Law Council
OF AUSTRALIA

Anti-Terrorism (No. 2) Bill 2005

Senate Legal and Constitutional Committee

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Conclusions and Recommendations

1. The Law Council of Australia urges the government to abandon proposals to introduce preventative detention orders and control orders. Persons not charged with or found guilty of a criminal offence should not be subjected by the State to imprisonment without trial or to restrictions on their liberty that impair their fundamental freedoms and human rights.

2. Since the announcement by the Prime Minister of his intention to take proposals to COAG, the Law Council has publicly raised its serious concerns about the proposal to introduce control and detention orders and the inadequacy of legal safeguards and judicial review in the legislation.

3. The Law Council acknowledges the right of all Australians to an appropriate degree of security and recommends that the government complete a review of current national security laws to determine their effectiveness to deal with the threat of terrorist activity.

4. While the Law Council opposes measures that are central to the Bill, if those measures find favour with the Parliament, the Law Council strongly urges Parliament to ensure that they are accompanied by proper legal safeguards as follows.

Control Orders and Preventative Detention Orders

a. An "issuing court" should be of no less status than a Federal Court or State Supreme Court.

b. The party subject to a preventative detention order should be given the opportunity to oppose the application.

c. Safeguards to ensure that a person cannot be held under successive continued preventative detention orders. In this regard a maximum aggregate period could be prescribed, preferably 28 days.

d. Provide statutory time limits in relation to the duration of an interim order made by a Court.

e. There should be a maximum limit on the aggregate duration of control orders, preferably twelve months.

f. The Parliament should consider replacing the control order scheme with a system akin to the civil injunction process.

g. Issuing authorities should apply a test of reasonableness and relevance to materials they are invited to consider when dealing with applications for control and detention orders. Control orders should not be founded on unlimited reaching back into a person's past.

h. Proceeding with an ex parte application for preventative detention orders should only be available in exceptional circumstances prescribed by the legislation.

i. A court should be required to issue written reasons for decisions and a copy should be provided to the person subject to the order.

j. A person subject to an order should be provided with all information and evidence that forms the basis of the application for such an order and not merely a copy of an order and a summary of grounds on which an order is made. Alternatively, an issuing authority should have the authority to determine if the nature and source of the information and evidence relied upon should not be disclosed in the interests of national security.

k. Rules of evidence should apply to an issuing court in making an order.

l. In relation to an application to revoke a control order, the police should not be permitted to produce to the Court additional material gained subsequently and which they did not produce at the time of applying for an order. Such information should be prima facie inadmissible.

m. Where a child subject to a preventative detention order has informed one parent, ensure that both parents (or legal guardians) are able to communicate with each other in relation to a preventative detention order without committing a disclosure offence.

n. Access to a lawyer should be facilitated within a reasonable time of an initial preventative detention order being made.

o. Ensure that a child served with a control order or a preventative detention order is provided an explanation of the relevant order in the presence of his or her parents (or legal guardians).

p. The monitoring of contact with a lawyer is repugnant and unnecessary and should be removed.

q. Regular reports (ie. quarterly or half yearly) should be tabled in the Australian Parliament by the Attorney-General in relation to the application of the law, including the number of people in relation to whom control orders and preventative detention orders were applied for and the places and circumstances of detention.

r. Persons subject to preventative detention orders should not be held in custody with people convicted of criminal offences.

s. Effective remedies, including costs orders and monetary compensation, should be provided in relation to the imposition of control orders found not to be justified, or that are revoked or varied.

t. Provide for regular independent reviews (at least every two years) in which the matter is referred by Parliament to a suitably qualified person such as a former judge to conduct the inquiry and report.

u. Notwithstanding that the Bill provides limited review to the AAT in relation to a preventative detention order, provide for full judicial review under the *Administrative Decisions (Judicial Review) Act* 1977.

v. Ensure that police records of preventative detention orders and control orders are unable to be accessed by all police and are only retained for a limited period.

w. In relation to the treatment of photographs and impressions of fingerprints (ie. identification material pursuant to s104.22), ensure that the person is informed that the material collected has been destroyed and allow the person to have the right to be present when it is destroyed.

x. Provision for independent oversight, such as by a Public Interest Monitor, which goes beyond the investigation of complaints by the Commonwealth Ombudsman, is required.

Financing Terrorism

5. The proposal relating to financing terrorism is unable to satisfy the intended purpose unless the provisions are expressed with greater precision and specificity.

6. The provisions are likely to deter persons making donations to certain international organisations for charitable or humanitarian purposes.

7. There should be exemptions inserted in the legislation to counterbalance the penalty of life imprisonment for a person who recklessly finances terrorism.

Sedition

8. The offence of sedition should be 'modernised' without :

   a. broadening its scope,

   b. increasing penalties seven-fold, and

   c. reducing the standard of fault to recklessness.

Introduction

9. The Law Council of Australia ("Law Council") acknowledges the paramountcy of Australia's national security and supports proper measures which address threats to personal security and protect the community from possible terrorist acts.

10. These serious issues and concerns have prompted the Law Council to contribute to public debate in relation to the significant legislative changes proposed in the Anti-Terrorism (No. 2) Bill ("the Bill") and to make concerted efforts to influence proposals which vary established legal rights and safeguards.

11. The Law Council is highly critical of the Federal Government's failure to properly and fairly consult the Australian people on these proposed laws. The Law Council submits that trust in parliamentary democracy has been undermined and in particular the presumption that parliamentarians will act fairly and with decency. The Law Council reminds the government that to ignore Australia's strong democratic traditions will place at risk public confidence in the Parliament and the rule of law.

12. The Law Council strongly submits that the provision of reasonable time for public consultation about these laws is imperative to ensure that the appropriate balance between national security and the rights of the Australian people is achieved.

13. The Law Council has reviewed the Bill and provides this paper to raise its concerns in relation to the following proposed measures:

    - Control Orders;
    - Preventative Detention Orders;
    - Use of Force;
    - Sedition Offences;
    - Financing Terrorism.

    This paper is not intended to provide an exhaustive catalogue of Law Council issues and concerns. There are a number of other issues but time does not permit them to be addressed exhaustively.

Adequacy of Existing Laws

14. No fewer than thirty-one Commonwealth Acts have provisions which provide for the prevention and prosecution of terrorist acts.[1] Under the existing laws a joint task force of federal and state police with ASIO arrested and charged 17 people with terrorist related offences. The operation required the execution of 22 search warrants.

