Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
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11 November 2005

Dear Secretary,

Submission in relation to the Anti-Terrorism Bill (No. 2) 2005 (Cth)

Please accept the attached submission, which we hope will assist the Committee in its inquiry into the Anti-Terrorism Bill (No. 2) 2005 (Cth) ('the Bill'). We are also prepared to appear before the Committee if that would assist it in its inquiry

Yours faithfully

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SUBMISSION IN RELATION TO THE ANTI-TERRORISM BILL 2005 (CTH)

I INTRODUCTION

We strongly believe that this Bill should be rejected. Safe communities need measures that effectively prevent political and religious violence. The government has, however, failed to demonstrate why this Bill is necessary.

Safe communities also need safe laws. The Bill will, however, expose Australians to dangerous laws. It will allow innocent people to be jailed. It will allow people to be punished without proof, and some will be treated as guilty until proven innocent. If passed, this Bill will also allow Australians to be targeted on the basis of their religious and political beliefs. More than this, the Bill expressly contemplates the secret exercise of invasive and coercive powers and adversely affects political freedoms. If passed, this Bill will mean the persecution rather than the protection of some Australians. So it is that far from promoting the security of Australians, the Bill, if enacted, will inflict insecurity on the community.

The main sections of our submission are as follows. In Part II, we object to the undemocratic process that has accompanied the debate of the Bill. Part III argues that there is no demonstrated necessity for the Bill. This is followed by Part IV which details how the Bill allows for the jailing and surveillance of innocent people, and the confiscation of their property. In Part V, we explain how the Bill adversely impacts upon political freedoms. Finally, Part VI argues that the review and sunset provisions in the Bill are inadequate.

II UNDEMOCRATIC PROCESS

At the outset, we object to the lack of time allowed for meaningful debate of the Bill. This Bill involves momentous changes to Australian law and runs over a hundred pages, yet the government is rushing through the passage of this Bill.

It seems somewhat disingenuous for the government to attempt to justify the failure to give adequate time for scrutiny and debate by reference to the publicising of the draft

Bill on the website of the Chief Minister of the Australian Capital Territory,[1] when the government opposed this action by the Chief Minister and sought to have it removed from the website.[2] There has been no indication that, had the government succeeded in having the draft Bill removed from the Chief Minister's website, it would have increased the time available for parliamentary scrutiny.

The government's actions speak not only of contempt for Australian citizens but also for their democratically elected representatives. In this respect, there appears to be a presumption on the part of the government that consultation with the State Premiers and Chief Ministers meant that the process has been sufficiently democratic.[3] If so, this is a dangerous view that is counter to any defensible notion of democracy. Democracies are founded upon the consent and participation of citizens and their democratically elected representatives. Labeling a process democratic simply by virtue of consultation with heads of the executive branch of governments is tantamount to locking out the participation of citizens and their representatives. It opens the door to oligarchy.

Further, the government is not only following a regrettable practice it has established in relation to other anti-terrorism laws[4] but it is also be undermining the various reviews of the current anti-terrorism laws that are currently underway. A comprehensive review of these laws, mandated by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), has just been announced.[5] Moreover, the

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[1] See the remarks made by the Attorney-General in an interview on *AM*, 30 October 2005, available online at <http://www.abc.net.au/am/content/2005/s1490788.htm> at 1 November 2005.

[2] Attorney-General Philip Ruddock, *Transcript of Interview*, 15 October 2005, available online at <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview_Transcripts_2005_Transcripts_15_October_2005_-_Transcript_-_Doorstop_interview_-_National_Bushfire_Awareness_Campaign_-_new_draft_anti-terrorism_legislation> at 1 November 2005; Michelle Grattan, 'Stanhope fires up debate over secretive terror laws', *Sun-Herald*, 16 October 2005, available online at <http://www.smh.com.au/news/opinion/stanhope-fires-up-debate-over-secretive-terror-laws/2005/10/16/1129401133232.html> at 1 November 2005.

[3] See, for instance, the Attorney-General's Second Reading Speech: Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, p 67.

[4] See Joo-Cheong Tham, 'Casualties of the Domestic 'War on Terror': A Review of Recent Counter-Terrorism Laws' (2004) 28(2) *Melbourne University Law Review* 512, 520-3.

[5] Attorney-General Philip Ruddock, 'Independent Committee to Review Security Legislation', Media Release, 12 October 2005, available online at <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2005_Fourth_Quarter_12_October_2005_-_Independent_committee_to_review_security_legislation_-_1852005> at 1 November 2005.

Parliamentary Joint Committee on ASIO, ASIS and DSD is presently undertaking a review of ASIO's questioning and detention powers and is due to review the other counter-terrorism laws.[6]

The creation by the government of an artificial deadline of having the legislation 'passed by Christmas'[7] should not be allowed to interfere with proper scrutiny of the legislation, nor with the need to take account of the reports of the statutorily-mandated inquiries into Australia's existing anti-terrorism legislation.

III LACK OF DEMONSTRATED NECESSITY FOR THE BILL

Very little justification has been given for the far-reaching measures contained in the Bill. The Prime Minister has argued that '[t]he terrorist attacks on the London transport system in July have raised new issues for Australia and highlighted the need for further amendments to our laws'.[8] Yet no serious attempt has been made to spell out what these 'new issues' are or what is the 'need for further amendments'.

Specifically, there has been no serious attempt to explain:

- why existing counter-terrorism laws are insufficient to deal with the threat of ideologically and religiously motivated violence in Australia;
- how the Bill more effectively deals with such a threat; and
- how the Bill, with its severe curtailment of rights and freedoms, is proportionate to such a threat.

A Lack of explanation as to why existing counter-terrorism laws are insufficient to deal with the threat of ideologically and religiously motivated violence in Australia

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[6] *Intelligence Services Act 2001* (Cth) ss 29(1)(ba)-(bb).

[7] Prime Minister John Howard, interviewed on *PM*, 26 October 2005, available online at <http://www.abc.net.au/pm/content/2005/s1491432.htm> at 1 November 2005

[8] Prime Minister John Howard, 'Counter-Terrorism Laws Strengthened', Media Release, 8 September 2005, available online at <http://www.pm.gov.au/news/media_releases/media_Release1551.html> at 1 November 2005.

Any new measure, including those proposed by the Bill, must be evaluated in the context of existing laws. Crucially, any evaluation must take into account the panoply of federal counter-terrorism laws enacted since the September 11 attacks.

These laws rest on six key planks. First, they make it an offence to engage in, prepare for or plan a 'terrorist act'.[9] 'Terrorist act' is a term that extends far beyond acts like bombing and hijackings to cover all acts or threats of politically or religiously motivated violence, whether in Australia or overseas, and whether aimed at civilians or soldiers.[10] At its margins, it embraces certain acts of industrial action like picketing by nurses.[11] The penalty for engaging in, preparing for or planning a 'terrorist act' is up to life imprisonment. The penalty is the same for attempts or conspiracies to engage in, prepare or plan 'terrorist acts'.[12]

Second, these laws establish a range of offences having at their base the broad statutory definition of a 'terrorist act' explained in the previous paragraph. These offences not only criminalise 'terrorist acts' but also *conduct ancillary to* 'terrorist acts'. For example, an offence is committed by merely possessing a thing or making a document that is connected with the preparation for, engagement in or assistance in a 'terrorist act'.[13] It is possible to commit these offences without being guilty of any violent act, or even having any violent intention.[14]

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[9] *Criminal Code* ss 101.1, 101.6

[10] *Criminal Code* s 100.1.

[11] While the definition of a 'terrorist act' excludes 'industrial action' (*Criminal Code Act* s 100.1), this is unlikely to afford any protection to picketing which has been found not to be 'industrial action' under the *Workplace Relations Act 1996* (Cth): *Davids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR, 550, 575 per Wilcox and Cooper JJ (with whom Burchett J agreed at 586) (*'Davids'*). For commentary on this case, see John Howe, 'Picketing and the Statutory Definition of 'Industrial Action'' (2000) 13 *Australian Journal of Labour Law* 84-91. The ruling in *Davids* has subsequently been applied in *Auspine Ltd v CFMEU* (2000) 97 IR 444; (2000) 48 AILR [4-282] and *Cadbury Schweppes Pty Ltd v ALHMWU* (2001) 49 AILR [4-382].

[12] *Criminal Code* ss 11.1, 11.5.

[13] *Criminal Code* ss 101.4, 101.5.

Third, a number of offences have been created which criminalise involvement with 'terrorist organisations'. If an organisation is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)', then it is an offence to be a member of the organisation, to direct it, to train with it, to recruit for it, to supply it with funds, other resources or support, or to receive funds from it.[15] Even 'informal membership' or the taking of steps to become a member of such an organisation is punishable by up to ten years in prison.[16] These offences can be committed whether or not the offender had any violent intention. With the exception of the offence of providing support to an organisation,[17] these offences can be committed even if the offender's involvement with the organisation was in no way itself connected, even indirectly, to 'terrorist acts'.

Fourth, powers have been conferred on the Government to ban 'terrorist organisations'. Part 4 of the *Charter of the United Nations Act 1945* (Cth) requires the Foreign Minister to list a person or entity if satisfied, among others, that such a person or entity is involved in a 'terrorist act'; a term that is not defined by the Act.[18] If an entity or person is listed, it is illegal to use or deal with the assets of the listed person or entity. It will also be an offence to directly or indirectly provide assets to a listed person or entity.[19] Moreover, under the *Criminal Code Act 1995* (Cth) (*'Criminal Code'*), regulations can be passed listing an organisation as a 'terrorist organisation' so long as the Federal Attorney-General is satisfied, on reasonable grounds, that the organisation is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or

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[14] The accused bears an evidential burden of adducing evidence that possession of the document or thing was not intended to facilitate preparation for, engagement in or assistance of a terrorist act: ss 101.4(5), 101.5(5).

[15] *Criminal Code* s 102.2-102.7, together with paragraph (a) of the definition of 'terrorist organisation' in s 102.1.

[16] *Criminal Code* s 102.3, together with paragraphs (a) and (b) of the definition of 'member' in s 102.1.

[17] See *Criminal Code* ss 102.7(1)(a).

[18] *Charter of the United Nations Act 1945* (Cth) s 15 and *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth) reg 6(1).

[19] Such conduct is not illegal if authorised by the Foreign Minister: *Charter of the United Nations Act 1945* (Cth) ss 20-1.

will occur)'.[20] Such a listing means that the offences discussed in the previous paragraph will apply to those who are involved with the organisation, with no need to prove the 'terrorist' character of the organisation beyond reasonable doubt. Furthermore, if an organisation has been banned under the *Criminal Code*, it also becomes an offence to meet or communicate with a member, director or promoter of that organisation, in circumstances where such meeting or communication is intended to support the organisation's existence or assist its expansion.[21]

Fifth, individuals arrested on suspicion of committing 'terrorism offences' – including all the offences under the *Criminal Code* relating to 'terrorist acts' or 'terrorist organisations' discussed in the preceding paragraphs – may be held without charge for up to 24 hours, compared to the normal period under the *Crimes Act 1914* (Cth) ('*Crimes Act*') of 12 hours.[22] In addition, certain periods of time which would normally count against this period of pre-charge detention may be excluded in the case of someone arrested on suspicion of having committed a 'terrorism offence'.[23] Finally, a person charged with a 'terrorism offence' has an extremely restricted right of bail.[24]

Sixth, ASIO has unprecedented powers to compulsorily question and detain persons *suspected of having information* related to such a 'terrorism offence'.[25] Detention under the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act'*) may last for up to 7 days.[26] Furthermore, the exercise of such powers by ASIO is

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[20] *Criminal Code* s 102.1. This power was conferred by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

[21] *Criminal Code* s 102.8, together with the definition of 'associate' in s 102.1.

[22] Compare ss 23CA and 23DA(7) of the *Crimes Act* applying to terrorism offences, to ss 23C and 23D(5) of *Crimes Act* applying to all other Commonwealth offences.

[23] *Crimes Act* s 23CB.

[24] *Crimes Act* s 15AA.

[25] Division 3, Part II, *Australian Security Intelligence Organization Act 1979* (Cth) ('*ASIO Act*').

