Castan Centre for Human Rights Law

11 November 2005

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

Dear Secretary,

Please accept the enclosed submission from the Castan Centre for Human Rights Law regarding the Inquiry into the Provisions of the Anti-Terrorism (no 2) Bill 2005. This submission was prepared by Professor Sarah Joseph, Director of the Centre, and Mr Ibrahim Abraham, Research Fellow of the Centre

We are glad, of course, to answer any questions you may have regarding the submission, and should you require, we would be happy to provide oral evidence to the Committee.

Yours sincerely,

Professor Sarah Joseph
Director

Submission to the Senate Legal and Constitutional Committee

Castan Centre for Human Rights Law, Monash University

Prepared by

Ibrahim Abraham and Professor Sarah Joseph

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Summary

1.

The legal regime that Australia employs to combat terrorism must protect human rights, including the right to life.

Australia has not opted to derogate from any of its current international human rights obligations and is thus obliged to respect them.

2.

To be valid under international human rights law, a preventative detention regime must be absolutely necessary to protect the public and not arbitrarily imposed. The Australian legal tradition is adverse to the unnecessary deprivation of liberty.

We are concerned about the necessity, constitutional validity, and lack of judicial control of federal preventive detention orders. If it is absolutely necessary, we would prefer this regime to be authorised by State legislation, overseen by State Courts.

We believe the Bill abrogates certain rights to legal counsel and privacy.

We are disturbed by the prospect of the preventative detention of children.

3.

We have some concerns about the absolute necessity and efficacy of control orders.

The possibility of imposing successive 'repeat orders' may impinge on a variety of human rights, especially if the civil standard of proof applies to such orders.

We view the retrospective nature of aspects of the control order legislation as problematic.

4.

We are pleased with the Attorney-General's pledge to review the sedition legislation, and that certain existing sedition previsions are revoked.

The sedition legislation applying to associations may impinge on freedom of association and freedom of expression in both international human rights law and in the *Constitution*.

The sedition legislation lacks appropriate provisions to protect journalistic and artistic expression.

5.

We are pleased with the removal of so-called 'shoot-to-kill' provisions.

We reiterate the necessity that all governmental and Parliamentary activity be carried out in a non-discriminatory manner.

6.

We believe that there are still questions to be answered concerning this legislation.

We believe that greater Parliamentary oversight may be required of this legislation than is currently provided for in the Bill.

> *Keeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Defending, even under assault, even for the feared and hated, the legal rights of suspects. … Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause before acting precipitately.*[1]

Part 1.
INTRODUCTION

1.1 HUMAN RIGHTS AND ANTI-TERRORISM LEGISLATION

This submission concerns the Commonwealth's *Anti-Terrorism Bill (No. 2) 2005* ('the Bill'). All references are to this Bill unless otherwise indicated. The focus of this submission shall be the impact of the Bill on Australian's enjoyment of human rights, and allied legal concerns.

Examining these matters from the perspective of human rights protection rests on two principles. Firstly, this submission is informed by respect for and a desire to maintain the right to life; specifically, the right for Australians and others not to be arbitrarily (or otherwise) deprived of life.[2] Terrorism of the sort that may target Australia and Australians has shown itself to be directed by the goal of killing civilians so as to influence political and cultural norms. It is hard to imagine a more repugnant repudiation of human rights than the actions carried out by terrorists in Oklahoma City, New York, Israel, Bali, Madrid, London, and in countless other attacks in recent memory. We are also concerned with protecting other human rights, however. Often rights are pitted against each other in abstract ways, and often also the rights of various individuals and groups in the community are seen to conflict.

It is the desire of this submission to articulate strategies in which the human rights of all Australians can be maintained and strengthened whilst allowing for terrorism to be effectively combated.

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[1] Michael Kirby, 'Australian Law – After September 11 2001' (2001) 21 *Australian Bar Review* 253 at 263.

[2] As articulated in article 6 of the International Covenant on Civil and Political Rights (1966), henceforth 'ICCPR' and article 3 of the Universal Declaration on Human Rights (1948).

1.2 – STATUS OF AUSTRALIA'S HUMAN RIGHTS OBLIGATIONS

It is significant that the Australian government has at no time sought to derogate from any of its international human rights obligations, as permitted. Article 4 of the ICCPR allows most articles of the convention to be derogated from:

> 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 strictly 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.

Thus, we proceed upon the assumption that the government intends to fulfil all its international human rights obligations.

Part 2.
PREVENTATIVE DETENTION

2.1 - PREVENTATIVE DETENTION: BACKGROUND

International human rights law does not forbid preventative detention *per se*, but has had much to say about detention and deprivation of liberty. The legitimacy of a detention regime, preventative or not, rests on its necessity and lack of arbitrariness. As the United Nations Human Rights Committee, the monitoring body under the ICCPR, ruled in *van Alphen v Netherlands*,[3]

> if so-called 'preventative-detention' is used, for reasons of public security, it … must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given and court control of detention must be available as well as compensation in the case of a breach.[4]

[3] UN doc. CCPR/C/39/C/305/1988 (1990).
[4] UN doc. CCPR/C/39/C/305/1988 (1990) at paragraph 6.3.

Earlier in its judgement the Human Rights Committee reflected on the meaning of 'arbitrariness' in international law.

> 'arbitrariness' … must be interpreted … to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.[5]

Our concern at this stage is with the 'reasonableness' of the provisions which, in order to be deemed non-arbitrary, must be 'reasonable in the particular circumstances of the case'[6] as well as proportionate.[7] We do not believe that we are in a position now to argue conclusively whether or not the preventative detention regime is proportionate to the threat. We believe that the best way to determine that is that such detention is authorised by judicial bodies, and that judicial oversight be available at all times. We note the timely and professional prevention of the recent terrorist plot in Australia was effected, as it were, under normal criminal law procedures, without recourse to preventative detention. We welcome the stipulation concerning the annual report to be issued by the Attorney-General to the Parliament on the use of preventative detention orders, subject to reservations below.[8]

We wish to note, however, several concerns about the proportionality, reasonableness and necessity of the preventative detention regime, for we are concerned that the government's desire to legislate for preventative detention might not be based on the proportionality, reasonableness and necessity of the preventative detention regime as such, but rather, their comparative use of resources. The Attorney-General debated the distribution of anti-terrorist and law enforcement resources on the ABC's *Lateline* programme. He said,

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[5] UN doc. CCPR/C/39/C/305/1988 (1990) at paragraph 5.8.
[6] UN Human Rights Committee General Comment 16 (1994).
[7] See the UN Human Rights Committee's decision in the case of *Toonen v Australia*. UN Doc CCPR/C/50/D/488/1992 (1994).
[8] Section 105.47 of the Bill.

> if you are going to put people under covert surveillance, it requires 30 people. And it's not too hard to imagine how an organisation that employs at the moment up to 900 people has very limited capacity to conduct surveillance operations - covert surveillance operations - along with all their other activities and if you're only dealing with one or two people, the problem would not be there. But when you're dealing with a much larger pool - and I cannot specify the nature of the pool, we haven't at any point, but we do know that people have trained with terrorist organisations. We've got people who are charged with those offences in Australia now. We have Hicks and Habib, who were the subject of commentary because of their training before 2002. It gives you some perspective that this is not something that has been dreamt up for the purposes of pursuing legislative measures that are unreasonable.[9]

Regardless of the size of the threat - though it is instructive that in the media the number of possible suspects in Australia was suddenly multiplied from eighty to eight hundred after the dramatic COAG meeting[10] - is it not preferable to make the resources available to ensure not just the best work conditions and outcomes for Australian law enforcement, but to subsequently make anti-terrorist investigations as discrete as possible? In the mid-1970s, a small but violent anarchist terrorist group called the 'Angry Brigade' began a campaign of bombing prominent 'class enemies' in London. The response of Scotland Yard was instructive. They placed suspected members under the closest possible scrutiny without violating their rights with the result of the arrest and conviction of the terrorists in accordance with conventional criminal law of the time.[11] One must compare this example with the extraordinarily invasive tactics that were being employed against the IRA in Northern Ireland and mainland Britain at that time,[12] and ask which approach the proposed Australian legislation more resembles.