[1] Listed at: http://www.nationalsecurity.gov.au/agd/www/nationalsecurityHome.nsf/headingpagesdisplay/9F291545F46DC7B9CA256E43000565D4?OpenDocument

15. In a joint media release Australian Federal Police (AFP) Deputy Commissioner John Lawler said about the raid:

> "By working collaboratively Australia's law enforcement and intelligence agencies have managed to disrupt the alleged activities of this group and therefore protect the Australian community from a potential terrorist threat."[2]

16. Before the government "strengthens" the existing laws by removing vital protections for human rights, there should be an assessment of whether the proposed measures are proportionate to the threats that the Government seeks to counter. This must include an explanation of how important is the right affected, how serious is the interference with it and, if it is a right that can be limited, how strong is the justification for the interference, how many people are likely to be affected by it, and how vulnerable they are.[3]

17. In May 2005, Dennis Richardson, former head of the Australian Security Intelligence Organization, in his opening address before a parliamentary all-party committee reviewing ASIO's questioning and detention powers, said:

> "I would note [the legislation] has worked very smoothly so far. To be frank, there was a concern [it] would be unduly complex and difficult to administer. [What] was initially introduced into the Parliament, with our support and advice, was much simpler and, of course, tougher.
>
> We debated among ourselves whether the compromises [forced on the Government by a hostile Senate] would make it unduly complex. Our concerns were misplaced. We were wrong on worrying about it. The balance has so far been very workable …"[4]

18. Further, no serious case has been made out, by reference to existing or reasonably foreseeable circumstances, to show why these laws are necessary. As Commissioner Moroney (NSW Police) noted on 8 November 2005 at a press conference, the lessons the law enforcement authorities learned from Bali, Madrid and London were lessons of coordination, cooperation and organisation in policing. Government effort should be concentrated on ensuring our law enforcement and intelligence authorities are properly resourced and organised to deal with any perceived threats.

Control Orders and Preventative Detention Orders

Australia's Criminal Justice System

19. Australia's formal criminal justice system embraces critically important guarantees and safeguards, including:

    a. the right of an accused to a fair trial,

    b. rules of evidence which are fair,

[2] http://www.afp.gov.au/afp/page/Media/2005/mr051108terrorism.pdf

[3] UK Joint Committee on Human Rights, *Report of the Joint Committee on Human Rights* (6 May 2004), paragraph 47.

[4] May 19 2005, transcript of proceedings,

c. the presumption of innocence; and

d. the requirement that guilt be established “beyond reasonable doubt”

and these safeguards and minimum guarantees have been developed to reduce the risk of innocent individuals being convicted and punished and to ensure the guilty are convicted and punished, is based on a fair process.

20. The Bill proposes to introduce a system of preventative detention and control orders which will establish a “de facto” or “informal” criminal justice system without the proper safeguards and guarantees provided in the formal system.

21. According to the Bill, people can be deemed to be threats to national security and "suspected international terrorists" and imprisoned for potentially an extensive period under successive preventative detention orders or restricted from movement, speech and expression and association for up to 12 months at a time under a control order. These orders can be sought:

a. In the knowledge that no relevant criminal offence has been committed;

b. On the basis of evidence that is inadmissible in a criminal trial;

c. To the civil evidentiary standard that requires proof only on the balance of probabilities; and

d. Where the person the subject of the orders is accused of being a danger to national security but is absent from the proceedings.

22. The Law Council strongly submits that it is unwarranted and unacceptable that the Federal Government should seek to circumvent the safeguards of the criminal justice system in this manner. To do so is a violation of fundamental human rights. The government proposes to imprison and restrict the freedoms of people in relation to whom there is insufficient evidence to prosecute for a criminal offence.

23. The Law Council urges the government to apply existing processes in the criminal justice system. It is unacceptable that people should be imprisoned or their freedom prohibited or restricted unless they are promptly charged with criminal offences and tried in proceedings that comply with the fundamentals of our criminal justice system and the rule of law.

24. Orders of this type, which interfere with basic human rights, should only be introduced when strictly necessary. The government has given no justification for this additional detention. There is no explanation of why these powers of detention are said to be required in addition to those which currently exists under s34D of the *Australian Security Intelligence Organisation Act* 1979.

25. Should the proposed measures be introduced, the Law Council strongly urges the Parliament to ensure that proper legal safeguards, protections and guarantees are provided, including those listed above.

Inadequate Legal Safeguards and Protections

Making Orders

26. The proposed law does not permit the person who is subject to an application for a preventative detention order to attend and present his or her case.

27. The Law Council believes that courts or judicial officers should at least be provided with the discretion to permit this in circumstances judged by them to be appropriate. Should the person require time to prepare their case, laws similar to the bail laws should apply.

28. It is a significant contravention of the rule of law for a person to not be furnished with all information and evidence relied upon to request an order be made. This severely impedes a person's ability to oppose an order or to apply for an order to be revoked. A person who is the subject of a detention or control order should be provided with all the information and evidence that forms the basis of the application for such order, or at least permit the court to exercise discretion in this regard.

29. The denial to the person subject to a detention or control order of the basis upon which the order is made may impermissibly interfere with the right to apply for a constitutional writ, under s75(v) of the Australian Constitution. Moreover, the summary of the grounds on which an order is made is prepared by the police and is required to be provided only in relation to an initial preventative detention order pursuant to s105.32. There does not appear to be an obligation to provide any ground in relation to the continued preventative detention order.

30. The Law Council observes that there is potential for a person to be detained for a lengthy period in circumstances where rolling preventative detention orders are made. The Law Council believes that there needs to be proper safeguards to address this concern including prescribing a maximum period that a person can be held under successive preventative detention orders (preferably 28 days).

31. The proposed laws do not make reference to the application of the rules of evidence by an issuing authority in relation to making orders. It is unclear what role, if any, these courts are to have in relation to issuing orders.

32. The Law Council suggests that there is a significant risk that rules of evidence may not be applied to determine for instance, issues of admissibility, relevance and probative value as applies to making an order to issue warrants. The Law Council suggests that it is appropriate for the rules of evidence to be applied by an issuing authority in making an order given the serious impact of an order on a person's liberty.