[26] *ASIO Act* ss 34D(3), 34HC.

cloaked with secrecy. It is illegal to disclose information relating to most of ASIO's activities relating to the exercise of these special powers.[27]

This brief outline demonstrates the breadth of already existing counter-terrorism measures. Built upon the base of a 'terrorist act' is a superstructure of broad criminal offences, together with sweeping executive powers to investigate and detain those suspected of having information related to, or of having committed, 'terrorism offences'. Under the *ASIO Act* Australia has a detention without trial regime with respect to 'terrorism offences', together with a proscription regime under the *Criminal Code Act* that bears 'disturbing similarity' to the *Communist Party Dissolution Act 1950* (Cth).[28]

Any proposal for new laws must be evaluated against this existing legal situation. The existence of these broad-ranging laws mean that the Government bears a heavy onus of demonstrating the need for laws that further criminalise conduct and confer more power to police and security organisations. To date, this is an onus it has failed to discharge. As Hugh White correctly observed in relation to the proposals contained in the Bill,

> The Government has failed to justify the case for expanded powers … Until a few months ago, the Government apparently believed these powers were sufficient. In 2002 and 2003 they passed laws to increase their powers to combat terrorism, but they did not try to strengthen the existing detention powers. So why were those powers thought to be sufficient then, but not now? … If the police have information that someone is planning a terrorist attack, they can arrest them already.[29]

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[27] *ASIO Act* s 34VAA. These offences were created by the *ASIO Legislation Amendment Act 2003* (Cth).

[28] George Williams quoted in Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] etc* (2002) 47.

[29] Hugh White, 'Without answers, terror laws should be rejected', *The Age*, 31 October 2005, available online at <http://www.theage.com.au/news/hugh-white/without-answers-terror-laws-should-be-rejected/2005/10/30/1130607148563.html> and <http://www.theage.com.au/news/hugh-white/without-

The offences of planning 'terrorist acts', of conspiring to engage in 'terrorist acts', of attempting to engage in 'terrorist acts', plus the powers of the police and ASIO to investigate such offences, seem particularly suited to the protection of Australia from such activity (particularly when it is borne in mind that 'terrorist act' includes any threat of politically or religiously motivated violence). No explanation has been given of their inadequacy for this purpose.

Furthermore, when one looks at the grounds for the proposed control orders and preventative detention, in several cases these overlap with existing grounds on which arrests can be made (as will be explained in the following section). No explanation or justification has been offered for this overlap and duplication.

It was perhaps acknowledgment of the breadth of the current laws that prompted Dennis Richardson, previous Director-General of ASIO, when recently appearing before the Parliamentary Joint Committee on ASIO, ASIS and DSD, *not* to ask for any further powers. Specifically, in response to a question by Senator Robert Ray on whether he was 'satisfied that the *existing powers* equip you to do the job you need to do?', Mr Richardson replied 'Yes'.[30]

B Lack of explanation as to how proposed measures more effectively deal with the threat of ideologically and religiously motivated violence in Australia

The proposals are said to 'enable us to better deter, prevent, detect and prosecute acts of terrorism'.[31] There is, however, no explanation of how they will actually do this:

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answers-terror-laws-should-be-rejected/2005/10/30/1130607148563.html?page=2> at 1 November 2005.

[30] Commonwealth, *Parliamentary Debates*, Parliamentary Joint Committee on ASIO, ASIS and DSD, transcript of public hearings, Canberra, 19 May 2005, 8. Available online at <http://www.aph.gov.au/hansard/joint/commttee/J8382.pdf at 18 September 2005> at 18 September 2005 (emphasis added).

[31] John Howard, Prime Minister, 'Counter-Terrorism Laws Strengthened' (Press Release, 8 September 2005) 1.

What is the specific threat that these proposals meet? In what way do they actually deter or prevent those threats?

The proposals appear to adopt the 'tough' counter-terrorism approach of *criminalisation* and *coercion*. The assumption seems to be that this 'tough' approach will more effectively prevent and deter the threat of ideologically and religiously motivated violence. This assumption is open to doubt. Crucial to the success of counter-terrorism efforts is the co-operation of the public. Criminalisation and coercion not only imply a very crude method of securing such co-operation but also risks forfeiting the trust of the public in security and police organisations.

Indeed, we are concerned that the measures contained in the Bill may in fact prove to be counter-productive, for a number of reasons.

First, the Bill would grant to executive agencies (particularly the AFP and ASIO) a very high degree of discretion in determining those to whom the new laws would be applied. This submission does not oppose, as such, the use of executive warrants in law enforcement and security operations; but such discretion must be appropriately limited and controlled. It is the lack of such limits and controls that is the cause of concern with this Bill. This gives rise to the possibility that the powers it confers will be directed disproportionately at the Muslim sections of the Australian community.

Such a possibility of discriminatory application, and the adverse consequences thereof, is a very real one. 'Terrorism offences' depend in part upon a person's political and/or religious motive.[32] Under laws which allow police and security agencies to exercise intrusive and coercive power on the basis of suspicions without properly-tested evidence, it is quite possible that evidence of the person's political or religious beliefs alone would be taken to suffice. This in turn raises the specter of *thought-crimes* in Australian law, particularly for those who might, on account of their beliefs, be 'suspect' persons, whether they be Muslims, political activists or those who oppose the government's political positions.

[32] See definition of 'terrorist act' in section 100.1 of the *Criminal Code Act* (Cth).

Freedom of religion is a key principle of Australian society and is expressly recognised by section 116 of the Constitution. The same can be said to the freedom of political expression.[33] The Bill, however, poses a grave threat to these freedoms of religion and political expression because it increases the likelihood of police targeting Australians based on their religious or political views.

Moreover, the provisions contained in the Bill will expose a broader range of individuals to intrusive exercise of policing powers, including those who are presumed to be innocent. This clearly means that these measures will mean *increased insecurity* for some parts of the Australian community. Given this, adoption of the proposals risks alienating the very part of the community whose co-operation is crucial in preventing ideologically and religiously motivated violence in the current circumstances.

Further, the adoption of the proposed measures may prove to be counter-productive in a more insidious manner. It may limit the possibility of robust and evidence-based political debate that is needed to ensure that the most meritorious policy is adopted by legislatures. In short, free political debate leads to better policy-making. Some of the proposed measures, however, directly attack the freedoms necessary for such debate. In doing so, they set the scene for ill-considered and badly-designed counter-terrorism measures.

Lastly, the Government has invoked the July London bombings as a reason for these new proposals. The Federal Government's own National Counter-Terrorism Alert Level has, however, remained unchanged at 'medium' since those bombings.[34] Indeed, this has been the threat level since the attacks on 11 September 2001. It is worthwhile stressing that a 'medium' level of threat means that the Government believes that a 'terrorist attack *could* occur'. It does not mean that a 'terrorist attack is *likely*' ('high' level of threat) or that a 'terrorist attack is *imminent* or *has occurred*'

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[33] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

34 See National Counter-Terrorism Committee Communiqué: 8 July 2005, available online at <http://www.nationalsecurity.gov.au/agd/WWW/nationalsecurityHome.nsf/Page/RWP94CAF198B3B53A9ACA257038001A4861> at 8 November 2005.

('extreme' level of threat).[35] In these circumstances, it is extremely difficult to accept that the London bombings have ushered in an increased threat of ideologically or religiously motivated violence that justifies these proposals.

There is another serious problem with relying upon the London bombings for some of these proposals. These proposals, namely, those relating to control orders and preventive detention, borrow from measures implemented in United Kingdom (UK) *before* the London bombings; measures that presumably failed to prevent those bombings.

The lack of elaboration on how the proposed measures would more effectively deal with ideologically or religiously motivated violence, the unchanged threat level since the London bombings and the copying of UK measures in place some time before the bombings all strongly suggest that the London bombings are being opportunistically used for the aggrandizement of coercive powers.

C Lack of explanation how the proposed measures are proportionate to the threat of ideologically and religiously motivated violence in Australia

The right to physical safety is an important interest that government should protect. Insofar as ideologically and religiously motivated violence threatens this right, measures that are properly adapted to meet this threat which do not improperly compromise fundamental rights and freedoms should be implemented. At the same time, the right to physical safety and the threat posed to this right by ideologically and religiously motivated violence need to be kept in perspective. The right to physical safety, important as it is, sits alongside other key rights including freedom from arbitrary governmental action, arbitrary interference with a person's liberty, security and freedom of association, speech and religion.

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[35] See <http://www.nationalsecurity.gov.au/agd/www/NationalSecurityHome.nsf/Page/RWP76C5554A184DBF2BCA256D420012BA76?OpenDocument> at 15 September 2005 (emphasis added).

All this points to the need to consider the *proportionality* of the proposed measures. 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.[36]

The Federal Government, however, has singularly failed to provide any assessment of whether and how the radical departures made by the Bill from fundamental rights and freedoms including the presumption of innocence, freedom from arbitrary arrest, freedom of political association and the right to privacy are necessary and proportionate. Not only that, the Government faces tremendous difficulty in successfully arguing that the measures proposed by the Bill satisfy the test of proportionality. As it stands, the current anti-terrorism laws with their serious infringements of rights and freedoms[37] are already arguably disproportionate to the threat to Australia of ideologically and religiously motivated violence.[38]

IV THE BILL ALLOWS FOR THE JAILING AND SURVEILLANCE OF INNOCENT PEOPLE, AND THE CONFISCATION OF THEIR PROPERTY

The Bill, if passed, will allow innocent Australians, those who have not been charged or convicted of any crime, to be detained, to be subject to surveillance and/or to have

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

[37] See Michael Head, 'Counter-Terrorism' Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666-82; Greg Carne, 'Terror and the Ambit Claim: Security Legislation Amendment (Terrorism) Act 2002 (Cth)' (2003) 14 *Public Law Review* 13-9; Patrick Emerton, 'Paving the Way for Conviction without Evidence: A disturbing trend in Australia's 'anti-terrorism' laws' (2004) 4 *Queensland University of Technology Law and Justice Journal* 129-166; Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2003) Chapter 11 and Jenny Hocking, 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49 *Australian Journal of Politics and History* 355.

[38] Christopher Michaelsen, 'Antiterrorism legislation in Australia: A Proportionate Response to the Terrorist Threat?' (2005) 28 *Studies in Conflict & Terrorism* 297.

their property seized, without proper evidence having to be led to establish any criminal guilt. Under the Bill, some of these powers, for instance, those under initial preventative detention orders, can be exercised simply in virtue of authority granted by the AFP to one of its officers. Absent any requirement to prove the need to exercise these powers before an independent authority, the AFP in these situations becomes largely the sole arbiter of its powers. Not only does the Bill allow for unprecedented police powers without the need for proper proof before an independent authority, it also lowers the threshold of proof when an independent authority is involved. For instance, control orders can be issued if the requirements are satisfied on the balance of probabilities. So instead of Australians being innocent until proven guilty beyond reasonable doubt, they can now be incarcerated on the basis of much weaker evidence, with a real danger that mere suspicion of guilt by police will be sufficient. In effect, these extraordinary powers permit 'guilt by suspicion' to prevail.

This also creates a risk of people being targeted on the basis of their religious and political beliefs. A key feature of existing anti-terrorism laws is their broad scope but *selective application.* Specifically, these laws have disproportionately affected some Muslim communities. All persons charged so far under a 'terrorism' offence are Muslim[39] and all groups that have been proscribed as 'terrorist organisations' under the *Criminal Code* are Muslim organisations.[40] It is reasonable to predict that the Bill, if passed, will also be selectively applied. The danger then is that 'suspect' communities, like some Muslim communities or groups who hold robust political views, will be singled out through the use of the powers conferred by the Bill and subject to unjustifiable interference with their freedoms.

In many cases, such as preventative detention, the power to obtain information and documents, and ASIO's powers, these coercive and surveillance powers will be exercised in secret. The secret exercise of such powers is an invitation to abuse. The risk of abuse becomes all the greater when, as in the case of preventative detention,

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[39] For details of those charged prior to this year's operations by police and ASIO, see Brendan Nicholson, 'A man of terror, or a terrorised man?', *The Age: Insight* (Melbourne), 19 February 2005, 5.

[40] *Criminal Code Regulations 2002* (Cth) regs 4-4F, Schedules 1-1A.

secrecy is combined with a lack of adequate evidentiary requirements and a lack of independent oversight.

We will now detail these concerns in relation the following provisions of the Bill:

- the power to seek control orders under the proposed new Division 104 of the *Criminal Code* (Schedule 4 of the Bill);
- the power of preventative detention under the proposed new Division 105 of the *Criminal Code* (Schedule 4 of the Bill);
- the expanded AFP powers to stop, question and search (Schedule 5 of the Bill);
- the new powers vested in the AFP to demand information and documents (Schedule 6 of the Bill);
- the expanded powers that would be vested in ASIO (Schedule 10 of the Bill);
- other amendments made by Schedule 10 of the Bill;
- the expansion of the offence of financing a 'terrorist organisation' (Schedule 1 of the Bill).

A Control orders

We object to the proposed control orders on the fundamental ground that innocent persons, against whom no crime has been alleged, should not be subject to the possibility of house arrest or comparable restraints on his or her liberty.[41]

We also have more specific concerns and discuss them under these headings:

- grounds and consequences of control orders;
- process for the issuing of control orders; and
- the interaction between control orders and executive detention.

