

Dear Secretary

On 8 September 2005, the Federal Government proposed important changes to Australia's anti-terrorism laws.

The proposed laws represent significant erosions to civil liberties and undermine basic protections in the criminal justice system.

I attach a report, 'Laws for Insecurity? A Report on the Federal Government's Proposed Counter-Terrorism Measures'. The report details concerns regarding the Commonwealth Government's proposals.

It is written by a group of community lawyers, policy workers, advocates and legal academics expert in the field of Australia's anti-terrorism laws.

I provide it to you with the request that you pass a copy of this report to each member of the Senate Committee on Legal and Constitutional Affairs.

Please note that the report has been sent to State and Territory Premiers, the Prime Minister and the Federal Attorney-General as well as the federal Opposition. Finally, we have made the report publicly available and called on community organisations to use it to write to relevant politicians.

We hope that the members of the Committee find the analysis in the report useful. Please do not hesitate to contact me if you have further enquiries.

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**LAWS FOR INSECURITY? A REPORT ON THE FEDERAL GOVERNMENT'S
PROPOSED COUNTER-TERRORISM MEASURES**

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I INTRODUCTION

On 8 September 2005, the Federal Government proposed important changes to Australia's anti-terrorism laws.¹ This report evaluates these proposals against the following criteria:

- adequacy of detail;
- conformity with key principles of a liberal democracy;
- constitutionality;
- necessity in efforts to prevent ideologically or religiously motivated violence; and
- adequacy of public discussion of the proposals.

This evaluation falls into three parts. The first, Part II, provides an overall consideration of the proposals. It finds the proposals *generally* wanting when tested against the above criteria. The proposals not only lack detail but are also constitutionally-fraught and mark serious departures from key principles of a liberal democracy. Most importantly, the Federal Government has failed to provide a proper justification of why the proposed changes are necessary in efforts to prevent ideologically or religiously motivated violence. Specifically, it has not made a serious attempt to explain how these measures more effectively deal with the threat of such violence; why current anti-terrorism laws are insufficient to deal with such a threat and how these measures, with their severe curtailment of rights and freedoms, are proportionate to such a threat. Equally serious are the indications that the Government is seeking to implement these proposals by the end of the year. Such a timetable will fail to provide for proper public debate of these far-reaching proposals.

Following on from this general evaluation, Part III examines the specific proposals. Part IV then outlines the existing scope of State anti-terrorism legislation. This existing legislation establishes a key part of the framework against which any proposed amendments must be assessed. Finally, Part V concludes the analysis finding that the proposals as they stand should not be adopted. Instead of rushing to implement them, the Federal Government should withdraw these proposals and ensure a proper review of the current anti-terrorism laws in order to determine the desirability of any changes. This means allowing the public reviews

under the *Security Legislation Amendment (Terrorism) 2002* (Cth) and the *Intelligence Services Act 2001* (Cth) to run their course prior to the adoption of any new counter-terrorism laws

II GENERAL EVALUATION

A *Lack of detail*

All the proposals have been accompanied by an astonishing lack of detail. Most of them involve conferring greater and, in some cases, unprecedented powers on police and security organisations and yet they are very unclear as to the circumstances in which such powers would be exercisable and, importantly, against whom these powers could be employed.

All up, two pages of the PM's Media Release are devoted to what can be fairly characterised as radical proposals.² More than this, the PM's Media Release is littered with vague phrases. Two examples can be given to illustrate this point.³ Control orders, it is said, can be issued against 'people who pose a terrorist risk to the community'.⁴ Crucial issues are unexplained: what is a 'terrorist' risk? How serious a 'risk' is being contemplated? What is meant by 'the community'?

Another blatant example of a lack of detail relates to the proposal to '(p)rovide access to airline passenger information for ASIO and the AFP'.⁵ There is no other detail provided beyond the last-mentioned sentence. Unexplained are the circumstances under which the Australian Security Intelligence Organisation ('ASIO') and the Australian Federal Police ('AFP') can access 'airline passenger information'. Also unclear is what sort of information ASIO and the AFP would be permitted to access. For instance, does 'airline passenger information' also include very private details like the movies watched by an airline passenger?

¹ John Howard, Prime Minister, 'Counter-Terrorism Laws Strengthened' (Press Release, 8 September 2005) ('PM's Media Release'). This media release has been attached as an Appendix to the paper.

² Ibid 4-5.

³ More detailed analysis will be made in Part III.

⁴ PM's Media Release, above n 1, 4.

⁵ Ibid 4.

B *Departure from key principles of a liberal democracy*

Despite the lack of detail, what is clear is that these proposals, if adopted, will mark serious departures from key principles of a liberal democracy. Foremost, some of the proposals will overturn the *presumption of innocence*. This principle, firstly, entails that individuals are presumed innocent until proven guilty in a court of law upon adequate proof. Moreover, it generally secures individuals presumed innocent freedom from coercive powers. A limited departure from the latter, of course, exists in terms of arrest powers in relation to persons *suspected on reasonable grounds of committing a crime* who must be brought before a judicial officer after a short period of detention.⁶

If adopted, the proposed measures will go far beyond this limited departure. For instance, the extended stop, question and search powers proposed to be granted to the AFP can be exercised where ‘there are reasonable grounds that a person *might* have just committed, *might* be committing, or *might* be about to commit a terrorism offence’.⁷ Allowing coercive powers to be used when there is only a *possibility* of an offence being committed considerably lowers the threshold for the use of such powers. Much the same concern applies to control orders that can be issued against ‘people who pose a terrorist *risk* to the community’.⁸ Professor Arie Freiberg, Dean of the Monash University Law Faculty has, for one, rightly characterised the proposal to introduce ‘control orders’ as eroding:

the once-cherished presumption of innocence and [as having] blurred the nexus between crime and punishment. It continues a process whereby governments increasingly seek power to act proactively and preventively *without the necessity of first proving the commission of an offence*.⁹

By lowering the threshold for the use of coercive powers and, by implication, departing from the presumption of innocence, the proposals, if adopted, clearly mean that a much wider range of individuals could be subject to detention, restrictions on movement and compulsory questioning. This has further implications for the *freedoms of political and religious association and belief* simply by virtue that ‘terrorism’ offences depend upon a person’s

⁶ See, for example, *Crimes Act 1914* (Cth) ss 23C-D (‘Crimes Act’).

⁷ PM’s Media Release, above n 1, 4 (emphasis added).

⁸ *Ibid* (emphasis added).

ideological and/or religious motive.¹⁰ If all that is needed prior to the exercise of coercive powers is a *possibility* of an individual committing a ‘terrorism’ offence, it is quite possible that evidence of the person’s political or religious beliefs alone would suffice. Put differently, political or religious beliefs could be grounds for inferring that an individual *may* commit a ‘terrorism’ offence. If so, this raises the spectre of *thought-crimes*.

Other proposals constitute more direct attacks on political freedoms. For instance, the extension of the unprecedented powers to ban ‘terrorist organisations’ under the *Criminal Code* to ‘cover organisations that advocate terrorism’¹¹ poses the danger that many organisations that publicly support independence movements like Fretilin and the ANC will be vulnerable to proscription.

Another important principle breached by several of these proposals is the *right to privacy*. Adoption of the loosely-worded proposal to ‘(p)rovide access to airline passenger information for ASIO and the AFP’¹² would clearly mean that once-private information will be in the possession of police and security organisations. The proposal for a ‘notice to produce’ regime¹³ has the potential to result in serious incursions into the privacy of individuals. It could mean, for instance, that the library records of individuals could be accessed as of right by ASIO and the AFP, rather than by seeking a warrant.

Lastly, there is a real danger that the powers conferred by these proposals would be exercised in a discriminatory fashion. All persons charged so far with a ‘terrorism’ offence are Muslim¹⁴ and that all groups that have been proscribed as ‘terrorist organisations’ under the *Criminal Code* are organisations that espouse a connection to Islam.¹⁵ In these circumstances, it is not far-fetched to predict that the exercise of any new powers will disproportionately affect Muslim sections of the Australian community. If so, not only will there be a serious breach of the principle of *equality before the law* but also an erosion of this country’s

⁹ Arie Freiberg, ‘Control orders: a rights attack out of control’, *The Age* (Melbourne), 14 September 2005, 15 (emphasis added).

¹⁰ See definition of ‘terrorist act’ in section 100.1 of the *Criminal Code Act* (Cth) (*‘Criminal Code’*). For discussion, see Ben Golder and George Williams, ‘What is ‘Terrorism’? Problems of Legal Definition’ (2004) 27 *University of New South Wales Law Journal* 270.

¹¹ PM’s Media Release, above n 1, 5.

¹² *Ibid* 4.