Relevant also are the comments of former Attorney General and current President of the International Crisis Group, Gareth Evans related relevant information on the Indonesian anti-terrorism efforts:

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[9] Tony Jones, 'Ruddock defends proposed counter-terrorism laws', *Lateline* ABC Television, October 27, 2005.
[10] Adam Shand, 'Make Laws, Not War' *Sunday* Channel 9 Television, October 16, 2005.
[11] David R. Lowry, 'Terrorism and Human Rights: Counter-Insurgency and Necessity at Common Law' (1977-1978) 53 *Notre Dame Lawyer* 49 at pp. 84-5.
[12] It is worth recalling that the emergency anti-insurgent legislation enacted in Northern Ireland in 1922, the *Civil Authorities (Special Powers) Act*, lasted until 1973, and had little effect on reducing terrorism or ending political and religious divisions in that society.

> One of the interesting things in Crisis Group's work in Indonesia that we discovered about the success of the police operation there against the *Jemaah Islamiah* terrorist group is that they've been extremely careful in the way they've used their police powers, in terms of only detaining people for any period of time when they've had really hard evidence against them. And that's been an important part of the process of creating some political space and some community support in which they've been able to do their job properly. If they'd gone overboard there or if our police go overboard here, you're going to see a very, very significant backlash and all of this stuff will prove not productive, but counterproductive.[13]

It is not just international human rights law, but also Australian law that is deeply concerned with preventing illegitimate deprivation of liberty. 'The law of this country is very jealous of any infringement of personal liberty' Brennan J commented in *Re Bolton; Ex parte Beane*[14] and we note that the High Court held, in *Williams v R*,[15] that detaining a person not so that they could be charged and brought before a court, but so that, in Mr Williams' case, he could be questioned by the Tasmanian police,[16] was a violation of the long-held traditions of the Australian common law and the norms of criminal law as it operates in Australia.[17] As Gibbs CJ declared,

> The power given by the common law, and by statutes in the form of those in force in Tasmania, to arrest a person reasonably suspected of having committed a crime is given for the purpose of enabling that person to be brought before a justice as soon as reasonably practicable so that he may be dealt with according to law. If the arrested person is detained for any longer period or for any other purpose the detention will be an unlawful infringement of his civil liberties.[18]

[13] Tony Jones, 'Evans says sunset clause too long', *Lateline* ABC Television, September 28, 2005.
[14] (1987) 162 CLR 514 at p. 523.
[15] (1986) 66 ALR 385.
[16] A situation that could be well contemplated under section 105.4(6) of the Bill, after section 105.1(b), concerning detention after a terrorist attack has occurred to, in effect, assist the investigation.
[17] See recently the judgement of the Full Court of the Federal Court in the important case of *Minister for Immigration v al Masri* [2003] FCA 70 at paragraphs 86-91 on the importance given to this common law right in Australian Courts.
[18] (1986) 66 ALR 385 at p. 390.

It is, of course, the right of the Parliament to legislate in contravention of the common law, even in contravention of such fundamental common law principles.[19] Following Gibbs CJ's logic, the Parliament is able to legislate for *lawful* infringements of civil liberties. We would caution the Parliament about approving legislation that allows for detention without charge and without proper judicial oversight, however. As the great English jurist, Sir William Blackstone, declared in his commentaries in 1765,

> Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper … there would soon be an end of all other rights and immunities.[20]

As Malcolm Fraser recently argued,

> Authorities in Australia already have the capacity for the exercise of extreme and arbitrary power without adequate judicial safeguards. Much of this involves the gravest failure of administrative and ministerial responsibilities. As shown in the Palmer and Comrie Reports the Department of Immigration has been at the centre of much of it. Two Ministers have been in charge, neither Minister is responsible. As far as one can tell, nobody has been held accountable.[21]

In response to claims of his responsibility for the incidents of wrongful detention revealed by Commonwealth Ombudsman John McMillan, whilst he was Minister for Immigration the present Attorney General's response was less than encouraging. Mr Ruddock argued,

> When I was Immigration Minister, I counselled Immigration officers always to make lawful decisions. That's the culture that I believe ought to be in place. It's the culture that I encouraged people to implement.[22]

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[19] As Mason and Brennan JJ repeat in *Williams*' case, '[t]he right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes. The issue in this case is the extent of the power of the police to detain in their custody for questioning a person who has been lawfully arrested.' (1986) 66 ALR 385 at p. 395.

[20] *Blackstone's Commentaries on the Laws of England*, vol. 1 at pp. 120-1, 130-1. This is quoted with approval by Mason and Brennan JJ, above.

[21] Malcolm Fraser, 'Laws for a secret state without any safeguards', *Sydney Morning Herald*, October 20, 2005. http://www.smh.com.au/articles/2005/10/19/1129401313470.html# accessed November 4, 2005.

[22] Tony Jones, *supra* n. 9.

Clearly, decisions were not always made lawfully. It is a fundamental principle of our Westminster system of government that Ministers take responsibility for activities carried out within their portfolio. The public is rightly concerned that wrongful detentions did occur (e.g. Cornelia Rau, Vivian Solon); the Parliament has been unable and in parts, unwilling, to hold the Minister responsible as good government practices would require.

We are concerned that the regime of preventative detention violates article 9 of the ICCPR. Article 9(1) declares that:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The UN Human Rights Committee examined the human rights implications of preventative detention regimes recently *Rameka & Ors v New Zealand*,[23] concerning a New Zealand statutory regime providing for the explicit sentencing of dangerous sexual offenders on their perceived future dangerousness. That is, the sentences (imposed by a court) were effectively preventative rather than based on punishment for past crimes. The Committee majority found that preventative detention is not *per se* arbitrary and therefore is not automatically a breach of article 9(1), so long as safeguards were strictly employed.

Five HRC members dissented and found that preventative detention breached article 9(1) and/or other procedural guarantees in the Covenant.[24] Four minority members stated that 'the very principle of detention based solely on potential dangerousness' was a priori problematic.[25] Commenting further, they observed that in the case of preventative detention, 'a person thought to be dangerous who has not yet committed

[23] UN doc. CCPR/C/79/D/1090/2002.
[24] See generally, S. Joseph, 'UN Human Rights Committee: Recent Cases", (2004) 4 *Human Rights Law Review* 109, at 117-124.
[25] UN doc. CCPR/C/79/D/1090/2002 at Appendix.

the offence of which he/she is considered capable is less well protected by the law than an actual offender.'[26]

The majority stated:

> detention for preventive purposes, that is, protection of the public, once a punitive term of imprisonment has been served, must be justified by compelling reasons, reviewable by a judicial authority, that are and remain applicable as long as detention for these purposes continues. The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public.[27]

Rameka indicates that any regime of preventative detention will require just as much, and preferably more procedural safeguards than regular criminal proceedings, if it is to conform to the ICCPR. It may be noted that the New Zealand regime concerned sentencing by a Court of persons convicted of sexual crimes, whereas the current Bill concerns administrative detention of persons who may not, and may never, be convicted of any crime. The Bill as it stands creates a regime of preventative detention with less procedural safeguards than routine criminal proceedings and is therefore problematic.

2.2 - PREVENTATIVE DETENTION: REVIEW MECHANISMS

The interim preventative detention order made by the Australian Federal Police officer has made[28] must be approved in accordance with section 105.2(1). This section defines whom the 'issuing authority' may be. The process for establishing a person as an 'issuing authority' is articulated thus:

> The Minister may, by writing, appoint as an issuing authority for continued preventative detention orders:

[26] UN doc. CCPR/C/79/D/1090/2002 at Appendix.
[27] UN doc. CCPR/C/79/D/1090/2002 at paragraph 7.3.
[28] Section 105.8.

(a) a person who is a judge of a State or Territory Supreme Court; or
(b) a person who is a Judge; or
(c) a person who is a Federal Magistrate; or
(d) a person who:
(i) has served as a judge in one or more superior courts for a period of 5 years; and
(ii) no longer holds a commission as a judge of a superior court; or
(e) a person who:
(i) holds an appointment to the Administrative Appeals Tribunal as President or Deputy President; and
(ii) is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory; and
(iii) has been enrolled for at least 5 years.