Conditions of Orders

33. The Law Council has serious concerns that people who are not charged and not tried for offences will be detained with people who have been charged or convicted of offences pursuant to s105.27. Persons subject to preventative detention orders should not be charged with or held in custody with people convicted of criminal offences.

Revocation of an Order

34. In relation to an application to revoke a control order, the police should not be permitted to produce to the court additional material gained subsequently which they did not produce at the time of applying for an order. Alternatively, the Law Council believes that judicial discretion should be provided to determine whether additional material should be admitted.

35. Currently, it is unclear how records of the application of control orders and preventative detention orders will be treated following expiry of the orders. The Law Council believes that police records of preventative detention orders and control orders must not be used against the person in other circumstance. The legislation must ensure that such records are retained for a limited period, for example, two years.

36. In relation to the treatment of photographs and impressions of fingerprints (ie. identification material pursuant to s104.22 and s105.44), the legislation must entrench the right of the person to be present when the material is destroyed and, if that right is not exercised, to be informed that the material collected has been destroyed.

37. The court's power to confirm an interim control order (s104.14), appears to restrict the court from revoking or varying the interim order in circumstances where the subject of the order does not appear at the hearing.

38. Section 104.14(4) states that the court may confirm the interim order where a party or their representatives do not appear. The power to declare void, to revoke or to vary the interim order on the other hand appears to be provided for only in s104.14(6) and (7).

39. Concern arises because s104.14(5) provides that the court may taken the action in subs (6) or (7) "if the person…or a representative" attends the hearing. That is, if the person or their representative attends the hearing, the court has the power to declare void, revoke or vary the order, but no provision is made for the court to do any of those things if there is no appearance for the subject. This construction of the section gains weight from subs (4), which specifically states that the court may confirm the order in the event of no appearance by the subject.

40. Accordingly, if that is the correct construction, it leads to the absurd result that the court, in circumstances where there is no appearance by the subject, is constrained to either confirming the interim order, or making no order (effectively allowing the interim order to continue). That would be so even where the court was convinced, for whatever reason, that the basis for the interim order was unsustainable, or that it had been improperly made.

Judicial Review

41. The extraordinary measures found in this Bill will confer great and unusual powers on the executive. The Law Council believes that there is a need to provide for judicial review to monitor and control the use of such powers.

42. Section 105.51 provides for legal proceedings in relation to preventative detention orders. The Bill proposes to deny detainees access to review under the *Administrative Decisions (Judicial Review) Act* 1997. An application may be made to the Administrative Appeals Tribunal Security Division for review of the

decision to make a detention order or to extend an order which is in place after the order expires. It is entirely unclear whether and what type of proceedings could be brought in the Federal Court.

43. A State or Territory court may require pursuant to s105.52(3) that the Commissioner of the Federal Police provide to the Court and the parties the information that was put before the person who issued the Commonwealth order when the application for the order was made. This provision maintains the effect of the *National Security Information (Criminal and Civil Proceedings) Act* 2004. There does not appear to be any provision in s105.51 which provides for this information to be put before the Administrative Appeals Tribunal or the Federal Court.

44. These provisions could mean that a merits review of the detention or control order becomes impossible because the court does not have the information required to make a determination on the merits. In any event the extent to which merits review is allowed is entirely unclear in this Bill.

45. The power to make an initial preventative detention order is given to a senior AFP member. This provides even less protection than providing for a judicial officer to make the order in his or her personal capacity.

46. The judicial officers entitled to make continued preventative detention orders include Family Court Judges, Federal Magistrates, non judicial members of the AAT and retired judges. This may involve some judicial officers and some non judicial tribunal members who have no specialist background in matters akin to the criminal law in the confirmation of these orders. These arrangements are not optimum for the gravity of the situation in which persons the subject of such orders will find themselves.

Constitutional Issues – The Role of the Judiciary in Making Orders

47. The Law Council is of the opinion that the role given to the judiciary in making a control order or a preventative detention order may be invalid under the *Commonwealth of Australian Constitution Act* 1900 ("Australian Constitution").

Control Orders – Division 104

48. The scheme of Division 104 discloses an invalid attempt by the Commonwealth Parliament to confer non-judicial power on Federal Courts. The power or jurisdiction to make a control order is to be given to an "issuing Court" which is defined to mean the Federal Court, the Family Court or the Federal Magistrates' Court. The power to make the orders is conferred upon Federal Courts and, of course, it is judicial power that may be conferred upon such courts. To combine executive and judicial power in a court is to remove a vital, fundamental and well-established constitutional safeguard.[5]

49. The Law Council acknowledges that a court may exercise non judicial functions, though not every non judicial function. The union of judicial and non judicial

[5] *Attorney General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 541

functions is possible provided that the power joined to the judicial power is not "incompatible" or "inconsistent" with it.[6]

50. There are many administrative functions which form incidents in the exercise of judicial powers and which may be committed to a court, but are not themselves exclusively judicial.[7]

51. The control order provisions confer non-judicial power on the issuing Courts because the procedure is inherently non-judicial. The first step is the interim order which is made by the court in the absence of the party subject to the order. The person subject to the order is furnished with the order and a summary of the grounds, but not the material, on which the interim order is made.

52. An essential feature of judicial power is that it is exercised in accordance with judicial process and, critically, that includes the application of the rules of natural justice. It is of the essence of judicial power that, in its exercise, there be an open and public inquiry, subject to limited exceptions, and that there be an application of the rules of natural justice.[8] The absence of fair procedures including the lack of full disclosure of the basis upon which orders are sought and made does not accord natural justice to the person in question.

Preventative Detention Orders – Division 105

53. The Bill proceeds on the assumption that preventative detention orders are not being made in the exercise of the judicial power of the Commonwealth and that these non-judicial functions are conferred upon Judges in their personal capacity, as persona designata, rather than in their judicial capacity.

54. Preventative detention orders are to be made ex parte, without any notice to the person subject to the order. The proposed law does not give the detainee a right to challenge the order. Judicial supervision under the *Administrative Decisions (Judicial Review) Act* 1977 is expressly denied, though limited review to the AAT and supervision by way of the constitutional writs remain.

55. The Law Council submits that making a preventative detention order may be characterised as judicial power in which case, it is a power that only courts may enjoy.

56. Should this be the case, it would be unconstitutional for the Australian Federal Police as members of the executive to exercise that power.

