REMEDYING THE PAST OR LOSING INTERNATIONAL HUMAN RIGHTS IN TRANSLATION? – 'COMPREHENSIVE' RESPONSES TO AUSTRALIAN NATIONAL SECURITY LEGISLATION REVIEWS

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CONTENTS

I INTRODUCTION

In December 2008, the Commonwealth Attorney-General, Robert McClelland, tabled Government responses[1] to the recommendations

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made by four counter-terrorism reviews, which examined controversial national security matters arising during the tenure of the previous Howard government.

Two of those reviews were by independent reviewers: the Clarke Inquiry into the case of Dr Mohamed Haneef[2] and the Australian Law Reform Commission ('ALRC') Review of Sedition Laws in Australia.[3] The other two reviews were the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code[4] and the PJCIS Review of Security and Counter-Terrorism Legislation.[5] The Attorney-General announced that there would be *comprehensive* legislative and other responses to these reviews.[6]

Subsequently, the Attorney-General released a discussion paper,[7] described as a '*comprehensive* discussion paper',[8] on proposed national security legislative amendments. The release of the Discussion Paper was linked explicitly to the four national security legislation reviews referred to above.[9]

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the anonymous referee for comments on a draft of this article.

1 Robert McClelland, Attorney-General (Cth) 'Comprehensive Response to National Security Legislation Reviews' (Press Release, 23 December 2008) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases > at 30 November 2009 ('A-G's Media Release, 23 December 2008').

2 M J Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008), ('*Clarke Report*').

3 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia,* Report 104 (2006) ('*Fighting Words*').

4 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007) ('*PJCIS 2007 Report*').

5 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) ('*PJCIS 2006 Report*').

6 A-G's Media Release, above n 1, and its opening sentence.

7 The National Security Legislation Discussion Paper (2009) <http://www.ag.gov.au/> ('*Discussion Paper*'). The discussion paper was released by the Attorney-General on 12 August 2009, and was opened for public comment and submissions until 25 September 2009. See A-G (Cth) 'National Security Legislation Discussion Paper' (Press Release, 12 August 2009) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Media_Releases > at 30 November 2009.

8 See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 August 2009, 7603 (Robert McClelland, Attorney-General) (emphasis added).

9 Ibid: 'In December 2008, the Government announced its response to a number of outstanding reviews of national security and counter-terrorism legislation … At the time, the Government stated that it supported the majority of recommendations made by these reviews … In addition, the Government also committed to publicly

The enactment of Howard-era national security legislation, which includes the legislation the subject of these reviews, featured two prominent characteristics. These were the paradigm of urgency in the legislative process,[10] as well as asserting compliance of legislation with international human rights law, in spite of considerable contrary evidence.[11] The Rudd Government stated that its legislative responses to the reviews would be developed in a 'careful, transparent and consultative manner'.[12] This suggests a clear departure from its predecessor's urgency paradigm, with its distorting consequences for the institutions and practices of representative democracy.

This claim of comprehensiveness of the present Government response to the four outstanding reviews must therefore be tested in its response to and remediation of the Howard government terrorism legislation practice and consequences. This is necessary to discover if there has been any slowing, or reversal, of the concentration of executive control, power and discretion created by this substantial counter-terrorism legislative legacy.[13] Changing the methodology of enacting legislation by replacing the urgency paradigm, as well as consciously integrating international human rights principles to increase executive accountability, are *important additional factors* in assessing the

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release draft legislation implementing the Government's response to these reviews'.

10 Andrew Lynch, 'Legislating with Urgency – The Enactment of the *Anti-Terrorism Act [No 1] 2005'* (2006) 30 *Melbourne University Law Review* 747; Martin Krygier 'War on Terror' in Robert Manne (ed) *Dear Mr Rudd; Ideas For A Better Australia* (2008), 137; Anthony Reilly 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001-2005' (2007) 10 *Flinders Journal of Law Reform* 81, 91-95; Greg Carne 'Hasten Slowly: Urgency, Discretion and Review – A Counter-Terrorism Legislative Agenda and Legacy' (2008) 13 *Deakin Law Review* 49; Martin Scheinin, *Australia: Study On Human Rights Compliance While Countering Terrorism: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN HRCOR 4th Sess, Provisional Agenda Item 2, [65], UN Doc A/HRC/4/26/Add.3 (2006) ('*Special Rapporteur Report*').

11 Greg Carne 'Neither Principled nor Pragmatic? International Law, International Terrorism and the Howard Government' (2008) 27 *The Australian Year Book of International Law* 11, 13-19.

12 On this point regarding the *Discussion Paper* see A-G's Media Release, 12 August 2009, above n 7 and 'Introduction' *Discussion Paper,* above n 7, as well as Commonwealth, *Parliamentary Debates,* above n 8, 7605: 'The government remains committed to developing legislation in a careful and consultative manner'.

13 Over 40 pieces of counter-terrorism legislation were passed since 2001: *Chronology of Legislative and Other Legal Developments since September 11 2001* (Parliamentary Library) <http://www.aph.gov.au/library/intguide/law/terrorism.htm#terrchron> at 29 November 2009.

comprehensiveness of the government response. However, this is not to say that the inclusion of international human rights principles in review and remediation of national security legislative matters is conclusive or definitive of a comprehensiveness of response.

However, attaining a new methodology which gives due recognition to international human rights law principles will provide welcome democratic practice to partly remediate earlier conferrals of broad executive and potentially arbitrary power in Australian national security legislation. It will commence the task of re-instituting control and accountability mechanisms consistent with traditional expectations of Australian liberal democracy. Furthermore, for the response to national security legislation from the Howard era to be genuinely comprehensive, it should transcend these four reviews and anticipate other existing, as well as prospective forms of review of other national security legislation.

By looking more deeply at the question of comprehensiveness of response to reviews of Howard government national security legislation, an assessment can be made of how substantively, rather than rhetorically, comprehensive reform is being pursued by the Rudd government, including prospective reform and standards applied to reform.

Of course, an assumption underpinning the above assessment is that *at some degree*, the legislative and other counter-terrorism measures taken within Australia after the events of September 11, 2001, are a necessary and legitimate response to terrorism. That assumption means that ultimately an assessment of comprehensiveness of government response to terrorism law reviews is founded upon the necessity and legitimacy of measures and their proposed remediation and modification as part of Australian liberal democracy. Whether that assumption is open to challenge on the ground that national and international counter-terrorism measures are merely a pretext and political agenda of an undemocratic concentration of political power is a larger issue[14] beyond the framework of this article. Such assumptions also focus questions about the meaning and operation of the balancing equation invoked by governments, commonly seen as seeking to balance security against individual liberty.

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14 See for example, Michael Head and Scott Mann, *Law in Perspective: Ethics Society and Critical Thinking* (2nd ed, 2009) 411: 'there is much evidence to suggest that the "war on terror" has been declared for definite political purposes, both foreign and domestic, rather than to protect the security of ordinary people'.

Whilst the focus of this article is in examining a 'comprehensiveness' of government response in relation to four specific national security legislation reviews, consideration is also given to the fact that the Rudd government has not, as part of that 'comprehensive response', engaged with five other completed international reviews applying international human rights principles to aspects of Australian terrorism law which deal with several of the topics raised in the four national security reviews. Two prospective national security reviews are also considered from the perspective of the particular influence that international human rights law might have in providing a genuinely more comprehensive analysis.

II ASSESSING THE 'COMPREHENSIVENESS' OF RESPONSES TO REVIEWS: THE LANGUAGE OF 'BALANCE' AND THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN THAT 'BALANCE'

In making assessments of comprehensiveness of legislative responses to review processes, it is important to look towards the scope for interpreting international human rights law as a modifying influence upon relevant legislation, as the legislative reviews make some significant references to that framework body of law.

The language of legislative intention in responding to reviews may provide important indications of the scope available for incorporating the influence of international human rights law into legislative responses. Equally, that language may be too opaque to discern any adoption of international human rights law from the reviews in government responses and legislative proposals.

The Attorney-General stated that the measures announced in response to the reviews 'are designed to give the Australian community confidence that our law enforcement and security agencies have the tools they need to fight terrorism, while ensuring the laws and powers are *balanced* by appropriate safeguards'.[15] He also claimed that:

> Through these changes, Government seeks to ensure changes to counter-terrorism legislation are well considered, *balanced* and suited to the achievement of a just and secure society… I am confident that our implementation measures will achieve the right *balance* between fighting terrorism and protecting the rights of our citizens.[16]

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15 A-G Media Release, 23 December 2008, above n 1 (emphasis added)

16 The Hon Robert McClelland, A-G (Cth), (Speech delivered at the 7th Annual National Security Australia Conference, 23 March 2009)

The language of balance was also consistently used by the Attorney-General with the subsequent release of the *Discussion Paper*:

> The amendments proposed in this Discussion Paper seek to achieve an appropriate *balance* between the Government's responsibility to protect Australia, its people and its interests and instil confidence that our laws will be exercised in a just and accountable way … maintaining this *balance* is an ongoing challenge for all modern democracies in preparing for the complex national security challenges of the future. By striking this *balance*, the Australian community can have confidence in our national security framework.[17]

In contrast, the former Howard government Attorney-General, Philip Ruddock, increasingly sought to justify counter-terrorism legislation through a distorted appropriation of the international law concept of human security.[18] This meant that a traditional balancing of security against liberty gave way to a 'different paradigm'[19] whereby the provision of physical safety and security obtained overwhelming precedence as a precursor to the enjoyment of other human rights.

However, the question with the responses of the present Attorney-General to the reviews is different: how, if at all, that stated language of balance accommodates international human rights law principles? The reference to '*balance*' as this reconciliatory device in these comments[20] admits of two possible alternatives.

Firstly, the continuation of an existing *balancing* paradigm, the trading off of rights and liberties, with the expectation of advancing security, perhaps with some minor substantive or rhetorical improvements. This

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<http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches> at 30 November 2009.

17 Commonwealth, *Parliamentary Debates,* above n 8, 7603, 7605 (emphasis added). See also very similar language in the Introduction by the Attorney-General to the *Discussion Paper*, above n 7: 'The amendments proposed in this Discussion Paper seek to achieve a balance … It is a balance that must remain a conscious part of the national security policy process. The Government is committed to ensuring that Australia's national security legislation achieves this balance'.

18 See Greg Carne, 'Reconstituting 'Human Security' in a New Security Environment: One Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights' (2006) 25 *Australian Year Book of International Law* 1.

19 Philip Ruddock, 'A New Framework: Counter-Terrorism and the Rule of Law' (Address to the Sydney Institute, 20 April 2004) reprinted in (2004) 16(2) *The Sydney Papers* 113; and see Head and Mann, above n 14, 417-418.

20 See also the balancing principle in the comment 'At the last election, the Rudd Government gave a commitment to ensure Australia has strong counter-terrorism laws that protect the security of Australians while preserving the values and freedoms that are part of the Australian way of life': A-G's Media Release, 23 December 2008, above n 1.

traditional approach of '*balancing*' has been the subject of much criticism elsewhere,[21] as producing a constant attrition of rights as the national security interest takes priority.

Secondly, the reference to 'balance' might be seen as shorthand for the use of international human rights law, as a central guiding principle in the amendment of legislation following the reviews and in the government responses. This is a less likely but not impossible result.

International human rights law significantly informed at least one of the reports[22] that are the subject of the Government's 'comprehensive' response. This was because the *PJCIS 2006 Report* reviewed[23] and *approved the findings* of the Security Legislation Review Committee report[24] ('Sheller Committee'), which had stated as its guiding principle

> whether the legislation was a *reasonably proportionate means* of achieving the intended object of protecting the security of people living in Australia and Australians living overseas, including protecting them from threats to their lives … the legislation must be well framed and have sufficient safeguards to stand the test of proportionality and fairness.'[25]

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21 Simon Bronitt, 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Matthew, *Fresh Perspectives on the 'War On Terror'* (2008) 65; Christopher Michaelsen 'Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29 *University of New South Wales Law Journal* 1; and International Commission of Jurists, *Assessing Damage, Urging Action Report of the Eminent Jurists panel on Terrorism, Counter-terrorism and Human Rights*, 103 ('*ICJ Report*').

22 *PJCIS 2006 Report*, above n 5.

23 Ibid, [1.6]: 'Subsection 4 (9) of the *Security Legislation Amendment (Terrorism) Act 2002* requires the PJCIS to take into account the Sheller Report. Consequently, the Sheller Report forms an important part of the evidence to this inquiry and reference is made to evidence submitted to that review and to parts of this report where it is appropriate to do so'; [1.8}: '… the PJCIS decided to focus attention on the recommendations and findings of the Sheller Committee'.

