

21 December 2016

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

By email: 18Cinquiry@aph.gov.au

Dear Chair

Inquiry into Freedom of Speech in Australia

Thank you for the opportunity to provide a submission to the Parliamentary Joint Committee on Human Rights' (PJCHR) Freedom of Speech in Australia Inquiry (the **Inquiry**).

The Law Council makes the following observations on matters relevant to the Terms of Reference for the Inquiry.¹

Racial Discrimination

In the timeframe permitted for submissions, the Law Council has not arrived at a settled position on the question of whether Part IIA of the *Racial Discrimination Act 1975* (Cth) (the **RDA**), and particularly sections 18C and 18D, impose an unjustified limitation on freedom of speech and are in need of reform.

The Law Council welcomes the PJCHR's Inquiry as an important mechanism to offer a clearly articulated analysis of what often appears to be polarised positions about the value of free speech and the effect of unrestricted speech on social equality.

The importance of freedom of expression to the maintenance of an effective democratic society cannot be overstated; however this right is not unqualified.

There are strongly held, divergent views within the legal profession about whether amendments to Part IIA of the RDA are necessary. On one view, the provisions of Part IIA do not impose unnecessary or disproportionate limitations on freedom of speech. The current provisions are seen, on this view, to offer important and appropriate protections for those seeking redress from racial vilification.

¹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of Speech in Australia Inquiry - Terms of Reference* (2016)
<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Terms_of_Reference>.

Notwithstanding concerns about the broad language used in section 18C of the RDA, proponents of this view consider that the courts have construed the provision in a conservative manner to the protection of the important right to freedom of speech and expression, and have found contraventions of section 18C only in cases of “profound and serious effects”, and not in cases involving “mere slights”.² The exemptions in section 18D are considered on this view to have provided important and effective safeguards for freedom of expression consistently with such protections which exist elsewhere in the law.

There is an alternative, and equally valid view that the RDA does not achieve the right balance between freedom of speech and speech that causes harm on the basis of a person’s race, colour or national or ethnic origin. On this view the wording of section 18C of the RDA is seen to be overly broad, beyond what is required from Australia’s international obligations, possibly unconstitutional and an unjustified incursion on free speech.³

The associated case for reform appears to be coalescing around the views put forward by acting NSW Supreme Court Justice Ronald Sackville AO and Professor George Williams AO. According to this position, section 18C of the RDA should be altered to substitute the words ‘offend, insult, humiliate or intimidate’ with a more rigorous standard such as ‘to degrade, intimidate or incite hatred or contempt’.⁴ In addition, references to the subjective responses of groups targeted by the speech should be replaced with an objective test having reference to the standards of a reasonable member of the community.

While the Law Council has not yet reached a settled position on whether Part IIA of the RDA requires reform in the timeframe permitted for submissions, it supports a proportionality approach in recognising both the right to freedom from racial discrimination and vilification, and the right to freedom of speech. The proportionality principle involves consideration of whether the provisions of Part IIA as a whole, as well as individually, have: a clear and precise legal basis; a legitimate objective; a rational connection to the objective to be achieved; and are suitable and necessary to meet that objective.

Australian Human Rights Commission Complaints Process

The Law Council considers that the Australian Human Rights Commission (**AHRC**) should not be required to conciliate complaints relating to matters, which it is satisfied have not arisen from unlawful conduct under Commonwealth anti-discrimination legislation. Accordingly, the Law Council suggests that the *Australian Human Rights Commission Act 1986* (Cth) (**the AHRC Act**) should include a mechanism for the early resolution of disputes or strike out of cases by the AHRC for matters which are unmeritorious. Exercise of this power should be subject to review by the Federal Court or Federal Circuit Court.

Further, the Law Council and Law Society of New South Wales recommend that, consistent with procedural fairness principles, the AHRC Act be amended to provide for minimum notification periods within which the AHRC should notify:

² See for e.g. *Eatock v Bolt* (2011) 283 ALR 505 [263]; and *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

³ Australian Law Reform Commission, *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015).

⁴ Professor George Williams AO, Submission to the Parliamentary Joint Committee on Human Rights, *Freedom of Speech Inquiry*, 30 November 2016.

- (a) the respondent(s) about the complaint which has been made against them; and
- (b) the complainant and respondent(s) about the complaint being inquired into, including its termination, and their attendance at any conciliation conference.