57. Alternatively, the power to make continued preventative detention orders that is conferred upon Federal judicial officers, may be characterised as a non judicial function which may be incompatible with the exercise of judicial power.

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[6] In *Victorian Stevedoring and General Contracting Co v Dignan* (1931) 46 CLR 73 , for example Evatt J. said in general terms that a court set up by the Federal Parliament might exercise non-judicial functions, though he clearly did not mean any and every non-judicial function. In other cases it has been suggested that the union is possible so long as the power joined to the judicial power is not "incompatible" or "inconsistent" with it: see for example the judgment of Latham C.J., in R. v. Federal Court of Bankruptcy; Ex parte Lowenstein (1938) 59 CLR 556, at p 566 .

[7] (1953) 87 CLR, at p 151. (at p544)

[8] As Gaudron J said in *Harris v Caladine* (1991) 172 CLR 84 at 150. "[Judicial power] is a power which cannot be exercised until the 'Tribunal which has power….is called upon to take action'" which (subject to limited exceptions) proceeds by way of open and public inquiry, which involves the application of the rules of natural justice and which is directed to ascertaining "the law as it is and the facts as they are, followed by an application of the law as to the facts as determined."

58. Federal judicial officers may not be validly given powers which are incompatible with the exercise of their judicial functions. Such incompatibility may arise when public confidence in the integrity of the judiciary is diminished.

> "The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch".[9]

59. McHugh J and Gummow J in *Grollo v Palmer*[10] adopted the opinion of the Supreme Court of the United States in Mistretta[11] in concluding that the reason the Constitution restricts the availability of Ch III judges to perform non-judicial functions is:

> "The legitimacy of the Judicial Branch ultimately depends upon its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action."

60. Generally, the involuntary detention of a citizen by the Commonwealth is permissible only as a consequential step in the adjudication of criminal guilt. That is, it may be that a citizen may be deprived of liberty, under a law of the Commonwealth, only upon an adjudication of guilt.[12] There are some exceptions including in relation to illegal immigrants, persons with mental conditions or have infectious diseases which pose a danger to the community or the detention of persons who are awaiting trial which are characteristically different from the circumstances of preventative detention orders.

61. The detention is for the purpose of crime prevention, preventing an imminent terrorist act, (and for the purpose of preserving evidence of or in relation to a past terrorist act – a committed crime). The police are given the powers of an arresting officer in connection with the taking of a person into custody, and the detainee may be kept in prison or remand centre.

62. In *Fardon v AG* (Qld)[13], Gummow J said,

> "...detention by reason of apprehended conduct, even by judicial determination on a quia timet basis...is at odds with the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct."

63. Gummow J also said that detention without adjudication of criminal guilt, even as a result of a judicial process, was inconsistent with Chapter III of the Australian Constitution.[14]

64. The function that the Division confers upon judicial officers in making a continued preventative detention order is relevantly identical with that conferred upon the Commissioner and other senior officers of the AFP in connection with the making of initial preventative detention orders. In each case, the issuing authority makes

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[9] Wilson Minister for Aboriginal & Torres Strait Islanders Affairs (1996) 189 CLR 1, Grollo v Palmer (1995) 184 CLR 348.

[10] (1995) 184 CLR 348 at 377 and 392.

[11] (1989) 488 US 361 at 407.

[12] See *Fardon* v *A-G. (Queensland)* (2004) 210 ALR 50; *Al-Kateb* v *Godwin* (2004) 208 ALR 27.

[13] (2004)210 ALR 50 @[84]

[14] (2004)210 ALR 50 @[85]

the order if he or she is satisfied that there are reasonable grounds to suspect that the subject will engage in a terrorist act.

65. Arguably, the Division discloses that the judicial officer, in making a continued preventative detention order, is exercising a police function that is relatively identical to that of an officer of the AFP in making the initial preventative detention order. The judicial officer is exercising a police function of such a kind that may prejudice public confidence in the independence of the judiciary.

Use of Force

66. The Bill extends police powers of arrest such as the power to detain and take into custody, to enter and search premises, to frisk search and carry out ordinary searches, to persons subject to preventative detention orders.

67. Should the government introduce preventative detention orders, the Law Council urges the government to insert a provision that expressly provides that a police officer cannot cause serious injury or death in exercising the power to detain under such an order. A person who is the subject of such an order is not suspected of having committed a criminal offence. Police normally have this power when engaged in the process of arresting an offender and/or where a person poses an immediate threat of serious injury.

68. The Law Council believes that the legislation should contain a positive duty on police to ensure that they employ non-violent strategies in taking people into custody under preventative detention orders.

69. The Law Council submits that the inclusion of such powers in the legislation is highly problematic and may lead to unjustified killing and serious injury. There must be stringent safeguards to ensure that the incident in London in which an innocent Brazilian national, Mr Jean Charles de Menezes, was fatally shot by armed police, is not repeated here.

70. Police should, of course, retain the power to defend themselves and protect others from serious injury where reasonably justified.

71. The Law Council believes that this power warrants a special training requirement for police and other law enforcement officers. Safeguards must include appropriate selection of police for this work matched with intensive training and discipline.

Disclosure Offences

72. The Law Council is concerned that control orders and preventative detention orders are to be kept secret in every case pursuant to s105.41. The proposed disclosure offences associated with orders provide that it is an offence to disclose information to another person while a preventative detention order is in effect. The Law Council believes that there does not appear to be good reason for such secrecy in every case.

73. The Law Council submits that it is a better policy for the State or the person who is the subject of an order to have the ability to seek a secrecy order.

74. Should the government proceed with the disclosure offence provisions, the Law Council strongly recommends that a court should have the discretion to determine whether the orders should be kept secret similar to the discretion of a court to currently close a court in certain circumstances.

75. The Law Council is also concerned that broadcasters and publishers may publicise details of persons who have previously been subject to preventative detention orders and this will result in adverse consequences including stigmatisation for that person and his or her family and perhaps, their community.

76. The Law Council recommends that laws should be introduced that make it an offence to publish details of the person who was the subject of an order without that person's written consent. In the absence of such laws, there is the potential for serious conflict and divisions within communities.

