Australia's response to the Questionnaire on the use of legislation, including criminal legislation, to regulate the activities and work of human rights defenders

Information provided is current as at 14 June 2012

Not-for-Profit Reform Agenda
(Response to Questions 1a, 4a, 8)

Australia is currently undertaking a reform of its not-for-profit (NFP) sector, focussed on improving national regulation of charities (which are a subset of the broader NFP sector), changing the tax arrangements for charities and NFPs and introducing some safeguards for advocates and whistle blowers.

Australians Charities and Nor-for-profit Commission (ACNC)

One key element of the agenda is the creation of the ACNC. The proposed ACNC (legislation is scheduled to be introduced into parliament this year) will regulate and register charities, provide some protection for whistle blowers and will require Australian charities to register and complete annual reporting requirements if the proposed legislation is passed.

It is proposed the ACNC would commence operations from 1 October 2012, while the governance standards, including the external conduct standards and the financial reporting framework would commence on 1 July 2013 with the first financial reports for medium and large registered entities due after 1 July 2014.

National Compact: working together

The National Compact: *working together* (Compact) is an agreement between the Australian Government and the NFP sector to find new and better ways of working together based on mutual trust, respect and collaboration. The Compact was co-created by the Australian Government and a broad range of NFP organisations following extensive consultation.

The Compact commits the Australian Government to eight priorities for action, one of which stipulates the protection of the NFP sector's right to advocacy irrespective of any funding relationship that might exist.

An *Engagement and Consultation Code* and a *Funding Code* are currently being developed to provide practical guidance on the application of the Compact's principles.

http://www.nationalcompact.gov.au/

Removal of gag clauses

In early 2008, restraint of advocacy clauses were removed from all Australian Government contracts and funding agreements and the insertion of an 'absence of doubt' clause has since been encouraged. For example, the Commonwealth Community Legal Services Program administered in the Attorney-General's Department, has included the following clause in all 2010-2013 Service Agreements:

> *The Commonwealth is committed to ensuring that its agreements do not contain provisions that could be used to stifle legitimate debate or prevent organisations engaging in advocacy activities. In order to avoid any doubt about the interpretation of provisions in this agreement, the Commonwealth gives the following undertakings:*
>
> - *no right or obligation arising under this Agreement will be read or understood by the Commonwealth as limiting the Organisation's right to enter into public debate or criticism of the Commonwealth, its agencies, employees, servants or agents; and*

- *the Commonwealth will not require the Organisation to obtain advance approval of any public debate or advocacy activities in relation to this Agreement.*

Protection of rights to freedom of political communication, assembly and a fair trial within Australia (Response to Questions 1c, 3b, 4b, 6, 7a & 7b)

Freedom of Political Communication

Australia does not have specific laws designed to avoid undue restrictions on the opinions and expressions of human rights defenders. Rather, Australians are free, within the bounds of the law, to say or write what they think privately or publicly, about government, or about any topic. This principle applies equally to human rights defenders. Australia does not censor the media and human rights defenders may criticise government without fear of arrest. Although there is no Commonwealth legislation enshrining a general right to freedom of expression, the Australian High Court has inferred a freedom of political communication primarily from sections 7 and 24 of Australia's Constitution. These provisions require that members of the Parliament be 'directly chosen by the people'. The High Court found that for this to be an informed choice, there must be free access to relevant political information.

The High Court has recognised that the implied freedom can be limited, but only by laws that are reasonably appropriate and adapted to serving a legitimate end in a manner which is compatible with Australia's system of representative and responsible government. For example, it is unlawful to incite hatred against others on the basis of culture, ethnicity or background. These laws apply equally to human rights defenders as they do the general community.

Classification in Australia

Australia's National Classification Scheme engages the right to freedom of expression in Article 19 of the International Covenant on Civil and Political Rights which encompasses the freedom to seek, receive and impart information and ideas. The right to freedom of expression carries with it special responsibilities. The Australian Government notes that this right may be restricted on a limited number of grounds. Such grounds include, where necessary, to protect public health and morals, or the rights of others, including protecting children and young people against the harm caused by age-inappropriate material. The National Classification Scheme applies generally, including in relation to human rights defenders.

The National Classification Scheme (NCS) is a cooperative arrangement between the Commonwealth, States and Territories. It is designed to provide consumers and parents with information about publications, films and computer games, to allow them to make informed decisions about appropriate entertainment material for themselves and their children. Under the NCS, the Commonwealth is responsible for making classification decisions under the *Classification (Publications, Films and Computer Games Act) 1995 (Cth)* (the Classification Act). The States and Territories are responsible for the enforcement of classification laws. The NCS is designed to reflect community standards and is based on the principle that adults should be able to read, hear and see what they want (with appropriate exceptions) while recognising that minors should be protected from material likely to harm them, and that everyone should be protected from offensive unsolicited material.

