

11 November 2005

Owen Walsh
Secretary
The Senate Legal and Constitutional Legislation Committee

By e-mail: LegCon.Sen@aph.gov.au

Dear Sir

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

On behalf of the President and Committee of Liberty Victoria I enclose your attention Liberty Victoria's submission to the Parliamentary Inquiry into the provisions of the Anti-Terrorism (No. 2) Bill 2005.

This has been prepared by our Committee under the supervision of Professor Spencer Zifcak, and any questions or comments should be addressed to him, President, Brian Walters SC, care of Liberty Victoria at the address displayed in this letter.

Yours faithfully



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Liberty Victoria
Submission with Respect to
Anti-Terrorism Bill 2005

1. Liberty Victoria is pleased to have the opportunity to make this submission to the Committee with respect to the Anti-Terrorism Bill 2005. This is controversial legislation. Liberty applauds any effort by the Government to enact laws that are likely to be successful in deterring or preventing terrorist acts. At the same time, however, Liberty opposes any laws that are likely to trench disproportionately upon fundamental rights and liberties. We regard the idea that a balance can be struck between these two competing imperatives as misconceived. Instead, it is apparent that protection against terrorist activity may require some sacrifice of rights and liberties. Equally, the protection of rights and liberties requires that laws designed to protect against terrorism must not be disproportionate to their objective. One key criterion of proportionality is the extent to which such laws infringe upon human rights and civil liberties. The greater the infringement the less likely it is that anti-terror laws will be regarded as proportionate to their protective aim.

2. It should be remembered that Australia is a signatory to all six major international human rights treaties. The Parliament, therefore, is bound to frame its laws in a manner that is consistent with the obligations assumed under these treaties. This was recognized by the Prime Minister at the COAG meeting in September. At that meeting the Prime Minister undertook to ensure that the Anti-Terrorism laws would be fully in accordance with the principles and provisions set down in the International Covenant on Civil and Political Rights. It is

against that benchmark that we assess the Bill now before the Committee for consideration. More particularly, relevant international law requires that the Commonwealth Government must demonstrate that its proposed measures are:

- a. Adopted in pursuit of a legitimate objective
- b. Necessary for the achievement of that purpose, that is, they must
 - i. Be rationally connected to the achievement of the objective
 - ii. Be proportionate
 - iii. Be calculated to interfere as little as possible with fundamental human rights
- c. Subject to adequate safeguards to avoid any abuse of the powers granted.

In many respects, it is plain that the Government has not as yet been successful in meeting these criteria. It is not apparent to us, with the information at our disposal, that the arbitrariness and severity of the laws now proposed is capable of justification given the current level of the terrorist threat in Australia. Before analyzing the provisions of the Bill in some detail, and in accordance with the criteria outlined, we wish to comment briefly on some of the major constitutional issues raised by it.

Constitutional Questions

3. It is by no means clear that the Schedules with respect to control orders and preventative detention orders will survive constitutional scrutiny. These Schedules provide for executive detention. Although the detention is said to have a protective purpose, it is plainly punitive in character. It is a fundamental principle of Australian constitutional law that only the judiciary can impose punitive detention, and even then only after a person has been tried and convicted of a criminal offence. The matter was put plainly by Justice Gummow of the High Court in the recent case of *Fardon v Attorney General of Queensland* (2004):

"...the 'exceptional cases' aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts."

In this Justice Gummow was reflecting the view of the majority of the High Court in the earlier case of *Lim v Minister for Immigration* (1992) where Brennan, Dean and Dawson JJ observed that:

"the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt."

The imposition of control orders and preventative detention orders is plainly in breach of these constitutional injunctions. Both orders involve the detention of a person without any adjudgment of criminal

guilt and on the basis, not of past acts, but of those that may be anticipated. The danger of such legislation was made very plain in the judgment of Justice Kirby in the case of *Fardon* just referred to. Justice Kirby remarked in terms that could equally apply to the proposed legislation under consideration here that:

"In Australia, we formerly boasted that even an hour of liberty was precious to the common law. Have we debased liberty so far that deprivation of liberty, for yearly intervals, confined in a prison cell is now regarded as immaterial or insignificant? Under the Act...the prisoner could theoretically be detained for the rest of the prisoner's life. This could ensue not because of any past crime but because of a prediction of future criminal conduct."

It is precisely on this basis that Liberty regards the relevant Schedules as objectionable. And it is precisely on this basis that their constitutionality is questionable.

It is true that the High Court in two recent decisions has affirmed the constitutional validity of indefinite executive detention first, with respect to 'stateless' persons (*Al-Kateb v Godwin*) and secondly, with respect to sexual offenders regarded as posing an unacceptable risk to the community (*Fardon v Attorney-General of Queensland*). These circumstances of these two cases, however, are clearly distinguishable from those involved in the present anti-terrorism legislation. *Al-Kateb* is distinguishable on the grounds that the detention there was applicable only to non-citizens. *Fardon* is distinguishable on the ground that the continuing detention there provided for was consequent upon the commission of a prior serious criminal offence even though the offence itself did not subsequently form the basis for

an extension of the period of detention beyond that set at the outset.