77. The Bill makes no provision for access to an interpreter for detainees. Section 105.34 restricts a detainee's access to any person other than a family member (s105.35), a lawyer (s105.37), a parent or guardian (s105.39) or the Commonwealth Ombudsman (s105.36). The only reference to interpreters is in relation to monitoring communication between persons and the detainees. As matters presently stand an interpreter, for example, assisting a lawyer in communicating with a detainee would be committing an offence in relation to any of the proscribed information it interprets for that lawyer as would the detainee and the lawyer (in respect of any proscribed information it imparts via an interpreter to the detainee).

78. In relation to persons under 18 or incapable of managing their own affairs, the Second Reading speech by the Attorney General said that the Bill provided for special rules. In fact, the communication restrictions s105.41(3) imposes on parents and guardians in respect of persons under 18 or incapable of managing their own affairs arguably places those detainees at a disadvantage as compared to other detainees. For example, a person under 18 or incapable of managing their own affairs cannot have their parent or guardian instruct a lawyer on their behalf in Federal Court proceedings unless the detainee has also had contact with that lawyer. Similarly, it is arguable s105.41(3)(e)(i)-(iii) do not allow them to have their parent or guardian instruct a lawyer to act for them on complaints to the Commonwealth Ombudsman, State authorities or senior AFP member.

79. Further, s105.41(3)(c) makes it an offence for one parent or guardian to tell the other parent or guardian any information about the detainee other than that they are "safe and not able to be contacted for a while" unless that other parent or guardian has also had contact with the detainee.

80. In relation to lawyers communicating with other lawyers, the wording of s105.41(2)(d)(i) is quite broad and, on its face, appears to provide an exclusion for disclosures related to Federal Court and other identified proceedings. However s105.41(2) read together with the Explanatory Memorandum suggest that a lawyer could not disclose information lawfully obtained from a detainee for the purposes of seeking advice from a barrister because "*it should not be necessary to disclose the fact of the particular person's detention to that barrister*". How could any meaningful advice be obtained since the disclosure relates to "*any information that the detainee gives the lawyer in the course of the contact*" (s105.41(2)(b)(iv))?

Other Issues

Contact Rights in Detention

81. There is no provision in the Bill for the detainee's doctor to be contacted by or communicate with and treat a detainee.

82. There is no provision in the Bill for the doctor to be contacted by a family member or lawyer. Presumably medical treatment for the detainee is left to the discretion of the AFP or other detaining authorities.

Inadequate Safeguards including Removal of an Avenue of Judicial Review

83. The Law Council observes that there are insufficient checks and balances in relation to making control or preventative detention orders.

84. The Law Council believes that a judge, or for that matter the Attorney General, has limited capacity to inquire as to the substance or accuracy of the matters contained in the material put before him or her by the Australian Federal Police. The so called facts are untested.

85. The Law Council believes that the requirements of written consent from the Attorney General, and judicial review of the request based on a balance of probability does not provide sufficient safeguards to minimise errors, bias and bad judgement.

86. Notwithstanding limited review by the AAT, the Bill removes judicial review and scrutiny in accordance with the *Administrative Decisions (Judicial Review) Act* 1977 in relation to decisions of the Attorney General in consenting to a request to invoke preventative detention orders and control orders.

87. The Law Council believes that removing this safeguard will prevent effective scrutiny of government decision-making, which will in turn weaken accountability and transparency in government processes in relation to these extreme measures.

Limited Access to Legal Representation

88. The proposed law indicates that a person who is the subject of a preventative detention order may contact a lawyer. However, the proposed law does not require authorities to facilitate access to a lawyer. The Law Council believes that access to a lawyer should be facilitated within a reasonable time of an initial preventative detention order being made.

89. Section 105.38 provides that any contact between a detained person and his or her lawyer must be monitored. Thus rules in relation to client/lawyer confidentiality are abandoned. This proposal is anathema to a system of justice which depends in significant part on the sacrosanct nature of client/lawyer communications. The Law Council urges the government to remove this provision from the Bill.

90. Should this provision pass into law, over the serious objections of the Law Council, the courts should be given discretion to determine whether such monitoring is required.

91. These measures hinder the administration of justice. Such measures will seriously impede a detained person in giving sensible instructions to his or her lawyer in which sensitive but innocent information is contained which could form, in part at least, the basis of an application challenging such an order to be brought to the Federal Court, in circumstances where that information is fed directly to the State. It constitutes an unacceptable obstruction to lawyers performing their duty to the client.

92. A person detained subject to a preventative detention order can contact a lawyer while they are detained (s105.37); but the permissible purposes of contact are heavily restricted to

    a. obtaining advice / giving instructions regarding the issue of the order; or

    b. the treatment of the subject while in detention.

    Contact with a lawyer for any other purpose is not permitted. This is a very significant diminution of the right to legal advice and is not acceptable.

93. A lawyer can only have contact with a detained person if the communication can be monitored by the police (s105.38(1)). The rationale for legal professional privilege (full and frank disclosure by the client to the lawyer) will be utterly undermined by this provision. (See Lord Hoffmann in *R (Morgan Grenfell) v Spec Comm of Income Tax* [2002] UKHL 21 at [7]). Again, the Law Council cannot accept this approach.

94. We draw attention to the following proposals:

    a. The police must be able to monitor both the content and the meaning of communication between a lawyer and a detained person (s105.38(1));

    b. A detained person may communicate with the lawyer through an interpreter providing the police can monitor the content and meaning of the communication effectively (s105.38(2));

    c. An interpreter may be, but does not have to be, a police officer (s105.38(3));

    These are unnecessary restrictions which interfere with a lawyer's ability to properly represent the client.

95. Section 105.38(4)(b) seems to suggest that sometimes it will not be "reasonably practicable" to provide an interpreter "as soon as practicable". This means that legal advice – even on the narrow terms of s105.37 – will sometimes be denied because the police are unable or unwilling to provide an interpreter to assist in "monitoring".

Independent Oversight

96. The Law Council strongly suggests that there is a vital role to be played by an independent body such as a Public Interest Monitor (PIM) in all aspects of the

operation of any law that provides for control orders and preventative detention orders.

97. The PIM should be involved at all stages of the processes by which these orders are obtained and reviewed. The PIM should also monitor their enforcement.

98. The need for a PIM, with access to all material upon which an application for such orders is based, is acute. This is particularly so if orders are to be granted in the absence of the persons who are to be subject to them, or those persons and their lawyers are denied access to all of the material upon which an order is sought.