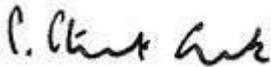
Criminal Law Provisions and the Australian Law Reform Commission's Traditional Freedoms Inquiry

The Terms of Reference for the Inquiry also require the PJCHR to consider the recommendations of the Australian Law Reform Commission in Chapter 4 of its *Final Report on Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*.⁵ The Law Council's views on a range of these recommendations are **attached**.

Thank you again for the opportunity to provide these observations.

The Law Council welcomes the pending review by the PJCHR and would welcome an opportunity to address any questions that it may have or expand on the above issues where required.

Yours sincerely



S Stuart Clark AM
President

⁵ Australian Law Reform Commission, *Final Report on Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Report No 129 (2015).



Law Council
OF AUSTRALIA

Freedom of Speech in Australia

Parliamentary Joint Committee on Human Rights

21 December 2016

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors - one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of its National Criminal Law Committee in the preparation of this submission.

Executive Summary

1. The Law Council of Australia welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Human Rights (**PJCHR**) Freedom of Speech in Australia Inquiry (the **Inquiry**).
2. This submission addresses the following laws which have been identified as per the Terms of Reference for the Inquiry (**TOR**)¹ regarding possible unjustified limitations on freedom of speech:
 - Secrecy offences, including the general secrecy offences in sections 70 and 79 of the *Crimes Act 1914* (Cth) (**Crimes Act**);
 - *Criminal Code Act 1995* (Cth) (**Criminal Code**) section 80.2C (advocating terrorism), sections 102.1, 102.3, 102.5, and 102.7 (prescribed terrorist organisations), and section 105.41 (preventative detention orders);
 - Section 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) (special intelligence operations); and
 - Secrecy offences in the *Australian Border Force Act 2015* (Cth) (**ABF Act**).
3. Key recommendations of this submission include:
 - As recommended by the Australian Law Reform (**ALRC**) in its 2009 report, *Secrecy Laws and Open Government in Australia*,² the general secrecy offences in sections 70 and 79 of the Crimes Act should be repealed and replaced by new offences that require that the disclosure of Commonwealth information did, or was reasonably likely to, or intended to cause harm.
 - Section 35P of the ASIO Act should continue to be subject to review by the Independent National Security Legislation Monitor (**INSLM**).
 - Paragraph 102.1(2)(b) of the Criminal Code relating to proscribing organisations which 'advocate' the doing of terrorist acts and subsection 102.1(1A) relating to the definition of 'advocates' should be repealed.
 - Binding, clear and publicly stated criteria for proscription of terrorist organisations should be statutorily prescribed.
 - Section 105.41 of the Criminal Code should be limited to include an additional physical element that the disclosure of information will endanger the health or safety of any person or prejudice the effective conduct of a terrorism investigation.
 - There should be a defence of prior publication for preventative detention order disclosure offences. The defence should require the defendant to satisfy the court that:
 - the information in question had previously been published;
 - having regard to the nature and extent of that prior publication and the place where it occurred, the defendant had reasonable grounds to believe that the second publication was not damaging, and

¹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, Freedom of Speech in Australia Inquiry - Terms of Reference (2016) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Terms_of_Reference>.

² Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

- the defendant was not in any way directly or indirectly involved in the prior publication.
- The ABF Act should be amended to include a public interest disclosure exception to the secrecy provisions that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.
- Consideration should be given to expanding the protections to all entrusted persons under the ABF Act in accordance with the 29 June 2015 Determination of Immigration and Border Protection Workers.

Criminal Law Provisions and the ALRC Traditional Freedoms Inquiry

4. The Terms of Reference for the Inquiry also require the PJCHR to consider the recommendations of the Australian Law Reform Commission in Chapter 4 of its *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Freedoms Inquiry Report)*.³ The ALRC’s recommendations included that the following Commonwealth laws, for example, should be further reviewed to determine whether they unjustifiably limit freedom of speech:

- Secrecy offences, including the general secrecy offences in sections 70 and 79 of the Crimes Act;
- Criminal Code section 80.2C (advocating terrorism), sections 102.1, 102.3, 102.5, 102.7 (prescribed terrorist organisations) and section 105.41 (preventative detention orders). These provisions are subject to review by the INSLM and the Parliamentary Joint Committee on Intelligence Committee (PJICIS) as part of their ongoing roles; and
- Section 35P of the ASIO Act (special intelligence operations). This provision is also subject to review by INSLM and the PJICIS as part of their ongoing roles.⁴

5. The ALRC also recommended that:

*... the Australian Government should give further consideration to the recommendations of the ALRC in its 2009 report on secrecy laws, and to whether Commonwealth secrecy laws – including the Australian Border Force Act 2015 (Cth) – provide for proportionate limitations on freedom of speech.*⁵

6. The Law Council recognises that a balance must be struck between open government and freedom of speech on the one hand and the protection of sensitive and classified information from disclosure on the other. Secrecy provisions such as those above are generally in pursuit of a legitimate objective to ensure the limitation of disclosures that would endanger the health or safety of any person or prejudice Australia’s interests or criminal prosecutions. The question, however, is whether these provisions are proportionate vis-à-vis that objective and whether they are necessary.

7. The Law Council encourages the PJCHR to consider whether these provisions have, in practice, caused unjustifiable interferences with freedom of speech.⁶

8. A number of aspects of the above offences may suggest that the provisions could be regarded as a disproportionate interference with freedom of speech. The Law Council supports ongoing review of those laws by, for example, the INSLM to consider whether

³ Australian Law Reform Commission, *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015).

⁴ The Australian Law Reform Commission’s recommendations also included that the following Commonwealth laws should be further reviewed to determine whether they unjustifiably limit freedom of speech: Part IIA of the RDA, in conjunction with consideration of anti-vilification laws more generally (addressed above in this submission); and legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators, for example s 170 of the *Veterans’ Entitlements Act 1986* (Cth).

⁵ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws Final Report*, Report No 129 (2015) 79.

⁶ Human Rights Committee, *General Comment 34: Article 19 of the ICCPR on Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34 (12 September 2011) [35].

any restrictions on rights are proportionate. It also makes a number of recommendations aimed at strengthening the proportionality of the provisions.

Secrecy Offences (Crimes Act sections 70 and 79)

9. Section 70 of the Crimes Act (disclosure of information by Commonwealth officers) has a broad scope to prohibit a wide range of information from being disclosed. The provision makes it an offence for a current or former Commonwealth officer to disclose 'any fact or document' obtained by virtue of his or her position as a Commonwealth officer that it is 'his or her duty not to disclose'. The offence is punishable by 2 years' imprisonment.
10. The provision also captures any disclosure even if it is of information that could otherwise be available in the public domain or the disclosure of which is innocuous.⁷
11. Such breadth may impact on whether the provision is indeed proportionate and a justifiable limitation on freedom of expression because there is no requirement, for example, that a disclosure would be prejudicial to the effective working of government.
12. Section 79 of the Crimes Act creates a number of offences relating to the use or disclosure of official secrets. While subsection 79(2) requires that a person act intending to prejudice the security or defence of the Commonwealth, section 79 applies broadly to disclosure of all information, regardless of its 'nature or the effect of its disclosure'.⁸
13. The ALRC also noted that:

*Section 79 also covers the unauthorised disclosure of information obtained and generated by Commonwealth officers and information 'entrusted' to other persons by Commonwealth officers. The offence therefore covers both initial disclosures by Commonwealth officers and subsequent disclosures by third parties. In addition, the offences relating to the receipt and handling of an official secret apply to any person, regardless of whether the person was aware that he or she had a duty not to disclose information.*⁹

14. In order to ensure that freedom of expression is not unduly limited, the Law Council supports the ALRC's recommendation in its 2009 review of secrecy laws in Australia that sections 70 and 79 of the Crimes Act should be repealed and replaced with a new general secrecy offence. The new offence would be limited to disclosures that:
 - damage the security, defence or international relations of the Commonwealth;
 - prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
 - endanger the life or physical safety of any person; or

⁷ See also Law Council of Australia, Submission to the Australian Law Reform Commission, *Review of Australian Secrecy Laws*, 27 February 2009, 5.

⁸ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) [3.124].

⁹ *Ibid* [3.125].

- prejudice the protection of public safety.¹⁰

15. This recommendation has not been adopted to date. Implementation of the ALRC's recommendation would assist in ensuring that official secrecy is justified, proportionate and necessary to achieving legitimate objectives.