[41] The list of burdens that may be imposed by a control order is set out in Item 24 of Schedule 4 of the Bill, s 104.5(3).

1 Grounds and consequences of control orders

The issue of a control order would involve a four-step process: the preparation of a request by a senior AFP member,[42] the approval of that request by the Attorney-General,[43] the granting of a requested control order on an interim basis by the Federal Court, the Family Court or the Federal Magistrates Court, subsequent to an *ex parte* hearing,[44] and then the confirmation of that control order by the court subsequent to an *inter partes* hearing.[45]

The Bill does not impose any constraints on the Attorney-General's exercise of his or her discretion in relation to the approval of a request,[46] permits a request to be made in advance of the Attorney-General's consent,[47] and also allows the AFP to apply to vary a control order without requiring the Attorney-General's consent. The real constraints are therefore those imposed on the requesting AFP member and on the court.

The requesting AFP member must either 'consider on reasonable grounds that the order … would substantially assist in preventing a terrorist act'[48] or 'suspect on reasonable grounds that the person in relation to whom an order is sought has provided training to, or received training from, a listed terrorist organisation.'[49] It should be noted that if a member of the AFP believes on reasonable grounds that a person has provided training to, or received training from, a listed 'terrorist organisation', than her or she can arrest that person for a criminal offence.[50] This second ground for the issuing of control orders is therefore unnecessary, except when

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[42] Item 24 of Schedule 4 of the Bill, s 104.2(2),(3).

[43] Item 24 of Schedule 4 of the Bill, s 104.2(1),(4).

[44] Item 24 of Schedule 4 of the Bill, ss 104.3, 104.4, together with Item 11 of Schedule 4 of the Bill (definition of 'issuing court').

[45] Item 24 of Schedule 4 of the Bill, s 104.14.

[46] Compare with s 34C(3),(3B),(3D) of the *ASIO Act*.

[47] Item 24 of Schedule 4 of the Bill, ss 104.6, 104.7, 104.8, 104.9, 104.10.

[48] Item 24 of Schedule 4 of the Bill, s 104.2(2)(a).

[49] Item 24 of Schedule 4 of the Bill, s 104.2(2)(b).

[50] The offence of training with a listed terrorist organisation is created by s 102.5 of the *Criminal Code*. The power to arrest on the basis of reasonable belief is found in s 3W of the *Crimes Act*.

used to impose control orders on those who trained with a listed organisation *before* it was a criminal offence to do so. In this case, the control order not only restrains the liberty of an innocent person, but it does so on what are effectively retrospective grounds: at the time such training took place, Australian law gave those who trained no reason to suppose that their training would attract adverse legal consequences in Australia.

The issuing court must be 'satisfied on the balance of probabilities that making the order would substantially assist in preventing a terrorist act,' and that each of the burdens imposed by the control order 'is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.'[51] Given the breadth of the meaning of 'terrorist act',[52] and the associated ambiguity of the word 'public', which in the definition of 'terrorist act' encompasses the public of any country anywhere in the world,[53] the control order regime allows the imposition of extreme constraints on liberty on extremely wide-ranging grounds. In particular, it should be noted that there is no requirement that the person to be subject to the order should himself or herself be shown to have, or suspected of having, any intention to commit a 'terrorist act'.

Put briefly, a control order could be sought against an entirely innocent person, if it could be shown that restraining his or her activities would substantially assist in preventing a threat of political violence being made. For example, a scholar of just war theory might be prohibited from speaking at certain forums, or from leaving Australia to speak in some forum overseas, if it was believed that potential activists or militants might draw inspiration from the scholar's lectures.

The restraints imposed under a control order can be particularly extreme, for instance:

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[51] Item 24 of Schedule 4 of the Bill, s 104.4(1)(c),(d). In making the latter determination, the court must take into account the impact of the order on the person's circumstances: s 104.4(2). The same test applies at the confirmation hearing: s 104.14(7); or to any revocation or variation of the order: s 104.20(1), 104.24(1)(b),(2).

[52] See the discussion in section II above.

[53] *Criminal Code* s 100.194)(b).

- a requirement to remain at certain premises at certain times, which clearly allows for house arrest;[54]
- a prohibition on being at certain places or carrying out certain activities,[55] which could render a person unemployed with no means of financial support (and perhaps unable to qualify for unemployment benefits, if the terms of the control order precluded the person from satisfying the work test);
- a requirement to wear a tracking device,[56] which would be a severe invasion of privacy; and
- a prohibition on the use of telephones or the Internet;[57]
- a prohibition on communicating with specified individuals, which could include a prohibition on contacting lawyers.[58]

In relation to the last of these points, while the Bill does provide for section 102.8(4) of the *Criminal Code* to apply to prohibitions on contact and association under a control order,[59] the Bill does not amend section 102.8(4)(d) to expand the categories of exempted legal advice to cover (for example) control orders or preventative detention.

A control order may operate for up to a year,[60] and the Bill expressly contemplates successive control orders being made in relation to the same person.[61] The Bill therefore makes possible the lifetime house arrest of a person, although no criminal charges have ever been alleged or proved in relation to that person. No law which permits such a result can be said to be consistent with the principles of liberal democracy.

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[54] Item 24 of Schedule 4 of the Bill, s 104.5(3)(c).

[55] Item 24 of Schedule 4 of the Bill, s 104.5(3)(a),(h).

[56] Item 24 of Schedule 4 of the Bill, s 104.5(3)(d).

[57] Item 24 of Schedule 4 of the Bill, s 104.5(3)(f).

[58] Item 24 of Schedule 4 of the Bill, s 104.5(3)(e). Section 46(3) of the *Acts Interpretation Act 1901* (Cth) provides that a power to specify a person is a power to specify a class of persons, such as 'all lawyers'.

[59] Item 24 of Schedule 4 of the Bill, s 104.5(4).

[60] Item 24 of Schedule 4 of the Bill, s 104.5(1)(f). For those between 16 and 18 years of age, the maximum duration of a control order is 3 months: s 104.28(2).

[61] Item 24 of Schedule 4 of the Bill, ss 104.2(5), 104.5(2), 104.28(3).

2 Process for the issuing of control orders

These concerns about the scope of control orders, both in application and consequences, are compounded by concerns about the process by which control orders would be issued and confirmed.

We, firstly, note that the Bill implies that at least 48 hours must elapse between the issuing of an interim control order, and the hearing to confirm that order,[62] but it does not state a maximum period of time that may elapse. This creates the prospect of a person suffering the burdens of an interim order for an excessively lengthy period, before being able to challenge the order in a confirmation hearing.

Second, under the Bill, while an additional application for a control order must be approved by the Attorney-General, no such requirement applies to an application to vary the terms of the control order so as to increase the burdens upon the subject of the control order.[63] This removes an important check on the application of control orders.

Third, the Bill seems to place no limits on the additional evidence that may be adduced by the AFP at the confirmation hearing.[64] This creates the possibility of an ambush by the AFP.

Importantly, the Bill fails to provide adequate opportunity to the subject of a control order to contest that control order. This failure stems from the inadequate information supplied to the subject. For instance, there is a requirement that, when the interim control order is served on a person, there must also be served on the person a summary of the grounds on which the order is made.[65] A copy of the summary must

[62] Item 24 of Schedule 4 of the Bill, ss 104.5(1)(e), 104.12(1).

[63] Item 24 of Schedule 4 of the Bill, s 104.23.

[64] Item 24 of Schedule 4 of the Bill, s 104.14(1)(a),(b),(3)(b).

[65] Item 24 of Schedule 4 of the Bill, s 104.12(1)(ii).

also be provided to the subject's lawyer.[66] If the AFP is seeking a variation or revocation of a control order, they must provide the subject with notice of the grounds on which the revocation or variation is sought,[67] and if a variation is granted then the subject's lawyer must be provided with a summary of the grounds on which any additional burdens are imposed.[68] However, the Explanatory Memorandum suggests that the summary may contain no more information than that, for example, 'the person is alleged to have engaged in training with a specified listed terrorist organisation.'[69]

Moreover, although the court at a confirmation hearing must have regard to the original request for the control order including reasons against the grant of the order,[70] it is not at all clear how much of this information the subject of the order will have access to. This may lead to a situation where the subject of a control order is relying upon the AFP to provide the principal arguments against the confirmation of the control order.

To remedy these defects, the subject and his or her lawyer should be provided with more than just the grounds for the control order. At the very least, they should be provided with information relating to the material facts underlying the grounds for the interim or varied control order and any other relevant information pertaining to the grant of the control order including information relating to the reasons against such a grant.

The inadequacy of information supplied to the subject of a control order can also be traced to two other sources. The Bill also does not specifically provide that when the issuing court confirms a control order that it provides the reasons for such a

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[66] Item 24 of Schedule 4 of the Bill, s 104.13(1)(b).

[67] Item 24 of Schedule 4 of the Bill, ss 104.19(2), 104.23(3).

[68] Item 24 of Schedule 4 of the Bill, s 104.21(1)(b). Curiously, no similar requirement is imposed following the confirmation of an interim order.

[69] Explanatory Memorandum, Anti-Terrorism Bill (No. 2) 2005, 27.

[70] Item 24 of Schedule 4 of the Bill, s 104.14(3)(a). The relevant AFP officer is obliged under proposed section 104.2(3)(b)(ii) to advise of any reasons against the issuing of a control order of which s/he is aware.

confirmation to the subject or his or her lawyer.[71] This allows for a situation where a confirmed control order being made against a person without him or her being fully informed of the basis of such an order. In such situations, the individual's ability to subsequently contest the control order by applying to vary or revoke it will be severely impaired.[72]

Further, the operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004* may limit the capacity of the subject of a control order to properly test the evidence against him or her. It also provides a basis on which information may be excluded from a summary of grounds on which a control order has been made or varied, without any opportunity to challenge such exclusions.[73]

A final point in relation to process concerns the obligation to inform the subject of the effect of a control order. The Bill requires the AFP to inform the subject of a control order of its effect, provided that this has not been made impracticable by the actions of that person.[74] 'Impracticality' is a vague concept, however, particularly when the subject of the control order faces up to 5 years imprisonment for contravention,[75] and when the effect of the control order, if it restricts association, communication and movement, may be to prevent a person receiving legal advice. The obligation of informing the subject of the control order should be absolute, and where appropriate (for example, in relation to a confirmed control order or a varied control order) should be undertaken by the court.

3 Interaction between control orders and executive detention

The initial request for a control order must indicate the details of any other control orders or preventative detention to which the person has been subject[76]. The Bill does

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[71] Item 24 of Schedule 4 of the Bill, s 104.16(1).

[72] Such an application is provided by item 24 of Schedule 4 of the Bill, s 104.18.

[73] Item 24 of Schedule 4 of the Bill, ss 104.12(2), 104.26(2).

[74] Item 24 of Schedule 4 of the Bill, ss 104.12(1),(3), 104.26(1),(3).

[75] Item 24 of Schedule 4 of the Bill, s 104.27.

[76] Item 24 of Schedule 4 of the Bill, s 104.2(3)(d).

not, however, indicate how these facts are to be used. It would be appropriate to have regard to previous experiences of executive detention as a reason for not imposing a control order (eg if such facts expose a pattern of harassment unconnected to any criminal conduct), but it would be wrong to use such facts as the basis for arguing for the imposition of a control order: executive detention cannot be justified purely on the basis of earlier episodes of executive detention.

Furthermore, the Bill does not require the initial request to set out any details of detention pursuant to the *ASIO Act*. This omission has not been explained, and creates the possibility that a person may be subjected to a control order although the issuing court has not been provided with all relevant information.

The Bill also provides that, if a person or his or her lawyer does not attend court to contest the confirmation of a control order, the court may confirm the order provided that it is satisfied the interim control order was properly served.[77] No allowance is made for the fact that a person's non-attendance may be due to him or her being detained pursuant to a warrant issued under section 34D of the *ASIO Act*.[78] or pursuant to a preventative detention order issued pursuant to proposed Division 105 of the *Criminal Code*. It should be noted that if such an order has been issued between the request for an interim control order and the confirmation hearing, the Bill provides no guarantee that the court will be aware of it. Although the preventative detention regime allows for the possibility of a making contact with a lawyer to organise representation at a court hearing,[79] such contact is subject to any prohibited contact orders that have been issued.[80] The Bill would also place limits on a person who is subject to preventative detention discussing issues relating to a control order with his

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[77] Item 24 of Schedule 4 of the Bill, s 104.14(4).