¹³ *Ibid*.

¹⁴ For details of those charged, see Brendan Nicholson, ‘A man of terror, or a terrorised man?’, *The Age: Insight* (Melbourne), 19 February 2005, 5.

commitment to multiculturalism, by excluding or placing under suspicion a class of people in the community.

C *Constitutionally-fraught proposals*

It is clear that the Federal Government will require the co-operation of the States in order to fully implement its proposals. With most of the proposed measures, a referral of States' legislative power akin to those made under section 100.2 of the *Criminal Code* (Cth) will be necessary for a nation-wide application of these measures.¹⁶

There are constitutional problems surrounding these proposals. The Prime Minister, for instance, has acknowledged the constitutional issues in relation to the proposal for preventative detention and urged the States and Territories to implement this proposal in order to circumvent the constitutional restrictions.¹⁷ The restrictions in question appear to be those that prevent non-judicial bodies ordering detention as a result of the separation of judicial power implied in the *Commonwealth Constitution*.¹⁸ It should be noted that even if the Federal Government succeeds in persuading the States and Territories to implement the preventative detention proposal, this does not completely remove the constitutional limitations in question as it has been found that these limitations also apply to the States, albeit to a lesser degree.¹⁹

There are other constitutional problems that will still arise even if the States co-operate by referring legislative power to the Commonwealth. The proposal to '[s]trengthen [the] existing offences for providing false or misleading information under an ASIO questioning warrant'²⁰ builds upon a questioning and detention regime that stands on already shaky constitutional foundations.²¹ The proposal for an offence of 'inciting violence against the community' and the extension of banning powers under the *Criminal Code* to 'organisations that advocate

¹⁵ *Criminal Code Regulations 2002* (Cth) regs 4-4F, Schedules 1-1A.

¹⁶ For discussion, see Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd ed, 2004) 252-4.

¹⁷ PM's Media Release, above n 1, 4.

¹⁸ *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28.

¹⁹ See *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.

²⁰ PM's Media Release, above n 1, 5.

²¹ See Greg Carne, 'Detaining Questions or Compromising Constitutionality? The *ASIO Legislation Amendment (Terrorism) Act 2003*' (2004) 27 *University of New South Wales Law Journal* 524.

terrorism'²² may be in breach of the implied freedom of political communication.²³ Moreover, the banning powers under this statute and those under the *Charter of United Nations Act 1945* (Cth) financing of assets regime are constitutionally suspect.²⁴ Control orders, on the other hand, may be in breach of section 92 of the *Commonwealth Constitution*; a section which states that 'trade, commerce, and *intercourse among the States*, whether by means of internal carriage or ocean navigation, shall be absolutely free'.²⁵

D *Lack of justification*

The proposals, despite departing from key principles of liberal democracy and being constitutionally fraught, have been accompanied by a dangerous lack of justification. The Prime Minister has argued that '[t]he terrorist attacks on the London transport system in July have raised new issues for Australia and highlighted the need for further amendments to our laws'.²⁶ Yet no serious attempt has been made to spell out what these 'new issues' are or what is the 'need for further amendments'. The lack of detail accompanying these far-reaching proposals is mirrored by their lack of justification.

Specifically, there has been no serious attempt to explain:

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

1 *Lack of explanation how proposed measures more effectively deal with the threat of ideologically and religiously motivated violence in Australia*

The proposals are said to 'enable us to better deter, prevent, detect and prosecute acts of terrorism'.²⁷ There is, however, no explanation of how they will actually do this: What is the

²² PM's Media Release, above n 1, 5.

²³ See, for example, *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96.

²⁴ See Joo-Cheong Tham, 'Possible Constitutional Objections to the Powers to Ban 'Terrorist' Organisations' (2004) 27 *University of New South Wales Law Journal* 482.

²⁵ *Commonwealth Constitution* s 92 (emphasis added).

²⁶ PM's Media Release, above n 1, 4.

²⁷ *Ibid* 1.

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

We are concerned that the proposed measures may prove to be counter-productive. There are several reasons for this. First, as mentioned above, there is a considerable chance that the powers they confer will be directed disproportionately at the Muslim sections of the Australian community. Given this, adoption of the proposals risks alienating the very part of the community whose co-operation is crucial in preventing ideologically and religiously motivated violence in the current circumstances. As Daryl Melham, chair of the Australian Labor Party's Federal Caucus, cogently argued:

by targeting and alienating Australia's Islamic communities, the Government is jeopardising the co-operation and assistance vital for successful counter-terrorism efforts.²⁸

More generally, the proposals appear to adopt the 'tough' counter-terrorism approach of *criminalisation* and *coercion*. This is most apparent with the proposal to enact an offence of 'leaving baggage unattended within the airport precinct'.²⁹ The assumption seems to be that this 'tough' approach will more effectively prevent and deter the threat of ideologically and religiously motivated violence. This assumption is open to doubt. Crucial to the success to counter-terrorism efforts is the co-operation of the public. Criminalisation and coercion not only imply a very crude method of securing such co-operation but also risks forfeiting the trust of the public in security and police organisations. For instance, if airline passengers resent being dubbed as criminals simply for inadvertently leaving their baggage unattended, they are less likely to co-operate with police and security organisations.

Moreover, the proposed measures will expose a broader range of individuals to intrusive exercise of policing powers, including those who are presumed to be innocent. This clearly means that these measures will mean *increased insecurity* for some parts of the Australian community. Further, the adoption of the proposed measures may prove to be counter-productive in a more insidious manner. It may limit the possibility of robust and evidence-based political debate that is needed to ensure that the most meritorious policy is adopted by

²⁸ Daryl Melham, 'Here's the real security threat: laws that steal our freedoms', *The Age* (Melbourne), 15 September 2005, 13.

²⁹ PM's Media Release, above n 1, 4.

legislatures. In short, free political debate leads to better policy-making. Some of the proposed measures, however, directly attack the freedoms necessary for such debate. In doing so, they set the scene for ill-considered and badly-designed counter-terrorism measures.

Lastly, the Government has invoked the July London bombings as a reason for these new proposals. The Federal Government's own National Counter-Terrorism Alert Level has, however, remained unchanged at 'medium' since those bombings.³⁰ Indeed, this has been the threat level since the attacks on 11 September 2001. It is worthwhile stressing that a 'medium' level of threat means that the Government believes that a 'terrorist attack *could* occur'. It does not mean that a 'terrorist attack is *likely*' ('high' level of threat) or that a 'terrorist attack is *imminent* or *has occurred*' ('extreme' level of threat).³¹ In these circumstances, it is extremely difficult to accept that the London bombings have ushered in an increased threat of ideologically or religiously motivated violence that justifies these proposals.

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

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

³⁰ See National Counter-Terrorism Committee Communiqué: 8 July 2005. Available online:

<http://www.nationalsecurity.gov.au/agd/WWW/nationalsecurityHome.nsf/Page/RWP94CAF198B3B53A9ACA257038001A4861>; at 15 September 2005).

³¹ See

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

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

Any new measure, including those proposed by the Federal Government, must be evaluated in the context of existing laws. These laws include those relating to existing State police powers; laws that are described in some detail in Part IV. Crucially, any evaluation must take into account the panoply of federal counter-terrorism laws enacted since the September 11 attacks.

In essence, these laws rest on three key planks. First, a range of ‘terrorism’ offences came into existence. At the base of these offences is the broad statutory definition of a ‘terrorist act’; a term that, at its margins, embraces certain acts of industrial action like picketing by nurses.³² These offences travel far beyond acts like bombing and hijackings to not only criminalise ‘terrorist acts’ but also *conduct ancillary to ‘terrorist acts’*. For example, a ‘terrorism’ offence is committed by merely possessing a thing that is connected with the preparation for, engagement in or assistance in a ‘terrorist act’.³³

Second, powers have been conferred on the Government to ban ‘terrorist’ organisations. Part 4 of the *Charter of the United Nations Act 1945* (Cth) requires the Foreign Minister to list a person or entity if satisfied, among others, that such a person or entity is involved in a ‘terrorist act’; a term that is not defined by the Act.³⁴ If an entity or person is listed, it is illegal to use or deal with the assets of the listed person or entity. It will also be an offence to directly or indirectly provide assets to a listed person or entity.³⁵ Moreover, under the *Criminal Code Act 1995* (Cth), regulations can be passed listing an organisation as a ‘terrorist organisation’ so long as the Federal Attorney-General is satisfied, on reasonable grounds, that

³² While the definition of a ‘terrorist act’ excludes ‘industrial action’ (*Criminal Code Act* s 100.1), this is unlikely to afford any protection to picketing which has been found not to be ‘industrial action’ under the *Workplace Relations Act 1996* (Cth): *Dauids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR, 550, 575 per Wilcox and Cooper JJ (with whom Burchett J agreed at 586) (*‘Dauids’*). For commentary on this case, see John Howe, ‘Picketing and the Statutory Definition of ‘Industrial Action’’ (2000) 13 *Australian Journal of Labour Law* 84-91. The ruling in *Dauids* has subsequently been applied in *Auspine Ltd v CFMEU* (2000) 97 IR 444; (2000) 48 AILR [4-282] and *Cadbury Schweppes Pty Ltd v ALHMWU* (2001) 49 AILR [4-382].

