is to include a public interest exemption for the lesser offence of unauthorised disclosure. This alternative would afford the appropriate importance to the freedom of communication because it creates some space for public scrutiny of ASIO activities that relate to SIO, yet still provides sufficient

²⁴ Revised Explanatory Memorandum, *National Security Legislation Amendment Bill (No. 1) 2014* (Cth) 18; *Crimes Act 1914* (Cth) s15HK.

²⁵ Williams and Hardy, above n 21, 69.

²⁶ Revised Explanatory Memorandum, *National Security Legislation Amendment Bill (No. 1) 2014* (Cth) 7; ASIO Act s 35P(3)(f).

²⁷ Williams and Hardy above n 21, 68; Australian Broadcasting Corporation, Fact Check: Journalists face 10 years' jail for exposing security agency bungles (14 October 2014) <<http://www.abc.net.au/news/2014-10-14/journalists-face-jail-for-exposing-security-agency-bungles/5776504>>.

²⁸ Department of Parliamentary Services, above n 24, 30.

protection to those involved in SIOs because where there is such harm, either the greater offence under s 35P(2) may be made out, or the presence of the risk will counter the defence of public interest. Complete removal of the lesser offence, leaving only s 35P(2) may be less likely to achieve the legitimate goals (outlined above) because the prosecution may face difficulty in proving the additional elements of intended or actual risk to safety or prejudice of the SIO. Reducing the penalty for the lesser offence is also undesirable because it would create inconsistency with the penalty for disclosing information about ASIO warrants, which is also a maximum of 5 years.²⁹

4. *Appropriateness – balance of benefits and detriments*

The benefit of the lesser offence, as it stands, is that it provides broad protection to those participating in SIOs, preventing the disclosure of anything that may relate to such activities. Such protection, in general, is also a benefit to society at large because SIOs are conducted in the interests of national security.

However, in the absence of an exemption to the offence for public interest disclosure, there is a serious detriment to society generally because of the excessive restriction on the freedom of communication. The right to receive and impart information is intrinsically part of freedom of political communication,³⁰ and an informed public is necessary to true participation in democracy.³¹ The offence of unauthorised disclosure prevents journalists from performing the legitimate role of reporting misconduct or incompetence that has a substantial risk of relating to an SIO. While the prosecution may decide not to proceed with a charge because it is considered against the public interests, in the absence of such a defence, journalists and editors will likely adopt the default position of not publishing

²⁹ *ASIO Act* s 34ZS.

³⁰ *ICCPR* art 19(2).

³¹ Larsen and Atcherley, above n 23, 50.

information if there is a chance of it relating to an SIO.³² This restriction on reporting is even more detrimental in the context of the expanded ASIO powers in relation to SIOs, which includes immunity from civil and criminal liability.³³ Moreover, the restriction on communication will also be acutely felt by those individuals or communities who may be harmed due to misconduct relating to SIOs.

5. Conclusion

As it stands, the lesser offence of unauthorised disclosure under s 35P(1) is an excessive encroachment on freedom of political communication.

B. Unauthorised Communication of Protected Information

Amendments under the *National Security Legislation Amendment Act (No. 1) 2014* (Cth),³⁴ increases the maximum penalty from two to ten years for unauthorised communication of information acquired by ASIO or relating to the performance of its functions by a current or former ASIO employee or contractor.³⁵ The amendments also inserted the new offences of unauthorised dealing, including removing, copying or retaining, of intelligence information, and unauthorised recording of intelligence information.³⁶ Both carry a maximum penalty of three years imprisonment.

These offences restrict freedom of communication because they restrict the ability of employees and those in agreements or arrangements with ASIO from imparting information relating to its performance of its functions.

³² See, eg, Williams and Hardy, above n 21; *Australian Broadcasting Corporation*, above n 28; *Department of Parliamentary Services*, above n 24, 6; Elaine Pearson, 'Australia's counter-terrorism law will restrict our free speech and free press', *The Guardian* (online), 22 September 2014. <<http://www.theguardian.com/commentisfree/2014/sep/22/australias-counter-terror-laws-will-restrict-our-free-speech-and-free-press>>.

³³ *ASIO ACT* s 35K, as inserted by *National Security Legislation Amendment Act (No. 1) 2014* (Cth) sch 3.

³⁴ *National Security Legislation Amendment Act (No. 1) 2014* (Cth) sch 6.

³⁵ *ASIO Act* s 18(2).

³⁶ *ASIO Act* ss 18A, 18B.

1. *Is encroachment justified - application of the proportionality test*

2. *Suitability – legitimate goals?*

The purpose is to prevent the unlawful release of intelligence information by those with unique access to this information, which is necessary for national security and is therefore legitimate.³⁷ Again, it would not be a legitimate goal compatible with the representative and democratic government to use these provisions to avoid government embarrassment or weakened public trust (as mentioned above in 2.1.1).

3. *Necessity – less restrictive means available?*

The increased penalty for unauthorised communication may be overly restrictive for two key reasons.

Firstly, the s 18 offence carries no harm element, and in this way is similar to the offence of unauthorised communication by a Commonwealth officer, which carries a maximum penalty of only 2 years.³⁸ Additionally, the unauthorised communication of “official secrets”, which does require proof of intent to prejudice defence or security, only carries a maximum penalty of 7 years. However, the release of ASIO information may more dangerous to national security and therefore the higher penalty, without the harm element, may be a necessary deterrent, despite the limitation on the freedom of communication. The increase penalty also seems appropriate given that espionage offence carry a maximum penalty of 25 years imprisonment.³⁹

Given that the current offence is likely necessary to fulfil the purpose of protecting national security, the safeguards for whistle-blowers against liability must be

³⁷ Revised Explanatory Memorandum, *National Security Legislation Amendment Bill (No. 1) 2014* (Cth) 34.

³⁸ *Crimes Act 1914* s 70; see also, *Crimes Act 1914* s 79(3).

³⁹ Commonwealth, Parliamentary Debates, Senate, 16 July 2014, 5158 (George Brandis, Minister for Arts and Attorney General).

adequate. However, under the *Public Disclosure Act*, only internal public interests disclosure to the IGIS is permitted, which includes disclosure of conduct that was not in performance of its functions, was performed for improper purposes or resulted in danger to the people.⁴⁰ Disclosure beyond the IGIS is not permitted even if the disclosure has reasonable grounds to believe that the information concerns a “substantial risk to the health and safety of others.”⁴¹ Although this level of secrecy may sometimes, or even often, be necessary to protect the nation as a whole, given the nature of the information that ASIO deals with, the complete ban on public disclosure of any misconduct by ASIO is a serious limitation on freedom of political communication and deserves serious scrutiny in a democratic country.

4. Appropriateness – balance of benefits and detriments

Society seems to broadly benefit from ASIO’s ability to perform its functions expediently due to the absence of unauthorised disclosure of sensitive information by its employees and those working in agreements/arrangements with ASIO.

However, society at large is also disadvantaged by the complete restriction external public interest disclosure of any misconduct by ASIO because ASIO may effectively act, or be seen to act, with impunity, and we have no way to gauge how much to trust this organisation. The complete absence of external disclosure means that ASIO is essentially not accountable to the people it is supposed to protect, which has been given extensive powers and exemptions from liability for this very purpose.

5. Conclusion

While, for the most part, the restrictions on freedom of communication relating to disclosure of ASIO information is necessary and appropriate for national security, the complete restriction on external disclosure of conduct by ASIO by whistle-

⁴⁰ *Public Disclosure Act 2013 (Cth)* ss 10, 29, 33, 41.

⁴¹ *Public Disclosure Act 2013 (Cth)* s 26 item 3.

blowers within ASIO, who are best able to provide such information, is a serious detriment to a representative democracy. As such, possible provisions allowing for such disclosure, albeit under necessarily limited circumstances, must be seriously considered to justify this encroachment on the freedom of communication.

C. Control orders

The issuing of control orders by the courts under the *Criminal Code 1995*⁴² can be seen as to encroach on the right to freedom of communication. It was first introduced by the *Anti-Terrorism Act (No.2) 2005*,⁴³ and is now found in Division 104 of the *Criminal Code*.⁴⁴ A control order is an order issued by the court against a person that imposes obligations, prohibitions, and restrictions on them.⁴⁵ A person subject to a control order has their freedom restricted or moderated. This includes 'communicating or associating with certain people',⁴⁶ such as family members or close friends.

1. Is encroachment justified - application of the proportionality test

2. Suitability – whether the goal(s) is legitimate

The purpose of control orders is for 'protecting the public from a terrorist act'.⁴⁷ The general goal is to ensure the safety of the public by introducing pre-emptive crime control measures, such as control orders, as part of the government's counter-terrorism agenda. This can be viewed as a legitimate goal. Australia, in response to Resolution 1373 (a UN instrument to counter terrorism), stated that it had 'a highly coordinated domestic counter-terrorism response strategy incorporating law

⁴² *Criminal Code Act 1995* (Cth).

⁴³ *Anti-Terrorism Act (No.2) 2005* (Cth).

⁴⁴ Above n 43, Div 104.

⁴⁵ *Ibid* s 104.1

⁴⁶ Attorney-General's Department, *Control orders*, Australian Government

<<http://www.ag.gov.au/nationalsecurity/counterterrorismlaw/pages/controlorders.aspx>>.

⁴⁷ NSW Government, *NSW counter terrorism legislation* (27 October 2014) Secure NSW <<https://www.secure.nsw.gov.au/Legislation/NSW-counter-terrorism-legislation.aspx>>

enforcement, security and defence agencies'.⁴⁸ Accordingly, since 2002, Australia has had 'a number of preparatory terrorism offences'.⁴⁹ Control orders is one aspect of the various counter-terrorism legislation that go towards Australia's domestic 'preparedness'⁵⁰ in maintaining national security and protecting public safety from potential terrorism.

3. ***Necessity – less restrictive alternatives***

Although protecting public safety is necessary to the stability of Australia, there may be alternatives to the current scheme of court-issued control orders. One alternative is for the courts to consider 'the viability of a criminal prosecution'⁵¹ upon deciding whether to issue a control order. This is the process for the UK model of control orders, which will be later explained.

The Australian control orders scheme, despite being based on a 'claimed precedence' of the UK model, does not involve this process.⁵² Currently, under the Australian model, control orders do not necessarily mean that the person subject to the order is a terrorist. Nor do control orders mean that there is sufficient evidence to indict the person for terrorist activity. It can be issued against a person who may have had a history of training with an organisation that the government now deems as terrorist organisation.⁵³ It can also be issued if the court is satisfied, on a balance of probabilities that, in doing so, it 'substantially assists in preventing a terrorist attack'.⁵⁴

In contrast, the UK model of control orders is distinct from the Australian model. Under the UK's *Prevention of Terrorism Act 2005*, the Secretary of State, prior to issuing a control order, is required to consider whether the person's participation in

⁴⁸ Department of the Parliamentary Library, *Security Legislation Amendment (Terrorism) Bill 2002 [No.2]*, No 126 of 2001-02, 30 April 2002, 3.

⁴⁹ Bronwen Jagers, *Anti-terrorism control orders in Australia and the United Kingdom: a comparison*, No 28 of 2007-08, 29 April 2008, 17.

⁵⁰ Above n 49, 3.

⁵¹ Above n 50, 18.

⁵² Greg Carne, 'Gatehred intelligence or antipodean exceptionalism? Securing the development of ASIO's detention and questioning regime' (2006) 27(1) *Adelaide Law Review* 1-58.

⁵³ Above n 43, s 104.4(1)(c)(ii).

⁵⁴ *Ibid* s 104.4(1)(c)(i).

terrorism-related activities may have involved the commission of an offence relating to terrorism which is being investigated by the police force or will be likely to fall into investigation.⁵⁵ The Secretary is also required to consult the chief officer of the police force about whether there is sufficient evidence that can reasonably be used to prosecute the person for terrorism-related offences.⁵⁶

This additional process to issuing control orders is a safeguard for those whose rights and freedoms, including freedom of communication, may be restricted or curtailed by the courts without being proved beyond a reasonable doubt that they engage in terrorism-related offences. If this safeguard is to be adopted under the Australian counter-terrorism legislation, it would justify the use, and strengthen the vigour, of control orders. However, its limitation is that it may be cost and time-inefficient for the judiciary to take on an additional process.

4. Appropriateness – balancing benefits & detriments

The goal of ensuring public safety must be balanced with the implications on the individual whose rights to freedom of communication may be impinged on, due to a control order. To date, there have only been two cases in Australia relating to control orders: *Thomas v Mowbray*⁵⁷ and David Hicks case.⁵⁸ As such, because of limited precedents, there is little scope to examine, in practicality, the effectiveness of control orders at the expense of the individual. Nonetheless, it is still worth noting that there has not been much parliamentary debates around control orders.⁵⁹ Shortly after the *Anti-Terrorism Act (No.2)*⁶⁰ was enacted, the Eminent Jurists Council of the International Commission of Jurists stated:

Provisions permitting use of control orders are disquieting due to the wide range of conditions that can be imposed on the liberty, movement and

⁵⁵ *Prevention of Terrorism Act 2005*, s 8.

⁵⁶ *Ibid.*

⁵⁷ *Thomas v Mowbray* [2007] HCA 33.

⁵⁸ *Jabbour v Hicks* [2008] FMCA 178.

⁵⁹ Commonwealth, Parliamentary Debates, House of Representatives, 25 November 2014, 9168, 9177 (Penny Wright, David Leyonhjelm).

⁶⁰ Above n 44.

communication of a person subjected to the order, without any trial or charge.⁶¹

A control order punishes a person retrospectively for an act that may otherwise not have been prohibited under Australian law. As a result, a person subject to a control order is unable to communicate freely. This can last for a period of one year before the court decides to issue a successive order on that same person; thus making the control order indefinite.⁶² The ramification of this is that a person can potentially be subject to a control order indefinitely with little safeguards and no freedom to express themselves or to communicate with others.

5. Conclusion

In light of the social benefits of protecting the public and the potential detriments to the individual under a control order, we conclude that the detriment does not overtly outweigh the benefit. The fact that there have only been two cases to date that have arisen in challenging control orders also facilitates this conclusion.

D. Urging violence offences

The offences classified under ss. 80.2-80.2B of the *Criminal Code*,⁶³ referred to as the 'urging violence offences', can be seen as a detractor from the fundamental right to freedom of communication. Urging violence offences can be against the *Constitution* (s 80.2),⁶⁴ against groups (s 80.2A),⁶⁵ or against members of groups (s 80.2B).⁶⁶

Originally, in 2005, the *Criminal Code* was amended to include both treason and sedition as part of the government's counter-terrorism legislation.⁶⁷ However, in 2010, the *National Security Legislation Amendment Act*,⁶⁸ which implemented most

⁶¹ Eminent Jurists Panel on Terrorism, 'Counter-Terrorism and Human Rights' (Media Release, 17 March 2006).

⁶² Above n 43, s 104.5(2).

⁶³ Ibid s 80.2A-B.

⁶⁴ Ibid s 80.2.

⁶⁵ Ibid s 80.2A.

⁶⁶ Ibid s 80.2B.

⁶⁷ Above n 44.

⁶⁸ *National Security Legislation Amendment Act 2010* (Cth).

of the Australian Law Reform Commission's (ALRC) recommendations,⁶⁹ made a number of reforms to sedition laws. Most notably, the term 'sedition' was replaced by 'urging violence offences'.⁷⁰ Consequently, where the law stands now is that acts which constitute as urging violence (where the person who urges does so intending that force or violence will occur) is punishable for up to 7 years imprisonment.⁷¹

1. *Is encroachment justified - application of the proportionality test*

2. *Suitability – whether the goal(s) is legitimate*

The purpose of the urging violence offences is for maintaining peace, order, and good government ('POGG') of the Commonwealth.⁷² It prevents individuals from being encouraged to spread hatred or contempt towards the Commonwealth that could result in violence or anarchy. It is a legitimate goal because maintaining POGG is a fundamental aspect of our Australian Constitution; it justifies powers conferred to the legislative. Additionally, maintaining peace and order is crucial to any civil democratic society.

3. *Necessity – less restrictive alternatives*

Whilst it is necessary to have laws that prohibit a person from urging violence, the law must also be compatible with the fundamental value of freedom of communication. One method is to have the law framed in such a way so that it does not stifle or inhibit freedom of communication, differing public opinions, as well as alternative views presented by the media, the arts, and journalists. This requires an amendment to ss. 80.2-80.2B of the *Criminal Code*.⁷³ An additional section or a subsection can be added that recognises the right to freedom of communication and accommodates for healthy, robust political debate and

⁶⁹ ALRC, 'Fighting Words: A Review of Sedition Laws in Australia' (2006) 104 ALRC Report, 281-287.

⁷⁰ Above n 64.

⁷¹ Ibid.

⁷² Ibid 80.2A-80.2B.

⁷³ ALRC, above n 64.

discourse. Otherwise, an exception to the law can be made in circumstances such as for the arts or certain online public forums. This is similar to the defence in s 80.3 for 'acts done in good faith'.⁷⁴ By providing a specific section that acts as an exception to the law, recognising the importance of freedom of communication in certain instances, it is still likely to achieve the legitimate goals of maintaining POGG.

4. Appropriateness – balancing benefits & detriments

The main issue is whether there is a need for 'urging violence offences'. On one hand, it is vital that Australia has domestic laws in place for ensuring POGG, especially during periods of political election. On the other hand, the need to maintain POGG for the wider public must be balanced with a law that is compatible with Australia's liberal democratic system. A law like the 'urging violence offences' creates a 'chilling effect',⁷⁵ similar to that of its predecessor (sedition laws). A 'chilling effect' occurs when the law 'chills' 'free artistic expression by forcing artists and authors to engage in self-censorship or risk facing prosecution'.⁷⁶

A comparison can be drawn to Singapore's sedition laws that impinge on freedom of communication. The *Sedition Act of the Statutes of Singapore* stipulates that any acts, tendencies, or statements which can be construed as to bring 'hatred or contempt or to excite disaffection' against the government are punishable under this Act.⁷⁷ The adverse implication is that it bans public discussion (including on the internet) on most matters of race, religion, or sexuality, as well as vocal and direct criticism of the government.⁷⁸ What this translates to, in reality, is that not every political topic is acceptable in public discourse. However, what constitutes as acceptable is not specifically defined in what is known by Singaporeans as the 'out

⁷⁴ Ibid s 80.3.

⁷⁵ Symposium, 'UWS Symposium: Sedition, free speech and the war on terror' (2007) *ALRC Report*.

⁷⁶ Above n 70, 161 [7.91].

⁷⁷ Sedition Act (Singapore, cap 290, 1985 rev ed) s 3.

⁷⁸ InterNations, 'Limitations of Civil Freedoms in Singapore', InterNations Worldwide <<http://www.internations.org/singapore-expats/guide/16087-safety-security/limitations-of-civil-freedoms-in-singapore-16091>>

of bounds markers'.⁷⁹ Thus, journalists opt for self-censorship.⁸⁰ One example is internet censorship, where the Singaporean Media Development Authority monitors and regulates internet usage.⁸¹

Likewise, in Australia, the current 'urging violence' laws provide 'inadequate protection to established media organisations in carrying out their functions of news reporting and the dissemination of bona fide comment on matters of public interest'.⁸² This is seen as incompatible with the Australian system of liberal democracy. In Australia, freedom of communication is 'the foundation of community and democracy – without which open political process becomes impossible'.⁸³

5. Conclusion

Based on the above, it appears that the limitations of having 'urging violence offences' outweigh the benefit of maintaining POGG. Therefore, we conclude that the laws which govern ss. 80.2-80.2B are disproportionate and are a detriment to the freedom of communication principle.

E. Advocating Terrorism

Amendments in 2014 added the offence of "advocating terrorism", which is committed if a person "counsels, promotes, encourages or urges" the doing of a terrorist act and is reckless as to whether another person will engage in a terrorist act or offence.⁸⁴ The offence does not require that another person to actually carry out a terrorist act. The penalty is a maximum 5 years.

This new offence encroaches on the freedom of political communication for a number of reasons. The concept of terrorism is largely undefined, or at least, hotly contested. As a result determining whether material 'counsels, promotes,

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Above n 70, 140 [7.5].

⁸³ Commonwealth, *Parliamentary Debates, Senate*, 5 December 2005, 89 (Rachel Siewert).

⁸⁴ *Criminal Code 1995* (Cth) s 80.2C, as inserted by Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth) sch 1 s 61.

encourages or urges' terrorism would be based on a judgment or assessment which could be speculative or coloured by political bias and views.

1. *Is encroachment justified - application of the proportionality test*

2. *Suitability – whether the goal(s) is legitimate*

The new offence was created in response to the threat posed by “foreign fighters”, those returning from Syria and Iraq with radicalised ideologies, including violent extremism.⁸⁵ The new offence also closes a gap in Australian counter-terror laws because it applies to individuals who advocate terrorism, whereas pre-existing laws only criminalised advocacy by organisations.⁸⁶ This goal of preventing the commission of local terrorist acts is legitimate, especially given the recent one-man siege in Sydney.

3. *Necessity – less restrictive alternatives*

The necessity of the new offence has been questioned given that the pre-existing “urging violence” and incitement offences would seem to cover most situations where a person “urges” a terrorist act.⁸⁷ However, both “urging violence” and incitement offences require proof of intention that the force or violence will occur, whereas the new offence of “advocating terrorism” is intended to respond to more general statements, possibly made by a person in a position of influence, which pose an unacceptable risk of resulting in terrorist activity.⁸⁸ Thus, the pre-existing offences may not in practice be adequately cover the type of comments that the new offence seeks to respond to.

⁸⁵ Revised Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth) 2.

⁸⁶ Commonwealth, Parliamentary Debates, Senate, 24 September 2014, 7001 (George Brandis, Attorney-General and Minister for Arts); See Criminal Code 1995 (Cth) s102.1(1A).

⁸⁷ Chris Berg, ‘The redundancy of new anti-terrorism laws’ *The Drum* (online) 30 September 2014 <<http://www.abc.net.au/news/2014-09-30/berg-the-redundancy-of-new-terrorism-laws/5778076>>; Jason Om, ‘Second phase of Government’s anti-terror measures could endanger freedom of speech, human rights advocates say’, Australian Broadcasting Corporation (online), 17 October 2014 <<http://www.abc.net.au/news/2014-10-17/5820558>>.

⁸⁸ Revised Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth) 127.

