



Australian  
Human Rights  
Commission

# Judicial review of lawfulness of detention

**AUSTRALIAN HUMAN RIGHTS COMMISSION  
RESPONSE TO QUESTIONNAIRE FROM THE  
WORKING GROUP ON ARBITRARY DETENTION**

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## 1 Introduction

1. The Australian Human Rights Commission provides this response to the questionnaire from the Working Group on Arbitrary Detention in relation to judicial review of the lawfulness of detention. The long title to the questionnaire notes that it relates to the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful.
2. This right is recognised by article 9(4) of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>1</sup>
3. The Human Rights Council, in resolution 20/16, asked the Working Group to prepare draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty.<sup>2</sup> In carrying out this function, the Human Rights Council asked the Working Group to seek the views of bodies including national human rights institutions. The questionnaire has been provided to the Commission in response to this request.

## 2 Summary

4. The structure of this response follows the structure of the questionnaire. The most substantial responses are in relation to questions 2 and 3 dealing with Australian law on judicial review of detention and common problems faced in Australia.
5. A key issue for Australia in terms of compliance with article 9(4) of the ICCPR relates to judicial review of administrative detention. Provided that administrative detention is in compliance with Australian law, the necessity or proportionality of that detention cannot be challenged, for example by way of *habeas corpus*. Australia's High Court has upheld the constitutional validity of laws which allow for indefinite immigration detention. The result of this is that the question of whether such detention is arbitrary in any individual case (and therefore unlawful under international human rights law) cannot be separately adjudicated.
6. The Commission's response to the questionnaire focuses on two types of administrative detention: immigration detention, and detention pursuant to counter-terrorism and national security legislation. These are areas in which the Commission has previously made submissions, but they are not the only areas in which issues about access to effective judicial review of the lawfulness of detention (and particularly its necessity and proportionality) may arise. For example, the Commission notes that similar issues may arise with the review of administrative detention of people in psychiatric facilities, and with review of the administrative detention of people charged with criminal offences who are deemed unfit to plead or to stand trial.
7. Australia has a system of mandatory immigration detention of 'unlawful non-citizens'. A key concern with Australia's system of mandatory detention is that the detention of an unlawful non-citizen is not based on an individual

assessment that the particular person needs to be detained. It is an *a priori* rule which applies to an entire class of people regardless of their circumstances and is not subject to judicial review.

8. More specifically, mandatory detention impacts significantly on two classes of asylum seekers who are not entitled to a visa but who also cannot be removed from Australia consistently with Australia's international obligations:
  - a. refugees who are subject to an adverse security assessment by the Australian Security Intelligence Organisation
  - b. people assessed as not being refugees and who are subject to removal from Australia, but who cannot be removed to another country, for example because they are stateless.
9. These people face the prospect of indefinite administrative detention at the discretion of the executive.
10. The Commission also has concerns about three types of administrative detention available under laws dealing with national security and counter-terrorism. These types of detention are:
  - a. questioning and detention warrants – which permit detention by the Australian Security Intelligence Organisation for up to seven days and questioning for up to 24 hours in order to collect intelligence that is important in relation to a terrorism offence
  - b. preventative detention orders – which permit a person to be taken into custody and detained for up to 14 days (or up to 48 hours under the Commonwealth regime) without that person being charged, convicted, or even suspected of having committed a criminal offence
  - c. control orders – which permit restrictions to be imposed on a person's liberty at the request of the Australian Federal Police, for example a requirement that the person remain at specific premises at particular times of the day, for the purpose of protecting the public from a terrorist act.
11. The issues faced in the judicial review of decisions to detain pursuant to these means are described in more detail below.

### **3 Response to questions**

#### **3.1 Role of the Australian Human Rights Commission**

12. **Question 1** asks: Please describe your national institution's concern and practice with the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court.
13. The Commission is recognised as a national human rights institution which complies with the Principles relating to the Status of National Institutions adopted by General Assembly resolution 48/134 of 20 December 1993.

14. The Commission was established by the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). It has a number of functions relating to human rights, including article 9(4) of the ICCPR. In particular, the Commission has the following functions:<sup>3</sup>
- a. to examine enactments for the purpose of ascertaining whether they are inconsistent with or contrary to any human right;
  - b. to inquire into acts or practices that may be inconsistent with or contrary to any human right;
  - c. to promote an understanding and acceptance, and the public discussion, of human rights in Australia;
  - d. to undertake research and educational programs for the purpose of promoting human rights;
  - e. to report to the Attorney-General on laws that should be made by the Parliament, or action that should be taken by Australia, on matters relating to human rights;
  - f. to report to the Attorney-General on action that needs to be taken by Australia to comply with the provisions of the ICCPR;
  - g. to prepare guidelines for the avoidance of acts or practices that may be inconsistent with or contrary to any human right;
  - h. to intervene in court proceedings involving human rights issues, with the leave of the court.
15. If a person was deprived of a right under domestic Australian law to bring proceedings before a court to challenge the lawfulness of his or her detention, then they can lodge a complaint with the Commission which can be investigated. For example, if, contrary to law, a person was not informed of his or her review rights or prevented from exercising them, this may be an act or practice contrary to article 9(4) of the ICCPR that could be the subject of an inquiry.
16. More often, however, concerns arise in relation to the lack of sufficient basis in domestic law to review the necessity or proportionality of certain kinds of administrative detention. In such cases, the role of the Commission is to make submissions to Government about the need for law reform.