In summary, therefore, in our view the two relevant Schedules rest on very uncertain constitutional foundations and that for good reason. It would clearly be preferable if the constitutional difficulties could be considered and remedied prior to the legislation's enactment rather than afterwards in circumstances that may, suddenly, reduce the state's capacity to counter any perceived terrorist threat.

4. Secondly, the constitutionality of the scheme of detention provided for in the *Anti-Terrorism Bill*, is questionable in so far as it seeks to utilize judges in the issue of control and preventative detention orders. Again, it is a fundamental principle of Australian constitutional law that only courts created under Chapter III of the Constitution can exercise the Commonwealth's judicial power. Equally, no Chapter III court can be required constitutionally to exercise non-judicial power. It follows that the trial and conviction of a person is a function that appertains exclusively to the judiciary. As the High Court put the matter in *Lim*:

"In exclusively entrusting to the courts designated by Chapter III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form."

In contrast to confer upon Chapter III courts and their judges the function of predicting the likelihood of future criminal behaviour is to confer upon them a power not recognized as judicial. This is the case, even though a process fully resembling judicial process is set in place to determine the likelihood of that future criminal behaviour.

Justice Gummow explained the problem lucidly in *Fardon*:

"It is not to the present point, namely, consideration of the Commonwealth's submissions, that federal legislation...may provide for detention without adjudication of criminal guilt but by a judicial process of some refinement. The vice for a Chapter III court and for the federal laws postulated in submissions would be in the nature of the outcome, not the means by which it was obtained."

It seems, therefore, that to use Chapter III courts and their judges to effect the Parliament's purpose of implementing a non-judicial form of detention is fraught with constitutional difficulty. To put the matter plainly it involves the conscription of judges in the imposition of effective judicial punishment in proceedings not otherwise known to the law. It is fundamentally repugnant, therefore, to the judicial process. As the former Solicitor-General Gavan Griffith put the matter in a recent interview with the ABC:

"I regard it as very questionable for judges and courts to be involved at all in any aspect with respect to these warrants and detention orders. They're essentially just providing an administrative practice for administrative detention. And there's no obvious role for the judiciary to come to give, as it were, a cloak of legitimacy to matters which essentially are not judicial."

5. A further important constitutional issue relates to the utilization of judges to make and issue preventative detention orders not in their capacity as judges of the Court of which they are a member but instead in their personal capacity. It is a well recognized exception to the general rule that Courts should not exercise non-judicial power that non-judicial functions may nevertheless be exercised by judges

acting in their personal capacity. The capacity of judges to act in this way is constrained, however, by the requirement that judges when acting in their personal capacity are not able to undertake functions that are fundamentally incompatible with their role as judges of the court on which they sit. It follows from what has been said previously that, under the proposed legislation, judges may be required to act in just such an incompatible manner. More specifically, they may be required to preside in proceedings that, of their nature, are repugnant to proper judicial process. The repugnancy derives from the fact that judges are being asked to take part in a process the outcome of which may be detention without proof of the commission of any criminal offence and without trial. This ought not to be contemplated. Its problems were exposed recently in an address by Justice Alastair Nicholson, formerly Chief Justice of the Family Court who said:

“The problem about this is that if a judge is not sitting in a judicial capacity then he/she is not sitting as a judge at all and the proposal for so called judicial review is illusory. Also, it may well be that the performance of such a role is incompatible with his/her role as a judge. Further, there is the risk that judges who would volunteer to carry out this work will not be or will not be perceived to by the community to be representative of the judiciary as a whole. This invites concerns about bias and the erosion of public confidence.”

6. In summary, therefore, Liberty holds grave concerns regarding the constitutionality of the control order and preventative detention order provisions of the *Anti-Terrorism* legislation. This suggests that the legislation should be subject to considerably greater scrutiny and debate prior to its introduction to the Parliament. It clearly invites the conclusion that the legislation should not be rushed to meet a

governmental timetable which, seemingly, has no foundation in present concerns about a potential terrorist threat. It also suggests clearly that the legislation should be amended so that it is consistent in all aspects with the fundamental constitutional principles just discussed.

7. We turn now to a more detailed consideration of the provisions with respect to the detention of persons suspected of engagement in terrorist activity. Their adequacy is assessed by reference to the standards and requirements set down in the International Covenant on Civil and Political Rights. Article 9 of the ICCPR provides that:

(i) Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary or detention. No one shall be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.

(ii) Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for their arrest and shall be promptly informed of the charges against them.

Article 9(4) of the Convention provides in addition that:

Anyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order their release if the detention is not lawful.

Further, the United Nations Human Rights Committee, in its General Comment on Article 9 has stated:

"If so called preventative detention is used, for reasons of public security...it must not be arbitrary, and must be based on grounds and procedure established by

law...the reasons must be given and court control of detention must be available, as well as compensation in the case of a breach. And if in addition, criminal charges are brought in such cases, the full protection of Article 9 (right to liberty and security) as well as Article 14 (fair trial), must also be granted.”

As a matter of principle, Liberty is opposed to the imposition of control orders. This is because, as previously stated, they amount to a form of detention without trial, in the absence of any finding of criminal guilt referable to past conduct. By contrast, the detention in this instance is imposed by reference to a reasonable suspicion that a person may engage in future criminal conduct. We recognize, however, in accordance with the opinion of the Human Rights Committee cited above, that in certain exceptional circumstances preventative detention, strictly limited in time and subject to proper judicial scrutiny, may be regarded as appropriate.