24 Security Legislation Review Committee ('Sheller Committee'), Commonwealth Parliament, *Report of the Security Legislation Review Committee* (2006) ('*Sheller Report*').

25 *Sheller Report*, above n 24, 3 (emphasis added). The statement of a 'guiding principle' of reasonable proportionality invokes the international human rights law principle of selecting means (in this instance legislative means) which are proportional to the legitimate end or objective sought to be achieved, with reasonableness describing the selected means as falling within a range of acceptable choices. Through its approval of the *Sheller Report* findings, the *PJCIS 2006 Report* is informed by the international human rights law principle of proportionality adopted by the Sheller Committee as its guiding principle.

In turn, that 'guiding principle'[26] was directly informed by the submissions of the Human Rights and Equal Opportunity Commission ('HREOC') to the Sheller Committee, including the use of *balancing* terminology:

> HREOC asks this Review Committee to accept that international human rights law is not an optional extra during times of concern about international terrorism. Such an approach implies that human rights are somehow antithetical to issues of national security, necessitating a compromise or trade off. This approach also ignores the fact that international human rights law already strikes a *balance* between security interests and rights considered to be fundamental to the person. International Human Rights Law allows for protective actions to be taken by states, but demands that those actions remain within carefully crafted limits – most notably proportionality.[27]

That matter was further elaborated in HREOC's supplementary submission to the Sheller Committee[28] and HREOC made similar statements in its submission to the PJCIS 2006 review, which reviewed the *Sheller Report*.[29]

The *Sheller Report* acceptance of testing legislative conformity with international human rights principles, and the subsequent influence of the *Sheller Report* on the *PJCIS 2006 Report*, indicates the potential for a governmental response to national security legislation reviews embodying significant international human rights law influences in legislative amendments. However, given the above two expositions of '*balance*', it is probable that there is no clear delineation of the type of model being adopted in the Attorney-General's announcements. The answer most probably lies somewhere between these two 'balancing' alternatives.

This lack of clarity about the uses of 'balance' is also the consequence of a lack of an Australian charter of rights at federal level, against which pre-legislative drafting and legislative scrutiny of national security based legislation for compliance with international rights based standards would routinely occur.

Recent debate about a federal statutory charter of rights has emerged

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26 In adopting an international human rights law analysis of counter-terrorism legislation.

27 HREOC, Submission to Sheller Committee, [1.4] (emphasis added).

28 Ibid [13] (emphasis added).

29 HREOC, Submission to PJCIS Review of Security and Counter Terrorism Legislation, 1.

following various official reports at state and territory level,[30] the introduction of statutory charters in the Australian Capital Territory[31] and Victoria,[32] and in the release of the *National Human Rights Consultation Report*,[33] which recommended the introduction of a Commonwealth Human Rights Act. Several of the recommendations of the *National Human Rights Consultation Report* (which lists a range of non-derogable civil and political rights[34] and additional civil and political rights[35] to be included in a federal Human Rights Act) in relation to a Commonwealth statutory charter would provide concrete mechanisms to review and potentially modify national security legislation to conform more closely to international human rights standards.

In particular, these recommendations are that an obligation be imposed on federal public authorities to act in accordance with those rights,[36] that the Act require statements of compatibility to be tabled for all Bills introduced into the Federal Parliament,[37] that the Act empower the proposed Joint Committee on Human Rights to review all Bills and the relevant legislative instruments for compliance with the human rights expressed in the Act,[38] that the Act contain an interpretative provision that requires federal legislation to be interpreted in a way that is compatible with the human rights expressed in the Act and consistent with parliament's purpose in enacting the legislation,[39] that the Act extend only to the High Court the power to make a declaration of incompatibility[40] and that the Act allow an individual to institute an independent cause of action against a federal public authority for

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30 See Australian Capital Territory, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003); Victoria, *Rights Responsibilities and Respect – The Report of the Human Rights Consultation Committee* (2005); Tasmania Law Reform Institute, *A Charter of Rights for Tasmania,* Final Report No 10 (2007); *A WA Human Rights Act: Report Of The Consultation Committee For A Proposed WA Human Rights Act* (2007).

31 *Human Rights Act 2004* (ACT).

32 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

33 National Human Rights Committee, *National Human Rights Consultation Report* (2009).

34 Ibid xxxv-xxxvi, Recommendation 24.

35 Ibid xxxvi-xxxvii, Recommendation 25.

36 Ibid xxxiv, Recommendation 20.

37 Ibid xxxvii, Recommendation 26.

38 Ibid xxxvii, Recommendation 27.

39 Ibid xxxvii, Recommendation 28.

40 Ibid xxxvii, Recommendation 29.

breach of human rights and that a court be able to provide remedies including damages.[41]

An earlier concrete example of how a human rights charter can modify the 'balance' in critical national security legislative drafting is to be found in the influence in 2005 of the *Human Rights Act 2004* (ACT) over the formation of Commonwealth, state and territory preventative detention legislation. The ACT Chief Minister's release of the draft COAG bill and various legal advices on it initially prompted a broadly based, critical national public debate.[42] Subsequently, the legislation enacted in the ACT[43] incorporated a greater range of safeguards[44] and higher standards[45] in attempting to adhere to the standards of the *International Covenant on Civil and Political Rights* as reflected in the *Human Rights Act 2004* (ACT).[46]

Key points exist in relation to the notion of 'balance' in discussion about national security legislation in the *absence* of a federal charter of rights. Such 'balance' leaves to chance, through a range of circumstantial factors, whether international human rights law will provide any influence or input in obtaining such 'balance'. Secondly, the absence of a required practice of assessing legislative proposals, including national security proposals, against international human rights standards, militates against the development of a culture and expertise whereby those standards enjoy a central role in legislative enactment and review.

Without bureaucratic and political culture being shaped through the a human rights charter to address, reconcile and integrate counter-terrorism and civil and political rights, much chance and conjecture will exist around the meaning of 'comprehensiveness' of legislative response to national security legislation reviews. Comprehensiveness ideally requires institutional capacity in Australian legislative

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41 Ibid xxxviii, Recommendation 31.

42 See Greg Carne 'Prevent, Detain Control and Order?: Legislative Process and Executive Outcomes in Enacting The *Anti-Terrorism Act (No 2) 2005* (Cth)' (2007) 10 *Flinders Journal of Law Reform* 17, 31-32.

43 *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT)

44 See Andrew Byrnes and Gabrielle McKinnon 'The ACT *Human Rights Act 2004* and the Commonwealth *Anti-Terrorism Act (No 2) 2005*: A Triumph for Federalism or a Federal Triumph?' (Paper presented at the Expert Workshop 'Ensuing accountability – Terrorist Challenges and State Responses in a Free Society', National Europe Centre, ANU, 20-21 April 2006), 10; Carne, above n 42, 59-60.

45 See Carne, above n 42, 32 fn 122.

46 Ibid 32.

responses – by giving meaning to the concept of 'balance' - be obtained by drawing upon international human rights principles, such as lawfulness, necessity and proportionality, in testing legislative proposals and in subsequent judicial review of the application and operation of legislation.

III INTERNATIONAL HUMAN RIGHTS LAW PRINCIPLES *COMPREHENSIVELY* FORMING PART OF THAT GOVERNMENT RESPONSE — THE ROLE OF THE REVIEWING BODY

There is a real prospect that ensuring legislative conformity with international human rights principles in responding to legislative reviews will remain both inconsistent and ad hoc, influenced by the extent to which the reviewing body has adopted that framework itself. This is because international human rights law principles are not central to review in all the committee reviews the subject of the Government response.

An adoption by a reviewing body of international human rights analysis in reviewing national security legislation will itself provide an accessible platform for legislative amendment to ensure closer conformity with international human rights principles. In contrast, an absence by a reviewing body of international human rights analysis in reviewing counter terrorism legislation will mean by default, reliance upon the Government itself to incorporate such analysis into its responses and reforms.

This randomness by which international human rights analysis may or may not be incorporated in review work is an inherently unreliable approach. It cannot foster the qualities of *comprehensiveness* of legislative response in relation to the four reviews, let alone comprehensiveness, in the sense of a consistent analysis in ongoing national security legislation reviews and government responses.

Indeed, this lack of a clear delineation of what 'balance' really means in the Attorney-General's announcements may inadvertently produce a further selective internationalism in counter-terrorism legislative formation, characteristic of the Howard years.[47] The consequences of

[47] Selective internationalism involves the selective drawing upon international examples to adopt and extend counter-terrorism enabling measures, whilst distinguishing, resisting or rejecting measures promoting human rights accountability and protection. See Greg Carne, 'Gathered Intelligence or Antipodean Exceptionalism?: Securing the Development of ASIO's Detention and Questioning

that selective internationalism form part of the Howard legislation subject matter sought to be remedied by responding to the reviews of counter-terrorism legislation. A *new failure* to respond to that legislation by the inclusion of international human rights analysis, previously marginalized in legislative responses, would be ironic within the claim of a comprehensive response.

IV PARALLEL DEVELOPMENTS — A MORE *COMPREHENSIVE* MEANING OF NATIONAL SECURITY WITHIN A RENEWED AUSTRALIA-UNITED NATIONS RELATIONSHIP

The Attorney-General's announcements regarding the comprehensiveness of response to the four reviews also acknowledge the content of the Prime Minister's December 2008 National Security Statement.[48] The Statement[49] articulates a more comprehensive conception of national security, making a *comprehensiveness* of response involving international human rights law to present and future reviews more compelling:

> As stated by the Prime Minister last year, 'National Security' means freedom from attack or threat of attack, maintaining our territorial integrity, maintaining our political sovereignty, preserving our hard won freedoms and maintaining our capacity to advance economic prosperity for all Australians. 'Threats to National Security' therefore include non-traditional threats such as serious and organized crime, electronic attack and … natural disaster. In that context, we have specifically acknowledged that climate change will have an impact upon the intensity and frequency of natural disasters … Second, in response to the broader concept of national security, the Government has re-iterated its commitment to an "all-hazards" approach. By "all-hazards" approach, we mean having agencies well-equipped and ready to detect, deter and/or deal with a crisis or attack on Australia's security of any kind.[50]

The National Security Statement also included a significant appraisal

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Regime' (2006) 27 *Adelaide Law Review* 1, 2-3.

48 The Attorney-General acknowledges the PM's broadening of 'national security': A-G's Speech, above n 16.

49 First National Security Statement to the Parliament, Address by the Prime Minister of Australia The Hon Kevin Rudd MP, 4 December 2008 ('*National Security Statement*'). See also Commonwealth, *Parliamentary Debates,* House of Representatives, 4 December 2008, 12549 (Kevin Rudd).

50 A-G's Speech, above n 16. The Attorney-General made further reference to this 'all hazards' approach at the time of release of the *Discussion Paper*: Commonwealth *Parliamentary Debates,* 12 August 2009, above n 8, 7605.

of the interests at stake — fundamental freedoms and the rule of law — in a balancing exercise.[51] To address the identified shortcomings in how international human rights law is factored into the Attorney-General's balancing language, international human rights law must remain a conscious part of the national security policy process. This is necessary because of function creep[52] and the expansion of national security subject matters,[53] broadening an application of terrorism law principles. With both the actual and potential migration of national security legislative content and approaches to other, particularly criminal law areas,[54] as well as the expanding conception (and institutional interest of national security agencies in such expansion) of what are classified as national security issues, a moderating role of international human rights law principles becomes all the more compelling.

Any significant gaps in international human rights analysis in the responses to the four existing reviews (or indeed in conducting or implementing subsequent reviews) should be identified so that review

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51 *National Security Statement*, above n 16, under the heading 'The principles of Australian national security', 2-3 (emphasis added).

52 Synonyms for this phenomenon include 'seepage', 'migration', 'colonising', 'modelling', 'bleeding' and 'snowballing'. What is being identified are the existing legislated national security methodologies and techniques being used as a model for expanding both national security subject matter as well as extending these methodologies and techniques into criminal law and other regulatory environments.

