Submission to the

Senate Legal and Constitutional Committee

Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005

This submission was prepared by:

Michael Cordover
71 Mountain Rd
Allens Rivulet
Tasmaina, 7150
Phone: (03) 6239 6784
Mobile: 0438 591 479
Email: michael.cordover@gmail.com

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Summary

This submission was prepared in haste. The period of time between the call for submissions and the close of submission was insufficient to compile a detailed submission to my satisfaction. This is evidenced by my typing this at one o'clock on the morning on 11 November 2005. For this reason I ask the indulgence of Senators in the consideration of this and other submissions. I would also note that, through my involvement in the United Nations Youth Association, it has become clear that organisations such as that one wish to make a submission but time constraints prevented this from occurring.

I have prepared this submission addressing each Schedule of the Bill in a separate section as well as a general consideration of the Anti-Terrorism Bill (No. 2) 2005 ("the Bill") overall. Although not a qualified lawyer, I am a student of law at the University of Tasmania. Despite this incomplete training, I may have made some mistakes – for this I apologise. I am also quite certain that some of my arguments are stronger than others. I ask simply that consideration be given to all arguments. I am more than happy to discuss and defend my position(s) should I be requested to do so by any means, as part of this Inquiry or otherwise. I have not commented on all parts of the Bill.

References in this document to sections, subsections etc are generally to those numbers as proposed in amended Acts, unless otherwise specified. References to Schedules are to the Schedules of the Bill.

General Comments on the Bill

Although I believe most provisions in the Bill to be unnecessary, that is a question for debate in Parliament. I believe strongly that on the topic of national security, and especially with respect to the Bill, the safety of Australia is most important. This issue is too important for politics. I would therefore urge that any votes taken be declared conscience votes, so politics does not dominated this debate.

My position is that portions of this Bill – specifically those in Schedule 4 – are an attempt to vest too much power in the Executive arm of government. This is a dangerous move towards an overbearing government. My fear is not necessarily for the actions of the current government, rather for the way the provision of the Bill may be used improperly in the future. I believe the sunset provisions are insufficient to prevent this.

It is my opinion that these laws, even if necessary, are poorly drafted. This is evidenced by the way the laws have been misinterpreted by the public and the media, as well as the way the wording of provisions may differ from the intentions of the lawmakers responsible. This issue *must* be addressed if the Bill, if passed, is to be effective.

Schedule One

By s 102.1(1A), several indirect actions become grounds for listing an organisation as a terrorist organisation. These grounds are broad and, although can be used alone, should not be sufficient grounds alone for listing. There is no necessity to include advocacy as a grounds for listing given the existence of crimes including incitement. The drafting of the provision has allowed for indirect advocacy, an exceptionally broad concept, to be sufficient, something which provides grounds for the listing of many organisations. Although it is unlikely that these laws will be used unfairly by this government it is important to restrain the power given on the grounds that it might be improperly used by a future government in a way that prevents the removal of that power.

Schedule Three

The penalties for reckless financing of terrorism are inconsistent with those of financing a terrorist organisation, knowingly or recklessly, and are excessive at life imprisonment. There is no exception for the provision of funds for humanitarian purposes which are later used for terrorist acts. I believe that such an exemption should be provided generally and is an absolute necessity for s 103.2 specifically.

Schedule Four

Control Orders

I believe the inclusion of the Family Court of Australia as an issuing court is inappropriate and outside its mandate. Control Orders allow activities generally associated with punishment, being harsh treatment, to be exacted upon people on the basis of suspicion rather than proven criminal guilt. The obligations and restrictions which can be imposed on a person are extensive and unnecessary. Electronic tracking devices are easy to modify, bypass or otherwise disrupt. People can have a control order issued against them and must follow it even if a police officer has not taken reasonable measures to ensure they understand it; it is not a crime for a police officer to fail to take reasonable steps to ensure understanding. A control order can be issued if the balance of probabilities show that there is a reasonable suspicion that something may occur. People have no chance to represent themselves before a control order is issued, they only have a limited power of appeal, without a jury decision; guilt is assumed. A person can thus be punished for an entire year – and an order can be reissued an infinite number of times – on the basis of a suspicion.