99. A PIM would not inhibit the operation of the proposed law. It would enhance it. This has been the experience in Queensland, where a PIM plays a beneficial and helpful role.[15]

Reporting and Review

100. The Attorney General must prepare an annual report on the operation of laws relating to detention and control orders and table it in Parliament.

101. The Law Council suggests that yearly reports are inadequate. Regular reports on a quarterly or half yearly basis should be tabled in the Australian Parliament by the Attorney-General in relation to the application of the law, including the places and circumstances of detention. Information in the Annual Report should include the number of young persons aged 16-18 years and foreign nationals subject to orders made. The annual report should also indicate the number (and proportion) of persons subject to orders who were subsequently charged and convicted of terrorist related offences.

102. Further, as annual reporting is inadequate as a system of review, the Law Council believes that the operation of the Bill should be subjected to periodic statutory reviews of at least every 2 years (instead of 5 years).

[15] The Public Interest Monitor (PIM) is a statutory officer in Queensland essentially established to counterbalance invasive law enforcement powers introduced in 1997 allowing warrants to be obtained from a Supreme Court judge or magistrate permitting:

1. the use of surveillance devices (listening, visual, and tracking devices installed in a private place, or in a public place, on a person's clothing or on a moveable object), and
2. covert or undercover operations

Broadly, under the Queensland model, the role and responsibilities of the PIM are to:

- appear in the Supreme Court or Magistrates Court at the hearing of an application for a surveillance warrant or covert search warrant to test the validity of the application by:

i. presenting questions to the applicant police officer

ii. examination or cross-examination of any witness, and

iii. making submissions on the appropriateness of granting the application.

- Monitor compliance by law enforcement officers regarding applications for the warrants (both before and after the issue of a warrant),
- Gather statistical data about the use and effectiveness of surveillance warrants and covert search warrants,
- Report, whenever appropriate, to the police commissioner or Crime and Misconduct Commission on non-compliance with the Act, and
- Report to Parliament annually on the use of surveillance and covert search warrants.

The PIM has operated very successfully in Queensland since that time, under both Coalition and Labor governments

103. The *Security Legislation Amendment (Terrorism) Act* 2002 ("SLAT Act") and the review pursuant to the *Australian Crime Commission Act* 2002 are required to occur after three years. The Law Council believes that a similar timeframe for such extreme laws as are found in the Bill is necessary.

104. The Law Council also notes that, as the sunset clause takes effect after 10 years, a review after 5 years appears inadequate in correcting problems and implementing change, where appropriate. The Law Council suggests that the review should be referred by Parliament to a suitably qualified person such as a former judge to conduct the inquiry and report. Alternatively, regular reviews which are similar to that provided under the SLAT Act are also appropriate. Law Council nominees should be appointed to any such review.

Operation of the Sunset Clause

105. According to the Bill, sunset clauses operate in relation to control orders and preventative detention orders and the powers to stop, question and search persons in relation to terrorist acts in which these provisions cease to have effect after 10 years from the date of commencement (proposed s104.32 and s105.53) and in relation to certain police powers under the Crimes Act (proposed s3UK).

106. Should the recommendation made by the Law Council in relation to financing terrorism and sedition be ignored, the Law Council believes that the sunset clause should be extended to these provisions due to the over reach of the proposed law.

Financing Terrorism

107. The Law Council acknowledges that Div 103 of the Criminal Code currently deals with financing terrorism. Notwithstanding this, the Law Council believes that schedule 3 of the Bill on Financing Terrorism extends its application and is likely to target innocent, well meaning people.

108. Proposed s103.2 applies to donors who make funds available or collect funds (directly or indirectly) and who are reckless in relation to whether the funds will be used to facilitate or engage in a terrorist act. The offence is committed notwithstanding that no terrorist act occurs, that the funds will not be used for a specific terrorist act, or that they will be used for a number of terrorist acts.

Unintended Consequences

109. The Law Council believes that the proposed measure is likely to lead to a number of unintended results including discouraging donations to charitable organisations.

110. The Law Council also believes that the Bill's provisions are likely to exacerbate community, and possibly racial, tensions as members of the public who propose to donate funds to seemingly needy groups or causes decide which recipients should be questioned, and to what extent, about how they propose to use the donated funds.

111. Further, there is a genuine risk that placing an onus on a person to make an enquiry, may also place a person in breach of anti-discrimination laws.

112. The proposed measure in relation to financing terrorism casts the net too wide and encroaches on everyday activities

113. The proposed measure has the capacity to catch all financial transactions and everyday activities including purchasing items, paying bills, banking transactions and charitable and other collections, many of which typically do not warrant, require or allow an enquiry as to the purpose of the funds.

114. The failure to make an enquiry could constitute recklessness, especially where the recipient is later shown to have been engaged in terrorist activities. This would be disproportionate in circumstances where a person made an insignificant donation as there is no minimum amount to commit the offence, so that the purchase of a $5 raffle ticket could be sufficient.

115. The Law Council believes that to create criminal offences in relation to a wide range of financial transactions in which there is a degree of risk that a recipient may use the transacted funds to facilitate or engage in a terrorist act, thereby incriminating the payer, is inappropriate and unnecessary.

116. Measures which create criminal offences, particularly where there is a real risk of loss of liberty, must be drafted precisely and with specificity. Casting the scope of these offences so wide is likely to create uncertainty and produce unjust consequences. This provision typifies one of the foundation problems with the legislation. No evidence has been brought to bear to make the case for these changes. In this instance, we pose the question: Where is the evidence that ordinary Australians are wittingly or unwittingly financing terrorist activities as to justify these new and drastic criminal sanctions?

Recklessness as the Standard of Criminal Responsibility

117. The Law Council is opposed to setting the fault element to "recklessness". Where a person convicted of this offence faces the real possibility of losing their liberty and serving a lengthy prison term, intention and knowledge should be the standard of fault required.

118. A central objective of criminal law – deterring criminal behaviour – is better achieved by punishing a person who knowingly and intentionally commits an offence.

119. The High Court has recognised that, for the most serious offences in the criminal index based on the prescribed maximum sentence of life imprisonment and the impact of such criminal activity on society, the gravity of an offence necessitates the requirement of "guilty knowledge" to be an element of the crime.[16]

120. Section 5.4 of the Criminal Code defines recklessness as knowledge of a substantial risk of a circumstance existing or knowledge of a substantial risk that a circumstance or result will occur.