It is unfortunate that in this regime, the 'issuing authority' will be acting in his/her individual capacity, as a presumable learned and just individual, *not* as an officer of a court or tribunal.[29] We reiterate the insistence of the Human Rights Committee in *van Alphen* that 'court control of detention must be available'.[30]

However, we recognise that such a system is probably necessary under our constitutional system. It is unlikely that the authorisation of preventive detention is characterised as a judicial power, and therefore, under constitutional principles, the Commonwealth cannot give such powers to judges acting in a judicial capacity.[31]

Indeed, it is possibly doubtful that the Commonwealth can confer such powers on judges acting even in a non-judicial capacity (under the *persona designata* exception). In *Fardon v Attorney General (Qld),*[32] it was confirmed that State courts acting under State jurisdiction are able to order the preventive detention of certain persons on the grounds that they posed a particular danger to the community. It was not certain, nor was it strictly relevant in the case, whether judges could do so under federal legislation.[33] In this circumstance, it is perhaps best for preventive detention orders to

[29] Section 105.18(2). We note that there is clear legislative intent to refer to a judge in her or his personal capacity. See *Hilton v Wells* (1985) 157 CLR 57.
[30] UN doc. CCPR/C/39/C/305/1988 (1990) at paragraph 6.3.
[31] *R v Kirby; ex parte Boilermakers Society of Australia* (1956) 94 CLR 254; upheld by the House of Lords at [1957] 2 All ER 45.
[32] (2004) 210 ALR 50.
[33] Gummow J indicated that the Commonwealth could not confer such powers on courts (2004) 210 ALR 50 at pp. 71-6.

be enacted solely under State legislation, where judicial controls can be constitutionally put in place.[34]

We are concerned about the lack of judicial control over federal preventive detention orders. It is also possible that the envisaged role for judges under the federal system is unconstitutional. We recommend that this field, if it must exist, be covered by State legislation, where judicial controls can be put in place under Australian constitutional principles.

We are concerned that under section 105.47(2) the Attorney-General will not be required to reveal to the parliament in his or her annual report concerning the operation of the preventative detention regime, the number of voided detention orders, nor the number of cases for compensation that may result from unlawful detention. We are concerned with the possible centralising – even monopolising[35] - of operational information in the hands of the Executive. The Parliament has a right to hold the government accountable both for the legislation that it introduces before Parliament and also for the ways in which it gives effect to that legislation. As such, the Parliament has a right to all the information it needs to be fully informed of the Executive's performance.

We recommend that in his or her annual report to Parliament concerning the operation of the preventative detention regime, the Attorney-General be required to include the number of preventative detention orders that are voided by a federal court or the Administrative Appeals Tribunal and the number and details, where appropriate, of any successful compensation claims brought against the Commonwealth in regard to the preventative detention orders.

2.3 - PREVENTATIVE DETENTION: LEGAL ACCESS

[34] This does not necessarily imply that we agree with the fact that parallel State orders may extend for a period of 14 days, nor does it necessarily imply that we agree in principle with preventive detention orders.

[35] See, Joo-Cheong Tham, 'Casualties of the Domestic "War on Terrorism": A Review of Recent Counterterrorism Laws' (2004) *28 Melbourne University Law Review* 512 at pp. 526-7.

We are concerned that the Bill dictates a ban on those detained for preventative reasons from talking to their lawyers without police monitoring. Whilst it is necessary and commendable that section 105.38(5) prevents any information communicated between detainee and lawyer monitored by the Police from being admitted in Court, these provisions still have the potential to severely impact on detainees' rights.

The right to communicate in confidence with one's lawyer is paramount. It is especially important given that those detained for preventative reasons will not necessarily have been convicted of, nor even charged with, any offence. It is of particular importance given that this is a new legal regime that the detainee will be subject to. A preventative detainee may well be entirely unaware of what rights he or she has and does not have under this new regime.

Reasonable security in communications is guaranteed under article 17 of the ICCPR, concerning the right to privacy. The relevant provisions of article 17 reads:

> '(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence…
>
> (2) Everyone has the right to the protection of the law against such interference or attacks.'

Therefore, the question arises as to whether the monitoring of lawyer/client communications is reasonable or 'arbitrary' here. In *Cornelis van Hulst v Netherlands*,[36] the Human Rights Committee found that the tapping of a lawyer's phone, which inevitably led to the listening in on conversations with clients, did not, in that case, breach article 17. However, the lawyer in that case was reasonably suspected of involvement in certain offences. The *routine and constant* monitoring of lawyer/client communications under the preventive detention regime is hardly analogous. The lawyer in this situation is not necessarily suspected of involvement in offences. The client may be, but that is commonly the case with a criminal lawyer's clients!

[36] UN doc. CCPR/C/82/D/903/2000 (2004).

Furthermore, confidential lawyer/client communications is an aspect of the right in article 14(3)(b) to have reasonable access to a lawyer if one is facing a criminal trial.[37] Though that article is not directly relevant, as preventive detention may not result in *any* trial, the analogy between preventive detention and detention for the purposes of being brought to criminal trial is obvious. This aspect of article 14(3)(b) can be expected to impact on interpretations of article 17, and strongly indicates that the monitoring of lawyer/client communications under the preventive detention system constitutes an 'arbitrary' invasion of privacy under article 17 of the ICCPR.

The Bill's Explanatory Memorandum gives justifies the provision thus:

> New subsection 105.38(1) provides that the contact with other people to which the person is entitled *can only occur* if it is conducted in such a way that both the contact and the content and meaning of the communication can be effectively monitored by a police officer acting under the authority of the preventative detention order. *This is to ensure that the person does not communicate information that he or she is not entitled to communicate.*
>
> New subsection 105.38(2) provides that, although the contact may take place in a language other than English, this *can only occur* if the content and meaning of the communication that takes place during the contact can be effectively monitored with the assistance of an interpreter. (my italics)

Precisely what 'information that he or she is not entitled to communicate' does the Bill envisage would be illegitimately communicated to legal counsel? To what end do the drafters of the Bill believe the lawyer will use the 'information that he or she is not entitled to communicate' to him or her? We are concerned that these provisions go beyond what is required to ensure the security of the Australian people and the efficacy of anti-terrorism law enforcement. This provision would appear to illustrate that in the mind of the drafters of this Bill, the desire to prevent potentially dangerous communication between terrorists has been conflated with the legitimate rights of preventative detainees to communicate with their lawyer. Lawyers are depicted by this legislation as potential co-conspirators. We believe that there is a case for differentiating between the communication that may take place between a

[37] UN Human Rights Committee, General Comment 13 (1984), paragraph 9.

preventative detainee and members of their family, and the communication that may be permitted to take place between a preventative detainee and his/her lawyer.

We recommend that the Bill be altered to allow for confidential briefings between the detainee and his or her lawyer.

We believe that the potential for the violation of detainee's rights will be particularly serious if that detainee does not speak English or he/she is not confident in communicating in English. Section 105.38(2) holds that:

> The contact between [for our purposes here the detainee and their lawyer, subject to Section 105.37] may take place in a language other than English *only* if the content and meaning of the communication that takes place during the contact can be effectively monitored with the assistance of an interpreter. (emphasis added)

Section 105.38(4) continues,

> If the person being detained indicates that he or she wishes the contact to take place in a language other than English, the police officer who is detaining the person must:
> (a) arrange for the services of an appropriate interpreter to be provided *if it is reasonably practicable to do so* during the period during which the person is being detained; and
> (b) *if it is reasonably practicable to do so* — arrange for those services to be provided *as soon as practicable*.[38] (emphasis added)

Our concern is with any unjust delay that may be caused by the Police's inability to access the services of a translator 'as soon as possible' or at all. If it is not 'reasonably practicable' to 'arrange for the services of an appropriate interpreter' 'during the period during which the person is being detained', what is the effect of section 105.38(4) on the operation of section 105.38(2)? Recalling that section 105.38(2) insists that contact between a detainee and his or her lawyer or family member may take 'only if the content and meaning of the communication that takes

[38] Although our focus is on sections 105.38(2-4) we also note the repetition of these limitations on contact between detainees under 18 and their family members in section 105.39 (7-10), and note that our objections to this aspect of the legislation is also included in this submission.

place during the contact can be effectively monitored with the assistance of an interpreter', if the services of an interpreter cannot be or, for whatever reason are not, obtained, will that prevent any communication in a language other than English occurring between the detainee and his or her lawyer? If the detainee does not speak English well enough to communicate effectively with his or her lawyer in English, will this provision then not be tantamount to preventing all communication between a detainee and a lawyer? Australia is obligated under Article 26 of the ICCPR to ensure that a person is not discriminated against on the basis of his or her language with regard to the enjoyment of rights. Further, article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) obliges Australia to 'guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law'. Whilst we are confident that the government is not intending to abrogate the rights of non-English speakers to legal council through this legislation, provisions in the legislation that will impede – and in some circumstances potentially entirely abrogate – individuals' right to legal council because they are from a non-English speaking background and cannot competently discuss their legal situation in English should be of great concern to the Government and the Parliament.