³³ *Criminal Code*, s 101.4.

³⁴ *Charter of the United Nations Act 1945* (Cth) s 15 and *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth) reg 6(1).

³⁵ Such conduct is not illegal if authorised by the Foreign Minister: *Charter of the United Nations Act 1945* (Cth) ss 20-1.

the organisation is ‘directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)’.³⁶ Such a listing means that the ‘terrorist organisation’ offences under this Act will apply to the organisation. These offences mean, for example, that membership of such organisations is punishable by a maximum of ten years in prison.³⁷

Thirdly, ASIO now has unprecedented powers to compulsorily question and detain persons *suspected of having information* related to a ‘terrorism’ offence.³⁸ Furthermore, the exercise of such powers by ASIO is cloaked with secrecy. It is illegal to disclose information relating to most of ASIO’s activities.³⁹

This brief outline demonstrates the breadth of already existing counter-terrorism measures. Built upon the base of a ‘terrorist act’ is a superstructure of broad criminal offences and sweeping executive powers. Moreover, the panoply of sweeping executive powers means that Australia now has a detention without trial regime with respect to ‘terrorism’ offences. It also has a proscription regime under the *Criminal Code Act* that bears ‘disturbing similarity’ to the *Communist Party Dissolution Act 1950* (Cth).⁴⁰

It was perhaps acknowledgment of the breadth of the current laws that prompted Dennis Richardson, previous Director-General of ASIO, when recently appearing before the Parliamentary Joint Committee on ASIO, ASIS and DSD, *not* to ask for any further powers. Specifically, in response to a question by Senator Robert Ray on whether he was ‘satisfied that the *existing powers* equip you to do the job you need to do?’, Mr Richardson replied ‘Yes’.⁴¹

³⁶ *Criminal Code*, s 102.1. This power was conferred by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

³⁷ *Criminal Code*, s 102.3.

³⁸ Division 3, Part II, *Australian Security Intelligence Organization Act 1979* (Cth) (‘*ASIO Act*’).

³⁹ These offences were created by the *ASIO Legislation Amendment Act 2003* (Cth).

⁴⁰ George Williams quoted in Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] etc* (2002) 47.

⁴¹ Commonwealth, *Parliamentary Debates*, Parliamentary Joint Committee on ASIO, ASIS and DSD, transcript of public hearings, Canberra, 19 May 2005, 8. Available online: <http://www.aph.gov.au/hansard/joint/commtee/J8382.pdf> at 18 September 2005 (emphasis added).

Importantly, the existence of these broad-ranging laws mean that the Government bears a heavy onus for demonstrating the need for laws that further criminalise conduct and confer more power to police and security organisations. To date, this is an onus it has failed to discharge. As Daryl Melham correctly observed in relation to the Government's proposals, 'Australia's counter-terrorism laws have not been shown to be deficient'.⁴²

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

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

All this points to the need to consider the *proportionality* of the proposed measures. There should be an assessment of whether the proposed measures are proportionate to the threats that the Government seeks to counter. This must include an explanation of

how important is the right affected, how serious is the interference with it and, if it is a right that can be limited, how strong is the justification for the interference, how many people are likely to be affected by it, and how vulnerable they are.⁴³

In other words, the Government bears the onus of justifying why radical departures from fundamental rights and freedoms including the presumption of innocence, freedom from arbitrary arrest, freedom of political association and the right to privacy are necessary and proportionate. There is no flexibility in relation to certain rights and freedoms – no departure from the right to freedom of thought and conscience and religion and to manifest one's religion or beliefs, can be justified consistent Australia's international obligations.⁴⁴

⁴² Daryl Melham, above n 28.

⁴³ UK Joint Committee on Human Rights, *Report of the Joint Committee on Human Rights* (6 May 2004), paragraph 47.

The Federal Government has not only singularly failed to provide any such assessment but it faces tremendous difficulty in successfully arguing that the proposed measures satisfy the test of proportionality. As it stands, the current anti-terrorism laws with their serious infringements of rights and freedoms⁴⁵ are already arguably disproportionate to the threat to Australia of ideologically and religiously motivated violence.⁴⁶

E *Failure to provide for proper public debate*

In his press release, the Prime Minister stated that the government 'will move quickly to implement the following new regimes'.⁴⁷ This suggests that the Federal Government is intent upon rushing through these far-reaching proposals. This approach is confirmed by the government failing to brief its own Attorney-General's backbench committee on these proposals prior to announcing them⁴⁸ and reports that the Government will seek to have these proposals adopted before Christmas this year.⁴⁹

Rushing to adopt these proposals will be even more egregious given the remarkable lack of detail and justification accompanying these proposals, the Government's control of the Federal Parliament, the extent to which the proposals depart from key principles of a liberal democracy, and the constitutional problems they raise. If the Government adopts such an approach, it will not only be following a regrettable practice it has established in relation to other anti-terrorism laws⁵⁰ but will also be rendering meaningless various reviews of the current anti-terrorism laws that are happening or are due to occur. A comprehensive review of

⁴⁴ International Covenant on Civil and Political Rights, UN Doc. A/6316 (1966), Articles 4(2) and 18.

⁴⁵ See Michael Head, 'Counter-Terrorism' Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666-82; Greg Carne, 'Terror and the Ambit Claim: Security Legislation Amendment (Terrorism) Act 2002 (Cth)' (2003) 14 *Public Law Review* 13-9; Patrick Emerton, 'Paving the Way for Conviction without Evidence: A disturbing trend in Australia's 'anti-terrorism' laws' (2004) 4 *Queensland University of Technology Law and Justice Journal* 129-166; Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2003) Chapter 11 ('*Terror Laws*') and Jenny Hocking, 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49 *Australian Journal of Politics and History* 355.

⁴⁶ Christopher Michaelsen, 'Antiterrorism legislation in Australia: A Proportionate Response to the Terrorist Threat?' (2005) 28 *Studies in Conflict & Terrorism* 297.

⁴⁷ PM's Media Release, above n 1, 4.

⁴⁸ See Brendan Nicholson, 'PM orders: search, tag and track', *The Age* (Melbourne), 9 September 2005, 1 and Michelle Grattan, 'Four years gone, so why the big rush?', *The Age* (Melbourne), 9 September 2005, 2.

⁴⁹ Marian Wilkinson and David Marr, 'Rough justice', *Sydney Morning Herald* (Sydney), 17 September 2005 (available at <http://www.smh.com.au/news/world/rough-justice/2005/09/16/1126750134100.html> at 18 September 2005).

⁵⁰ See Joo-Cheong Tham, 'Casualties of the Domestic 'War on Terror': A Review of Recent Counter-Terrorism Laws' (2004) 28(2) *Melbourne University Law Review* 512, 520-3.

these laws was supposed to commence as soon as practicable after July this year.⁵¹ Moreover, the Parliamentary Joint Committee on ASIO, ASIS and DSD is presently undertaking a review of ASIO's questioning and detention powers and is due to review the other counter-terrorism laws.⁵²

III EVALUATION OF SPECIFIC PROPOSALS

A *Control Orders*

In his media release, the Prime Minister described the proposed 'control orders' regime as:

[a] new regime to allow the AFP to seek, from a court, 12-month control orders on people who pose a terrorist risk to the community. These would be similar to apprehended violence orders but would allow stricter conditions to be imposed on a person such as tracking devices, travel and association restrictions.⁵³

As mentioned above, the Government has failed to provide sufficient detail regarding how the proposed control orders would operate. Critical issues such as what constitutes a 'terrorist risk'⁵⁴ remain unexplained. Furthermore, the Government has not provided detailed criteria that would govern how the AFP would exercise these extraordinary powers.

The Government modelled its control order provision on those contained in the United Kingdom's *Prevention of Terrorism Act 2005*. Under the UK regime, control orders can be issued by the Home Secretary and applied to anyone who is a 'terrorist suspect', that is, someone who has not been charged, tried or convicted of any crime. The consequences of a control order in the United Kingdom may include:

- prohibition of possession of 'specified articles or substances', eg a mobile phone;
- prohibition of access to 'specified services or specified facilities', eg the internet;
- restriction on work, occupation or business;
- restriction of 'association or communications with specified persons or with other persons generally';
- restriction of place of residence and who one can visit;
- restriction of movement to a 'specified area at specified times';

⁵¹ *Security Legislation Amendment (Terrorism) Act 2002* (Cth).