53 See the extract in the text at n 50. The *National Security Statement* lists non-terrorism, 'non-traditional threats or new security challenges' including transnational crime, border security, people smuggling, cyber attacks and information technology vulnerability, climate change, declining food production, violent weather patterns, population movements and energy security as national security matters: *National Security Statement*, above n 49, 5-6. A recent example is the further enlargement of ASIO's role to include border protection: see Joint Media Release Attorney-General, Minister for Immigration and Citizenship and Minister for Home Affairs 'Legislation To Combat People Smuggling' (23 February 2010) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Media_Releases> at 3 March 2010: 'The *Anti-People Smuggling and Other Measures Bill 2010* … will support the Government's multi-pronged approach to combating people smuggling by enabling the Australian Security Intelligence Organisation (ASIO) to specifically investigate people smuggling and other serious border security threats. The Bill will also enable Australia's national security agencies to collect foreign intelligence about non-State actors, including people smugglers and their networks'.

54 An example is the adoption of control orders, the declaration of organisations and association prohibitions in State legislation purportedly directed against motorcycle gangs in the *Serious and Organised Crime (Control) Act 2008* (SA) – see *Totani and Another v South Australia* (2009) 259 ALR 673. Special leave to appeal has been granted by the High Court against the majority finding of legislative invalidity by the Full Court of the Supreme Court of South Australia.

responses might achieve genuine 'comprehensive' standards. Identified gaps may be traced to the degree in which international human rights law principles were insufficiently applied in the conduct of the original review. If this assessment does not occur and if in future reviews suitable criteria are not adopted to test legislative changes against international human rights principles, it would be incorrect to suggest that Government responses are fully 'comprehensive'.

A further reason supporting the principle that international human rights law should be systematically factored into Government responses is premised in the Rudd government's affirmed commitment to re-engagement with United Nations institutions. Various expressions of this were made by the Prime Minister,[55] the Attorney-General[56] and the Minister for Foreign Affairs.[57]

This matter is of particular importance for Australian national security legislation and policy reform if these United Nations assertions are to be substantively, rather than rhetorically, achieved. This is because the United Nations has been the principal advocate of integrated human rights approaches (in contradistinction to balancing approaches) in

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55 'The Principles of Australian national security' in *National Security Statement*, above n 49.

56 A-G speeches: Robert McClelland, 'Australia and International Human Rights: Coming in from the Cold' (Speech delivered at the Human Rights and Equal Opportunity Commission, Sydney, 23 May 2008) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches > at 30 November 2009; Robert McClelland, 'Strengthening Human Rights and the Rule of Law' (Speech delivered at the Human Rights Law Resource Centre, Mallesons Stephen Jacques, 7 August 2008) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches > at 30 November 2009; Robert McClelland, 'Melbourne Law School Function' (Speech delivered at the Melbourne Law School Student Centre, Melbourne University, 21 August 2008) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches > at 30 November 2009; Robert McClelland, 'Human Rights under a Rudd Labor Government – What will be different?' (Speech delivered at the Banks/Barton FEC Regional Forum, 17 November 2008) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches > at 30 November 2009; Robert McClelland, 'Human Rights: A Moral Compass' (Speech delivered at the Lowy Institute for International Policy, Sydney, 22 May 2009) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches > at 30 November 2009.

57 Attorney–General and Minister for Foreign Affairs, 'Invitation to United Nations Human Rights Experts' (Joint Press Release, 8 August 2008) <http://www.foreignminister.gov.au/releases/2008/fa-s080808.html> at 30 November 2009.

counter-terrorism legislative and other responses.[58]

Firstly, this is a position which reflected in the language and structure of the articles of the *International Covenant on Civil and Political Rights,* the primary international human rights law treaty referred to in the four Australian national security legislation reviews and in submissions to those reviews, providing the standards for analysing the Australian legislation. The *ICCPR* articles provide for a range of non-derogable rights[59] and derogable rights,[60] many of which are of potential and direct relevance in the application of counter-terrorism laws.[61] The derogable *ICCPR* rights are subject to two sets of potential limitations. The first is a set of general limitations (for truly exceptional circumstances), which arises under Article 4 of the *ICCPR*.[62] The second are common limitations (including on occasions that relating to

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58 An excellent summary of these principles is contained in the United Nations Office of the High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism,* Fact Sheet No 32 < http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>. See especially (as relevant to the ensuing discussion in this article) Chapter II, Human Rights and Counter-Terrorism under the headings 'A The promotion and protection of human rights while countering terrorism' and 'B The flexibility of human rights law'.

59 *International Covenant on Civil and Political Rights,* opened for signature 19 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976) ('*ICCPR*'): art 6 (Right to life), art 7 (Freedom from torture or cruel, inhuman and degrading treatment or punishment), art 8 (Freedom from slavery and servitude), art 11 (Freedom from imprisonment merely on the ground of inability to fulfil a contractual obligation), art 15 (Prohibition of guilt for retrospective criminal law), art 16 (recognition as a person before the law) and art 18 (right to freedom of thought, conscience and religion). By definition, non-derogable rights cannot be qualified or subtracted from.

60 These are the remaining *ICCPR* rights (other than the non-derogable rights) commencing with Article 9 (liberty and security of the person).

61 For example, *ICCPR* art 7 (Freedom from torture or cruel, inhuman or degrading treatment or punishment), art 9 (Liberty and security of the person and freedom from arbitrary arrest and detention), art 10 (those deprived of liberty to be treated with humanity and respect for inherent human dignity), art 14 (rights of due process and a fair and public hearing by a competent, independent and impartial tribunal established by law), art 18 (Freedom of thought, conscience and religion), art 19 (Freedom of opinion and expression) and art 22 (Freedom of association).

62 Article 4, para 1 of the *ICCPR* states 'In time of *public emergency which threatens the life of the nation and the existence of which is officially proclaimed*, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant *to the extent required by the exigencies of the situation*, provided that such measures are *not inconsistent* with their other obligations under *international law* and do *not involve discrimination* solely on the ground of race, colour, sex, language, religion or social origin'. The italicized words indicate the constraints upon derogation from the derogable articles.

national security), which are contained within a range of individual *ICCPR* articles,[63] typically permitting restrictions as provided by law and necessary in a democratic society for identified interests.[64] The inclusion of lawfulness is intended to safeguard against arbitrary impositions and the requirement of necessity imports a test of proportionality between means adopted towards the objectives sought. In other words, national security and other objectives sought at the intersection with specific human rights are able to be constrained in a way that positively contributes to maintaining democratic values.

Importantly, the *ICCPR* provides a potential framework by which incursions on human rights may be strictly controlled by tests relating to legality, proportionality and necessity. These principles are embedded in the language of the articles and further supported by the Human Rights Committee's[65] jurisprudence under the First Optional Protocol[66] and its issuing of General Comments[67] expounding the principles of the individual *ICCPR* articles and its States Parties reporting process to the Human Rights Committee.[68]

Secondly, an integrated human rights approach in counter terrorism policy and legislation is also consistently reflected in the approach advocated by several different United Nations institutional bodies and forums engaging with the intersection of terrorism and human rights.[69]

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63 See, eg, *ICCPR* arts 12, 13, 14, 19, 21 and 22.

64 See, eg, the limitations 'which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others' in *ICCPR* arts 21 and 22, and similar phrases in *ICCPR* arts 18 and 19.

65 The Human Rights Committee is established under Article 28 of the *ICCPR*.

66 State Parties to the First Optional Protocol recognise the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any rights set forth in the Covenant: *First Optional Protocol To The International Covenant on Civil and Political Rights* (1966) 999 UNTS 302, art 1 (entered into force 23 March 1976). Australia recognized the competence of the Human Rights Committee to receive and consider individual communications in 1991.

67 The Human Rights Committee has issued 33 General Comments, being its interpretation of the content of the articles of the *ICCPR*. For example, General Comment 8 on *ICCPR* art 9 - right to liberty and security of the person emphasizes that the article applies to all deprivations of liberty, that such deprivation must not be arbitrary, it must be based on grounds and procedures established by law, that reasons must be given, that court control of the detention must be available and that compensation must be available in the event of breach.

68 See *ICCPR* art 40.

69 For example – UN General Assembly Resolutions; UN Security Council Resolutions; UN Secretary General statements in relation to review of UN institutions; UN Treaty

These institutional bodies and forums include the General Assembly,[70] the Security Council,[71] the Secretary General,[72] the Counter-Terrorism Committee[73] the Office of the High Commissioner for Human Rights,[74] the Human Rights Council[75] and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.[76] These bodies and forums have reflected a

bodies – Human Rights Committee, *Convention Against Torture* Committee, *Convention on the Elimination of Racial Discrimination* Committee; UN High Commissioner for Human Rights; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

70 *United Nations Global Counter Terrorism Strategy*, GA Res 60/288 UN GAOR, 60th sess, Agenda Items 46 and 120, UN Doc A/RES/60/288 (2006).

71 Security Council Resolutions subsequent to SC Res 1373 UN Doc S/RES/1373 (2001) have cautioned the need to implement counter-terrorism measures in a manner that respects international law, in particular international human rights, refugee and humanitarian law. See the following UN SC Resolutions: SC Res 1456 UN Doc S/RES/1456 (2003), SC Res 1566 UN Doc S/RES/1566 (2004) and SC Res 1624 UN Doc S/RES/1624 (2005), which influence the interpretation of SC Resolution 1373.

72 *Uniting Against Terrorism; Recommendations for a global counter-terrorism strategy*: *Report of the Secretary-General,* UN Doc A/60/825 (2006); General, *Protecting human rights and fundamental freedoms while countering terrorism: Report of the Secretary-General,* UN Doc A/60/374 (2005).

73 *Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its comprehensive review of the Counter-Terrorism Committee Executive Directorate*, [13] UN Doc S/2005/800 (2005) and Policy Guidance PG.2 of Counter Terrorism Committee of 26 May 2006, UN Doc S/AC.40/2006/PG.2 (2006).

74 *Human rights: a uniting framework: Report of the UN High Commissioner for Human Rights*, 27 February 2002, UN Doc E/CN.4/2002/18; 'High Commissioner for Human Rights Calls for Balancing Anti-Terrorism Efforts With Respect For Rights' (UN Press Release, 20 March 2002); 'Proposals for 'Further Guidance' for submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 – Compliance with International Human Rights Standards, 1. General Guidance: Criteria for balancing of human rights protection and the combating of terrorism, UN Doc E/CN.4/2002/18 Annex (2002); High Commissioner for Human Rights, Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective on the Counter-Terrorism Measures; Security Under the Rule of Law (September, 2002); Address by Louise Arbour, UN High Commissioner for Human Rights at Chatham House and the British Institute of International and Comparative Law, 16 February 2006; *Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism*, 2 June 2008, UN Doc A/HRC/8/13; Launch of the *Report of the ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* by UN High Commissioner for Human Rights, 16 February 2009.

75 Statements made by the mandates of bodies absorbed and replaced by the new UN Human Rights Council: *Terrorism and human rights,* Sub-Commission on Human Rights Resolution 2004/21, 12 August 2004; and *Protection of human rights and fundamental freedoms while countering terrorism,* Human Rights Resolution 2005/80 (Commission on Human Rights).

76 For example, Martin Scheinin, *Promotion and Protection of All Human Rights, Civil,*

view that human rights and counter terrorism are not mutually exclusive or antipathetic, but that their integration is intrinsic to effective counter terrorism legislative and policy development.

Both of these major examples — human rights treaty based and human rights institutional based responses — provide a firm rejoinder to the suggestion that their particular usages of international human rights law would, if applied, make little difference in restraining the diminution of democratic practices and institutions through opportunistic counter-terrorism enactments in a war on terrorism. Instead, the real question is one of the preparedness, in this particular instance, of the Rudd government to incorporate these principles within any 'comprehensive' response to the four national security legislative reviews and beyond.

In addition to these points, Howard government influence of Australia's interaction with the United Nations human rights treaty system[77] and its preferred model for the protection of human rights[78] in marginalising international human rights law in terrorism legislation, must also be seen as a point of contradistinction from which the comprehensiveness of Rudd government responses to the four reviews can be assessed.

In considering the claim of comprehensiveness of government response to the four outstanding reviews from the Howard government, the above principles are important indications of a particular degree of comprehensiveness — that is, have the government responses absorbed, or been crafted in response to, relevant aspects of international human rights law? Alternatively, is the matter left to chance, requiring government of its own initiative, or in response to interest group or individual submissions, to incorporate international human rights law analysis as part of a comprehensive

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Political, Economic, Social and Cultural Rights, Including The Right To Development: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/HRC/10/3 (2009).