[78] In particular, s 34F(1)(a) of the *ASIO Act* permits a person to be detained, pursuant to an order of the prescribed authority, with no right to contact a lawyer, and therefore no possibility of organising for a representative to attend the confirmation hearing on the person's behalf. The Attorney-General's Department has acknowledged that the law allows for this possibility of detention with no right to legal representation: Submission no 84 to Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of Division 3 Part III of the ASIO Act 1979 - Questioning and Detention Powers* (2005) 27, available online at <http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/subs/sub84.pdf> at 10 November 2005.

[79] Item 24 of Schedule 4 of the Bill, ss 105.37(1)(e)

[80] Item 24 of Schedule 4 of the Bill, ss 105.40. The possible operation of prohibited contact orders to preclude contact with a lawyer will be discussed further below.

or her lawyer: the precise limits would depend upon the meaning of the phrase 'arranging for the lawyer to act for the person in relation to an appearance, or hearing, before a court'.[81]

B Preventative detention

We object to the provisions conferring the power to issue preventative detention orders on three grounds:

- these powers are unnecessary;
- these powers are an affront to the traditions and practices of liberal democracy;
- the processes surrounding preventative detention are fundamentally flawed.

1 Preventative detention orders unnecessary

The Bill would establish four grounds for the issuing of preventative detention orders.[82] In each of these cases, given the existing statutory framework relating to 'terrorism offences', there is no demonstrated need for a regime of preventative detention.

First, a preventative detention order could be issued, in respect of a person, if the AFP member requesting the order, and the AFP member or other authority issuing the order, are satisfied that

- there are reasonable grounds to suspect that the person will engage in a terrorist act;[83]
- making the order would substantially assist in preventing a terrorist act occurring;[84]
- detaining the person under the order is reasonably necessary to prevent a terrorist act occurring;[85] and

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[81] These limits on communication with a lawyer would be imposed by Item 24 of Schedule 4 of the Bill, ss 105.34, 105.37(1).

[82] Item 24 of Schedule 4 of the Bill, ss 105.4.

[83] Item 24 of Schedule 4 of the Bill, s 105.4(4)(a)(i).

[84] Item 24 of Schedule 4 of the Bill, s 105.4(4)(b).

- the terrorist act is one which is imminent within the next 14 days.[86]

It is very difficult to envisage a situation in which these grounds would be satisfied, but there would not be a sufficient basis to arrest the person in question for an offence such as preparing for or planning a terrorist act,[87] attempting to prepare for or plan a terrorist act,[88] possessing a thing or making a document connected to preparation for or planning of a terrorist act,[89] or a similar offence established under the *Criminal Code*.

Second, a preventative detention order could be issued, in respect of a person, if the AFP member requesting the order, and the AFP member or other authority issuing the order, are satisfied that

- there are reasonable grounds to suspect that the person possess a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act;[90]
- making the order would substantially assist in preventing a terrorist act occurring;[91]
- detaining the person under the order is reasonably necessary to prevent a terrorist act occurring;[92] and
- the terrorist act is one which is imminent within the next 14 days.[93]

This power is clearly unnecessary. If a police office believes on reasonable grounds that a person possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act, and that the person either knows of or is reckless as to the existence of that connection, then under existing law the police

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[85] Item 24 of Schedule 4 of the Bill, s 105.4(4)(c).

[86] Item 24 of Schedule 4 of the Bill, s 105.4(5).

[87] *Criminal Code* s 101.6.

[88] *Criminal Code* s 101.6 together with s 11.1.

[89] *Criminal Code* ss 101.4, 101.5.

[90] Item 24 of Schedule 4 of the Bill, s 105.4(4)(a)(ii).

[91] Item 24 of Schedule 4 of the Bill, s 105.4(4)(b).

[92] Item 24 of Schedule 4 of the Bill, s 105.4(4)(c).

[93] Item 24 of Schedule 4 of the Bill, s 105.4(5).

officer can exercise a power of arrest with no need for a warrant if this is necessary to ensure the person's attendance in court, to prevent the continuation of the offence, or to preserve evidence.[94]

Third, a preventative detention order could be issued, in respect of a person, if the AFP member requesting the order, and the AFP member or other authority issuing the order, are satisfied that

- there are reasonable grounds to suspect that the person has done an act in preparation for, or planning, a terrorist act;[95]
- making the order would substantially assist in preventing a terrorist act occurring;[96]
- detaining the person under the order is reasonably necessary to prevent a terrorist act occurring;[97]
- the terrorist act is one which is imminent within the next 14 days.[98]

This power is equally unnecessary. If a police office believes on reasonable grounds that a person has done any act in preparation for, or planning, a terrorist act, then under existing law the police officer can exercise a power of arrest with no need for a warrant if this is necessary to ensure the person's attendance in court, to prevent the continuation of the offence, or to preserve evidence.[99]

In relation to the first three grounds of preventative detention, it must also be emphasised that recent amendments to the *Crimes Act* expanding investigative powers in relation to 'terrorism offences' only strengthen the argument that these orders are unnecessary.[100] As was pointed out in section III above, if a person is arrested for a

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[94] *Criminal Code* s 101.4 (establishing the offence of possessing a thing connected with terrorist acts) together with *Crimes Act* s 3W(1) (establishing the power of arrest without warrant).

[95] Item 24 of Schedule 4 of the Bill, s 105.4(4)(a)(iii).

[96] Item 24 of Schedule 4 of the Bill, s 105.4(4)(b).

[97] Item 24 of Schedule 4 of the Bill, s 105.4(4)(c).

[98] Item 24 of Schedule 4 of the Bill, s 105.4(5).

[99] *Criminal Code* s 101.6 (establishing the offence of doing acts in preparation for, or planning, terrorist acts) together with *Crimes Act* s 3W(1) (establishing the power of arrest without warrant).

[100] These amendments were introduced into the *Crimes Act* by Schedule 1 of the *Anti-Terrorism Act 2004* (Cth).

'terrorism offence' then he or she may be held by the police for up to 24 hours, compared to the normal maximum of 12 hours.[101] In addition, however, the police may apply to a magistrate or a justice of the peace for a stopping of the clock (or so-called 'dead time').[102] The grounds on which such 'dead time' may be sought include (but are not limited to) the following:

> (i) the need to collate and analyse information relevant to the investigation from sources other than the questioning of the person (including, for example, information obtained from a place outside Australia);
>
> (ii) the need to allow authorities in or outside Australia (other than authorities in an organisation of which the investigating official is part) time to collect information relevant to the investigation on the request of the investigating official;
>
> (iii) the fact that the investigating official has requested the collection of information relevant to the investigation from a place outside Australia that is in a time zone different from the investigating official's time zone;
>
> (iv) the fact that translation is necessary to allow the investigating official to seek information from a place outside Australia and/or be provided with such information in a language that the official can readily understand.[103]

The magistrate or justice of the peace may approve the 'dead time' only 'if satisfied that … detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence.'[104]

These existing powers therefore give the police ample time and opportunity to investigate alleged or suspected 'terrorism offences'. There is no need for a distinct regime of preventative detention that is divorced from the well-established and well-understood regime of procedures and protections that it is established under the *Crimes Act*.[105]

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[101] *Crimes Act* ss 23CA and 23DA, compared to ss 23C and 23D for non-terrorism offences.

[102] *Crimes Act* ss 23CA(8)(m), 23CB.

[103] *Crimes Act* s 23CB(5)(c)(i),(ii),(iii),(iv).

[104] *Crimes Act* s 23CB(7)(c).

[105] For example, access to a lawyer and contact with friends and relatives is guaranteed under s 23G of the *Crimes Act.*

The fourth ground for the issuing of preventative detention orders permits an order to be issued, in respect of a person, if the AFP member requesting the order, and the AFP member or other authority issuing the order, are satisfied that

- a terrorist act has occurred within 28 days;[106]
- detaining the person under the order is reasonably necessary to preserve evidence of, or relating to, the terrorist act.[107]

Where a person is a suspect in relation to the terrorist act that has occurred, there is already power to arrest and charge them.[108] The *Crimes Act* also establishes a number of offences relating to destruction of evidence and interference with the course of justice.[109] If a person is reasonably suspected of committing such an offence, or attempting or conspiring to commit such an offence, they may be arrested without a warrant if this is believed on reasonable grounds to be necessary to protect evidence.[110]

These existing powers are extensive. No case has been put as to why otherwise innocent persons need to be detained to preserve evidence of offences believed to have been committed.

2 Preventative detention an affront to liberty and the presumption of innocence

As the preceding discussion has made clear, the provisions authorising preventative detention orders empower the AFP to detain persons without the need to prove or even suspect criminal guilt. Such an order can be issued simply for the purpose of preserving evidence.[111] Put plainly, innocent people can be imprisoned under these

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[106] Item 24 of Schedule 4 of the Bill, s 105.4(6)(a).

[107] Item 24 of Schedule 4 of the Bill, s 105.4(6)(a),(b).

[108] *Criminal Code* s 101.1 (establishing the offence of engaging in a terrorist act) together with *Crimes Act* s 3W (establishing the power of arrest without warrant).

[109] *Crimes Act* ss 35-43.

[110] The attempt and conspiracy offences are established under the *Criminal Code* ss 11.1, 11.5; the preservation of evidence is expressly canvassed by the *Crimes Act* as being among the bases for arresting someone who is suspected of committing an offence: s 3W(1)(b)(iii),(iv),(v).

[111] Item 24 of Schedule 4 of the Bill, s 105.4(6).

provisions. A person should not be deprived of his or her liberty simply for the purpose of assisting criminal investigations when s/he is not even suspected of any criminal wrongdoing. To allow otherwise is to cheapen the value of personal freedom.

These concerns are only amplified by the fact that, as has been explained above, in the majority of circumstances the grounds giving rise to a preventative detention order would themselves be sufficient to permit the AFP to arrest a person on suspicion of having committed a crime. This leads naturally to apprehension that the purpose of the preventative detention powers is not so much to supplement an inadequacy of existing power, but rather to create a new regime of executive detention that is able to operate in parallel with the ordinary criminal justice system, but quarantined from the judicial oversight and well-established protections and traditions that are part of that system.

This apprehension seems to be confirmed by the provisions of the Bill which expressly provide for the transfer of a person from one to another mode of detention from preventative detention to arrest or ASIO detention – and back again.[112] Proposed section 105.26(5) is particularly sinister, defining 'release from detention under a preventative detention order' to include a situation in which a person is taken into custody on some other basis immediately upon being informed of his or her 'release'.[113]

One of the most pernicious features of the preventative detention regime that the Bill would establish is its near-incommunicado character, which is increased by the system of 'prohibited contact orders.' A person who is being detained under a preventative detention order is forbidden from contacting any other person.[114] Certain exceptions apply, but these are inadequate for two reasons: the limitations that apply, and their susceptibility to being overridden by a prohibited contact order. The only

[112] Item 24 of Schedule 4 of the Bill, ss 105.25, 105.26.

[113] Item 24 of Schedule 4 of the Bill, s 105.26(5).

[114] Item 24 of Schedule 4 of the Bill, s 105.34.

right of contact under the Bill that cannot be overridden by a prohibited contact order is the right to contact the Ombudsman.[115]

A person who is under preventative detention may make contact with a lawyer for limited purposes, including discussing their rights and remedies in relation to the order, or organising for the lawyer to appear for them in court.[116] In this latter circumstance, however, the Bill does not permit them to discuss the substance of their case with their lawyer; nor does the Bill allow them to discuss other matters which they fear may arise out of their preventative detention, such as criminal charges or a warrant under section 34D of the *ASIO Act*. The Bill also forbids the lawyer from discussing the preventative detention order with the persons friends and family.[117]

The drafting of the Bill also suggests that the person may have to specifically identify the lawyer they wish to contact,[118] and in any event allows the police, in suggesting a lawyer, to give priority to security-cleared lawyers.[119] This has the clear potential to undermine the confidence of a person in his or her legal representation.

Even where contact does take place, it is subject to monitoring for its content by the police[120] (contrary to the suggestion made by the Inspector-General of Intelligence and Security to the Parliamentary Joint Committee's investigation into the operation of ASIO questioning and detention).[121]

Furthermore, the contact may take place in a language other than English only if it is reasonably practicable for the police to provide an interpreter.[122]

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[115] Item 24 of Schedule 4 of the Bill, ss 105.34, 105.36.

[116] Item 24 of Schedule 4 of the Bill, s 105.37(1).

[117] Item 24 of Schedule 4 of the Bill, s 105.41(2). The exception that applies to parents or guardians of a child or person lacking capacity, allowing them to tell another person that the detained person is safe but unable to be contacted (item 24 of Schedule 4 of the Bill, s 105.41(4)), does not apply to lawyers.

[118] Item 24 of Schedule 4 of the Bill, s 105.37(3)(a).

[119] Item 24 of Schedule 4 of the Bill, s 105.37(4).