⁵² *Intelligence Services Act 2001* (Cth) ss 29(1)(ba)-(bb).

⁵³ PM's Media Release, above n 1, 4.

⁵⁴ *Ibid.*

- restriction of movement ‘to, from or within the United Kingdom’ (including the requirement to surrender passport);
- an obligation to give access to ‘specified persons’ (police and Special Branch) to search place of residence at all times;
- monitoring of movement, communication or other activities through electronic or other means, ie ‘electronic tagging’; and
- house arrest.⁵⁵

There are at least three reasons to question the desirability of importing these UK provisions into Australian law. First, these far-reaching powers, which potentially curtail innocent peoples’ basic freedoms, have not succeeded in preventing terrorism. This is evidenced by the fact that these powers were in place prior to the London bombings on 7 July 2005.

Second, the proposed laws would herald a significant departure from fundamental rights and freedoms. It is a central precept of our liberal democracy that people be free from arbitrary interference by police and government. Vesting authorities with a broad discretion to target the liberties of individuals in the way proposed opens the door to discrimination against particular individuals and communities and risks the further politicisation of Australia’s terrorism laws. Likewise, these proposals seek to overturn important legal rights, such as the presumption of innocence, which have developed to protect individuals against state power. The concern is that by treating people as though they had committed an offence, by subjecting them to detention and limiting their personal liberty, the presumption of innocence is violated. Not surprisingly, the UK provisions have been strongly criticised by lawyers and civil libertarians. For instance, in legal advice provided prior to the enactment of the *Prevention of Terrorism Act 2005*, Ben Emerson QC raised serious concerns that,

[a]n executive decision to curtail a citizen’s rights, based on *reasonable suspicion alone*, does not meet the requirement for an independent and impartial tribunal, [Article 6(1) ECHR] even if it [is] subject to a limited measure of judicial review.⁵⁶

Third, it is important to recognise that the UK and Australia have very different legal landscapes. The UK’s *Human Rights Act 1998* incorporates the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (‘ECHR’) into domestic law,

⁵⁵ *Prevention of Terrorism Act 2005* (UK) c 1(5).

requiring UK courts to interpret legislation in a way that is compatible with the ECHR. Thus there are significant human rights protections in UK law that may afford protection from the exercise of control orders in a manner inconsistent with the ECHR. However, in the absence of a bill or charter of rights, there are no such protections in Australian law. As such, Australia, in contrast to the United Kingdom, lacks an important check on executive power with regard to basic human rights and civil liberties.

Finally, the Government has likened the control orders to apprehended violence orders ('AVOs'), allowing stricter conditions to be imposed on a person, such as tracking devices, travel and association restrictions.⁵⁷ This comparison is disingenuous. An AVO is sought by a particular person to protect herself or himself from the threats of another. AVOs are about interpersonal disputes. In contrast, the government is proposing to identify particular individuals it deems to be a risk and radically restrict their liberty. In our view, control orders are more analogous to parole conditions imposed upon convicted offenders than AVOs which are made in a civil jurisdiction and which are narrowly tailored to impact minimally upon the liberty of the subject of the AVO.

B *Preventative Detention Regime*

In his media release, the Prime Minister described the proposed preventive detention regime as:

[a] new preventative detention regime that allows detention for up to 48 hours in a terrorism situation. Preventative detention is to be contrasted with ASIO and police detention for the purposes of questioning which is limited by the intelligence available to allow proper questioning.⁵⁸

This brief statement leaves crucial questions unaddressed. Foremost, what is meant by a 'terrorism situation'? Does such a situation exist in the absence of a *specific threat* of ideologically or religiously motivated violence? If so, then these detention powers are aimed at addressing a *vague or general threat* of such violence and will, in effect, confer upon police and security organisations *detention powers at large*.

Also, what is sought to be prevented by these powers? Given that the AFP already possesses powers to arrest persons suspected on reasonable grounds for committing or having

⁵⁶ B Emerson, *The Prevention of Terrorism Bill: Legal Opinion* (2005) (available at www.statewatch.org at 16 May 2005) 2.

⁵⁷ PM's Media Release, above n 1, 4.

committed an offence in order to prevent *the commission of crimes*,⁵⁹ the proposed preventive powers are clearly aimed at persons not suspected of having committed any crimes and at *conduct falling short of the commission of crimes*. Can the powers then be used against persons who *might* commit a crime? For instance, one of the ‘terrorism’ offences under the *Criminal Code* makes illegal the possession of a thing connected with a ‘terrorist act’.⁶⁰ Will these preventive detention powers extend to those who *might* possess a thing connected with a ‘terrorist act’ because they *thought* of doing so?

Other questions also remain to be answered: Are children also subject to these preventive detention powers? Will such powers be subject to a warrant process? If so, what is the authority that will issue such warrants? What is the provision for legal representation for persons subject to these powers?

Depending upon how the provisions conferring these preventive detention powers are drafted, they could, at the extreme, be a recipe for mass internment. Again Daryl Melham is quite right to point out that:

[t]he proposal to introduce preventive detention crosses a critical threshold. It is a most odious measure with the prospect of people being held in detention for weeks without charge, indeed, without being suspected of any involvement in terrorist activities.⁶¹

This proposal is all the more odious given the existing powers that are conferred on ASIO and the AFP. As detailed above, the AFP has the power to prevent ‘terrorism’ offences through its powers of arrest. ASIO, on the other hand, has unprecedented powers to detain and question persons. While the Prime Minister is quite right in pointing out that these powers are used for intelligence gathering, they also have a preventive purpose. This is made plain by the fact that one of the circumstances for issuing a detention warrant is to prevent the subject of the warrant alerting a person involved in a ‘terrorism’ offence that the offence is being investigated.⁶²

⁵⁸ Ibid.

⁵⁹ See, for example, *Crimes Act*, ss 23C-D.

⁶⁰ *Criminal Code*, s 101.4.

⁶¹ Daryl Melham, above n 28.

⁶² *ASIO Act*, s 34C(3)(c)(i).

C *'Notice to produce' regime*

According to the Prime Minister, one of the proposed measures is:

[a] new notice to produce regime to facilitate lawful AFP requests for information that will assist with the investigation of terrorism and other serious offences.⁶³

Again there is a stark lack of detail accompanying this proposal. In what circumstances will the AFP be empowered to issue these notices to compel the production of information? Specifically, what is meant by 'lawful AFP requests'? Against whom could these notices be issued? Would they, for instance, extend to employers, financial institutions and sporting clubs? Importantly, would the AFP need to seek a warrant prior to issuing such notices? If not, the proposed notice to produce regime would give the AFP powers, as a matter of right, that it would otherwise only exercise with a warrant, that is subject to judicial oversight.

As it stands, the AFP can access information in limited circumstances, for instance, through search and telecommunication interception warrants. Both are issued by judicial officers and in limited circumstances.⁶⁴ The proposed 'notice to produce' regime is presumably aimed at conferring powers going beyond these limited circumstances. This raises two disturbing possibilities. First, the AFP could issue a notice without seeking a warrant or approval from an independent body. Second, a notice could be issued when there is only a loose nexus with a commission of a crime. If both circumstances apply, the 'notice to produce' regime will, in effect, be a proposal to confer upon the AFP *powers of compulsory production that are at large*.

D *Access to passenger information*

The Prime Minister proposes to:

[p]rovide access to airline passenger information for ASIO and the AFP.⁶⁵

⁶³ PM's Media Release, above n 1, 4.

⁶⁴ *Crimes Act*, s 3E; *Telecommunications Interception Act 1979* (Cth).

⁶⁵ PM's Media Release, above n 1, 4.

Aviation security is a key area in legitimate counter-terrorism regulation. The Federal Government seem to be proposing to provide airline passenger information to ASIO and to the AFP *as a matter of right* - that is, without demonstrating conduct directly connected with criminal activity or to demonstrate such a circumstance to an independent body. As noted in Part II, the Government's proposal lacks meaningful detail as to the circumstances when the ASIO and the AFP can access 'airline passenger information' and what is meant by 'airline passenger information'.⁶⁶

Whilst further details are still required on this proposed measure before informed debate is possible, we flag our concern to ensure that increased access to passenger information by intelligence and law enforcement agencies is not used in a way that amounts to ethnic, religious or racial profiling. The negative experiences in the United States of racial profiling should be avoided in Australian responses to terrorism. Profiling and other group measures that bring people of a particular ethnicity, race or religion under increased scrutiny is counter-productive and unsophisticated. It may appear to be an expedient means of addressing perceived terrorist threats, but we are concerned that it may begin to constitute the problem, by marginalising certain groups within Australian society, such as Muslims, and Arab Australians.