We would prefer to see an approach more in keeping with section 105.31 of the Bill. Section 105.31(3) holds that

> [t]he police officer who is detaining the person under the preventative detention order must arrange for the assistance of an interpreter … if the police officer has reasonable grounds to believe that the person is unable, because of inadequate knowledge of the English language or a physical disability, to communicate with reasonable fluency in that language.

Section 105.31(4) allows for the interpreter to be engaged by telephone. In other words, the police must do everything they reasonably can to procure the services of the interpreter, even via telephone - which is an option not mentioned in section 105.38.

We believe that a similar approach should be taken in regard to communication between the preventatively detained person and his/her lawyer, if it is decided that communications have to be monitored by police.[39]

2.4 - PREVENTATIVE DETENTION: DETENTION OF CHILDREN

We are especially concerned about how the above provisions, and the Bill generally, will relate to children who may be placed under detention orders. We advise that in addition to the above matters, the Parliament should bear in mind the special rights that children have, especially when the issue of depravation of liberty is concerned.

Section 105.5 prohibits the preventative detention of anyone under 16 years of age, which goes some way to accommodate the concerns of many in the community of the effects of detention - especially detention without charge - of young people. However, article (1) of the Convention on the Rights of the Child (CRC) (1989) defines children as those under the age of 18 '[u]nless under the law applicable to the child, majority is attained earlier', which in Australia, it is not. It is therefore inappropriate to draw the line at 16, rather than 18. Indeed, in its efforts to counter terrorism, Israel has been condemned by the United Nations Committee on the Rights of the Child for drawing a distinction between those over and under the age of 16, rather than 18, in regard to arrest, detention and human rights.[40]

Article 37 of the CRC sets out the rights of children in custody. The Bill does not indicate whether or not children who are subject to detention orders will be placed in detention with adult prisoners or detainees. The United Nations Committee on the Rights of the Child has previously expressed grave concern about the preventative detention of minors alongside adults.[41] If detainees under 18 years of age are placed

[39] With which we do not agree (see above).
[40] UN Committee on the Rights of the Child, 'Concluding Comments of Israel'. UN doc. CRC/C/121 (2002) at paragraphs 574-5. The Committee also commented obliquely but critically on Namibia's assertion that a clause in its constitution preventing preventative detention for children under 16 years of age fulfilled its requirements under articles 37-40. See, UN Committee on the Rights of the Child, 'Concluding observations on Namibia'. UN doc CRC/C/15/Add.14 (1994) at paragraph 20.
[41] UN Committee on the Rights of the Child, 'Concluding Observations on Saudi Arabia'. UN doc. CRC/C/15/Add.148 (2001) at paragraph 41.

in detention alongside adults, Australia will be in violation of article 37(3) of the CRC.[42]

Section 37(b) of the CRC forbids detention of children unless detention is 'a measure of last resort and for the shortest appropriate period of time.' We are not convinced that preventative detention is absolutely necessary, especially when used against children.

We acknowledge the special provisions in section 105.39 and section 105.43(4-9,11) that apply to detainees under 18 years of age. Our concerns here mirror our concerns in relation to legal representation and detainees' contact with lawyers.

We are further concerned that the Bill will impact disproportionately on children who cannot competently communicate in English and who will thus be prevented from any communication unless and until the Police arrange the services of an interpreter.[43] We note that under article 37(c) of the CRC 'every child deprived of liberty shall … have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances'. Article 2(1) of the Convention requires State Parties, including Australia, to:

> respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Thus, it is essential that the rights under article 37(c) are enjoyed equally by children from a non-English speaking background.

We recommend that in accordance with human rights norms, preventative detention orders should not be made against people under 18 years of age.

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[42] Article 37(c) reads, in part, '[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.'

[43] Section 105.38(2).

Part 3.
CONTROL ORDERS

3.1 CONTROL ORDERS: BACKGROUND

Whilst less problematic than preventative detention orders, we still have concerns about the operation of control orders under the Bill relating to the legal rights of those subject to the control orders; the possible abuse of repeat orders; and the retrospective operation of these sections of the Bill. We acknowledge the oft-repeated assertion that control orders are akin to apprehended violence orders and other forms of intervention orders, which are certainly a well-established feature of the Australian legal system.

Clearly, control orders have the potential to impair numerous rights of those subjected to them, including freedom of movement,[44] freedom of association,[45] freedom of expression,[46] rights of access to information,[47] right of privacy,[48] and right to work.[49] All of these rights may be limited in certain circumstances, particularly in circumstances that are not 'arbitrary' and are proportionate in the circumstances. We note that courts should not issue such orders unless they are 'satisfied on the balance of probabilities that [the control order] is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.'[50] Nevertheless, concerns can perhaps be raised that such serious restrictions on rights can be imposed at the civil standard of proof rather than the criminal standard.

Whilst we are not in a position to argue conclusively about the need for control orders, we do note the concerns of Malcolm Fraser who argued recently that, 'one consequence of a "control order" would be the immediate disappearance of all the subject's contacts and collaborators.' Given this, he continued, '[t]he intelligence

[44] Section 104(3)(a), 3(b), 3(c), and 3(i).
[45] Section 104(3)(e).
[46] Section 104(3)(e).
[47] Section 104(3)(f).
[48] Section 104(3)(d), 3(j) and 3(k).
[49] Section 104(3)(h).
[50] Section 104.1(1)(d).

rationale for a "control order" is not easy to grasp. If surveillance is thorough why not watch the person, collect more evidence and then charge the person with an offence?'[51]

3.2 – CONTROL ORDERS: REPEAT ORDERS

We are troubled by section 104.5(2) that holds, 'Paragraph (1)(f)' of section 104.5 that limits the control orders to 12 months duration, 'does not prevent the making of successive control orders in relation to the same person.' Given this power, where is the incentive for law enforcement agencies to confirm the role that the person subject to the control order plays in the threat to security, put an end to that threat and, if necessary, charge him or her with a criminal offence? It would not be appropriate to leave an individual subject to potentially extremely invasive restrictions for ten years, until the legislation's sunset clause comes into force, under section 104.32. We agree with Malcolm Fraser, that if there is suspicion about an individual, it is far preferable to 'double surveillance [and] collect more information, which would enable a charge and a prosecution to be laid'[52] rather than merely leave the suspect subject to a decade of control orders, constantly under suspicion. This is an area where the difference between the burden of proof for control orders, and the burden of proof for criminal trials, becomes extremely problematic. **A higher burden of proof, equating with the criminal burden of proof, should be introduced for repeat control orders.**

3.4 - CONTROL ORDERS: RETROSPECTIVITY

We are concerned about potential retrospectivity in the legislation in section 104.2(2)(b) in relation to the making of control orders, that holds that a reason for issuing an interim control order is if a member of the Australian Federal Police, 'suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation.'

International human rights law is very much concerned with retrospective criminal legislation. Article 11(2) of the Universal Declaration of Human Rights holds that,

[51] Malcolm Fraser, *supra* n. 21.
[52] Malcolm Fraser, *supra* n. 21.

> [n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

It is true that proceedings regarding control orders are not, strictly speaking, criminal proceedings. However, the massive potential invasion of rights that can be entailed in a control order indicate that retrospectivity in such a situation is, at the least, undesirable.