The Classification Act contains limited restrictions on freedom of opinion and expression. The restrictions are principally defined by the criteria for refused classification decisions, which are contained in the Classification Act, the National Classification Code and the classification guidelines. The refused classification criteria specifically targets opinion or expression that:

- depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency or propriety generally accepted by reasonable adults to the extent that they should not be classified,

- describes or depicts in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under the age of 18 (whether the person is engaged in sexual activity or not),
- promotes incites or instructs in a matter of crime or violence, or
- advocates the doing of a terrorist act.

While it is not necessarily an offence to possess material which has been refused classification under the NCS, refused classification material cannot be published legally in Australia. The classification categories of R18+ and MA15+ are also legally restricted categories. The R18+ category is designed to ensure that that minors are protected from adult material. The MA15+ category restricts access to persons under the age of 15 unless they are accompanied by an adult or guardian.

Defamation laws

Similarly, there are limitations on freedom of speech embodied in Australia's defamation laws at the State and Territory level which operate to protect reputation. In 2005, State and Territory Attorneys-General signed an intergovernmental agreement for the development and amendment of model uniform defamation law. Model provisions have been passed in all jurisdictions (albeit with some modifications in different jurisdictions). Although a small number of amendments have been made to jurisdictions' legislation since that time, the Acts remain largely consistent with the model provisions. As a result, the law of defamation is substantially uniform across Australia. The express purpose of the model provisions includes ensuring that the law of defamation does not place unreasonable limits on freedom of expression, and in particular, on the publication and discussion of matters of public interest and importance.

There are a number of defences to a cause of action in defamation that could be of particular relevance to human rights defenders. For example, it is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations are substantially true; that the matter was, or was contained in in a fair report of any proceedings of public concern; or that the matter was an expression of opinion rather than a statement of fact that related to a matter of public interest and the opinion was based on proper material.

Freedom of association and assembly

Similarly, although there is no Commonwealth legislation that enshrines the right to freedom of assembly and association in all circumstances, Australians are also free to join any organisation or group if it is legal, and this principle applies equally to human rights defenders. Australians are free to meet with other people in public or private places in small or large groups for legal social or political purposes. Being able to protest and to demonstrate is an accepted form of free expression in Australia. However, human rights defenders must not break the law in the pursuit of their aims, e.g. through violence, destruction of property or trespass. The Commonwealth Criminal Code criminalises associating with a member of a terrorist organisation and thereby providing support to it, if the person intends that the support assist the organisation. This restriction is applied on the grounds of national security and public safety.

Right to a fair trial

Australians also have the right to fair trial before an impartial tribunal, and this applies equally to human rights defenders. This right is secured through a range of different pieces of legislation at the Commonwealth and State levels governing criminal proceedings. For example, the Evidence Act 1995 sets out the rules of evidence for proceedings in federal courts. The Crimes Act 1914 also makes provision regarding the admissibility of evidence in particular types of cases. The National Security Information (Criminal and Civil Proceedings) Act 2004 prevents the disclosure of information in criminal and civil proceedings that would be likely to prejudice national security. Among the matters that a court is required to consider in exercising powers under the Act is the defendant's right to receive a fair hearing. The High Court has held that the right to a fair trial may be called

into question if certain minimum guarantees in criminal proceedings such as the absence of legal representation where the accused faces a serious criminal charge are not met.

Safeguards to protect rights contained within Australia's counter-terrorism arrangements (Response to Questions 2a, 2b, 3a)

The aim of Australia's national security legislation is to protect Australian people and interests from threats to security, including the threat of terrorism, without unnecessarily encroaching on the individual rights and liberties that are fundamental to our democratic system. There are also numerous safeguards to ensure that Australia's counter-terrorism legislation is effective but does not encroach on individuals' rights and freedoms. The Australian Government considers that the safeguards built into Australia's counter-terrorism arrangements—especially the arrangements for regular monitoring and review—will ensure that its response properly balances national security interests with fundamental rights and freedoms.

The legal definition of 'terrorist act'

The definition of 'terrorist act' is carefully set out in s 100.1 of the Criminal Code Act 1995 (Cth). The section provides that actions or threats of action must be made with the intention of advancing a political, religious or ideological cause and with the intention of coercing or intimidating an Australian or foreign government or the public. The definition refers to actions or threats of action involving serious harm to people, damage to property, endangerment of life, serious risk to the public's health or safety, or serious interference with an electronic system including telecommunications, financial and essential government services systems, essential public utilities and transport providers. Action that is advocacy, protest, dissent or industrial action and is not intended to cause serious harm or death, endangerment of life or serious risk to the health or safety of the public is expressly excluded from being a 'terrorist act'. This ensures that the definition is properly targeted at terrorist activity.