### **3.2 Australian law on judicial review of detention**

17. **Question 2** asks: How far is the right of anyone deprived of his or her liberty to bring proceedings before court part of the laws of your country?
18. Australia is a common law country and, like other common law countries, its superior courts have jurisdiction to grant a writ of *habeas corpus* (or orders in the nature of *habeas corpus*) in order to secure the release of an applicant from illegal detention.

19. The requirement that the detention be illegal before *habeas corpus* can issue is a limitation on the remedy.<sup>4</sup> For example, *habeas corpus* is not available to challenge a lawful sentence of imprisonment following conviction by a court. *Habeas corpus* will be available to secure release from official detention where there was a jurisdictional error in the decision or order requiring detention.
20. In Australia, there are statutory schemes which provide for restrictions on liberty, sometimes for prolonged periods, in circumstances such as immigration detention and pursuant to control orders and preventative detention orders contained in counter-terrorism and national security legislation. Detention that is in conformity with this legislation, and therefore lawful under domestic law, will not be able to be successfully challenged through *habeas corpus*. This has the effect of reducing the practical scope of the remedy.<sup>5</sup>
21. The High Court of Australia held in *Al-Kateb v Godwin* that the legislation that required the detention of ‘unlawful non-citizens’ in immigration detention was constitutionally valid, even if the removal of these people from Australia was not reasonably practicable in the foreseeable future.<sup>6</sup> The effect of this decision is that indefinite immigration detention is lawful under Australian law.
22. Similarly, in *Thomas v Mowray*, the High Court upheld the validity of provisions of the *Criminal Code* (Cth) which allowed a federal court to make an interim control order in relation to a person if it was satisfied on the balance of probabilities of certain matters.<sup>7</sup> Those matters included either ‘that making the order would substantially assist in preventing a terrorist act’ or ‘that the person has provided training to, or received training from, a listed terrorist organisation’, and also ‘that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act’. One obligation that may be imposed is a requirement that the person remain at specified premises between specified times each day, or on specified days.
23. In *A v Australia*, the United Nations Human Rights Committee (UNHRC) gave a view on a communication submitted in 1993 from a person in immigration detention. The UNHRC observed that judicial review by Australian courts of detention decisions was limited to whether detention was lawful in accordance with domestic law, not whether it was in accordance with article 9(1) of the ICCPR which would also require consideration of whether detention was arbitrary. The inability to order release if detention was inconsistent with article 9(1) of the ICCPR more broadly meant that there was a breach of article 9(4) of the ICCPR.<sup>8</sup>

The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention ... . In effect, however, the courts’ control and power to order the release of an individual was limited to an assessment of whether this individual was a “designated person” within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee’s opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must

include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release “if the detention is not lawful”, article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. ... As the State party’s submissions in the instant case show that court review available to A was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a “designated person” within the meaning of the Migration Amendment Act, the Committee concludes that the author’s right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.

24. Since 1993, similar comments have been made by the UNHRC in other views on communications that relate to Australia’s system of mandatory detention of asylum seekers.<sup>9</sup>
25. The most recent views adopted by the UNHRC in relation to Australia that deal with article 9(4) of the ICCPR were in July 2013. These views addressed two sets of communications on behalf of a total of 46 people facing indefinite detention in immigration facilities. The Committee referred to Australian case law including *Al-Kateb v Godwin*, saying:<sup>10</sup>

In view of the High Court’s 2004 precedent in *Al-Kateb v Godwin* declaring the lawfulness of indefinite immigration detention and the absence of relevant precedents in the State party’s response showing the effectiveness of an application before the High Court in similar situations, the Committee is not convinced that it is open to the Court to review the justification of the authors’ detention in substantive terms. Furthermore, the Committee notes that in the High Court’s decision in the M47 case, the Court upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. The Committee recalls its jurisprudence that judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1. Accordingly, the Committee considers that the facts in the present case involve a violation of article 9, paragraph 4.

26. Two jurisdictions within Australia have enacted human rights statutes which contain language that reflects article 9(4) of the ICCPR. However, the application of these rights is limited.
27. In Victoria, s 21(7) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter) provides:

Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must -

- (a) make a decision without delay; and
- (b) order the release of the person if it finds that the detention is unlawful.