77 See Minister for Foreign Affairs, Attorney-General and Minister for Immigration and Multicultural Affairs 'Australian Initiative to Improve the Effectiveness of UN Treaty Committees', Joint Press Release, 5 April 2001; Minister for Foreign Affairs and Attorney-General 'Progress Made To Reform UN Treaty Bodies', Joint Press Release, 9 March 2006 with attached report *Reform of the United Nations Treaty Body System: Australian Initiatives*.

78 A-G's Department, *Australia's National Framework For Human Rights National Action* (2005) emphasising representative and responsible government, and parliamentary doctrines and institutions, as the most effective human rights protection mechanisms.

response to the issues identified in the reviews? It is to a brief examination of Rudd government responses to each of the four reviews of Howard government legislation that our attention now turns. A tentative conclusion able to be made is that with the subsequent release of the *Discussion Paper* and its draft legislation,[79] the apparent influence of international human rights law principles, where previously raised in the four reviews, in ensuring balanced and comprehensive national security legislative reform, is inconsistent between reviews.

V ASSESSING THE 'COMPREHENSIVENESS' OF GOVERNMENT RESPONSES: THE INFLUENCE OF INTERNATIONAL HUMAN RIGHTS LAW IN THE FOUR NATIONAL SECURITY LEGISLATION REVIEWS AND SUBSEQUENT DEVELOPMENTS

A *Responding to the Clarke Inquiry into the Case of Dr Mohamed Haneef*

The Attorney-General announced that the Government accepted and would implement all ten[80] of the Clarke Inquiry[81] recommendations of the Inquiry into the Case of Dr Mohamed Haneef.[82] Of greatest significance for present purposes is the Inquiry's recommendation about the operation of Part 1C of the *Crimes Act 1914* (Cth), in conjunction with the powers of arrest under s 3W of the *Crimes Act 1914* (Cth).

Of critical moment in Part 1C is the operation of the 'dead time' provisions,[83] particularly s 23CA(8)(m) which allows investigating officials to disregard

> any reasonable time that
>
> (i) is a time during which the questioning of the person is reasonably

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79 See exposure draft, *National Security Legislation Amendment Bill 2009*.

80 Attorney-General (Cth), 'Statement on the tabling of the Government's response to reviews of national security legislation and the public report of the Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef', (Speech delivered at Commonwealth Parliamentary Offices, Sydney on 23 December 2008) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches> at 30 November 2009.

81 *Clarke Report*, above n 2.

82 See Stephen Keim, 'Dr Haneef and me' (2008) 33 *Alternative Law Journal* 99.

83 During which, time is not counted as investigatory purposes time of an arrested person under s 23CA (4)(b) and s 23DA of the *Crimes Act 1914* (Cth).

> suspended or delayed; and
>
> (ii) is within a period specified under section 23CB.

Section 23CB applies if the person mentioned in paragraph 23CA(8)(m) is detained under subsection 23CA(2) for the purpose of investigating whether the person committed a terrorism offence. These provisions operatively led to the 12-day detention of Dr Haneef[84] — relevantly section 23CB (2) states:

> At or before the end of the investigation period, an investigating official may apply for a period to be specified for the purpose of subparagraph 23CA(8)(m)(ii).[85]

The *Clarke Report* stated in Recommendation 3,

> That the provisions of Part 1C of the *Crimes Act 1914* in relation to terrorism offences and the association of those provisions with s 3W of the Act be reviewed in the light of the discussion in Chapter 5 and relevant provisions of the United Kingdom's *Terrorism Act 2000*.[86]

The Government responded by stating that

> it has requested the Attorney-General's Department to conduct a review of the relevant provisions in Part 1C, and their interaction with s 3W of the Crimes Act, taking into account the issues raised in the Clarke Inquiry report … the review will involve public consultation through a discussion paper to be released in the first half of 2009.[87]

The *Discussion Paper* referred to subsequently invited public consultation and proposed placing a 'seven day cap … on the amount of time that can be disregarded under paragraph 23DB (8)(m) (current 23CA(8)(m)'.[88]

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84 For the Haneef chronology, see Maurice Blackburn Lawyers, Submission to the Clarke Inquiry, 3-10 <http://www.haneefcaseinquiry.gov.au/>. See also *Clarke Report*, above n 2, 238 indicating detention under Part 1C of the *Crimes Act* 'for the period 2 to 13 July 2007 before being charged with a terrorism offence on 14 July 2007' and *Clarke Report*, above n 2, 238, fn 19.

85 After the maximum allowable investigation period extension had been obtained under s 23DA of the *Crimes Act*, four applications were made under s 23CB to specify dead time. After the adjournment for 48 hours of the fourth dead time application, '240 hours of dead time had been allowed or had elapsed' – meaning that the total detention period was 264 hours or 11 days: *Clarke Report*, above n 2, 247-248.

86 *Clarke Report*, above n 2, Recommendation 3, 255 and *Australian Government response to Clarke Inquiry into the Case of Dr Mohamed Haneef - December 2008* <http://www.ema.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoClarkeInquiryintotheCaseofDrMohamedHaneef-December2008> *('Clark Inquiry Government Response')*, Point 3 - Issues relating to legislation.

87 *Clarke Inquiry Government Response*, above n 86, Point 3 - Issues relating to legislation.

88 *Discussion Paper*, above n 7, 127 and generally, *Discussion Paper*, above n 7, 123-135.

The important statement in the above quotation is 'Taking into account the issues raised in the Clarke Inquiry report'. Several important issues relating to the legislation's deficiencies were identified, with the reporter acknowledging the 'invaluable assistance I received from the written submissions lodged with the Inquiry and the papers delivered at public forums.'[89] The methodology of the chapter of the *Clarke Report* dealing with legislative deficiencies is adopted within the framework of the fourth term of reference:

> [H]aving regard to (a), (b) and (c), any deficiencies in the relevant laws or administrative and operational procedures and arrangements of the Commonwealth and its agencies, including agency and interagency communication protocols and guidelines.[90]

The terms of reference would therefore admit consideration of international human rights law in assessing those deficiencies, enabling that perspective to be factored into the Government's 'comprehensive review' of the provisions. However, the reviewer's working methodology was more modest,[91] its assumption a traditional balancing model of civil liberties and response to terrorism,[92] inspired by the keynote address of former High Court Chief Justice Sir Gerard Brennan.[93]

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89 *Clarke Report*, above n 2, 231.

90 Clarke Inquiry, Term of Reference 'd'. The Inquiry was also to examine and report on (a) the arrest, detention, charging, prosecution and release of Dr Haneef, the cancellation of his Australian visa and the issue of a criminal justice stay certificate; (b) the administrative and operational procedures and arrangements of the Commonwealth and its agencies relevant to these matters; and (c) the effectiveness of cooperation, coordination and interoperability between Commonwealth agencies and with state law enforcement agencies relating to these matters <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Terms_of_Reference>.

91 'The approach I took … is to identify deficiencies that have sufficient connection to Dr Haneef's case … I analysed those provisions that are relevant to an exposure of what I perceive to be deficiencies, at least problem areas': *Clarke Report*, above n 2, 231. This approach is in contrast to the use of the international human rights law principle of proportionality in the *Sheller Report* and subsequently in the *PJCIS 2006 Report*, which reviewed the *Sheller Report*: see the discussion under the heading 'Assessing the 'comprehensiveness' of responses to reviews: the language of 'balance' and the role of international human rights law in that 'balance'.

92 *Clarke Report*, above n 2, 231, citing Brennan J in *Alister v The Queen* (1984) 154 CLR 404, 456, 'that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty'.

93 Sir Gerard Brennan, Opening Address to the Clarke Inquiry Public Forum, 22 September 2008 <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Transcripts>.

Two of the four papers at the Inquiry Public Forum raised *ICCPR* Article 9 human rights issues in relation to the *Crimes Act 1914* (Cth) provisions - the Law Council presentation[94] and the presentation of Dr Ben Saul.[95] Submissions to the Clarke Inquiry also raised international human rights law issues in relation to the provisions of the *Crimes Act 1914* (Cth). Of particular significance was the HREOC submission,[96] which provided a detailed analysis of the provisions of Part 1C, Division 2 of the *Crimes Act 1914* (Cth) by applying the requirements of Articles 9(1)[97], 9(2)[98] and 9(3)[99] of the *ICCPR*.

However, these HREOC international human rights law analyses are not overtly included in the relevant discussion in the Clarke Report and its Recommendation 3,[100] nor in the Government response to the *Clarke Report*. Similarly, no indication was given that the Attorney-General's department would be required to give direct consideration to this type of *ICCPR* analysis as part of its 'comprehensive review', within the review methods occasioned by the release of the *Discussion Paper*.

Therefore, international human rights law analysis became a matter for relevant submissions during the public consultation period in response

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94 'Policing in the Shadow of Australia's Anti-Terror Laws', Law Council of Australia, Presentation to the Clarke Inquiry Public Forum, 22 September 2008, 6.

95 Analysis of the dead time sections 23CA and 23 CB of the *Crimes Act 1914* (Cth) as infringing the right to freedom from arbitrary detention under Article 9 of the *ICCPR*): Ben Saul, Presentation to the Clarke Inquiry Public Forum, 22 September 2008, <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Transcripts>.

96 HREOC, Submission of the Human Rights and Equal Opportunity Commission to the Clark Inquiry on the Case of Dr Mohamed Haneef, May 2008 <http://www.hreoc.gov.au/legal/submissions/2008/200805_haneef.html>.

97 Ibid [12], [13]. Article 9, paragraph 1 states 'Everyone has the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law'.

98 Ibid [16]. Article 9, paragraph 2 states 'Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him'.

99 Ibid [17]-[19]. Article 9, paragraph 3 states 'Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.'

100 *Clarke Report*, above n 2, Recommendation regarding dead time provisions in the *Crimes Act 1914* (Cth).

to the *Discussion Paper*.[101] This situation indicates the point that the 'comprehensiveness' of the Government response cannot be assumed, but requires scrutiny as to what that response encompasses.[102] In this respect it is significant that the reviewing department, Attorney-General's, is the same department which denied before a Senate Committee that enactment of the dead time provisions[103] could result in extended detention,[104] which might comprise arbitrary detention under international human rights law. Yet the Attorney-General's Department continued to display a relaxed attitude on this point in its submission to the Clarke inquiry in the face of demonstrated inefficacy in the Haneef matter of the 'safeguard' of judicial oversight:

> The Department is aware of publicly stated concerns that the length of time Dr Haneef was held under the provisions of Part 1C of the Crimes Act was significantly longer than that foreshadowed by the Department to the Senate Legal and Constitutional Legislation Committee which enquired into proposed amendments to Part 1C. Comments made by the Department to the Committee related to an earlier version of the provisions concerning detention periods – which did not provide for judicial oversight — and not to the version as passed by Parliament. The current regime with its provision of judicial oversight provides accountability of the actions of investigating officers and ensures that any period of investigative detention is appropriate to the particular circumstances of the case, and at the same time certain.[105]

In assessing a comprehensiveness of Government response in relation to proposed amendments to the relevant sections of the *Crimes Act 1914* (Cth),[106] which only partly ameliorate concerns raised in various

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101 *Clarke Inquiry Government Response*, above n 86, Point 3, second column. See also reference to public consultation from the *Discussion Paper*, above n 7, in the text of this article at above n 87. .

102 The *Discussion Paper* on this point at best invokes only two comparisons — being the United Kingdom and Canada — as to the maximum period of detention without charge in relation to the investigation of an alleged terrorism offence: see *Discussion Paper*, above n 7, 127.

103 *Anti-Terrorism Act 2004* (Cth). The legislation came into force on 30 June 2004.

104 See, in relation to the removal by the *Anti-Terrorism Act 2004* (Cth) of the 12 hour (in total) time limit on pre-charge detention, Senate Legal and Constitutional Legislation Committee, *Hansard,* 30 April 2004, 29, 35-36.

105 Attorney-General's Department, Submission to the Clarke Inquiry into the case of Dr Mohamed Haneef, 4-5 <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Submissions>.

106 See Exposure Draft, National Security Legislation Amendment Bill 2009, Schedule 3 - Investigation of Commonwealth offences.

submissions to the Clarke inquiry, two critical factors emerge.

First, the omission in the Clarke Report of overt consideration and articulation of Article 9 *ICCPR* analysis against the *Crimes Act 1914* (Cth) provisions relating to 'dead time' has allowed significant legislative drafting latitude to the Commonwealth in its draft bill, as well as for some important matters affecting potential compliance with the *ICCPR* proportionality requirements not to be addressed. The fact that critical issues are not supported and articulated by the international human rights law analysis available to the Clarke review in the submissions to the review, conveys a message that something less than a rigorous and systematic line by line legislative reform of the 'dead time' provisions is satisfactory.

