QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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SUBMISSION TO THE SENATE LEGAL & CONSTITUTIONAL LEGISLATION COMMITTEE

INQUIRY INTO THE PROVISIONS OF THE ANTI-TERRORISM (NO 2) 2005

Executive summary

1. The Council accepts there is a risk that Australia will be the subject of criminal acts by terrorists, and that the government has a duty to protect its citizens against such acts.

2. But the Bill offends principles that are entrenched in our Constitution and common law and that are recognised by international law. It creates a system of preventative detention of persons who are not criminals, and who are not even reasonably suspected of committing a criminal offence. Detention is permitted on the basis of information which may be unreliable, rather than evidence that can be tested by a judicial process.

3. Because the Bill contains inadequate safeguards it is open to abuse. Persons who have not been charged with any criminal offence may be subject to control orders for lengthy periods, of up to 12 months at a time, with control orders being "rolled over" one after the other.

4. Proponents of the Bill have not demonstrated that it is necessary. The evidence tends to suggest that current laws that prevent and punish terrorists' acts are adequate.

5. Such an unjustified system of arbitrary detention is likely to arouse hostility and paranoia, particularly amongst groups in the community who, perhaps wrongly, perceive that the Bill is directed at them. Such resentment may even lead to recruitment of individuals to a terrorist cause. The benefits, if any, which the Bill offers would need to greatly outweigh the risk that it will be counter-productive.

6. The QCCL submits that the Bill should not be passed.

7. At the very least, it should be subjected to more careful Parliamentary and public scrutiny than has been possible by the timetable presently imposed for its passage.

8. If, despite the opposition of the QCCL, other organisations and individual citizens to the Bill, it is to be passed, then it should be substantially amended to increase safeguards and to generally improve it.

9. The QCCL generally adopts the submissions of bodies such as the ACCL, the Law Council of Australia, the joint submission of the Bar Association of Queensland and the Queensland Law Society and other bodies concerning deficiencies in the Bill. One particular deficiency is the absence of a Public Interest Monitor (PIM), an institution that has worked successfully in Queensland since 1997. A PIM would not inhibit the operation of the proposed law. It would enhance it.

Submissions

10. Behind the Bill, and all of its detail, lie two scenarios that compete for our attention.

11. The first is acts of conspiracy and murder of the kind that occurred in London on 7 July. The apparent intent of the Act is to interdict criminals before they perpetrate such terrorist acts.

12. The second is the incarceration of those who are not criminals and who do not intend to commit any crime. If the present criminal justice system, with all of its safeguards, cannot prevent miscarriages of justice, then a system of administrative detention is unlikely to prevent the detention of the innocent and misuse of power. The names Vivian Alvarez and Cornelia Rau remind us of the potential for zealous or incompetent officials to unlawfully deprive vulnerable citizens of their liberty. Of course, Ms Alvarez and Ms Rau were not incarcerated on the strength of intelligence that had been analysed by law enforcement official. But this provides little comfort, since to ignore the prospect of error and misuse of power by officials would be to overlook the failings of law enforcement[1] and intelligence agencies[2] in the past.

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[1] This includes miscarriages of justice which have been well-documented: see for example Nobles and Schiff "Understanding Miscarriages of Justice" 2000 Oxford University Press; T Prenzler and J Ransley (eds) "Police Reform: Building Integrity". Miscarriages of justice have devastating effects on individuals, who face loss of their liberty, jobs, family and reputation. Often real perpetrators remain undetected. Miscarriages of justice undermine confidence in our system of government. A telling example of a miscarriage of justice in the context of alleged terrorist offences in Australia was the wrongful imprisonment of Tim Anderson and others.

13. Understandably, proponents of the Bill are moved by the first scenario. Opponents of the Bill, whilst recognizing the threat of terrorism, are haunted by the second scenario. They also see the Bill as an unprecedented system of administrative detention, which is foreign to our system of government and tradition of freedom under law.

