> 'control orders are intended to substitute the ordinary criminal justice system with a parallel system run by the executive...What is essential is that the measures themselves are proportionate to the threat, objective in their criteria, respectful of all applicable rights and, on each individual application, justified on relevant, objective, and not purely racial or religious grounds.'[24]

Newly defined offence of sedition

The Bill proposes to amend the provisions in the *Crimes Act 1914* and the *Criminal Code 1995* relating to sedition, by inserting a new definition of 'seditious intention' and new provisions, such as urging violence within the community:

'80.2(5). A person commits an offence if
(a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished) and
(b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.
Penalty: Imprisonment for 7 years.

80.2(6) Recklessness applies to the element of the offence that it is a group or groups that are distinguished by race, religion, nationality or political opinion that the first mentioned person urges the other person to use force or violence against.'

Fundamentally the need for a newly defined offence of sedition has not been established. Attempted prosecutions were made in the 1940s cases against Communist Party members: *R v Sharkey* and *Burns v Ransley*.[25] I note that the existing sedition offence has a penalty of 3 years imprisonment and already targets promotion of inter-communal violence. It is also already an offence, punishable by life imprisonment, to threaten politically-motivated violence with the intention of intimidating a section of the public. A community report on the Government's proposals to replace the existing sedition provisions points out that broadening of the basis for prosecuting political speech as 'seditious' is a matter of grave concern in a liberal democracy.[26] The right to free expression has been described as:

> 'one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man (sic)...applicable not only to information or ideas that are favourably received...but also to those that offend shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.'[27]

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[24] Council of Europe, Office of the Commissioner for Human Rights, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4-12 November 2004*, 8 June 2005, pp10-12

[25] (1949) 79 CLR 101 and 201.

[26] *Laws for insecurity? A report on the federal government's proposed counter-terrorism measures*, 23 September 2005, by Agnes Chong, Patrick Emerton, Waleed Kadous, Annie Petittt, Stephen Sempill, Vicki Sentas, Jane Stratton and Joo-Cheong Tham, pp28-29

[27] *Handyside v UK* (1976) 1 EHRR 737, cited in Liberty's Briefing on the UK Draft Terrorism Bill, Sept 2005, para 13. See also The Council of Europe's Commissioner for Human Rights has warned that an offence for incitement to terrorist violence must be carefully framed so as not to include legitimate criticisms in a democratic society: A. Gil-

Restrictions on freedom of expression under article 19 of the ICCPR (s.16 of the ACT HR Act) must be formulated with sufficient precision so that a person knows what is and is not permitted, and the case for such restriction must be strictly proved.[28] It seems that our ability to criticise the activities of Australian defence forces in countries such as Iraq will be limited. Such public debate has been an important safeguard of democracy and human rights in previous military conflict, such as in Vietnam.

The Federal Government has asserted that its proposals are consistent with the Gibbs Committee's. However, that Committee recommended a *narrowing* of the existing sedition offences,[29] on the grounds that as expressed they are in tension with modern democratic values,[30] and are potentially redundant.[31] It proposed limiting sedition to three specific circumstances and increasing the penalty from 3 to 7 years imprisonment:

- incitement to overthrow or supplant by force or violence the Commonwealth government and constitution;
- incitement to violent interference in parliamentary elections;
- incitement to the use of force by one group within the community against another.[32]

As stated in my advice of 19 September 2005, it is not clear what the inter-relationship will be between this proposed offence and existing Commonwealth, State and Territory laws protecting against racial and other vilification, for example religion in Victoria.[33] This formulation of the new definition of sedition may be too broad to satisfy article 19 of the ICCPR (s.16 of the ACT HR Act), and so overreaching as to be disproportionate to the objectives of the law. For example the newly defined offence may catch a journalist's article where it inadvertently triggers a terrorist act,[34] capture opinions that do not lead to terrorist acts, and critics have suggested that it

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Robles, *Opinion of the Commissioner for Human Rights on the Draft Convention on the Prevention of Terrorism*, Council of Europe, 2 February 2005.

[28] Jurisprudence under the ICCPR and under the European Convention on Human Rights have established that not only procedural requirements must be followed, but that the law itself be certain, that is 'accessible and precise: *Sunday Times v UK* (1979) 2 EHRR 245, para 49 and *Steel and others v UK* (1999) 28 EHRR 603. See also *R v Secretary of Health Ex parte Wagstaff* (2001) WLR 292

[29] *Review of Commonwealth Criminal Law* (1991). See the Committee's discussion in 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) paras 32.13, 32.14, 32.16.

[30] *ibid* para 33.13

[31] *ibid* para 32.6, 32.12

[32] *ibid* para 32.18

[33] *Racial and Religious Tolerance Act 2001* (Vic).

[34] T. Allard, "Fear that Law Changes Will Curb Free Speech," *The Sydney Morning Herald*, 9 September 2005.

may cover private conversations.[35] The defence of good faith in varying circumstances is available under clause 80.3, but the evidential onus is on the accused. It is also unclear if this includes the constitutional doctrine of implied freedom of political communication.[36]

Conclusion

The Anti-Terrorism Bill 2005 for the reasons set out above appear to be inconsistent with several provisions of the International Covenant on Civil and Political Rights, which also have been incorporated as principles of interpretation in the *Human Rights Act 2004 (ACT)*. If laws in these proposed terms (or more onerous in the case of preventive detention for 14 as opposed to 2 days) were enacted in the ACT, I would recommend specific amendments to narrow powers and discretions to make them human rights compliant. A sufficient case has not been made out that there is a legitimate necessity to protect the community from terrorism that cannot be achieved under existing laws, without needing to rely on such wide-ranging measures, including control orders and a newly defined offence of sedition. I believe that the development of this legislation in consultation with the community can be a process of continuos improvement, leading to it being more human rights compliant.

Yours sincerely,
Dr Helen Watchirs

Human Rights and Discrimination Commissioner
19 October 2005

[35] C. Merritt, *The Australian*, 14 September 2005.
[36] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *Levy v Victoria* (1997) 189 CLR 579.