Preventative Detention Orders ("PDOs")

Requirements to obtain a PDO are broad and easy to satisfy. PDOs grant the power for the Executive to detain people without evidence, let along proof, charge, trial, conviction and impartial sentencing. PDOs are, for this reason, open to abuse by the Executive, especially the police. The burden of proof established in the Bill is minimal. The danger of abuse is increased by empowering members of the AFP to order an initial PDO without any judicial review. This is a violation of the principle, as old as any police force, that the judiciary are the only people able to order detention of a person. Detention in this manner can be continued indefinitely through extensions to a PDO.

There is a strong argument that the way issuing authorities are set up may be unconstitutional and that this law would be subject to a High Court challenge on the basis

of failing to uphold the separation of powers. Representations to the nominated senior AFP member are unduly limited. I believe that cruel, inhuman or degrading treatment is insufficiently punished. Preventing communication about the PDO will be ineffective. The right of privacy is violated, with only limited right to professional privilege preserved. The secrecy surrounding PDOs is reminiscent of totalitarian regimes throughout history.

The inability of police to question people detained under a PDO is a good thing but is likely to be abused. Sunset clauses are generally ineffective at preventing power abuse in the future.

Schedule Five

Evidence obtained from terrorism-related searches can be used in non-terrorism-related prosecutions. The powers given to the minister with respect to designating areas are excessive given Australia's relatively low risk (a level constant since late 2001) and existing powers to declare an emergency.

Schedule Seven

Some parts of the offence of Sedition can be used to prevent the airing of legitimate beliefs. The drafted version of this section does not represent Parliament's intent and therefore these should be redrafted. Again, these laws are not likely to be misused now, due to the requirement for consent of the Attorney-General in order to prosecute, but they may be abused in the future.

General Comments

Comparison to Communist Party Dissolution Act 1950

In the course of my research I made some comparisons to the Communist Party Dissolution Act 1950 (Cth). That Act, declared invalid by the High Court of Australia[1], aimed to ban a specific organisation (the Communist Party of Australia) and associated organisations. The Act created crimes, inter alia, of association, financing, participating in activities of an "unlawful association" and "do[ing] any other act which assumes or pretends that that organization or body has not been dissolved."[2] Each of these was punishable by imprisonment for five years. It should be noted that crimes created under s 7 of the Act were only if a person knowingly undertook an action. The Communist Party Dissolution Act 1950 (Cth) also prevented any action from being taken under the Act until the process of an appeal was complete.

In contrast to that Act, the Bill creates crimes of reckless assistance (Schedule 3) and empowers detention and control without criminal activity. These actions of detention and control are undertaken without the person being controlled or detained having the ability to present arguments against their accusers. Worse still, the grounds for granting an order are on the balance of probabilities or on reasonable suspicion. This is a long way from long-recognised principles of innocence until guilt is proven and the requirement for guilt to be proven beyond reasonable doubt.

When examining the Bill it must be remembered that the Communist Party Dissolution Act 1950 was voided by the High Court and, despite a referendum to amend the Constitution, no measures were taken against the Communist Party. The end result was not, however, the violence, revolution and compromise of the defence of Australia as

[1] Australian Communist Party v The Commonwealth [1951] HCA 5; (1951) 83 CLR 1.
[2] Communist Party Dissolution Act 1950 (Cth), s 7(2.)(c).

predicted by that Act's preamble. The result was simply a demonstration that Communism, despite fears, did not pose a significant threat to Australia.

I do not propose to claim that Australia is under no threat of terrorist action. The arrests earlier this week indicate that there is credible reason to consider that there is a threat, although the guilt of those accused shall be determined in a trial. The important parts of these arrests are, however, firstly that the accused will be entitled to a trial before being subjected to punishment, and secondly that they were arrested for criminal activity. The fact that the police in Australia can arrest people this early in a terrorist plot, disrupt the operation and charge them is a demonstration that powers to detain people without charge are unnecessary. Australia has suffered no attacks, and we have this week allegedly seen attacks prevented, with existing laws. There has been no evidence provided that the measures proposed by the Bill will do anything to further prevent terrorism.