14. Proponents of the Bill implicitly and explicitly rely upon the good character and good will of present and future governments. Opponents are not so sanguine about the future and prefer like Sir Thomas More in Bolt's *"A man for all seasons"* the shelter of a forest of laws. After all, Western society has spent most of the last 1000 years struggling for the rule of law to prevail over the rule of men. It would be a major victory for the terrorists to throw it away now. Anti-terrorist legislation enacted in South Africa during the apartheid era created a police state. Internment laws can prove to be counterproductive.[3]

15. In the circumstances, proponents of the Bill carry a heavy onus to demonstrate that:
    (a) current laws and police powers are inadequate to counter the kinds of criminal acts at which the Bill is aimed. Expressed differently, they must show that the Bill is *necessary* to counter a known terrorist threat to Australia;
    (b) the new powers will be *effective* to reduce or avoid acts of terrorisms;
    (c) any demonstrated reduction in terrorists acts does not come at *too high a price* to individuals who are subject to new powers, including individuals who are detained on the basis of malicious and false accusations;
    (d) conferring such sweeping powers, that are widely perceived as being aimed at sections of the Muslim community, is not *counter-productive*. The risk exists that such laws and their administration may encourage resentment and paranoia, and act as a recruiting tool for terrorists;
    (e) in the final analysis, the supposed benefits of the proposed law, when measured against its likely adverse consequences, justifies a system of

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2 This includes a raid by ASIO upon innocent citizens which was recently settled out of Court. The most notorious recent example of an intelligence failure was the assurance given by Australian intelligence agencies that there were WMDs in Iraq.

3 This was the experience with internment in Northern Ireland according to Brigadier Malcolm Mackenzie-Orr, the former head of the Protective Services Co-ordination Centre that was responsible for national counter-terrorism arrangements in Australia, who served in Northern Ireland from 1970 to 1974.: ABC Radio Interview, Radio National 1.11.05.

administrative detention that is inconsistent with our legal and political inheritance.[4]

The point of principle

16. Much opposition to the Bill begins with the final point: that a system of administrative detention, however well-intentioned, is inconsistent with the basic tenets of our legal system.[5] This position was expressed forcefully by Lord Hoffmann:

> "… Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom. When Milton urged the government of his day not to censor the press even in time of civil war, he said: 'Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governors'.
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> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qa'ida. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist

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4 Justice Jackson stated "Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man shall be imprisoned … save by the judgment of his peers …" (cited by McHugh J in *Lim v MILGEA* (1992) 176 CLR 1 at 63.) In the same case, at p.27, Brennan, Deane and Dawson JJ wrote:

> "… 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."

In a leading case that recently considered the power to detain terrorism suspects, Lord Hoffmann observed:

> "… Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the convention because it set out the rights which British subjects enjoyed under the common law." (*A v Secretary of State* [2004] UKHL 56 at [88]; [2005] 3 All ER 169 at 218).

Lord Hoffmann is widely regarded as one of the finest lawyers of his generation. He was born in South Africa, a country that experienced terrorism in a variety of forms during the apartheid era, Therefore Lord Hoffmann might be expected to have a keen appreciation of issues of freedom in the face of terrorism.

5 Although our Constitution does not contain express guarantees of the kind found in a comprehensive Bill of Rights, freedom from arbitrary arrest and detention is a principle embodied in the common law and it underpins our Constitution.

> violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.
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> …
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> I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. **In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.**"[6]

17. The Bill should be rejected on this point of principle. Even with certain safeguards, the Bill creates a system of administrative detention, inimical to our common law and constitutional traditions. Such involuntary detention of a citizen in custody by the State is punitive in character and, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[7]

18. But that is not the only reason the Bill should be rejected. It should be rejected because its proponents have not demonstrated that;

    (a) it is necessary;

    (b) it will be effective;

    (c) it will not result in the unjustified detention of individuals and other incursions on civil liberties;

    (d) it will not be counter-productive.

Necessity

19. There is a very strong argument that current laws adequately protect the community against terrorist acts. The law of conspiracy strikes at plans to commit terrorist acts. Commonwealth and State law enforcement agencies, and intelligence organisations, are given extensive powers to survey, monitor and arrest persons who are reasonably suspected of engaging in criminal acts. Thirty-one Commonwealth Acts provide for the prevention and prosecution of terrorist acts.

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6 (supra) at [95]-[96], p.220.

7 See *Lim* (supra).

20. Recent public statements by senior law enforcement officials after raids and arrests in Sydney and Melbourne indicate that current laws were adequate to lead to the arrest of suspected terrorists.