28. The Charter requires public authorities in Victoria, such as state and local government departments and agencies, and people delivering services on behalf of government, to act consistently with the human rights in the Charter.<sup>11</sup> However, the Charter does not give individuals a new right to begin legal action for a breach of human rights, including a breach of s 21(7). A breach of the Charter may be raised in legal proceedings that could otherwise be brought on the ground that an act or decision of a public authority was unlawful.<sup>12</sup> If Victorian legislation is inconsistent with the Charter, the Supreme Court of Victoria can issue a declaration of inconsistent interpretation which requires the Minister responsible for administering the legislation to reconsider it and table a copy of his or her response to the declaration in Parliament.<sup>13</sup> However, a declaration does not affect the validity of the legislation.<sup>14</sup>
29. Since the Charter came into effect, the Commission is not aware of any case in which the Supreme Court of Victoria has been asked to interpret s 21(7).
30. In the Australian Capital Territory, s 18(6) of the *Human Rights Act 2004* (ACT) provides:
- Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful.
31. The Human Rights Act requires public authorities in the Australian Capital Territory to act consistently with the human rights set out in the Act.<sup>15</sup> If a person claims that a public authority has acted in a way that is incompatible with a human right set out in the Act or has failed to give proper consideration to a relevant human right in making a decision, and the person is a victim of the contravention, the person may start a proceeding in the Supreme Court of the Australian Capital Territory against the public authority or rely on the person's rights under the Act in other legal proceedings.<sup>16</sup> However, the conduct of the public authority will not be unlawful if the law expressly requires the act to be done or a decision to be made in a particular way that is inconsistent with a human right and the law cannot be interpreted in a way that is consistent with the human right.<sup>17</sup>
32. If legislation of the Australian Capital Territory is inconsistent with the Act, the Supreme Court of the Australian Capital Territory can issue a declaration of incompatibility which requires the Attorney-General to present a written response to the Legislative Assembly.<sup>18</sup> However, a declaration does not affect the validity of the legislation.<sup>19</sup>
33. Section 18(6) of the Human Rights Act has been raised in proceedings in the Supreme Court of the Australian Capital Territory in which *habeas corpus* has also been sought.<sup>20</sup>

### **3.3 Common problems**

34. **Question 3** asks: Please describe the most common problems individuals face in their realisation of the right in your country.



35. This response by the Commission focuses on two types of administrative detention: immigration detention, and detention pursuant to counter-terrorism and national security legislation. As noted above, these are areas in which the Commission has previously made submissions, but they are not the only areas in which issues about access to effective judicial review of the lawfulness of detention (and particularly its necessity and proportionality) may arise. For example, the Commission notes that similar issues may arise with the review of administrative detention of people in psychiatric facilities, and with review of the administrative detention of people charged with criminal offences who are deemed unfit to plead or to stand trial.

(a) *Immigration detention*

36. It is mandatory under the *Migration Act 1958* (Cth) (Migration Act) for every non-citizen who is in Australia without a valid visa to be detained, regardless of his or her individual circumstances.<sup>21</sup> Once detained, unlawful non-citizens must be kept in detention until they are either granted a visa or removed from Australia.<sup>22</sup> The Migration Act specifically prohibits a court from releasing an unlawful non-citizen from detention unless those preconditions are satisfied.<sup>23</sup>

37. The Commission has raised concerns over many years that the system of mandatory detention under the Migration Act breaches Australia's obligations under article 9 of the ICCPR to ensure that no one is subjected to arbitrary detention.<sup>24</sup> The prohibition on arbitrary detention in article 9(1) includes detention which, although lawful under domestic law, is unjust or disproportionate.<sup>25</sup> Therefore, in order for the detention of a person not to be arbitrary, it must be a reasonable and necessary measure in all the circumstances.<sup>26</sup>

38. Detention of persons for the purpose of immigration control is not, *per se*, inconsistent with article 9. The UNHRC has commented that '[a]sylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt'.<sup>27</sup> However, the UNHRC has made clear its view that '[t]o detain [asylum seekers] further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual'.<sup>28</sup>

39. A key concern with Australia's system of mandatory detention is that the detention of an unlawful non-citizen is not based on an individual assessment that the particular person needs to be detained. It is an *a priori* rule which applies to an entire class of people regardless of their circumstances and is not subject to judicial review.

40. Mandatory detention impacts significantly on two classes of asylum seekers who are not entitled to a visa but who also cannot be removed from Australia consistently with Australia's international obligations. For these classes of people, the relevant conditions for release from detention under s 196 of the Migration Act cannot be fulfilled and they face the prospect of indefinite detention without effective judicial review of the reasonableness or necessity of their detention.