There are myriad crimes which exist under the Criminal Code which empower the police to act against terrorists. Actions taken under the Criminal Code as it currently stands do not violate due process or other rights which are granted to all Australians. Some provisions in the Bill will do so. These rights are more than those traditionally enjoyed by Australians. As will be later discussed, these are rights to be enjoyed by *all human beings*. The violation of these rights is inexcusable, no matter the emergency or threat.

Timing

Insufficient time has been given to debate the Bill both in Parliament and in public. Discussions between states and the Australian Government do not constitution consultation; many people other than these parties will be affected and should have been consulted. The lack of time has also led to several errors of drafting where the intention of the lawmakers is not clearly communicated by the language of the Bill. The greater danger is that the wording of the Bill clearly communicates a certain idea which was not the intention of Parliament, leading to dangerous precedents set and dangerous capacities for charges to be laid, amongst other dangers.

Schedule 1

Definition of "advocacy"

Counsel (s 102.1(1A)(a))

s 102.1(1A) would cause advocacy of certain actions to be grounds for an organisation to be listed, at the discretion of the Minister, as a terrorist organisation. Special note should be given to s 102.1(1A)(a) which would mean that an organisation which "indirectly counsels the doing of a terrorist act" could be classified as a terrorist organisation. Taking a definition from the Shorter Oxford English Dictionary ("the SOED"), "counsel" means to "recommend or advise an action" and "indirectly" means not "clearly; unambiguously". Thus, if an organisation provides advice which advises the doing of a terrorist act, and such advice is ambiguous or unclear, there exist grounds for listing the organisation as a terrorist organisation.

Consider, as a case study, the Socialist Alliance, a registered Australian political party. I am not a supporter or member of this organisation, considering that many of their policies are not good solutions to the problems facing Australia. Members of the Socialist Alliance have declared to me, in discussion, that "civil disobedience is sometimes necessary and can even be the duty of a good citizen"[3]. This is a legitimate philosophical position and something which may be subject to argument. The Socialist Alliance is a legitimate organisation. Yet, on the basis of that statement, which I would argue encompasses support for terrorist acts, the Minister could declare the Socialist Alliance a terrorist organisation.

s 102.1(1A)(a) is broad enough to empower the Minister to declare almost any organisation which does not completely reject violence. I would remind the Senators reading of how few organisations do completely reject violence in all its forms, and

[3] Private conversation with Michael Harris, a member of the Socialist Alliance, on 26 October 2005.

suggest that these would not include any government in Australian history or any political party with a representative in any Parliament in Australia.

This and other provisions under advocacy (s 102.1(1A)) would seem unnecessary given the existing crimes of incitement and conspiracy under ss 11.4 and 11.5 of the Criminal Code (Cth), respectively. Although I firmly believe that advocating or inciting violence should be a crime, I do not believe that advocacy is valid as the sole reason for naming an organisation as a terrorist organisation.

While I'm certain that these provisions would not be used by the current government to list the Socialist Alliance or similar organisations, the problem is that they could be used in this way. We can never be certain of the actions or responsibility of a future government and should thus not give them more power than required, especially with as little oversight as exists here. Even if a regulation creating a terrorist organisation is disallowed by Parliament, that regulation was still in effect until its disallowance – this may cause the arrest and imprisonment of a person guilty of associating with an organisation which Parliament later acknowledged was not a terrorist organisation. Of course, such a thing would never happen. The fact that it could occur is both dangerous and evidence that this provision is poorly drafted. Redrafting or removing the provision is essential to remove the danger.

Instruction (s 102.1(1A)(b))

This subsection would create grounds for listing an organisation as a terrorist organisation by the Minister on the sole basis of indirectly providing instruction on the doing of a terrorist act. Again, examining the SOED it is apparent that the provision of instruction could include education, direction or ordering. Hence, providing information which may be used for a terrorist act becomes grounds for listing as a terrorist organisation. This could include education about security systems and their weaknesses (c.f. s 100.1(2)(f)), training in the causing of harm (c.f. ss 100.1(2)(a), 100.1(2)(d)),

education about coercion, intimidation (c.f. s 100.1(1) definition of "terrorist act" (c)) or education about how risks to public safety may be created (c.f. 100.1(2)(d), 100.1(2)(e)).