In brief, the procedure for the issue of a control order is as follows. An interim control order can be made where:

- the applicant (senior AFP member):
 - a. *considers on reasonable grounds* that the order would substantially assist in preventing a terrorist attack; or
 - b. *suspects on reasonable grounds* that the person has provided training to or received training from, a listed terrorist organization; and

- c. provides the Attorney General with a draft request and certain information relating to it as the applicant *may have*; and
- the Attorney General has consented to the application; and
- the issuing court has received such further information (if any) as it requires) and is satisfied *on the balance of probabilities* that each of the obligations prohibitions and restrictions to be imposed on the person by the order is *reasonably necessary and reasonably appropriate and adapted* for the purpose of protecting the public from a terrorist attack and that:
 - d. making the order would substantially assist in preventing a terrorist attack; or
 - e. the person has provided training to or received training from, a listed terrorist organization.

Once an interim control order is made in relation to a person then it must be brought before a court which can confirm, revoke or declare void the order upon assessing and determining whether it is satisfied of the matters determined by the issuing court and *according to the same tests* as the issuing court was required to apply.

While legal representation is possible at the hearing to confirm (or otherwise) the interim order, neither the lawyer nor the person the subject of the order is entitled to receive *any information* about it other than a copy of the interim order and the *summary of grounds* on which it is made.

While the senior AFP officer seeking the order must inform and ensure that the person understands the effect and term of the order and the hearing procedure, this does not apply where it is *impracticable* for the AFP member to do so.

Upon the making of a confirmed control order the person the subject of it may apply to an issuing court to revoke or vary the order and while evidence and submissions may be made by various persons, there is nothing to allow the person the subject of the order to compel the provision of the evidence against them or the cross examination of the applicant senior AFP officer or other AFP members. It is unclear whether the expressly reserved right of the court to control proceedings would allow this.

8. These provisions are a commendable improvement on those contained in the initial ‘Stanhope’ draft of the legislation. In particular the capacity for the subject of a control order to seek its revocation at a mandatory hearing before the issuing court is a most welcome change. Nevertheless, in accordance with the human rights and proportionality principles previously outlined, Liberty retains a number of important reservations with respect to the present procedures for the issue of control orders.
9. It is notable that the grounds on which a control order is made specifically refer to the protection of the public. However, an issuing court is not explicitly required to consider the nature and importance of the human rights of a person subject to the order, the exercise of which may be restricted severely by a that order. We recommend

therefore that an additional criterion, requiring an issuing court to take into consideration the extent to which the terms of an order infringe upon an individual's human rights, be added to those presently contained in the Bill. When concerns with respect to public security are considered together with concerns about actual and potential breaches of an individual's human rights, it is more likely that the decision of an issuing court about whether to issue a control order and what form the order should take will be proportionate to the danger that is contemplated.

10. In proceedings to confirm an interim control order, the onus of proof with respect to adducing grounds for the voiding or revocation of the order appears to fall on the person who subject to the order. This conclusion follows from the fact that the issuing court has already approved an interim control order on the basis of information supplied by an officer of the AFP. Given that approval, the burden of demonstrating reasons why the order should be revoked so soon after its issue falls clearly on the subject. Such a procedure involves an 'inequality of arms.' This is because the subject of the order is to be provided only with a summary of the grounds upon which the order has been made. The subject's legal representative is similarly constrained with respect to the provision of information relevant to determining the appropriateness of the order. Unless, therefore, there is some guarantee that the subject or his/her legal adviser is given sufficient information to enable them to challenge the order, the review and revocation proceedings are likely to be empty of content. It would be preferable therefore if the review and revocation proceedings were conducted on the basis that the court would be *required* to revoke the order unless satisfied by the AFP in a properly

contested hearing that there *are* reasonable grounds to justify that continuation.

11. The standard of proof in such proceedings is specified as being satisfaction on the balance of probabilities as to the matters referred to in s.104.4(1)(c). Given that the consequences of the order are akin to penalties upon conviction of a criminal offence, it would be preferable if the standard was the criminal standard, that is, proof of the matters required beyond reasonable doubt. If this is considered too onerous a standard in what are essentially administrative proceedings, a standard necessitating proof that the matters required are 'highly likely' to occur would seem to be a reasonable compromise. Similarly, the court is required to determine whether each and every constraint included in the order is necessary on the balance of probabilities. We argue that this standard too should be altered to require that every one of these constraints must be proven to be highly likely to be necessary to achieve the legislation's protective objectives without disproportionately infringing upon the human rights and civil liberties of the subject.