E *Stop, question and search powers*

The Prime Minister has proposed to:

[e]xtend stop, question and search powers for the Australian Federal Police (AFP) where there are reasonable grounds that a person might have just committed, might be committing, or might be about to commit a terrorism offence.⁶⁷

The Government has provided no detail on exactly how and why it seeks to extend AFP powers. Both State and Federal Police wield extensive powers to stop, search, detain, question and arrest in relation to 'terrorism' offences. The AFP are presently empowered by a variety of intersecting laws with broad coercive investigative, preventive and surveillance powers as well as extensive stop, search and question powers. The following outline demonstrates the breadth of *current* police powers.

⁶⁶ See text accompanying n 5.

⁶⁷ PM's Media Release, above n 1, 4.

Under the *Crimes Act*, the AFP enjoys broad search and questioning powers without warrant as well as the power of arrest, where there is reasonable suspicion of the commission of an offence.⁶⁸ Additional powers provide for protective service officers to have powers of arrest if there is reasonable belief that someone has committed or is committing an offence, or may commit a further offence.⁶⁹ These powers clearly mean that an arrested person may be detained for the purposes of investigation as to whether that person has committed a terrorism offence, or some other terrorism offence which they are reasonably suspected of having committed.⁷⁰ Moreover, the AFP are empowered to detain persons suspected of committing a ‘terrorism’ offence for questioning for an extended period of 24 hours, with provisions for reasonable period of ‘dead time’, far greater than the position under State laws which generally provide for detention of up to 12 hours without charge.⁷¹

The AFP may also stop and search a person in a broad range of listed circumstances, for example, where there is a reasonable belief that they have something that they will use to cause damage or harm to a place or person ‘in circumstances that would be likely to involve the commission of a protective service offence’.⁷² ‘Protective service offences’ include the ‘terrorism’ offences under the *Criminal Code*.⁷³ Further, AFP officers now have the power to demand name and identification, where there are reasonable grounds ‘that a person might have just committed, might be committing, or might be about to commit a protective service offence’.⁷⁴

It is extremely unclear why the present police powers are insufficient for the investigation of ‘terrorism’ offences. Put differently, an extension of these powers has not been justified. Importantly, the extension of AFP powers to provide a pre-emptive authority based on what someone ‘might’ do, risks the discriminatory and blanket application of stop and search powers. Stop and search powers operate at the level of ‘street policing’ and have a history of controversial application, exposing particularly vulnerable minority communities to over-policing and arbitrary interference.⁷⁵ Research demonstrates such powers are routinely used for purposes other than ‘apprehending criminals’, such as gathering intelligence, harassment

⁶⁸ *Crimes Act*, Part 1C.

⁶⁹ *Australian Federal Police Act 1979* (Cth) s 14A.

⁷⁰ *Crimes Act*, s 23CA(1) (2).

⁷¹ *Ibid* s 23 CA(4), s23DA(7).

⁷² *Australian Federal Police Act 1979* (Cth) s 14J(1).

⁷³ *Ibid* s 4(1).

⁷⁴ *Ibid* s 14I.

⁷⁵ For example, in Australia, see C Cunneen, *Conflict, Politics and Crime, Aboriginal Communities and the Police* (2001).

and punishment along ethnic lines. Heavy-handed forms of policing such as the regular use of stop and search powers, particularly where used in conjunction with racial profiling have proven counter-productive to terrorism investigation through the alienation of communities.⁷⁶

‘Reasonable suspicion’ as a trigger for the exercise of police power represents a powerful discretion to determine levels of action and to interpret law. Coercive powers, together with increased discretionary power, give the police an extended freedom to characterise a situation as giving rise to a ‘terrorist offence’. Given the exceptionally broad range of activity, which can fall within a ‘terrorism’ offence, these extended police powers are likely to increase police interaction with those who are not a threat to security. In such circumstances, the discretionary aspect of increased police power presents a formidable threat to basic freedoms.

F *Police powers at transport hubs, random baggage searches, CCTV*

The Prime Minister has proposed:

[e]xploring with the States and Territories about extending these powers to police at transport hubs and other places of mass gatherings as well as the use of random baggage searches and a National Code of Practice for Closed Circuit Television (CCTV) Systems for the Mass Passenger Transport Sector.⁷⁷

While we welcome a National Code of Practice in relation to the use of CCTV, the use of random baggage searches is an unjustifiable shift in public policy. Random baggage searches are unlikely to deter violent acts and may divert police away from intelligence relating to specific activity. Given the current assessment of the threat level as ‘medium’, such a coercive infringement on privacy and interference with the person remains unjustified.

This is especially the case given that State police currently have broad, discretionary, coercive and covert powers which already apply to mass gatherings and transport hubs. We further caution the adoption of powers that may be counter productive in preventing violent acts. Also, the wholesale use of discretionary police powers at particular geographic locations raises the spectre of blanket ‘stop and search’ operations. For instance, will stop and search and questioning powers follow the lead of random bag searches, thereby, forfeiting its application as a considered investigative tool?

⁷⁶ J White, *Defending the Homeland, Domestic Intelligence, Law Enforcement and Security* (2004).

⁷⁷ PM’s Media Release, above n 1, 4.

The Prime Minister has proposed to make the following changes to the ASIO warrants regime:

ASIO's special powers warrant regime is being refined to:

- clarify the definition of 'electronic equipment', and allow for entry onto premises, in the computer access warrant provisions
- extend the validity of search warrants from 28 days to 3 months
- extend the validity of mail and delivery service warrants from 90 days to 6 months
- amend the search warrant provisions to provide that material may be removed and retained for such time as is reasonable "for the purposes of security".⁷⁸

As with the other proposals, it is crucial to bear in mind the breadth of already existing counter-terrorism laws. The ASIO special powers warrant regime is established under Division 2 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*'). A number of types of warrants may be issued pursuant to this regime as it currently stands, including:

- search warrants;⁷⁹
- computer access warrants;⁸⁰
- warrants for the inspection of postal articles;⁸¹
- warrants for the inspection of articles delivered by delivery services.⁸²

These warrants are issued by the Federal Attorney-General at the request of ASIO.⁸³

The Prime Minister's proposals have serious implications with regard to all these classes of warrant.

Inspection of people's mail, whether delivered by post, or by delivery services, is a serious infringement of personal privacy. The significance of this is recognised by the *ASIO Act*, which makes it unlawful for ASIO to interfere with the post or other delivery services except

⁷⁸ Ibid.

⁷⁹ *ASIO Act*, s 25(1).

⁸⁰ Ibid s 25A(1).

⁸¹ Ibid s 27(2).

⁸² Ibid s 27AA(2).

⁸³ Ibid ss 25(1), 25A(1), 27(2), 27AA(2).

pursuant to a warrant, and obliges the Director-General of ASIO to take all reasonable steps to ensure that such unlawful activity does not take place.⁸⁴

Nevertheless, the grounds on which a warrant authorising such interference may be issued are comparatively broad. Such a warrant may be issued if the person whose mail is to be targeted is ‘engaged in, or reasonably suspected ... of being engaged in, or of being likely to engage in, activities prejudicial to security’⁸⁵ and that interfering with the mail will, or will be likely to assist ASIO in ‘obtaining intelligence relevant to security.’⁸⁶ Part of what prevents these warrants turning into mere fishing expeditions by ASIO is the existence of strict limits on the time for which such a warrant can remain in force, namely, 90 days.⁸⁷ In proposing that this period be doubled, to six months, the Prime Minister is proposing the dilution of one of the key factors balancing the interests of privacy against the interests of security.

At present, it is possible for ASIO to seek the issue of a further warrant if there continue to be grounds for the issuing of a warrant.⁸⁸ The proposed amendment is therefore unnecessary for ASIO to be able to carry out its operations. Rather, it would simply reduce the degree of oversight to which ASIO is subject. In particular, if the time period for which a warrant remains in force is doubled, ASIO is in effect invited to take an ever less strict view of what counts as an individual’s likelihood to engage in activities prejudicial to security. With a lengthened period of surveillance, the threshold requirement that interference under the warrant would be likely to assist in obtaining intelligence is also diluted.

The proposal in relation to the warrants permitting inspection of delivery and postal articles is therefore disturbing enough. But the proposals in relation to computer access warrants and search warrants are equally or even more worrying.