[120] Item 24 of Schedule 4 of the Bill, s 105.38(1).

[121] Evidence to Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of Division 3 Part III of the ASIO Act 1979 - Questioning and Detention Powers*, Canberra, May 20 2005, 9-10, available online at <http://www.aph.gov.au/hansard/joint/commttee/J8391.pdf> at 11 November 2005

[122] Item 24 of Schedule 4 of the Bill, s 105.38(2),(3),(4).

The Bill also provides that the person detained may contact a family member, employer, housemate etc.[123] However, except in the case of a person who is under 18 or lacks capacity contacting his or her parent or guardian, the contact is limited to phone, fax or email, and the person may communicate nothing except that he or she to is safe and unable to be contacted.[124] To say anything more is an offence punishable by up to 5 years imprisonment.[125]

Even in the case of a child or person lacking capacity, where a right of contact ostensibly exists, if one parent or guardian discloses to another the fact of the person's detention, he or she commits an offence punishable by up to 5 years imprisonment.[126] The parent or guardian is also prohibited from disclosing the fact of detention to a lawyer or to a court.[127]

In all these circumstances, the same rules as to monitoring and interpretation apply as they do to lawyers.[128]

Furthermore, the Bill would allow the AFP to seek a prohibited contact order in respect of any person subject to a preventative detention order, specifying a person with whom they may not make contact while in detention, on the basis that 'making the prohibited contact order will assist in achieving the purpose' of the preventative detention order.[129] Such an order may specify a class of persons with whom contact may not be made.[130] It will therefore be possible to seek a prohibited contact order prohibiting contact with 'any lawyer' or 'any family member'. The Bill expressly

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[123] Item 24 of Schedule 4 of the Bill, ss 105.35, 105.39.

[124] Item 24 of Schedule 4 of the Bill, ss 105.35(1).

[125] Item 24 of Schedule 4 of the Bill, ss 105.35(2), 105.41(1).

[126] Item 24 of Schedule 4 of the Bill, s 105.41(3).

[127] Item 24 of Schedule 4 of the Bill, s 105.41(3)(e) establishes certain exceptions, such as complaining to the Ombudsman, but does not permit disclosure to a lawyer or a court.

[128] Item 24 of Schedule 4 of the Bill, s 105.38, 105.39(7),(8),(9),(10).

[129] Item 24 of Schedule 4 of the Bill, ss 105.15,16. The grounds are specified at ss 105.15(4)(b), 105.16(4).

[130] Section 46(3) of the *Acts Interpretation Act 1901* (Cth) provides that a power to specify a person is a power to specify a class of persons.

provides that a prohibited contact order overrides any right to contact a lawyer or family member that would otherwise exist.[131] Moreover, given that prohibited contact orders are secret,[132] a person detained may find himself or herself in circumstances where her attempts to make contact with family or a lawyer are continually frustrated by secret orders that she has no right to see.

The Bill therefore provides for near-incommunicado detention. This is compounded by the raft of disclosure offences created that operate while a preventative detention order is in force, which apply not only to the person detained and the parents and guardians of a child or person lacking capacity, but also to lawyers and others who learn that a person is detained under an order.[133] Not only to these provisions impose a shroud of secrecy, but they inhibit the rights of the person detained – for example, to have his or her lawyer seek advice from, or brief, counsel.

Such circumstances, of secret and near-incommunicado detention established in part on the basis of secret orders is practically an invitation to excess and abuse. They also make it extremely difficult, in practice, to bring a court case for review of a preventative detention or prohibited contact order. Even if a detained person does have access to a lawyer, the lack of access to the process or documents surrounding the making of these orders will make it very difficult to make out a case for wrongful detention.[134] These practical difficulties are only compounded by the fact that the Bill provides that the Administrative Appeals Tribunal may not hear a matter relating to a preventative detention order while the order is in force.[135]

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[131] Item 24 of Schedule 4 of the Bill, s 105.40.

[132] Item 24 of Schedule 4 of the Bill, ss 105.28(3), 105.29(3), 105.32(10).

[133] Item 24 of Schedule 4 of the Bill, s 105.41(2),(6).

[134] The exclusion of these matters from the operation of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) pursuant to item 25 of Schedule 4 of the Bill will preclude the detained person from using section 13 of that Act to seek the reasons for his or her detention.

[135] Item 24 of Schedule 4 of the Bill, s 105.51(5).

3 The processes surrounding preventative detention fundamentally flawed

Not only is preventative detention flawed in principle, but the processes that would be put in place by the Bill are themselves fundamentally flawed.

The Bill entrenches the possibility of abuse created by secret detention by allowing senior AFP officers to issue initial preventative detention orders and prohibited contact orders.[136] That is, these orders can be issued without proving their need to an independent authority. This violates two key principles applicable to the exercise of coercive power by the police: the principle of proof and the principle of independent verification of the grounds for the exercise of these powers. The Bill will therefore permit severe restrictions of freedom without the need for proper proof. Instead of requiring the police to prove the necessity of powers to an independent authority, the Bill allows police to give themselves permission to preventively detain someone for up to 24 hours.

As we argued earlier, the Bill allows for 'guilt by suspicion'. There is also a grave risk that for groups suspected by the police of committing, or being likely to commit, terrorist acts, the rule might very well be 'guilty until proven innocent'. In the United Kingdom, preventive detention orders have been used against persons who have been found innocent by juries after a seven-month long criminal trial.[137] Jailing innocent people is not only a travesty of justice but also does nothing to improve the safety of Australians.

Even in the case of a continued preventative detention order, the processes are extremely objectionable. There is no guarantee of a judicial role in the issuing of a such an order and any associated prohibited contact orders.[138] Moreover, despite the duty imposed by the Bill to 'consider afresh the merits of making the order',[139] no

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[136] Item 24 of Schedule 4 of the Bill, ss 105.8 (initial preventative detention orders) and 105.15 (prohibited contact orders).

[137] Derek Brown, 'Jurors speak out over terror laws', *Guardian Weekly*, 14-20 October 2005, 9.

[138] Item 24 of Schedule 4 of the Bill, s 105.2(1), allowing the appointment as issuing authorities of persons other than serving judicial officers.

[139] Item 24 of Schedule 4 of the Bill, s 105.12(2).

provision is made for any submissions to be made on the issue other than those from the police seeking the order. The issuing authority is obliged to taken into account 'relevant information',[140] but no process is established whereby such information may be obtained.

The Bill attempts to establish a system of monitoring to oversee preventative detention, by obliging the Commissioner of the AFP or a delegate to 'nominate a senior AFP member … to oversee the exercise of powers under, and the performance of obligations in relation to, the preventative detention order.'[141] The name and work telephone number of this AFP member must be provided to a person in relation to whom a preventative detention order is made.[142] This is far from adequate, however, for a number of reasons.

First, there is no requirement that the contact details be provided in writing. Second, no provision is made for contacting the AFP member at times when he or she is not in the vicinity of his or her work telephone. Third, no clear right is given to the person detained to contact that AFP member: the Bill says that the person detained is 'entitled to make representations' to the AFP member,[143] but it does not make explicit that this entitlement may be exercised despite the words of the Bill that '(e)xcept as provided in sections 105.35, 105.36, 105.37 and 105.39, while a person is being detained … the person … is not entitled to contact another person.'[144] They are therefore reliant upon their lawyer, parent or guardian undertaking such contact on their behalf.[145] Even this may be difficult, however, as the provisions for contact with a lawyer do not expressly provide that the name and contact details of the AFP member are among the subject matter that may be communicated by the detained person to his or her lawyer.[146]

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[140] Item 24 of Schedule 4 of the Bill, s 105.12(2).

[141] Item 24 of Schedule 4 of the Bill, s 105.19(5),(6)(,7),(8),(9).

[142] Item 24 of Schedule 4 of the Bill, ss 105.28(2|)(i), 105.29(2)(h).

[143] Item 24 of Schedule 4 of the Bill, s 105.19(8)(a).

[144] Item 24 of Schedule 4 of the Bill, s 105.34.

[145] Such rights of disclosure on the part of a lawyer, parent or guardian are expressly protected by the Bill: ss 105.19(8), 105.41(2)(d)(iv), 105.41(30(e)(iii).

[146] Item 24 of Schedule 4 of the Bill, s 105.37(1).

Fourth, no role is given to this AFP member to represent the interests of the detained person at a hearing for a continued preventative detention order. Fifth, a member of the AFP – the organisation which has sought the preventative detention order and is overseeing the person's detention – is not sufficiently independent to be able to act as an effective monitor.[147] The position of such an AFP member is quite unlike that of the Inspector-General of Intelligence and Security who, as an independent statutory officer, has a comparable monitoring role in relation to ASIO questioning and detention.[148]

There are further objections that can be made against the processes that the Bill would establish:

- the fact that no indication is given of how the facts of a person's previous executive detention are to be taken into account in deciding whether or not a preventative detention order should be issued;[149]
- the fact that previous occurrences of ASIO detention in relation to a person need not be included in an application for a preventative detention order;[150]
- the fact that the Bill permits the detention of innocent non-suspects in remand and prison facilities;[151]
- the fact that the explanation to a person who is taken into custody need not include an explanation of the effects of the disclosure offences, and thus of the person's extremely limited right to indicate their safety to a family member, housemate or employer etc without indicating that they are in preventative detention;[152]

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[147] The requirement that the AFP member not have been involved in applying for the order is manifestly insufficient in this regard: item 24 of Schedule 4 of the Bill, s 105.19(6).

[148] *ASIO Act* ss 34F(2),(9), 34HAB, 34HA, 34NC, 34Q, 34QA, 34T(1), 34VAA(5)(paragraphs (a)(iv),(f) of the definition of 'permitted disclosure').

[149] Item 24 of Schedule 4 of the Bill, ss 105.7(2)(e),(f) 105.11(2)(e),(f). See the discussion of the same issue above in relation to control orders.

[150] Item 24 of Schedule 4 of the Bill, ss 105.7(2)(e), 105.11(2)(e).

[151] Item 24 of Schedule 4 of the Bill, s 105.27. This is particularly concerning in light of the Cornelia Rau case, which revealed that prison authorities and procedures have great difficulty in recognising and implementing regimes of non-criminal detention.

[152] Item 24 of Schedule 4 of the Bill, ss 105.28(2), 105.29(2).

- the fact that a person who is subjected to a continuing preventative detention order, or the extension of a preventative detention order, need not be provided with a statement of the grounds on which the order was made,[153] despite the fact that those grounds might differ from the grounds on which the initial order was made;[154]
- when it comes to the recognition by regulation of a state law as a 'corresponding State preventative detention law'[155] there is no requirement that that state law include any safeguards, in particular in relation to the protection from interrogation.[156]

C Stop and search powers

Schedule 5 of the Bill would give the AFP expanded powers to stop, search and question without a warrant. These powers appear to be modelled on existing powers under Division 4 of Part II of the *Australian Federal Police Act 1979* (Cth) ('*AFP Act*'),[157] but would apply in a broader range of circumstances. They would also supplement more general police powers found in the *Crimes Act*.

Under these existing powers, if a person is in the vicinity of a place, person or thing in respect of which the AFP is providing protective services, and if an AFP member 'suspects on reasonable grounds' that the person 'might have just committed, might be committing, or might be about to commit, a protective service offence,' then the AFP member may require a person to provide his or her name and address, and her reason for being in the vicinity of the place, person or thing.[158] A 'protective service

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[153] Item 24 of Schedule 4 of the Bill, s 105.32(4),(5).

[154] Item 24 of Schedule 4 of the Bill, ss 105.11(2)(b), 105.12(2) (permitting new information to be adduced in seeking a continued preventative detention order) and 105.10(2)(b), 105.14(2)(b) (permitting new information to be adduced in seeking the extension of a preventative detention order).

[155] Item 5 of Schedule 4.

[156] See item 4 of Schedule 4, s 105.42: the Commonwealth does not have legislative power to prevent state police from questioning those who are detained under a state law.

[157] These existing powers were established by Item 27 of Schedule 1 of the *Australian Federal Police and Other Legislation Amendment Act 2004* (Cth), which in turn expanded powers vested in the Australian Protective Services by the now-repealed *Australian Protective Services Act 1987* (Cth) as amended by the *Australian Protective Services Amendment Act 2003* (Cth).

[158] *AFP Act* s 14I.

offence' includes an offence under Division 101 of the *Criminal Code*,[159] that is, the offence of engaging in a terrorist act, plus the offences involving ancillary and preparatory conduct discussed in section III above.