There is also a reluctance and hesitation in the Clarke Report to make a definitive recommendation about capping the maximum detention time[107] when referenced to various suggestions about the duration of detention time.[108] Instead, the relevant recommendation was for general review, without adequately recommending the precise terms of the review or the importance that the review be entirely independent of government.[109]

Second, the fact that, in contrast to the sedition provisions of the *Criminal Code* (Cth), the review was not conducted by an independent body such as the ALRC, but instead was a consultative review by the Attorney-General's department, is likely to mean that amendments to the *Crimes Act 1914* (Cth) 'dead time' provisions – based on the draft bill - are not as extensive as they might otherwise have been. It also meant that the *Discussion Paper* content (and its companion Exposure Draft of the National Security Legislation Amendment Bill (2009) on the 'dead time' issue is consistent with the Clarke Report in not shaping and articulating the reforms by reference to international human rights principles.

In consequence, only some, but not comprehensive, changes have been made in the draft legislation, which coincidentally conform with the

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107 See *Clarke Report*, above n 2, 249: 'I believe that both a cap and judicial oversight are necessary. That said, I do not understand my task as requiring me to put forward a specific recommendation as to the allowable time. If pressed ... I would tend to say the cap should be no more than seven days'.

108 Ibid.

109 Ibid, xii Recommendation 3: 'The Inquiry recommends that the provisions of Part 1C of the *Crimes Act 1914* in relation to terrorism offences and the association of those provisions with s 3W of the Act be reviewed in the light of the discussion in Chapter 5 and relevant provisions of the United Kingdom's *Terrorism Act 2000*.'

Article 9 *ICCPR* principles.

The changes leading to greater conformity with non-arbitrariness and legality are the inclusion of a maximum time limit on pre-charge detention through capping the amount of time that may be disregarded for the investigative period;[110] the right by the person detained or his or her legal representative to make representations both about applications for disregarded time[111] and applications for extension of the investigation period;[112] and the removal of non-judicial persons, namely bail justices and justices of the peace, from authorizing periods of disregarded time.[113]

However, the draft legislation also displays a potential failure to meet other non-arbitrary and legal requirements under Article 9 *ICCPR* principles. Article 9 arbitrariness, as understood within the meaning of relevant jurisprudence,[114] may continue to arise because of the potential maximum length of the pre-charge detention is eight days;[115]

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110 Exposure draft, *National Security Legislation Amendment Bill 2009*: s 23DB(11): 'No more than 7 days may be disregarded under paragraph (9)(m) in relation to an arrest'. When read in conjunction with the specified investigation periods for terrorism offences in s 23DB(5)(b) '4 hours' and s 23DF (7) 'The investigation period may be extended any number of times but the total of the periods of extension cannot be more than 20 hours', the maximum period of post arrest detention time is eight days.

111 Exposure draft, National Security Legislation Amendment Bill 2009, s 23DC(6).

112 Exposure draft, National Security Legislation Amendment Bill 2009, s 23DE(5).

113 Exposure draft, National Security Legislation Amendment Bill 2009, s 23DD(2); see also s 23DC(2).

114 *Mukong v Cameroon,* CCPR/C/51/D/458/1991, *Human Rights Committee,* UN Doc 458/1991 (1994): 'arbitrariness must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law' (see also Amnesty International Australia, Submission to the Clarke Inquiry into the Case of Dr Mohamed Haneef, [6]; *Melnikova v Russia* [2007] Eur Court HR, (App 24552/02, 21 June 2007) arbitrariness arises if the detention is unpredictable in its duration, and be foreseeable and certain in its application (see also Saul, above n 95, 5); *Van Alphen v Netherlands,* UN Doc 305/88 (1994) (Human Rights Committee) [5.8]: 'arbitrariness is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances'.

115 The UN Human Rights Committee in its General Comment 8 on Article 9 of the *ICCPR* states its opinion that the Art 9, paragraph 3 requirement that persons arrested or detained be brought promptly before a judge authorised by law to exercise judicial power and empowered to order release means that delays 'must not exceed a few days'. Under the draft legislation (and apart from a right to make representations before a magistrate concerning applications for specification of periods of disregarded time and for applications seeking to extend the investigation period), the obligation to bring before a judicial officer empowered to release the

that there are significant limits on information available to a person or the person's legal representative hindering effective representations being made to the magistrate regarding applications for disregarded time[116] and applications for the extension of the investigation period;[117] that the grounds upon which an application for specification of disregarded time can be made remain broad and vague;[118] that similarly, the grounds upon which the magistrate may specify a period of disregarded time upon receipt of that application are also broad and vague;[119] and that the time spent in making and disposing of an application for disregarded time itself counts as disregarded time,[120] thereby deterring the making of detailed representations by the detainee or his or her legal representative in either instance.[121]

B *Responding to the ALRC Report* Fighting Words: A Review of Sedition Laws in Australia

The ALRC review of sedition laws[122] was conducted after swift enactment of the Anti-Terrorism Bill (No 2) 2005 (Cth), following a commitment by the then Attorney-General to review the sedition

detainee arises elsewhere: See Exposure draft, National Security Legislation Amendment Bill 2009 s 23DB(4): 'If the person is not released within the investigation period, the person must be brought before a judicial officer within the investigation period, or, if it is not practicable to do so within the investigation period, as soon as practicable after the end of the investigation period'.

116 See Exposure draft, National Security Legislation Amendment Bill 2009 s 23DC(5) and s 23DD(4); Amnesty International Australia, Submission to the Clarke Inquiry into the Case of Dr Mohamed Haneef, 7; HREOC, above n 93, 5.

117 See Exposure draft, National Security Legislation Amendment Bill 2009 s 23DE(4) and s 23DF(4).

118 Saul, above n 95, 5 described the existing legislation grounds as 'numerous, variable and unpredictable'. See the equivalent section to the previous section applied in the Haneef matter: Exposure draft, National Security Legislation Amendment Bill 2009 s 23DB(9)(m) 'subject to subsection (11) where the time is within a period specified under s 23DD, so long as the suspension or delay in the questioning of the person is reasonable'. Section 23DC(4)(e) provides a broad range of non-exhaustive *examples* of 'the reasons why the investigating official believes the period should be specified', reflecting the genesis of these broad statements in original 2004 draft bill's more precise dealing with the issue for investigators of differences in international time zones.

119 Exposure draft, National Security Legislation Amendment Bill 2009 s 23DD(2)(a) to (f).

120 Exposure draft, National Security Legislation Amendment Bill 2009 s 23DB(9)(h); See also Saul, above n 95, 5.

121 See Saul, above n 95, 5.

122 See *Fighting Words*, above n 3, 104.

offences in the bill[123] and the later announcement of the review.[124] However, tabling in Parliament of the ALRC report[125] did not lead to Howard government action to implement its provisions.[126]

The ALRC review of sedition laws drew extensively upon international human rights law analysis of freedom of expression and the necessity-proportionality test under Article 19 of the *ICCPR*.[127] The inclusion of this analysis was prompted by various submissions made to the earlier Senate Legal and Constitutional Affairs Committee Inquiry into the Anti-Terrorism Bill (No 2) (2005) (Cth) arguing that its new sedition offences may be inconsistent with Article 19 of the *ICCPR*,[128] as well as the fact that the Attorney-General's department alone submitted that the sedition offences complied with Article 19 of the *ICCPR*.[129]

Critical discussion is undertaken of the nature of the relationship between Article 19(2),[130] and the necessity-proportionality

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123 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 103 (Philip Ruddock) and Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2005, 88 (Philip Ruddock). For sedition offences analysis see Simon Bronitt and James Stellios 'Sedition, Security and Human Rights: 'Unbalanced' Law Reform In The 'War On Terror'' (2007) 30 *Melbourne University Law Review* 923.

124 Philip Ruddock, 'ALRC to Review Sedition Laws' and Attachment 'Review of Sedition Laws' (Press Release, 2 March 2006).

125 Commonwealth, *Parliamentary Debates,* House of Representatives, 13 September 2006, 83-84 (Tony Abbott).

126 Philip Ruddock, 'ALRC Report on Sedition Laws Tabled' (Press Release, 13 September 2006). The ALRC report was still listed on the House of Representatives notice paper over a year later: Commonwealth, *Notice Paper,* House of Representatives, 19 September 2007. See Greg Carne, above n 10, 75-76.

127 See *Fighting Words,* above n 3, [5.23] to [5.58], 107-117. Article 19 of the *ICCPR* states that (1) Everyone shall have the right to hold opinions without interference (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds…(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as provided by law and are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order or of public health or morals.

128 See ALRC, *Review of Sedition Laws,* Issues Paper 30, (2006) [5.28] and *Fighting Words*, above n 3, 111, [5.37].

129 ALRC, Issues Paper 30, above n 128, [5.34]; A-G's Department, *Submission 290A to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, Attachment A, 6; A-G's Department, *Submission 290B to Senate inquiry into Anti-Terrorism Bill (No 2) 2005,* 24 November 2005, 3.

130 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of

requirements of Article 19(3).[131] Subsequently, two sets of *ICCPR* based reforms are advanced by the ALRC, one in relation to clarifying intention in a set of offences,[132] the other in relation to the level of assistance properly required to constitute sedition[133] and treason based offences.[134]

The Government response to the ALRC recommendations appeared to accept the recommendations in relation to both sets of offences comprehensively.[135] There remains the translation of these principles into legislation, but every indication is that these reforms will more closely adhere to *ICCPR* standards. Subsequently, the *Discussion Paper* very closely follows the ALRC recommendations,[136] suggesting once more that reforms will follow *ICCPR* standards. Importantly, the draft legislation consistently applies principles of *intentionally urging* the application or use of force or violence as the foundation of the relevant offence, as well as that that the person urging the use of force or violence *intends* that the force or violence will occur.[137] Clearly these are significant and substantive proposed reforms, focusing upon real differences of an intention and objective of bringing about violence for nominated ends and responding to the arguments in the various submissions referred to above that the existing sedition offences were inconsistent with Article 19 of the *ICCPR*.

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frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'.

131 'The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary.'

132 *Fighting Words,* above n 3, Recommendations 8-1 and 9-2 inserting 'intentionally' in s 80.2(1), 80.2(3) and 80.2(5) of the *Criminal Code* (Cth).

133 Ibid Recommendation 11-1, recommending repeal of s 80.2 (7), (8) and (9).

134 Ibid Recommendation 11-2, recommending modification of s 80.1 (1)(e)-(f) to require *material* assistance.

135 See *Fighting Words: A Review of Sedition Laws in Australia - Government Response to Recommendations,* 8-1. See also *Australian Government response to ALRC Review of sedition laws in Australia — December 2008*, Recommendations 9-2, 9-5, 10-2, 11-1 and 11-2.

136 See Part 2 of Chapter One of the *Discussion Paper*, above n 7, 'Amendments to the urging violence offences in Division 80 of the Criminal Code' and Exposure Draft, National Security Legislation Amendment Bill 2009 (Cth).

137 See Exposure Draft, National Security Legislation Amendment Bill 2009 Appendix 1, Subdivision C, Item 18 (new subsection 80.2(1)) Urging violence against the Constitution; Item 20 (new subsection 80.2(3)) Urging interference in Parliamentary elections or constitutional referenda by force or violence, Item 35 (new section 80.2A and new section 80.2B), urging violence against groups distinguished by race, religion, nationality, national origin or political opinion or urging violence against the members of such groups.

The ALRC's review reveals two important circumstances conducive to a genuinely comprehensive government response to national security legislation reviews. The first is the taking of public submissions by bodies independent of the executive – here the Senate Legal and Constitutional Affairs Committee[138] and the ALRC[139] — which tested the compliance of the sedition provisions with international human rights law.

The second is the identification by a body with the ALRC's reputation, of the merit of claimed breaches by the legislation of the *ICCPR*, followed by drafting of accessible amendments closely conforming to the *ICCPR*. The importance of practical accessibility — in converting international human rights law claims into comprehensible and readily adoptable legislative amendments — cannot be understated, where executive and legislative processes are unfamiliar with such analysis.