That said, the wording of the new offence does unnecessarily restrict freedom of political communication because the definition of “advocating” includes “promoting” and “encouraging” terrorism, which could apply to those expressing diverse view points on various international conflicts, such as those expressing support for rebel efforts against totalitarian regimes.⁸⁹ Similar concerns have been raised in the UK regarding a similar offence of “encouraging terrorism”, which was enacted after the London bombing in 2006. The UK offence prohibits the publication of “a statement that is likely to be understood by some or all the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism.” The broadness of the terms, like the Australian offence, raise the issue of determining when a statement is actually “promoting” or “encouraging” terrorist offences, given that reasonable people will disagree as to whether a comment is merely an explanation or expression of understanding or whether it goes further to promote, praise or glorify.⁹⁰

The offence does provide some limited protection for freedom of communication through the “good faith” defences, which includes good faith reporting or commentary on a matter of public interest.⁹¹ However, while this defence may cover academic and media discussion of terrorism and extremist ideologies, it does not specifically apply to artistic, comedic or satirical depictions of terrorism.⁹²

Thus, as concluded above with regards to the “urging violence” offence, the defence to “advocating terrorism” should be clarified to include forms of expression outside media and strictly academic discussion, and such an amendment should

⁸⁹ George Williams and Keiran Hardy, “National Security Reforms Stage Two: Foreign Fighters” (2014) *Law Society Journal* 69.

⁹⁰ Adrian Hunt, “Criminal prohibitions on direct and indirect encouragement of terrorism” (2007) *Criminal Law Review* 441, 450.

⁹¹ *Criminal Code 1995 (Cth)* s 80.3(f).

⁹² Williams, above n 89, 220.

not overly inhibit the purpose of the law to prevent those communications that do pose a substantial risk of causing terrorist activity.

4. *Appropriateness – balancing benefits & detriments*

The law benefits society at large because it is designed to respond to a growing threat to national security of local radicalisation. Given that the definition of a terrorist act includes acts that cause harm or death, endanger lives, or create a serious risk to public safety, preventing people from advocating such acts, rather than responding to them after the facts is a significant advantage. In theory, general online comments about terrorism or depictions, for example in films, of terrorists could influence susceptible people to commit or copy such acts in Australia. Thus providing only a limited defence of “good faith acts” allows police to enforce broader restrictions on speech to prevent even slight chances of such influence, which, in theory, would further protecting society.

However, the limitation on the freedom to communication about terrorism is also a serious detriment to society because it restricts important expressions and opinions about international conflicts, which would further the discourse surrounding these significant political happenings. The law could become particularly detrimental to those who propose views that are different from the majority or those who seek to challenge majority assumptions about international situations.

5. *Conclusion*

While the law does play an important role in responding to the threat of local radicalisation and terrorism, as it stands, it poses an unjustified encroachment on the freedom of communication on this topic, and the defence of “good faith” needs to be clarified as outlined above to remedy this encroachment.



F. s 18C of the Racial Discrimination Act 1975 (RDA)

Section 18C of the RDA is a civil law provision which makes it unlawful to do an act in public that is 'reasonably likely to offend, insult, humiliate, or intimidate another person or a group of people' on the basis of 'race, colour or national or ethnic origin of that person or group'.⁹³ The provision seeks to balance the right to freedom from racial discrimination and freedom of political communication.

1. Is encroachment justified - application of the proportionality test

2. Suitability – whether the goal(s) is legitimate

The law serves two legitimate goals. Firstly, it protects certain individuals or groups from being the target of racial discrimination. Secondly, it protects society as a whole by promoting social cohesion and the spirit of multiculturalism. The law was enacted as part of Australia's obligation, as a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination, to prohibit the advocacy of national racial or religious hatred that constitutes incitement to discrimination, hostility or violence.⁹⁴

3. Necessity – less restrictive alternatives

The reason some consider the provisions too restrictive on the freedom of communication is because of the potentially extensive scope of the words "offend" and "insult".⁹⁵ However, s18C does not operate based on the subjective feelings of

⁹³ *Racial Discrimination Act 1975* (Cth) s 18C.

⁹⁴ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 4(a).

⁹⁵ Anthony Gray, 'Racial Vilification and Freedom of Speech in Australia and Elsewhere' (2012) 41 *Common Law World Review* 167, 171.

the complainant, but is based on community standards of behaviour.⁹⁶ That said, in practice this standard has not been consistent and has resulted in value-laden decisions by judges and administrators. This inconsistency could be rectified by redefining the harm threshold to acts with “profound and serious effects”, as distinct from “mere slights”.⁹⁷

Aside from this possible clarification of the terms, s18C is the least onerous law that can protect the right to freedom from racial discrimination while preserving the freedom of communication.

Firstly, s18D provides an express exemption for freedom of communication, protecting acts that are done “reasonably and in good faith”, whether: performance or artistic work; statements, publications or debates held for academic, scientific or other genuine public interests purposes; or in fair comment in reporting or as an expression of a genuinely held belief on a matter of public interest.⁹⁸ Such an exemption was found to apply in relation to a comedy performance by a non-indigenous person portraying indigenous people as drunk, dirty and unable to speak English.⁹⁹ The term “good faith” has been consistently interpreted as the absence of “spit, ill-will or other improper purposes”.¹⁰⁰ Cases where the communications were found not to be in good faith include where they were based on erroneous or distorted truths,¹⁰¹ or were based on sensationalist feelings lacking factual basis.¹⁰²

⁹⁶ Marie Iskander, ‘Balancing Freedoms and Creating a Fair Marketplace of Ideas: The Value of 18C of the *Racial Discrimination Act*’ (2014) 8(10) *Indigenous Law Bulletin* 19, 20.

⁹⁷ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356 (Kiefel J), quoted in Dan Meagher, ‘So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia’ (2004) 32 *Federal Law Review* 225, 228.

⁹⁸ *Racial Discrimination Act 1975* (Cth) s 18D.

⁹⁹ *Kelly-Country v Beers & Anor* [2004] FMCA 336 (21 May 2004).

¹⁰⁰ Meagher, above n 97, 250.

¹⁰¹ *Eatock v Bolt* (2011) 283 ALR 505, 601-602, quoted in Katherine Gelber and Luke McNamara, ‘Freedom of Speech and Racial Vilification in Australia: “The Bolt case” in public discourse’ (2013) 48(4) *Australian Journal of Political Science* 470.

¹⁰² *Jones v Scully* (2002) 120 FCR 243, 286 (Hely J).

Secondly, the provision does not create a criminal offence.¹⁰³ Instead, it provides that a person may lodge a complaint with the Australian Human Rights Commission ('AHRC'), which will then investigate the complaint and will look at informal dispute resolution. Only if the matter is not resolved by the AHRC will the complainant be able to take the matter to court to seek, for example, damages, an injunction or apology.¹⁰⁴ Between 2012 and 2013, 53 per cent of all complaints were resolved by the AHRC at conciliation, while less than three per cent went to court.¹⁰⁵ Importantly, this conciliation process does not determine if the act complained of was unlawful, but instead tries to resolve the issue between both sides. In one instance, a complaint about a cartoon that allegedly vilified Aboriginal people was resolved with the cartoonist agreeing to visit the complainant's community to listen to its members and teach the children how to draw cartoons.¹⁰⁶ Some have argued that education and government policies aimed at bringing communities together are more constructive alternatives than legal provisions for protecting people against racial discrimination.¹⁰⁷ However, as demonstrated with the example above, the emphasis on informal complaint resolution, without attributing fault, does in fact do both these things, because the process targets the groups in conflict and brings them together wherever possible. In this manner, the practical application of s18C contributes to deepening debate about race and multiculturalism in Australia.

4. Appropriateness – balancing benefits & detriments

¹⁰³ Distinguish from Canadian discrimination law, which creates an indictable offence for "communication statements, other than in private conversation, [which] wilfully promotes hatred against any identifiable group": See Gray, above n 95, 179.

¹⁰⁴ Australian Human Rights Commission, *The Complaints Process for Complaints about sex, race, disability and age discrimination* <<https://www.humanrights.gov.au/complaint-process-complaints-about-sex-race-disability-and-age-discrimination#Heading31>>.

¹⁰⁵ Australian Human Rights Commission, *At a Glance: Racial Vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)* (12 December 2013) <<https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth>>.

¹⁰⁶ *Ibid.*

¹⁰⁷ Gray, above n 95, 192.

Section 18C benefits society by responding to the societal and psychological harm that has been proven to result from racial hatred.¹⁰⁸ Further, the provision helps prevent the seemingly low-level racist behaviour that can lead to more severe harassment or intimidation, as seen in the Cronulla Riots in 2005. The inclusion of the provision in our laws also stands as a statement of our societal values in general. Indeed, 88 per cent of people polled by Fairfax last year and 76 per cent of the 5000 submissions made regarding the proposed changes to the law, stated that it should remain unlawful to offend, insult or humiliate people on the basis of race.¹⁰⁹ Furthermore, the provision specifically benefits minority groups, by proscribing unnecessarily racist speech, which helps prevent discouragement from political discourse and thus enhances participation in our representative democracy.¹¹⁰ While some argue that racist behaviour should not be regulated by the law, but rather debated in the public arena, the prohibition on unnecessary racist remarks acknowledges that not everyone has equal access to public debate and the reproduction of dominant knowledge in society.¹¹¹

Given that s 18D expressly protects the freedom of communication in relation to artistic and academic communications in the public interest, the main detriment to the freedom is that it prevents people from offensive remarks on the grounds of race, which serve no useful purpose in society. Some argue that the law attempts to “civilise debate”, which is not a legitimate purpose,¹¹² however, as noted above, s18C does more than that, as it responds to the harms that are caused by racial vilification.

¹⁰⁸ The sections of the *Racial Discrimination Act* were introduced in response to recommendations from various inquiries including *the National Inquiry into Racist Violence* and the *Royal Commission into Aboriginal Deaths in Custody*: See *Australian Human Rights Commission*, above n 105.

¹⁰⁹ Tim Soutphommasane, ‘Racial Vilification Law Unites Australians’ (2014) 39(3) *Alternative Law Journal* 150.

¹¹⁰ Iskander, above n 96, 20.

¹¹¹ Gelber and McNamara, above n 101, 471.

¹¹² Gray, above n 96, 186; see also, Coleman 2004) 220 CLR 1.

5. Conclusion

The provisions against racial discrimination in s 18C do not unjustly encroach upon the freedom of political communication, but instead strike the appropriate balance between that freedom and the freedom from racial discrimination.

4 - 1 FREEDOM OF ASSOCIATION – GENERAL PRINCIPLES

Question 4-1 What general principles or criteria should be applied to help determine whether a law that interferes with the freedom of association is justified?

The right to freedom of association is essential for people to freely express their opinions, participate in economic, cultural and social activities and partake in the election of government leaders.¹¹³ The role of freedom of association as a vehicle for exercising a number of human rights is essential in a democratic society. However, its classification as a qualified right enables law-making bodies to overturn the prescribed right if it infringes, or threatens to infringe upon the rights of a person or group of people, a particular concern within the Australian context. This is also common in many jurisdictions.¹¹⁴ Although the right to freedom of association can be limited for the purposes of national safety and security, Australian legislation relating to terrorism, criminal organisations and migration are too restrictive on this freedom. International human rights instruments provide for a right to freedom of association, however, cannot act as a safeguard to override the provisions of domestic legislation in Australia.

The aim of the Freedoms Inquiry is to investigate whether the objectives and enforcement of Commonwealth laws in Australia justifiably compromise citizens'

¹¹³ UN Human Rights Council, *The Rights to Freedom of Peaceful Assembly and of Association*, A/HRC/RES/15/21, 15th Session, 06/10/2010.

¹¹⁴ *International Covenant on Civil and Political Rights*, GA Res2200A (xxi); *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

ability to exercise the fundamental right to freedom of association. In order to achieve this, a set of criteria must be established and applied accordingly. This assessment is composed of the Australian proportionality test,¹¹⁵ the Canadian proportionality test,¹¹⁶ and provisions outlined in the International Covenant on Civil and Political Rights (ICCPR).

A. Australian Proportionality Test

In Australia, the key principle used to determine whether a law that interferes with freedom of association is justified is the principle of proportionality. This is derived from the second limb of *Lange v Australian Broadcasting Company*.¹¹⁷ The principle of proportionality has three components. These are: suitability, necessity and appropriateness.¹¹⁸

1. Suitability

Suitability is the idea that the law that impinges on a right or freedom must be suitable in pursuing a 'valid legislative objective'.¹¹⁹ This also involves considering the 'probable effectiveness' of the legislation.¹²⁰ Most laws often pursue a valid legislative objective therefore this first component is quite broad and easy to establish.¹²¹

2. Necessity

¹¹⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Rowe & Anor v Electoral Commissioner & Anor* [2010] HCA 46; *Monis v The Queen* [2013] HCA 4.

¹¹⁶ *R v Oakes* [1986] 1 SCR 103, 105.

¹¹⁷ The first limb of the test is whether the law effectively burdens the right or freedom: *Lange v Australian Broadcasting Company* (1997) 189 CLR 520, 567-8 (The Court) quoted in Anthony Gray, 'Freedom of Association in the Australian Constitution and the Crime of Consorting' (2013) 32(2) *University of Tasmania Law Review* p. 182.

¹¹⁸ *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 140-141[460].

¹¹⁹ *Monis v The Queen* (2013) 249 CLR 92, 193-194[280] (Crennan, Kiefel and Bell JJ).

¹²⁰ *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 141[462] (Kiefel J).

¹²¹ *Ibid.*

The test of necessity builds on the test of suitability by considering whether there is 'other, less drastic means of achieving a legitimate objective'.¹²² These other means must be equally as practicable and available as the law in question.¹²³ If there are other means that are 'obvious and compelling', then the Act should be called into question.¹²⁴

3. *Appropriateness or Strict Proportionality*

The final component of the proportionality test is to consider whether the law is reasonably appropriate and adapted to achieving its legitimate purpose or end.¹²⁵ In determining whether the law is reasonably appropriate, it must be considered whether it is consistent with the maintenance of the constitutionally prescribed representative government.¹²⁶ In other words, the law must not be disproportionate or arbitrary.¹²⁷ To be put differently, this third component requires a consideration of whether the law imposes too great a burden upon the implied freedom by the means it employs.¹²⁸ If the detriment of the law in practice is disproportionate to the benefit that the law offers, then the law should be considered invalid because its net effect will be antagonistic.¹²⁹

In order to further refine the Australian test to meet the specific considerations of 'freedom of association', we will also look at Canadian considerations of proportionality as well as the grading scale used by the *International Covenant on Civil and Political Rights (ICCPR)* to determine the importance of this right.

¹²² *Lange v Australian Broadcasting Company* (1997) 189 CLR 520, 568 (The Court) cited in *Monis v The Queen* (2013) 249 CLR 92, 214[347] (Krennan, Kiefel and Bell JJ).

¹²³ *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 306 cited in *Monis v The Queen* (2013) 249 CLR 92, 214[347] (Krennan, Kiefel and Bell JJ).

¹²⁴ *Monis v The Queen* (2013) 249 CLR 92, 214[347] (Krennan, Kiefel and Bell JJ).

¹²⁵ *Lange v Australian Broadcasting Company* (1997) 189 CLR 520, 567-8 (The Court) quoted in Anthony Gray, above n 95,182.

¹²⁶ *Ibid.*

¹²⁷ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199[85] (Gummow, Krennan and Kirby JJ) cited in *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 59[161] (Gummow and Bell JJ).

¹²⁸ *Monis v The Queen* (2013) 249 CLR 92, 152[140] (Hayne J).

¹²⁹ *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 20-21[25] (French CJ).

We believe that freedom of association is an important civil right; however in many jurisdictions¹³⁰ it is qualified so that it may be infringed for the purposes of safety and security. Although freedom of association can be limited in this way, we believe that the Australian legislation relating to terrorism, criminal organisations and migration are too restrictive of this freedom.

B. Canadian Proportionality Test and Freedom of Association

In addition to using the Australian proportionality test, we will utilise elements of the Canadian proportionality test as they provide context for our discussion of the boundaries of freedom of association. Our reasons for looking at the Canadian test are twofold. Firstly, Canada's political structure is similar to that of Australia in having a representative, liberal-democratic government. Secondly, Australia's approach to the freedoms of association and speech are more closely aligned to that of Canada than other jurisdictions such as the United States.

In particular, we will examine the Canadian requirements that the objective of a law must be, 'pressing and substantial,'¹³¹ to society and also must be, 'rationally connected,'¹³² to the limitation of the right. Laws that restrict freedom of association, in particular those relating to terrorism and criminal organisation, are often implemented in response to current and immediate threats posed by a particular group and are thus, 'pressing,' for society. Rarely, however, is a long-term view taken that considers the effect of legislation on other groups within society or how it can be amended to remain, 'substantial,' and 'relevant to

¹³⁰ *Canadian Charter of Rights and Freedoms*, c 11, sch B pt I.

¹³¹ *R v Oakes* [1986] 1 SCR 103, 105.

¹³² *Ibid.*

changing conditions.¹³³ A key example of this dilemma is the conviction of Charlie Foster under the *New South Wales (NSW) Bikie laws*,¹³⁴ despite his not being a member of a Bikie gang, not associating with them.

Furthermore, the requirement for there to be a, 'rational connection,' between the objectives of the law and the need to infringe the right is particularly relevant to Australian association laws, given that the evidence regarding the effectiveness of such legislation is highly disputed amongst scholars. Whilst association laws have been thought to reduce crime owing to the fact that they prevent communication and planning, there have also been instances where anti-association laws have had the opposite effect as in Canada, where following the introduction of legislation to ban Bikie clubs there was a proliferation in ethnic gangs.¹³⁵

C. International Covenant on Civil and Political Rights (ICCPR)

Again, to illustrate the how the boundaries freedom of association are fluid and able to be infringed to a certain extent, we will also examine the approach in the ICCPR, whereby rights are graded in terms of their relative importance. We believe it is crucial to include the ICCPR in our discussion on freedom of association given that it has been enshrined in the *Human Rights (Parliamentary Scrutiny) Act* and is a significant reflection of international standards for limiting rights and freedoms. The grading system used in the ICCPR can be contrasted to the reasonable limits clause in the *Canadian Charter of Rights and Freedoms*¹³⁶ which allows all rights to be limited to an extent which is, 'demonstrably justified in a free and democratic

¹³³ Allison Maston Danner and Jenny S Martinez, 'Guilty Association: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93(1) *California Law Review* 75, 132.

¹³⁴ Sean Rubinsztein-Dunlop, 'Disabled man's jailing angers consorting law critics', *Australian Broadcasting Corporation (Online)*, 12 November 2012, <http://www.abc.net.au/news/2012-07-12/disabled-mans-jailing-angers-consorting-law-critics/4127194>.

¹³⁵ Rick Sarre, 'Combatting serious and organised crime by attacking its associates: will it work?' (2012) 112 *Precedent* 15, 18.

¹³⁶ *Canadian Charter of Rights and Freedoms* pt I s 1.

society.' This contrast will allow us to consider the extent to which a person's freedom of association may be infringed upon by exploring the relative weight given to the freedom itself in various jurisdictions.

Although freedom of association is a qualified right, as is recognised in the *Canadian Charter of Rights and Freedoms* and the ICCPR, we do not believe that given the substantial detriments and limited benefits of the legislation, that its infringement of freedom of association is justified.

4 - 2 FREEDOM OF ASSOCIATION – APPLICATION

Question 4-2 Which Commonwealth laws unjustifiably interfere with the freedom of association, and why are these laws unjustified?

A. Terrorism Legislation

Counter-terrorism legislation in Australia has gone beyond prohibiting direct acts of terrorism. The provisions outlined in the *Criminal Code Act*,¹³⁷ *Security Legislation Amendment (Terrorism) Act*,¹³⁸ and *Anti-Terrorism Act (No. 2)* raise concerns with the violation of the right to freedom of association.¹³⁹

1. Suitability

The aims of the abovementioned counter-terrorism legislation are primarily to ensure those responsible for terrorist attacks are prosecuted and that emerging threats to national security are prevented.¹⁴⁰ Given that the counter-terrorism legislation and amendments to the Criminal Code were introduced to address the

¹³⁷ *Criminal Code Act 1995* (Cth).

¹³⁸ *Security Legislation Amendment (Terrorism) Act 2002* (Cth).

¹³⁹ *Anti-terrorism Act (No.2) 2005* (Cth).

¹⁴⁰ Commonwealth, Parliamentary Debates, House of Representatives, 3 November 2005, 102 (Philip Ruddock, Attorney-General).

global concern of terrorism following the events of September 11, 2001;¹⁴¹ their purpose must also be noted within the context of stopping association with terrorist organisations. At face value, the aim of reducing the number of people associating with terrorist organisations appears legitimate. However, targeting individuals to achieve this may not be the most suitable approach. For example, the extent to which an individual's association with a terrorist organisation amounts to terrorist activity occurring is unclear. This is evident in the case of Mohamed Haneef, in which he was falsely accused of supporting a terrorist organisation and had his Australian visa cancelled 'on the grounds that his SIM card was connected to failed terrorist attacks in Britain'.¹⁴² It is therefore important to understand that mere association with a terrorist organisation may not be intentional and is not directly linked to the planning and execution of an attack. Despite the legitimacy of the broad aims of counter-terrorism laws in Australia, it is debatable whether targeting individuals by criminalising association with terrorist organisations is effective and appropriate.

2. *Necessity*

There are two main alternatives which should be considered regarding whether the counter-terrorism legislation in Australia is necessary to achieve the abovementioned objectives.

The first suggestion is to change the definition of 'terrorist act' in legislation to meet standards of clarity and accessibility outlined in Article 19 of the ICCPR.¹⁴³ The main advantage to this approach is that the adoption of a more holistic definition enables individuals to enjoy the fundamental rights outlined in the ICCPR without triggering excessive responses to public order offences, which may be

¹⁴¹ Sarah Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' [2004] *UNSW Law Journal* 29, 428.

¹⁴² Mark Rix, 'The Case of Dr Mohamed Haneef: An Australian Terrorism Drama With British Connections' [2009] *Plymouth Law Review* 2, 126, 127.