The current legislation relating to search warrants and computer access warrants permits a warrant to authorise certain conduct in relation to a computer or other electronic equipment.⁸⁹ Currently, the phrase ‘electronic equipment’ is not defined, but might reasonably be expected to include such things as programmable calculators, personal organisers and so on. There is nothing intrinsically wrong with ‘clarifying’ the definition of this phrase by enacting a

⁸⁴ Ibid ss 27(1), 27AA(1).

⁸⁵ Ibid ss 27(2)(a),(3(a), 27AA(3)(a),(6)(a).

⁸⁶ Ibid ss 27(2)(b),(3(b), 27AA(3)(b),(6)(b).

⁸⁷ Ibid ss 27(4), 27AA(9).

⁸⁸ Ibid s 27(5), 27AA(10).

⁸⁹ Ibid ss 25(5), 25A(4).

statutory definition; it would be a matter of concern, however, if this definition was used to significantly expand the scope of these warrant provisions.

The Prime Minister also proposes to allow entry onto premises as part of the computer access warrant provisions. Currently, ASIO may enter onto premises to inspect computers and other electronic equipment under an appropriately worded search warrant,⁹⁰ provided that ‘there are reasonable grounds for believing that access to things or records on the premises will substantially assist the collection of intelligence’ important in relation to security,⁹¹ and ‘there is reasonable cause to believe that data relevant to this security matter may be accessible by using a computer or other electronic equipment’ on the premises.⁹² There is thus no demonstrated need for a widening of the conduct authorised by a computer access warrant; and it would be a matter of concern if the proposed widening was an attempt to circumvent the need to have regard, in issuing a warrant, to the need to enter premises in order to gather intelligence.

Perhaps the most serious proposals in relation to these ASIO warrants related to search warrants. Currently, a search warrant issued to ASIO is valid for 28 days.⁹³ This limited duration is a reflection of the serious nature of the covert infiltration of private places by a covert security agency.⁹⁴ To triple this duration to three months would be to invite ASIO to go on mere fishing expeditions, to dilute the threshold at which a warrant is able to be issued, and to reduce the level of oversight, for the same reasons as given above in relation to mail inspection warrants. As with other types of warrants, ASIO has sufficient powers under the current law.⁹⁵

The single most concerning aspect of the Prime Minister’s proposals in relation to ASIO warrants is the proposal to allow ASIO to confiscate property. At present, a search warrant may authorise ASIO to ‘remove and retain’ any record or thing found in a search of the premises if it is relevant to the security matter in relation to which the warrant was issued. The item may be retained by ASIO only for such time as is reasonable for the purposes of

⁹⁰ Ibid ss 25(4),(5).

⁹¹ Ibid s 25(2).

⁹² Ibid s 25(5).

⁹³ Ibid s 25(10).

⁹⁴ Section 25(4)(e) of the *ASIO Act* permits a search warrant to authorise ASIO to do any thing reasonably necessary to conceal the fact that it has taken action under the warrant.

⁹⁵ For example, section 25(11) of the *ASIO Act* gives ASIO the ability to seek the issue of a further warrant if the grounds for issuing a warrant continue to be satisfied.

inspecting or examining the record or thing, and (in the case of a record) making a copy if the warrant so authorises.⁹⁶

The Prime Minister's proposal is to provide that such material may be removed pursuant to a search warrant and retained for such time as is reasonable 'for the purposes of security'. Unlike the existing law, this would give ASIO a power of confiscation. Under the *ASIO Act*, 'security' is quite expansively defined to include, among other things, the protection of the governments and people of Australia from politically motivated violence, and from attacks on Australia's defence system.⁹⁷ Each of these phrases is in turn defined, to include, among other things:

- activities intended to interfere with the performance by the Defence Force of its functions;⁹⁸
- acts that are offences against Part 5.3 of the *Criminal Code*.⁹⁹

Offences against Part 5.3 include such non-violent activity as meeting twice with the member of a banned organisation to try and persuade the organisation to stop the use of violence,¹⁰⁰ or teaching a member of an organisation linked to political violence how to use a photocopier.¹⁰¹ Will ASIO interpret anti-war protests as being 'activities intended to interfere with the performance by the Defence Force of its functions'? This proposal has the potential to politicise the manner in which ASIO's powers are exercised and to provide greater opportunities for the infringement of the civil rights of those subject to ASIO's power. It also throws into serious question the role of ASIO: is it properly regarded as an intelligence agency, consistent with the *ASIO Act*, or does it risk being transformed into a law-enforcement agency?

It may also raise issues of constitutionality under section 51(xxxi) of the *Constitution*, which requires the Commonwealth to acquire property only on just terms. There are a number of exceptions to the requirement imposed by section 51(xxxi).¹⁰² However, it is probably true to say that a law which authorises confiscation of property must be appropriate and adapted to

⁹⁶ Ibid s 25(4).

⁹⁷ Ibid s 4, sub-para (a)(iii),(iv),(v) of the definition of 'security'.

⁹⁸ Ibid s 4, definition of 'attacks on Australia's defence system.'

⁹⁹ Ibid s 4, para (ba) of the definition of 'politically motivated violence' together with the definition of 'terrorism offence'.

¹⁰⁰ *Criminal Code*, s 102.8.

¹⁰¹ Ibid s 102.5, together with s 102.1(1), para (a) of the definition of 'terrorist organisation'.

¹⁰² A discussion of these exceptions can be found in Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A contemporary view* (2001) 297-300.

the purpose being pursued.¹⁰³ Given the extreme breadth of the definition of ‘security’ in the *ASIO Act*, it may be that such a wide power of confiscation is not appropriate and adapted to the goal of ensuring the safety of Australia and Australians.

H *Changes to and introduction of various criminal offences*

The Prime Minister has proposed the creation of two new offences:

- leaving baggage unattended within the airport precinct, and
- inciting violence against the community to replace the existing sedition offence, to address problems with those who communicate inciting messages directed against other groups within our community, including against Australia’s forces overseas and in support of Australia’s enemies. This is consistent with the Gibbs Committee in its Review of Commonwealth Criminal Law in 1991 which recommended that the sedition offence should be updated and simplified and the maximum penalty increased from 3 to 7 years imprisonment.¹⁰⁴

The first of these is a proposed offence of ‘leaving baggage unattended within an airport’.¹⁰⁵ The apparent purpose of such an offence would presumably be to facilitate the work of airport security staff, by discouraging ordinary people from being careless with their luggage, and thus causing unnecessary distractions for security staff. This purpose is to some extent laudable – everyone has an interest in effective airport security. However, the use of the threat of criminal sanctions to drive what is, in reality, an issue of civic culture, is excessive and potentially counterproductive. Unfortunately, the Government has already shown a tendency in its existing ‘anti-terrorism’ laws to use the criminal law, rather than other policy mechanisms, in pursuit of its goals.

There are at least three objections to the use of criminal law in this way, rather than relying on other methods, such as the attempt to build public awareness and trust, to achieve security goals:

- The use of criminal law inevitably has an alienating effect on some members of society, thus undermining the goal of public co-operation in ensuring security at airports;
- Such an offence will be difficult to draft effectively, and is therefore likely to exclude some of what ought to be picked up, while criminalising those

¹⁰³ Ibid 299-300.

¹⁰⁴ PM’s Media Release, above n 1, 5.

¹⁰⁵ Ibid.

who are manifestly not criminals, eg, people who put down a bag in an airport bathroom because it won't fit in a toilet cubicle; people who suffer from mental or cognitive impairments; parents who temporarily leave their baggage to retrieve a wandering child);

- As a result of this, the offence is likely to be policed in an extremely discretionary manner, opening up yet another avenue for the discriminatory application of Australia's 'anti-terrorism' laws.

Civic culture should be built through civic means, not the threat of prosecution.

The other offence proposed by the Prime Minister is that of 'inciting violence' against the community, to replace the existing offence of sedition. There are currently two sedition offences defined by the *Crimes Act*. It is an offence to 'engages in a seditious enterprise with the intention of causing violence, or creating public disorder or a public disturbance'¹⁰⁶ or to write, print, utter or publish any seditious words 'with the intention of causing violence or creating public disorder or a public disturbance'.¹⁰⁷ The maximum penalty for either offence is three years' imprisonment.

The concept of 'sedition' includes:

- bringing the Sovereign into hatred or contempt;¹⁰⁸
- exciting disaffection against the government;¹⁰⁹
- exciting attempts at unlawful alterations of matters established by Commonwealth law;¹¹⁰
- promoting communal hostility so as to endanger the peace, order or good government of the Commonwealth.¹¹¹

Certain activity carried out in good faith is exempted, such as:

- endeavouring to show that the government is mistaken;¹¹²

¹⁰⁶ *Crimes Act*, s 24C.

¹⁰⁷ *Ibid* s 24D.

¹⁰⁸ *Ibid* s 24A(a).