Article 15(1) the ICCPR substantially reproduces the provision from the Universal Declaration reproduced in the preceding paragraph. Article 15(2) of the Covenant extends, however, the role of international law in that provision, holding that

> [n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Whilst this is article was primarily informed by concern with the prosecution of the heinous war crimes that occurred during World War II and other conflicts in countries, such as Nazi Germany where the war-time legal systems did not prohibit murder and genocide, it can certainly be extended to terrorism. The problem occurs, from the perspective of international law, when cases of military opposition to foreign occupation are concerned. If an individual was involved with the training of, or training with, a listed terrorist organisation, before it was listed, that was engaged in military operations against a foreign occupying army, then that ought not come under the heading of an act that was 'criminal according to the general principles of law recognized by the community of nations' as the ICCPR holds. We agree with Labor MP Darryl Melham that there may well be cases of Australians who have 'foolishly' trained with organisations now proscribed as terrorist, but that were not so proscribed at the time.[53] We also note that Lord Carlile, QC, in reviewing similar provisions in new anti-terrorism laws in the United Kingdom has described the criminalisation of

[53] Australian Associated Press, 'Labor MP says citizens could be terrorised', October 31, 2005.

training with a terrorist organisation as 'more extensive than required'.[54] Needless to say, this is an extraordinarily complex and controversial debate, pointing out the cliché that one person's terrorist is another person's freedom fighter. Thus, when proposing legal action - whether criminal or otherwise - legislation must endeavour to be absolutely clear and above controversy to avoid becoming mired in historical debates.

We acknowledge that section 104.4(1) provides that the court 'may make an order under this section in relation to the person … only if', according to section 104.4(1)(d),

> the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

However, it is still the case that training with an organisation that may not have been recognised as such when the training took place, and has only recently been listed as a terrorist organisation, may severely prejudice an individual. The legislation seems to, in section 104.4(1)(c), place the issuing of a control order for someone who has 'provided training to, or received training from, a listed terrorist organisation' on a par with the issuing of a control order that would 'would substantially assist in preventing a terrorist act'. The two have been effectively conflated so that training with an organisation that is now listed as a terrorist organisation,[55] but which may not have been so listed at the time of the training, becomes synonymous with committing a terrorist act. The Explanatory Memorandum, in commenting on Section 104.12(1), goes so far as to suggest that the allegation that a person has 'engaged in training with a specified listed terrorist organisation' may well be the *sole* grounds upon which they

[54] Simon Freeman, 'Terror watchdog savages new Bill as "too extensive"', *The Times (London)*, October 12, 2005. http://www.timesonline.co.uk/article/0,,22989-1822479,00.html accessed November 4, 2005; Richard Ford, 'Anti-terror Bill suffers double blow over human rights issue', *The Times (London)*, October 13, 2005. http://www.timesonline.co.uk/article/0,,22989-1823404,00.html accessed November 4, 2005.

[55] The United States Supreme Court has repeatedly insisted that it is not appropriate to convict individuals for mere involvement with an extremist or militant organisation if active participation in or incitement to engage in an illegal act is not shown. See *Brandenburg v Ohio* (1969) 395 US 444; *NAACP v Claiborne Hardware* (1982) 458 US 886.

are subjected to an interim control order. It is not, we submit, so simple, especially when the issue of retrospectivity is included.

We recommend that this provision be amended so that providing training for, or receiving training from, a listed terrorist organisation is only compelling towards the implementation of control orders if the training occurred *after* the organisation was listed as a terrorist organisation.

Part 4
SEDITION

4.1 – SEDITION: BACKGROUND

First, we are encouraged by the Attorney-General's agreement to review the amendment to the amendments to existing Commonwealth legislation concerning sedition in the proposed Bill.[56] We are pleased that the Attorney General has acknowledged 'the considerable interest'[57] and, we would add, legitimate concern, shown in the community about this section of the legislation.

We are pleased that section 1 of Schedule 7 repeals the crime of sedition, as it currently exists in the Commonwealth *Crimes Act 1914*. The language, as it exists, reflects the 19-century definition of the eminent Victorian-era English jurist James Fitzjames Stephen. That definition of sedition dates from 1877, as is noted with approval by Dixon J in *Burns v Ransley*.[58] As is to be expected, these provisions show no understanding of the progress in civil rights and political freedoms in the intervening decades. Indeed, this was pointed out back in 1991 by the Review of Commonwealth Criminal Law carried out by the Gibbs Commission which, citing the incompatibility of the antiquated sedition proceedings with freedoms in a contemporary liberal democracy, urged them to be abolished *except* for when violence

[56] Attorney-General Philip Ruddock, *Hansard*, November 3, 2005 at pp. 67-8.
[57] Michelle Grattan and Brendan Nicholson, 'Bill's sedition offences to be reviewed', *The Age*, November 4, 2005. http://www.theage.com.au/news/national/bills-sedition-offences-to-be-reviewed/2005/11/03/1130823342697.html. Accessed November 4, 2005.
[58] (1949) 79 CLR 101.

was advocated.[59] Whilst we observe that these provisions have largely lay dormant for the last half century,[60] we nevertheless see the repeal of these provisions to be a significant step forward in protecting freedom of political speech in Australian law, and bringing Australia further into line with its obligations under international human rights instruments, notably article 19 of the ICCPR and article 19 of the Universal Declaration of Human Rights.

4.2 - SEDITION: EFFECT ON ORGANISATIONS AND ASSOCIATIONS

We do retain concerns, however, about amendments contained in section 4 of schedule 7 concerning the right to freedom of expression that associations may enjoy under section 30A of the Commonwealth's *Crimes Act 1914*.

Section 4(3) of schedule 7 of the Bill might alter the effect of section 30A of the Commonwealth's *Crimes Act 1914* declaring associations[61] to be 'unlawful'[62] if 'by its constitution or propaganda or otherwise advocates' that association 'advocates or encourages the doing of any act having or purporting to have as an object the carrying out of a seditious intention'.[63] Seditious intention is to be defined by section 4(3) of schedule 7 of the Bill as:

> an intention to effect any of the following purposes:
> (a) to bring the Sovereign into hatred or contempt;
> (b) to urge disaffection against the following:
> (i) the Constitution;
> (ii) the Government of the Commonwealth;
> (iii) either House of the Parliament;
> (c) to urge another person to attempt to procure a change, otherwise than by lawful means, to any matter established by law of the Commonwealth;

[59] Attorney-General's Department, *Review of Commonwealth Criminal Law, Fifth Interim Report* (1991) at paragraph 32.18.
[60] On the use of sedition clauses in the Australian law see Lawrence W Maher, 'The use and abuse of Sedition' (1992) 14 *Sydney Law Review* 287; *Id.* 'Dissent, disloyalty and disaffection: Australia's last Cold War Sedition Case' (1994) 16 *Adelaide Law Review* 1 and Roger Douglas, 'Saving Australia from Sedition: Customs, the Attorney-General's Department and the Administration of Peacetime Political Censorship' [2002] *Federal Law Review* 135.
[61] Associations are defined in section 30A(1)(a) of the *Crimes Act 1914* (Cth) as 'any body of persons, incorporated or unincorporated'.
[62] *Crimes Act 1914* (Cth) section 30A(1).
[63] *Crimes Act 1914* (Cth) section 30A(1)(b).

> (d) to promote feelings of ill-will or hostility between different groups so as to threaten the peace, order and good government of the Commonwealth.

We note that this provision is very similar to the existing definition of 'seditious intention' contained in section 24A of the Commonwealth's *Crimes Act 1914* which is repealed under section 2 of schedule 7 of the Bill. The only significant alteration in our opinion is the addition of the word 'urge' in section 4(b) and (c),[64] in place of 'excite'. We cannot be certain of the effect that the addition of this word will have, or indeed whether it will have any effect at all, but it certainly appears to be intended to make it easier for an association to be declared unlawful. The Attorney-General has declared the intent of these sedition laws to expand 'upon the Australian government's ability to proscribe terrorist organisations that advocate terrorism.'[65] However, there is no provision here that limits the proscribing of organisations to terrorist organisations. Non-violent political, cultural or religious organisations may 'bring the Sovereign into hatred or contempt'[66] or 'urge disaffection' against a branch of government or the *Constitution*.[67] It should be noted that there is neither in the Bill in question, nor in Part IIA of the existing *Crimes Act 1914* (Cth) the sort of 'good faith' exemptions that are a feature of the Bill's amendments to acts of sedition to be directed against individuals in the Commonwealth's *Criminal Code 1995* (also outlined in schedule 7 of the Bill).