An AFP member may also search a person or their vehicle for a thing that is likely to cause or be used to cause violence to a person, place or thing to which the AFP is providing protective services.[160] If the suspected thing is found, or a weapon or other dangerous article is found, it may be seized.[161]

The new powers would be similar in their operation, but broader in the grounds on which they can be invoked. Rather than being limited to 'protective services' contexts, the powers could be exercised against any person who is in a Commonwealth place, and whom an AFP member 'suspects on reasonable grounds … might have just committed, might be committing, or might be about to commit, a terrorist act.'[162] They would also apply to any person who is in a Commonwealth place that has been declared by the Minister to be a 'prescribed security zone'.[163] The Bill would authorise the Minister to prescribe any Commonwealth place as a security zone if he or she considers that such a declaration would assist in preventing a terrorist act occurring, or in responding to a terrorist act that has occurred.[164]

Given the breadth of the definition of 'terrorist act', the broad grounds on which the Minister may make a declaration of a place as a 'prescribed security zone', and the lack of any requirement that the Minister's declaration be based on reasonable grounds, means that the circumstances in which these powers are able to be invoked may be very broad.

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[159] *AFP Act* s 4, paragraph (d) of the definition of 'protective service offence'.

[160] *AFP Act* s 14J(1),(2).

[161] *AFP Act* s 14K.

[162] Item 10 of Schedule 5 of the Bill, s 3UB(a).

[163] Item 10 of Schedule 5 of the Bill, s 3UB(b).

[164] Item 10 of Schedule 5 of the Bill, s 3UJ(1).

Under the appropriate circumstances, an AFP member would be able to demand a person's name and address, and their reason for being in the Commonwealth place.[165] By way of comparison, the ordinary powers vested in the police by the *Crimes Act* are limited to circumstances in which a police officer believes on reasonable grounds that the person whose name and address is sought 'may be able to assist … in inquiries in relation to an indictable offence that the constable has reason to believe has been or may have been committed.'[166] The Bill would therefore considerably expand the scope of these powers, by allowing the AFP to also demand people's reasons for being in a place, and by eliminating the connection to a crime that it is believed might have taken place. Also, unlike the *Crimes Act*, the Bill would not oblige the AFP member to identify himself or herself at the request of the person he or she is questioning.[167]

The Bill would also permit, in the appropriate circumstances, the AFP member to search a person. Unlike the search powers vested in police by the *Crimes Act*, this power to search without warrant could be exercised in relation to a person who has not been arrested, who need not be a suspect, and who not have the basis of the search explained to him or her.[168] Unlike the search powers vested in the AFP by the *AFP Act*, these search powers could be exercised in relation to a person who is not suspected of carrying any dangerous thing.[169] Furthermore, and unlike the search powers in the *AFP Act*, there is also no requirement in the Bill that a search be carried out by an AFP member of the same sex as the person being searched.[170]

Furthermore, the Bill would also permit the AFP member to seize an item found in the course of the search if the AFP reasonably suspects that the item 'may be used in', 'is evidence of, or relating to' or 'is connected with the preparation for, or the

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[165] Item 10 of Schedule 5 of the Bill, s 3UC.

[166] *Crimes Act* s 3V.

[167] Contrast *Crimes Act* s 3V(3).

[168] Contrast *Crimes Act* ss 3ZE, 3ZF, 3ZH, 3ZI, as well as 3ZD(1) which requires the AFP to inform a person of the basis on which he or she is being arrested.

[169] Contrast *AFP Act* s 14J.

[170] Contrast *AFP Act* s 14J(2)(b)(i),(3).

engagement of a person in' either a 'serious offence' or a terrorist act.[171] A serious offence is defined as an offence punishable by 2 or more years imprisonment.[172] This is therefore a wider power of seizure than the power to seize dangerous items under the *AFP Act*,[173] and rather than requiring an immediate production of a receipt for the thing seized, as is the case for things seized under warrant pursuant to the *Crimes Act*,[174] only requires the production of a 'seizure notice' within 7 days.[175]

No explanation has been offered of how the vesting of greater discretionary and coercive powers in the AFP will prevent acts of political or religious violence. Currently, if an AFP member suspects on reasonable grounds that a person is attempting to commit a terrorist act, or is engaged in preparation for or planning of a terrorist act, or has in his or her possession any document or other thing connected to such preparation or planning, then the AFP member can arrest that person.[176] This then triggers a number of powers, as well as accountability and review mechanisms, under the *Crimes Act*.

Rather then increasing the safety of Australians, the vesting of broad discretionary policing powers which are not subject to effective review is a recipe for discrimination and racial or ethnic profiling, with all the adverse consequences discussed in section III above.

D The AFP's powers to demand information and documents

Schedule 6 of the Bill would give the AFP the power new powers to demand documents and information. Specifically, the Bill would give the Commissioner, a Deputy Commissioner, or an authorised senior member of the AFP the power to

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[171] Item 10 of Schedule 5 of the Bill, s 3UE together with the definitions of 'serious offence related item' and 'terrorism related item' in s 3UA.

[172] Item 2 of Schedule 5 of the Bill.

[173] *AFP Act* ss 14J, 14K.

[174] *Crimes Act* s 3Q.

[175] Item 10 of Schedule 5 of the Bill, s 3UF(1).

[176] For offences under Division 101 of the *Criminal Code*, or ancillary offences thereto established by s 11.1 of the *Criminal Code*. The police's power of arrest without warrant on the basis of 'belief on reasonable grounds' is established under s 3W(1) of the *Crimes Act*.

demand information and documents from the operator of a ship or an aircraft, if he or she believes on reasonable grounds that the operator has information or documents 'relevant to a matter that relates to the doing of a terrorist act (whether or not a terrorist act has occurred or will occur'.[177] These are very broad grounds.

These powers will be able to be exercised without any need for a warrant being issued, and without the involvement or supervision of any judicial or independent authority. Failure to provide the information or document will be a strict liability offence.[178] There is no express protection of the privilege against self-incrimination, although this might result from defence of 'reasonable excuse'.[179] The burden will be placed on an accused who does not have the information or documents to adduce evidence of this in his or her defence.[180]

Schedule 6 also establishes two additional regimes allowing the Commissioner, a Deputy Commissioner, or an authorised senior member of the AFP to demand documents. Under the first regime, a notice may be issued to any person compelling the production of certain information if the relevant AFP member 'considers on reasonable grounds that a person has documents . . . [that] will assist the investigation of a serious terrorism offence'.[181] A 'serious terrorism offence' is defined as meaning any 'terrorism offence' other than an offence against s 102.8 of the *Criminal Code* (the offence of associating with a terrorist organisation), or an offence against the control order or preventative detention regimes.[182] The notice can be issued without any need for a warrant being issued.

Under the second additional regime, an application may be made to a Federal Magistrate, acting in his or her personal capacity, for a notice compelling production of certain information if the relevant AFP member 'considers on reasonable grounds

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[177] Item 1 of Schedule 6 the Bill, s 3ZQM.

[178] Item 1 of Schedule 6 the Bill, s 3ZQM(5).

[179] Item 1 of Schedule 6 the Bill, s 3ZQM(5)

[180] Under the defence of 'reasonable excuse' that would be created by item 1 of Schedule 6 the Bill, s 3ZQM(6).

[181] Item 1 of Schedule 6 the Bill, s 3ZQN(1),(2).

[182] Item 3 of Schedule 5 of the Bill.

that the person has documents . . . [that] will assist the investigation of a serious offence'.[183] The Federal Magistrate may issue the notice if her or she is satisfied of the same on the balance of probabilities.[184] A serious offence is defined as an offence punishable by 2 or more years imprisonment.[185]

Failure to comply with a notice under either regimes is illegal even when compliance would contravene other laws, such as legislation protecting private and personal information. A document must be produced even if it would incriminate the person producing it, or breach legal professional privilege.[186].

The Bill would allow a notice to specify that information about the notice not be disclosed.[187] In this case, it would become an offence to disclose the existence or nature of the notice except in the course of obtaining legal advice or engaging in legal proceedings in respect of the notice, or if necessary to obtain a requested document. In this latter case, the person to whom disclosure is made must be directed that the person to whom the document relates is not to be told about the notice.[188]

The Bill limits the documents that are subject to a notice to produce to various matters including details of financial accounts, funds transfer, dealings in assets, travel, utility accounts, telephone bills and residence.[189] Nevertheless, this power gives the AFP the capacity to build up extensive dossiers of information on individuals or companies that they are interested in, potentially in secret.

This is particularly so in the case of the powers relating to 'terrorism offences', which may be exercised, and subjected to secrecy, without the supervision of any judicial or independent authority. Although the AFP's use of this power is stated to be limited to

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[183] Item 1 of Schedule 6 the Bill, ss 3ZQO(1), 3ZQQ.

[184] Item 1 of Schedule 6 the Bill, s 3ZQO(2).

[185] Item 2 of Schedule 5 of the Bill.

[186] Item 1 of Schedule 6 the Bill, ss 3ZQR(1), 3ZQS. The document cannot be used in evidence, however, and nor can information obtained as a direct or indirect result of the document; likewise, legal professional privilege continues to apply to any document produced: s 3ZQR(2),(4).

[187] Item 1 of Schedule 6 the Bill, ss 3ZQN(3)(g), 3ZQO(4)(g).

[188] Item 1 of Schedule 6 the Bill, s 3ZQT.

investigation of terrorism offences, in practice this will be a difficult constraint to enforce, as the party against whom the demand is made will not be in a good position to contest the issue simply by virtue of not having the relevant information. Moreover, if the AFP chooses to impose a secrecy requirement, the person who is suspected of engaging in a terrorist offence will have no knowledge that these demands are being made in relation to their personal or business information. Giving the police such free rein opens the door to mistakes and abuse.

The civil liberties concerns raised by the existence of such secret police dossiers is increased by the fact that there is no provision, under any of these three regimes for acquiring information and documents, for the use or storage of the information or documents acquired.

E Expanded ASIO powers

Schedule 10 of the Bill would vest new powers in ASIO, and expand its existing powers. No clear case has been articulated to justify the need for increased intrusive powers on the part of ASIO, and the reduction in the degree of control and accountability that would result from these powers.

1 Special powers warrants

The existing regime of ASIO search and surveillance warrants is established under Division 2 of Part III of the *ASIO Act*. A number of types of warrants may be issued pursuant to this regime as it currently stands, including:

- search warrants;[190]
- computer access warrants;[191]
- warrants for the inspection of postal articles;[192] and
- warrants for the inspection of articles delivered by delivery services.[193]

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[189] Item 1 of Schedule 6 the Bill, s 3ZQP.

[190] *ASIO Act* s 25(1).

[191] *ASIO Act* s 25A(1).

[192] *ASIO Act* s 27(2).

These warrants are issued by the Attorney-General at the request of ASIO.[194]

Schedule 10 of the Bill would significantly extend the time for which a search or inspection warrant remains in force, and would significantly expand the powers able to be exercised by ASIO pursuant to a computer access warrant.

Inspection of people's mail, whether delivered by post, or by delivery services, is a serious infringement of personal privacy. The significance of this is recognised by the *ASIO Act*, which makes it unlawful for ASIO to interfere with the post or other delivery services except pursuant to a warrant, and obliges the Director-General of ASIO to take all reasonable steps to ensure that such unlawful activity does not take place.[195]

Nevertheless, it should be recognised that under the *ASIO Act* the grounds upon which a warrant authorising such interference may be issued are comparatively broad. Such a warrant may be issued if the person whose mail is to be targeted is 'engaged in, or reasonably suspected … of being engaged in, or of being likely to engage in, activities prejudicial to security'[196] and that interfering with the mail will, or will be likely to assist ASIO in 'obtaining intelligence relevant to security.'[197] An important check that prevents these warrants from turning into mere fishing expeditions by ASIO is the existence of strict limits on the time for which such a warrant can remain in force, namely, 90 days.[198] By doubling this period, to 6 months,[199] the Bill would dilute of one of the key factors balancing the interests of privacy against the interests of security.

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[193] *ASIO Act* s 27AA(2).

[194] *ASIO Act* ss 25(1), 25A(1), 27(2), 27AA(2).

[195] *ASIO Act* ss 27(1), 27AA(1).

[196] *ASIO Act* ss 27(2)(a),(3(a), 27AA(3)(a),(6)(a).

[197] *ASIO Act* ss 27(2)(b),(3(b), 27AA(3)(b),(6)(b).

[198] *ASIO Act* ss 27(4), 27AA(9).

[199] Items 16, 17, 19 and 20 of Schedule 10.

At present, it is possible for ASIO to seek the issue of a further warrant if there continue to be grounds for the issuing of a warrant.[200] The proposed amendment is therefore unnecessary for ASIO to be able to carry out its operations. Rather, it would simply reduce the degree of oversight to which ASIO is subject. In particular, if the time period for which a warrant remains in force is doubled, ASIO is, in effect, invited to take an ever less strict view of what counts as an individual's likelihood to engage in activities prejudicial to 'security'. With a lengthened period of surveillance, the threshold requirement that interference under the warrant would be likely to assist in obtaining intelligence is also diluted.