C *Responding to the 2007 PJCIS* Inquiry into the Proscription of 'Terrorist Organisations' under the Australian Criminal Code

The PJCIS was required[140] to review the operation, effectiveness and implications of the executive capacity to proscribe an organisation as a terrorist organisation under the *Criminal Code 1995* (Cth).[141] It was also required to take into account[142] the review of the terrorist organisation proscription provisions conducted by the Sheller Committee.[143] The engagement of the PJCIS in 2007 with international human rights law in assessing the terrorism proscription provisions is modest in the few situations where it arises in the *PJCIS 2007 Report*.[144]

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138 Cited in *Fighting Words*, above n 3, 111, fn 49. The Senate Legal and Constitutional Committee expressed no conclusion about Article 19 ICCPR arguments in its 2005 report *Provisions of the Anti-Terrorism Bill (No 2) 2005*.

139 Submissions to the ALRC inquiry are cited in *Fighting Words*, above n 3, 112, fn 53.

140 Section 102.1A(2) of the *Criminal Code* (Cth).

141 The power to proscribe an organisation as a terrorist organisation by regulation is specified by s 102.1 (2), (2A), (3), (4), (5) and (6) of the *Criminal Code* (Cth). See Andrew Lynch, Nicola McGarrity and George Williams, 'The Proscription of Terrorist Organisations in Australia' (2009) 37 *Federal Law Review* 1.

142 Under s 4(9) of the *Security Legislation (Terrorism) Act 2002*. See also *Sheller Report*, above n 24, 3 for adoption of a guiding international human rights law proportionality principle.

143 *PJCIS 2007 Report*, above n 4, 1-2.

144 Ibid. This is in contrast to the *PJCIS 2006 Report* and the *Sheller Report* being informed by the international human rights law principle of proportionality – see the above discussion under the heading 'Assessing the 'comprehensiveness' of responses to

Reforming the procedure for listing an entity as a terrorist organisation revolved around the *Sheller Report* recommendations of (a) a judicial process on application by the Attorney-General to the Federal Court or (b) by regulation on the advice of the Attorney-General in consultation with an independent statutory advisory panel.[145] The *Sheller Report* recommendations were crafted within the guiding principle of reasonable proportionality[146] and in advocating judicially based proscription, drew upon the HREOC submission to that effect,[147] whilst expressing several policy concerns about the existing executive proscription process.[148]

The *PJCIS 2007 Report* language on the question of procedural reform for listing an entity as a terrorist organisation barely touches upon, and seems disconnected from, the international human rights law language of the Sheller Committee recommended reforms and the HREOC submission to the Sheller Committee. In rejecting both the options of judicial authorization and supplementing the existing executive proscription process with an advisory panel, the PJCIS stated firmly that the 'Australian model provides strong safeguards against the *arbitrary* use of the proscription power'[149] and 'Judicial review under the ADJR is available, and in our view, provides an effective institutional guarantee of *lawfulness* and protection against regulations that go beyond the scope of powers provided for by the Criminal Code'.[150]

These conclusive statements led to the PJCIS recommendation that 'the mandate of the Committee to review the listing and re-listing of entities as 'terrorist organisations' for the purpose of the Criminal Code be maintained'.[151] The PJCIS similarly rejected claims of including

reviews: the language of 'balance' and the role of international human rights law in that 'balance'.

145 *PJCIS 2006 Report*, above n 5, 38 and *Sheller Report*, above n 24, 9-10.

146 *Sheller Report*, above n 24, 3.

147 HREOC Submission to the Security Legislation Review Committee, paragraphs 6.20 and 6.21. HREOC confirmed its preference for a judicial, rather than executive, proscription process, on two international human rights law grounds: HREOC Submission to PJCIS Review of Power to Proscribe Terrorist Organisations [47].

148 *Sheller Report*, above n 24, 92.

149 *PJCIS 2007 Report*, above n 4, paragraph 5.27, page 44 (emphasis added).

150 Ibid [5.28] (emphasis added). The further statement 'The Committee considers that the current model of executive regulation and parliamentary oversight provides a transparent and accountable system that is consistent with international practice' also implicitly rejects international human rights law analysis: *PJCIS 2007 Report*, above n 4, Foreword.

151 Ibid Report Recommendation 3 [5.34]. The Government indicated its support: PJCIS

statutory criteria and an overall proportionality test in the proscription requirements,[152] accepting the Attorney-General's Department view that the existing proscription process satisfied *ICCPR* proportionality requirements.[153]

This approach by the PJCIS of its inquiry process, its recommendations and the consequent government response, confirms that the comprehensiveness of review and review responses, involving integration of international human rights law principles, is neither guaranteed nor predictable. There is an unnecessary narrow application by the PJCIS of the obligation to take account of the *Sheller Report* — with its guiding principle of international human rights law proportionality — in its review of the proscription provisions.[154]

Government support of Recommendations 5 and 7 (that strict liability not be applied to the terrorist organisation offences of Division 102 of the *Criminal Code*) of the *PJCIS 2007 Report*[155] means there will be *further* reviews.[156] Integration of international human rights principles within these third iteration reviews cannot be assumed, demonstrating that a 'comprehensiveness' of government response to terrorism legislation reviews is shaped by contingencies — including different opinions of the reviewing committee with organisations making representations, or between two reviewing committees, about the determinative influence of *ICCPR* based human rights law over the proscription legislation.

Similarly, the PJCIS recommendation that a regulation proscribing an entity expire on third anniversary of the date it took effect,[157] which is adopted in the *Discussion Paper*[158] and subsequently in the draft

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2007 Inquiry, *Government Response* to Recommendation 3.

152 HREOC Submission to the PJCIS 2007 Review, 5-6 and 9.

153 *PJCIS 2007 Report*, above n 4, 27.

154 Section 4(9) of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) states that 'The Parliamentary Joint Committee on ASIO, ASIS and DSD must take account of the report of the review given to the Committee, when the Committee conducts its review under paragraph 29(1)(ba) of the *Intelligence Services Act 2001*.'

155 See *Government Response* to Recommendations 5 and 7 of the PJCIS 2007 Inquiry.

156 Strict liability for Division 102 *Criminal Code* (Cth) terrorist organisation offences is to be referred to the new National Security Legislation Monitor and the application of the power to proscribe terrorist organisations is to be referred to the 2010 COAG review. Both referrals follow existing PJCIS reviews, in turn informed by the *Sheller Report* and its guiding proportionality principle.

157 *PJCIS 2007 Report*, above n 4, Recommendation 6

158 *Discussion Paper*, above n 7, 59: 'To date the re-listing of each entity under the Criminal Code has been subject to the scrutiny of the PJCIS. Based on its own

legislation,[159] really repeats the endorsement of its own views, as expressed above, of the suitability of existing review processes. In doing so, it merely invokes comparisons with existing time limits for proscription in four other jurisdictions,[160] rather than further engaging with international human rights law — indeed, this is consistent with its clear, conclusive comments about arbitrariness and lawfulness above.[161]

D *Responding to the 2006 PJCIS* Review of Security and Counter-Terrorism Legislation

The Government responses to PJCIS *Review of Security and Counter Terrorism Legislation*[162] recommendations potentially have a more direct link to the Sheller Committee report guiding proportionality principle,[163] than did Government responses to the *PJCIS 2007 Report*.[164] The *PJCIS 2006 Report*[165] confirms a more direct influence of the *Sheller Report* on its inquiry:

> Subsection 4(9) of the *Security Legislation Amendment (Terrorism) Act 2002* requires the PJCIS to take into account the Sheller Report. Consequently, the Sheller Report forms an important part of the evidence to this inquiry and reference is made to evidence submitted to that review and to parts of the report where it is appropriate to do so. However, the PJCIS is not limited by the content, recommendations or findings of the Sheller Report and has departed from it where appropriate … To avoid unnecessary duplication, the

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experience since 2004, the PJCIS recommended that extending the period of a regulation from two years to three years and providing an opportunity for parliamentary review at least once during the parliamentary cycle would provide an adequate level of oversight.'

159 See the proposed amendment to 'third anniversary' in s 102.1(3) of the *Criminal Code*, in Appendix 1, Item 13 of *National Security Legislation Amendment Bill 2009* Exposure Draft.

160 *PJCIS 2007 Report*, above n 4, 50, the four jurisdictions being the United Kingdom, Canada, New Zealand and the USA.

161 See the text of PJCIS 2007 Report, above n 4, relating to footnotes 149 and 150 above.

162 *PJCIS 2006 Report*, above n 5.

163 *Sheller Report*, above n 24, 3.

164 See the discussion in the section 'Responding to the PJCIS Inquiry Into The Proscription of 'Terrorist Organisations' Under the Australian Criminal Code" above regarding *PJCIS 2007 Report*.

165 *PJCIS 2006 Report*, above n 5, on the 2002 counter terrorism legislation. For analysis of the 2002 legislation, see Sarah Joseph 'Australian Counter-Terrorism Legislation and The International Human Rights Framework' (2004) 27 *University of New South Wales Law Journal* 428 and Greg Carne 'Terror and the ambit claim: Security Legislation Amendment (Terrorism) Act 2002 (Cth)' (2003) 14 *Public Law Review* 13.

> PJCIS decided to focus attention on the recommendations and findings of the Sheller Committee.[166]

Several important legislative amendments were proposed by the *PJCIS 2006 Report*, in turn being addressed in the Government Responses. There was some acceptance of the PJCIS recommendations, as well as the indication of further review. As such, the adoption of international human rights principles as informing the Government response varies between the different recommendations and ultimately affects some aspects of the *Discussion Paper*.

The influence of international human rights law is most obvious in Recommendation 2 of the *PJCIS 2006 Report*, on the appointment of an independent reviewer of terrorism law.[167] Recommendation 2 is prefaced by, and is consequential upon consideration of UN Security Council and General Assembly responses,[168] which maintain that counter-terrorism developments 'must comply with States obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law and international humanitarian law'.[169]

Recommendation 2 is also influenced by an acceptance of the *Sheller Report* within the *PJCIS 2006 Report* on two aspects — namely an integrated approach between the collective right of security and individual rights was required in counter-terrorism responses,[170] and that principles of necessity and proportionality be used to test legislation and form the basis for recommended changes.[171]

It is against these international human rights law background principles that considerations of possible newly emergent issues, the breadth of anti-terrorism measures, the fragmented nature of the review methods to date and the ongoing importance of counter terrorism policy into the future[172] that the case is made for general, independent review of terrorism laws.[173] The PJCIS Independent Reviewer recommendation is subsequently supported in the

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166 *PJCIS 2006 Report*, above n 5, 2 [1.6] and 3 [1.8].

167 Ibid Recommendation 2.

168 Ibid 12-13.

169 Ibid 13.

170 Ibid 14.

171 Ibid 14, 15, 16.

172 Ibid 16.

173 Ibid 16-22.

Government response to the *PJCIS 2006 Report*,[174] the recommendation's background confirming a comprehensive Government response.

However, the bill first introduced into Parliament[175] failed to optimally integrate international human rights principles into the National Security Legislation Monitor functions.[176] The bill lacked a specificity and precision of international human rights obligations and sources to be taken into account. It invited a weighting towards the responsive counter-terrorism measures in UN counter-terrorism conventions, UN Security Council terrorism resolutions and Regional Memoranda of Understanding, to outweigh UN international human rights documents and policies providing integrated approaches to counter-terrorism and human rights.

Having considered at some length the question of integration of international human rights law into the Monitor role in reviewing Australia's counter-terrorism and national security legislation, the Senate Finance and Public Administration Legislation Committee considered that the bill should be amended to require the Monitor to assess whether the legislation under review is consistent with Australia's international human rights obligations.[177] Subsequently, the government made significant international human rights law

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174 *PJCIS 2006 Report*, *Government Response to Recommendations:* Recommendation 2.

175 National Security Legislation Monitor Bill 2009 (Cth) was introduced into the Senate on 25 June 2009 and referred for inquiry to the Senate Finance and Public Administration Committee, which reported on 7 September 2009: National Security Legislation Monitor Bill 2009 Report of the Senate Finance and Public Administration Legislation Committee (2009) ('*Monitor Bill 2009 Report*'). A previous private Senator's bill, the Independent Reviewer of Terrorism Laws Bill 2008 [No 2], was introduced into the Senate on 23 June 2008 and referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report. See Independent Reviewer of Terrorism Laws Bill 2008 [No 2] Report of the Senate Committee on Legal and Constitutional Affairs (2008).