Whilst we acknowledge that the proposed amendment would leave the law in a substantially similar position in regard to organisation as it is now, and as we said, significantly improve the sedition laws concerning individuals, we are still concerned about the government's action. The Bill indicates and may well further facilitate the proscribing of associations that whilst stridently opposed to either the sovereign, the Parliament, the government or the Constitution, are not inherently violent and do not urge or otherwise advocate violent or otherwise unlawful opposition to the government, Parliament, Constitution or sovereign. We are concerned that these laws

[64] As the Bill's explanatory memorandum explains, however, minor alterations have been made to the language in sections (4)(3)(c) and (d).
[65] Philip Ruddock, *supra* n. 56 at p. 67.
[66] Schedule 7, section 4(3)(a).
[67] Schedule 7, section 4(3)(b).

may violate the right to freedom of association in article 22 of the ICCPR, the relevant sections of which read:

> (1) Everyone shall have the right to freedom of association with others …
> (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others …

We believe that the Bill contains provisions that go beyond what is necessary in the interests of national security and public safety. We are further concerned that these laws may violate the right to freedom of expression. Article 19 of the ICCPR reads:

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

We note the legitimate limitations that may be placed on these rights to protect 'the rights of others'[68] as well as to protect 'national security or … public order (*ordre public*)'.[69] We believe that it is sufficient for the purposes of protecting national security and public order to proscribe communication urging violence or other criminal behaviour and proscribing organisations and associations that traffic in such incitement. We believe, however, that organisations engaging in robust and even unpopular political debate should not be proscribed, so long as they do not incite violence or other criminal activity.

The government has an obligation to outlaw organisations intent on violence or other unlawful conduct, whether they are violent political organisations,[70] terrorist

[68] Article 19(3)(a).
[69] Article 19(3)(b).
[70] We note that the UN Human Rights Committee applauded the proscription of Italy's (neo) Fascist Party, for example. See, UN Human Rights Committee, *Selected Decisions from the Human Rights Committee Under the Operational Protocol, Vol. 2.* (1990) at paragraph 13.3. See also the comments of the European Court of Human Rights in *KPD v Federal Republic of Germany* (*The German Communist Party Case*) (1957) 1 Yb ECHR 222.

organisations, or any other kind of criminal organisation or association such as an organised crime syndicate or drug cartel. However, the abolition of organisations or associations for non-violent but strident opposition to a state's constitutional arrangements is another matter altogether. In *United Communist Party of Turkey & Ors v Turkey*[71] the European Court of Human Rights held to be a violation of the right to freedom of association the dissolution of a non-violent political party – even one that seeks to significantly alter the constitutional arrangement of the state in a way that many may find repugnant. Further, the Court rightly noted in *United Communist Party of Turkey*, 'democracy thrives on freedom of expression.'[72] Mason CJ said something very similar in *Australian Capital Television v Commonwealth (No. 2)*:[73]

> Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community.[74]

As argued above, the legislation, in our view, probably breaches rights of free expression and free association. Given that the impugned behaviour will largely encompass speech in the political realm, it also might breach the constitutional guarantee of free political expression. Similarly, it might breach the constitutional guarantee of freedom of association. It is however acknowledged that there is no current agreement on the content or even the existence of the latter constitutional right, though it has been broached in several notable decisions, including *Kruger v Commonwealth*[75] and *Mulholland v Australian Electoral Commission.*[76] Those constitutional rights, like their international law counterparts, are not absolute. For example, political communication may be constitutionally regulated and even banned by a law that is appropriate and adapted to serve a legitimate end, which is compatible with the maintenance of the constitutionally prescribed system of representative and

[71] [1998] ECHR 1. Followed in *Socialist Party & Ors v Turkey* [1998] IIHRL 62.
[72] [1998] ECHR 1 at paragraph 57.
[73] (1992) 177 CLR 106.
[74] (1992) 177 CLR 106 at paragraph 39.
[75] (1997) 190 CLR 1. See judgements of Toohey and Gaudron JJ.
[76] (2004) 209 ALR 582.

responsible government.[77] The proscribing, dissolving and banning of the right of political communication[78] of an association or organisation that is not involved in inciting violence or criminal activity is not, we submit, appropriate and adapted to the totally legitimate intention of protecting Australians from terrorist attacks.

We recommend that the rights of freedom of expression and association be respected. To this end, we recommend that only associations whose enterprises articulate 'seditious intent' that involves the advocacy of violence be proscribed. We see no reason to render 'unlawful' under section 30A of the Commonwealth's *Crimes Act 1914* an association 'which by its constitution or propaganda or otherwise'[79] intends to or effects[80] adverse feelings (contempt[81] or disaffection[82]) towards official institutions, which is not directly connected to the advocacy of violence.

4.3 - SEDITION: EFFECT ON INDIVIDUALS

We are also concerned with the amendments to the Commonwealth's *Criminal Code* that the Bill seeks to make. We recognise the need to proscribe communication that advocates violence, but we are concerned that the Bill, as proposed, lacks sufficient safeguards. We are especially concerned about protection for legitimate journalistic academic and cultural expression.

We will use two examples to illustrate potential problems with the Bill as presented.

Australian-born, London-based journalist John Pilger has been the centre of discussions concerning sedition and sedition involving journalists. In March, 2004, he declared Australian soldiers serving in Iraq to be 'legitimate targets' of the Iraqi 'resistance'.[83] The following discussion was televised in September of this year.

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[77] See *Coleman v Power* (2004) 209 ALR 182 at 207.
[78] *Crimes Act 1914* (Cth) sections 30E-FA.
[79] *Crimes Act 1914* (Cth) section 30A(1)(a).
[80] Schedule 7, section 4(3).
[81] Schedule 7, section 4(3)(a).
[82] Schedule 7, section 4(3)(b).
[83] Tony Jones, 'Pilger on the US and Terrorism' *Lateline* ABC Television, March 10, 2004. The interview contained the following exchange: Tony Jones: 'Can you approve in that context the killing

John Pilger:

You have asked me on this program not to ask me whether I'd go to jail; you want a dissenting voice.

Tony Jones (host):

Nor am I trying to prosecute you on this program for what you told us when you said that Australian troops were legitimate targets.[84] The point is, you're not likely to go to jail, obviously, but a Muslim cleric in Melbourne, for example, if they were to say the same thing as you, might be subject to deportation or jail under the new laws.

John Pilger:

Absolutely, and that's a good point. The general point there is, the cleric might be - or somebody who speaks out, you know, the so-called excuse-maker that you hear now being used in the United States, somebody who seeks to understand what happens, tries to explain it, yes, they may find themselves in that position, but behind that person is an intimidated society.[85]

The assumption on the part of Jones is that Pilger, while he believes that he is legally - perhaps even morally - correct that Australians serving in Iraq are 'legitimate targets' (ie because he believes the invasion and occupation to be illegal), he is not actually advocating that Australian troops be killed.[86]

Pilger's remarks may bring into play Section 80.2(8) of the legislation which holds,

A person commits an offence if:
(a) the person urges another person to engage in conduct; and
(b) the first-mentioned person intends the conduct to assist, by any means whatever, an organisation or country; and
(c) the organisation or country is engaged in armed hostilities against the Australian Defence Force.
Penalty: Imprisonment for 7 years.

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of American, British or Australian troops who are in the occupying forces?' John Pilger: 'Well yes, they're legitimate targets.'

[84] *Id.*

[85] Tony Jones, 'Pilger on Australia's new anti-terrorism laws', *Lateline* ABC Television, September 12, 2005.

[86] Unlike, perhaps, the rhetorical cleric. This distinction between Pilger and the cleric is problematic, should it be an accurate reflection of the way these sections will operate. As Petro Georgiou told the Castan Centre on October 18, 2005, 'We must take care that the substance of the law and its implementation do not impact unfairly on Muslim and Arab Australians'.

One may note first of all that Pilger is fortunate that there is no provision for recklessness in section 80.2(8) as there is in sections 80.2(1), 80.2(3) and 80.2(5). Section 80.3(1) contains a variety of allowances for 'a person who' at section 80.3(1)(a):

> tries in good faith to show that any of the following persons are mistaken in any of his or her counsels, policies or actions:
>
> (i) the Sovereign;
>
> (ii) the Governor-General;
>
> (iii) the Governor of a State;
>
> (iv) the Administrator of a Territory;
>
> (v) an adviser of any of the above;
>
> (vi) a person responsible for the government of another country;

Further, section 80.3(1)(b) excuses 'a person who',

> points out in good faith errors or defects in the following, with a view to reforming those errors or defects:
>
> (i) the Government of the Commonwealth, a State or a Territory;
>
> (ii) the Constitution;
>
> (iii) legislation of the Commonwealth, a State, a Territory or another country;
>
> (iv) the administration of justice of or in the Commonwealth, a State, a Territory or another country.