12. It follows from the point that has been made in relation to the 'inequality of arms' that the subject of an order should be given as much information as is possible about the grounds upon which the order has been made. It is not sufficient in our view for the subject simply to be given a summary of such grounds. In practice, this requirement may simply be reinterpreted to mean that the subject is given a statement to the effect that, in the view of the AFP officer concerned, the order is necessary because the officer and the issuing authority is satisfied that making the order would 'substantially assist

in preventing the person from engaging in a terrorist act' etc. Such a summary would clearly be inadequate. Instead, the issuing authority should provide the subject with a statement of the grounds upon which the order has been made and a summary of the evidence to be adduced in support of those grounds. This requirement would of course be subject to the condition that the provision of such grounds and justificatory evidence should not prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

Preventative Detention Orders

13. In relation to preventative detention orders, Liberty emphasizes again that is opposed to the creation of such a scheme of preventative detention orders. The preventative detention of people who have not committed any offence is a serious encroachment upon fundamental human rights, including the right to liberty and the presumption of innocence, principles both of Australian constitutional and common law and of relevant international human rights law. These considerations suggest that the scheme of preventative detention provided for in the Bill may properly be considered as arbitrary under international human rights law. The term arbitrary is not confined to detention effected illegally. It extends to detention effected unreasonably. The term unreasonably embraces a situation in which the form of detention provided for is disproportionate to the legitimate end being sought. Given that existing law provides ample opportunity for a person to be detained for questioning and to obtain further evidence on the basis of which the person may be charged with a criminal offence and tried accordingly, the introduction of an

entirely new, and draconian preventative detention regime seems very difficult to justify. The preventative detention provided for is fundamentally inconsistent with international human rights principles and also with constitutional doctrine, including in particular, for the reasons specified above, with the constitutional injunction that the exercise of judicial power should be separate from and independent of the exercise of legislative and executive power. If detention is to be justified it should proceed from a fair and independent judicial process consequent upon an allegation of criminal wrongdoing where that criminal wrongdoing is said to involve the transgression of some pre-existing criminal law.

14. However, if such a regime of detention is considered essential to combat terrorism, it must be implemented in a way that will ensure that the most robust safeguards possible are set in place to ensure that the laws conform to the principle of proportionality and to avoid the introduction of a system of arbitrary detention. We now proceed to consider the relevant Schedule in the context of these remarks.
15. The system set down for the issue of preventative detention orders may briefly be summarized as follows:
 - a. Initial preventative detention orders may be granted by a senior member of the AFP and they may be extended or further extended. The Bill sets a maximum period of 24 hours.
 - b. Continued preventative detention orders may be granted by a Federal Judge or Magistrate, retired judge, Presidential Member of the Administrative Appeals Tribunal or Senior Counsel.

These continued orders may be made in relation to a person who is the subject of an initial preventative detention order and may also be extended and further extended. The Bill sets a maximum period of 48 hours. However, it is understood that following from complementary legislation to be enacted by the States, this period may be further extended to a maximum of 14 days detention.

- c. To make or extend any order, the issuing authority must be satisfied on the basis of information provided to them by the AFP that there are reasonable grounds to suspect that the person to be subjected to the order:
 - i. Will engage in a terrorist act; or
 - ii. Possesses something connected with the preparation for, or the engagement of the person in, a terrorist act; or
 - iii. Has done or will do an act in preparation for, or in planning a terrorist act.

- d. The issuing authority must also be satisfied that the order will substantially assist in preventing a terrorist act occurring and that detaining the subject for the period for which they will be detained is reasonably necessary for this purpose.

- e. For the purposes of issuing such an order a terrorist act is one that must be imminent and expected to occur at some time within the succeeding 14 days.

- f. An order may also be made where a terrorist act has occurred within the prior period of 28 days and where the order is necessary to preserve evidence of, or relating to, the terrorist act.
- g. As soon as practicable after a person is taken into custody under such an order, the police officer detaining the person must inform the person of the nature of the order and provide the person with a copy of the order and a summary of the grounds upon which it is made.
- h. The person is entitled to contact a lawyer but solely for the purpose of obtaining legal advice about their rights in relation to the order. Any contact between the lawyer and the detainee must be capable of being monitored by a member of the AFP.
- i. The person may also contact family members and a limited class of other persons but any such contact must also be capable of being monitored by the AFP.
- j. The person may not, however, inform any other person of the fact that a preventative detention order has been made or any other matter related to the fact of the order.
- k. An application to review any decision to make a preventative detention order may not be made under the *Administrative Decisions (Judicial Review) Act 1977*.

- l. An application may, however, be made to the Administrative Appeals Tribunal for a review of a decision of an issuing authority to make a preventative detention order. This application may not be made while the order is in force.
 - m. The person may, in addition, make an application for review to a State or Territory court on the grounds provided for by the relevant State legislation.
16. There are a great many matters of concern which arise in relation to these provisions. Here we refer only to the principal ones. In the case of initial preventative detention orders, the AFP is both the applicant for the order and the issuing authority that grants the order. This raises a clear apprehension of bias. The conflict of interest is clearly undesirable and the legislative sanction for it should be removed.
17. The proceedings for the issue of a preventative detention order are *ex parte* proceedings. Consequently, the information provided to an issuing authority in justification for the making of an order cannot be tested through argument or by the provision of evidence to the contrary by the person detained. Further, as with control orders, the subject is entitled only to a summary of the grounds on which the order is made. This makes any application for review or remedy to the Administrative Appeals Tribunal or to a State Court or to the Federal Court very difficult to pursue in any meaningful way.
18. The Prime Minister has said constantly that the orders provided for in the legislation would be subject to judicial review, and on the merits. It is perfectly apparent that the system for the review of

preventative detention orders does not meet these standards. Even though conducted by Presidential members of the AAT, the review provided for is administrative review and not judicial review. Because it is conducted by members of the AAT it lacks the quality of independence necessary for the proper determination of matters having the gravity of detention of an individual by the executive government. The review should be conducted by a Chapter III court.