176 Clause 3(c) (Objects) of the National Security Legislation Monitor Bill 2009 (Cth) stated that 'The object of this Act is to appoint a National Security Legislation Monitor who will assist Ministers in ensuring that Australia's counter-terrorism and national security legislation (c) is consistent with Australia's international obligations, including human rights obligations'. The functions in Clause 6 of the bill were (1)(b) 'to consider whether Australia's counter-terrorism and national security legislation (i) contains appropriate safeguards for protecting the rights of individuals; and (ii) remains necessary'; Clause 8 of the bill stated, 'When performing the National Security Legislation Monitor's functions, the Monitor must have regard to: (a) Australia's obligations under international agreements (as in force from time to time).' – see furthermore the Explanatory Memorandum to the Bill regarding Clause 8.

177 *Monitor Bill 2009 Report*, 34, Recommendation 10.

orientated amendments in response to the inquiry report, the bill's title being changed to the Independent National Security Legislation Monitor Bill 2010 (Cth), which emphasizes 'the independent nature of the Monitor'.[178] Importantly, the s 3 objects clause is amended to provide greater emphasis that Australia's counter-terrorism and national security legislation is consistent with Australia's international obligations including (i) *human rights obligations;* and (ii) counter-terrorism obligations and (iii) international security obligations.[179] The Monitor is now able to consider, on his or her own initiative, whether the relevant legislation (i) contains appropriate safeguards for protecting the rights of individuals; and (ii) remains *proportionate* to any threat of terrorism or threat to national security, or both; and (iii) remains *necessary*.[180] In performing the Monitor's functions under Clause 6[181] of the bill, the Monitor must have regard to (a) Australia's obligations under international agreements (as in force from time to time) including: (i) *human rights obligations*; and (ii) counter-terrorism obligations; and (iii) international security obligations.[182]

The Government response in relation to other *PJCIS 2006 Report* recommendations is not quite as clearly comprehensive — through providing consistent adoption of the recommendations, *motivated by* international human rights proportionality considerations, absorbed by the PJCIS recommendations from the methodology of the Sheller Committee. The *Sheller Report* did exercise significant, but not conclusive, influence over the *PJCIS 2006 Report*, reflecting the fact that the Government response and subsequent *Discussion Paper* accepted in whole or in part various PJCIS recommendations[183] where international human rights law analysis *incidentally* arose.

There are four clear examples of the influence of international human

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178 Supplementary Explanatory Memorandum, National Security Legislation Monitor Bill 2009, 1.

179 Amendment to Object clause: Item 1, List of Government amendments Document BD 213 (emphasis added).

180 Amendment to Clause 6, Functions of the Independent National Security Legislation Monitor: Item 6, List of Government amendments, Document BD 213.

181 Including consideration of safeguards, proportionality and necessity regarding counter-terrorism and national security legislation - see Clause 6(1)(b).

182 Amendment to Clause 8, Item 10, List of Government Amendments, Document BD 213 (emphasis added).

183 Recommendations 7, 8, 14, 18 and 19 of the *PJCIS 2006 Report*, above n 5, were accepted by the Government response. Recommendations 16 and 20 of the *PJCIS 2006 Report* were partly accepted by the Government response. Recommendation 15 of the *PJCIS 2006 Report* was rejected.

rights law analysis flowing right through to the content of the *Discussion Paper* and its proposed reforms and its draft legislation.

In reviewing the ground of advocating the doing of a terrorist act[184] as the basis for making a regulation specifying an organisation as a terrorist organisation,[185] the PJCIS makes reference to the relevant *Sheller Report* recommendation.[186] That recommendation, crafted within the general Sheller principle of reasonable proportionality, in turn informed by the proportionality issues in HREOC submission,[187] is partly adopted in the *PJCIS 2006 Report*.[188] The Government response accepts this recommendation of the PJCIS, with review of the advocacy criteria to be conducted by COAG in 2010 and the amendment of risk to *substantial* risk.[189] This question of an organisation advocating the doing of a terrorist act in s 102.1(1A) of the *Criminal Code* (Cth), as the

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184 See s 102.1(2)(b) of the *Criminal Code* (Cth). Under s.102.1 (1A) of the *Criminal Code* an organisation advocates the doing of a terrorist act if (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or (c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person … to engage in a terrorist act.

185 See paragraph (b) of the meaning of 'terrorist organisation' in s 102.1 of the *Criminal Code* (Cth).

186 See *PJCIS 2006 Report*, above n 5, 68 and *Sheller Report*, above n 24, 73, [8.10], [8.11]: 'For the reasons set out in the submissions from HREOC, AMCRAN, Gilbert and Tobin Centre of Public Law and others, the SLRC recommends that paragraph (c) of section 102.1 be omitted from the definition of 'advocates' … 'If paragraph (c) is not omitted from the definition, the SLRC recommends that 'risk' should be amended to read 'substantial risk''.

187 See the immediately preceding footnote indicating acceptance by the Sheller Committee of the point made by HREOC and its subsequent discussion: 'The breadth of the definition of 'advocates' in section 102.1(2) of the Criminal Code … may also lead to disproportionate outcomes and impermissibly restrict the right to freedom of expression ... HREOC considers that the definition remains extremely broad. This is for two reasons. First, paragraph (c) does not refer to a 'substantial risk' as recommended by the Committee, but merely a 'risk' such praise might have the effect of leading a person (regardless of age of mental impairment) to engage in a terrorist act … Secondly, the definition does not clearly set out the circumstances in which advocacy will be attributed to an organisation and hence, when a person who is a member of an organisation will be held accountable for the actions or views expressed by other members of that organisation': HREOC, Submission to Sheller Committee, [6.13], [6.14].

188 See *PJCIS 2006 Report*, above n 5, 71, Recommendation 14: 'The Committee does not recommend the repeal of 'advocacy' as a basis for listing an organisation as a terrorist organisation but recommends that this issue be subject to further review. The Committee recommends that 'risk' be amended to 'substantial risk''.

189 Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter Terrorism Legislation Government response to recommendations.

basis for listing an organisation as a terrorist organisation if the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person to engage in a terrorist act — is responded to in the *Discussion Paper* by proposing that the word 'substantial' be placed before risk in legislation amending paragraph 102.1(2)(b).[190] This change is taken up in the draft legislation.[191]

In relation to offences of providing training to and receiving training from a terrorist organisation,[192] there is a more explicit reference to the guiding proportionality principle informing the recommendations of the *Sheller Report*,[193] with the recommendation to define more clearly the type of training being a practical application of the proportionality requirement.[194] The Government response accepted the need to clarify the training offence so as to exclude legitimate activities from the classification of terrorist training, but rejected the second aspect of the PJCIS recommendation that the offence be amended to require that the training could reasonably prepare the individual or the organisation to engage in, or assist with, a terrorist act.[195] Subsequently, the Discussion Paper proposed an alternative approach,[196] invoking Australia's international obligations in support.[197] This proposal is taken up in the

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190 *Discussion Paper*, above n 7, 56-57.

191 See Exposure Draft, National Security Legislation Amendment Bill 2009, Schedule 2, Appendix 1, Item 12.

192 Section 102.5 of the *Criminal Code* (Cth).

193 'The purpose of the Sheller Committee recommendations is to draw the offence more carefully so that it cannot catch innocent training or the mere teaching of people who may be members of a terrorist organisation. Drawing the training offence more precisely would achieve greater certainty and a better proportionality between the conduct that is criminalized and the penalty': *PJCIS 2006 Report*, above n 5, 75 [5.81].

194 See *Sheller Report*, above n 24, 75, Recommendation 16 'The Committee recommends that the training offence be redrafted to define more carefully the type of training targeted by the offence. Alternatively, that the offence be amended to require that the training could reasonably prepare the individual or the organisation to engage in, or assist with, a terrorist act'. The second sentence of the recommendation is adopted directly from a recommendation of the Sheller Committee — see *Sheller Report*, 118 [10.42].

195 Government response to recommendations — Recommendation 16.

196 'It is proposed that a ministerial authorisation scheme be established which would allow legitimate and reputable humanitarian aid organisations to be exempt in limited circumstances from the offence of providing training to a terrorist organisation': *Discussion Paper*, above n 7, 67.

197 The proposed ministerial authorisation scheme which would enable the 'Attorney-General … to declare certain aid organisations, either in their entirety, in part or in geographical regions, exempt from the application of the terrorist organisation

draft legislation, allowing for an exemption for training provided by a declared aid organisation or a declared regional aid organisation.[198]

In relation to the s 102.7 *Criminal Code* (Cth) offence of providing support to a terrorist organisation, the *PJCIS 2006 Report* engages significantly with the international human rights law proportionality principle in the HREOC submission[199] to it and to the Sheller Committee,[200] the latter by quotation of evidence from Simon Sheller QC to the PJCIS and the *Sheller Report* itself.[201] In recognizing the disproportional character of the section 102.7 offence, the PJCIS recommended 'that the offence of providing support to a terrorist organisation be amended to 'material support' to remove ambiguity.'[202] The Government response accepted the recommendation of the PJCIS on the grounds that the inclusion of material support will not increase the level of support required, instead clarifying that support has to go beyond mere support.[203] That acceptance is reflected in the inclusion of a 'material support' amendment to s 102.7 of the *Criminal Code* (Cth) in the *Discussion Paper*.[204] In turn, the draft legislation adopts the concept of providing material support to a terrorist organisation.[205]

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training offence in section 102.5 of the *Criminal Code*' is seen as acceptably addressing 'Australia's international obligations to ensure support, resources and funding are not provided to terrorist organisations': Ibid.

198 See Exposure Draft, National Security Legislation Amendment Bill 2009 Item 21; see also Items 19 and 20.

199 See *PJCIS 2006 Report*, above n 5, 77 [5.86]: 'HREOC argued that 'support' could extend to publication of views that appear favourable to a listed organisation and therefore infringe freedom of expression'. In its submission to the Sheller Committee, HREOC stated that 'the ambiguity and breadth of the term 'support' may render section 102.7(1) disproportionate to the legitimate aim sought to be achieved by the legislature … that section 102.7 may therefore disproportionately restrict the right to freedom of expression … It may also impermissibly infringe the right to freedom of association. HREOC therefore contends that the term 'support' used in section 102.7 should be defined in such a way as to ensure that it does not deprive that section of its proportionality.'

200 The *Sheller Report* largely adopts verbatim the HREOC submission on this point – see *Sheller Report*, above n 24, 122: 'SLRC accepts that the combination of vulnerability and uncertainty requires that the section be amended to limit its application in a way which would reduce any infringement upon the right to freedom of expression'.

201 *PJCIS 2006 Report*, above n 5, 77.

202 Ibid 79, Recommendation 18.

203 Government response to recommendations Recommendation 18.

204 *Discussion Paper*, above n7, 63.

205 See Exposure Draft, National Security Legislation Amendment Bill 2009, Item 17 and Item 18.

The influence of international human rights law analysis is also shown in that no change is made in the *Discussion Paper* from the PJCIS[206] and Sheller Committee[207] positions that it was important to retain the distinguishing element of political, ideological and religious cause in defining a terrorist act. Similarly, the retention of the current exemption of advocacy, protest, dissent and industrial action as part of the definition of terrorism, as supported by both the PJCIS[208] and the Sheller Committee[209] is also not departed from or raised in the amendments proposed by the *Discussion Paper*. However, the draft legislation does expand the definition of a terrorist act by removing the requirement that harm be physical, thereby permitting psychological harm to be included.[210]

Likewise, the Government response to the *PJCIS 2006 Report* of referring three additional items for review — the advocacy of terrorist acts as the basis for the making a regulation specifying an organisation as a terrorist organisation,[211] the offence of associating with a terrorist organisation,[212] and the application of strict liability provisions applied to serious criminal offences that attract a penalty of imprisonment[213] — reflects different degrees of interaction in the *PJCIS 2006 Report* with the international human rights law proportionality principles consistently invoked by the *Sheller Report*. These Government responses referring these matters for further review made it unnecessary for these issues to be considered in the *Discussion Paper*, or

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206 *PJCIS 2006 Report*, above n 5, Recommendation 7 and *PJCIS 2006 Report*, 51, 57.

207 *Sheller Report*, above n 24, 57.

208 *PJCIS 2006 Report*, above n 5, 60, Recommendation 8.

209 *Sheller Report*, above n 24, 58.

210 See Exposure Draft, National Security Legislation Amendment Bill 2009, Schedule 2, Item 4 and Item 10. The *Sheller Report* recommended this change: Ibid, 50. However, the *PJCIS 2006 Report* did not adopt this *Sheller Report* finding – instead, in its recommendation 9, stated that it was open to the Government to consult the States and Territories regarding acceptance of the Sheller Committee recommendation: see *Discussion Paper*, above n 7, 45.