Recommendation

- **As recommended by the ALRC in its 2009 report, *Secrecy Laws and Open Government in Australia* (ALRC Report 112), the general secrecy offences in sections 70 and 79 of the Crimes Act should be repealed and replaced by new offences that require that the disclosure of Commonwealth information did, or was reasonably likely to, or intended to cause harm.**

Disclosure relating to an ASIO special intelligence operation

16. Section 35P creates two offences of disclosure of information relating to an ASIO 'special intelligence operation' (SIO).

17. By way of background, the National Security Legislation Amendment Bill (No 1) 2014 introduced the section 35P secrecy offences into the ASIO Act. Subsection 35P(1) of the ASIO Act provides that a person commits an offence if the person discloses information; and the information relates to a SIO. Recklessness is the fault element in relation to whether the information relates to a SIO.

18. Subsection 35P(2) provides an aggravated offence where the person intends to endanger the health or safety of any person or prejudice the effective conduct of a SIO; or the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a SIO.

19. In 2014, the Law Council provided a submission to the PJCIS in relation to the National Security Legislation Amendment Bill (No 1) 2014, recommending that subsection 35P(1) be removed from the Bill. The Law Council submitted that section 35P would 'result in severe intrusions on the freedom of speech as a person is unlikely to disclose a wide range of information for fear that it might relate to an SIO'.¹¹

20. The Law Council reiterated these views in its submission to the INSLM's 2015 inquiry into section 35P, noting:

The section 35P offences apply where a person knows or is aware of a substantial risk that information relates to an SIO. Accordingly, it is unlikely that a person would be found guilty of one of these offences for disclosing information that he or she had no idea related to an SIO.

However, in practical terms, it may mean that journalists may be disinclined to report on potentially criminal or corrupt conduct rising out of 'ordinary' operations by ASIO

¹⁰ Ibid 160.

¹¹ Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security, The National Security Legislation Amendment Bill (No 1) (6 August 2014), 45.

*out of trepidation that they were aware of a risk that the information may relate to an SIO.*¹²

21. The Law Council recommended that:

- Subsection 35P(1) be repealed;
- A defence for those who, in good faith, make public interest disclosures should be included; and
- A specific legislative exception that permits disclosures relating to an SIO, where the information is already in the public domain should be included.

22. The *Counter-Terrorism Legislation Amendment Act 2016* (Cth) implements the INSLM's recommendations as set out in his *Report on the Impact on Journalists of section 35P of the ASIO Act*. The Act creates separate offences for 'insiders' and 'outsiders', and there are both basic and aggravated offences for each category of persons. An additional element has been added in relation to offences committed by 'outsiders', requiring that the disclosure of the information will endanger the safety of a person or prejudice the effective conduct of an SIO, and recklessness as to that fact. The aggravated offence for 'outsiders' is in the same terms except that knowledge is the requisite fault element in relation to whether the disclosure will endanger safety or prejudice an operation.

23. In relation to offences for 'insiders', the aggravated offence now requires proof that the disclosure either endangered the safety of a person or prejudiced the conduct of an SIO, with recklessness the relevant fault element.

24. The Act also introduces a new defence of prior publication, which does not apply to offences committed by 'insiders'.

25. The Law Council considers that the amendments in the *Counter-Terrorism Legislation Amendment Act 2016* (Cth) largely ameliorate the concerns that section 35P unduly limits freedom of expression. However, the provision should continue to be subject to ongoing review by the INSLM to ensure that it remains both necessary and proportionate.

Advocating Terrorism

26. Section 80.2C of the Criminal Code provides a maximum penalty of five years' imprisonment where a person intentionally advocates the doing of a terrorist act or terrorism offence and is reckless as to whether another person will engage in that conduct as a result. The definition of 'advocates' is broad and includes situations where a person 'promotes' or 'encourages' the doing of a terrorist act or terrorism offence.

27. The offence of advocating terrorism under section 80.2C was inserted into the Criminal Code through the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (**Foreign Fighters Bill**).

¹² Law Council of Australia, Submission to the Independent National Security Legislation Monitor, *Inquiry into section 35P of the ASIO Act INSLM s35P Submission*, 20 April 2015, 2.