41. The first class of people comprises those found to be refugees but who are subject to an adverse security assessment by the Australian Security Intelligence Organisation (ASIO). As at 6 August 2013 there were 52 refugees in immigration detention facilities in Australia who have been either refused a protection visa or denied the opportunity to apply for one as a result of receiving an adverse security assessment from ASIO.<sup>29</sup> A number of these individuals have been detained for over four years. There are also five young children who are living in detention with a parent who has received an adverse security assessment. One child in this situation was born in immigration detention.
42. Refugees with adverse security assessments cannot be returned to their country of origin consistently with Australia's *non-refoulement* obligations as they have been found to have a well-founded fear of persecution. Australian Government policy requires that they remain in immigration detention facilities unless and until a third country agrees to resettle them. As can be seen from the length of detention of some of these individuals, the prospect of third country resettlement appears unrealistic.
43. In August 2013 the UNHRC found that the indefinite detention of a group of 46 refugees with adverse assessments was inflicting serious psychological harm upon them, amounting to cruel, inhuman or degrading treatment.<sup>30</sup> The UNHRC also found that their detention was arbitrary contrary to article 9(1) of the ICCPR and that the lack of ability to judicially review the justification of their detention in substantive terms was contrary to article 9(4).
44. The second class of people comprises those not found to be refugees but who cannot be removed to another country. One example of a type of person in this situation is a stateless person who has no right to enter any other country. This was the situation faced by the plaintiff in *Al-Kateb v Godwin*.
45. The Department of Immigration and Citizenship responded to this issue raised in the Commission's July 2012 report on *Community arrangements for asylum seekers, refugees and stateless persons*, saying:<sup>31</sup>

Cases where a person does not engage Australia's protection obligations and who cannot be removed for reasons beyond their control, including if their statelessness is a practical barrier to removal, will be managed through the Ministerial Intervention process for consideration of case resolution options, including possible temporary or permanent visa pathways.
46. While the prospect of the release from detention of people in this situation is welcome, the Ministerial Intervention process is discretionary and the Minister has no duty to consider exercising the powers available to grant a visa. In this sense, the proposed remedy falls short of the right recognised in article 9(4) of the ICCPR.

(b) *Counter-terrorism and national security legislation*

47. The Commission has previously raised a number of concerns about the potential for arbitrary detention under the following statutory regimes:<sup>32</sup>

- a. questioning and detention warrants under the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act)
- b. preventative detention orders under the *Criminal Code Act 1995* (Cth) and equivalent State and Territory legislation
- c. control orders under the *Criminal Code Act 1995* (Cth).

48. Some of these concerns relate specifically to the sufficiency of judicial review of detention under these provisions. The comments below relate to this issue in particular. A fuller statement of Commission's concerns about this legislation is contained in the submissions referred to in the footnote to the previous paragraph.

(i) Questioning and detention warrants

49. Division 3 of Part III of the ASIO Act enables ASIO to seek a 'questioning and detention warrant' from an 'issuing authority' (a federal judge, acting in his or her personal capacity). To obtain such a warrant, the Director-General of ASIO must first seek the consent of the Attorney-General to apply for such a warrant. The Attorney-General may consent to the Director-General applying for a questioning and detention warrant if she or he is satisfied (*inter alia*):

- that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence
- that relying on other methods of collecting that intelligence would be ineffective.<sup>33</sup>

50. Further, the Attorney-General must be satisfied that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:

- may alert a person involved in a terrorism offence that the offence is being investigated
- may not appear before the prescribed authority, or
- may destroy, damage or alter a record or thing the person may be requested to produce in accordance with the warrant.<sup>34</sup>

51. A person who is the subject of a questioning and detention warrant must be brought immediately before a 'prescribed authority' for questioning.<sup>35</sup> These prescribed authorities are former members of the judiciary who are appointed by the Attorney-General.<sup>36</sup>

52. A person may be detained for a maximum of seven days (168 hours),<sup>37</sup> and questioned for a maximum period of 24 hours.<sup>38</sup> However, the prescribed authority must authorise ongoing questioning every eight hours.<sup>39</sup> The total time for questioning increases to 48 hours if 'an interpreter is present at any time while a person is questioned under a warrant'.<sup>40</sup> The prescribed authority must direct that the person be released from detention:

- at the end of the 24 or 48 hour maximum period, or
  - at such a time as the authority refuses permission to continue questioning or revokes an earlier granted permission.<sup>41</sup>
53. The Commission has concerns about the restrictions that the ASIO Act places on the ability of a person the subject of a questioning and detention warrant to challenge the legality of their treatment, and to contact a lawyer for this purpose.
54. Section 34K(10) of the ASIO Act provides as a general rule that a person who has been taken into custody or detained under Division 3 is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention. This is subject to certain exceptions, including a right of access to the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman.
55. A person subjected to a questioning and detention warrant has no guaranteed right to access a legal adviser. Rather, his or her right to contact a legal adviser and to legal representation during questioning is regulated by both the terms of the warrant and the prescribed authority in the exercise of its discretion.
56. A questioning and detention warrant must permit the person to contact a single lawyer of choice at any time after they have been detained, but contact with the lawyer is not permitted until the person is brought before the prescribed authority and ASIO has had an opportunity to oppose access to the particular lawyer of choice.<sup>42</sup>
57. The prescribed authority may prevent the subject of a detention warrant from contacting a particular lawyer if satisfied, on the basis of circumstances relating to that lawyer, that:
- a person involved in a terrorism offence may be alerted that the offence is being investigated
  - a record or thing that the person may be requested in accordance with the warrant to produce may be destroyed, damaged or altered.<sup>43</sup>
58. Further, the prescribed authority can tightly control the contact between a person being questioned and his or her legal adviser. It must provide a reasonable opportunity for the lawyer to advise the person detained during breaks in questioning,<sup>44</sup> but contact between the lawyer and the person detained must be made in a way that can be monitored by a person exercising authority under the warrant.<sup>45</sup> The lawyer may not interrupt the questioning of the person detained or address the prescribed authority before whom questioning is being conducted, except to request clarification of an ambiguous question.<sup>46</sup> Indeed, the Act specifically provides that a person may be questioned in the absence of their lawyer.<sup>47</sup> In addition, a lawyer may be removed from the location where questioning is taking place if the prescribed authority considers that he or she is 'unduly interrupting questioning'.<sup>48</sup> The person detained is then to be given the opportunity to contact a further lawyer of their choice.<sup>49</sup>