Clearly, the operative world here is 'reforming'. Could Pilger's comments be construed as advocating non-violent 'reform' of government policy? To what extent can the language of violence be legally employed in advocating non-violent reform under these new provisions?

To further illustrate the ambiguity of these provisions - indeed, the ambiguity of *any* sedition legislation that is not drafted with the utmost care - consider the following quote:

> Arbitrary arrest happened in Stalin's Russia and was once the prerogative of kings, which in England led to Charles I having his head cut off: it is the mark of tyranny.

This quote has a real hint of menace to it. It has could be interpreted as expressing approval of the overthrow and, indeed, the murder of a sovereign[87] who oversees in the practice of arbitrary arrest. This quote was made recently in the context of the United Kingdom's new anti-terrorism laws, and thus seeks to link the policies of King Charles I with the current policies of Tony Blair's government. One may be left asking of this quote; if Charles I engaged in the policy of arbitrary detention and ended up being overthrown and murdered, what will or should happen to the head of government who oversees policies of arbitrary detention today? Our concern is, were this quote to be made in Australia, would it meet the requirements of sedition or seditious intent as laid out in the bill before Parliament? Would it, or should it, trigger section 80.2(1) that makes it a crime, punishable with up to seven years imprisonment to

> urge … another person to overthrow by force or violence
> (b) the Government of the Commonwealth, a State or a Territory; or
> (c) the lawful authority of the Government of the Commonwealth.

Perhaps it would be a 'reckless' example of the above, following section 80.2(2). Does it matter where this quote comes from? Does is matter that it comes nor from a known or suspected terrorist or militant, or even Tony Jones's rhetorical 'Melbourne cleric' but rather from the English fashion designer, Vivienne Westwood?[88]

A quote from Prime Minister John Howard is revealing:

> There is a difference between saying, you know, 'I think the troops should come home, I don't think Howard should have sent them, I think it's a terrible mistake - he's a disaster,' and actually encouraging people to attack them.[89]

It would appear that the Pilger and Westwood quotes fall somewhere between the two approaches - the implicitly legal and illegal approaches - the Prime Minister offers. As the Bill stands right now, one cannot say with any surety whether Ms Westwood's

[87] This is relevant to either section 80.3(1)(a)(i) or (vi) depending on one's interpretation of this quote.
[88] http://www.viviennewestwood.com./flash.php accessed November 6, 2005.
[89] Narda Gilmore, 'PM defends anti-terrorism laws', *Lateline* ABC Television, September 8 2005.

and Mr Pilger's comments would be considered seditious. One might go so far as to say that neither journalists nor fashion icons are the likely targets of this legislation whereas (to quote Tony Jones) 'a Muslim cleric in Melbourne'[90] may well be. It is then left up to the whim of the Attorney-General[91] to decide who is prosecuted for sedition and who is not. We are concerned that the legislation lacks, at this stage, appropriate guidelines for the Attorney-General to follow when deciding whether or not to proceed with sedition charges.

As these two examples illustrate, we are also concerned that the legislation lacks sufficient safeguards to protect journalistic and academic speech that does not intend to incite violence or assistance to the enemies of Australia. Lord Carlile, QC, in reviewing similar provisions in new anti-terrorism laws in the United Kingdom has also expressed concern about the possible effects of similar laws on journalists.[92] We do not believe that the current 'good faith' defences in the Bill[93] sufficiently ensure that journalists, writers and artists will not be caught up in the effects of the law, however unlikely. At the least, it is likely that the laws could usher in levels of self-censorship and editorialising that are not currently a part of Australia's media or cultural environment.

We would like to see the defences in section 80.3 extended to better protect academic debate, journalism and other public-interest reporting, and artistic expression. We believe that Victoria's *Racial and Religious Tolerance Act 2001* serves as a good guide in this regard. The *Racial and Religious Tolerance Act 2001* (Vic) contains defences to the offences of racial and religious vilification covering the headings 'public' and 'private'[94] conduct. Section 11 contains the 'public conduct exceptions':

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[90] Tony Jones, *supra* n. 85.
[91] In section 80.5
[92] Simon Freeman, *supra* n. 54.
[93] As it stands, section 80.3(1)(d) comes the closest to insulating legitimate debate and reporting, immunising communication that: 'points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matter'.
[94] Section 12 of the *Racial and Religious Tolerance Act 2001* (Vic) contains so-called 'private conduct' defences permitting communication that would otherwise be unlawful if it is restricted to private exchanges between, in a sense, consenting individuals. We do not envisage the need for this sort of defence in the Bill due to the focus on the incitement of others in the legislation.

> A person does not contravene section[s prohibiting racial and religious vilification] if the person establishes that the person's conduct was engaged in reasonably and in good faith -
> (a) in the performance, exhibition or distribution of an artistic work; or
> (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for -
> (i) any genuine academic, artistic, religious or scientific purpose; or
> (ii) any purpose that is in the public interest; or
> (c) in making or publishing a fair and accurate report of any event or matter of public interest.

We believe that the enactment of similar defences to these in section 80.3 of the Bill would be a significant measure to ensure not only that well-intentioned journalists, artists, and academics are not caught up in the net of these provisions, but also to assuage the concerns of the community – especially the artistic community[95] – who may oppose the legislation due to the fear that their rights to free political and artistic communication that does not advocate violence or criminal activity, is endangered.[96]

We recommend the inclusion of provisions in the Bill to safeguard from prosecution fair and good faith reporting, academic debate and artistic work. We recommend that strict guidelines be put in place for the Attorney-General to adhere to before any charge arising from these provisions is initiated to ensure fair and non-discriminatory application.

Part 5.
MISCELLANEOUS MATTERS

5.1 – 'SHOOT-TO-KILL'

We are pleased that the so-called 'shoot to kill' provision[97] has been removed from the Bill presented to Parliament. However, we are concerned that the debate

[95] See, for example, National Association for the Visual Arts – Australian Lawyers for Human Rights joint media release 'New Sedition Laws to Stifle artists', 1 November, 2005. http://www.visualarts.net.au/home/ accessed November 6, 2005.
[96] Whilst we may not agree with the legal reasoning of all such groups, their concern is genuine, and ought to be troubling for the Parliament. We are further concerned that the government has not acted to allay the fears of these groups.
[97] Section 105.23 of the original Bill.

regarding such a provision may contribute in the long term to an attitude within the community, and perhaps even within law enforcement agencies themselves, that the use of lethal force is now more acceptable or inevitable given the heightened security climate. Given the tragic shooting of Jean Charles de Menezes in the London underground on July 22, 2005, we believe that every effort must be made to ensure that the use of lethal force is not seen to be more acceptable. Further, lethal force must only be used in proportionate circumstances, which can only be to protect life.

Currently, we believe that the Australian public has no reason to be suspicious or nervous of law enforcement officers as they go about their important business of combating terrorism and other crimes. The government's decision to remove the contentious section 105.23 from the legislation before Parliament will assist in making sure that this remains the situation.

5.2 - NON-DISCRIMINATION

We are concerned with the rhetoric of some members of the government that has contributed to the perception that this legislation is specifically targeted to Muslims.[98] The Treasurer, Peter Costello has been unhelpful in this regard. His comments on August 23, 2005, are indicative of the sorts of comments that can lead to division and suspicion:

> This is a country, which is founded on a democracy. According to our Constitution, we have a secular state. Our laws are made by the Australian Parliament. If those are not your values, if you want a country which has *shari'a* law or a theocratic state, then Australia is not for you. This is not the kind of country where you would feel comfortable if you were opposed to democracy, parliamentary law, independent courts and so I would say to people who don't feel comfortable with those values there might be other countries where they'd feel more comfortable with their own values or beliefs.[99]

[98] See, however, Australian Associated Press, 'Raids not anti-Muslim: PM' November 9, 2005.
[99] Tony Jones, 'Respect Australian values of leave: Costello', *Lateline* ABC Television, August 23, 2005. See also, Waleed Aly, 'The Making of Muslim Australia' *The Age*, October 23, 2005 http://www.theage.com.au/news/general/the-making-of-muslim-Australia/2005/10/22/1129775997101.html accessed November 6, 2005; Malcolm Farr, 'Accept our ways or leave: Costello' *The Daily Telegraph*, November 11, 2005

Mr Costello continued, when asked if his attitude might, should the sort of environment in the United Kingdom after the London bombings come to Australia, morph into laws to deport those with dual citizenship,

> where people have dual citizenship and they're not comfortable with the way Australia is structured, it may be possible to ask them to exercise their other citizenship. [100]

Not only is this needlessly divisive, but it is intellectually dishonest; Costello has elsewhere declared the basis of the Australian legal system to be not democracy or secularism, but rather 'Judeo-Christian ethics' and even the Ten Commandments.[101] If this legislation is to enjoy the support of all Australians, Parliamentarians who are not doing so already must temper their language so that no one section of our community feels wrongly singled out or labelled as uniquely problematic or exceptionally different from the rest of the community.