28. It is difficult to make an accurate assessment as to the necessity of the advocacy offence in light of the wide range of offences which are currently available.¹³ The Law Council has previously noted that there are a range of legislative measures which would appear to overlap significantly with section 80.2C.¹⁴ These include:

- urge another person to overthrow the Constitution or Government violence;¹⁵
- urge another person to interfere with parliamentary elections or constitutional referenda by force or violence;¹⁶
- urge another person to engage in inter-group violence or violence against members of groups;¹⁷
- recruit persons to join organisations engaging in hostile activities against foreign governments, where 'recruit' includes 'procure, induce and incite' and 'incite' includes to 'urge, aid and encourage';¹⁸
- recruit for a terrorist organisation where 'recruit' includes 'induce, incite and encourage';¹⁹ and
- collect or make a document that 'is connected with preparation for, the engagement of a person in, or assistance in a terrorist act'.²⁰

29. A person who urges the commission of an offence is also guilty of the offence of incitement.²¹ Much of the conduct intended to be covered by the proposed offence is therefore already covered by incitement to commit other offences. Some of relevant Commonwealth offences in this regard may include:

- incitement to enter a foreign State with intent to engage in a hostile activity or engaging in such an activity in a foreign State;²²
- treason;²³
- terrorism offences;²⁴
- causing harm to Commonwealth officials;²⁵
- offences against the Government;²⁶
- offences concerning the protection of the Constitution and public services;²⁷
- offences under the *Commonwealth Electoral Act 1918* (Cth); and
- ordinary criminal offences prohibiting harm, or threats of harm, against persons or property.

¹³ Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 3 October 2014, 16.

¹⁴ *Ibid*, 16-17.

¹⁵ *Criminal Code 1995* (Cth) s 80.2(1)

¹⁶ *Ibid* s 80.2(3)

¹⁷ *Ibid* ss 80.2A and 80.2B

¹⁸ *Ibid* s 119.6.

¹⁹ *Criminal Code Act 1995* (Cth) ss 102.4 and 102.1(1)

²⁰ *Ibid* s 101.5.

²¹ *Ibid* s 11.4. Subsection 11.4(2) requires that the person must intend that the offence incited be committed.

²² *Ibid* s 101.5.

²³ *Criminal Code 1995* (Cth) s 80.1.

²⁴ *Ibid* pt 5.3.

²⁵ *Ibid* pt 7.8.

²⁶ *Ibid* pt II.

²⁷ *Ibid* pt IIA.

30. In terms of the proportionality of the measure, the Law Council supports the PJCHR's previous assessment that the offence:

... is overly broad in its application, and may result in the criminalisation of speech and expression that does not advocate the commission of a terrorist act or terrorism offence. This is because the proposed offence would require only that a person is 'reckless' as to whether their words will cause another person to engage in terrorism (rather than the person 'intends' that this be the case). The committee is concerned that the offence could therefore apply in respect of a general statement of support for unlawful behaviour (such as a campaign of civil disobedience or acts of political protest) with no particular audience in mind. For example, there are many political regimes that may be characterised as oppressive and non-democratic, and people may hold different opinions as to the desirability or legitimacy of such regimes; the committee is concerned that in such cases the proposed offence could criminalise legitimate (though possibly contentious or intemperate) advocacy of regime change, and thus impermissibly limit free speech.²⁸

31. The Law Council acknowledges the good faith defence in section 80.3 of the Criminal Code is an important safeguard in that it, for example, addresses legitimate expressions by artists or writers, and allows for genuine debate of issues in the public interest. It also recognises that the encouragement or promotion will be tied to the requirement of the person being aware of a substantial risk that such conduct may have the effect of leading a person to engage in a terrorist act or terrorism offence.