Further, an application for review by the AAT may not be entertained while the person concerned is subject to a preventative detention order. In other words, once placed on the order the subject has no means of challenging the order until after having been released from it. This is not judicial review of the person's detention pursuant to the order in any meaningful sense whatsoever. It denies the subject any avenue for effective review while he or she is detained. The best that can be said of the process is that it may provide one means of obtaining post hoc compensation where it can be demonstrated that the order was not properly made. But the difficulties of so demonstrating have already been referred to.

19. The Bill provides for further review by a State Court. This review, however, applies only after the period of detention has been extended, presumably by such a court, to the foreshadowed time limit of 14 days. The initial period of detention provided for in Commonwealth legislation remains unreviewable until such time as a person is no longer detained on an order. The relevant provision here (cl 105.52) states that a State court may only conduct a review and grant remedies for the Commonwealth order on the grounds provided for in State legislation. However, State legislation has yet to

be enacted, so one is completely in the dark as to whether the post hoc review provided for will meet the desirable standard of ‘judicial review on the merits.’

20. We note that decisions made under this Schedule are specifically excluded from review under the *Administrative Decisions (Judicial Review) Act 1977*. No such exclusion appears to apply to decisions made in the process of issuing control orders. The exclusion here, denying a person as it does, an accessible avenue for challenging decisions that may have been made illegally, irrationally or unreasonably appears to have no plausible justification, particularly in the absence of effective judicial review on the merits.

21. In the light of the inadequacy of the review provisions with respect to preventative detention orders, we recommend that these provisions be redrafted. The redrafting would be designed to ensure that a person detained under such an order has the opportunity immediately upon entry into custody to apply to a court for review of the decision to detain him or her. That review should be conducted on the merits.

As with our recommendation with respect to control orders, the onus of demonstrating that the preventative detention order should continue should rest with the Australian Federal Police. A court should be required to revoke a preventative detention order unless satisfied by the Australian Federal Police that the issue of the order is in all the circumstances justifiable according to the relevant criteria. It is inconsistent with the principles of a fair trial for the onus to be placed upon the subject of the order, particularly in circumstances

where there is a very significant ‘inequality of arms.’ Here the subject of the order and their legal representative may have only the briefest summary of the grounds upon which the order has been made. While they are able to adduce additional evidence, the nature of evidence that might be persuasive will be largely unknown. It is highly likely that an application would be made to keep certain aspects of the relevant evidence secret on the grounds of national security. This would disadvantage the person detained even further. It should be the responsibility of the detaining authorities to demonstrate to an impartial court, in accordance with fair judicial procedure, that the person concerned should be the subject of an order depriving them of their human right to liberty.

22. We remain deeply concerned by the provision in the legislation that requires that contacts between the subject of a preventative detention order and his or her legal representative be monitored. This is a fundamental breach of the principle that such communications should, in accordance with solicitor-client privilege, remain absolutely confidential. The provision is calculated to hamper the capacity of the subject and his or her lawyer to initiate legal proceedings for review. And there would seem to be no good reason in the public interest for such monitoring to be imposed. It is a disproportionate response to a seemingly non-existent problem. We recommend that this provision be removed.

23. We are also concerned about the provision which places strict limits on what a person subject to the order may say to their family and other limited categories of person about their detention. Presumably the provision is designed to ensure that the fact of a person’s

detention is not capable of communication to others with whom the person may have been preparing to engage in terrorist activity. If this is so, the provision will not achieve its objective. It would be simple to have a pre-determined form of words, perhaps couched in the language of the statutory provision, which would indicate clearly to others what had actually occurred. The cost to others who had not reasonably have been detained would be substantial however. They would be cut off entirely from family, friends and associates who may be in a position to offer them some assistance even if only of an emotional kind.

We are disturbed by the disclosure offences and the severe penalties that attach to such unauthorized communications. As the proposed law stands, a family member who is either told or divines that the subject has been placed on a preventative detention order is prohibited from informing any other family member on pain of five years imprisonment. To provide that that an intra-familial communication should attract such a draconian penalty goes far beyond what is proportionate in the circumstances. It is difficult to imagine that any one in the community would accept that a father's communication to a mother that their son or daughter has been placed on a preventative detention order should attract a long-term sentence of imprisonment. In these circumstances, we recommend that the disclosure provisions of the Bill be removed and further reviewed if some other means of engendering a certain measure of secrecy is required.