211 See s 102.1(2)(b) of the *Criminal Code* (Cth) and s.102.1 (1A) of the *Criminal Code* (Cth). See *PJCIS 2006 Report*, above n 5, 71 Recommendation 14 and Government Response to Recommendation, with review of the advocacy criteria to be conducted by COAG in 2010.

212 See s 102.8 of the *Criminal Code* (Cth). See *PJCIS 2006 Report*, above n 5, 81 Recommendation 19 and Government Response to Recommendation, with referral for examination by the new National Security Legislation Monitor.

213 See *PJCIS 2006 Report*, above n 5, 83 Recommendation 20 and Government Response to Recommendation, with referral for examination by the new National Security Legislation Monitor.

indeed to be presently considered in draft legislation.

VI COMPREHENDING WHAT IS 'COMPREHENSIVE': THE INFLUENCE OF EXISTING INTERNATIONAL REVIEWS AND FUTURE DOMESTIC REVIEWS OF AUSTRALIAN NATIONAL SECURITY LEGISLATION

The claim of a 'comprehensive response' to outstanding terrorism law reviews must further be considered in the context of five other completed international reviews[214] applying international human rights principles to aspects of Australian terrorism law. Criticism is made in the international reviews about the definition of a terrorist act,[215] burden of proof issues in terrorism offences,[216] prejudice and discrimination against Arab and Muslim communities as a consequence of counter-terrorism laws,[217] the listing of terrorist organisations[218] and criminal law investigative detention.[219]

The Government response to the content of the four national security legislation reviews, including the *Discussion Paper*, instead of being *further* informed by that criticism and analysis, simply omits consideration of them. In contrast, the potential for other reviews to constructively influence and inform the Government response was highlighted in a further Senate Committee Report on a private Senator's bill:

> [T]he committee makes no formal recommendation about the passage of this Bill but has used this inquiry process as a mechanism to further

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214 UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Consideration of Australian States Party Report* submitted under Article 40 of the *International Covenant on Civil and Political Rights,* 2 April 2009 ('*HRC Concluding Observations*'); UN Committee Against Torture, *Concluding Observations* of the *Committee Against Torture Consideration of Australian States Party Report* submitted under Article 19 of the *Convention Against Torture,* 22 May 2008 ('*CAT Concluding Observations*'); UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Consideration of Australian States Party Report* submitted under Article 9 of the *Convention on the Elimination of all Forms of Racial Discrimination*, 14 April 2005 ('*CERD Concluding Observations*'); *Special Rapporteur Report,* above n 10; and *ICJ Report*, above n 21.

215 *HRC Concluding Observations* [11]; *Special Rapporteur Report,* above n 10, [66].

216 *HRC Concluding Observations* [11].

217 *CERD Concluding Observations* para 13 (relevant to Recommendations 1, 3 and 5 of *PJCIS 2006 Report*).

218 *Special Rapporteur Report,* above n 10, [9].

219 Ibid [16].

> the public discussion on ways to improve laws relating to terrorist activity in Australia. To this end, the committee will forward to the Attorney-General copies of this report, along with Hansard transcripts and submissions to the inquiry so that they might assist him in progressing the consultation currently underway on the national security legislation framework.[220]

There is also the question of future reviews and the particular influence that international human rights law might then have. The scheduled 2010 COAG review[221] will re-visit key matters such as control orders and preventative detention, which were extensively critiqued from an international human rights law perspective leading up to enactment of the *Anti-Terrorism Act 2005 (No 2)* (Cth).[222]

The ASIO questioning and detention powers[223] are subject to review in 2016.[224] International human rights law criticism of this legislation was made during the PJCIS May 2005 review,[225] but that did not noticeably

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220 Commonwealth Parliament, *Anti-Terrorism Laws Reform Bill 2009 (Cth) Report of Senate Legal and Constitutional Affairs Legislation Committee* (2009), 28.

221 Legislation to be covered by the review comprises Schedule 1 of the *Anti-Terrorism Act 2005* (Cth), Schedules 1, 3, 4 and 5 of the *Anti-Terrorism Act 2005* (No 2) (Cth), State and Territory legislation enacted to provide for preventative detention, enhancement of stop, question and search powers in areas such as transport hubs and places of mass gatherings and further amendments made to Commonwealth, State and Territory legislation described above: s 4 *Anti-Terrorism Act (No 2) 2005* (Cth). Two further matters are also referred to the 2010 COAG Review — Item 14 of the *Government Response* to *PJCIS 2006 Report* — advocacy as the basis for the listing an organisation as a terrorist organisation and Item 7 of the *Government Response* to PJCIS 2007 Report — the proscription power. See also Attachment G to COAG meeting of 10 February 2006 — Purpose and Scope of the Review: '… the committee should take into account the agreement of COAG leaders at the Special Meeting on Counter-Terrorism on 27 September 2005, that any strengthened counter-terrorism laws must be *necessary*, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence led and *proportionate*'. (emphasis added) The italicized words admit international human rights law analysis.

222 Clare Macken, 'Preventative Detention in Australian law: Issues of interpretation' (2008) 32 *Criminal Law Journal* 71, 71-72 and Carne, above n 42, 17, 30-32.

223 *ASIO Act 1979* (Cth) Division 3 Part III.

224 *Intelligence Services Act 2001* (Cth): Functions of the Parliamentary Joint Committee on Intelligence and Security, s 29 (1)(bb).

225 The 2005 PJCIS review *ASIO's Questioning and Detention Powers Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005) received international human rights law submissions from the International Commission of Jurists (Submission 60), Castan Centre for Human Rights Law (Submission 75), Amnesty International Australia (Submission 81), Human Rights and Equal Opportunity Commission (Submission

influence the Committee's deliberations or produce amendments. The ten year interval between ASIO powers reviews is corroborative of the fact that Government claims of a 'comprehensive' response to terrorism law reviews are specific and contextual – in a similar way that the international reviews analysis[226] has not prompted an extensive review of all Howard government national security legislation.

These existing international reviews engage with broad subject matters to arise in the 2010 COAG review and the 2016 PJCIS Review. These subject matters include preventative detention orders,[227] control orders,[228] stop, question and search powers,[229] advocacy of terrorism as a basis for proscription as a terrorist organisation[230] and ASIO questioning and detention warrants.[231] Experience suggests the need to invoke the content of these international reviews by bodies or individuals making submissions to the 2010 and 2016 reviews, to achieve any influence over the subsequent Committee reports – invocation is unlikely to be through Government initiative *formative* to a Government response.

VII CONCLUSION

In *Assessing Damage, Urging Action*, the ICJ Eminent Jurists Panel stated:

> It is vital that governments and the international community now engage in a stock taking process designed to ensure that respect for human rights and the rule of law is integrated into every aspect of counter-terrorism work[232]

and

85) and Chief Minister ACT Government (Submission 93). See the *PJCIS 2005 Report*, 28-29, 53-54.

226 Reviews mentioned above n 214.

227 *CAT Concluding Observations*, above n 214, [10]; *Special Rapporteur Report,* above n 10, [43]-[45], 71; *ICJ Report*, above n 21, 107.

228 *CAT Concluding Observations,* ibid [10] *Special Rapporteur Report,* ibid [37]-[40], [71]; *ICJ Report,* ibid 110, 112. 121.

229 *Special Rapporteur Report,* ibid [30], [68].

230 Ibid [67].

231 *HRC Concluding Observations,* above n 214, [11]; *CAT Concluding Observations,* above n 214, [10]; *Special Rapporteur Report,* ibid, [30], [31], [69]; and *ICJ Report*, above n 21, 74-75.

232 *ICJ Report*, ibid v.

> states should undertake *comprehensive* reviews of their counter-terrorism laws, policies and practices, in particular the extent to which they ensure effective accountability, and their impact on civil society and communities. States should adopt such changes as are necessary to ensure that they are fully consistent with the rule of law and respect for human rights.[233]

This article has argued the importance of systematically testing Rudd government claims about the *comprehensiveness* of responses to national security legislation reviews. In that testing, pressing issues relate to reforming the process of legislative enactment — namely movement away from the urgency paradigm, as well the degree to which international human rights law legislative analysis as influencing reform proposals has been incorporated in Government responses for legislative change.

These factors are critical in comprehensively responding to these four legislative reviews, but also in establishing a broader methodology to remediate deficiencies in Howard government national security legislation, through the *Discussion Paper* and including subsequent national security reviews and responses.

Similarly, the Rudd government's contemplation of the subject matter of national security is itself more comprehensive, in tandem with its claim of re-engagement with United Nations institutions. These enlarged legislative subject matter and policy initiatives make their need for scrutiny for compatibility with international human rights most compelling, if legislative review responses are legitimately to be *comprehensive*.

There is evidence in the Government responses and elsewhere[234] that the paradigm of urgency[235] in terrorism legislation enactment has been abandoned. However, the review process and capacity for genuinely comprehensive government responses retain an *ad hoc* and inconsistent quality between reviews. Absorption of international human rights principles into recommended and implemented legislative and policy

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233 Ibid 164.

234 The consultative language of the Attorney-General's press releases and speeches (above n 12 and above n 80) is corroborated by submissions sought within a six week time frame; that the continuous terrorism legislative activity of the Howard government has ceased under the Rudd government – one exception being the Telecommunications (Interception and Access) Amendment Bill 2008 (Cth); and the two prospective referrals of problematic legislative issues to the National Security Legislation Monitor.

235 See the references at above n 10.

changes depends upon a constellation of factors.

In the absence of an federal human rights charter mandating analysis of legislation for compliance with international human rights standards, prominent factors include the terms of reference, the membership and legal background of the reviewers[236] familiarity with international human rights law, the subject matter of the reviews, the opportunity afforded to make submissions to the reviewing body, the practical utility of the international human rights law submissions and the receptivity of review committees towards such submissions.

Other factors include the role of the secretary and inquiry secretary of review committees,[237] the interest of review committees in self-vindicating their previous reviews whilst preserving their status quo in conducting reviews,[238] as well as the mandate to *further review* existing reviews prior to the evaluation of a Government response for comprehensiveness.[239] Accordingly, remedial contribution of international human rights law upon Australian national security law reform may be wholly or partly lost in translation.

Furthermore, there are several examples of *other* existing international reviews, distinct from the four reviews the subject of Government responses. Expert international human rights law analysis in international UN Treaty and Charter body reviews and ICJ review has not been incorporated into present government responses. That omission fails to signal a government initiated inclusion of international human rights analysis in the 2010 COAG review or the 2016 ASIO review.

Consideration and adoption of international human rights law analysis within national security government response and legislative changes

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236 The legal and non-legal occupational qualifications and background of the members of the PJCIS is a relevant factor. On occasions, the PJCIS membership has included only one person with a legal qualification.

237 The Inquiry Secretary to the *PJCIS 2006* and *2007 Reports* had an international human rights law background.

238 Discussion from PJCIS comments, above under the heading 'Responding to the PJCIS *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*.'

239 For example, in the PJCIS subsequently reviewing the *Sheller Report*, in relation to the proscription of terrorist organisations (*PJCIS 2007 Report*, above n 4) and in reviewing the 2002 security and terrorism legislation (*PJCIS 2006 Report*, above n 5). It is anticipated that the PJCIS will have a similar review role for National Security Legislation Monitor recommendations and reports, to be established under the Independent National Security Legislation Monitor Bill (Cth) – see Commonwealth *Parliamentary Debates*, Senate, 25 June 2009, 4261 (Senator Wong).

is in Australia presently both indeterminate and inconsistent. The example of the highly professional, international human rights law informed review of Australia's sedition laws by the ALRC[240] and the comprehensive acceptance by Government Response of the ALRC recommendations demonstrates a potential rigorous integration of international human rights law principles into national security law reform.

It may be concluded about the three other national security legislation reviews and predicted in relation to the 2010 COAG and 2016 ASIO legislation reviews, that various omissions of international human rights law analysis at the different stages of review or legislative response will cause reviews, responses and reforms being less than fully comprehensive. The laws, policies and practices ensuring that respect for human rights and the rule of law are integrated[241] into the legislative review and response phases are presently haphazard and inconsistent, meaning that remediation is likely to be partly, but not wholly, lost in translation.

240 *Fighting Words*, above n 3.

241 *ICJ Report,* above n 21, v.