59. Protection of a person's right to have access to a legal adviser once subjected to a questioning and detention warrant is crucial, as it is a precondition to effective exercise of that person's right to challenge the legality of his or her detention.

60. Australia's Independent National Security Legislation Monitor has recommended that the provisions of the ASIO Act allowing for questioning and detention warrants should be repealed.<sup>50</sup>

(ii) Preventative detention orders

61. In all nine Australian jurisdictions there is legislation in place which provides for the making of preventative detention orders (PDOs).<sup>51</sup> These orders enable a person to be taken into custody and detained for up to 14 days (or up to 48 hours under the Commonwealth regime) without that person being charged, convicted, or even suspected of having committed a criminal offence.

62. The levels (and institutions) of review available for persons who are detained pursuant to a PDO vary widely across the different jurisdictions. For example, in the ACT and NSW there are three opportunities for court control of the detention built into the PDO regime, as in both jurisdictions the Supreme Court:

- issues any interim PDO
- holds a (mandatory) hearing (in which the detainee has a right to be involved) and makes a (final) PDO
- can hear applications from the person the subject of a PDO for revocation or setting aside of that order.<sup>52</sup>

63. A similar regime of multiple court reviews of PDOs is in place in Victoria, with the exception that a person the subject of a PDO can only apply to the Victorian Supreme Court for revocation (or variation) of that order with leave of the Court.<sup>53</sup>

64. At the other end of the spectrum, under the Commonwealth regime there is no court control or review of PDOs built into the PDO regime. Initial PDOs are issued by a senior member of the Australian Federal Police (AFP).<sup>54</sup> Continued PDOs are made by an 'issuing authority' (who is a judge, retired judge or President or Deputy President of the Administrative Appeals Tribunal, acting in a personal capacity).<sup>55</sup> Both applications will be decided *ex parte*. There is no provision allowing a person the subject of a Commonwealth PDO to apply to any body for revocation of that order.

65. The Commonwealth PDO legislation does expressly provide that a person may bring legal proceedings in a court in order to obtain a remedy in relation to a PDO or the treatment of a person in connection with that person's detention under a PDO.<sup>56</sup> However, the Commonwealth regime restricts access to avenues of court review which would usually be available to a person who wants to challenge a decision made by a government official.

66. Applications for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of decisions relating to Commonwealth PDOs are excluded,<sup>57</sup> as is the jurisdiction of state and territory courts while a PDO is in force.<sup>58</sup>
67. In addition, while under the Commonwealth regime a person detained under a PDO can apply to the AAT for a review of the merits of the decision to make that PDO, such an application cannot be made while the PDO is in force.<sup>59</sup> This essentially confines the AAT to issuing a remedy after the fact; the AAT cannot order the release of a person who is wrongly detained under a PDO.
68. The remaining option for court review of a Commonwealth PDO is to make an application for judicial review to the Federal Court under s 39B of the *Judiciary Act 1903* (Cth) or to the High Court under s 75(v) of the *Constitution*. However, these processes do not allow for an investigation of the facts or of the reasonableness and proportionality of the detention; the grounds upon which the decision to make a PDO can be challenged in this type of review are very limited. In addition, such applications are unlikely to be made, heard, and determined quickly enough to end any unlawful detention.
69. There are a number of ways in which the Commonwealth PDO regime could be amended to insert safeguards of court review. The Commission considers that two options would be to transfer to a federal court the functions of issuing interim and continued PDOs, and amending the Criminal Code to provide that a person the subject of PDO, or his or her lawyer, can make an urgent application to a federal court for revocation of that order.
70. Australia's Independent National Security Legislation Monitor has recommended that provisions of the *Criminal Code Act 1995* (Cth) providing for PDOs should be repealed.<sup>60</sup>

(iii) Control orders

71. Division 104 of Part 5.3 of the *Criminal Code Act 1995* (Cth) provides for the making of control orders. A control order is an order issued by a court (either the Federal Court, Family Court or Federal Circuit Court), at the request of a member of the AFP, to allow obligations, prohibitions and restrictions to be imposed on a person, for the purpose of protecting the public from a terrorist act.<sup>61</sup> Among other things, control orders may require a person to remain at specific premises at particular times of the day.
72. The Commission has concerns about the restricted ability of persons the subject of control orders to have the legality of these orders reviewed.
73. Both interim control orders and urgent interim control orders may be made *ex parte*. The person the subject of those orders has no right to appear before the court prior to them being made. Nor does Division 104 of the *Criminal Code Act 1995* (Cth) impose any requirement upon the AFP or the court to consider whether the circumstances of the case are such that the person may be given such an opportunity without endangering national security.