Division 101 of the Criminal Code creates offences in relation to terrorist acts and Division 102 creates offences in relation to terrorist organisations. The fault elements of the terrorist act and terrorist organisation offences ensure that only conduct associated with a terrorist motive is criminalised. *Listing terrorist organisations*

An organisation is a 'terrorist organisation' if it is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs) or if it is specified a 'terrorist organisation' by the Criminal Code Regulations 2002 (Cth). Safeguards are built into the legislation. Before a terrorist organisation can be listed under the Criminal Code Regulations the Attorney-General must be satisfied on reasonable grounds that the organisation in question is directly or indirectly engaged in, preparing, planning, assisting in, fostering or advocating the doing of a terrorist act (whether or not the terrorist act has occurred or will occur). In addition, the Criminal Code provides that the Parliamentary Joint Committee on Intelligence and Security may review a terrorist listing regulation. The committee regularly reviews all terrorist listings, which allows for further parliamentary scrutiny.

Police and ASIO powers

Police and the Australian Security Intelligence Organisation have powers under Australia's counter-terrorism arrangements. The Australian Government has stressed that these powers are measures of absolute last resort and has ensured that important safeguards, which must be strictly complied with for the protection of individual rights, exist.

Under the Australian Security Intelligence Organisation Act 1979 (Cth) ASIO may seek a warrant to question, and in very limited circumstances detain, a person for up to seven days to question them about intelligence that is important in relation to a terrorism offence. Such a warrant may only be sought with the consent of the Attorney-General and must be issued by a judge or federal magistrate. A person may be questioned in the absence of a lawyer of their choice if access to their chosen lawyer has been denied and the person refuses to have any other lawyer present. Access to a lawyer of choice can be denied only if the 'Prescribed Authority' (an

independent person with judicial experience who presides over the questioning) is satisfied that, on the basis of the circumstances relating to that particular lawyer, there is a risk that a person allegedly involved in a terrorism offence may be alerted about the investigation or evidence the person is required to produce under warrant may be destroyed, damaged or altered.

Control orders and preventative detention orders

Control orders allow controls to be placed on the movements and activities of people deemed to pose a terrorist risk to the community. An application for a control order can be initiated by the Australian Federal Police but requires the consent of the Attorney-General. The order can be issued only by a court. Legislation requires that every one of the obligations, prohibitions and restrictions to be imposed on a person by an order must be reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. The court must take into account the order's impact on the person's circumstances, including their financial and personal circumstances. A number of protective safeguards relating to the issuing of a control order also apply. For example, people subject to such an order are entitled to notice and judicial review. Each year the Attorney General must report to parliament on the orders' operation.

Preventative Detention Orders

In very rare situations preventative detention orders may be issued if there has been a terrorist act or a terrorist act is imminent. A person may be preventatively detained for a maximum of 48 hours. Again, a number of safeguards are built into the legislation. For example, there must be reasonable grounds to suspect the person will engage in a terrorist act or has done an act in preparation for a terrorist act and the preventative detention order would substantially assist in preventing this occurring. Questioning of the person in preventative detention is prohibited. They must be treated with humanity and dignity and not be subjected to cruel, inhuman or degrading treatment; they must be given an opportunity to contact a lawyer; and they are entitled to contact a family member and employer solely for the purpose of letting them know they are safe but cannot be contacted for the time being. An interpreter is to be provided if the person has difficulty with English. The person is also to be advised of any right he or she has to make a complaint to the Commonwealth Ombudsman. The Ombudsman is notified of the making of the order, given a copy of the initial preventative detention order, and notified when the person is taken into custody. Offences apply for breaching certain safeguards.

Monitoring counter-terrorism legislation

Australia's national security legislation is regularly reviewed in order to ensure that the laws remain appropriate and are being complied with.

The Inspector-General of Intelligence and Security, an independent statutory office holder, reviews the activities of the agencies that collectively make up the 'Australian intelligence community'. The inspector-general has the power to conduct regular inspections of intelligence agencies and to conduct inquiries. Additionally, in 2011 an Independent National Security Legislation Monitor was appointed. The monitor will review the practical operation of the counter-terrorism legislation annually to ensure that it is operating effectively and appropriately.

The Parliamentary Joint Committee on Intelligence and Security is responsible for reviewing the administration and expenditure of Australia's intelligence agencies, including any matters relating to these agencies referred by the responsible minister or the parliament. The Criminal Code also provides that the PJCIS may review a terrorist listing regulation. The PJCIS regularly reviews all terrorist listings, which affords additional parliamentary scrutiny. It also conducted an inquiry into the terrorist organisation listing provisions under the Criminal Code in 2007 and a review of the ASIO questioning and detention powers in 2005. The PJCIS will review the ASIO questioning and detention powers before the powers sunset in 2016.

The Australian Government has a record of responding positively to reviews of its counter-terrorism arrangements. In November 2010 the parliament passed the National Security Legislation Amendment Act 2010

(Cth), implementing the recommendations of several independent and bipartisan parliamentary committee and other reviews of Australian national security and counter-terrorism legislation, such as:

- the Review of Security and Counter-Terrorism Legislation by the PJCIS (December 2006)
- the Review of Sedition Laws in Australia by the Australian Law Reform Commission (July 2006)
- the PJCIS inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code (September 2007)
- the Hon. John Clarke QC's inquiry into the case of Dr Mohamed Haneef (November 2008).