¹⁴³ *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), 21 UN GAOR, Supp No 16 at 52, UN Doc A/6316 (19 December 1966, adopted 23 March 1976), (*International Covenant on Civil and Political Rights*)

misidentified as a terrorist threat.¹⁴⁴ Aspects of Australia's counter-terrorism legislation, including the revised definition of 'terrorist act' in the *Criminal Code* following the changes made by the *Security Legislation Amendment (Terrorism) Act*,¹⁴⁵ have been criticised for containing 'inadequate safeguards'¹⁴⁶ against prospective human rights violations. A revision of the current definitions and diversion from the current 'selective enforcement'¹⁴⁷ will ensure that a 'broad brush definition'¹⁴⁸ will not be applied to domestic or international affairs and that the existing legislation remains compliant with human rights instruments.

Another proposition to the counter-terrorism legislation in Australia would be to not use control orders as a preventative measure for associating with a terrorist organisation.¹⁴⁹ The benefit of this amendment is that it would be less restrictive on freedom of association than the current legislation, owing to the fact that an individual cannot be detained for merely associating with an organisation. A similar standard was enforced in the United Kingdom following the finding of the indefinite detention of prisoners without trial incompatible with human rights provisions in international instruments.¹⁵⁰ Changes to laws in relation to the enforcement of control orders would focus on a narrower group of people by applying to those who explicitly support and partake in the activities of a terrorist organisation, in contrast to general anti-association provisions, which can potentially be used to wrongfully detain individuals.

3. Proportionality

¹⁴⁴ Article 19, 'Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter Terrorism and Human Rights', *The Impact of UK Anti-Terror Laws on Freedom of Expression*, April 2006, 3.

¹⁴⁵ *Criminal Code Act 1995* (Cth); *Security Legislation Amendment (Terrorism) Act 2002* (Cth).

¹⁴⁶ Australian Human Rights Commission (AHRC), *A Human Rights Guide to Australia's Counter-Terrorism Laws*, 2008, <https://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws>.

¹⁴⁷ Aidan Ricketts, 'Freedom of association or guilt by association: Australia's new anti-terrorism laws and the retreat of political liberty' (2002) 6, *Southern Cross University Law Review* 133, 143.

¹⁴⁸ *Ibid* 142.

¹⁴⁹ Cat Barker, 'Counter-terrorism and national security legislation reviews: a comparative overview' (Research Paper Series 2014-2015, Parliamentary Library, Parliament of Australia, 2014) 5.

¹⁵⁰ *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

3.1 *Social benefit of law in pursuing objective*

One key advantage of maintaining anti-association provisions in counter-terrorism legislation is that they are a mechanism for lessening the immediate threat of terrorism in Australia and abroad by Australians. Despite the inevitable nature of counter-terrorism laws being at odds with the protection of human rights, it is important to understand that the preservation of national security through the enforcement of such legislation can in fact uphold the aims of protecting political liberties.¹⁵¹ Ruddock argues that the listing of terrorist organisations can act as a deterrent for Australians becoming involved and gives law enforcement agencies a greater geographical scope of imposing the laws.¹⁵²

3.2 *Social detriment of law in pursuing objective*

One of the main detriments of Australian counter-terrorism legislation is the provisions in s102.8 of the *Criminal Code*.¹⁵³ This section criminalises an individual's association with a terrorist organisation, which can have a widening impact on the number of people affected based on the definition of 'associate' in subsection 102.1(1)¹⁵⁴ as "meeting or communicating with the other person".¹⁵⁵ Given the global nature of online communication, this provision gives rise to a number of offences being committed within the scope of the legislation, despite Article 17 of the ICCPR suggesting that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence'.¹⁵⁶

¹⁵¹ Philip Ruddock, 'A new framework: counter-terrorism and the rule of law' [2004] 2 *The Sydney Papers* 112, 117.

¹⁵² *Ibid* 118.

¹⁵³ *Criminal Code Act 1995* (Cth) s 102.8.

¹⁵⁴ *Criminal Code Act 1995* (Cth) s102.1(1).

¹⁵⁵ Christopher Michaelsen, 'Antiterrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat?' [2005] 28 *Studies in Conflict & Terrorism* 321, 328.

¹⁵⁶ *International Covenant on Civil and Political Rights*

Despite human rights being central to the operation of 'modern western liberal democracies', it is not guaranteed that such rights are safeguarded when exercising national security legislation.¹⁵⁷ Ruddock describes the conflict between maintaining human rights and exercising counter-terrorism legislation as a 'dichotomy of concerns to be balanced against the other'.¹⁵⁸ It is interesting to note the conflict of interest between maintaining national security and ensuring the civil liberties of citizens and the profound impact of freedom of association. In the Australian context, it is clear that infringing on the right to freedom of association to the extent of the provisions outlined in the *Criminal Code* and other counter-terrorism laws are not necessarily beneficial to society. While the need to do so is debatable, the way in which laws are written and applied need to be changed to ensure a balanced approach is achieved.¹⁵⁹

B. Criminal Association and Consorting Legislation (Part 9.9 Criminal Code 1995 (Cth))

1. Suitability

The aim of Part 9.9 is primarily to prevent crime by quashing the means through which communication and planning of criminal activity occurs.¹⁶⁰ Given that these provisions were introduced within a package of legislation addressing unexplained income,¹⁶¹ their purpose must also be seen within this context of stopping criminal association to prevent unexplained income and profit. On face value, the goal of reducing crime rates and unexplained income appears legitimate. However, targeting criminal associations to achieve this aim may not be the most suitable

¹⁵⁷ Ben Golder and George Williams, 'Balancing national security and human rights: assessing the legal response of common law nations to the threat of terrorism' (2006) 8(1) *Journal of Comparative Policy Analysis* 43, 44.

¹⁵⁸ Ruddock, above n 151, 116.

¹⁵⁹ Golder and Williams, above n 157, 44.

¹⁶⁰ Commonwealth, Parliamentary Debates, House of Representatives, 24 June 2009, 6964 (Robert McLelland, Attorney-General).

¹⁶¹ *Ibid.*

method. For instance, the extent to which organised crime contributes to unexplained income is unclear. This is evident in cases such as *Regina v Walsh and Little*¹⁶² in which members of outlawed motorcycle gangs were involved in illicit drug production, yet this was entirely separate to their group membership. Moreover, it is important to recognise that not all crime is organised and thus the extent of the legislation's effect on reducing income derived from crime may be limited.¹⁶³ Although the broad aim of the legislation is legitimate, it is questionable whether targeting unexplained income through criminalising association is effective and suitable.

2. Necessity

There are two main alternatives which can be considered in relation to whether Part 9.9 is necessary to achieve the aims discussed above.

The first alternative is to target group leaders, rather than focusing on group membership.¹⁶⁴ The key advantage to targeting the leaders of criminal organisations is that it is far less restrictive on freedom of association, in that the scope of people affected by the legislation is reduced. Furthermore, Section 390.6 already contains an offence for 'directing activities of a criminal organisation.'¹⁶⁵ As such, it would be highly practicable to implement such an alternative. It may, however, be more effective to incorporate a specific element of directing activities relating to unexplained profit, so as to fulfil the fundamental purpose of the legislation more effectively. Although targeting the leaders of criminal organisations is certainly an alternative to pursuing the members generally, it is important to note that the conviction of an organisation's leader may neither ensure the collapse of the organisation, nor prevent another leader taking their place. This was evident in

¹⁶² *Regina v Walsh and Little* [2005] NSWSC 125.

¹⁶³ Michael Levi and Mike Maguire, 'Reducing and Preventing Organised Crime: An evidence-based critique' [2004] *Crime, Law and Social Change* 397, 399.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Criminal Code Act 1995* (Cth) s 390.6.

Canada where legislation was introduced to outlaw motorcycle gangs; however this resulted in an influx of ethnic and street gangs.¹⁶⁶ Although such an alternative may not be as likely to succeed as the current legislation, the fact that it already partially exists and is less restrictive on freedom of association certainly makes it a genuine possibility.

Another alternative to the legislation in Part 9.9 would be to make membership of a criminal organisation an aggravating factor in sentencing, rather than having a substantive offence.¹⁶⁷ Again, the benefit of this alternative is that it would be far less restrictive on freedom of association than the current legislation, owing to the fact that membership itself is not criminalised. Moreover, the effect of changing sentencing laws would impact a narrower group of people by specifically applying to members of criminal organisations, in contrast to general anti-association laws that can be used to convict people such as Charlie Foster, who have no relation to outlawed groups.

3. *Proportionality*

3.1 *Social benefit of law in pursuing objective*

The key benefit of maintaining anti-association laws is that they are a tool to reduce crime by preventing the means through which criminals communicate and plan. Indeed, when crimes are committed as part of a group, there is a greater chance that they will be completed owing to peer pressure.¹⁶⁸ Furthermore, there is also the argument that a greater amount of harm is likely to be produced by groups, rather than individuals. However, as Abbate notes, 'the mere addition of heads and

¹⁶⁶ Rick Sarre, 'Combatting serious and organised crime by attacking its associates: will it work?' (2012) 112 *Precedent* 15, 18.

¹⁶⁷ Manuel Cancio Melia, 'The Wrongfulness of Crimes of Unlawful Association' (2008) 11(4) *New Criminal Law Review* 563, 565.

¹⁶⁸ Fred J. Abbate, 'The Conspiracy Doctrine: A Critique' (1974) 3(3) *Philosophy and Public Affairs* 295, 298.

hands does not of itself increase the potential for danger,¹⁶⁹ given that crimes committed in groups provide the opportunity to be, 'talked out,' of going through with the act and require more organisation and coordination than those committed by individuals. The Canadian requirement for there to be a, 'rational connection,' between the law and its infringement of the right is particularly significant here, as it highlights the tenuous and controversial rationale that criminalising association will reduce crime.

Another benefit of pursuing the aim of Part 9.9 is that by restricting the freedom of association of a select group of people, others are able to exercise their freedom of association more fully.¹⁷⁰ Such a benefit is justified in arguing that those who enter into a criminal organisation have abused their right to having freedom of association and therefore it is both acceptable and beneficial to infringe upon their rights so that other people may exercise their freedom.¹⁷¹ The nature of freedom of association as described in the ICCPR is particularly useful when considering this benefit of the legislation. The ICCPR recognises that freedom of association may be infringed for the purposes of, 'national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.'¹⁷² Whilst it is true that Part 9.9 restricts freedom of association for purposes such as public safety, morals and the freedoms of others, it is questionable whether the extent to which this is done is excessive, given the broad scope of the legislation.

3.2 Social Detriment caused by effect of law on freedom

One of the key detriments of Part 9.9 is that it criminalises a person's status as a member of an organisation and can lead to unnecessary discrimination and arrests.¹⁷³ This can have a widening effect on the number of people affected by the

¹⁶⁹ *Ibid* 300.

¹⁷⁰ Manuel Cancio Melia, above n 5, 571.

¹⁷¹ *Ibid* 568.

¹⁷² *International Covenant on Civil and Political Rights*, Article 22.

¹⁷³ Anthony Gray, above n 95, 167.

legislation and result in people not initially meant to be targeted by the legislation being investigated. An example of this is the case of Charlie Foster,¹⁷⁴ who was convicted under the NSW bikie legislation¹⁷⁵ having had no associations with or membership of an outlawed motorcycle gang. It is interesting to consider the requirement for laws to be, 'pressing and substantial,' under the Canadian proportionality test in relation to the law having too broad a scope and not having a, 'pressing,' purpose. Charlie Foster's case certainly vindicates the argument that anti-association laws can result in unintended prosecutions as tends to focus on short-term political goals.

Part 9.9 is not only detrimental to individuals, but could also be detrimental to police. Firstly, criminalising group membership without the requirement of a positive act makes the scope for police to arrest very broad. This can increase the amount of funding and resources needed to sufficiently investigate all individuals who may be covered by the legislation. This is exacerbated by the fact that Part 9.9 defines a criminal organisation as having, '2 or more persons,'¹⁷⁶ giving it a particularly broad scope. Secondly, anti-association laws can discourage friends and family members from giving information to police, for fear that they may be prosecuted for association.¹⁷⁷ Although section 390.1(1) explicitly excludes family members from being convicted under these provisions, it cannot be assumed that community members will be aware of this, thus leaving open the possibility that they will not assist in police investigations. It is interesting to consider the impact of anti-association laws on police investigations within the context of the Canadian requirement for there to be a, 'rational connection,' between the law's objective and the infringement of the right. In this situation, it is clear that infringing freedom of

¹⁷⁴ Sean Rubinsztein-Dunlop, 'Disabled man's jailing angers consorting law critics', *Australian Broadcasting Corporation* (Online), 12 November 2012, <http://www.abc.net.au/news/2012-07-12/disabled-mans-jailing-angers-consorting-law-critics/4127194>.

¹⁷⁵ *Crimes (Criminal Organisations Control) Act 2009* (NSW).

¹⁷⁶ *Criminal Code Act 1995* (Cth) s 390.4(1)(c), s390.5(1)(c), s390.6(1)(c).

¹⁷⁷ Rick Sarre, 'Doubtful Measures in Crime Control' (2013) 51(8) *Law Society Journal* 68,70.

association is not necessarily beneficial to society and thus the need to do so is questionable.

C. Migration

One law that potentially interferes with freedom of association is the *Migration Act*.¹⁷⁸ Of particular concern is s 501(6)(b):¹⁷⁹

'Refusal or cancellation of visa on character grounds

(6) For the purposes of this section, a person does not pass the character test if:

(b) the Minister reasonably suspects:

- (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and
- (ii) that the group, organisation or person has been or is involved in criminal conduct;'

As will be illustrated, while this provision meets the first two components of the principle of proportionality,¹⁸⁰ the way the provision is worded is not reasonably appropriate and presents a risk that it will be interpreted broadly and lead to a disproportionate infringement of freedom of association.¹⁸¹

1. *Suitability*

¹⁷⁸ *Migration Act 1958* (Cth).

¹⁷⁹ *Migration Act 1958* (Cth) s 501(6)(b).

¹⁸⁰ That being, 'suitability' and 'necessity': *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 140-141[460].

¹⁸¹ *Lange v Australian Broadcasting Company* (1997) 189 CLR 520, 567-8 (The Court) quoted in Anthony Gray, above n 5,182.

In applying the general principle of proportionality outlined above to assess whether this law interferes with freedom of association, the first consideration is that of suitability.¹⁸² The purpose of the *Migration Act* is to regulate, in the national interest, the coming into, and presence in Australia of non-citizens.¹⁸³ This is a valid legislative objective,¹⁸⁴ as it promotes the security of Australia and recognises that Australia is a sovereign State and is able to regulate those entering and leaving its borders, ensuring that people who have associated with a criminal group, organisation or person do not enter the country or remain in the country, is in the national interest as it prevents people who may intend to engage in criminal conduct from entering or remaining in Australia. This ensures the peace and safety of the Australian community.

2. Necessity

The next consideration is that of necessity. While the current legislation is drastic in allowing people to be refused entry or deported from Australia by mere association, there is currently no legislative alternative that is less drastic in achieving the objective of regulating non-citizens in the national interest and for the security of Australia.¹⁸⁵

3. Proportionality

While the provision may satisfy the first two limbs of the general principle of proportionality, it is this final limb of appropriateness where this provision can be called into question. This is because of the potential risk of interpreting 'association' broadly to mean any form of association. This is indicative in *Minister for Immigration and Citizenship v Haneef* (*Haneef*).¹⁸⁶ In *Haneef*, the Minister for Immigration and Citizenship cancelled Haneef's visa because he failed to pass the

¹⁸² *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 140-141[460].

¹⁸³ *Migration Act 1958* (Cth) s 4(1).

¹⁸⁴ *Monis v The Queen* (2013) 249 CLR 92, 193-194[280] (Crennan, Kiefel and Bell JJ)

¹⁸⁵ *Lange v Australian Broadcasting Company* (1997) 189 CLR 520, 568 (The Court) cited in *Monis v The Queen* (2013) 249 CLR 92, 214[347] (Crennan, Kiefel and Bell JJ).

¹⁸⁶ *Minister for Immigration and Citizenship v Haneef* 163 FCR 414 (*Haneef*).

character test as stated in s 501(6)(b).¹⁸⁷ This is because he was related to two men in the United Kingdom who were suspected of a car bombing terrorist attacks and he had been in correspondence with these men.¹⁸⁸ This illustrates that s 501(6) is arbitrary particularly if a broad approach is taken to interpreting the word 'association' to mean any form of contact with a criminal group or person.¹⁸⁹ This is because people should be able to choose their acquaintances and connections without government interference and without adverse effects such as deportation. There is the argument that such provisions need to exist because the climate of terrorism and terrorist groups is a 'pressing and substantial concern' particularly if people in Australia are associated with such groups.¹⁹⁰ However, it is still important to strike the right balance to prevent the law creating too great a burden on freedom of association.¹⁹¹

There have been attempts to address the problem of a broad interpretation of 'association'. For example, judges bound by the principle of legality have attempted to construe the word so as not to impinge on fundamental rights such as freedom of association. This was illustrated in *Haneef* where the Court highlighted that due to the principle of legality, 'association' should not be construed as including an innocent association.¹⁹² Furthermore, direction no. 55 of the Migration Act states that three factors should be considered when establishing 'association' including the nature, frequency and duration of the association.¹⁹³ The direction further states that the person must be 'sympathetic with, supportive of, or involved in the criminal conduct of the person' and 'mere knowledge' of the criminality will not suffice.¹⁹⁴

¹⁸⁷ *Haneef*, 418[14].

¹⁸⁸ *Haneef*, 430[57].

¹⁸⁹ *Lange v Australian Broadcasting Company* (1997) 189 CLR 520, 567-8 (The Court) quoted in Anthony Gray, above n 5, 182.

¹⁹⁰ *R v Edward Books and Art Ltd* [1986] 2 SCR 713, 768 cited in Robert A Sedler, 'The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis' (1988) 20(2) *Case Western Reserve Journal of International Law*, Summer, 577, 581.

¹⁹¹ *Monis v The Queen* (2013) 249 CLR 92, 152[140] (Hayne J).

¹⁹² *Haneef* 444[114].

¹⁹³ Minister for Immigration and Citizenship, *Direction [No. 55] Visa Refusal and Cancellation Under s 501*, 25 July 2014. Annex A s 2(3).

¹⁹⁴ *Ibid.*

While these are attempts to prevent a broad interpretation of 'association', these attempts are not as grounded, nor as enforceable as explicitly defining 'association' in the *Migration Act*.

Restrictions on freedom of association for national security are permitted in international law.¹⁹⁵ However, this requires proof of a grave case of a political or military threat to the entire nation.¹⁹⁶ While there are potential threats to Australia because of criminal association, the provision can be interpreted too broadly to the point where a person may associate with a group without knowledge that the group is criminal given that there is no form of *mens rea* that is required to be established. These further highlights the need to properly define 'association' in the legislation particularly to suggest that some form of knowledge of the criminal activity of the group should be required before a failure of the character test.

To conclude, s 501(6)(b) unjustifiably interferes with freedom of association due to the risk of a broad interpretation of 'association' to mean any form of association including mere communication or familial connection. The provision as it is now imposes too great a burden and therefore calls for greater clarification to prevent it from being disproportionate to the purpose of maintaining national security.

5-1 FREEDOM OF MOVEMENT – GENERAL PRINCIPLES

Question 5-1 What general principles or criteria should be applied to help determine whether a law that interferes with the freedom of movement is justified?

In order to determine which laws unjustly interfere with our freedom of movement in Australia, the UNSW Law Society seeks to rely on the *International Covenant on Civil and Political Rights*¹⁹⁷ as a point of reference.

¹⁹⁵ *International Covenant on Civil and Political Rights*, art 22(2).

¹⁹⁶ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 1993) 379 cited in Australian Human Rights Commission, *Human Rights Brief No. 4: Lawful Limits on Fundamental Freedoms* (8 March 2006) <https://www.humanrights.gov.au/publications/human-rights-brief-no-4>.

¹⁹⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), ('ICCPR').

Australia is bound by the First Optional Protocol to the ICCPR, which means that the findings of the Human Rights Committee are not enforceable in Australia, unless written in law. Nevertheless, since Australia is a state party to ICCPR, it is appropriate that these form the basis of our identification and evaluation of Australian laws.

Article 12 of *ICCPR* provides that:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

In order to assess the validity of laws that breach Article 12 of the ICCPR, the UNSW Law Society will use the principle of proportionality. Whether such laws are proportionate in their restriction of the freedom of movement is 'a matter of weighing the competing public interests.'¹⁹⁸

Originating in Germany as a measure of assessing constitutional and administrative action, it has since evolved into a framework for evaluating rights violations globally.¹⁹⁹

Although proportionality has not been formally recognized in public policy or

¹⁹⁸ *Cuncliffe v The Commonwealth* (1994) 182 CLR 272, 307—308 (Mason CJ).

¹⁹⁹ Stavros Tsakrakis 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468.

administrative law as means of assessing jurisprudence, Courts have readily applied it in areas of administrative and human rights discourse.²⁰⁰ For instance, the High Court has used it to determine the validity of subordinate legislation²⁰¹ and to tentatively examine the grounds of judicial review in *Australian Broadcasting Tribunal v Bond*.²⁰²

In *Rowe v The Electoral Commissioner*,²⁰³ Kiefel J outlined three considerations for the test of proportionality:

1. *Suitability*: The law must be practically suitable for pursuing a legitimate objective.
2. *Necessity*: There must be no other means of pursuing the legitimate objective that is both less restrictive of the particular right or freedom, and equally as practicable and as likely to succeed as the impugned law. If there is such a means, the impugned law will be considered unnecessary.
3. *Appropriateness and proportionate (stricto sensu)*: The social detriment caused by the effect of the law on the right or freedom must not be greater than the social benefit of the law in pursuing the objective. This is a normative balancing exercise.

Thus, relying on the findings in the ICCPR and the proportionality test, UNSW Law Society will identify and then argue which laws unjustly interfere with our freedom of movement.

5-2 FREEDOM OF MOVEMENT - APPLICATION

²⁰⁰ Justice Garry Downes 'Reasonableness, Proportionality, and Merits Review', Speech delivered at the New South Wales Young Lawyers Public Law CLE Seminar, The Law Society, Sydney, 24 September 2008.

²⁰¹ *South Australia v Tanner* (1989) 166 CLR 161.

²⁰² (1990) 170 CLR 321 per Deanne J.

²⁰³ (2010) 243 CLR 1.

Question 5-2 Which Commonwealth laws unjustifiably interfere with the freedom of movement, and why are these laws unjustified?