¹⁰⁹ *Ibid* s 24A(d).

¹¹⁰ *Ibid* s 24A(f).

¹¹¹ *Ibid* s 24A(g).

¹¹² *Ibid* s 24F(1)(a).

- pointing out errors in government or law, with a view to reform;¹¹³
- exciting attempts at lawful alteration of matters established by law.¹¹⁴

Despite these exemptions, the existing sedition law clearly criminalises a wide range of political conduct, including various sorts of non-violent political protest and civil disobedience.

The proposed new offence would, according to the Prime Minister, ‘address problems with those who communicate inciting messages directed against other groups within our community, including against Australia’s forces overseas and in support of Australia’s enemies.’¹¹⁵ However, the existing sedition offence already targets promotion of inter-communal violence. In addition, some Australian jurisdictions also have laws targeting racial and/or religious vilification.¹¹⁶ And, finally, it is already an offence under Australian law, punishable by life imprisonment, to threaten politically-motivated violence with the intention of intimidating a section of the public.¹¹⁷

Presumably, then, the Government is proposing an offence that would be broader than these existing offences. The need for such a new offence has not been established. A broadening of the basis for prosecuting political speech as ‘seditious’ is a matter of grave concern in a liberal democracy. Free speech, including speech that is hostile to existing structures and authorities, is part of the right of citizens, indeed of anyone in Australia, to engage in political debate.

The Prime Minister suggests that this new offence will extend to the incitement of violence against Australian forces in action abroad. Is it the aim of the Government to stop Australians from criticising the activities of Australian soldiers? Would it become a criminal offence to suggest that the Iraqi resistance is in the right, and Australia in the wrong? Whatever the merits of such a view, surely it is legitimate to express such an opinion as part of the political debate in Australia.

¹¹³ Ibid s 24F(1)(b).

¹¹⁴ Ibid s 24F(1)(c).

¹¹⁵ PM’s Media Release, above 1, 1.

¹¹⁶ For example, the *Racial and Religious Tolerance Act 2001 (Vic)*.

¹¹⁷ *Criminal Code*, s 101.1, together with s 100.1, definition of ‘terrorist act’.

Finally, it is important to challenge the Government's suggestion that its proposal is consistent with the Gibbs Committee's Review of Commonwealth Criminal Law in 1991. That Committee recommended a *narrowing* of the existing sedition offences,¹¹⁸ on the grounds that as expressed they are in tension with modern democratic values,¹¹⁹ and are potentially redundant, given that each involved incitement to violence, which is already a criminal offence regardless of its political motivation.¹²⁰ The Committee proposed limiting sedition to the following three circumstances:

- 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.¹²¹

The Committee also took the view that the more specific nature of these offences warranted an increase in the penalty, to a maximum of seven years' imprisonment.¹²²

The report of the Gibbs Committee therefore provides no support for the Government's proposal to broaden the scope of sedition-like offences, and at the same time to increase their maximum penalty.

I *Changes to existing offences for financing of terrorism, providing false or misleading information under an ASIO questioning warrant and for threatening aviation security*

According to the Prime Minister, the proposals will

[s]trengthen existing offences for financing of terrorism, providing false or misleading information under an ASIO questioning warrant and for threatening aviation security.¹²³

¹¹⁸ 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.

¹¹⁹ Ibid para 33.13.

¹²⁰ Ibid paras 32.6, 32.12.

¹²¹ Ibid para 32.18.

¹²² Ibid para 32.19.

This proposal falls far short of an adequate description. What does ‘strengthening’ involve? What does ‘threatening aviation security’ mean? In light of this paucity of detail, it is hard to provide a proper evaluation of these measures. That having been said, it is clear that the proposals to ‘strengthen’ the offences for financing of terrorism and providing false or misleading information under an ASIO questioning warrant are highly problematic.

The *Criminal Code* presently provides for two ‘financing of terrorism’ offences. The first makes punishable by life imprisonment the provision or collection of funds by a person who is reckless as to whether the funds will be used to facilitate or for the engagement in a ‘terrorist act’.¹²⁴ Given the maximum penalty for this offence, it is unlikely that this is the offence to which the Government is referring when it argues a need for strengthening. It is more likely that is referring to the offence of providing funds to a ‘terrorist organisation’.¹²⁵ This offence, unlike the previous one, imposes guilt by association in that it imposes harsh penalties for conduct that does not *necessarily* result in physical harm or property damage.

As for the false or misleading information offence, it is an element of in a very objectionable detention and questioning regime. Former Liberal Prime Minister, the Honourable Malcolm Fraser, for instance, has described this regime as follows:

The legislation is contrary to the Rule of Law. It is contrary to Due Process, to Habeas Corpus, to the basic rights which we have come to understand are central to a free and open society.¹²⁶

This offence is part of a cluster of provisions that removes the *right to silence* by requiring persons subject to a questioning or detention warrant to answer questions put by ASIO or to produce items requested by ASIO.¹²⁷ Given this, any proposal to ‘strengthen’ this offence should be viewed with apprehension.

¹²³ PM’s Media Release, above n 1, 5.

¹²⁴ *Criminal Code*, s 103.1.

¹²⁵ *Ibid* s 102.6.

¹²⁶ Malcolm Fraser, ‘Responsibilities and Human Rights in the Age of Terror’, address given to InterAction Council Symposium, Global Leadership and Ethics Program, Markkula Center for Applied Ethics, Santa Clara University, California, USA, 1 April 2005, 7.

¹²⁷ *ASIO Act*, s 34G.

J *Changes to powers to ban 'terrorist organisations' under Criminal Code and associated offences*

The Prime Minister stated:

[t]errorism offences in the Criminal Code will be clarified and the criteria for listing terrorist organisations extended to cover organisations that advocate terrorism. This will be another issue that will be discussed with the States and Territories.¹²⁸

The proposal to extend the listing criteria to cover organisations that advocate terrorism would only exacerbate the problems that have been persistently identified in relation to the existing proscription regime.

Under the *Criminal Code*, there is already wide power for the Government to proscribe organisations if the Minister is 'satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)'.¹²⁹ The regime has been criticised for granting too much power to the Executive at the expense of oversight by the Judiciary. It has also been criticised as being overly broad. For example, the phrases 'indirectly assists in' or 'indirectly fosters' the doing of a terrorist act could apply to a range of acts or behaviours.

Despite the breadth of the listing criteria, it is cold comfort that only eighteen organisations have been proscribed. There are many terrorist organisations that meet the same criteria for proscribed organisations, but are not listed. A *Parliamentary Research Note* highlights what appear to be 'inconsistencies of the proscription process as it is currently applied' and lists seven organisations that meet the same criteria but which are not listed¹³⁰.

A Parliamentary Joint Committee on ASIO ASIS and DSD (PJCAAD) report¹³¹ further points to the contradictory listing criteria used by the Attorney General's Department and ASIO. For example, while ASIO considers connections to Australia, the Attorney-General maintains that

¹²⁸ PM's Media Release, above n 1, 5.

¹²⁹ *Criminal Code*, s 102.2.

¹³⁰ Nigel Brew, *Parliamentary Research Note No 63: The Politics of Proscription* (2004). Available online: <http://www.aph.gov.au/library/pubs/rn/2003-04/04rn63.htm> at 18 September 2005. These are Mujahideen-e-Khalq (MeK), Liberation Tigers of Tamil Eelam (LTTE), Sendero Luminoso (Shining Path), Euskadi Ta Askatasuna (ETA), Babbar Khalsa International, International Sikh Youth Federation, and (al-)Gama'a al-Islamiyya.

¹³¹ Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the Listing of Six Terrorist Organisations*, March 2005.

this was not a necessary condition. In paragraph 2.22 of this report, the Committee bluntly asks: ‘The question remains: how and why are some organisations selected for proscription by Australia?’

The proposal to extend the criteria would substantially increase this confusion and lack of transparency. In particular, the adoption of vague concepts such as ‘advocating’ terrorism would only serve to exacerbate the arbitrary nature of the proscription regime.

A particular concern with any broadening of the existing grounds for the listing of organisations as ‘terrorist’ would be the severing of any required nexus between proscription, and the organisation’s link to acts of political violence. For example, an organisation may become liable to proscription simply on the grounds that it has voiced support for a political struggle somewhere in the world. Currently, all the organisations listed under the *Criminal Code* are based outside Australia. Such an expansion of grounds for proscription would also have the potential to significantly increase the number of Australian organisations liable to be banned, not because of their own participation in political violence, but because of the views they have expressed about political events overseas.