All the education listed can be used legitimately, from martial arts training to educating computer security researchers. Regardless of the level of their legitimacy, an organisation providing education on these matters does not make them a terrorist organisation. Given that the satisfaction of any of these criteria would be sufficient to declare an organisation a terrorist organisation, it is my belief that this provision is drafted in a manner which is much too broad to represent the true intentions of those who proposed the Bill. I would also claim that anything other than direct advocacy of a terrorist act cannot be grounds for an organisation to be declared a terrorist organisation.

Many points relevant to counsel are also relevant here, especially those of necessity, given other laws, and possible abuse by future governments.

Schedule 3

Financing a terrorist organisation (s 103.2)

This section expands the existing provisions of Division 103 to criminalise financing terrorism. This is an appropriate thing to criminalise. By considering the a worst-case scenario arising from the narrowest interpretation of s 103.2 it is possible to see, however, the way the amended provisions may criminalise the behaviour of people who would not be considered, by society at large, to be guilty of a crime. Conviction of these people would clearly contravene the intention of the lawmakers but, due to the wording of the provision, would nonetheless occur.

Firstly, I would claim that, given that the offence is for reckless, rather than knowing, financing, the maximum penalty of life imprisonment is excessive. Comparing Division 103 to s 102.6 it becomes clear that there is inequality amongst penalties. s 102.6 criminalises, *inter alia*, the provision of funds to a terrorist organisation. This is punishable by imprisonment for 25 years if knowing (s 102.6(1)), or 15 years if reckless (s 102.6(2)). The penalty is clearly inappropriate considering other penalties for similar action.

Secondly, consider an extreme test circumstance. A person, with the intention of improving humanitarian conditions, goes from Australia to, for the sake of example, a Central Asian nation. They are warned by the Australian Embassy there that they should not venture into one area of the country because it contains many terrorists who may misuse the money. The naïve humanitarian goes there anyway and distributes to the people there money. This was given for the purpose of humanitarian aid yet, if used for a terrorist act, the humanitarian would be guilty of an offence under Australian law, punishable by life imprisonment. They were given warning and the risk was arguably unjustifiable. They should have known better. Despite their good intentions, and regardless of the quantity of money provided, they will be guilty of an offence.

Although the example I have provided is extreme, it is possible. The fact that such an occurrence is possible under the Bill is evidence of the fact that these provisions are poorly worded at best. For this reason, I propose that, alongside a reduction of penalty, provisions similar to those of s 102.8(4)(c) should be applied to this and other terrorism offences.

Schedule 4

Control Orders

Issuing Courts (s 101.1(1) definition of "issuing court")

The definition of "issuing court" includes the Family Court of Australia. This is highly inappropriate, given that the purpose of the Family Court, as stated by Prime Minister Whitlam during his proposal that the Family Law Bill 1974 be read a second time, is solely to "provide help, encouragement and counselling to parties with marital problems, and to have regard to their human problems, not just their rights"[4]. The Family Court should have no role issuing control orders which are clearly outside the Court's jurisdiction and purpose. I am aware that the Parliament may provide the Court with additional jurisdiction but I feel it is inappropriate in this Bill.

This inclusion also conflicts with the dismissal of the comments on the Bill of Former Chief Justice of the Family Court, Alastair Nicholson, by our Attorney-General.

Punishment (s 104.2(2)(b))

s 104.2(2)(b) allows a control order to be issued on the basis of suspicion. The restrictions, prohibitions and requirements that can be placed on a person on the basis of a control order are those which I would associate with punishment – these include involuntary detention (ss 104.5(3)(a-c)), breach of privacy (s 104.5(3)(d)), prevention of activities which may include normal work (s 104.5(3)(h)), and prohibition on contact (s 104.5(e-h)). All of these occur, effectively, on the basis of being suspected of committing an offence under ss 102.5(1) or 102.5(2). Since these are already crimes, no action should be taken on the basis of suspicion without sufficient evidence to try the accused.