32. Nevertheless, due to uncertainty in the scope of key terms such as 'promotion' – which are lower-level than 'urging' – the offence may inhibit public commentary on controversial topics, for fear of criminal prosecution – regardless of whether it is illegal or not. The terms 'encourages' and 'promotes' are not defined in the Bill. The Law Council notes in this regard that these terms would take on their ordinary meaning and that these words are broad in their connotations.²⁹

33. In its report on the Bill, the PJCIS did not recommend any substantive amendments to the offence, but did recommend that the meaning of 'encourage', 'advocates' and 'promotion' be clarified. The Explanatory Memorandum to the Bill was subsequently revised to state that:

The terms 'promotes' and 'encourages' are not defined. The ordinary meaning of each of the relevant expressions varies, but it is important that they be interpreted broadly to ensure a person who advocates terrorism does not escape punishment by relying on a narrow construction of the terms or one of the terms. However, some examples of the ordinary meaning of each of the expressions follow: to 'counsel' the doing of an act (when used as a verb) is to urge the doing or adoption of the action or to recommend doing the action; to 'encourage' means to inspire or stimulate by assistance of approval; to 'promote' means to advance, further or launch; and 'urge' covers pressing by persuasion or recommendation, insisting on, pushing along and exerting a driving or impelling force.³⁰

²⁸ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011* (2014) [1.258].

²⁹ *Ibid*, 17.

³⁰ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 127.

34. In its submission to the ALRC's Freedoms Inquiry Report, the Law Council noted, '...section 80.2C of the *Criminal Code Act 1995* (Cth) [is] framed broadly and may have the potential to unduly burden freedom of expression.'³¹ Given the Explanatory Memorandum explicitly calls for a broad interpretation of these terms, the Law Council maintains its previously expressed concerns in relation to the possibility of the offence inhibiting otherwise permissible public commentary. Indeed, the PJCHR, in its report on the Bill, stated that section 80.2C was 'likely to be incompatible with the right to freedom of opinion and expression'.³² These sentiments were echoed by the Senate Standing Committee for the Scrutiny of Bills in its report on the Bill.³³

Advocacy and proscription of terrorist organisation

35. Section 102.1 of the Criminal Code allows the Governor-General to proscribe an organisation as a 'terrorist organisation' by regulation, where the Minister is satisfied on reasonable grounds that the relevant organisation is either (a) directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or (b) (relevantly) advocates the doing of a terrorist act.³⁴ An organisation will advocate the doing of a terrorist act where it promotes, encourages or urges the doing of a terrorist act; provides instruction on the doing of a terrorist act; or 'directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person ... to engage in a terrorist act'.³⁵ The proscription power may trigger a range of offences. These include offences of being a member of a terrorist organisation,³⁶ recruiting for a terrorist organisation,³⁷ training involving a terrorist organisation,³⁸ getting funds to, from or for a terrorist organisation,³⁹ providing support to a terrorist organisation⁴⁰ and associating with a terrorist organisation.⁴¹

36. Section 102.1 of the Criminal Code may unduly infringe on freedom of speech insofar as it may have the potential to, in effect, ban legitimate organisations:

- on the basis of views expressed only by some of its members;
- with unpopular or controversial views that might not necessarily be harmful;
- that 'indirectly promote' or 'indirectly encourage' the doing of a terrorist act, regardless of the mental state of another third party.

37. This is particularly so given that there is an absence of binding and transparent criteria to be applied to the listing of organisations as terrorist organisations for the purposes of the Criminal Code.

³¹ Law Council of Australia, Submission to the Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, March 2015.

³² Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011* (2014) [1.259].

³³ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, 14th Report of 2014 (2014), 795.

³⁴ *Criminal Code 1995* (Cth) s. 102.1(2).

³⁵ *Ibid* s 102.1(1A).

³⁶ *Ibid* s 102.3.

³⁷ *Ibid* s 102.4.

³⁸ *Ibid* s 102.5.

³⁹ *Ibid* s 102.6.

⁴⁰ *Ibid* s 102.7.

⁴¹ *Ibid* s 102.8.

38. Similarly problematic terms in the section dealing with the basis for proscription include 'indirectly fostering' the doing of a terrorist act by an organisation. Indirectly fostering the development of a terrorist act becomes even more uncertain if the terrorist act is a 'threat of action'.⁴² This definition lacks legal certainty and introduces unclear terminology that may encompass a very wide spectrum of acts or representations.⁴³
39. Without paragraph 102.1(2)(b), the Executive is also already empowered to prosecute an individual for inciting violence and for a broad range of terrorist related offences. Without paragraph 102.1(2)(b) the Executive is already empowered to proscribe any organisation which is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).⁴⁴
40. The Council of Australian Governments Counter Terrorism Review Committee (2013) (**COAG Counter Terrorism Review**) was of the view that the power to proscribe an organisation on the basis of advocacy alone is unjustified and unnecessary. It accordingly recommended that section 102.1(1A) should be repealed in its entirety. The Law Council agrees with this assessment.