74. Division 104 does provide for a hearing involving both parties after the interim control order has been served, at which the person the subject of the control order, and his or her legal representative, may make submissions and adduce evidence.<sup>62</sup> After considering the material before it, the court is empowered to confirm the interim control order, revoke the order, or declare it void. However, this hearing can be up to 72 hours after the interim control order was made,<sup>63</sup> meaning that severe restrictions, for example of a person's freedom of movement, may have been in place for days before the person can oppose the legality of these restrictions.
75. After an interim control order has been confirmed, the subject of a control order can bring an application for revocation or variation of the order, provided he or she has given written notice of the application and the grounds upon which revocation is sought to the Commissioner of the AFP.<sup>64</sup> However, there is a difficulty with the review of control orders under Division 104, in terms of access to information because information may be withheld on national security grounds. This may prevent the subject of the control order from formulating and prosecuting grounds for revocation.
76. Australia's Independent National Security Legislation Monitor has recommended that provisions of the *Criminal Code Act 1995* (Cth) providing for control orders should be repealed, and that consideration should be given to replacing them with provisions authorising control orders against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness.<sup>65</sup>

### **3.4 Assistance of individuals by the Commission**

77. **Question 4** asks: How does your national institution assist individuals who do not enjoy the right to bring proceedings before the court?
78. As noted above, the Commission has the function of investigating complaints that an officer of the Commonwealth has done an act or engaged in a practice that was inconsistent with or contrary to a human right, including article 9(4) of the ICCPR. However, this function does not include investigating complaints of conduct that was required by Australian law. As a result, complaints about administrative detention required by Australian law cannot be the subject of such an inquiry. For the reasons set out above, the Commission has concerns about whether some conduct required by Australian law is consistent with article 9(4).
79. However, if the relevant act or practice was a discretionary act done by or on behalf of Australia or under an Australian law, then a person may lodge a complaint with the Commission. The Commission must conduct an inquiry into such complaints. For example, if, contrary to law, a person was not informed of his or her review rights or prevented from exercising them, this may be an act or practice contrary to article 9(4) that could be the subject of an inquiry.
80. If, after conducting an inquiry, the Commission finds that the conduct was contrary to article 9(4), it will prepare a report to the Attorney-General. The report may include recommendations for the payment of compensation or the

taking of other action to remedy or reduce any loss or damage suffered by the person. The report must be tabled in Parliament.

81. As noted above, the Commission also has the function of intervening in existing legal proceedings that involve human rights issues. When it exercises this function, the Commission does not appear on behalf of individuals. Rather, it appears to provide assistance to the court on the application of human rights to the proceedings. For example, the Commission intervened in each of the High Court cases of *Al-Kateb v Godwin* (2004) 219 CLR 562 and *Plaintiff M47/2012 v Director General of Security* (2012) 292 ALR 243 which were referred to by the UNHRC (see paragraph 25 above).

### **3.5 Assistance of the Government by the Commission**

82. **Question 5** asks: Does your national institution assist your country in the realisation and implementation of this right? If yes, please explain how.
83. As noted above, the Commission assists the Government in realising and implementing this right and other human rights through examining enactments, undertaking research and preparing submissions, guidelines and reports.

### **3.6 Support for the work of the Commission**

84. **Question 6** asks: How would the general principles and guidelines that the Working Group has been entrusted to elaborate on the realisation of the right to bring proceedings before court best support your work?
85. The Commission has regard to the work of the Working Group, including reports and views on communications, in assessing whether the facts of complaints made to the Commission reveal a breach of article 9(4) of the ICCPR. The development of general principles and guidelines by the Working Group on article 9(4) would further assist the Commission in this work.
86. Given the concerns about potential breaches of article 9(4) in Australia in the circumstances set out above in this response to the Working Group's questionnaire, a focus on the principles relevant to administrative detention in the guidelines produced by the Working Group would be welcome.

### **3.7 Support for Australia**

87. **Question 7** asks: In your view, how would these general principles and guidelines best support your country?
88. The general principles and guidelines would support Australia by assisting it to comply with its obligations under the ICCPR. Legislation passed by the Commonwealth Parliament must include a statement of compatibility with human rights.<sup>66</sup> If the recommendations of the Commission and the Independent National Security Legislation Monitor are adopted by Australia, and amendments are made to legislation identified above in the Commission's response to the questionnaire, the guidelines produced by the Working Group



would assist the Australian Government in drafting legislation that is consistent with article 9(4).