Sedition

24. There are so many difficulties with the sedition offences that it is difficult to know where to begin. Perhaps the central matter to be understood is that sedition involves the criminalization of speech. At the same time, freedom of speech is one of Australian society's most precious values. It is imperative therefore that this freedom, so valued, should not be unreasonably or disproportionately trenched upon. Yet this is exactly the outcome that the sedition provisions included in Schedule 7 will produce. We list below in summary form the principal arguments against the inclusion of Schedule 7 at this time.
25. The fifth Interim Report of the Review of Commonwealth Criminal Law (The Gibbs Committee Report) recommended the abolition of existing sedition offences and their replacement by the creation of the offence of inciting treason, interference with elections and racial violence. That recommendation, which was sensible, and sought to draw the law more clearly into line with the principles of ordinary criminal law, was not acted upon at the time. One key aspect of the report was its recommendation that the new offences recommended must necessarily be linked to words inciting violence. This criterion is a critical one. In our view, no words should be criminalized unless their intended result, or reasonably likely result, is to provoke violence. And yet, at least two of the new range of sedition offences proposed in Schedule 7 (s.80(2) ss.(7) and (8) are entirely disconnected from that critical nexus. Here it is sufficient merely to demonstrate that that a person has urged another to engage in conduct that is intended to assist, 'by any means whatever', an

organization or country at war with Australia or engaged in armed hostilities against Australia. Such a definition of criminal behaviour is cast so widely as to permit prosecution in relation to an enormously broad range of statements and speech, without there being, at any time, any direct incitement to violence. This is totally undesirable in principle and open to substantial (political) abuse in practice.

26. The new sedition offences also broaden the nature of the intention required to constitute the crimes. There is no reference within the proposed s.80(2) to any requirement that the person doing the urging have any particular intention, such as the previous requirement for the intention to cause violence or create public disorder or disturbance. All that is required is that the person concerned engage in the act which amounts to the urging. It is not required that the person be shown to have intended the result. Nor is it required that the person doing the urging should have a particular audience in mind. One would have expected that a particular audience should be capable of identification in order to demonstrate that the person concerned intended his or her comments to have affected that audience in the specified way. But such limitations are completely absent. All that is required is the urging. No reflection is required upon what the conduct of the person being urged to act actually does or will do. Further, the existing sedition offences require an intention to utter seditious words or engage in seditious conduct with the further intention of causing violence or creating a public disorder or disturbance. The new offences require no such further intention to cause violence. In relation to the first three offences in particular it is enough that a person is reckless as to the commission of violence,

without any express intention to do so.

27. All that is required under the new offences is that a person 'urge; another to engage in the specified behaviour. Upon a common definition, however, urging would appear to be far too broad a concept. Urging involves a person endeavouring to induce or persuade, as by entreaties or earnest recommendations; to recommend or advocate earnestly. This is far broader than the better term 'incitement' which embraces such terms as to 'spur on, stir up, prompt to action, instigate or stimulate. Again the use of the broader term widens the ambit of each offence to an undesirable degree.

28. The breadth and vagueness of the terminology just discussed makes worse an associated problem with laws of sedition. This is that such laws inevitably are interpreted in the context of their times. In peaceful times one can expect that interpretations will be narrow and prosecutions rare. On times of 'war' and trouble (which we appear to be approaching rapidly) one can reasonably expect the relevant offences to be interpreted broadly, in particular when accompanied by public anxiety or even hysteria, so amply demonstrated during the so called 'war on communism.' The matter was summed up aptly by Lawrence Maher in an article in the Sydney Law Review in which he remarked:

"...because of unprecedented changes in community attitudes about specific political issues, the statutory language will inevitably fluctuate in meaning across time. This is a totally unsatisfactory situation. Fifty years later, Chafee's criticism in that regard remains true. The definition of sedition 'is so loose that guilt or innocence must

obviously depend on public sentiment at the time of the trial. This will not be a source of concern when public opinion is supportive of vigorous free speech. But recent history demonstrates that public opinion can be manipulated to generate irrational fear of minority groups and attitudes.”

29. It may be that offences of this kind might be acceptable if an adequate defence for comments made without malice and in the course of legitimate public and political discussion were available. Again this is not the case with the present legislative proposals. There is a defence of ‘good faith’. But this is defined far too narrowly. In essence the defence relates only to engagement in constructive political expression having the reform of law or public policy as its objective. The defence as framed is insufficient to cover public statements made in good faith for academic, artistic, scientific, religious, journalistic or any other related purposes in the public interest. Without such a broadened defence, the sedition laws are calculated to have a chilling if not repressive effect not just upon speech but upon written expression, symbolic speech and artistic characterization and image making. Such forms of expression may fall easily within the idea of political error or mistake. They may not, of their nature, be suggestive of appropriate reform. And yet they remain legitimate forms of public expression whose repression, in a free and democratic society, is totally undesirable.

30. It is worth noting more particularly, that this criminalization of words embraces not just oral expressions of opinion but also, very importantly, written expressions of such opinion. It cannot fail to be the case that those involved in the production of written political,

journalistic and artistic expression which has the quality of assertive opposition to the government in power will experience a chilling effect upon their work. More than that, the criminalization of politically oppositional or contentious speech, as will occur if the currently very broad definitions of sedition and seditious intent are to persist, opens the gate in the longer term and in more fraught political and social circumstances to political censorship and prosecution. This, under no circumstances, should be contemplated.