121. The issue of recklessness raises the fundamental question as to what will be necessary to establish that the payer was not reckless. The recent report on the Australian Wheat Board "knowingly" providing funds to the Saddam Hussien Government via a Jordanian trucking company provides an interesting example if

[16] *He Kaw Teh v R* (1985) 157 CLR 523

the facts were slightly different. For example, what if the funds had flowed through to a terrorist organisation, would the Board's conduct amount to the reckless financing of terrorism?

122. Further, the Law Council believes that the penalty of life imprisonment is unreasonable and not proportionate to an offence unknowingly committed by a person.

Independent Review

123. The current financing terrorism provisions in the Criminal Code, and now the proposed provisions in the Bill, are excluded from independent judicial review under the *Security Legislation Amendment (Terrorism) Act* 2002 ("SLAT Act").

124. The Law Council strongly recommends these new financing terrorism provisions be subject to the same review as other terrorism provisions.

Sedition Offences

125. The Law Council observes that the government has said the proposed measures in relation to sedition primarily "modernise" the relevant offences.

126. The Law Council has reviewed the draft provisions on sedition and concludes that the proposed changes significantly broaden the law on sedition inappropriately and to the extent of unnecessarily interfering with freedom of speech and expression.

127. The Law Council believes that the Bill does not protect statements or publications that may fall within the constitutional doctrine of implied freedom of political communication.

128. The Law Council submits that while this is an evolving area of the law, such implied freedoms clearly exist – and individuals or organisations are, at law, entitled to exercise this political freedom (however defined). Yet, in spite of this implied freedom, media organisations may still be reluctant to broadcast or published material out of caution that they may indirectly or recklessly "urge" the actions of others – and thereby contravene sedition provisions in the Anti-Terrorism Bill. Such caution is not in the interests of informed political debate. As a result, there should be an exemption for media organisations broadcasting or publishing content in good faith, by simple amendment to s80.3.

129. The Law Council notes that with the broadening of the circumstances that would fall within the new offences, the maximum penalty has increased seven-fold to seven years imprisonment for all of the new offences in comparison to the 12 month term of imprisonment penalty for the current offence.

130. Further, the fault element for most of the offences is lowered from intention and knowledge in the current offence to recklessness in the proposed offences.

131. Additionally, it appears that the requirement in current law (subs. 24E(2)) that a person can not be convicted of sedition upon the uncorroborated testimony of one witness is abolished.

132. The Law Council is concerned that the restrictions on communication under the proposed new offences are disconnected from the real issue of the threat of terrorist acts and are unwarranted, inappropriate and unnecessary.

133. The Bill broadens the sedition offences to include:

- urging violence within the community (subs. 80.2(5));
- urging a person to assist the enemy (subs. 80.2(7));
- urging a person to assist those in armed hostilities (subs. 80.2(8)).

134. The concept of "urging" another person to do certain acts is undefined and might potentially be construed to include broadcasters, publishers, journalists and media commentators. The Law Council believes that such changes imperil freedom of speech and expression. They are also unnecessary.

135. A significant change is the use of the phrase "urges another person" instead of the current concepts of engaging in conduct or uttering/publishing words. Each of the new offences is made out if the accused person "urges another person" to do the prescribed act.

136. "Urge" or "urges another person" is not defined in the proposed Bill, or the Criminal Code. Applying such a provision to current context, it is highly likely that broadcasters and publishers, as well as the journalists and commentators who work for them, who engage in robust debate – whether in the print media, on television or on radio – could be considered in some contexts, to be held to be "urging another person".

137. The proposed measures have not been appropriately and reasonably adapted to address the terrorist threat and disproportionately infringe on freedom of speech.

138. This is also evident in the proposal to create the offences in subs. 80.2(7) and 80.2(8) in relation to "urging" another person to engage in conduct, which is intended:

> *… to assist, by any means whatever, an organisation or country…*

that is either at war with the Commonwealth or engaged in "armed hostilities against the Australian Defence Force". Such offences go well beyond the traditional common law understanding of sedition, could be construed to include peace activists and protestors, and may be unconstitutional.

139. Such a broad framing of laws may be beyond the powers of the Commonwealth Parliament.

140. Pursuant to current law, sections 24A to 24E of the *Crimes Act* 1914 have been held to be within the constitutional powers of the Commonwealth Parliament by the High Court in *Burns v Ransley*.[17] The reasoning of each member of the High Court differed in the case. Dixon J, for example, said that the legislative powers of the Commonwealth Parliament validly extend to measures for the suppression

[17] *Burns v Ransley* (1949) 79 CLR 101

of incitements to the actual use of violence for the purpose of resisting the authority of the Commonwealth or to effect a revolutionary form of government.[18]

141. Dixon J also said:

> "…I think that the legislative power authorises measures against incitements to the use of violence for the purpose of effecting a change in our constitutional position under the Crown or in relation to the United Kingdom or in the Constitution or form of government in the United Kingdom.
>
> But the power must extend much beyond inchoate or preparatory acts directed to the resistance of the authority of government or forcible political change…"[19]

142. The proposed offences are made out if recklessness, as distinct from intention, is proved. [Refer to the Law Council concerns above in relation to recklessness as the standard of fault discussed in respect of "Financing Terrorism".]

143. The requirement of an intent to cause violence or public disorder was inserted in the current offences of sedition pursuant to s24C and s24D of the *Crimes Act* 1914 in 1986 following the recommendation of Justice Hope, who conducted the Royal Commission to review the activities of Australia's Security and Intelligence Agencies in 1983-1984.

144. Even if the Act is to be left as it stands, Section 80.3 dealing with acts of good faith, should be expanded to provide a defence of good faith where there is a publication, or reporting in good faith by media of otherwise seditious conduct, or the utterances of others.

145. The Law Council notes that the government proposes to introduce the new sedition provisions and review them in its first year of operation. The Law Council believes that it is bad policy to introduce flawed legislation creating serious criminal offences for which offenders face terms of imprisonment when some doubt obviously exists about its appropriateness. The Law Council recommends that the existing sedition laws be reviewed to determine the need to have them in view of the number of new terrorist offences introduced. The new provisions ought to be deferred pending that review.