UNSW Law Society has identified two Commonwealth laws, which unjustly encroach on our right to freedom of movement, in the following amendments:

- A. *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*; and
- B. *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*.

A. Migration and Maritime Powers legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

The Government's introduction of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, has brought in significant measures to combat people smuggling and manage asylum seekers,²⁰⁴ including the resurrection of temporary protection visas.

The re-introduction of temporary protection visas ('TPVs') in *The Migration Act 1985* (Cth) (*The Migration Act*) and associated *Migration Regulations 1994* (Cth) provides for people who have arrived in Australia without visas and are found to engage Australia's protection obligations.²⁰⁵

In particular, section 35A has inserted two subclasses of TPVs: a new Class XD Temporary Protection (Subclass 785 (Temporary Protection)) and Class UJ Temporary Safe Haven Enterprise Visas (Subclass 449 (Humanitarian Concerns)). Both of these TPVs will automatically be cancelled if the holder departs from Australia, according to s 82(8) of the *Migration Act*. This means that a holder of a TPV cannot freely re-enter Australia if they depart.

UNSW Law Society submits that this raises issues concerning the right to freedom

²⁰⁴ Explanatory Memorandum, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*.

²⁰⁵ *Ibid.*

of movement under Article 12 of the ICCPR, in particular the right to leave any country (article 12(2)).

Although the inability of a TPV holder to re-enter Australia does not prohibit departing Australia, it nonetheless discourages TPV holders from choosing to depart, which in itself is an encroachment on the right to freely choose to leave a country.

1. *Suitability*

The restriction on re-entry is designed to 'maintain the integrity of Australia's borders, encourage regular migration and discourage dangerous voyages by boat'.²⁰⁶

The proposed *Migration Act* amendment and *Migration Regulations* would prevent people in this class from being eligible to apply for, or being granted, other visas (s 91K of *Migration Act*) - for instance a Permanent Protection Visa that allows the holder to remain in Australia indefinitely (i.e. Subclass 866 (Protection) visas). As such, holders of TPVs will have to apply successively for new visas every 3 years, or be subject to deportation.

The UNSW Law Society therefore submits that the objective of the legislation is legitimate.

2. *Necessity*

However, The UNSW Law Society submits that the discouraging effect of restricting travel can be made less strenuous, for example, by imposing a heavy fine on the TPV Holders if they choose to depart.

This would be less restrictive as their freedom of movement is not threatened by denied re-entry, but still equally reasonable, as it offers protection to genuine

²⁰⁶ Statement of Compatibility with Human Rights, Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.

refugees and those fearing significant harm, while also protecting the integrity of the TPV regime.

Its successfulness and practicability in reducing large influxes of unauthorized persons would as successful as the current regime.

In participating in the Humanitarian Evacuation Program in 1999 in response to the Kosovar, and East Timorese Crisis, Australia introduced Temporary Safe Haven Visas²⁰⁷– with two subclasses– into the *Migration Act* for the first time: the subclass 448 (Kosovar safe haven (temporary)) visa and the subclass 449 (humanitarian stay (temporary)) visa.

Although the current TPVs are largely different to the 1999 visas due to the increase in humanitarian rights afforded to the visa holders, the effectiveness of the current TPV can be still be measured against the outcome of the 1999 visa, insofar as its role in deterring voyages by boat and people smuggling.

It is generally accepted that the introduction of the temporary protection regime in 1999 did not serve as deterrence to unauthorized smuggling movement,²⁰⁷ but rather the naval blockade of Australia from August 2001 that achieved it.²⁰⁸

Instead of succeeding as an effective deterrent, unauthorized arrivals continued and increased: less than 1000 unauthorized arrivals applied for asylum in 1999 when TPVs were introduced,²⁰⁹ which rose to 4000 when the policy was in full force in 2001.²¹⁰

²⁰⁷ See e.g. Savitri Taylor, 'Do On-Shore Asylum Seekers have Economic and Social Rights? Dealing with the Moral Contradiction of Liberal Democracy' (2000) 1 *Melbourne Journal of International Law* 4.

²⁰⁸ Sidoti C 'One year after Tampa: refugees, deportees and TPVs' (2003) in M Leach and F Mansouri (eds) *Critical Perspectives on Refugee Policy in Australia: Proceedings of the Refugee Rights Symposium*, Hosted by the Institute for Citizenship and Globalisation, Faculty of Arts, Deakin University, December 5, 2002 Deakin University, Burwood, Victoria, 23, 27.

²⁰⁹ Asylum Seeker Resource Centre, 'Temporary Protection Visas' (2003) http://www.asrc.org.au/wp-content/uploads/2013/07/Temporary-Protection-Visas_August-2013.pdf p 2.

²¹⁰ Karin Fathimath Afeef, 'The Politics of Extraterritorial Processing: Off shore Asylum Policies in Europe and the Pacific,' (2006) *Refugee Studies Centre*, Working Paper No. 36, October 2006,12.

Therefore, taking into account past experience, it can be seen that restricting the freedom of movement and banning re-entry will not necessarily achieve the legitimate objectives of the act.

3. Appropriateness

(a) Cost to the Affected Group

Effectively banning overseas travel separates TPV visa holders from family and subjects them to mental stress.²¹¹

TPV visa holders are not permitted to apply for family reunion through either the Special Humanitarian Program or the General Migration Program.

The absence of the right to family reunion for the duration of the visa, combined with the effective ban on overseas travel, means that some holders will be forcibly separated from family for a long, potentially indefinite, period of time, or, in the case of those condemned to a succession of temporary visas, forever.²¹²

In addition, the uncertainty and instability of the status of their visa every three years is often measured by their deteriorating mental health.

The condition of never receiving permanency in Australia coupled with ban of re-entry effectively gives TPV holders two options: they are compelled to remain in Australia, not leave, and lose contact with their family; or, they are forced into 'induced' repatriation²¹³ to meet loved ones. According to the UNHCR:

If refugees are legally recognized as such, their rights are protected and if they are allowed to settle, their choice to repatriate is likely to be truly free and voluntary. If however, their rights are not

²¹¹ See e.g. Jonathon Lovell "Are Temporary Protection Visas Here to Stay (2002) 11(2) *Human Rights Defender* 7.

²¹² Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.

²¹³ UNHCR, Handbook Voluntary Repatriation: International Protection (1996), 11, available at: <<http://www.unhcr.org/3bfe68d32.html>>.

*recognised, if they are subjected to pressures and restrictions and coined to closed camps, they may choose to return, but this is not an act of free will.*²¹⁴

The current policy certainly puts pressures on refugees and is an overriding factor, which restricts their freedom of movement. A refugee's decision to remain or leave Australia would be induced, and not an act of free will.

(b) *Social Gain*

A social benefit from restricting the freedom of movement of TPV holders is that the public's economic burden is alleviated.²¹⁵

Although refugees can be a genuine economic problem by overtaxing limited resources, refugees are unlikely to cause serious financial burden to receiving nations that are as developed as Australia.²¹⁶ While there is a community perception in Australia that we are being overburdened, Australia is, in fact, sufficiently affluent to allocate adequate resources to the process of determining the protection needs of its on shore asylum seekers, and also to the permanent resettlement of all of these persons if need be, without noticeably depriving its own population.²¹⁷

(c) *Balancing Act*

As such, the suffering caused to individual by conditions of uncertainty and insecurity is almost certainly disproportionately greater than the social gain that is achieved by subjecting these people to banned re-entry conditions. European

²¹⁴ *Ibid.*

²¹⁵ Savitri Taylor, 'Protection or Prevention: A close look at the Temporary Safe Haven Visa Class' (2000) 23(3) *UNSW LAW Journal* 75.

²¹⁶ A Adepoju, "The Consequences of Influx of Refugees for Countries of Asylum in Africa", 219-30 and R Lohrmann, "Irregular Migration: An Emerging Issue in Developing Countries", 135-6 both in R Appleyard (ed), *The Impact of International Migration on Developing Countries*, OECD (1989).

²¹⁷ See for example, D Pratt, "Refugee Alert Sounds Like a Wake-up Call" *The Australian*, 25 November 1999, p 13; M Kirby, "Refugees - Their Need Has Never Been Greater", presented at the National Launch of the Refugee Week Committee, Canberra, 14 June 1995 : <http://www.fl.asn.au/resources/kirby/papers/19950614_refugee.html>.

countries, which have temporary protection regimes for persons other than recognized Convention refugees, have so far accepted the truth of this proposition and mostly allow for more secure status and more liberal movements after periods ranging from one to seven years.²¹⁸

(d) Other Considerations

In addition, our current approach of "protecting" our borders by banning TPV holders from returning is potentially breaching our obligations of non-refoulement under Article 33 of the 1951 *Refugee Convention*. Since reliance on article 33(2) exception of the *Refugees Convention* requires 'proportionality between the danger to itself which a state averts by removal of the refugee, and the danger to which the refugee is thereby exposed'²¹⁹ the situation described creates a substantial risk that a refugee will returned to his or her country of origin due to pressures as discussed above, circumstances in which article 33 is breached.

4. Conclusion

Thus, it is the submission of the UNSW Law Society that the re-introduction of TPVs impinges on our human rights, particularly right to freedom of movement. The ban on re-entry is an effective control on overseas travel, that is, however unnecessary and not proportionate to the possible public gain caused by the infringed human right.

***B. Counter Terrorism Legislation Amendment (Foreign Fighters)
Act 2014***

The Government's *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* introduces a range of amendments to existing laws, many of which infringe upon various human rights recognised by the ICCPR. In his section of our

²¹⁸ Sopf D 'Temporary protection in Europe after 1990: the "right to remain" of genuine convention refugees' (2001) 6 *Washington University Journal of Law and Policy*, 109, 151.

²¹⁹ Savitri Taylor, 'Reconciling Australia's International Protection Obligations with the "War on Terrorism"' (2002) 14 *Pacifica Review: Peace, Security & Global Change* 121.

submission, the UNSW Law Society will be focusing on amendments to the *Australian Passports Act 2005* and the *Criminal Code Act 1995* which impinge on the freedom of movement, as determined by Article 12 of the ICCPR.²²⁰

Under the new legislation, the *Australian Passports Act 2005* will now enable 'the Minister of Foreign Affairs to suspend a person's Australian travel documents for a period of 14 days if requested by the Director-General of Security.'²²¹

Moreover, the amended legislation will now abolish the requirement of the person in question to be notified of the Minister's decision, where 'it is essential to the security of the nation or where notification would adversely affect a current investigation into a terrorism offence.'²²²

The changes made to the *Criminal Code Act 1995* will create a new offence that states a person commits an offence 'if the person enters, or remains in, an area in a foreign country and that area is an area declared by the Foreign Affairs Minister.'²²³

Furthermore, the new *Foreign Fighters Act* has also amended the control order regime, which extends the sunset clauses on control orders and preventative detention orders (PDOs). The Government has stated, 'Among the restrictions that may be placed on an individual subject to a control order is that the may be restricted from being in specified places, they may be prohibited from leaving Australia and they may be required to remain at a specific premises between specified times each day, or on specified days.'²²⁴

1. Suitability

²²⁰ ICCPR, Article 12.

²²¹ Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 12 [46].

²²² Ibid. 12 [50].

²²³ Ibid. 47 [229].

²²⁴ Ibid. 33 [163].

The goal of the Government's new laws is to help Australian security agencies, such as ASIO and the AFP, to protect Australians at home and overseas from the 'escalating terrorist situation.'²²⁵ The government has submitted that previous laws were not adequate for addressing domestic security threats by the return of Australians from overseas who have participated in foreign conflicts or trained with terrorist groups.²²⁶

These laws are designed to achieve this goal by limiting the movement of Australians, involving cancelling the travel documents of those suspected of possibly being a threat to nation security, without any notification in some circumstances; through fixed limitations of potential destinations people are allowed to visit without facing criminal prosecution, and the extension of control orders and PDOs.

It is the submission of the UNSW Law Society that the Government's goal of protecting Australians from the growing terror threat is a legitimate one. This submission is based on an acknowledgement of the growing terrorist threat and influence of ISIS and other organisations overseas, and the increasing number of Australians leaving to join the fight, as well as the broader trend of fighters subscribing to the extremist ideology and returning to their homelands.²²⁷

2. Necessity

The UNSW Law Society submits that despite its support of the legitimacy of the Government's goals of mitigating the terror threat, there are other means of achieving this goal that do not infringe upon the freedom of movement established by Article 12 of the ICCPR.

It is the submission of the UNSW Law Society that investigating terror suspects both while they are overseas and upon their arrival back in Australia, after liaising

²²⁵ *Ibid.* 1 [1].

²²⁶ *Ibid.*

²²⁷ Dafna Rand and Anthony Vassalo, 'Bringing the Fight Back Home: Western Foreign Fighters in Iraq and Syria' (2014) *Center for a New American Security*.

with international intelligence agencies, would be a more legitimate course of action rather than preventing them from travelling to certain areas in the world or cancelling passports without notification.

We submit this is a more practical approach because it does not unfairly restrict the freedom of movement of those who have not committed a crime, while still working towards the goal of protecting Australians from harm and mitigating the terror threat of Australians being involved in overseas conflict.

If there is evidence of criminal conduct committed by Australians overseas, charges can be brought before the courts immediately on their arrival back in Australia. If they do not return to Australia, they can be arrested by cooperating nations and returned to Australia for trial.

If the suspected individuals are away from Australian soil, it follows that they are not an immediate threat to the Australian community until they return to the border.

Moreover, there is research to suggest that only a small percentage of those who become involved in overseas fighting commit related crimes on their return home.²²⁸ This suggests the threat of those returning home is not as dire as the government states, and thus they should utilise existing laws to deal with the issue.

The UNSW Law Society agrees with the government's submission that 'the absence of notification does not itself restrict the right to liberty of movement',²²⁹ however, we submit it still hinders its operation in Australia, without an entirely persuasive justification.

²²⁸ Thomas Hegghammer, 'Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting,' (2013) 107 *American Political Science Review* 1, 3.

²²⁹ Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 14 [59].

The Government's current justification is that 'in some situations, notifying a person that their passport has been cancelled will adversely affect the security of the nation or the investigation of a terrorism offence.'²³⁰

It is our submission that human rights and the rule of law ought to be adhered to, and notifications of decisions relating to cancellations directly affecting an Australian's right to freedom of movement is an unjustified human rights contravention.

The UNSW Law Society submits that abolishment of the requirement of notification of the cancelation of travel documents could be overcome by greater investigative efficacy within the security services so people who have their passport cancelled can be charged with an offence if appropriate.

3. Appropriateness

The UNSW Law Society submits that the current law is benefitting the ability of security agencies, such as ASIO and the AFP, to stop potential terror threats from leaving Australia to fight overseas.

The UNSW Law Society acknowledges that by their very nature, terrorist attacks are atypical, making them extremely difficult for security agencies to prepare for. Attacks may be carefully planned over long periods of time, or as seen recently with the 'Sydney Siege', may involve rudimentary planning with a short lead up period. It is because of these unknown factors and the threat of 'lone wolf' attacks that the government would insist on more stringent anti-terror laws.

The UNSW Law Society also acknowledges that Australia is not the only country to have difficulty with the legal response to the growing terror threat.²³¹

²³⁰ *Ibid.*

²³¹ Craig Forcese and Ani Mamikon, 'Neutrality Law, Anti-Terrorism and Foreign Fighters: Legal Solutions to the Recruitment of Canadians to Foreign Insurgencies' [2015] *University of British Columbia Law Review* (forthcoming), 1.

Various states around the world are grappling with how to deal with the threat, through utilisation of various legal means, such as the Canadian approach which involves a combination of criminal law, foreign partnership, recognizance, citizenship revocation, passenger no fly lists and passport revocation.²³²

(a) Passport Revocation

The Government's claim is that passport revocation laws have been put in place for reasons of national security. It does not follow, however, that prohibiting a person from leaving the country, a person who has not been called to answer to any criminal allegation, is in the nation's security interests. Instead, this law conflicts with the rule of law and gives Australian security agencies too much control over the movements of citizens out of the country's borders.

On the other hand, the passport revocation is limited to 14 days. It is increasingly difficult for security agencies to assess which foreign fighter suspects are in fact a legitimate threat, so this law is a relatively limited administrative approach to curb a significant complication.

However, these laws do have the potential to unfairly target Australians who have family in nations where terrorist activity is operating. Although the government states that 'the limited duration of the seizure ensures that an individual's right to return to a foreign state is not unduly impinged', this is difficult to argue to people who are returning to their home country for a special occasion, for example a wedding. There are many reasons people choose to leave for overseas destinations, such as a dying family member, and the restrictions for up to two weeks is simply too long in the opinion of the UNSW Law Society.

Moreover, passport cancellations only affects the departure stage of foreign fighter activities, and rather than always preventing travel of fighters, sometimes only

²³² *Ibid.* 26.

impedes it.²³³ It also has ramifications for innocent citizens who feel targeted by the measures taken, which we believe perpetuates part of the broader societal problem of stigmatization of certain groups.

If an individual is deemed by ASIO to be an immediate threat to national security, the UNSW Law Society submits that such a lengthy period of time needed to investigate is overbearing. Instead, the individual in question should face the courts to answer to criminal allegations, or be without a passport for a maximum of 72 hours. Despite this, it is the submission of the UNSW Law Society that the introduction of passport revocation is a justifiable measure taken by the Government.

(b) *'Declared Zones'*

The UNSW Law Society submits that the new offence of 'declared zones' is unjustified as it does not only target potential foreign fighters leaving Australia; it targets a large group of people who travel to middle eastern countries for a wide variety of legitimate reasons. Such restraints expose them to very severe criminal repercussions unless they can prove their innocence.

The law has a defence for an accused to prove they had a legitimate purpose in the area, though it is in effect reversing the burden of proof that goes against the fundamental tenets of criminal law.

Moreover, it is unclear 'why this law is necessary when the government has strengthened other offences relating to foreign incursions.' This includes amendments to the *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)*, which now carries a maximum penalty of life imprisonment under the *Criminal Code*.²³⁴

(c) *Control Orders*

²³³ *Ibid.*

²³⁴ George Williams and Kieran Hardy, 'National Security Reforms Stage Two: Foreign Fighters' (2014) 1 *Law Society of New South Wales Journal* 7, 68.

In relation to the extension of the sunset clauses on control orders, the UNSW Law Society agrees with George Williams and Kieran Hardy that the laws are unjustified, as their extension ignores the recommendations of the Independent National Security Legislation Monitor (‘INSLM’), which suggested the repeal of control orders and PDOs based on the fact police have satisfactory alternative powers to prevent terrorist attacks from occurring.²³⁵ Moreover, ‘the INSLM concluded that control orders were not effective, not appropriate and not necessary.’²³⁶

The government has submitted they have only invoked these laws twice,²³⁷ which begs the question why they are needed in the first place.

4. Conclusion

It is the submission of the UNSW Law Society that broad sweeping laws such as those found in the *Foreign Fighters Act* are overly restrictive and mostly unjustified, as the overwhelming innocent population of Australians who will be caught by the parameters of these laws. The Government should look more carefully at how other countries approach their counter terrorism legislation to maintain human rights.²³⁸

8 - 1 RIGHT TO A FAIR TRIAL – GENERAL PRINCIPLES

Question 8-1 What general principles or criteria should be applied to help determine whether a law that limits the right to a fair trial is justified?

The nature of the ‘right to a fair trial’ is complex, and requires some initial clarification. The right to a fair trial is best understood as a collection of individual rights, privileges and freedoms taken together. The elements of a fair trial are

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 33 [161].

²³⁸ Lorenzo Vidino, *Foreign Fighters: An Overview of Responses in Eleven Countries* (Zurich: Center for Security Studies, 2014).

numerous, and cannot be determined exhaustively.²³⁹ They include a range of rights in and of themselves - including the other rights addressed in this submission - as well as a complex range of more minor rights that contribute to the overall fairness of the trial. Determining whether the right to a fair trial has been abrogated requires a consideration of the fairness of the trial overall. In some instances, the encroachment on a single right may amount to an unfair trial. In others, limitations on a range of different elements may be appropriate.

The right to a fair trial is widely considered to be a foundational component of our justice system. In *Jago v District Court (NSW)*, Deane J describes it as 'the central prescript of our criminal law...that no person shall be convicted of a crime otherwise than after a fair trial according to law.'²⁴⁰ In the same case, Mason CJ described the right to a fair trial as 'entrenched in our legal system' which extends to 'the whole course of the criminal process'. Similarly, in *Dietrich v The Queen*, the right to a fair trial is described as 'a central pillar of our criminal justice system.'²⁴¹ Numerous domestic and international human rights instruments also indicate the importance of the right to a fair trial.²⁴²

The UNSW Law Society believes that the right to a fair trial cannot be 'limited'; any trial held will be either fair or unfair. Certain laws may 'encroach' upon the limits of fairness. However, at such point as the conduct of a trial crosses the threshold into unfair, the UNSW Law Society believes that there are no circumstances where such a trial can be considered appropriate in a liberal democracy.

²³⁹ J J Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29, 33.

²⁴⁰ *Jago v District Court (NSW)* (1989) 168 CLR 23, 56 (Deane J) ('*Jago*').

²⁴¹ (1992) 177 CLR 292, 298 (Mason CJ and McHugh J) ('*Dietrich*').

²⁴² See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948) art 10; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14 ('*ICCPR*'); *Human Rights Act 2004 (ACT)* s 21; *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 24.

We believe that the basic proportionality test used throughout this submission is an appropriate starting point, but must be amended in its application to the right to a fair trial. Such a test would require the law to be suitable, in the sense that the law must advance a legitimate policy goal, and necessary, in the sense that there should be no other means that are less burdensome on the right to a fair trial are equally practical to implement and operate. However, the third element – appropriateness or proportionality - must involve an enquiry into whether the law or legal regime in question rendered the trial process ‘unfair’. If the law fails to meet the requirement of any of the three sub-elements, it will be deemed to be an unjustified limitation of the right to a fair trial.

Determining whether a law unjustly abrogates the right to a fair trial turns primarily on the notion of ‘fairness’. While the right to a fair trial may be absolute, the concept of fairness is not. No trial can be perfectly fair. Some limitation of the extent of fairness is a practical necessity and accepted by community standards. Instead, the key question is to determine at what point a trial becomes ‘unfair’ or constitutes a miscarriage of justice. As identified in *Jago*, the right to a fair trial is better understood ‘in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial.’²⁴³

Generally, it has been the role of the judiciary and the appellate system to determine the fairness of a trial.²⁴⁴ The elements of a fair trial cannot be exhaustively defined.²⁴⁵ International and domestic instruments have outlined certain key elements of the right to a fair trial but these are also not an exhaustive list. Instruments such as the *International Covenant on Civil and Political Rights* includes both ‘rights’ and ‘minimum guarantees’, suggesting a varied importance of different

²⁴³ *Jago* (1989) 168 CLR 23, 57 (Deane J).