The proposals in relation to computer access warrants and search warrants are even more disturbing. The Bill would amend the *ASIO Act* to allow a computer access warrant to permit entry onto premises using necessary and reasonable force.[201] Currently, ASIO may enter onto premises to inspect computers and other electronic equipment under an appropriately worded search warrant,[202] provided that 'there are reasonable grounds for believing ' that access to things or records on the premises will substantially assist the collection of intelligence important in relation to security,[203] and 'there is reasonable cause to believe that data relevant to this security matter may be accessible by using a computer or other electronic equipment' on the premises.[204] There is thus no demonstrated need for a widening of the conduct authorised by a computer access warrant.

Given that a computer access warrant lasts for 6 months,[205] rather than the current 28 days and amended 90 days for a search warrant, this amendment seems to be nothing more than an attempt to get around the shorter duration of search warrants. It would also appear to circumvent the current need to have regard, in issuing a warrant, to the need to enter premises in order to gather intelligence;[206] the computer access regime

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[200] *ASIO Act* s 27(5), 27AA(10).

[201] Items 13 and 15 of Schedule 10.

[202] *ASIO Act* ss 25(4),(5).

[203] *ASIO Act* s 25(2)

[204] *ASIO Act* s 25(5).

[205] *ASIO Act* s 24A(6).

[206] *ASIO Act* s 25(2).

does apply such a requirement to the issue of the warrant as such, but not to the question of whether or not access to the premises on which a computer is located is necessary.[207]

Perhaps the most serious proposals in relation to these ASIO warrants related to search warrants. Currently, a search warrant issued to ASIO is valid for 28 days.[208] This limited duration is a reflection of the serious nature of the covert infiltration of private places by a covert security agency.[209] The Bill would more than triple this duration, to 90 days.[210] This would be to invite ASIO to go on mere fishing expeditions, to dilute the threshold at which a warrant is able to be issued, and to reduce the level of oversight, for the same reasons as given above in relation to mail inspection warrants. As with those warrants, ASIO has sufficient operation under the current law given its power to seek the issue of a further warrant if the grounds continue to be satisfied.[211]

The single most concerning part of the Bill in relation to ASIO special powers warrants, however, is the power it would give to ASIO to confiscate property. At present, a search warrant may authorise ASIO to 'remove and retain' any record or thing found in a search of premises or of a person. The item may be retained by ASIO only for such time as is reasonable for the purposes of inspecting or examining the record or thing, and (in the case of a record) making a copy if the warrant so authorises.[212] The Bill would amend this provision, to provide that material may be removed pursuant to a search warrant and retained for 'such time as is reasonable, unless returning the record or thing would be prejudicial to security.'[213]

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[207] *ASIO Act* s 25A(2).

[208] *ASIO Act* s 25(10).

[209] Section 25(4)(e) of the *ASIO Act* permits a search warrant to authorise ASIO to do any thing reasonably necessary to conceal the fact that it has taken action under the warrant.

[210] Items 12 and 18 of Schedule 10 of the Bill.

[211] *ASIO Act* s 25(11).

[212] *ASIO Act* s 25(4).

[213] Items 3 and 4 of Schedule 10 of the Bill.

Unlike the existing law, this would give ASIO a power of confiscation. Under the *ASIO Act*, 'security' is quite expansively defined to include, among other things, the protection of the governments and people of Australia from politically motivated violence, and from attacks on Australia's defence system.[214] Each of these phrases is in turn defined, to include, among other things:

- activities intended to interfere with the performance by the Defence Force of its functions;[215]
- acts that are offences against Part 5.3 of the *Criminal Code*.[216]

Offences against Part 5.3 include such non-violent activity as meeting twice with the member of a banned organisation to try and persuade the organisation to stop the use of violence,[217] or teaching a member of an organisation linked to political violence how to use a photocopier.[218] Will ASIO interpret anti-war protests as being 'activities intended to interfere with the performance by the Defence Force of its functions? This proposal would give ASIO the power to confiscate the property of political activists it does not like, and retain such property at its pleasure. This would be a clear infringement of the civil rights of those subject to ASIO's power. The risk of abuse is all the greater because ASIO is able to execute its search warrants, and the power of confiscation that it would be granted, in secret.[219]

It may also raise an issue of constitutionality under section 51(xxxi) of the *Constitution*, which requires the Commonwealth to acquire property only on just terms. There are a number of exceptions to the requirement imposed by section 51(xxxi).[220] However, it is probably true to say that the law which authorises confiscation of property must be appropriate and adapted to the purpose being

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[214] *ASIO Act* s 4, sub-paras (a)(iii),(iv),(v) of the definition of 'security'.

[215] *ASIO Act* s 4, definition of 'attacks on Australia's defence system.'

[216] *ASIO Act* s 4, para (ba) of the definition of 'politically motivated violence' together with the definition of 'terrorism offence'.

[217] *Criminal Code* (Cth) s 102.8.

[218] *Criminal Code* (Cth) s 102.5, together with s 102.1(1), para (a) of the definition of 'terrorist organisation'.

[219] See above n 209.

[220] A discussion of these exceptions can be found in Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A contemporary view* (2001) 297-300.

pursued.[221] Given the extreme breadth of the definition of 'security' in the *ASIO Act*, it may be that such a wide power of confiscation is not appropriate and adapted to the goal of ensuring the safety of Australia and Australians.

2 Questioning and detention warrants

The Bill would make two changes to the regime of questioning and detention warrants established under Division 3 of Part III of the *ASIO Act*. Both are objectionable.

The same power of confiscation that ASIO would gain pursuant to search warrants, would be granted to ASIO in relation to records or things produced in response to questioning under a warrant, or in relation to records or things uncovered pursuant to a search of a person subject to a detention warrant.[222] Allowing the property of non-suspects to be seized as part of a regime of secret intelligence gathering[223] and near-incommunicado detention[224] is a gross breach of civil rights.

The other change to the Part III Division 3 warrant regime would be an amendment to the offence of making a misleading statement to ASIO while being questioned under a warrant.[225] Currently, the burden lies on the prosecution to prove that the statement was false or misleading in a material particular, and that the defendant knew this.[226] Under the amended offence, the prosecution would only have to prove that the statement was false or misleading, and that the defendant knew this. The prosecution would not have to proof the statement was false or misleading in a material particular.

Absence of materiality would instead become a defence, with an onus falling on the accused to adduce evidence that the statement, while false or misleading, was *not* false or misleading in a material particular. It should be noted that it will not be a

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[221] Ibid, pp 299-300.

[222] Items 23 and 24 of Schedule 10 of the Bill.

[223] *ASIO Act* s 34VAA.

[224] *ASIO Act* s 34F(8).

[225] Items 21 and 22 of Schedule 10 of the Bill.

[226] *ASIO Act* s 34G(5)(b).

sufficient defence for the accused to adduce evidence that he or she was ignorant of the materiality of the statement in question. Using the terminology of the *Criminal Code*, the net effect of this amendment is therefore to partially reverse the onus of one of the physical elements of the offence, and to abolish the fault element in respect of that material element.

In practice, this sort of a partial reversal of the onus of proof has the possibility of requiring an accused to waive his or her right to silence by testifying in his her own defence, in order to explain why the answer was not false or misleading in any material particular.

In addition, the abolition of the knowledge requirement means that it is likely to be difficult for the accused to make out the defence, given that the accused may not be aware of what is or is not material to ASIO, and indeed information about such matters ASIO will typically be protected for national security reasons.

We note that a number of charges have already been laid under this provision over the past two years.[227] We suspect that this partial reversal of the onus of proof and the abolition of one of the fault elements in relation to this offence is a response to perceived difficulties that have arisen in the course of prosecuting these current charges. Given that the ASIO questioning regime is already quite contrary to civil rights, allowing as it does the secret interrogation and detention of non-suspects, to increase the burden upon those subject to it simply in order to facilitate prosecutions under the regime is extremely objectionable.

3 Other ASIO powers

The Bill would give ASIO new coercive powers, to demand information and documents from the operators of vessels and aircraft.[228] These powers will be able to be exercised without any need for a warrant being issued, and failure to provide the

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[227] Australian Security Intelligence Organisation, *Report to Parliament 2003200-4*, p 17; Australian Security Intelligence Organisation, *Report to Parliament 2004-2005*, pp 21, 41.

[228] Item 2 of Schedule 10 the Bill.

information or document will be a strict liability offence. Furthermore, as with the offences under s 34G of the *ASIO Act*, the burden will be placed on an accused who does not have the information or documents to adduce evidence of this in his or her defence.

This increased practice of vesting coercive powers in a covert intelligence organisation is contrary to principles of accountability and democracy. In practice, given the secrecy that cloaks ASIO's operations, it will be virtually impossible for any subject to a demand under these new provisions to contest the legality of the demand. Power of this nature are therefore ripe for abuse, encouraging ASIO to undertake fishing expeditions for information on those it regards as 'suspect' individuals or organisations.

F Other amendments made by Schedule 10 of the Bill

The Bill would widen the grounds on which customs officers may make copies of documents that they examine as part of their inspection duties, to include not just information relevant to the import or export of prohibited goods, or relevant to criminal offences, but also information relevant to security (as broadly defined under the *ASIO Act*) or relevant to the functions of ASIO and ASIS.[229]

The Bill would also allow the Australian Customs Service to disclose personal information held by them to ASIO or to ASIS without needing the consent of the person to whom the information relates.[230]

These are further examples of a general pattern in the Bill, of increasing the scope of executive agencies to collect information on individuals on very broadly defined 'security' grounds, without adequate scrutiny, publicity and oversight.

Finally, the Bill would amend the *Migration Act 1958* (Cth) to widen the grounds on which non-citizens can be deported, from conduct threatening 'the security of the

[229] Item 29 of Schedule 10 f the Bill.

[230] Item 30 of Schedule 10 f the Bill.

Commonwealth, of a State or of an internal or external Territory' to conduct threatening security, as that is broadly defined in the *ASIO Act*. Given the recent deportation of the American peace activist Scott Parkin, not to mention the ongoing inquiries into incompetence and abuse within the Department of Immigration, Multiculturalism and Indigenous Affairs, there is every reason to be concerned that such expanded powers of deportation would be subject to abuse.

G Financing 'terrorism'

Schedule 3 of the Bill would extend the existing offence of getting funds to or from a terrorist organisation.

Currently, it is an offence to receive funds from, or make funds available to, a 'terrorist organisation'.[231] This existing offence is already extraordinary in its breadth for two reasons. The definition of 'terrorist organisation' embraces organisations that many members of the Australian public will not consider terrorist, as it is not restricted to organisations whose principal activities are the promotion and engagement of extreme acts of ideological/religious violence. A 'terrorist organisation' can, for example, be an organisation which is predominantly involved in charitable work but is also indirectly involved in a 'terrorist' act.[232] Moreover, for the existing offence to be committed, the funds received or provided need not have any connection with a 'terrorist act'. In short, an offence can be committed without any violent intention.

The Bill would add an additional ground of criminal liability under this offence, that a person 'collects funds for, or on behalf of, an organisation (whether directly or indirectly)'. This would widen the offence even more, removing any requirement that funds actually be made available to the organisation. This will further increase the capacity of this offence to criminalise the conduct of those whose intentions are entirely non-violent.

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[231] *Criminal Code* s 102.6(1)(a),(2)(a).

[232] *Criminal Code* s 102.1.

V THE BILL ADVERSELY IMPACTS UPON POLITICAL FREEDOMS

The Bill threatens political freedoms in two ways: by expanding the grounds upon which organisations can be listed under the *Criminal Code* as 'terrorist organisations'; by amending and, in certain respects, expanding the offence of sedition.

A Proscription powers

As noted in section III above, an organisation can be listed by the Attorney-General as a terrorist organisation if he or she is satisfied, on reasonable grounds, that the organisation is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)'.[233] The Bill would expand this power to allow the Attorney-General to list an organisation on one of three further grounds, that it:

- 'directly or indirectly counsel or urges the doing of a terrorist act';
- 'directly or indirectly provides instruction on the doing of a terrorist act';
- 'directly praises the doing of a terrorist act'.[234]

Given the vagueness of the existing grounds for listing, which include the notion of 'indirectly fostering the doing of terrorist act' it is not clear what the effect of the first two of these new additional grounds would be. However, the third of these new grounds would dramatically widen the scope for proscription. Given the very large number of community, religious and political organisations in Australia and around the world which from time to time express praise for acts of political violence – whether that be commending the United States on its invasion of Iraq, or expressing support for organisations resisting oppressive regimes – this is a very real power to target organisations and their members on the basis of nothing more than their political or religious orientation.