21. In May 2005 the former head of ASIO told a Parliamentary Committee that laws were adequate.

22. The terrorist attack of 7 July has brought a demand for more powers. But there is no evidence that there is an increased threat to Australians of a terrorist attack. The threat level remains at "medium" where it has been since 11 September 2001. There are no new travel advisories regarding Australia from the United States. Great Britain or any other country. The government has not made a convincing case that any change, other than that recently made, is required to existing anti-terrorism laws.

23. But if there was to be an attack in Australia by the kind of individuals who bombed London on July 7, would the proposed Bill stop it? There is no evidence that it would. The possibility that it might does not justify the slide towards a system of executive detention.[8]

24. In the absence of a well-reasoned case demonstrating that existing laws are inadequate, the Bill should not be passed.

The laws are unlikely to be effective

25. These laws are justified by reference to the 7 July attacks in London. But they are modelled on laws in place at that time. How can it be said then they are likely to be effective? It has been noted that the main cause of police and intelligence failure overseas has been a lack co-ordination between agencies.

The Bill contains inadequate safeguards

26. The Bill permits the detention of persons who have not committed any crime and who do not intend to commit any crime. Preventative detention orders and control orders may be made against persons who are not even reasonably suspected of committing an offence, or planning to commit an offence.

27. The QCCL opposes preventative detention on the basis of the following principles:

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[8] The debate has some similarity to that over the *Communist Party Dissolution Bill*. In those state where similar legislation was enacted subsequent governments used the legislation to create a police state.

(a) The requirement that an individual can only be deprived of their liberty after they have been convicted by a Court of a specified offence is one of the fundamental bulwarks of liberty. To enable a person to be deprived of their liberty on the basis of what they might do or might know or with whom they might be associated would represent a vast increase in the power of the state.

(b) The corollary of this principle is the presumption of innocence. To deprive a person of their liberty in circumstances where they have not been convicted of any offence is to create a major exception to the presumption of innocence.

(c) Thirdly, to deprive a person of their liberty on the basis of what they might do seriously undermines the possibility of fairness in our judicial system. It does so in two respects. Firstly, it reduces the capacity of persons to defend themselves. It is much harder for a person to defend themselves from the accusation that they might do something than to defend themselves from the accusation they have done something. Secondly, punishment really can only be imposed when it is measured against some conduct which it is established a person has undertaken.

(d) Fourthly, to deprive people of their liberty on the basis of what they might do increases significantly the risk of the innocent being incarcerated.

28. But because the government is intent on proceeding with these laws the Council make the following comments on deficiencies in the control order and preventative detention regimes and the new sedition offence.

Control Orders

29. The decision whether or not an application can be made *ex parte* should lie with the court.

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

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

role.[9]

32. The onus should be on the authorities to establish the need for the order. The standard of proof should be the criminal standard.

33. The court should be required to have specific regard to the effect of the order on the rights of the respondent as contained in the International Covenant on Civil and Political Rights.

34. The Bill provides for the subject of the order to be given a summary of the grounds upon which the order is made excluding matters the disclosure of which is likely to prejudice "national security" as defined in the *National Security Information (Criminal and Civil Proceedings) Act* ("the NSI Act"). These are two difficulties with this provision. Firstly, a fair trial requires that the accused must be acquainted with *all* the facts alleged against them not just a summary. [10] Secondly even if the legislation were changed to require the disclosure of the facts on which the application is made the definition of National security in the NSI Act is so wide that it is likely to render all disclosure, including the summary, nugatory. Whilst the Council considers that the NSI Act has many floors which were identified at the time of its passage, the Council sees no reason why the mechanisms provided in that Act

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

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

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

- appear in the Supreme Court or Magistrates Court at the hearing of an application for a surveillance warrant or covert search warrant to test the validity of the application by:
  - (i) presenting questions to the applicant police officer
  - (ii) examination or cross-examination of any witness, and
  - (iii) making submissions on the appropriateness of granting the application.
- monitor compliance by law enforcement officers regarding applications for the warrants (both before and after the issue of a warrant),
- gather statistical data about the use and effectiveness of surveillance warrants and covert search warrants,
- report, whenever appropriate, to the police commissioner or Crime and Misconduct Commission on non-compliance with the Act, and
- report to Parliament annually on the use of surveillance and covert search warrants.