²⁴⁴ *Dietrich* (1992) 177 CLR 292, 300 (Mason CJ and McHugh J), 353 (Toohey J).

²⁴⁵ *Ibid.* Spiegelman provides an informative ‘limited list’ of procedural rights largely protected by the common law, which provides an indication of their variety and complexity: Spiegelman, above, 36-7.

trial features.²⁴⁶ The definition of fairness provided by the United Nations in the General Comments on Article 14 provides limited assistance: 'fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever reason'.²⁴⁷ This is an idealistic definition, as there are countless acceptable examples of where there is influence on the trial process. That said, the UNSW Law Society believes that there are certain general principles that may be applicable and informative when considering fairness:

- a) Any influence, pressure, intimidation or intrusion is inconsistent with the notion of fairness, but may be acceptable in some circumstances;
- b) While certain elements of unfairness cannot be controlled for, the impact should be minimised to the full extent possible;²⁴⁸
- c) The right to a fair trial does not and should not just consider fairness from the perspective of the accused, but fairness should extend to all parties and to the community;²⁴⁹
- d) That said, there is an expectation in the community that trials be fair;²⁵⁰
- e) Central to the concept of fairness is that the courts maintain public confidence in the manner in which they administers justice;²⁵¹
- f) Fairness must be determined on a case-by-case basis. While it is appropriate and necessary to draw on past experience, determining

²⁴⁶ *ICCPR* art 14. Rights include the overarching right to a 'fair and public hearing by a competent, independent and impartial tribunal established by law' (Article 14 (1)) and the right to the presumption of innocence (14(2)). Minimum Guarantees include, inter alia, to be tried without undue delay (14(3)(c)), access to an interpreter (14(3)(f)) and the privilege against self-incrimination (14(3)(g)).

²⁴⁷ Human Rights Committee, *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, 90th Session, UN Doc CCPR/C/GC/32 23 August 2007 [25].

²⁴⁸ See *Jago* (1989) 168 CLR 23, 47 (Brennan J).

²⁴⁹ *Ibid* 33 (Mason CJ), 54 (Brennan J). Regarding the interest of the crown in determining balancing the fairness of the trial, see *Barton v The Queen* (1980) 147 CLR 75, 102, 106.

²⁵⁰ *Jago* (1989) 168 CLR 23, 33 (Mason CJ).

²⁵¹ Spigelman, above, 31. See also *Mann v O'Neil* (1997) 191 CLR 204, 245.

fairness will still require an 'essentially intuitive judgement' to balance between competing considerations; and²⁵²

- g) Generally, the standard of fairness required should be a high standard.

The UNSW Law Society believe that while the right to a fair trial can be considered as a right in and of itself, it should also be considered as a principle of our legal system that has wider application. Justice Spigelman prefers this terminology as it reflects the "inherently flexible character" of the notion of a fair trial.²⁵³ As indicated by Deane J in *Dietrich v The Queen*:

It is desirable that the requirement of fairness be separately identified since it transcends the content of more particularised legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law required to be observed in the administration of the substantive criminal law.²⁵⁴

The UNSW Law Society believes that the question of fairness is a general principle that should be applied when assessing the encroachment of any law on a right or freedom which is concerned with the trial process. The law (or legislative regime) must not render the trial 'unfair', all things considered. This is a necessary consideration, because these rights do not exist in a vacuum. The concept of fairness must be applied as an overarching requirement. In doing so, it may provide further leeway with certain rights, or greater strictness in the enforcement of others. Determining fairness must give consideration to the conduct of the trial as a whole.

²⁵² *Jago* (1989) 168 CLR 23, 57 (Deane J).

²⁵³ Spigelman, above, 30.

²⁵⁴ *Dietrich*, (1992) 177 CLR 292, 326 (Deane J).

8 - 2 RIGHT TO A FAIR TRIAL – APPLICATION

Question 8-2 Which Commonwealth laws unjustifiably limit the right to a fair trial, and why are these laws unjustified?

A. Preventative Detention Orders

The Preventative Detention Order (PDO) regime is contained in s 105 of the *Criminal Code Act 1995* (Cth). It allows the Australian Federal Police (AFP) to detain a person without charge to prevent the occurrence of a terrorist attack or to preserve evidence related to a recent terrorist attack.²⁵⁵ An initial PDO is for a period of up to 24 hours, and may be approved by a senior AFP officer.²⁵⁶ Initial PDOs may be extended (or further extended) for a further maximum of 24 hours (48 hours maximum in total).²⁵⁷ Extension of PDOs must be made by an issuing authority, which includes appointed judges, retired judges or a president or deputy president of the Administrative Appeals Tribunal.²⁵⁸ Issuing a PDO only requires suspicion on reasonable grounds that the person will engage in a terrorist act, has engaged in preparatory steps or is in possession of a thing connected with a terrorist act.²⁵⁹ The PDO must also ‘substantially assist’ in the prevention of a terrorist act and can only be ordered for a period considered ‘reasonably necessary’.²⁶⁰

1. Suitability

The UNSW Law Society believes that the PDO scheme satisfies the requirement of suitability. The objective of preventing a terrorist act (or to preserve evidence after

²⁵⁵ *Criminal Code Act 1995* (Cth) s 105.1 (*‘Criminal Code’*).

²⁵⁶ *Ibid* s 105.8.

²⁵⁷ *Ibid* s 105.10.

²⁵⁸ *Ibid* s 105.2.

²⁵⁹ *Ibid* s 105.4(4).

²⁶⁰ *Ibid*.

an attack) is a manifestly legitimate goal, and an important role of the state in protecting its citizens.

2. *Necessity*

Whether the scheme is necessary is less clear. The effectiveness of the scheme to prevent an attack or preserve evidence may be limited, as a person may not be questioned while subject to a PDO.²⁶¹ Many of the same objectives of a PDO could be (and likely are) achieved through existing criminal law rules. This is evidenced in the fact that, since the scheme was introduced in 2005, only three PDOs have been made.²⁶² The risk of such a significant infringement on personal liberties should not be considered necessary where it has been so infrequently required over an extended period.

3. *Appropriateness or Proportionality*

Appropriateness/Proportionality: In applying the principles of fairness outlined above, the UNSW Law society believes that this scheme cannot be considered to be fair. A clear component of a fair trial must be that guilt or innocence be determined by a trial. The process for issuing a PDO is a non-judicial process. As identified by Lynch and Reilly, the orders are more administrative than judicial. Even where the order is made by a judge it is in their personal capacity (*persona*

²⁶¹ Ibid s 105.42. However, a person subject to a PDO may concurrently be subject to an ASIO warrant: s 105.25.

²⁶² The PDO scheme was introduced in the *Anti-Terror Act (No 2) 2005* (Cth) sch 4. Although specific details related to PDOs are not published, s 105.47 of the *Criminal Code* requires an annual report to be published detailing the number of orders made. See 'Control Orders and Preventative Detention Orders' (Annual Report 2013-14, Attorney General's Department), 4; 'Control Orders and Preventative Detention Orders' (Annual Report 2012-13, Attorney General's Department), 4; 'Control Orders and Preventative Detention Orders' (Annual Report 2011-12, Attorney General's Department), 4; 'Control Orders and Preventative Detention Orders' (Annual Report 2009-10, Attorney General's Department), 4; 'Control Orders and Preventative Detention Orders' (Annual Report 2008-09, Attorney General's Department), 5; 'Control Orders and Preventative Detention Orders' (Annual Report 2006-07, Australian Federal Police), 3; 'Control Orders and Preventative Detention Orders' (Annual Report 2005-06, Australian Federal Police), 3. Since the most recent report was made, three PDOs have been issued: Jason Om, 'Counter-terrorism raids: AFP Used Extraordinary Powers for First Time to Detain People Without Charge', *ABC News* (online), 20 September 2014 <<http://www.abc.net.au/news/2014-09-19/afp-used-extraordinary-powers-to-detain-people-without-charge/5757546>>.

designata). Further, the subject of the PDO has no right to challenge the issuing of the order.²⁶³ At the same time, the orders permit the detention of individuals without any charge for a significant period of time. Lynch and Reilly argue that the intent of the scheme is to detain an individual where there is insufficient evidence to charge,²⁶⁴ which is clearly inconsistent with principles of a fair trial. We believe that the standard of 'suspicion on reasonable grounds' is insufficiently definitive, and agree with Lynch and Reilly that its application is too susceptible to arbitrary application.²⁶⁵ The Independent National Security Legislation Monitor (INSLM) has voiced similar concerns, recommending in 2012 that if the orders were to be retained that the burden should be at least increased to 'actual belief' based on reasonable grounds.²⁶⁶ A further issue with the PDO scheme is that it may adversely impact public confidence in the judiciary. PDOs are 'highly political,'²⁶⁷ administrative, and relatively clandestine,²⁶⁸ yet still involve members of the judiciary in decision making. Such involvement may call into question the independence of the judiciary from the executive.

On balance, this scheme constitutes a serious limitation on individual freedoms without a fair trial. It is an unjustifiable infringement on the right to a fair trial. The UNSW Law Society wholly endorses the position of the INSLM:

The combination of non-criminal detention, a lack of contribution to [Counter-terrorism] investigation and the complete lack of any occasion so far considered appropriate for their use is enough to undermine any claim that PDOs constitute a proportionate interference with liberty.²⁶⁹

²⁶³ Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105, 130-32.

²⁶⁴ *Ibid*, 132.

²⁶⁵ *Ibid*, 131-2

²⁶⁶ Bret Walker, 'Declassified Annual Report' (Independent National Security Legislation Monitor, 20 December 2012) 50-1.

²⁶⁷ Lynch and Reilly, above, 141.

²⁶⁸ For example, that details of PDOs made are not made public. See above.

²⁶⁹ Walker, above [n 266](#).

Although PDOs have since been issued on three occasions, we still believe that the law remains disproportionate. Thus, we believe that the PDO scheme should be repealed or, at the very least, allowed to sunset in 2018 in accordance with s 105.53 of the *Criminal Code*.

4. Recommendation

We recommend that that the PDO scheme is an unjustifiable infringement of the right to a fair trial and should be repealed.

9 - 1 BURDEN OF PROOF – GENERAL PRINCIPLES

Question 9-1 What general principles or criteria should be applied to help determine whether a law that reverses or shifts the burden of proof is justified?

In Australia, the burden of proof that the prosecution bears is a fundamental tenant of the presumption of innocence.²⁷⁰ As French CJ notes in *Momcilovic v The Queen*, '[t]he presumption of innocence has not generally been regarded in Australia as logically distinct from the requirement that the prosecution must prove the guilt of an accused person beyond reasonable doubt'.²⁷¹

The presumption of innocence that is maintained by the burden of proof is an important measure in ensuring that a trial is fair according to the general principles of fairness noted in the introduction, specifically that any influence, pressure, intimidation, or intrusion is inconsistent with notions of fairness.

²⁷⁰ *Momcilovic v The Queen* (2011) 245 CLR 1.

²⁷¹ (2011) 245 CLR 1, 51 [54].

The principle of the presumption of innocence recognises the power imbalance between State and citizen in any criminal proceedings, and seeks to restore that balance by imposing a high burden on the party with considerable amounts of power.²⁷² Specifically, the burden of proof that the prosecution must bear ensures that the power imbalance between the State and citizen does not cause any influence, pressure, intimidation, or intrusion into the trial, thereby giving rise to unfairness.

The burden of proof that the prosecution and accused bears is codified in the *Criminal Code Act 1995*.²⁷³ Sections 13.1-13.5 require that the prosecution in any proceedings bears the legal burden of proving each element of the offence beyond a reasonable doubt, while the accused bears an evidential burden if any burden is imposed on him or her.²⁷⁴

The Code also specifies, however, that an accused may bear a legal burden of proof in a limited number of situations.²⁷⁵ Specifically, an accused may bear a legal burden (to be discharged on the balance of probabilities), in situations where the law expressly provides that the accused bears such a burden,²⁷⁶ or where the law requires that the accused prove the matter,²⁷⁷ or where the law expressly creates the 'presumption that the matter exists unless the contrary is proved'.²⁷⁸

The UNSW Law Society recognises that the burden of proof is not an unqualified or absolute requirement for the administration of a fair trial, as demonstrated by the exceptions codified in the *Criminal Code*. We adopt Isaacs J's explanation in *Williamson v Ah On*, that '[t]he burden of proof at common law rests where justice

²⁷² Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 251.

²⁷³ *Criminal Code 1995* (Cth), ss 13.1-13.5.

²⁷⁴ *Criminal Code 1995* (Cth), ss 13.1-13.5.

²⁷⁵ *Criminal Code 1995* (Cth), s 13.4.

²⁷⁶ *Criminal Code 1995* (Cth), s 13.4(a).

²⁷⁷ *Criminal Code 1995* (Cth), s 13.4(b).

²⁷⁸ *Criminal Code 1995* (Cth), s 13.4(c).

will be best served having regard to the circumstances both public and private.²⁷⁹ In certain circumstances, the burden of proof may be reversed while still maintaining the general principles of fairness as outlined above. As Isaacs J further explains: 'The usual path leading to justice, if rigidly adhered to in all cases, would sometimes prove but the primrose path for wrongdoers and obstruct the vindication of the law.'²⁸⁰ In order to ensure that such wrongdoing is not facilitated by the principles of law which govern the criminal trial, Isaacs J explains that the general rule regarding the burden of proof may be 'relaxed' where the knowledge of certain matters are in the peculiar knowledge of one party.²⁸¹

The UNSW Law Society therefore considers that the burden of proof (and presumption of innocence) may be encroached upon in certain circumstances without causing unfairness to a trial. In such situations, the encroachment upon this right is justifiable. These circumstances include situations in which the reversal of the burden of proof is necessary in order to ensure justice is being met, or where to maintain the traditional burden of proof would allow a wrong doing to go unaccounted for. Further, we consider that the exceptions noted in *Williamson v Ah On*, that where some information is in the peculiar knowledge of one party, are legitimate exceptions to the requirement that the prosecution bear the legal burden of proof.

These permissible circumstances should be taken into account when applying the proportionality test that has been used throughout this submission. This test requires a law to be:

- a) Suitable for advancing a legitimate policy objective;

²⁷⁹ (1926) 39 CLR 95, 113 (Isaacs J).

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

- b) Necessary, in the sense that there must be no alternative means of advancing that objective that involve a lesser reversal of the burden of proof but are equally practicable to implement and operate; and
- c) Appropriate, in the sense that the detriment caused by the shifting of the burden of proof must not exceed the benefit of the law.

9 - 2 BURDEN OF PROOF – APPLICATION

Question 9-2 Which Commonwealth laws unjustifiably shift or reverse, and why are these laws unjustified?

A. Declared Area Offence: Criminal Code 1995 (Cth) section 119.2.

Section 119.2 of the *Criminal Code 1995 (Cth)* makes it an offence for a person to enter or remain in an area in a foreign country that has been 'declared' by the Minister for Foreign Affairs on the basis that he or she is satisfied that a listed terrorist organisation is engaging in hostile activity in that area.²⁸² Currently, the Al-raqqa province in Syria has been listed as a declared area by the Minister for Foreign Affairs.²⁸³

It has been noted that this offence does not technically reverse the burden of proof as the prosecution must still prove all elements of the offence,²⁸⁴ being that the person remained or entered an area at this time in which it was a declared area. However, it is the UNSW Law Society's submission that the way in which the offence, and the relevant defence, is framed in the legislation has resulted in the reversal of the burden of proof.

²⁸² *Criminal Code 1995 (Cth)*, s 119.3.

²⁸³ Explanatory Statement, *Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014*.

²⁸⁴ Gilbert + Tobin Centre for Public Law, Submission No 3 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Counter-Terrorism Legislation (Foreign Fighters) Bill 2014*, 1 October 2014, 9.

It is our submission that the 'sole legitimate purpose' defence serves as an element of the offence, even though it is expressed as a defence, and it is this that has the effect of reversing the onus of proof. It is the absence of a sole legitimate purpose that is prima facie established by the prosecution when they prove the actus reus elements of the offence. In other words, the prosecution need not prove that a person entered or remained in a declared area for illegitimate purposes, but rather the burden is shifted on to the accused to prove that they were there for solely legitimate purposes. Although expressed as an evidential, in opposed to a legal, burden, this is still an onerous task for an accused to bear, especially having regard to the fact that it is the engagement in hostile acts that makes this act a criminal offence.²⁸⁵

Brennan J's comments in *He Kaw Teh v The Queen* are useful in understanding how the 'sole legitimate purpose' defence in essence serves as an element of the offence.²⁸⁶ Brennan J distinguishes between 'integral' and 'attendant' circumstances of an offence. It is our submission that engaging in an illegitimate purpose is an integral part of the offence, which makes the reversal of the burden of proof particularly onerous for the accused in such circumstances. According to Brennan J, the integral part of the offence is what gives the act its criminal component.²⁸⁷ As highlighted by the explanatory memorandum in introducing the bill, the objective of the act is to deter and prevent Australians from engaging in hostile activities in foreign countries, and returning to Australia to carry out a terrorist attack.²⁸⁸ Therefore, it is the illegitimacy of the purpose of entering or remaining in a declared area that serves as an integral part of the offence, as it is what gives the act its criminal component.

²⁸⁵ Gilbert + Tobin above n 284.

²⁸⁶ *He Kaw Teh* (1985) 157 CLR 523, 571 (Brennan J).

²⁸⁷ *Ibid*, 571.

²⁸⁸ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 225.

It is our submission that due to the nature of the way in which the offence is framed, the prosecution need not prove beyond reasonable doubt that the accused engaged in an illegitimate purpose unless the accused can first raise evidence to suggest that they entered the region for a sole legitimate purpose. The burden of proof that the prosecution must bear is therefore conditional upon the accused raising evidence as to a sole legitimate purpose for their travels. As has been noted, the evidentiary burden that the accused bears in showing that they entered the region solely for one of the purposes deemed legitimate pursuant to section 119.2(3) may be a difficult if not impossible task, as it could require the accused to prove a negative, that is, that they did not enter the declared area for any other purpose but a legitimate one.²⁸⁹ Therefore, the burden of proof in relation to the offence created by section 119.2 has been reversed.

B. Proportionality

1. Suitability

The UNSW Law Society is satisfied that the offence serves the legitimate objective of deterring and preventing Australians who have engaged in hostile activities overseas from returning to Australia and posing a threat to national security. Therefore the offence satisfies the test of suitability.

2. Necessity

The UNSW Law Society's submits that the legitimate objective of the offence could be achieved through means that infringe less upon the burden of proof and presumption of innocence. Primarily, as has been recommended by the Gilbert +

²⁸⁹ Gilbert + Tobin above, [284](#).

Tobin Centre for Public Law, the offence could expressly specify that the intention of engaging in an illegitimate purpose be an element of the offence.²⁹⁰

On the one hand, this approach would create some practical and operational difficulties for the State, particularly in regards to adducing sufficient evidence to prove beyond reasonable doubt that an accused had entered a declared area with the intention of engaging in terrorist activity. These evidential difficulties would depend upon the resources and competency of Australian intelligence services in order to enable a prosecution. On this approach, the legitimate objectives of the legislation would not be as likely to be achieved as the offence would be more difficult to prove.

On the other hand, requiring that the offence spell out illegitimate purpose as one of its elements imposes no more stringent a burden on the prosecution than is usually imposed in relation to serious offences such as this one. The prosecution is accustomed to bearing such a burden, and therefore given the powers that Australian intelligence services already possess this should pose no unique difficulty.

On balance, the UNSW Law Society believes that requiring the legislation to include intention to engage in an illegitimate purpose as an element of the offence is a less restrictive version of the offence which, taking all things into consideration, is equally practical to implement and operate.

3. *Appropriateness or Proportionality*

Section 119.2 of the *Criminal Code* is primarily benefiting the wider Australian community as it guards against the risk of terrorism. It ensures that no person who could have been exposed to fighter skills and tactics in a foreign country could

²⁹⁰ [Ibid.](#)

return to Australia freely and carry out a terrorist attack. This is important due to the threat of terrorism that Australia is under in the current climate. The UNSW Law Society recognises the threat posed by foreign fighters, terrorist organisations in foreign countries, and the radicalisation of some Australians by these groups. We therefore recognise the benefit that this law poses to the Australian community in our current climate.

This law, however, is causing huge detriment to certain minorities within the Australian community by restricting, and criminalising, behaviour that is usually deemed to be legitimate. In particular, this law is causing detriment to those people who have a purpose to visit a declared area that is not included within the list of legitimate purposes in section 119.2(3). As has been noted, this behaviour may include: 'conducting a pilgrimage or fulfilling some other religious obligation; visiting friends; working as a freelance journalist; or conducting business and commercial transactions.'²⁹¹ The UNSW Law Society considers the detriment caused to the wide range of individuals that could be engaging in what would otherwise be non-criminal behaviour a serious and unacceptable detriment in our modern liberal democracy.

The UNSW Law Society also believes that the detriment caused by this law is one that affects all of Australian society, as any law which criminalises movement in such a way is an indictment on the whole of the community.

The UNSW Law Society recognises that the benefit in preventing a potential terrorist attack from occurring is momentous given the particularly catastrophic nature of terrorist attacks on both the individual and the community at large. However, the UNSW Law Society also believes that the detriment posed to the individual is too great to justify such a draconian measure. In particular, we recognise that the reversal of the burden of proof and the presumption of

²⁹¹ Gilbert + Tobin, [above n 284](#).

innocence caused a grave unfairness in the trial, and therefore represents an unjustifiable encroachment upon this fundamental legal principle.

We believe that the circumstances of the enactment of this law do not justify any exception to the burden of proof that the prosecution must bear.

First, we do not believe that justice will best be served by reversing the burden of proof as section 119.2 is already an offence that gives huge power to the State in allowing the prosecution of what is usually lawful behaviour. To give the State even more power by allowing them to prima facie establish that an accused entered or remained in a declared area for the purpose of engaging in terrorist activity creates an even further power imbalance between the State and the citizen. This result is repugnant to the notions of fairness outlined above, primarily the idea that, while certain elements of unfairness cannot be controlled for, the impact should be minimised to the full extent possible.²⁹² Reversing the burden of proof enhances the inherent unfairness in any trial to the full extent possible and is therefore an unjustifiable encroachment upon this right.