[4] House of Representatives speech by The Hon Gough Whitlam on 28 November 1974.

One of the fundamental tenets of our justice system is that we do not punish a person unless there is proven criminal guilt. In order to prove criminal guilt, a trial must be held and the person must have an opportunity to defend themselves. They must be convicted on matters of fact by a jury of their peers. They must be considered innocent until they are proven guilty. None of these elements are present in the creation of a control order. These rights were first granted by Magna Carta in 1215 and were reaffirmed by the Universal Declaration of Human Rights ("UDHR") Articles 9-13, amongst others. This was further upheld by the International Covenant on Civil and Political Rights ("ICCPR") Articles 9 and 14-17.

These rights were supported by the decision of the High Court in Lim v Minister for Immigration[5], as will be further considered later. s 104.2(2)(b) would give police the power to punish a person for up to a year on the basis of suspicion. There are two definitions of "punish" in the SOED: retribution for an offence; harsh treatment. Under both, punishment is being undertaken, although with the former the only "offence" is the arousing of suspicion. Even disregarding questions of violation of international conventions or High Court rulings, it remains that the abilities here described are *morally* reprehensible. It is simply a moral wrong to grant these powers, so open to abuse, to the executive arm of government. In all cases where it is possible, the weaker party should be given an advantage, lest they be exploited. In this case, the person, not the government, should be given the advantage.

Detention (s 104.5(d)(c))

The requirement that a person "remain at specified premises between specified times each day or on specified days" is equivalent to the power to involuntarily detain a person. I have already discussed how I consider this to be punishment. Such action was held to

[5] Chu Kheng Lim and Others v The Minister for Immigration, Local Government and Ethnic Affairs and another [1992] HCA 64; (1992) 176 CLR 1

be unconstitutional by Brennan, Dean and Dawson JJ in Lim v Minister for Immigration at [22-24]. The decision was that punishment is the exclusive power of the Courts and that punishment can only be carried out by the Courts in response to proven criminal guilt. In this manner, the attempt to punish people on the basis of suspicion, using a control order, is unconstitutional.

Tracking devices and privacy (ss 104.5(3)(d) and 104.5(3)(f-g))

The use of an electronic tracking device is a gross breach of privacy. It is not necessary to know the precise location of a person who, I will state again, is only suspected of having committed a crime at all times. Aside from this humanitarian argument, electronic tracking devices are easy to disrupt or modify. I draw here on my knowledge of physics, mathematics and computing, all sufficient for this purpose and more extensive than many.

A tracking device would most likely use a GPS signal to determine location and then relay that to a base station through some radio mechanism – any other method is impractical and cost-intensive. If pure disruption is required, a broad-band radio broadcast on the tracking device's outgoing frequency (easy to determine using an appropriate scanner) will prevent the information from being accessed by police. For the more devious person subject to this penalty, a false GPS signal can easily be calculated and broadcast to the tracking device causing it to report a false location. This method of modifying the data police have is trivial for anyone with a basic knowledge of the operation of GPS – information readily available on the internet. For this reason, tracking devices will rarely, if ever, be effective in tracking a suspect.

Finally, even if the device is successful, it is a breach of the UDHR Art 12, the right to not be subject to arbitrary interference with one's privacy. Similarly ss 104.5(3)(f-g) breach UDHR Art 12.

Combined usage (ss 104.5(3)(e-h))

The use of s 104.5(3)(e-h) in combination could easily stifle the broadcast of any information originating from a person who has a control order issued against them. This would prevent sufficient public debate, an essential part of the democratic system in Australia. Although it is unlikely to be used in this manner by the current government, it is a dangerous precedent to set. It is quite possible that it would be abused by a future government.