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<sup>1</sup> ICCPR, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).

<sup>2</sup> Human Rights Council, *Arbitrary detention*, UN Doc A/HRC/RES/20/16 (17 July 2012) paras 10-11.

<sup>3</sup> AHRC Act, s 11(1)(e), (f), (g), (h), (j), (k), (n) and (o).

<sup>4</sup> M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action*, (4<sup>th</sup> ed, 2009) paras 14.75-14.80.

<sup>5</sup> M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action*, (4<sup>th</sup> ed, 2009) para 14.15.

<sup>6</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>7</sup> *Thomas v Mowbray* (2007) 233 CLR 307.

<sup>8</sup> *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/76/D/560/1993 (1997) para 9.5, at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f59%2fd%2f560%2f1993&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f59%2fd%2f560%2f1993&Lang=en) (viewed 21 October 2013).

<sup>9</sup> *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002) para 8.3, at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f76%2fd%2f900%2f1999&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f76%2fd%2f900%2f1999&Lang=en) (viewed 21 October 2013); *Baban v Australia*, Communication No. 1014/2001 (2003), UN Doc CCPR/C/78/D/1014/2001 para 7.2, at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f78%2fd%2f1014%2f2001&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f78%2fd%2f1014%2f2001&Lang=en) (viewed 21 October 2013); *Bakhtiyari v Australia*, Communication No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003) paras 9.4-9.5, at [http://www.refworld.org/type\\_CASELAW\\_HRC\\_AUS\\_404887ed0\\_0.html](http://www.refworld.org/type_CASELAW_HRC_AUS_404887ed0_0.html) (viewed 21 October 2013);

*Shams et al v Australia*, Communications Nos. Communications Nos. 1255,1256,1259,1260,1266,1268,1270,1288/2004, UN Doc CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004 (2007) para 7.3, at <http://daccess-ods.un.org/TMP/8081166.14818573.html> (viewed 21 October 2013).

<sup>10</sup> *F.K.A.G. et al v Australia*, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (2013) para 9.6, at

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f108%2fd%2f2094%2f2011&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f108%2fd%2f2094%2f2011&Lang=en) (viewed 21 October 2013). See also *M.M.M. et al v Australia*, Communication No. 2136/2012, UN Doc CCPR/C/108/D/2136/2012 (2013) para 10.6, at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/108/D/2136/2012&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/108/D/2136/2012&Lang=en) (viewed 21 October 2013).

<sup>11</sup> Charter, s 38.

<sup>12</sup> Charter, s 39(1).

<sup>13</sup> Charter, ss 36 and 37.

<sup>14</sup> Charter, s 36(5).

<sup>15</sup> *Human Rights Act 2004* (ACT), s 40B(1).

<sup>16</sup> *Human Rights Act 2004* (ACT), s 40C.

<sup>17</sup> *Human Rights Act 2004* (ACT), s 40B(2).

<sup>18</sup> *Human Rights Act 2004* (ACT), s 32(2).

<sup>19</sup> *Human Rights Act 2004* (ACT), s 32(3).

<sup>20</sup> For example, *Lewis v Chief Executive Department of Justice and Community Safety* [2013] ACTSC 198.

<sup>21</sup> *Migration Act 1958* (Cth), s 189.

<sup>22</sup> *Migration Act 1958* (Cth), s 196.

<sup>23</sup> *Migration Act 1958* (Cth), s 196(3). Subsections (4) and (4A) contemplate judicial review of the lawfulness of the detention of persons who have their visas cancelled under s 501 (character grounds)

or who are in the process of being deported pursuant to s 200. Section 200 is now rarely used given the broader removals powers under ss 198 and 199.

<sup>24</sup> For example, Australian Human Rights Commission, *Those who've come across the seas: Detention of unauthorised arrivals* (1998), at <http://www.humanrights.gov.au/publications/those-who've-come-across-seas-detention-unauthorised-arrivals-1998> (viewed 21 October 2013); Australian Human Rights Commission, *A last resort? report of the National Inquiry into Children in Immigration Detention* (2004), at <http://www.humanrights.gov.au/last-resort-report-national-inquiry-children-immigration-detention-2004> (viewed 21 October 2013); Australian Human Rights Commission, *Submission to the Joint Select Committee on Australia's Immigration Detention Network* (2012), at <http://www.humanrights.gov.au/australian-human-rights-commission-submission-joint-select-committee-australia-s-immigration> (viewed 21 October 2013).

<sup>25</sup> Human Rights Committee, Draft General comment No. 35, *Article 9: Liberty and security of person*, UN Doc CCPR/C/107/R.3 (2013) paras 13 and 18; Working Group on Arbitrary Detention, *Report*, UN Doc A/HRC/22/44 (2012) paras 61-63.

<sup>26</sup> *Ibid.*

<sup>27</sup> See, for example, Human Rights Committee, *F.K.A.G. et al. v Australia*, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (2013), para 9.3.