Second, we do not believe that to refrain from reversing the burden of proof will allow a wrong doing to go unaccounted for. The considerable resources that the State possess should allow it to be able to prove beyond reasonable doubt that an accused entered a declared area in order to engage in a terrorist act reasonably comfortably. To not allow this reversal of the burden of proof will not put the State at a considerable disadvantage, given the already disproportionate resources available to the parties.

Third, we do not believe that the reversal of the burden of proof is justified on the basis that some fact remains in the peculiar knowledge of the accused. As mentioned above, the State's resources should allow it to form highly efficient

²⁹² See *Jago* (1989) 168 CLR 23, 47 (Brennan J).

intelligence services aimed at targeting this sort of behaviour by Australians in such areas. It is our submission that the knowledge of events are no more in the peculiar knowledge of the accused in this situation than in any other prosecution of a serious offence. Therefore, to reverse the burden of proof in this situation would amount to a serious intrusion, pressure, or influence on the trial, giving rise to clear unfairness.

It is the UNSW Law Society's submission that section 119.2 of the Criminal Code represents an unjustifiable encroachment on the burden of proof as it deeply jeopardises the accused's right to a fair trial.

4. *Recommendation*

That section 119.2 specify an intention to engage in hostile activities in a declared area as an element of the offence.

12 - 1 STRICT OR ABSOLUTE LIABILITY – GENERAL PRINCIPLES

Question 12-1 What general principles or criteria should be applied to help determine whether a law that imposes strict or absolute liability for a criminal offence is justified?

There is a presumption at common law, which is also reflected in statute, that there is a mens rea element to all criminal offences, unless expressly or impliedly stated otherwise.²⁹³ The presumption is that when committing the offence, the person had

²⁹³ *He Kaw Teh v The Queen* (1985) 157 CLR 523, 567 ('*He Kaw Teh*').

the intention to commit the 'act of the defined kind'²⁹⁴ and that the accused had knowledge of 'the circumstances which make the doing of the act an offence'.²⁹⁵

The rationale for this presumption is well expressed in *He Kaw Teh*: 'the requirement of mens rea is at once a reflection of the purpose of the statute and a humane protection for persons who unwittingly engage in prohibited conduct'.²⁹⁶

Where this presumption is rebutted, the relevant offence becomes one of strict or absolute liability. It is a crime of strict liability where, absent a mens rea element of the offence, an accused can still rely on the defence of a honest and reasonable mistake of fact - that is, if the accused has an honest and reasonable belief in a set of facts that would otherwise make the act innocent, then they cannot be held criminally responsible.²⁹⁷

Typically, the presumption that there is a mens rea element to an offence can be rebutted in three circumstances:

1. Where, on examination of the words of the statute, Parliament has evinced a clear intention that there be no mens rea element,
2. Where the subject matter of the offence does not require a mens rea elements. Generally, the more serious the offence, the more likely that mens rea is required, and
3. Where the absence of mens rea would assist in enforcing the law.²⁹⁸

Instances in which parliament intended that a person be criminally liable absent mens rea include instances in which the purpose of the statute is "not merely to deter a person from engaging in prohibited conduct but to compel him to take preventative measures to avoid the possibility that,

²⁹⁴ *Ibid*, 582 (Brennan J).

²⁹⁵ *Ibid*.

²⁹⁶ *Ibid*, 567.

²⁹⁷ *Ibid*, 575-6.

²⁹⁸ *Ibid*, 529-30 (Gibbs CJ).

without deliberate conduct on his part, the external elements of the offence might occur.’²⁹⁹

The UNSW Law Society recognises that there are circumstances in which it is necessary for a crime to be one of strict liability in order to achieve the legitimate objective of the law, or where the subject matter of the offence calls for the absence of a mens rea requirement. For example, where to make the crime one of strict liability would have a better deterrent effect as it would ensure persons took precautions against a particular act and therefore prevented the occurrence of the act, or in circumstances where it would be onerous for the prosecution to prove mens rea.³⁰⁰ In such circumstances, we believe that to make the crime one of strict or absolute liability does not cause substantial unfairness to a trial, and is therefore acceptable.

Therefore, we consider that unfairness is caused to a trial where making a crime one of strict or absolute liability would not advance the legitimate objective of the law, or the subject matter does not warrant such a conclusion, or to do so would not assist in implementing the law. In such a case, crimes of strict liability are an unjustifiable encroachment on the presumption that all criminal offences contain a mens rea element.

In this respect, we propose to adopt a modified proportionality analysis to test whether a law that imposes strict or absolute liability for a criminal offence is justifiable. In order to be justifiable, the imposition of strict liability or absolute liability must be:

1. Suitable for achieving a legitimate purpose, such as those outlined above;
2. Necessary, in the sense that there must be no less restrictive yet equally practicable ways of achieving the legitimate purpose; and

²⁹⁹ *Ibid*, 567.

³⁰⁰ *R v Woodrow* (1846) 15 M & W 404.

3. Appropriate or proportionate, in the sense that the detrimental effect of the imposition of strict or absolute liability, particularly on the fairness of a trial, must not outweigh the benefit of the law.

12 - 2 STRICT OR ABSOLUTE LIABILITY – APPLICATION

Question 12-2 Which Commonwealth laws unjustifiably impose strict or absolute liability for a criminal offence, and why are these laws unjustified?

A. Declared Area Offence: Criminal Code 1995 (Cth) section 119.2.

As discussed above, section 119.2 of the *Criminal Code* presents issues in relation to the presumption that there be a mens rea element to this serious offence, warranting punishment of up to ten years imprisonment.

1. Is this a crime of strict liability?

There are two issues in determining whether a crime is one absent a mens rea requirement:

1. Whether there need be an intention to commit the act in question, and
2. Whether the accused need have knowledge of the circumstances which make the act a criminal one - namely, that the area is a declared one.

With respect to the issue of intention, by way of the statutory language and the objective of the offence, it can be deduced that a mens rea element of intention to enter or remain in the relevant area can be read into in to the offence. While it may be problematic that an intention to enter into an area (in opposed to an intention to commit a terrorist act) can be the subject of criminal punishment, there still remains



an undeniable presence of mens rea.

The state of mind of the accused in regards to the circumstances of the area being a declared area is not so clear. According to Brennan J in *He Kaw Teh* where there is an integral circumstance to an offence, there is a presumption that the accused must have knowledge of that circumstance, unless the legislation provides otherwise (as outlined above).³⁰¹ It is clear that the circumstance that the area be a declared one is an integral part of the offence, as it gives the otherwise ordinary act its criminality. Therefore, the initial presumption is that the mens rea knowledge of its status as a declared area is required before a prosecution can be sought.

The UNSW Law Society submits that this presumption is rebutted by way of the principles outlined above, that where the enforcement of the law would be best implemented where there is an absence of a mens rea.³⁰² The objective of the offence is to ensure that Australians who engaged in terrorist activities abroad are prevented from returning freely to Australia to carry out a terrorist attack. It would be too burdensome upon the prosecution if it had to prove beyond a reasonable doubt that the accused had knowledge that the area in which they were travelling were a declared area, and thus would impede what would otherwise be rightful prosecutions. Therefore, we believe that this must be an offence of strict liability in order to ensure that the law can be enforced, and in order to ensure that the objectives of the offence are successfully met.

Where there is a crime of strict liability, an accused may avoid criminal liability if he or she can raise evidence to suggest that they were labouring under an honest and reasonable mistake of fact that, if it were true, would make the act an innocent one.³⁰³ This defence becomes problematic in this instance as a mistake as to the declared status of the area in question more likely qualifies as a mistake of law

³⁰¹ (1985) 157 CLR 523, 575-6.

³⁰² *He Kaw Teh* (1985) 157 CLR 523, 529-30 (Gibbs CJ).

³⁰³ *Ibid*, 575-6 (Brennan J).

which does not exempt an accused from liability.³⁰⁴ Therefore, the only instance in which an accused may rely on an honest and reasonable mistake of fact would be should they believe they are in a different area to that which they are in (e.g., if an accused believed they were in Iran when actually they were in Syria). The particular nature of the offence means that it would be a difficult task for an accused to satisfy the court that they honestly and reasonable mistakenly believed they were in a different geographical location to the one which they were in.

B. Proportionality

1. Suitability

As outlined in the previous section, the UNSW Law Society is satisfied that the offence serves the legitimate objective of deterring and preventing Australians who have engaged in hostile activities overseas from returning to Australia and posing a threat to national security. Therefore the offence satisfies the test of suitability.

2. Necessity

The alternative to the offence would be to reinstate the presumption that knowledge that the area is a declared area is a requirement for criminal liability. The UNSW Law Society believes that this less restrictive means will be impracticable and inoperable version of the offence as it would impede the path to justice as it would be easy for an accused to claim they were ignorant as to the status of the offence. Therefore, if the offence is to remain in its current form, the UNSW Law Society believes that it must remain one of strict liability in order to achieve the legitimate objective of the law.

The other alternative which the UNSW Law Society believes would encroach less on the fundamental presumption of mens rea would be to make an intention to

³⁰⁴ *Ostrowski v Palmer* (2004) 218 CLR 493.

engage in hostile/terrorist activity an element of the offence (as stated above). This would ensure the offence is achieving its objective by criminalising only those with malicious intentions. Additionally, implicit in this intention is knowledge as to the declared status of the area, or at least knowledge as to the particular facts, which would lead the Minister for Foreign Affairs to 'declare' the area (i.e., knowledge of the activities of listed terrorist organisations engaging in that area). This implicit knowledge is more in line with ordinary notions of criminal guilt in our criminal justice system. As outlined above, on balance this would be an equally practical option available to the legislature.

3. Appropriateness or Proportionality

Having already reviewed the benefits and detriments of this offence in the above section, the UNSW Law Society believes that on balance, this strict liability offence poses a risk of jeopardising the fairness of the trial for the following reasons:

1. While making the crime one of strict liability is necessary for the enforcement of the law, to do so would place the accused in an impossible position in proving they honestly and reasonably mistook their geographical location. In effect, this becomes a crime of absolute liability, which, having regard to the seriousness of the offence (warranting a punishment of 10 years imprisonment) is repugnant to notions of fairness inherent in our criminal justice system. Therefore, the rights of the accused will be so unfairly eroded by imposing strict liability in this instance, that it overrides the concern that the law not be enforced properly should a presumption of mens rea be invoked.
2. Additionally, the other rationales for rebutting the presumption of mens rea are absent in this case. Firstly, the subject matter of the offence is a serious



one which, typically, would further reinforce the presumption in favour of mens rea. Secondly, often the presumption of mens rea is rebutted in situations in which the objective of the offence is to cause people to take extra precautions not to engage in particular activity that could render them criminally liable. In this instance it is clear that Parliament did not intend that people take extra precautions in deciding where to travel, but rather that they are deterred from entering a declared area in order to engage in terrorist acts.

The UNSW Law Society submits that the strict liability that applies to section 119.2 of the Criminal Code is an unjustifiable encroachment on the presumption in favour of mens rea, as it creates too much of an imbalance of power between State and citizen, and is therefore inconsistent with notions of fairness as outlined above. Additionally, it fails to accurately serve the legitimate objective and seriousness of the offence, which is to deter and prevent people from entering, remaining, and then returning to Australia after engaging in terrorist acts in a declared area.

4. Recommendation

That section 119.2 be repealed or, alternatively, specify an intention to engage in hostile activities in a declared area as an element of the offence.

14 - 1 PROCEDURAL FAIRNESS - GENERAL CRITERIA

Question 14-1 What general principles or criteria should be applied to help determine whether a law that denies procedural fairness is justified?

A. The Proportionality Test & the Criteria Used to Evaluate Justifiability of Infringement

The UNSW Law Society proposes that a proportionality test be adopted in order to



determine whether a law that denies procedural fairness is justified. In order for a law to be justified, it must:

- 1) Be practically suitable for achieving a legitimate policy objective;³⁰⁵
- 2) Be necessary, in the sense that there are no alternative means of pursuing that objective that are less inimical to procedural fairness, yet are equally practicable and as likely to succeed;³⁰⁶ and
- 3) Be appropriate, in that the detriment caused by infringing on procedural fairness must not exceed the social benefit of the legislation.³⁰⁷ Legislation is particularly likely to be inappropriate when it detrimentally affects the essential content of the right.

As Michaelson explains, however, proportionality is not just a judicial [doctrine that](#) the courts apply in reviewing the legality of government action.³⁰⁸ It is also a doctrine for political institutions to observe in their decision-making functions when assessing competing claims and interests.³⁰⁹

B. Outline of Procedural Fairness and its Essential Content

The UNSW Law Society will outline the general principles underlying the common law obligation to procedural fairness in order to assist in the evaluation of whether a Commonwealth law disproportionately infringes on it.

The broad purpose of administrative law is to safeguard the rights and interests of people in their dealings with the government and its agencies. It confers a right to challenge a government decision by which a person feels aggrieved through independent adjudication to contribute to a greater measure of justice in

³⁰⁵ See A Barak, 'Proportionality (2)' in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 738, 743.

³⁰⁶ See *Rowe and Anor v Electoral Commissioner and Anor* (2010) 243 CLR 1, 134 (Kiefel J)

³⁰⁷ *Ibid.*, 140 (Kiefel J).

³⁰⁸ Christopher Michaelson, 'Reforming Australia's National Security Laws: The Case for Proportionality-Based Approach' (2010) 29(1) *The University of Tasmania Law Review Law Review* 37.

³⁰⁹ *Ibid.*

administrative decision-making.³¹⁰ This ensures that the Executive does not act arbitrarily, while promoting the observance of public law values of accountability, legality and transparency.³¹¹

The obligation imposed upon decision-makers by the common law to accord procedural fairness is therefore one of the defining aspects of administrative law. The essence of this requirement is the opportunity to be heard.³¹² When a decision to be made 'will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against them and to be given an opportunity of replying to it'.³¹³ This generally means that an individual must be given prior notice of a decision in order to prepare a case, be provided with the substance of the information on which the decision is based and an opportunity to present their case.³¹⁴

These principles apply to cases before both courts and tribunals and are enshrined in Articles 13 and 14 of the *International Covenant on Civil and Political Rights* ('ICCPR'), to which Australia became a party in 1980. As a bare minimum guarantee, it stipulates that everyone shall be entitled to be informed of the nature and cause of the allegation against them in preparation of their defence.³¹⁵ This is extended to non-citizens who are lawfully abiding in the State but face the threat of deportation.³¹⁶

However, as procedural fairness is a common law obligation it means that the general rule that an individual must be given the opportunity to deal with adverse information when it affects their rights or interests can be abrogated by statute and

³¹⁰ Robin Creyke and John McMillan, *Control of Government Action* (LexisNexis Butterworths Australia, 3rd ed, 2012), 16.

³¹¹ *Ibid*, 27.

³¹² *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, [489].

³¹³ *Kiao v West* (1985) 159 CLR 550, [582].

³¹⁴ Robin Creyke and John McMillan, *Control of Government Action* (LexisNexis Butterworths Australia, 3rd ed, 2012), 632.

³¹⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS, (entered into force 13 August 1980) art 14(3).

³¹⁶ ICCPR art 13.

'reduced to nothingness'.³¹⁷ What is accorded therefore depends on the circumstances of the case, the statutory framework and the subject matter. This is particularly prominent when sensitive material is involved.³¹⁸ Similarly, Article 4 of the *ICCPR* sets out that States Parties to the Covenant may take measures derogating from their obligations in times of public emergency but that such derogations should not exceed what is necessarily required by the actual situation.³¹⁹

C. Proportionality as applied to Procedural Fairness

The test of proportionality, while a flexible test, ought to be considered through a different tone depending on what right is being infringed upon. The weight or importance of the particular right is formally recognised as part of the test as a factor considered in the determination of the 'overall social detriment' in the appropriateness stage. It is clear that the more essential a right is perceived to be, the law infringing upon it must either provide great benefits and/or be as least intrusive as possible. The elements of suitability and necessity, while normally low thresholds, will be elevated in importance in cases of fundamental rights.

Procedural fairness is such a right. It is recognised by Article 14 of the *ICCPR* and as stated in *Kioa v West*,³²⁰ fundamental to the common law. Because such a right is so deeply rooted, the overall integrity of judicial power bestowed by s 71 of the *Australian Constitution* is sensitive to a breach of procedural fairness.

Therefore, in any analysis of the social detriment of laws breaching upon procedural fairness, it is crucial that one must look beyond the directly affected parties and consider wider systemic implications. Part of this comprehensive scope includes: public perception and confidence of the delivery of executive and judicial power, access of certain individuals to the legal system, and generally, ideological damage to the sense of a democratic and participatory society.

³¹⁷ *Kioa v West* (1985) 159 CLR 550, [610]-[618].

³¹⁸ *Ibid*, [584]-[586].

³¹⁹ Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN DOC ICCPR/C/GC/32 (2007).

³²⁰ *Kioa v West* (1985) 159 CLR 550, [610]-[618].

D. The Importance of Intention

The importance of parliamentary intention has been well advocated by the judicial system through their exercise of statutory interpretation and particularly in the freedoms and rights context, through the principle of legality.

The UNSW Law Society would like to further advocate this importance in relation to drafting legislation that infringe upon procedural fairness. Clear intention to limit a right is important to flagging suspect laws that beg for a proportionality analysis of this kind and thus further enable a rigorous culture of legal accountability. In addition, the identification and weighing of government intention or rationale for passing the suspect law has already been discussed as a salient factor for proportionality. In absence of strong and clear rationale, the balancing act of whether a law is appropriate becomes much more difficult to ascertain. Furthermore, public confidence of the decision making process is one of the potential losses of laws that both justifiably and unjustifiably infringe upon procedural fairness. A convincing response for why procedural fairness had to be limited in this instance from the decision maker could be an effective compromise to restore some approval.

The UNSW Law Society therefore advocates that a clear intention that a law is limiting a right should go further and become a clear intention of why a law is limiting a right. For this reason, the UNSW Law Society welcomes reforms to s 8 and 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) where 'statements of compatibility' are required for Bills and legislative instruments.

14 - 2 PROCEDURAL FAIRNESS - APPLICATION

Question 14-2 Which Commonwealth laws unjustifiably deny procedural fairness, and why are these laws unjustified?



*A. Part IV of the Australian Security Intelligence Organisation Act
1979 (Cth)*

This submission will be focused primarily on Part IV of the *Australian Security Intelligence Organisation Act 1979 (Cth)* ('The ASIO Act'). This Part deals with the furnishing and reviewability of security assessments.

The Part IV empowers ASIO to issue adverse 'security assessments' about the security threat posed by certain individuals to government departments.³²¹ These assessments may express any recommendation, opinion or advice on whether it would be consistent with the requirements of security for prescribed administrative action to be taken with respect to a person deemed to pose a threat to the security and defence of Australia and the broader Australian community.³²² Recommendations could include administrative actions as onerous as the cancellation of a citizen's passport and the deportation of a non-citizen.

Section 38 of the Act provides some protection of procedural fairness by requiring ASIO to provide notice of such an assessment, and a statement of the grounds on which the assessment was made, within 14 days of making the assessment. Problematically, this is not required if the Attorney-General believes that giving the notice of the grounds on which the decision was made would be prejudicial to the defence and security of the nation.³²³

In this respect, while an affected individual has a right to apply to the Administrative Appeals Tribunal for a review of the decision,³²⁴ including a formal statutory right to apply for merits review in the Security Appeals Division under s 27AA of the *Australian Administrative Appeals Tribunal Act 1975 (Cth)*, the individual may not be informed of the reasons for ASIO's decision to make an adverse security assessment. This prevents a substantive challenge to the decision, and in effect constitutes a denial of the right to be heard. The individual will be unaware of the

³²¹ *Australian Security Intelligence Organisation Act 1979 (Cth)*, s 37.

³²² *Ibid*, s 35.

³²³ *Ibid*, ss 37, s 38(2)(a)(b).

³²⁴ *Ibid*, 54.

case to be met and will not be provided with a fair hearing on the evidence held against them.

Similarly, the ASIO Act clearly stipulates that the procedural fairness requirements in Part IV do not apply in respect of a person who is not an Australian citizen, holder of a valid permanent visa or a special purpose visa holder.³²⁵ There is therefore no statutory obligation to provide a notice of assessment, a statement of reasons or a right to merits review before a tribunal to this group of persons affected by the furnishing of a security assessment.³²⁶

As the legislation was passed before the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) was introduced, a statement of compatibility was not issued. The Inspector-General of Intelligence and Security has noted that there is 'a vital public interest in ensuring that any new measures to protect national security which have been implemented, or are presently being contemplated, should not be unduly corrosive of the values, individual liberties and mores on which our society is based'.³²⁷ The Security Legislation Review Committee (the 'Sheller Report') has emphasised the importance of the test of proportionality in achieving the intended object of national security.³²⁸

B. Suitability

Consecutive Liberal and Labor Governments have outlined that the main public policy objective of Australia's anti-terrorism legislation is to safeguard the community against the threat of terrorism by increasing security, while also maintaining our commitment to the rule of law and individual rights.³²⁹

³²⁵ *Australian Security Intelligence Organisation Act 1979* (Cth), s 36.

³²⁶ *Ibid*, ss 37, s 54.

³²⁷ Inspector General for Intelligence and Security, *Annual Report 2004-2005*, 2.

³²⁸ Report of the Security Legislation Review Committee (2006), 3.

³²⁹ Commonwealth, *Parliamentary Debates*, Senates, 5 December 2005, 3 (Chris Evans)
<http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result/Second%20Reading%20Speeches.aspx?bld=r2469>.

One of the means employed to do this was through expanding the powers of the ASIO to collect intelligence concerning the threat posed by certain individuals to the safety of the Australian community.³³⁰

The UNSW Law Society believes the general application of this law is suitable to achieve the intended purpose of securing Australia and Australians from terrorism. It is, however, the more extraordinary measures and qualifications stated within this legislation that will be assessed against the principles of proportionality.

C. Necessity

While a level of secrecy in national security affairs is necessary, the powers granted to ASIO in this area represent a serious infringement of common law procedural fairness. The extent of the burden is illustrated by the following case studies.