Recommendations:

- **Paragraph 102.1 (2)(b) relating to proscribing organisations which 'advocate' the doing of terrorist acts and subsection 102.1(1A) relating to the definition of 'advocates' should be repealed.**
- **Binding, clear and publicly stated criteria for proscription should be statutorily prescribed.**

Preventative Detention Order disclosure offences

41. The preventative detention order (PDO) disclosure offences must be considered in the context of reviews by the former INSLM and COAG Counter Terrorism Review that preventive detention orders (Division 105 of the Criminal Code) should be repealed.⁴⁵
42. The COAG Counter-Terrorism Review came to the conclusion that the PDO regime was 'neither effective nor necessary' and did so on the basis that the regime was not likely to be used in practice.⁴⁶ The former INLSM stated in his 2012 annual report that:

⁴² 'Terrorist act' is defined in section 100.1(1) *Criminal Code 1995* (Cth) as 'an action or threat of action where (a) the action falls within subsection (2) and does not fall within subsection (3); (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; (c) the action is done or the threat is made with the intention of (i) coercing or influencing by intimidation the government of the Commonwealth or a State, Territory or foreign country or (ii) intimidating the public or a section of the public'.

⁴³ Dina Yehia, 'Anti Terror Legislation Consideration of Areas of Legal And Practical Difficulties' (Speech delivered at the Federal Criminal Law Conference, Sydney, 5 September 2008) 12-13.

⁴⁴ *Criminal Code 1995* (Cth) ss 102.1(2)(a), 102.1(20)(a)). See also Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security, *Review of the Power to Proscribe Organisations as Terrorist Organisation*, 9 February 2007, 14-15.

⁴⁵ Ibid 63; Independent National Security Legislation Monitor, *Annual Report* (20 December 2012), 67.

⁴⁶ Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013), 171.

*... there is no demonstrated necessity for these extraordinary powers, particularly in light of the ability to arrest, charge and prosecute people suspected of involvement in terrorism. No concrete and practical examples of when a PDO would be necessary to protect the public from a terrorist act because police could not meet the threshold to arrest, charge and remand a person for a terrorism offence have been provided or imagined.*⁴⁷

43. The PDO disclosure offences were inserted into section 105.41 of the *Criminal Code by the Anti-Terrorism Act (No 2) 2005* (Cth). In substance, they prevent disclosure of the fact that a PDO has been made; the fact that a person has been detained; and the period for which the person has been detained. This general prohibition is subject to a range of exceptions.

44. The Bills Digest in relation to the Bill noted that:

*In addition, if the discloser is a parent, guardian, lawyer, interpreter or monitor they are also prohibited from disclosing 'any information' that they obtain in the course of contact - an extremely wide prohibition given the penalty involved. A similar prohibition - any information that a detainee communicates to a person while being detained - also applies to secondary disclosures under subclause 105.41(6). Secondary disclosers could include journalists.*⁴⁸

45. The breadth of these subsections is such that disclosures which are entirely innocuous and unconnected with the reasons for which a person has been detained could, in theory, be caught by the provision.

46. In the Law Council's view, the breadth of the provision, particularly in relation to the prohibition of the disclosure of 'any information that the detainee gives the person in the course of contact' means there may be a disproportionate limitation on freedom of speech.

Recommendations:

- **Section 105.41 be limited to include an additional physical element that the disclosure of information will endanger the health or safety of any person or prejudice the effective conduct of a terrorism investigation.**
- **There should be a defence of prior publication. The defence should require the defendant to satisfy the court that:**
 - **the information in question had previously been published;**
 - **having regard to the nature and extent of that prior publication and the place where it occurred, the defendant had reasonable grounds to believe that the second publication was not damaging, and**
 - **the defendant was not in any way directly or indirectly involved in the prior publication.**

⁴⁷ Independent National Security Legislation Monitor, *Annual Report* (20 December 2012), 67.

⁴⁸ Ibid 63; Independent National Security Legislation Monitor, *Annual Report* (20 December 2012), 67.