<sup>28</sup> Human Rights Committee, *F.K.A.G. et al. v Australia*, above.

<sup>29</sup> Australian Human Rights Commission, *Asylum seekers, refugees and human rights - Snapshot Report* (2013) p 9, at <http://www.humanrights.gov.au/publications/asylum-seekers-refugees-and-human-rights-snapshot-report> (viewed 22 October 2013).

<sup>30</sup> Human Rights Committee, *F.K.A.G. et al v Australia*, above; Human Rights Committee, *M.M.M. et al v Australia*, Communication No. 2136/2012, UN Doc CCPR/C/108/D/2136/2012 (2013).

<sup>31</sup> Department of Immigration and Citizenship, *Response to the Australian Human Rights Commission report on the use of community arrangements for asylum seekers, refugees and stateless persons who have arrived to Australia by boat* (2012), at <http://www.humanrights.gov.au/publications/diac-response-australian-human-rights-commission-report-use-community-arrangements> (viewed 21 October 2013).

<sup>32</sup> Australian Human Rights Commission, *Review of Counter-Terrorism and National Security Legislation*, Submission to the Independent National Security Legislation Monitor (14 September 2012), at <http://www.humanrights.gov.au/review-counter-terrorism-and-national-security-legislation> (viewed 21 October 2013); Australian Human Rights Commission, *COAG Review of Counter-Terrorism Legislation*, Submission to the COAG Review Committee (28 September 2012), at <http://www.humanrights.gov.au/coag-review-counter-terrorism-legislation> (viewed 21 October 2013).

<sup>33</sup> ASIO Act s 34F(4)(a) and (b).

<sup>34</sup> ASIO Act s 34F(4)(d).

<sup>35</sup> ASIO Act s 34H.

<sup>36</sup> ASIO Act s 34B.

<sup>37</sup> ASIO Act s 34S.

<sup>38</sup> ASIO Act s 34R(6).

<sup>39</sup> ASIO Act s 34R.

<sup>40</sup> ASIO Act s 34R(8) to (12).

<sup>41</sup> ASIO Act s 34R(7).

<sup>42</sup> ASIO Act s 34F(5).

<sup>43</sup> ASIO Act s 34ZO.

<sup>44</sup> ASIO Act s 34ZQ(5).

<sup>45</sup> ASIO Act s 34ZQ(2).

<sup>46</sup> ASIO Act s 34ZQ(6).

<sup>47</sup> ASIO Act s 34ZP.

<sup>48</sup> ASIO Act s 34ZQ(9).

<sup>49</sup> ASIO Act s 34ZQ(10).

<sup>50</sup> Independent National Security Legislation Monitor, *Annual Report 2012*, p 106, at [http://www.dpmc.gov.au/inslm/docs/INSLM\\_Annual\\_Report\\_20121220.docx](http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.docx) (viewed 21 October 2013).

<sup>51</sup> *Criminal Code Act 1995* (Cth) Div 105; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Police Powers) Act 2002* (NSW) Pt 2A; *Terrorism (Emergency Powers) Act 2003* (NT) Pt 2B; *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act*

2005 (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic) Pt 2A; *Terrorism (Preventative Detention) Act 2006* (WA).

<sup>52</sup> *Terrorism (Police Powers) Act 2002* (NSW) ss 26H, 26I and 26M; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss 18, 20 and 31.

<sup>53</sup> *Terrorism (Community Protection) Act 2003* (Vic) ss 13E and 13N.

<sup>54</sup> *Criminal Code Act 1995* (Cth) s 105.8.

<sup>55</sup> *Criminal Code Act 1995* (Cth) ss 105.12 and 105.18(2).

<sup>56</sup> *Criminal Code Act 1995* (Cth) s 105.51(1).

<sup>57</sup> *Criminal Code Act 1995* (Cth) s 105.51(4) and *Administrative Decisions (Judicial Review) Act 1977* (Cth) Sch 1, item (dac).

<sup>58</sup> *Criminal Code Act 1995* (Cth) s 105.51(2).

<sup>59</sup> *Criminal Code Act 1995* (Cth) s 105.51(5).

<sup>60</sup> Independent National Security Legislation Monitor, *Annual Report 2012*, p 67, at [http://www.dpmc.gov.au/inslm/docs/INSLM\\_Annual\\_Report\\_20121220.docx](http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.docx) (viewed 21 October 2013).

<sup>61</sup> *Criminal Code Act 1995* (Cth) s 104.1.

<sup>62</sup> *Criminal Code Act 1995* (Cth) s 104.14(1).

<sup>63</sup> *Criminal Code Act 1995* (Cth) s 104.5(1A).

<sup>64</sup> *Criminal Code Act 1995* (Cth) s 104.18.

<sup>65</sup> Independent National Security Legislation Monitor, *Annual Report 2012*, p 44, at [http://www.dpmc.gov.au/inslm/docs/INSLM\\_Annual\\_Report\\_20121220.docx](http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.docx) (viewed 21 October 2013).

<sup>66</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).