1. *Citizen Case Study: Hussain v Minister for Foreign Affairs (2008)*

In *Hussain v Minister for Foreign Affairs (2008)* 169 FCR 241, the applicant had his passport cancelled by the Minister for Foreign Affairs after ASIO issued an adverse security assessment. Hussain applied to the Security Appeals Division to have this decision reviewed but the Attorney-General found the disclosure of the evidence or submissions was not in the public interest because it would prejudice the security or defence of Australia. A security/defence certificate was therefore issued to thwart disclosure and the traditional capacity of the tribunal to determine the interests of the person affected by the decision was hindered.³³¹ Hussain appealed to the Federal Court under s 44(1) of the AAT Act 'on a question of law' raising the denial of procedural fairness at a tribunal level. The appeal was unsuccessful because they found the tribunal had no choice but to accept the validity of the certificate.³³² As a citizen Hussain had no means of knowing or being heard on the case against him nor could he have the

³³⁰ *Australian Security Intelligence Organisation Act 1979 (Cth)*.

³³¹ *Administrative Appeals Tribunal Act 1975 (Cth)*, s 38A.

³³² *Hussain v Minister for Foreign Affairs (2008)* 169 FCR 241, 127.

decision reviewed on its merits at a tribunal or on a question of law at the Federal Court.

2. *Non-citizen Case Study: Leghaei v Director General of Security (2010)*

In *NO500729, 29701858* [2010] MRTA 327 (19 February 2010), Sheikh Mansour Leghaei sought merits review to set aside a decision made by a delegate of the then Minister for Immigration and Multicultural Affairs to refuse to grant a request for a permanent residency visa.³³³ This decision was made under s 339(a) of the Migration Act 1958 following an assessment by ASIO in 2004 finding the Sheikh to be a risk to national security.³³⁴ The applicant claimed the assessment was void because procedural fairness was not provided to him.³³⁵ The Migration Review Tribunal (MRT) advised the applicant that although they did not have access to, or know the contents of, the ASIO adverse security assessment the applicant did not satisfy the legislative requirements to be issued with a visa because of it.³³⁶ Furthermore, they 'did not have the power to go behind or assess the validity of the ASIO assessment'.³³⁷ The original decision made by the Minister not to grant the applicant a visa was thereby affirmed.

Sheikh Mansour Leghaei sought relief in the courts pursuant to s 39B(1) and s 39B(1A) of the *Judiciary Act 1903*.³³⁸ In *Leghaei v Director General of Security* [2005] FCA 1576, the applicant sought an injunction from being deported and a declaration that the assessment was invalid for jurisdictional error constituted by a denial of procedural fairness.³³⁹ The applicant asserted a right to know the 'essential features' of the material that formed the basis of a decision seriously adverse to his interests, so that he may

³³³ *NO500729, 29701858* [2010] MRTA 327 (19 February 2010), 1.

³³⁴ *Ibid*, 2-3.

³³⁵ *Ibid*, 3.

³³⁶ *Ibid*, 4.

³³⁷ *Ibid*.

³³⁸ *Leghaei v Director General of Security* [2005] FCA 1576, 2.

³³⁹ *Ibid*, 9-10 [26].

address why is believed to be a risk to national security.³⁴⁰ The first respondent claimed that notifying the applicant of the nature of the allegations against him, even only in summary form, will prejudice national security.³⁴¹ Madgwick J, in the Federal Court of Australia, held that 'the content of procedural fairness is reduced, in practical terms, to nothingness' in this case as disclosure has the potential to prejudice national security interests.³⁴² This was affirmed on appeal to the Full Court of the Federal Court³⁴³ despite noting in obiter the 'courts are ill-equipped to evaluate intelligence'³⁴⁴ and therefore not in a position to contradict the confidential affidavit evidence provided to them by ASIO.³⁴⁵ Despite an acknowledgement of the risk of 'serious unfairness,'³⁴⁶ the courts found there was no error of law. An application for special leave to appeal to the High Court was refused.³⁴⁷ The applicant was subsequently deported from Australia back to his country of birth Iran without knowing or being able to test the allegations made against him.

The cases of Hussain and Leghaei represent a fundamental departure from the principles of procedural fairness in administrative law cases concerning national security that are being abrogated outside the strictly necessary parameters set out under our international obligations in the *ICCPR*, such as public emergencies.

It is the view of the UNSW Law Society that the denials of procedural fairness in Part IV do not pass the necessity stage of the proportionality analysis, as less burdensome, yet comparatively practicable, means of navigating the balance between procedural fairness and national security exist.

³⁴⁰ *Ibid*, 10 [30]-[31].

³⁴¹ *Ibid*, [46]-[61].

³⁴² *Ibid*, [88].

³⁴³ *Ibid*, [70]-[73].

³⁴⁴ *Leghaei v Director General of Security* [2005] FCA 1576, [84].

³⁴⁵ *Ibid*, [82].

³⁴⁶ *Ibid*.

³⁴⁷ *Leghaei v Director-General of Security & Anor* [2007] HCA Trans655.

3. *The Special Advocate Model as a Less Restrictive Means on Procedural Fairness*

Alternative models that maintain a higher degree of procedural fairness in a closed intelligence context have been implemented in foreign jurisdictions to varying levels of effectiveness. One of the reforms proposed by Ben Saul is to appoint special advocates³⁴⁸ similar to those in the United Kingdom,³⁴⁹ Canada³⁵⁰ and New Zealand.³⁵¹

The purpose of such an advocate is to assist the court in evaluating the sensitive evidence regarding the affected person when they are restricted from doing so when furnished with an adverse security assessment. Clearly, this is less restrictive means to on the right of procedural fairness as there is some element of disclosure and representation for the affected party which allows a third party to challenge the material which is deemed prejudicial to national security if disclosed to the affected person. This model allows for a more active approach to be taken towards the rights of an individual and mitigates to a certain extent the passive and deferential approach taken by Australian courts and tribunals towards executive decision-making.

The effectiveness of special advocates in the United Kingdom is uncertain. Kavanagh highlights three faults of the special advocate proxies in the actual effectiveness of 'balancing the odds' in favour of the effected individual as opposed to just security.³⁵² While in this context the analysis provided concerns control orders rather than adverse security assessments, the issues remain the same.

³⁴⁸ Ben Saul, 'Fair Shake of the Sauce Bottle': Fairer ASIO security assessments of refugees.' (2012) 37(4) *Alternative Law Journal* 224.

³⁴⁹ *Special Immigrations Appeals Commission Act 1997* (UK), s 6.

³⁵⁰ *Immigration and Refugee Protection Act 2001* (Canada), s 85.

³⁵¹ *Immigration Act 2009* (New Zealand), s 263.

³⁵² Aileen Kavanagh, 'Special Advocates Control Orders and Right to a Fair Trial' (2010) 73 *Modern Law Review* 836.

Firstly, once the special advocates have seen the sensitive evidence they are unable to communicate or receive direction from the affected individual.³⁵³

In addition, special advocates lack the resources of an ordinary legal team and have no power to call witnesses.³⁵⁴ It is clear that the affected individual is still placed at a significant disadvantage and that this arrangement is atypical of a normal solicitor-client relationship. Another issue raised by the special advocate model was that objections by the government to disclosure on the grounds of compromising their intelligence were almost always upheld by the court.³⁵⁵ This is the familiar rationale of the court being unable to question an expert assessment that is by its intelligence nature, unchallengeable.³⁵⁶

That being said, the question is whether this model eases some of the restrictions placed on procedural fairness in the Australian context at all in cases concerning national security, rather than if it is an acceptable end result. In *Secretary of State for the Home Department v MB* [2007] 46 UKHL 68, three judges adopted positions that the engagement of Special Advocates would enhance the measure of procedural justice available to an affected individual in almost all cases. Hence, it is clear that the existence of special advocates as opposed to nothing is less restrictive on procedural fairness.

The UNSW Law Society believes that the adoption of the Special Advocates model is a measure that would be practicable to implement. The prospect of carefully appointed individuals to accept their role in a sensitive area while recognising their duty and managing competing interests in a proportionate way is not unreasonable.

In terms of whether this less restrictive means is equally likely to achieve the government's goal of national security, there are important considerations involved. It very much depends on the level of responsibility the special advocate will be

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ Constitutional Affairs Committee, 7th Report, 2004-5 at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/32302.htm> at [52]

³⁵⁶ *Ibid.*

obligated to hold to the client. Lord Phillips in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 59 required a 'core irreducible minimum' of procedural fairness to be maintained and required the controlled person to be given sufficient information about the allegations to be able to give effective instructions to the special advocate.³⁵⁷ It is important to note that in the context of the AF case, there was a legal requirement for Article 6 of the European Convention of Human Rights to be satisfied.

In a similar implementation in Australia, the level of responsibility given to the special advocate could certainly be placed at a lower or higher standard. The main concern is whether special advocates will be able to effectively draw the line between meeting this standard and the goal of national security. Kavanagh also draws attention to such a requirement placing the government in a difficult decision. If the protection of non-disclosure materials becomes necessary, the likelihood of issuing such a control order in the first place will fall, as the evidence has a chance to be disclosed to a court that finds it necessary. Clearly, an increased hesitance to take sub-optimal intelligence decisions could be detrimental to national security. The UNSW Law Society believes however, that with a careful, but flexible standard for special advocates these concerns could certainly be mitigated.

D. Appropriateness

The reduction of procedural fairness to 'nothingness' in matters concerning national security is unbecoming of a modern liberal democracy that respects the dignity and rights of the individual. Securing the lives of all Australians against the threat of terrorism is a legitimate policy objective but it must be proportionate and not affect the essential content of the common law obligation to procedural fairness.

Madgwick J in *Leghaei v Director General of Security* poetically noted that the capacity for avoiding error 'grows in the sunlight of the opportunity for correction by

³⁵⁷ *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 59, [43]-[81] (Phillips LJ).

affected persons and withers where secrecy and unreviewability reign.³⁵⁸ The UNSW Law Society believes the detriment caused by the effect of the ASIO Act and the qualifications to procedural fairness in the AAT Act, in matters where disclosure of the reasons behind the furnishing of an adverse security assessment is deemed prejudicial to the defence and security of Australia, is disproportionate to the purpose of the measure. It creates the situation whereby it is difficult to assert the government has not acted arbitrarily or irrationally on the facts, and that it is not licensed to do so by the particularities of the statutory framework. The inability of affected persons to see, test or be heard on the allegations even in a redacted summary of evidence or through an independent advocate is not conducive to a just legal system.

The UNSW Law Society believes the burden created by the anti-terrorism legislation is too restrictive – particularly considering the alternative measures that are available to be adopted such as the Special Advocate Model - on such a fundamental right as procedural fairness because it abolishes the very nature of the right.

1. *The Nature of Intelligence*

The UNSW Law Society acknowledges the legitimate reluctance of the courts to analyse the validity or reasonableness of intelligence decisions. However, Kavanagh observes that intelligence material typically relied upon contain second or third hand hearsay from unidentified informants and predictions/conjecture. It is clear that such material would be inadmissible in a normal court of law and a judge would unlikely have the expertise to analyse such evidence.

The UNSW Law Society also believes that there is value in such a law that allows for ASIO to decide to respond to perceived security threats with a framework that emphasises ease, urgency and precaution.

2. *Confidence in the Legal System and Persona Designata*

³⁵⁸ *Leghaei v Director General of Security* [2005] FCA 1576, [80].

The UNSW Law Society believes that an absolute denial of procedural fairness to this degree causes significant damage to the integrity of legal institutions. An aggravating factor is the irregularity presented by section 54 of the *ASIO Act*, which bestows a statutory right to citizens to challenge the validity of adverse assessments to the Security Appeals Division of the Administrative Appeals Tribunal. Hardy states that this statutory right is a 'little more than an illusion in substance'³⁵⁹ as the right can, and is in the majority of cases, overpowered by the public certificate provision of section 38.³⁶⁰ This misleading provisions in the legislation, intentional or not, significantly increases the potential for public distrust as it demonstrates an attempt to avoid accountability.

The security/defence certificates under s 38³⁶¹ currently obligates the courts to effectively be a 'rubber stamp'.³⁶² A disturbing finding from Hussain³⁶³ is that the tribunal was obliged to accept the validity of the certificate without question, as no criteria exists for the Minister's decision and is prima facie to be taken as reasonable. Hardy proposes that this unquestioning acceptance is difficult to reconcile with the persona designata doctrine. The wider issue of an extension of the persona designata doctrine is beyond the scope of this report but the UNSW Law Society would like to acknowledge this serious concern.

3. *A Minimum Standard for Procedural Fairness*

The UNSW Law Society believes that a fundamental right such as procedural fairness could not be 'reduced to nothingness' under any pretence or circumstance. Part IV allows for an absolute infringement of the right, even though the actions to be taken against the individual can be onerous and burdensome.

³⁵⁹ Keiran Hardy, 'ASIO, Adverse Security Assessments and the Denial of Procedural Fairness' (2009) 17(1) *Journal of Administrative Law* 39.

³⁶⁰ *Australian Security Intelligence Organisation Act 1979* (Cth).

³⁶¹ *Ibid.*

³⁶² Keiran Hardy, 'ASIO, Adverse Security Assessments and the Denial of Procedural Fairness' (2009) 17(1) *Journal of Administrative Law* 39.

³⁶³ *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241.

The UNSW Law Society would like to advocate for an adoption of an irreducible minimum standard of procedural fairness similar to that interpreted from Article 6 of the European Convention of Human Rights in cases such as *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28. The minimum standard interpreted in the AF case was that the controlled person had to be given sufficient information to enable them to communicate effective instructions to their special advocate.³⁶⁴ The UNSW Law Society believes such a standard would be reasonable and proportionate.

17 - 1 EXECUTIVE IMMUNITIES - GENERAL CRITERIA

Question 17–1 What general principles or criteria should be applied to help determine whether a law that gives Executive immunities a wide application is justified?

A. Preliminary Comments

This section discusses Executive immunity from private law causes of action against Executive conduct. In this way it is distinct from a discussion of judicial review, which concerns public law causes of action.

1 Equality Principle and its Qualifier

The 'equality principle' and its qualifier underpin any discussion of Executive immunity in Australia. The equality principle states that the Crown is to be, as nearly as possible, equal before the law.³⁶⁵ Thus, the Executive is to be liable in private law in much the same way as private individuals. AV Dicey views such equality as

³⁶⁴ *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28.

³⁶⁵ P Cane and L McDonald, *Principles of Administrative Law* (Oxford University Press, 1st edition, 2008) 286; See also D Nolan, 'Suing the State: Governmental Liability in Comparative Perspective' (2004) 67 *The Modern Law Review* 844, 846, 848.

one of three pillars of the rule of law: 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm.'³⁶⁶ This principle seems enshrined in pt II art 2 s 3(a) of the *International Covenant on Civil and Political Rights*, which urges state parties to the Covenant to: 'ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.' This provision does not seem to limit its scope to public law remedies.

However, the equality principle in Australia has an important qualifier. The equality is not exact. The Crown is to be equal as nearly as possible before the law.³⁶⁷ This asymmetry of equality before the law stems from an important distinction between the interests of the Executive compared to those of private individuals. Private individuals are entitled to pursue private interests. The Crown (including its officers) is 'charged with the performance of public functions'.³⁶⁸ It is not entitled to promote its own interests but rather is obliged to pursue the public interest.³⁶⁹

The basal justification for Executive immunities thus becomes apparent: in pursuing the public interest, Executive immunity from private law litigation may be beneficial, even necessary.³⁷⁰

2 Critical Framework

³⁶⁶ AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1st ed, 1885; 10th ed, 1959) 193.

³⁶⁷ See *Judiciary Act 1903* (Cth).

³⁶⁸ Cane and McDonald, above, 365; see also Nolan, above, 846.

³⁶⁹ Cane and McDonald, above, 365; see also *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 259 (Crennan and Kiefel JJ): '...the position of a public authority is not the same as that of a citizen and the rule of equality is not regarded as wholly applicable. It has public functions and it has statutory powers which the citizen does not.'; *Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 556 (Gleeson CJ): 'Although the first principle is that the tortious liability of governments is, as completely as possible, assimilated to that of citizens, there are limits to the extents to which that is possible. They arise from the nature and responsibilities of governments.'

³⁷⁰ Cane and McDonald, above, 291 has observed that a common thread amongst several negligence cases involving public authorities was the underlying question of 'whether imposing a duty to take care not to harm the (private) interests of a particular individual would potentially hinder the alleged tortfeasor's capacity to protect and promote societal or public interests, the protection and promotion of which are its responsibility'.

Any given Executive immunity can be critiqued at two levels. First, its existence in any form is not acceptable. Second, its existence in some form is acceptable, but its current form is unacceptably broad.³⁷¹ In line with the terms of reference of the Issues Paper (namely, question 17-1) this discussion will focus on the second level of critique, though at times discussion additionally encompasses the first-level critique.

This discussion asserts that the Legislature is obliged to provide clear statutory documents which do not rely on judicial intervention (namely through the principle of legality)³⁷² to avoid potentially falling foul of common law rights. This is especially important given the often unsettled nature of judicial understanding of such legislation.³⁷³ Where multiple reasonable statutory constructions are possible, each will be assessed. The analysis of whether an immunity is too wide adopts a three tiered classification system:

Acceptable: All possible reasonable interpretations (including where there is only one) are not excessively wide according to the modified proportionality test.

Unacceptable: All possible reasonable interpretations (including where there is only one) are excessively wide according to the modified proportionality test.

Suspect: One or some of the possible reasonable interpretations are excessively wide according to the modified proportionality test. At least one

³⁷¹ See the Law Reform Commission of Canada, 'The Legal Status of the Federal Administration' (Working Paper No 40, Law Reform Commission of Canada, 1985), 41. Please note that this typology is not exhaustive, but serves the purpose of this discussion. Conceivably, two different executive immunities could be of equal breadth but owing to the difference in the subject matter of the immunities, one may be viewed as acceptable and the other not.

³⁷² See *Coco v The Queen* (1994) 179 CLR 427.

³⁷³ Cane and McDonald, above, [365](#).

interpretation is not excessively wide according to the modified proportionality test.

B. *Modified Proportionality Test*

The 'modified proportionality test' is built on the foundation of a 'base' proportionality test – a conceptual framework (not an established legal principle)³⁷⁴ designed to assist in addressing the difficult balancing act between preserving individual common law rights, and allowing necessary but detrimental incursions into this domain. Importantly, such guidelines (including the proposed additions) help to protect against the conscious or unconscious arrival of value judgements masquerading as reasoning when discussing proportionality.³⁷⁵ Several proportionality tests or guidelines, of varying similarity, have been proposed and discussed in several jurisdictions.³⁷⁶ The 'base' proportionality test employed in this discussion is a three-limbed test drawn out of judicial³⁷⁷ and extra-curial comments by Kiefel J.³⁷⁸

1 *Suitability*

At core, the suitability threshold asks whether the policy goal of the statute is or can be advanced via the given Executive immunity. Can the Executive immunity have an effect in achieving the broader policy goal?³⁷⁹ As Kiefel J notes in *Rowe*: '...the operation and effect of a law must be necessary to achieve the designated purpose.'³⁸⁰ Kiefel J has suggested that, at least in the European context, 'unsuitability' is rarely made out.³⁸¹ The UNSW Law Society views the threshold for

³⁷⁴ S Kiefel, 'Proportionality: A rule of reason' (2012) 23 *Public Law Review* 85, 86.

³⁷⁵ See J Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 19-20.

³⁷⁶ See, for instance, the 'reasonable suitability' test in Canada.

³⁷⁷ *Rowe and Anor v Electoral Commissioner and Anor* (2010) 243 CLR 1, 140 (Kiefel J) ('*Rowe*').

³⁷⁸ Kiefel, above.

³⁷⁹ *Rowe*, 133 (Kiefel J).

³⁸⁰ *Ibid.* 134 [435] (Kiefel J).

³⁸¹ *Ibid.* 141 (Kiefel J).

suitability as being 'more than theoretical or speculative potential to achieve a public policy objective'.³⁸²

This assessment stage clearly involves a process of statutory construction, namely to determine the policy goal of the statute. Thus, it is anticipated that reasonable minds may disagree about the policy goal, and thus the acceptability of the immunity. That said, the immunity itself should not be viewed as, on its own, a justification for expanding the policy goal of the statute. Where all other textual and contextual matters suggest the statute has 'x' purpose; the swelled nature of the immunity clause (which on its own suggests 'x+y' purpose) should not be grounds to conceive of the statute's purpose as 'x+y'. Otherwise, an immunity clause will necessarily justify its existence (at least at this stage) by shaping one's construction of the statute, and thus its purpose, so as to fit the immunity clause.

This discussion seeks to add to this limb an additional component that is specific to Executive immunity.

It should be reasonably conceivable that an officer of the Commonwealth may breach the private law obligations that they are immunised from in the execution of their powers. Where no private law cause of action is reasonably conceivable, the immunity will necessarily fail at the suitability stage. Where it is reasonably conceivable that only some private law causes may be breached, it is preferable for those private law obligations not within the scope of reasonably conceivable breach to not be included. (This discussion is aware that expecting drafters of legislation to list only reasonably conceivable causes of action may be an unduly strict expectation, and so limits its critique in this regard to noting 'preferable' variants.)

³⁸² See A Barak, 'Proportionality (2)' in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 738, 743.

Negligence case law offers guidance for defining 'reasonably conceivable'. It may be viewed as akin to the 'not far-fetched and fanciful' test espoused in *Wyong Shire Council v Shirt*.³⁸³

2 Necessity

At core, this limb asks whether there is no other means, than the given Executive immunity, to achieve the public interest goal that is:

- 1) less restrictive (a lesser incursion into fundamental rights);
- 2) equally practicable (understood as: ease of bringing into effect); and,
- 3) as likely to succeed (understood as: probability of policy success).³⁸⁴

Again, this discussion seeks to add additional components, specific to Executive immunity (tying those additions to the three sub-limbs).

(a) Least Restrictive

Two additions are proposed for the 'least restrictive' sub-limb.

If the breadth of the immunity is narrower, the immunity is therefore less restrictive: the range of potential causes of action available to a putative plaintiff necessarily grows. Thus qualifications to an immunity's breadth necessarily create a less restrictive immunity.

Two such qualifiers are offered.

³⁸³ (1980) 146 CLR 40, 47 (Mason J).

³⁸⁴ See *Rowe*, 134-5 (Kiefel J).