31. Because incitement to terrorism is already unlawful under present law, it can only be assumed that the revised sedition offences are intended expand the scope of such urging beyond direct praise or glorification of terrorism to indirect urging. This might produce the criminalization of a host of expressions of contentious opinions including for example, the lauding of the actions of Osama Bin Laden, the interpretation of the events of September 11 as a plot on the part of the CIA to foment anti-Muslim sentiment in the broader American community, the desirability of victory of the insurgent forces in Iraq, and any other statement seek to explain or justify the actions of terrorists or others fanatically opposed to existing governments or governmental policy. Again, to cast the net so widely is to trench significantly upon free public and political communication. Such views may be wrongheaded, objectionable, disgraceful, disgusting or discreditable, but, in a free and democratic society, they should not be met with severe criminal sanction. The imposition of such draconian sanction in addition is calculated to drive any such expression underground with the consequence that persons wishing to engage in such expression may simply intensify their poisonous views and have their feelings of disaffection

significantly strengthened.

32. It is a further undesirable feature of the relevant Schedule that the onus of demonstrating the defence of good faith, such as it is, is placed not upon the prosecution but on the defendant to the relevant charge of sedition. There is no justifiable reason for such a reversal which places the defendant at a significant disadvantage in the face of governmental power and authority. It appears to reflect the view that any person engaging in contentious political speech is guilty unless and until they can prove themselves innocent.
33. We note that the combination of the definition of ‘seditious intention;’ with the power to ban unlawful associations may have the effect of authorizing a prohibition on any organization which seeks to advance its political, social, industrial or other agenda through the advocacy of civil disobedience. This problem is aggravated by the fact that there appears to be good faith defence to statements made by officers of any such organization which may have the effect of urging protest by some unlawful means, however insignificant. This in turn may have the effect of outlawing, and opening to criminal penalty, statements, for example, by the Secretary of the ACTU that the new industrial relations laws should be resisted by all means including by accepting a term of imprisonment for their breach. Such a result, again, would constitute a huge incursion upon the freedom of political speech and expression.
34. Finally, we note that the penalty for sedition offences has been increased from a term of imprisonment of three years to seven years. No justification has been provided for such dramatic increase and

existing political and social circumstances do not appear evidently to provide such a justification, particularly as the sedition offences, although included in the *Anti-Terrorism* Bill, have no direct relationship to terrorism per se.

Stop, Question and Search powers

35. Schedule 5 amends the existing Part 1AA of the *Crimes Act 1914*. It alters the heading of Part 1AA by inserting the words “information gathering” and broadening the reach of the powers from arrest powers to “arrest and related powers”. Whilst the heading of a Part or Division of an Act does not define the specific powers contained within that part of the Act it nonetheless helps define the scope of what follows in the various sections.¹ The amendment of the heading by the proposed amendment is undesirable as Part 1AA is not concerned with information gathering. Rather the proposed Division 3A of Part 1AA deals with powers to stop and question in relation to specific matters, search and if appropriate seize certain items. The power to question is specifically limited to asking a person their name, residential address, reason for being in a particular Commonwealth place and to produce evidence of their identity. The proposed amendments to P1AA are not intended to limit or exclude the operation of other Commonwealth or Territory laws relation to requesting information or documents from persons: s 3D(1) & (4) as amended by the Bill. This proposed qualification does not, however, turn the specific questioning proposed by the new Division 3A into “information gathering”. We recommend, therefore, that the heading should be amended to remove the reference to “information

¹ Mackie v Hunt (1989) 44 ACrimR 426

gathering” altogether or to reflect the specific power to require name address and reason for being in a particular Commonwealth place.

36. The definition of serious offence is relevant to the power to seize items found on a person who is stopped and searched in a Commonwealth place – i.e. if the person conducting the search locates an item not suspected to be related to a terrorist act but suspected to be related to a “serious offence” then they can seize the item. This definition needs to be considered in light of the fact that the power to search in a “prescribed security zone” is entirely random. The definition is so broad (punishable by imprisonment for 2 years or more) that it includes virtually every offence in the calendar of offences that carry prison sentences. Arguably every state offence has a “federal aspect” by virtue of the search resulting in the location of the item being conducted in a Commonwealth place. Potentially social security offices, universities, Commonwealth courts & tribunals, airports Commonwealth office buildings and some polling booths could be declared a prescribed security zone by an unreviewable ministerial determination. The potential for abuse, particularly political abuse in the context of elections and demonstrations, of this stop, search, question and seize power is serious, even without the extraordinary breadth of the proposed sedition definition (also a serious offence by definition). It is submitted that the definition of serious offence should be amended, at the very least, to include only offences punishable by imprisonment for 5 years or more. This would be consistent with the definition of serious offence contained in s 23WA (in relation to forensic procedures on suspects or convicted persons) of the *Crimes Act 1914*. However, given the amendment creates a power to conduct random

searches in a prescribed security zone we submit that a definition limiting the term “serious offence” to offences punishable by 10 years or more is a far more appropriate balance between the intrusive and random nature of the power and the specific purpose for which the power is being created, namely terrorist acts.

37. The proposed amendments introduce random stop and search powers for any person within a Commonwealth place declared a “prescribed security zone” by the Minister. Given the Minister’s power to declare a Commonwealth place a prescribed security zone is limited to situations where in his or her opinion the declaration would assist in preventing a terrorist act or responding to a terrorist act this extraordinary grant of power can be justified provided the power to search remains confined to ordinary searches or frisk searches as defined by the *Crimes Act 1914*. Any extension of this extraordinary power to full searches or body searches would make the grant of the random search power unacceptable. Nevertheless the granting of arbitrary and random stop and search powers in the absence of controls akin to those contained in a Bill of Rights remains very concerning as the potential for abuse in the interests of political expediency is self-evident.