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[233] *Criminal Code* s 102.1(2), together with paragraph (b) of the definition of 'terrorist organisation' in s 102.1.

[234] Items 9 and 10 of Schedule 1 of the Bill, defining when an organisation 'advocates the doing of a terrorist act' and permitting the Attorney-General to list an organisation on the grounds that it does os.

In the current political climate, and given the very selective character of the current listing of organisations under the *Criminal Code*, there is a very real concern that the purpose of this power is to allow the executive to criminalise organisations which have expressed support for the Iraqi resistance to the invasion of that country, or support for Palestinian resistance of Israeli occupation.

B Sedition

Schedule 7 of the Bill seeks to repeal the existing offence of sedition (while preserving the existing law relating to seditious organisations)[235] and replace it with a new suite of offences.[236] Given a lack of justification for broadening the offence of sedition, together with the evident capacity of these offences to limit freedom of political activity, these parts of the Bill should be rejected as inconsistent with the values of liberal democracy.

1 Urging treason and treachery

New section 80.2(1),(2) of the *Criminal Code* would create an offence which overlaps to a large extent with the existing offence of incitement to treachery.[237] It would be broader in two respects, however: the offender need only be reckless, rather than have intention, with respect to the target of the violence; and he or she need only urge treacherous conduct, rather than intend both treacherous conduct and treacherous intentions, on the part of others. The maximum penalty for incitement to treachery is 10 years; for the new offence, it is 7 years.

This offence would also cover much of the ground of the sedition offences that would be repealed. These existing sedition laws make it an offence to 'engage in a seditious enterprise with the intention of causing violence, or creating public disorder or a public disturbance,'[238] or to write, print, utter or publish any seditious words 'with the

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[235] Items 2, 3 and 4 of Schedule 7 of the Bill.

[236] Item 12 of Schedule 7 of the Bill.

[237] *Crimes Act* s 24AA(1)(a) together with *Criminal Code* s 11.4.

[238] *Crimes Act* s 24C.

intention of causing violence or creating public disorder or a public disturbance'.[239] The concept of 'sedition' as it appears in these offences relevantly includes exciting disaffection against the government[240] and exciting attempts at unlawful alterations of matters established by Commonwealth law.[241]

The new offence would be broader than these aspects of the offence that it replaces, however, because it would require only the urging of violence rather the intention to cause it. The new offence would also carry a penalty considerably heavier than the present maximum sentence of 3 years imprisonment.[242]

This new offence could be committed by anyone anywhere in the world.[243] This is also an extension of liability compared to both the current sedition laws and the current offence of incitement to treachery, which require that the offence take place in Australia (or, in the case of incitement to treachery, that the treachery be intended to take place in Australia).[244]

New section 80.2(7),(8),(9) of the *Criminal Code* would create an offence which overlaps to a large extent with the existing offence of incitement to treason.[245], but which would be broader because the offender need only urge treasonous conduct, rather than intend both treasonous conduct *and* treasonous intentions, on the part of others. Like incitement to treason, this new offence could be committed by anyone anywhere in the world.[246] The maximum penalty for incitement to treason is 10 years; for the new offences, it is 7 years.

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[239] *Crimes Act* s 24D.

[240] *Crimes Act* s 24A(d).

[241] *Crimes Act* s 24A(f).

[242] *Crimes Act* ss 24C, 24D.

[243] Item 12 of Schedule 7 of the Bill, s 80.4, establishing the widest category of extended geographical jurisdiction.

[244] *Criminal Code* s 14.1.

[245] *Criminal Code* s 80.1(1)(e),(f) together with s 11.4.

[246] Item 12 of Schedule 7 of the Bill, s 80.4, establishing the widest category of extended geographical jurisdiction. The existing offence of incitement to treason has the same extended geographical jurisdiction established by the combined operation of *Criminal Code* s 80.1(7) and 11.4.

No case has been made for extending the grounds of criminal liability for engaging in politically-motivated speech. In particular, the extension of liability for urging treasonous conduct seems intended to criminalise the speech of those critics of the government who have argued for the illegality of Australia's invasion of Iraq, and on that basis have asserted the legitimacy of opposition to Australia's invasion and occupation by the people of Iraq. Whatever the merits of the view that the Iraqi resistance is in the right, and Australia in the wrong, it is surely legitimate to express such an opinion as part of the political debate in Australia.

2 Urging communal violence

New section 80.2(5),(6) of the *Criminal Code* would create a new offence of urging communal violence that would threaten the peace, order and good government of the Commonwealth. This would, to some extent, cover the same ground as aspects of existing sedition provisions which make either of the following an offence:

- to 'engage in a enterprise with the intention of causing violence, or creating public disorder or a public disturbance,' and also of promoting 'feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth;'[247]
- to write, print, utter or publish any words expressive of an intention 'to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth … with the intention of causing violence or creating public disorder or a public disturbance'.[248]

Again, however, the new offence would in certain respects be broader than these existing offences. Rather than intending violence, an offender need only urge it. And the application of extended geographical jurisdiction would mean that the offence could be committed wherever the conduct took place, and whichever communities were urged to engage in violence, provided only that this threatened the peace in

[247] *Crimes Act* s 24C together with ss 24A(g), 24B(1).

[248] *Crimes Act* s 24D together with ss 24A(g), 24B(2).

Australia. The new offence would also carry a maximum penalty of 7 years, rather than 3 years, imprisonment.

3 Urging electoral violence

New section 80.2(3),(4) of the *Criminal Code* would create an offence of urging electoral violence which overlaps to a large extent with the existing offence of inciting interfering with political liberty.[249] Again, however, no intention to bring about violence or intimidation would have to be shown; the mere urging of force would be sufficient. Also, the maximum penalty would be 7 years rather than 3 years imprisonment.

Whereas the other new offences considerably broaden the capacity for people to commit incitement-type offences, this new electoral violence offence seems primarily to have the practical effect of increasing the maximum penalty for an existing offence. No argument as to why this is necessary has been advanced, beyond the vague reference in the Gibbs Committee Report to the 'increased specificity' of the offence.[250]

4 Defences to sedition

Schedule 7 would retain the existing defence to sedition and treason that the allegedly criminal acts were done in good faith.[251] In certain respects this defence would be widened: currently, certain treasonous purposes and intentions automatically preclude good faith,[252] but under the Bill they would simply be relevant matters for the court to take into account.[253]

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[249] *Crimes Act* s 28 together with *Criminal Code* s 11.4.

[250] Attorney-General's Department, Review of Commonwealth Criminal Law, *Fifth Interim Report: Arrest and Matters Ancillary Thereto, Sentencing and Penalties, Forgery, Offences Relating to the Security and Defence of the Commonwealth and Part VII of the Crimes Act 1914* (1991) para 32.19.

[251] Item 12 of Schedule 7 of the Bill, s 80.3.

[252] These are set out in the *Crimes Act* s 24F(2).

[253] Item 12 of Schedule 7 of the Bill, s 80.3(2).

In another respect, however, the new defence of good faith would be narrower. Currently, good faith can include criticisms of the government of another country, or of the constitution of a State or Territory or of another country,[254] but the new defence would not include these matters.[255] There seems to be no good reason for narrowing this defence in such a fashion.

Also, the new offence does not include the existing protection, that a person cannot be convicted of sedition upon the uncorroborated testimony of one witness.[256]

VI INADEQUATE REVIEW AND SUNSET PROVISIONS

A No provision for proper independent review

Section 4 of the Bill states that:

> (1) The Council of Australian Governments agreed on 27 September 2005 that the Council would, after 5 years, review the operation of:
> (a) *the amendments made by Schedules 1, 3, 4 and 5*; and
> *(b) certain State laws.*
>
> (2) *If* a copy of the report in relation to the review is given to the Attorney-General, the Attorney-General must cause a copy of the report to be laid before each House of Parliament within 15 sitting days after the Attorney-General receives a copy of the report (emphasis added).

The COAG communiqué of 27 September 2005 merely states that '(l)eaders also agreed that COAG would review the new laws after five years'.[257]

Section 4 is wholly inadequate in providing for proper review of the extraordinary measures contained in the Bill. First, the time for review, five years, is unduly long

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[254] *Crimes Act* s 24F(1)(b).

[255] Item 12 of Schedule 7 of the Bill, s 80.3(1)(b)(i),(ii)

[256] *Crimes Act* s 24D(2).

[257] *Council of Australian Governments' Communiqué: Special Meeting on Counter-Terrorism 27 September 2005* 3, available online at <http://www.coag.gov.au/meetings/270905/index.htm>.

and should be shortened to a year. Second, neither section 4 nor the COAG communiqué makes any reference to who is to conduct the review or the procedure for the review. For instance, there is nothing presently to preclude section 4 being satisfied with a clandestine review by AFP and ASIO officers. Third, there is no stipulated time line for the completion of the review. Fourth, there is no requirement that the Attorney-General or, for that matter, parliamentary representatives and the public be informed of the outcomes of the review. By using the word 'if', section 4(2) clearly implies that the Attorney-General need *not* receive a copy of report and, hence, the obligation to table the report does not come into play.

Section 4 of the Bill should be removed. Instead, there should be provision for an *annual* review of the *all measures* contained in the Bill and *all complementary State laws* modeled upon that required under *the Security Legislation Amendment (Terrorism) Act 2002* (Cth).[258]

This statute requires a review of existing counter-terrorism laws and, among others, states that the committee must comprise:

> (a) up to two persons appointed by the Attorney-General, one of whom must be a retired judicial officer who shall be the Chair of the Committee; and
>
> (b) the Inspector-General of Intelligence and Security; and
>
> (c) the Privacy Commissioner; and
>
> (d) the Human Rights Commissioner; and
>
> (e) the Commonwealth Ombudsman; and
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> (f) two persons (who must hold a legal practising certificate in an Australian jurisdiction) appointed by the Attorney-General on the nomination of the Law Council of Australia.[259]

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[258] Petro Georgiou MP has made a similar suggestion: see Petro Georgiou MP, 'Multiculturalism and the war on terror' (Speech delivered at Castan Centre for Human Rights Law, Melbourne, 18 October 2005) 8, 10.

[259] *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 4.

Further, the process of review must allow for public submissions and hearings, and the review committee must report within six months of commencing its review and its report must be tabled before the federal Parliament.[260]

B Inadequacy of provisions dealing with sunset clauses

The Bill presently provides for a ten-year sunset clause in relation to Schedule 4 (control and preventative detention orders) and Schedule 5 (stop, question and search powers).[261] It does *not* state that the measures in other Schedules are to expire ten years after the enactment of the Bill.

We believe these provisions are inadequate. The sunset clauses should apply to *all* Schedules of the Bill. The COAG Agreement states 'the *new laws* . . .would sunset after 10 years'.[262] It does not select particular laws for sunsetting while excluding others. It is important to note in this respect that an all-encompassing 10-year sunset clause was clearly pivotal to the Premiers' agreeing to the new counter-terrorism measures. Queensland Premier Beattie, for instance, stressed that 'the sunset clause of ten years is . . . very important'. In a similar vein, South Australia Premier Rann said 'it's also important to . . .have a sunset provision in 10 years from now'. Tasmanian

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[260] Ibid.

[261] Item 24 of Schedule 4 of the Bill, proposed section 105.53 of *Criminal Code* and Item 10 of Schedule 5 of the Bill, proposed section 3UK of *Crimes Act*..

[262] *Council of Australian Governments' Communiqué: Special Meeting on Counter-Terrorism 27 September 2005* 3, available online at http://www.coag.gov.au/meetings/270905/index.htm (emphasis added).

Premier Lennon stressed that '(t)he ultimate check of course is the sunset clause after 10 years, quite appropriately, unanimously agreed'.[263]

More fundamentally, ten years is too long a period for the operation of the sunset clauses. As a matter of comparison, the sunset clause applicable to the provisions conferring upon ASIO to power to compulsorily question and detain persons suspected of having information related to 'terrorism' offence states that these provisions expire *three years* after their enactment.[264] Further, the regulations under the *Criminal Code* proscribing 'terrorist organisations' expire *two years* after the making the regulations.[265] We recommend that, given the extraordinary nature of the provisions contained in the Bill, the sunset clauses should state that these provisions should expire two years after the enactment of the Bill.

In conclusion, we urge the Committee to reject this Bill. It is a dangerous law that does little to improve the security of Australians.

END OF SUBMISSION

[263] COAG Joint Press Conference, Parliament House, Canberra, 27 September 2005, available online at <http://www.pm.gov.au/news/interviews/Interview1588.html>.

[264] *ASIO Act* s 34Y.

[265] *Criminal Code* s 102.1(3).