Australian Border Force Act

47. Part 6 of the *Australian Border Force Act 2015* (Cth) (**ABF Act**) makes it an offence to record or disclose any information obtained by a person in their capacity as an entrusted person ('protected information'). The offence is punishable by 2 years' imprisonment.⁴⁹
48. An 'entrusted person' is defined to include the Secretary of the Department of Immigration and Border Protection (**DIBP**), the Australian Border Force Commissioner and any Immigration and Border Protection worker (**IBP worker**).⁵⁰
49. An IBP worker may, by written determination of the Secretary or Commissioner, include any consultant, contractor or service provider – such as a doctor or welfare worker in an offshore immigration detention centre.⁵¹
50. The ABF Act provides for a range of exceptions.⁵² In general terms, unauthorised disclosure is only permissible if it is 'necessary to prevent or lessen a serious threat to the life or health of an individual' and the disclosure is 'for the purposes of preventing or lessening that threat'.⁵³ In some circumstances, an entrusted person who makes a disclosure may be protected by the *Public Interest Disclosure Act 2013* (Cth).
51. The Explanatory Memorandum to the Australian Border Force Bill 2015 (Cth) noted that the secrecy provisions:
- ... are necessary to provide assurances to law enforcement and intelligence partners in Australia and internationally and to industry that information provided to the Department will be appropriately protected ... The application of the secrecy provisions across the integrated department will ensure the disclosure of sensitive information is appropriately regulated.*⁵⁴
52. The Law Council is concerned that the ABF Act may unjustifiably encroach on freedom of speech because it:
- does not include an adequate public interest disclosure exception to the secrecy provisions, which would allow human rights abuses to come to the attention of the public and authorities to be appropriately addressed;⁵⁵ and
 - may (as previously noted by the PJCHR) contribute to limiting an individual's access to an effective remedy in circumstances where their human rights may have been violated.⁵⁶

⁴⁹ *Australian Border Force Act 2015* (Cth) s 42.

⁵⁰ *Ibid* s 5.

⁵¹ *Australian Border Force Act 2015* (Cth) ss 4 and 5.

⁵² *Ibid* ss 42-49.

⁵³ *Ibid* s 48.

⁵⁴ Explanatory Memorandum, Australian Border Force Bill 2015 (Cth), 14.

⁵⁵ See further, Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Australian Border Force Bill 2015*, 9 April 2015, 13; Law Council of Australia, Submission to Senate Legal and Constitution Affairs References Committee, *Serious allegations of self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Island Regional Processing Centre*, 10 November 2016, 20-22.

⁵⁶ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011* (2015).

53. The Law Council notes that on 29 June 2015, the Secretary of DIBP made a Determination of Immigration and Border Protection Workers, which sets out to whom the secrecy provisions of the ABF Act applies. The Determination has since been amended to exclude 'health practitioners' from certain provisions of the ABF Act, such that health professionals are exempt from prosecution under the ABF Act should they disclose certain information.⁵⁷ The Law Council observes that this change was made following the commencement of a constitutional challenge to Part 6 of the ABF Act in the High Court of Australia by Doctors for Refugees.⁵⁸
54. The Law Council welcomes this exemption, but considers that such protections should apply to all entrusted persons under the Act, and should be statutorily, rather than administratively, prescribed.

Recommendations:

- **Amend the ABF Act to include a public interest disclosure exception to the secrecy provisions that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.**
- **Consideration be given to expanding the protections to all entrusted persons under the ABF Act in accordance with the 29 June 2015 Determination of Immigration and Border Protection Workers.**

⁵⁷ For the amended Determination (as amended at 30 September 2016), see: <https://www.border.gov.au/AccessandAccountability/Documents/determination-workers.pdf>.

⁵⁸ Doctors for Refugees was challenging the constitutional validity of the secrecy provisions in Part 6 of the *Australian Border Force Act 2015* (Cth) on the basis that the provisions infringed the implied right to freedom of political communication. A few months after Doctors for Refugees filed their challenge in the High Court, the Department of Immigration made a determination, the effect of which was to exempt health practitioners from the secrecy provisions. See: https://d3n8a8pro7vhm.cloudfront.net/fitzroylegal/pages/137/attachments/original/1469756721/Doctors_for_Refugees_v_Commonwealth_of_Australia_-_Briefing_Paper_29_July_2016.pdf?1469756721.