We are puzzled as to why is it, in contrast with the practice of other countries such as the United States, that the *only* terrorist organisations that Australia proscribes[102] and will thus be relevant to this legislation, are (nominally) Islamic.[103] Why is terrorism being exclusively coloured as solely Islamic by Australian regulations? The United Kingdom lists 54 terrorist organisations from various religious and secular ideological backgrounds, from Asia, Africa and Europe.[104] The United States has also acknowledged the threats that terrorism from all over the world can pose, proscribing 42 foreign terrorist organisations with diverse ideological affiliations, and from various geographic locations, from Columbia to Japan, Northern Ireland to Israel, and

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http://www.dailytelegraph.news.com.au/story/0,20281,17204050-5001021,00.html accessed November 11, 2005.

[100] Tony Jones, *supra* n. 99.

[101] See, *inter alia*, Barry Cassidy, 'Government can afford pre-election spending, Costello says' *Insight* ABC Television July 11, 2004; Don Watson, 'A Jekyll-and-Hyde just waiting in the wings', *The Sydney Morning Herald* 26 August, 2005 www.smh.com.au/text/articles/2005/08/25/1124562975320.html accessed 6 November, 2005; Marion Maddox, *God Under Howard*. (Crows Nest, NSW: Allen & Unwin, 2005).

[102] For details concerning debate surrounding the overview of this process see, Joo-Cheong Tham, *supra* n.35 at pp. 518-24.

[103] *Criminal Code Regulations 2002* (Cth) regulations 4, 4A-S.

[104] United Kingdom Home Office, 'Proscribed Terrorist Groups', October 14, 2005. http://www.homeoffice.gov.uk/security/terrorism-and-the-law/terrorism-act/proscribed-groups accessed November 6, 2005.

Spain to Sri Lanka.[105] Importantly, the United States also recognises the threat the home grown terrorism plays, such as from militant anti-abortion activists.[106]

We wonder whether Australian practice in this regard might violate article 26 of the ICCPR, guaranteeing the equality of all before the law regardless of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'[107] The issue will be, of course, whether there are legitimate grounds to distinguish one particular group from the others. One could argue – and one would certainly expect – that the organisations proscribed are those whom Australia has to fear the most, either through statements or actions directly threatening Australia (such as *al Qaeda*[108]) or because of proximity (such as *Jemaah Islamiyah*[109]). However, examining the list, one sees that it is not all or merely organisations that have threatened or might threaten Australia. For example, the fundamentalist Islamic organisation *HAMAS Izz al Din al Qassam Brigades* operating in the Occupied Palestinian Territory is proscribed,[110] and yet non-Islamic organizations from the region such as the secular organisations, the Popular Front for the Liberation of Palestine and the Popular Front for the Liberation of Palestine-General Command and the fundamentalist Jewish organisation, Kach (Kahane Chai) are not proscribed. All three are proscribed by the United States.[111] We are generally concerned with the approach that has been taken to the proscribing of terrorist organisations following the introduction of the Commonwealth's *Criminal Code Amendment (Terrorist Organisations) Act 2004*. As Petro Georgiou has said, 'laws which are non-discriminatory on their face may be applied in a discriminatory way by the security and police agencies'[112] or, we might add, the Executive.

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[105] US Department of State, Office of Counterterrorism, 'Foreign Terrorist Organisations', October 11, 2005. http://www.state.gov/s/ct/rls/fs/37191.htm accessed November 6, 2005.
[106] See, Carol Mason, 'Who's Afraid of Virginia Dare? Confronting Anti-Abortion Terrorism after 9/11' (2003-2004) 6 *University of Pennsylvania Journal of Constitutional Law* 796. Australia has already had one case of religiously and ideologically-inspired murder at a medical clinic that would, in the United States (but not in Australia), be considered terrorism. ABC News Online, 'Convicted anti-abortion killer sentenced to life in jail', http://www.abc.net.au/news/newsitems/200211/s729925.htm November 19, 2002. Accessed November 8, 2005.
[107] See also article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.
[108] *Criminal Code Regulations 2002* (Cth) regulation 4A.
[109] *Criminal Code Regulations 2002* (Cth) regulation 4B.
[110] *Criminal Code Regulations 2002* (Cth) regulation 4U.
[111] US Department of State, Office of Counterterrorism, *supra* n. 132.
[112] Narda Gilmore, 'Fraser opposes anti-terror laws', *Lateline* ABC Television, October 19, 2005. See, for example in the (pre-9/11) American Context,

We recommend review of the current procedures for proscribing terrorist organisations, with reference to practices of other states and the Australian government's obligation to regulate in a non-discriminatory manner. We recommend that Parliamentarians take greater care to ensure that their comments are not divisive.

Part 6.
CONCLUSION

As this submission has hopefully illustrated, there are many questions to be answered concerning the validity of the Bill as it stands. The terrorist threat to Australia is real and it is imperative that the legal regime with which Australia combats this threat is appropriate and adapted to the nature of the threat and the abidingly open and democratic, non-discriminatory nature of Australian society. The protection of human rights is essential to maintaining Australia's democratic nature. Unfortunately, Australia does not have the legislation to properly safeguard human rights and monitor the effect upon human rights of new legislation, as is the case in the United Kingdom. We have no one undertaking the incalculably valuable human rights 'watchdog' role that Lord Carlile of Berriew is undertaking in the United Kingdom in relation to the British anti-Terrorism legislation. Lord Carlile has advised both the Blair government and the general public on the probable or potential impact of anti-terrorism legislation on the United *Kingdom's Human Rights Act 1998*.[113]

Needless to say, Australia also lacks the proper legislative protection of human rights that has been at the forefront of the anti-terrorism responses of the United Kingdom and United States. Whilst this is not the place to argue for the creation of a bill of rights for Australia, it is significant that the war on terrorism has reignited the debate.[114] There is clearly an increased desire to articulate precisely what it is that we are looking to protect from being destroyed by terrorism and the threat of terrorism.

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[113] Simon Freeman; Richard Ford, *supra* n. 64.
[114] See, *inter alia*, Julie Macken, 'Bill of rights debate back in the House' *Australian Financial Review*, October 28 2005 at p. 72.

We must, however, work within the system we have. And thus it falls upon the Parliament to a significant extent to ensure that the legislation it enacts is properly supervised. As Petro Georgiou recommended in his lecturer to the Castan Centre,

> one of the criteria the Parliament should apply in assessing the new counterterrorism legislation is that we have the means to monitor its implementation so as to identify and promptly rectify any unintended adverse consequences … the idea of an independent statutory monitor reporting regularly to the Parliament has much to commend it.'[115]

We concur. Given the unprecedented level of public interest and concern, as well as the gravity of the issues involved, we believe that the sort of oversight not normally given to legislation is justified on this occasion. There are a number of models for the Parliament to consider, such as the ACT's Human Rights Commissioner who is empowered under section 41(1)(a) of the ACT's *Human Rights Act 2004* to

> … review the effects of Territory laws, including the common law, on human rights, and report in writing to the Attorney-General on the results of the review.

We recommend the creation of a statutory monitor to report regularly to the Parliament on the efficacy of this Bill and allied legislation in the war on terrorism and the effects of this Bill and allied legislation on the human rights of Australians.

We wish to conclude by asking the Senate to keep in mind the words of the great English jurist HLA Hart, who reminds us that '[a]s our history only too clearly shows, it is comparatively easy to make criminal law and exceedingly difficult to unmake it.'[116]

[115] Petro Georgiou, 'Multiculturalism and the war on terror', lecture presented for the Castan Centre for Human Rights Law, Monash Law Chambers, October 18, 2005.
[116] HLA Hart, *Law, Liberty and Morality*. Oxford: Oxford University Press, 1963 at p. i.