The first is the bona fide qualifier. Executive immunities that fail to include a bona-fide qualifier – which limits the scope of the Executive immunity to only those actions that are conducted in good faith (honest, sincere) – may begin to look excessively broad. Multiple extant Executive immunity provisions expressly include bona-fide qualifiers. The immunity clause in s 55Z of the *Freedom of Information Act 1982* (Cth) only ‘applies if a person does any of the following in good faith’ (emphasis added).³⁸⁵ Similar good faith qualifiers can be found in the immunity provisions of s 99ZR(1) of the *National Health Act 1953* (Cth), s 460 of the *Fair Work Act 2009* (Cth), and ss 66 and 270 of the *Work Health Safety Act 2011* (Cth).

Limiting the breadth of an Executive immunity to only those actions conducted bona fide necessarily reduces the restrictive quality of the immunity: Putative plaintiffs are not denied the possibility of litigation where the Executive, or its officers, have engaged in mal fide behaviour (dishonest, fraudulent).

It is true that a court may read such qualifiers into a statute that is otherwise silent, but as noted in the introduction, this discussion remains wary of relying on this method to achieve common law protections, and feels the Legislative is obliged to be as clear as it can.

The second is the necessary, reasonable or proportionate use of force qualifier. Where the immunity covers otherwise tortious force against the person, it is expected that the immunity would be limited to necessary, reasonable or proportionate use of force. Defences to otherwise unacceptable behaviour against another’s person are often limited by the caveat of necessary, proportionate or reasonable use of force. For example, a property owner’s right to use self-help against a trespasser is qualified by such force being ‘reasonably necessary’.³⁸⁶

³⁸⁵ Section 55Z(1) *Freedom of Information Act 1982* (Cth).

³⁸⁶ See, for instance, *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720, where it was held that a landowner would not attract liability for employing self-help to evict an overholding tenant,

Where a criminal defendant pleads self-defence, the defence often turns on whether the defendant's use of force was proportionate to the threat posed by the victim.³⁸⁷

(b) *Equal Practicability*

Additions can be made to the 'equal practicability' sub-limb.

It must be reasonably conceivable that, were the immunity not present, the administration of the policy would, due the negative outcome inherent in a lack of Executive immunity (namely, private law litigation), become substantially more difficult than if the immunity were present (this by definition includes instances where the administration of policy becomes impossible).

This 'administrative paralysis via litigation' may occur in one of two ways. The first is actual paralysis: where the actual instigation of private law litigation harms the administration of policy. The manner in which the administration of policy is harmed may be various. For instance, excessive delay may be caused, or litigation costs may ultimately render the policy financially unfeasible.³⁸⁸ The second can be dubbed 'over-deterrence': Where the threat of private law litigation (but not its actual instigation) leads to excessive caution on the part of the Executive, and its officers, such that the administration of policy is harmed.³⁸⁹

provided the force used was reasonably necessary to remove the individual. This right was affirmed by the New South Wales Court of Appeal in *MacIntosh v Lobel* (1993) 30 NSWLR 441.

³⁸⁷ See, for instance, *Crimes Act 1900* (NSW) s 418.

³⁸⁸ See Nolan, above, 855.

³⁸⁹ See *Calveley v Chief Constable of Mersey Side* [1989] AC 1228, 1238 (Lord Bridge of Harwich): 'it would plainly be contrary to public policy, in my opinion, to prejudice the fearless and efficient discharge by police officers of their vitally important public duty of investigating crime by requiring them to act under the shadow of a potential action for damages for negligence by the suspect'; *Hill v Chief Constable of West Yorkshire* [1989] AC 53; cf *Home Office v Dorset Yacht Co. Ltd* [1970] AC 1004, 1032-1034 (Lord Reid). It should be noted that commentary is divided about whether there is sufficient empirical support to confirm the existence of a 'chilling' effect. Cane and McDonald, above, 293 questions the sufficiency of existing evidence to support the concept. Meanwhile, Nolan, above, 860 supports the proposition.

The same 'not far-fetched or fanciful' test for reasonably conceivable as noted above is suggested to be relevant here.

The increase in difficulty must be 'substantial'. A slight increase in difficulty cannot be considered sufficient, given the destruction of rights inherent in Executive immunity. Ultimately, determining the right balance is a normative inquiry, but certainly it seems (at this theoretical level of inquiry) possible to say that a slight increase in administrative difficulty is not sufficient to justify an Executive immunity.

Importantly, this analytical model focuses our attention on Executive immunity's concern with private law litigation. Analysis should be careful not to conflate a reasonably conceivable concern that judicial review (or other public law remedies) may cause administrative paralysis with a not reasonably conceivable concern that private law litigation will lead to the same result.

(c) *Success Rate*

The practicability and success rate of a policy may often be harmed by the addition of the bona fide qualifier or the necessary, reasonable or proportionate use of force qualifier. Tolerating mal fide behaviour or disproportionate, unreasonable or unnecessary behaviour may, by increasing the range of possible actions for Commonwealth officers, increase the effectiveness (both success rate and practicability) of a policy. Kiefel J notes in *Rowe* that the alternate (less restrictive) method must, to avoid denying legislative choice, be 'equally effective'.³⁹⁰ However, despite both qualifiers potentially (though not certainly) becoming disqualified at this stage, any analysis must remember the third limb: appropriateness. Both qualifiers return for analysis at that stage. Thus potential failure for both qualifiers at this stage need not end their relevance.

³⁹⁰ *Rowe*, 141 (Kiefel J).

Additionally, depending on the circumstances under analysis, the 'administrative paralysis via litigation' concern may equally apply to the success sub-limb.

3 Appropriateness

The appropriateness limb seeks to ask whether, on balance, the social benefit outweighs the social detriment.³⁹¹ Two sub-limbs become relevant for discussion: social benefit and social detriment.³⁹²

(a) Social Benefit

Two questions will likely need to be considered when discussing Executive immunities and their social benefit.

The first is directly associated with Executive immunity. The efficient and effective realising of policy goals is a social benefit. Thus, the extent to which Executive immunities prevent 'administrative paralysis via litigation', such immunities aid in the creation of this social benefit. Assessing social benefit therefore requires an assessment of the degree to which administrative paralysis via litigation is prevented. Unlike the similar discussion in the necessity limb, this question needs no threshold to be satisfied. That being said, the greater the expected paralysis, the more the balance is shifted towards the immunity being appropriate; the less the expected paralysis, the more the balance is shifted towards the immunity being inappropriate.

The second question concerns the statute's specific benefits. Any statute will likely suggest likely benefits – both direct and indirect. These need to be assessed on a case-by-case basis.

³⁹¹ *Rowe*, 140 (Kiefel J).

³⁹² *Rowe*, 142 (Kiefel J).

(b) *Social Detriment*

The bona fide qualifier returns for consideration at this stage.

The presence or otherwise of a bona fide qualifier concerns the question of social detriment. Despite the fact that tolerating mal fide behaviour may increase the effectiveness of policy, to create an immunity for such behaviour is to introduce a significant social detriment.

Mal fide behaviour by an Executive officer can be viewed as an abuse of power, unless we are to begin tolerating a fraudulent or malicious Executive. As P Cane and L McDonald have noted, 'inflicting harm by abusing public power can never be in the public interest'.³⁹³ Accepting these two propositions, it is then logically evident that to tolerate mal fide behaviour is to begin undermining the core foundation justifying the qualification to the equality principle: that public agents act in the public interest. Despite potential increases in effectiveness, a policy that has been realised via mal fide means begins to undermine the compact between the equality principle and its qualifier. This is clearly a hazardous outcome.

It is perhaps for this reason that the idea of limiting Executive immunity to bona fide exercises of power is not novel in Australian law. In *Local Board of Health of City of Perth v Maley* (1904) 1 CLR 702 the High Court of Australia held that a private citizen was barred from suing a public authority for trespass, provided that the public authority exercised its discretions in good faith.³⁹⁴ The public authority, a local board, was pursuing a public interest: establishment of a sewerage and drainage system.³⁹⁵

³⁹³ Cane and McDonald, above n 365.

³⁹⁴ *Local Board of Health of City of Perth v Maley* (1904) 1 CLR 702, 703.

³⁹⁵ *Ibid.*

Concerning use of force, a point similar to that made above regarding bona fide qualifiers can be made. Unnecessary, unreasonable or disproportionate use of force begins to look a lot like an abuse of power, especially when Executive officers rely on the protection of Executive immunities to carry out such behaviour: the Executive officer no longer seems to be acting in the public interest. Again, the compact between the equality principle (a principle of considerable force given it goes to the core of rule of law)³⁹⁶ and its qualifier is harmed.

A final addition is included within this limb: the availability of alternate remedies. This fits uneasily in this limb. Perhaps a justification for its presence here is that alternate remedy schemes offer a means of mitigating the social detriment, and thus can push the balance back in favour of acceptability.

The social detriment may be overcome or at least significantly mitigated by the existence of alternate sufficient remedies for putative plaintiffs.³⁹⁷ This can occur at two levels.

First, alternate judicial remedies may exist. This idea borrows from *Jones v Department of Employment* [1989] QB 1 – in which it was determined that a duty of care will not be imposed on the Crown where suitable alternative remedies are available (for instance, judicial review). The approach suggested in this discussion effectively reverses this idea: the non-existence of alternate suitable remedies will weigh against a given breadth of immunity being deemed proportionate.

The breadth of the immunity may actually determine the availability of alternative remedy. Certain relationships may offer remedy at both contract and tort. For whatever reason, only one cause of action may be likely to harm public administration (at least to an extent necessary to justify removal of common law

³⁹⁶ See Dicey, above.

³⁹⁷ See Law Reform Commission of Canada, above.

rights). Where immunity stretches to only the detrimental (for public administration) cause of action, the immunity overall may still be tolerable given that the other cause of action exists to offer an alternative remedy. However, where the immunity stretches across both, such alternative remedy is removed and the immunity may thus become unacceptably broad.

It should be noted that public law remedies likely offer a poor alternative to private law remedies. The former are not concerned with damages. Putative plaintiffs may be concerned only with monetary compensation. This should be remembered when assessing any given immunity.

The second level is the existence (or otherwise) of non-judicial remedies: are there non-legal avenues of redress that provide sufficient redress, such that the denial of legal avenues is practically insignificant or of less significance?

Discussing judicial review, P Cane and L McDonald have observed that viewing public law accountability purely through a legal lens can lead to a distorted image of accountability.³⁹⁸ Situations in which legal accountability mechanisms are negated may still, if one looks beyond legal factors, be sufficiently handled within a broader accountability framework. Such can apply to Executive immunities. No-fault compensation schemes offer a prime example.³⁹⁹ Where the scope of remedy of the no-fault compensation scheme and the private law causes of action nullified by Executive immunity are the same, or at least similar, it is possible to suggest that sufficient alternative remedy exists, thus allowing for the Executive immunity, or its given breadth, to be tolerated. For instance, Executive immunity for otherwise tortious behaviour while driving a vehicle may be tolerable in Victoria (due to the

³⁹⁸ Cane and McDonald, above [n 365](#), 214-5.

³⁹⁹ See for instance D Bamford and M Rankin, *Principles of Civil Litigation* (Thomson Reuters, 2nd Edition, 2014) 28-9, where they discuss Victoria no-fault compensation scheme for vehicle accidents, and South Australia's workers' compensation scheme. See M Bismark and R Paterson 'No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety' (2006) 25 *Health Affairs* 278.

state's no-fault compensation scheme)⁴⁰⁰ but not so in New South Wales, given that New South Wales lacks an equivalent scheme.

17 - 2 EXECUTIVE IMMUNITIES - APPLICATION

Question 17–2 Which Commonwealth laws unjustifiably give Executive immunities a wide application, and why are these immunities unjustified?

Statute	Status	Criteria issue
<i>Migration Act 1958</i> (Cth) 494AB(1)(a)	Suspect	Appropriateness: - constructions possible that lack bona fide qualifier
<i>Migration Act 1958</i> (Cth) 494AA(1)(e)	Suspect	Appropriateness: - constructions possible that lack bona fide qualifier
<i>Migration Act 1958</i> (Cth) 494AB(1)(ca)	Suspect	Appropriateness: - constructions possible that lack bona fide qualifier

A Migration Act 1958 (Cth) Section 494AB(1)(a)

Section 494AB(1) of the *Migration Act 1958* (Cth) deems that a range of proceedings against the 'Commonwealth may not be instituted or continued in any court'. Of relevance to our discussion is sub-section (1)(a), which concerns proceedings relating to the exercise of powers under s 198B. Section 198B grants a power to 'an officer' to bring 'transitory persons' to Australia, for a 'temporary purpose', from a locale outside Australia. (s 198B(1)) This power includes the power to

⁴⁰⁰ Bamford and Ranking, [Ibid](#), 28-29.

- 'place' the 'transitory person' on a vehicle/vessel (s 198B(2)(a));
- 'restrain' the 'transitory person' on a vehicle/vessel (s 198B(2)(b));
- 'remove' the 'transitory person' from a vehicle/vessel (s 198B(2)(c));
- use such force as is 'necessary and reasonable' (s 198B(2)(d)).

The definition of 'transitory person' is broad (s 5). However, a general statement is possible. 'Transitory persons' are, by and large, unlawful non-citizens currently undergoing processing within the regional processing scheme.

Section 198B clearly envisages action by officers of the Commonwealth. Section 494AB(1)(a) thus seeks to afford an Executive immunity to actions within s 198B.

Section s 494AB(1) refers to 'proceedings against the Commonwealth'. This broad phrasing seems to encompass both public and private law remedial forms. Nothing contextual suggests against this interpretation. The only remedies that s 494AB(1) is clear about not attempting to affect are those that are constitutionally obliged (s 494AB(3)).

1 *Suitability*

The immunity needs to be viewed in light of the broader government policy of seeking to control the movement of non-citizens within Australia.⁴⁰¹ The regional processing scheme is part of this broader goal, and so control of 'transitory persons' is thus tied to this broader goal.

Immunity for Commonwealth officers is suitable.

The availability of legal proceedings may slow and potentially paralyse (discussed further below) the government's administration of non-citizen movements. Thus,

⁴⁰¹ See *Migration Act 1958 (Cth)* s 4(1).

especially given the low threshold employed in our analysis, this immunity passes this first sub-limb of suitability: the policy goal of the statute is or can be advanced via this Executive immunity

The second sub-limb, specific to Executive immunity, is whether there is a reasonably conceivable concern of litigation. Of particular relevance are tortious causes of action. 'Placing', 'restraining' and 'removing' of 'transitory persons' on boats/vessels are phrases which invoke a relationship of control over the physical body of the 'transitory person'. Thus the tort of battery becomes apparent. Further, 'placing' and 'restraining' on a boat/vessel brings to mind the tort of false imprisonment. It is reasonably conceivable that such private law causes of action would arise in the enforcement of s 198B. No causes of action in contract or equity are apparent in s 198B. Despite seemingly including these irrelevant causes of action, this is not determinate of an excessively broad Executive immunity, though it would be preferable for the immunity to expressly limit itself to tortious conduct.

2 Necessity

The alternative of not having the immunity is not likely to be equally practicable and successful. It is reasonably conceivable that the non-existence of this immunity would lead to significant administrative difficulties – both the actual and 'over-deterrence' variant. It has been noted that judicial review has in recent history been predominantly made up of refugee cases.⁴⁰² It has been suggested that the 'stakes involved' with failing to achieve residency create a particularly strong imperative to, among other things, delay final determination of status.⁴⁰³ As R Douglas notes: 'With delay is brought the possibility that there will be a change in government or government policy which may mean that unsuccessful applicants for refugee status will be processed under a regime more favourable than that which applies at any

⁴⁰² R Douglas, *Douglas and Jones's Administrative Law*, (The Federation Press, 5th edition, 2006) 653-4.

⁴⁰³ *Ibid.* 654-5.

given point in time.⁴⁰⁴ It is hard to see why litigants would not pursue private law litigation for the same purposes, thus leading to delay and financial burden.

Further, given such a conclusion, it is reasonably conceivable that officers may become more wary about employing their s 198B powers ('over-deterrence').

It is reasonably conceivable that such burdens (both actual and 'over-deterrence') would be more than minor, especially in the case of actual burdens – where evidence suggests individuals seeking asylum will employ available legal methods to delay the process in the hope of a change in government policy.⁴⁰⁵

It should be noted that less restrictive alternatives are available. First, the section could conceivably limit itself to either public or private law remedies. However, for the reasons stated already (refugees and migrants employing whatever available legal redress), limiting the immunity to only one type of public or private law remedy is not likely to be equally successful (if success is measured as the efficient administration of non-citizens' movements).

Second, the section could include a bona fide qualifier. However, tolerating mal fide behaviour by the officers necessarily reduces the negative impact on administration – both actual (less litigation) and 'over-deterrence' (greater freedom of action, means fewer concerns about employing current powers). Given the forceful nature of the powers, and the potentially heated and dire nature of the interactions, that the powers in such a situation may at times be used mal fide is not unreasonably conceivable.

It is pleasing to see that the power pertaining to use of force seems qualified by a reasonable, proportionate or necessary qualifier. Section 198B(2)(d) refers to use of

⁴⁰⁴ [Ibid.](#) 655.

⁴⁰⁵ [Ibid.](#)

such force as is 'necessary and reasonable'. To the extent that power is employed outside the confines of s 198B (that is, the use of force was not 'necessary and reasonable'), then s 494AB(1)(a) necessarily cannot apply. It would seem that any force necessary to effect the placing, restraining or removing of transitory persons from vehicles/vessels (s 198B(2)(a)-(c)) must be necessary and reasonable, though it need not be reasonable or necessary to place, restrain and remove the 'transitory persons'.

3 Appropriateness

Despite, initial factors suggesting that this section is not excessively broad, considerations of appropriateness begin to move this section into the realm of 'suspect'.

First, to the extent that this immunity aids effecting of a legitimate government policy, and that government policy benefits Australia, a social benefit naturally flows. A discussion of the specific benefits, pitfalls and problems of the current policy are beyond the scope of this analysis. However, it is possible to say that, in the abstract, the following benefits are acquired by controlling migration flows: increased security and reduction in health hazards. Given the statute's focus on migration, this is a statute-specific factor.

Further, it is not unreasonable to suppose that the policy has a significant beneficial impact on mitigating administrative paralysis. However, it should be noted that such a conclusion is liable to alteration should empirical evidence suggest something different.

However, two factors that can be included under social detriment undermine the appropriateness of this legislation.



There is the question of the bona fide qualifier. Nothing textually or contextually (in s 494AB(1)(a) or s 198B) suggests the presence of a bona fide qualifier. It should be noted that honest and sincere (i.e. bona fide) behaviour does not necessarily equate with behaviour that is necessary, reasonable or proportionate, thus the contextual force of s 198B(2)(d) is negligible. Constructions with and without a bona fide qualifier are possible, though the principle of legality would likely counsel for the inclusion of a bona fide qualifier (as this necessarily reduces the level of incursion into common law rights).

Finally, no alternative remedies can be discerned. There is no non-legal scheme for compensating 'transitory persons' who have lost common law rights under s 198B. Meanwhile, the breadth of the statute (including both private and public law remedy) seems to deny any other form of legal recourse (short of those afforded under the Constitution).

A construction exists that immunises mal fide behaviour (though admittedly this is not the most likely construction). Despite the overarching policy goal, it is hard to justify an immunity that is so broad as to undermine the social compact between the equality principle and the qualifier. Given other constructions exist which remove these flaws, it is not possible to say that all versions of s 494AB(1)(a) are excessively broad. Thus the immunity must be classified as 'suspect'.

B Migration Act 1958 (Cth) Section 494AA(1)(e)

Section 494AA(1)(e) creates an Executive immunity for 'proceedings relating to the performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 in relation to an unauthorised maritime arrival.'



Subdivision B of Division 8 of Part 2 has a number of sections. Of relevance is s 198AD which, for the purposes of taking an unauthorised maritime arrival from Australia to a regional processing country,⁴⁰⁶ gives power to an officer of the Commonwealth to:

- 'place' the 'unauthorised maritime arrival' on a vehicle/vessel (s 198AD(3)(a));
- 'restrain' the 'unauthorised maritime arrival' on a vehicle/vessel (s 198AD(3)(b));
- 'remove' the 'unauthorised maritime arrival' from
- the place at which the unauthorised maritime arrival is detained (s 198AD(3)(c)(i))
- vehicle/vessel (s 198AD(3)(c)(ii));
- use such force as is 'necessary and reasonable' (s 198AD(3)(d)).

Given the parallels in purpose (control of non-citizen individuals), likely concerns (administrative paralysis) and powers (control of the physical person) between s 198AD and s 198B, the arguments relevant to s 198B are the same as those for s 198AD. Further, the initial phrasing of the immunity provision for s 494AA(1) and 494AB(1) are identical: 'The following proceedings against the Commonwealth may not be instituted or continued in any court'. Thus the immunity afforded by 494AA(1)(e) is, for the same reasons as those given for s 494AB(1)(a), viewed as suspect.

It should be noted that nothing about s 198AD(3)(c)(i) (an equivalent of which is not found in s 198B) suggests any material difference between the two sections for the purposes of this discussion. Further, that s 198B concerns 'transitory persons' and s 198AD concerns 'unauthorised maritime arrivals' is of no relevance. Both types of individual represent non-citizens of which the Australian state seeks to control the

⁴⁰⁶ *Migration Act 1958 (Cth) S 198AD(2).*

behaviour of regarding entry or denial of entry into Australia. Finally, nothing seems to turn on the fact that s 198AD(3) expressly refers to the purpose of taking an unauthorised maritime arrival to a regional processing centre, and s 198B expressly refers only to 'for a temporary purpose'. Given s 198B concerns 'transitory persons', it implicitly concerns non-citizens involved in the regional processing scheme.

C Migration Act 1958 (Cth) Section 494AB(1)(ca)

Section 494AB(1)(ca) creates an Executive immunity for 'proceedings relating to the performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 in relation to a transitory person' (emphasis added). Subdivision B of Division 8 of Part 2 has a number of sections. Of relevance (given its concern with transitory persons), is s 198AH which, subject to certain caveats, applies s 198AD (discussed above) to 'transitory persons'.

The caveats (s 198AH(1A)(a)-(c) and s 198AH(1B)(a)-(c)) do not have a material effect.

Thus the critique levelled against 494AA(1)(e) (which is the same as that levelled against 494AB(1)(a)) applies equally to 494AB(1)(ca).