Comprehension (ss 104.12(4), 104.26(4))

ss 104.12(4) and 104.26(4) would mean that a person could have a control order issued against them not understand the substance and the AFP member could reasonably have ensured that understanding, yet the order remains valid. Further it is not a requirement that the AFP member take all reasonable steps to ensure understanding. This comes dangerously close to punishing someone without informing them of the charge against them. Combined with a total inability for a person to even appeal for at least 48 hours, and noting the difference between defence (with the presumption of innocence) and appeal, these laws remove many of the rights enjoyed throughout history by Australians. The right of police to withhold information on the charges under s 104.12(2) is one which could easily be abused. This would render the subject of a control order and their lawyer unable to know the charges against them in any detail. Without sufficient knowledge of the charges and an ability to challenge the evidence, it can be exceptionally hard to contradict allegations. This subsection I consider to violate the UDHR Articles 10 and 11 as well as the ICCPR Article 9 para 2-4 and Article 14.

Burden of proof (s 104.24(1)(b), Subdivision 104 E)

The conditions which are required to be satisfied, even for appeals, under ss 104.24(1)(b) (and described in Subdivision 104 E) are only those of the balance of probabilities or of suspicion. This places an unreasonable burden of proof on the subject of the control order. This attacks the presumption of innocence which is a fundamental of a fair justice

system. Punishment can occur without proof of criminal guilt, without a jury trial and on the authorisation of even a judge of the Family Court, in whose mandate the question of control orders does not fall.

Sunset clause (s 104.32)

Although these laws expire after ten years there is nothing that will prevent these laws from being extended by a future government, or indeed this government at any time. Such an amendment could be made without significant outcry – claims of efficacy cannot be verified due to the nature of terrorist acts. Even though there is, in this section, pressure for the removal of these powers after ten years, once power has been granted to the Executive it is difficult to be removed. Equally, once rights have been sacrificed it is difficult to regain them. While sunset clauses are to be applauded, they are not sufficient to limit the future use of power, at least partially due to the intangible nature of the enemy in the war against terrorism.

Preventative Detention Orders ("PDOs")

Burden of proof (s 105.4(4)(a))

Any or all of the grounds specified in s 105.4(4)(a) are relatively easy to satisfy as only some reasonable suspicion is required; no proof or evidence is required for a PDO to be issued. It is possible to envisage that every beauty parlour, being in possession of reasonable quantities of both hair bleach (hydrogen peroxide) and nail polish remover (acetone), could be reasonably suspected of possessing a thing connected to a terrorist act. That this burden of proof is so low and that it is based on suspicion is something to be feared. Certainly police will often obtain more than the minimal evidence suggested above. The problem is they don't have to in order to obtain a PDO. Because of this, these laws are open to abuse by the Executive, specifically by police forces. The power to detain on suspicion without evidence, let alone charge, is what's being granted by these laws. Such powers are unprecedented and unnecessary, especially given the lack of review.

The power of the Executive to arbitrarily detain a person was first removed in the 13th century by Magna Carta and has been upheld in every human rights convention since, notably the UDHR Article 9 and ICCPR Article 9. This power was even questionably during wartime, as was demonstrated in Little v Cth[6]. The fact that they are not brough immediately before a court and are not able to defend themselves before the punitive (c.f. control orders) measures are ordered are arguably breaches of the UDHR Articles 10-11 and the ICCPR Articles 9 & 14. Aside from these legal precedents there is a general moral principle which is violated through this detention without charge, failing to inform a person and not giving them an opportunity to defend themselves.

Total lack of judicial review (s 105.8)

s 105.8 would empower any member of the Australian Federal Police ("AFP") of rank Superintendent or higher to order the detention of a person, without charge or review, for 24 hours. Further there is no limitation on the number of so-called "initial preventative detention orders" ("IPDOs") which can be issued for a particular person. This is a violation of the principle that has existed throughout the history of Australian police and before that only a member of the Judiciary can order the detention of a person. This power has only ever been vested in members of the Executive in countries described, without argument, as totalitarian. Given that such orders are made on the basis of suspicion, not evidentially-proved guilt, it is even more important than a respected, *independent*, authority verifies the validity of the suspicions. Granting such power to the executive is unprecedented and there is no evidence of a need. Even in times of declared war against a specific national enemy such powers were subject to greater review than they are under the Bill. I would like to think that impartial and fair review would become more common, not less, in fifty years of this nation's development.