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

10 The absence of any real, practical opportunity to access the information upon which orders have been made or upon which orders are intended to be made virtually guarantees that innocent individuals can be detained on the basis of flawed intelligence or false claims by malicious accusers.

for criminal procedures should not applied be applied to evidence in proceedings under this Bill.

35. The Commonwealth ought to provide legal aid to all persons who are the subject of an application for these orders.

36. There appears to be no limit on the number of control orders that could be obtained. The authorities ought to be limited to only one control order. At the very least they ought to be required to justify a second order on the basis of entirely new information.

Preventative Detention

37. Any preventative detention order should be limited to a period of no more than 24 hours.

38. The procedure for the making of these orders is defective in these respects:

(a) All the powers given under this legislation should be exercised by judges.

(b) These types of orders must only be made where there is clear and compelling evidence which has been reviewed by a Public Interest Monitor.

(c) There should be an opportunity given for the respondent during the time of their detention to contest these orders on their merits including all the conditions.

(d) Once again, it appears that any right of review will also be compromised by the fact that the accused will only be entitled to a summary of the grounds upon which the order was made. Our comments in relation to the provision of facts to the subject of a control order apply here.

(e) In the Council's view the proceedings are quasi-criminal in nature and the Act should make specific provision that in any civil challenge no costs order can be made against a person the subject of the order.

(f) The Public Interest Monitor should be involved at all stages of this process.

Prohibition on Contact

39. The unfairness of this scheme is reinforced by the power to make orders prohibiting the subject from having contact with other persons. The requirements for the making of a prohibition on contact order are vague and provide no objective criteria upon which the making of such orders can be based. They may be able to inform a family

member simply that they are "safe but unable to be contacted for the time being".[11] This restriction would be laughable if it was not so serious. In the real world, a statement from one family member to another "I am safe but I am not able to be contacted for the time being" would prompt the recipient to ask questions such as "Where are you? Why can't you contact me?". An honest answer to these kinds of questions exposes the detainee to a penalty of up to five years in jail. No answer would cause the family member grief and distress. Therefore, the proposed law encourages a detainee to lie to a family member about their circumstances.

Monitoring of Lawyers

40. Of very great concern in this legislation is the restriction on the capacity of a lawyer to communicate with their client. Somewhat incongruously the legislation says that legal professional privilege is protected but requires that all conversations between a lawyer and their client are to be monitored. This is clearly a violation of the right of a person to legal representation.

41. For centuries the law has made communications between a client and lawyer confidential so as to promote full and frank disclosure of all relevant information to a lawyer.[12] A citizen's right to keep communications with a lawyer confidential has been described as "a fundamental right long established in the common law".[13]

42. Although a police monitor is prohibited from disclosing the conversation, this does not provide any real protection. Other persons, including law enforcement officials, can access recordings of the monitored conversation and use them for all manner of purposes.

43. The requirement that communications between a detainee and the detainee's lawyer be monitored should be removed from the Bill.

Sedition

44. In the Council's view neither the existing sedition laws nor those proposed in the Bill are appropriate in a pluralistic modern democracy. It is legitimate to control speech leading to violence where the speech and the violent conduct are inseparably linked. For example where a speaker addresses an agitated audience and immediate violence

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11 Clause 105.35(1).

12 *Grant v Downs* (1976) 135 CLR 674 at 685.

13 *R v Special Commissioner* [2002] UKHL 21 at [7].

is likely speech could be controlled. The harm must come immediately from the conduct. In our view the existing sedition law does not meet this requirement. However, at least the existing sedition law requires the Crown to prove that the speaker intended that there be violence. That requirement is removed from the draft so that not only is there now no longer a need for the Crown to prove the speaker's conduct actually resulted in some violence. It is no longer necessary for the Crown to even prove that the speaker intended that there be violence. The good faith defence is inadequate in that the intention to cause violence only becomes one *factor* to be considered in *assessing* a defence. It is not a defence.

45. The government has signalled a review of the law of sedition. The proposed amendments to the law of sedition should await that review.

Other Issues

46. Schedule 3 of the draft bill on financing terrorism will be likely to result in innocent people being brought within the regime.

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for and on behalf of the Executive
QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
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