38. The requirement that a police officer must not use more force, nor impose greater indignity, than necessary is a non-negotiable safeguard for the exercise of any power to stop and search whether based upon reasonable grounds for suspicion or the completely arbitrary and random discretion of the searcher. Likewise the requirement the person being subject to the stop and search not be detained for longer than is reasonably necessary is, in our view, a non-negotiable

limitation on the grant of such an extraordinary power. The grant and subsequent exercise of such extraordinary stop and search powers require a system of comprehensive independent auditing of the use of the powers. This is particularly so given there is absence of a Bill of Rights to provide a constitutional or legislative framework against which the grant and exercise of the powers can be judged. However, even where a Bill of Rights is in place the need for regular independent random auditing of the exercise of the powers is necessary to maximize the protection of the public from the abuse of power.

39. Given an application to a magistrate under s 3UG for the retention of the seized item is made as a consequence of the owner's request for its return it must be mandatory for the police officer to notify the owner of the application to the magistrate. It is meaningless to give the owner a right to appear and be heard if they do not have notice of the competing application.

40. Whilst the inclusion of a sunset provision is welcome the period of 10 years is clearly too long. A 5 year sunset provision is far more appropriate given the extraordinary nature of the powers being granted to the executive and the absence of a Bill of Rights to provide a check on the operations of the executive arm of government.

Optical surveillance devices at airports and on board aircraft

41. Given the enactment of the *Surveillance Devices Act 2004* (which includes the grant of warrants for the use of optical surveillance devices in certain circumstances) and the absence of any legislative control over the installation and use of CCTV cameras it is of

concern that the Minister is empowered to, by legislative instrument, determine a code that regulates and authorises the use of optical surveillance devices by aviation industry participants. The development of a Ministerial code, in the absence of proper legislative control over CCTV and other optical surveillance devices, is unsatisfactory. In reality a Ministerial code devoid of a considered legislative framework will simply reflect the desires of law enforcement agencies and aviation industry participants without due regard to the interests of the travelling public and the broader community. The use of optical surveillance devices is of concern not only for what they may record but also because they are apt not to record or retain images that do not suit the interests of those who control the location and operation of the devices. The need for proper legislative framework in relation to CCTV and other optical surveillance devices is long overdue. The substitution of a Ministerial code developed under the auspice of the Anti-Terrorism Bill is unlikely to give adequate consideration to matters other than security concerns and the self interest of the aviation industry participants.

Advocacy Offences

42. The Bill, in Schedule 1, item 9, inserts a new offence of ‘advocates the doing of a terrorist act’ in a new subsection (1A) after subsection 102.1(1) of the Criminal Code.

In this Division, an organisation advocates the doing of a terrorist act if:

(a) the organisation directly or indirectly counsels or urges the doing

of a terrorist act; or

(b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or

(c) the organisation directly praises the doing of a terrorist act.

43. As the Explanatory Memorandum indicates this definition is designed to cover direct or indirect advocacy by an organisation in the form of counselling, urging and providing instruction on the doing of a terrorist act, as well as direct praise of a terrorist act. A 'terrorist act' is defined as an action or threat of action that is done with the intention of advocating a political, religious or ideological cause with the intention of coercing government or a section of the public. This is a very wide definition of a terrorist act. However as the Explanatory Memorandum indicates the definition of 'advocates' is unlimited, it is not restricted in terms of the manner in which advocacy occurs and it covers all types of communications, commentary and conduct. The net effect of this very wide, "unlimited" definition of 'advocates' is that the new offence of 'advocates the doing of a terrorist act' is framed too vaguely for practical application. Such loose drafting of a serious offence should not be contemplated. Furthermore an organisation may commit an offence of 'advocates the doing of a terrorist act' even if it cannot be shown that the organisation either intended a particular offence to be committed or intended to communicate with a person inspired to cause harm to the community. These provisions because of their breadth and lack of definition will, by themselves, unreasonably curtail freedom of speech and expression and may produce an undesirable 'chilling effect'; on some aspects of public and political communication.

Conclusion

44. In a recent legal opinion, Bret Walker SC and Peter Roney of the Sydney Bar described the effect of recent anti-terror legislation in the following terms:

”These enactments have been described in the legal literature as typically marked by patterns which included: the expansion of Executive Power and discretion outside the judicial process; the priority given to national security imperatives, limitation on the provision of independent legal advice; and departures from the presumptions of innocence, trial by jury and freedom of association.”

The legislation discussed in this submission bears all the hallmarks of this most undesirable and potentially destructive approach. It is an approach that invites the infringement of fundamental human rights, and suggests the possibility of further infringement of fundamental constitutional principle. We would urge the Committee to recommend that the *Anti-Terrorism* Bill 2005 should not proceed and should be withdrawn pending a further, much more extensive parliamentary review. Should such a recommendation not meet with the Committee’s approval we would urge the Committee to ensure that the Bill contain adequate safeguards including in particular judicial review on the merits of the provisions with respect to control orders and preventative detention orders. And, in any case, we recommend strongly that the provisions with respect to sedition be withdrawn.