[6] Little v The Commonwealth (1947) 75 CLR 94

Issuing authorities (s 105.10(1))

There is a strong claim that it is unconstitutional for the government to grant powers in the way suggested by s 105.10, specifically s 105.10(1). This subsection is one of many that asks members of the judiciary to take action, which I have argued is punitive, on a basis other than proven criminal guilt, or holding a person so they can face trial on criminal charges. The power to issue punitive orders is vested solely in the judiciary, and the judiciary has the sole role of issuing punishments on the basis of proven criminal guilt.[7]

Lack of evidentiary burden (ss 105.10(2) and 105.12(1))

No evidence need be presented, only the applying AFP member's understanding of the facts, and the person against whom the order is to be made has no chance to respond to allegations against them. A person can, under this section (in conjunction with others), be detained on the basis of a suspicion not verified by evidence. No doubt the argument that PDOs are urgent shall be used by members of the AFP from time to time in order to prevent proper consideration of even the minimal facts presented to the issuing authority.

Continued detention without charge (s 105.14)

A person can, by s 105.14, be detained continuously without charge or conviction. s 105.14 only empowers the issuing authority to lengthen the period of detention by 48 hours but there is no limit to the number of extensions, nor the total time of detention. Based on the requirements of s 105.4(5)(b) there can never be a legal need to detain a person for more than 14 days overall with extensions of a PDO. Any time required after 14 days will be evidence of an error in the facts considered by the AFP in their initial application for a PDO. If they can find evidence of a different terrorist attack, a new PDO should be issued, unless sufficient evidence exists to charge the person under other

[7] Brennan, Dean and Dawson JJ in Lim v Minister for Immigration at [22-24].

provisions of the Criminal Code. In no circumstance should a person be detained under a PDO for more than fourteen days. Although this would seem like a logical conclusion, this limit is not stated in s 105.14. This is another drafting flaw where the intention of the lawmakers was not correctly represented by the wording of the law. This could lead to dangerous circumstances in the future. This is another case of something which is unlikely to occur but creates a dangerous capacity to occur.

Semi-judicial powers (s 105.18(1))

Despite subsection (2), s 105.18(1) supports the idea that powers are being conferred on the Judiciary. The existence of 105.18(2) shows a concern that conferring these powers on the Judiciary would be dangerous for the legislation as it would be unconstitutional. Since the powers are bestowed on people who are members of the Judiciary, and by, *inter alia*, s 105.18(3) they are granted immunities and protections of the Judiciary, despite the fact that the power is conferred in "a personal capacity" there is a clearly Judicial nature to the power.

Either the role which issuing authorities play is as part of a court, which is unconstitutional (as the Judiciary can only punish on the grounds of proven criminal guilt[8]) or the Legislature is trying, through the Bill, to vest some of the exclusive power of the Judiciary (the power of punishment) in another body, something which is again unconstitutional. The Judicial nature of these powers is emphasised by s 105.46.

Limitations on representations (ss 105.19(8), 105.37(1)(a-c))

The representations which can be made to the nominated senior AFP member are limited to those which relate directly to the detainee's treatment and the PDO itself. This doesn't permit representations on the grounds for detention, factual issues which may be relevant. Some information may require the nominated senior AFP member to act under s 105.17.

[8] Ibid.

It is essential that if a PDO has been improperly issued the time in detention for the detainee should be minimised. This could be done by allowing the detainee, or their representative, to make representations to the nominated senior AFP officer on matters of fact relating to the reasons for their detention. I believe this is another case of poor drafting failing to reflect the will of the lawmakers.

Comprehension (s 105.31(3))

This can be compared to the question of comprehension with respect to control orders, ss 104.12(4), 104.26(4).

The detaining AFP officer has no requirement to offer assistance to a detainee if the person is unable to understand that which the officer is obliged to say. A provision that, notwithstanding s 105.31(1), a police offer should take reasonable steps to ensure the detainee understands information provided to them under ss 105.28, 105.29 and 105.30, in addition to s 105.31(3) as it stands, would be neither unprecedented nor unreasonable.