Breach of International Standards

146. Human Rights are not just there for good law-abiding people. Human Rights establish a standard of basic humanity, a mark of civilised behaviour.

    a. "A nation's level of civilisation is to be judged not by the way it treats the majority of its citizens but what it does to its minorities, its criminals, its troublemakers, its misfits.

    b. You cannot defend and promote a democratic system by taking away the very freedoms that made it a democracy in the first place. All that

[18] *Burns v Ransley* (1949) 79 CLR 101

[19] *Burns v Ransley* (1949) 79 CLR 101, 116

> happens is that the country becomes unfree and unpleasant – and probably still unable to resolve the terrorism problem with which it started off."[20]

147. In developing strategies to fight terrorism, it must be borne in mind that even defendants charged with the most appalling and despicable crimes remain entitled to basic rights - which are enshrined in international instruments.

148. The Law Council submits that a number of international standards established under the International Covenant on Civil and Political Rights 1966 and the International Covenant on Social, Economic and Cultural Rights 1966 and the Convention on the Rights of the Child 1989 are likely to be breached in relation to several measures proposed in the Bill. The relevant Articles of the Covenants and the standards breached are discussed below.

International Covenant on Civil and Political Rights 1966

149. Article 9

> "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

150. According to Article 9, a person who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. In this regard, the international standard is the right to due process.

151. According to the Bill in relation to control orders and preventative detention orders, neither the person who is subject to the order nor anybody acting on his or her behalf is given all information that forms the basis of the order.

152. The Law Council submits that it would be virtually impossible to challenge the order on the basis of erroneous or false information underpinning it given the person detained and/or his lawyer would not be entitled to see what information it was that formed the foundation of the application and no doubt the order given.

153. Article 14

a. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

b. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

c. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

[20] The Chair of the UK Bar Council, Guy Mansfield QC in his letter to the Law Council on 3 November 2005 expressing serious concerns in relation to the Anti-Terrorism Bill (No. 2) 2005.

d. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

e. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

f. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

g. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

154. The powers which are contained in the Bill in relation to control orders and preventative detention orders are an entirely different class in which freedom is denied and restrictions and prohibitions are imposed without laying any charges.

155. The proposed new orders are designed to monitor, control and detain people who are not guilty of any criminal offence. Otherwise a person in respect of whom sufficient evidence existed to justify a charge would be charged with a criminal offence and no doubt subjected to the ordinary processes of the Court in relation to arrest, detention, bail and prosecution.

156. The Law Council asserts that this represents an obvious and grave erosion of fundamental rights and breaches international standards premised on the laying of charges as the foundation of legal action and punishment.

157. There is authority that the rule of law forms an assumption in the Australian Constitution. In the Communist Party Case, Sir Owen Dixon said:

> "…[It] is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption."[21]

158. The Law Council submits that a notion fundamental to the concept of the rule of law is that citizens are entitled to due process. Due process necessarily includes a right to know what is alleged against you and the facts that are said to support that allegation against you and to have that allegation determined by a court of law which stands independent of the executive government.

159. The Law Council is appalled that it finds itself compelled to remind the government that a person is entitled to know what is alleged against him or her if he or she is to be imprisoned.

160. Imprisonment without charge is an odious act which should have no place in the Australian justice system.

[21] The Communist Party Case (1951) 83 CLR 1 at 193.

161. In addition to that, section 105.37 of the Bill limits the basis upon which a person in custody under a detention order can deal with a lawyer. The person in custody can only contact a lawyer for the purpose of arranging for the lawyer to bring proceedings in the Federal Court for the remedy relating to the preventative detention order or in relation to his or her treatment whilst in detention, or to bring a complaint on the detained person's behalf to the Commonwealth Ombudsman.

162. Article 17

    a. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

163. Article 18

    a. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

164. Article 19

    a. Everyone shall have the right to hold opinions without interference; and

    b. 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.

165. The Law Council acknowledges that restrictions on these rights are tolerated under the ICCPR to the extent that, for instance, such restrictions are necessary for the protection of national security or of public order.

166. In this regard, the Law Council believes that the restrictions on communication under the proposed changes are disconnected from the real issue of the threat of a terrorist acts and are unwarranted and unnecessary. Measures which have the effect of chilling free speech are highly unlikely to reduce the occurrence of a terrorist incident.

Convention on the Rights of the Child 1989

167. Article 3

    a. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

    b. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

c. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

168. The Law Council notes that Australia has recently presented the United Nations with its report in relation to Australia's programs and reforms to protect of the rights of children.

169. The Law Council submits that the proposal to introduce preventative detention in respect of children between 16 and 18 years of age in circumstances where no criminal offence has been committed breaches fundamental rights in relation to children pursuant to the Convention on the Rights of the Child 1989.

170. Children should obviously not be made the subject of such measures.

171. Should the proposed law proceed, the Law Council believes that children need special safeguards and care, including appropriate legal protection due to their physical and mental immaturity.

172. The Law Council believes that consistent with international law, a child served with a control order or a preventative detention order is provided an explanation of the relevant order in the presence of his or her parents (or legal guardians).

173. Further, it appears under the Bill that a person under 18 or incapable of managing their own affairs cannot have their parent or guardian instruct a lawyer on their behalf in Federal Court proceedings unless the detainee has also had contact with that lawyer.

174. In this regard, the Law Council submits that, should the proposed law proceed, that children should not confined in cells and nor should they be detained in the company of offenders including child offenders.

175. Should the proposal to apply preventative detention orders in relation to children proceed, the Law Council strongly recommends that one parent (or legal guardian) who is informed by their child should be able to inform the other parent without committing a disclosure offence.

176. The Law Council acknowledges that the government bears the heaviest responsibility to protect life. But protecting life and providing security must not lead to disproportionate measures. Every step taken in the name of our safety and security must be justified. Elements of the rule of law should be inalienable. The rights of Australians to their liberty and to freedom of speech, movement and association should be protected by our parliaments rather than being reduced by them.[22]

[22] The Chair of the UK Bar Council, Guy Mansfield QC in his letter to the Law Council on 3 November 2005 expressing serious concerns in relation to the Anti-Terrorism Bill (No. 2) 2005.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Northern Territory Bar Association;
- Queensland Law Society;
- The Victorian Bar; and
- Western Australian Bar Association.

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.