Seriousness of cruel etc treatment (s 105.33)

I am of the opinion that contravention of s 105.33 should be punishable by more than two years imprisonment. Subjecting a person to cruel, inhuman or degrading treatment is a far more serious crime than that of which an officer may be guilty under s 105.45 and this should be reflected in harsher penalties. I am aware that there are existing laws being violated depending on the type of treatment, but this provision, I feel, should be strengthened.

Limitation on contact (ss 105.35(1-2))

The purpose of preventing a person from revealing that they are being detained under a PDO is, I assume, to prevent warning other members of a suspected terrorist group. This purpose is certainly not served. People across Australia, including but certainly not limited to those who may be subject to PDOs, are informing family, friends and others that to be "safe but unable to be contacted for the time being" is to be subject to a PDO.

Most reasonable people would only make a similar claim if under duress; other times most people would explain more fully.

The use of code-phrases, including those specified in the Bill, is highly likely. Only the most unintelligent of terrorist organisations would lack such phrases, and these would no doubt leave sufficient evidence that they could be arrested and tried using the normal justice system. The limitations imposed by ss 105.35(1-2) do nothing but make the laws even closer to those employed to legitimise totalitarian regimes.

Lack of privacy (ss 105.38(1-2))

Police have extensive powers over a detained suspect. The only semblance of privacy which remains is the evidence law regarding legal professional privilege and even this is restricted. Communications can be stopped in no police officer present can understand the communication. Information obtained from conversations can be freely used in evidence, if not protected by that limited privilege, without any of the approval generally required for wiretaps.

Secret detention (s 105.41)

The fact that such secrecy surrounds detention is reminiscent of laws in totalitarian regimes. Never has Australia seen anything but a transparent Judicial system, yet the Bill proposes a mechanism where even mentioning, while it is the case, that a person is detained is a crime punishable by more than twice the prison time as that which punishes an officer treating a suspected in a cruel, degrading or inhuman manner. This is simply wrong.

Limitation on questioning (s 105.42)

I am glad that there is a severe limitation on the questioning of suspects that can occur while they are detained under a PDO. Despite this, I am worried that abuse will occur and suspects will be questioned, despite the illegality. My worry arises because in a discussion with Senator Eric Abetz on 19 October 2005 he suggested that a possible use

for a PDO would be the gathering of intelligence. This is against the purpose of the existence of a PDO but is nonetheless quite possible. Because the idea is accepted, not just by Senators but also by the general public, there is a huge capacity for these laws to be abused. The danger is extreme.

Sunset clause (s 105.53)

Please consider my remarks about the sunset clause for Division 104 (control orders), referring to s 104.32.

Schedule 5

Additional Powers

Search Powers (Subdivision B)

Search powers may be used in order to obtain evidence to be used in non-terrorism-related trials. This is a misuse of the additional powers being granted in the name of national security.

Ministerial Powers (s 3UJ)

The power here granted to the Minister to make a declaration with regards to an area is unnecessary given the existing powers to declare an emergency and extended powers. Such a power may be worth considering if the threat level increases, however it has been static since late 2001 and as such I can see no reason why additional powers of this nature are required. Again, the issue isn't use soon, it is abuse later.

Sunset clause (s 3UK)

Please see my other remarks about the ineffective nature of sunset clauses.

Schedule 7

Provisions of ss 82.2(7-8) could be used to prevent the airing of legitimate views than an enemy at a given time may have a legitimate aim and thus should be encouraged. The topical example of this is the question of support of "insurgents" (also know as "freedom fighters" or "the resistance to the occupying force") in Iraq. Here the defence of good faith would not apply and despite not condoning *actual* violence (rather an organisation which uses violence to further a political aim in specific circumstances) a person would be guilty of sedition. I believe this would be inappropriate.

Although the consent of the Attorney-General is required in order to prosecute for sedition and a sensible Attorney-General would not prosecute in the above case, concern must be expressed over the possibility that an Attorney-General of the future may not be sensible. Laws should give the government only as much power as is actually necessary.