On this point, the Government’s proposal seems to contradict the PJCAAD’s position that:

while political violence is not an acceptable means of achieving a political end in a democracy ... there are circumstances where groups are involved in armed conflict and where their activities are confined to that armed conflict, when designations of terrorism might not be the most applicable or useful way of approaching the problem.¹³²

Further, while the proposed amendment would stifle free speech and legitimate debate, no evidence has been put forward to show that it would provide any measure of safety to the Australian people. Specifically, no clear justification has been given as to why the addition of ‘advocating terrorism’ as a listing criterion is necessary to prevent ideologically or religiously motivated violence or to strengthen security. It is arguable, for example, that the statement ‘Australians should not be in Iraq and the Iraqis should fight to be free of occupation’ ‘advocates’ ‘terrorism’, and any organisation that supports this view may well become liable to proscription. Far from promoting the physical safety of Australians, such criminalisation

would expose many ordinary Australians to the coercive power of police and security organisations.

The proportionality of such a measure is also dubious. Under section 102.3 of the *Criminal Code*, every member - informal or formal - of the organisation would be liable for imprisonment for up to 10 years; those directing such an organisation could be imprisoned for up to 25 years; and those who made donations to the organisation could also go to prison for 25 years. This seems to impose a “blanket” punishment that could affect hundreds of people, not on the basis of involvement in any terrorist act, but merely on the basis of a connection to an organisation that has, for example, a stated policy that people of occupied lands have the right to resist occupation.

K *Changes to citizenship laws*

The Prime Minister has stated:

[w]e will continue to work on visa and citizenship security and character checking processes but will move immediately to strengthen our citizenship provisions including:

- extending the waiting period in order to obtain citizenship by 12 months to three years,
- security checking of citizenship applications, so that citizenship applications can be refused on security grounds; and
- strengthening the deprivation of citizenship provisions relating to serious criminal offences to include offences committed in the period between approval of an application and acquisition of citizenship.¹³³

In evaluating these specific proposals, we were heartened to hear the public comments of the Honourable John Cobb, Minister for Citizenship and Multiculturalism, at the National Press Club on 14 September 2005. He said that:

Our security does not lie in making some Australians feel isolated. All Australians should feel included in the life of our great nation; to feel a sense of belonging. Australian Citizenship is formal and legal recognition of this inclusion in our society.¹³⁴

¹³² Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the Listing of Four Terrorist Organisations*, September 2005. The organisations reviewed in this Inquiry were Hizballah External Security Organisation, Hamas Izz al-Din al-Qassam Brigades, Lashkar-e-Tayyiba, and Palestinian Islamic Jihad.

¹³³ PM's Media Release, above n 1, 5.

¹³⁴ The Honourable John Cobb MP, Minister for Citizenship and Multiculturalism, 'Australian Citizenship in the Global Age – Reforms to Australian Citizenship Act', Address to the National Press Club, Canberra, 14 September 2005.

Like the Minister for Citizenship and Multiculturalism, we favour a model of inclusion over a model of citizenship that excludes, marginalises and radicalises people who wish to be regarded as Australians. We therefore regard the measures that the Government proposes to implement around Australian citizenship in the name of ‘national security’ to be unnecessary.

The Government proposes that the residency requirements for citizenship should be extended from two years to three years.¹³⁵ We take no issue with that proposal *per se*. However, we do object to these proposals being framed as measures to counter terrorist threats. The Minister for Citizenship and Multiculturalism frames them as ‘allowing more time for new arrivals to become familiar with the Australian way of life and the values which they will need to commit to as Australian citizens’.¹³⁶ While that may appear to be jingoistic, it is the more appropriate explanation for the proposal. To explain it through the prism of national security would be to cast all outsiders who seek to become Australian citizens as suspect. That would clearly be wrong.

The Government has also foreshadowed a process by which citizenship applications will be security checked by ASIO, and by which applications can be refused on ‘security grounds’.¹³⁷ The Minister for Citizenship and Multiculturalism says that a citizenship application will be refused where an applicant is assessed by ASIO to be a direct or indirect threat to ‘national security’. The States, Territories and Federal politicians should exercise the greatest caution around notions of ‘national security’. The recent experience of the deportation of Scott Parkin, an American activist, on ‘national security’ grounds illustrates how easy it is for that term to excuse the removal from public discourse of important issues.¹³⁸ It becomes increasingly difficult for important procedural safeguards to individual rights and democratic traditions to be exercised once the ‘national security’ card is played. In our view, it is inappropriate that the actions of our government should be so strongly determined by the assessments of a security organization, ASIO.

The Minister’s published comments at the Press Club include a section on ‘Integrity and Security’ in which he details the proposed revocation of citizenship provisions. He goes further than the Prime Minister’s announcement of 8 September 2005. Governments should

¹³⁵ PM’s Media Release, above n 1.

¹³⁶ The Honourable John Cobb MP, above n 135.

¹³⁷ PM’s Media Release, above n 1.

¹³⁸ See Marian Wilkinson and David Marr, ‘Rough justice’, *Sydney Morning Herald* (Sydney), 17 September 2005 (available at <http://www.smh.com.au/news/world/rough-justice/2005/09/16/1126750134100.html> at 18 September 2005).

take pause before considering an extension to existing revocation powers. The federal Minister for Citizenship raises a series of significant concerns about the possible consequences of revoking citizenship, including the possibility of rendering a person stateless.¹³⁹ The Minister goes on to detail a new regime of identifying people for the purpose of citizenship, including iris scans and other biometric measures. He describes this measure as part of a whole-of-government effort to counter fraud.¹⁴⁰

It is crucial to stress that fraud and terrorism are not synonymous: we should not allow a government to justify new and intrusive measures in the name of ‘national security’, a popular political catch-cry of our times, when the real concern is fraud.

L *Changes to the financing of terrorism regime*

In his media release, the Prime Minister stated that the proposals will:

[i]mprove our terrorism financing regime to better implement criminalising financing of terrorism, alternative remittance dealers, wire transfers and cash couriers. The Government will investigate with the States and Territories better ways to ensure charities are not misused to channel funds to terrorists.¹⁴¹

Again there is an obvious lack of detail. Specifically, what is meant by ‘to better implement’ and what is considered a ‘misuse’ of charities? Absent such important details, it is difficult to evaluate, let alone justify these proposed measures.

These proposals should be viewed with caution. They are aimed at changing the financing of terrorism regime under the *Charter of United Nations Act 1945* (Cth). This Act presently confers a broad power on the Foreign Minister to list ‘terrorist’ entities. The breadth of this power stems from the fact that the key phrase ‘terrorist’ is not defined by this Act.¹⁴² Once an entity of individual is listed,¹⁴³ it becomes illegal to use or deal with the assets of that entity or

¹³⁹ The Honourable John Cobb MP, above n 135.

¹⁴⁰ Ibid.

¹⁴¹ PM’s Media Release, above n 1, 5.

¹⁴² *Charter of the United Nations Act 1945* (Cth) s 15(1) and *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth) reg 6(1).

¹⁴³ For entities and individuals listed under this Act, see http://www.dfat.gov.au/icat/persons_entities at 18 September 2005.

individual. It also becomes an offence to directly or indirectly provide assets to that entity. Both offences are punishable by a maximum of five years' imprisonment.¹⁴⁴

This short description highlights two problems with this banning regime. First, it confers very broad, possibly arbitrary, power on the Foreign Minister. Second, the offences the exercise of this power triggers impose criminal guilt by association: a person can commit these offences without having directly caused any physical harm or property damage; she or he need only have financially supported a listed individual or entity. These two features, together with the constitutional problems surrounding this regime,¹⁴⁵ means that any proposals should be subject to intense scrutiny.

IV EXISTING STATE POLICE POWERS

In the interval between the initial Federal anti-terrorism legislation (*Security Legislation Amendment (Terrorism) Act 2002*) and the current proposals, the Australian States have also expanded their police powers. In order to fully comprehend the impact of the Federal Government's proposals, there needs to be an understanding of these recent expansions of State Police powers.

State police have greatly expanded powers of surveillance, investigation and intelligence gathering capabilities with less scrutiny and accountability, reversing in some instances, fundamental traditions of judicial oversight. In New South Wales, Victoria and Queensland, State police were granted additional powers in relation to terrorism offences, which range from covert search and surveillance warrants, to warrant-less 'special powers'. Western Australia and South Australia have recently indicated that they intend to legislate for new exceptional powers. With the announcement of new Commonwealth terrorism laws, there have been calls for greater uniformity across State jurisdictions to standardise police powers. However, such a move will have the probable effect of extending the most draconian and unaccountable powers, such as warrant-less searches, and a prohibition on judicial review, as the norm. The breadth of current powers, their impact upon civil liberties and extant accountability measures need to be properly understood in considering this move towards uniformity.

¹⁴⁴ Such conduct is not illegal if authorised by the Foreign Minister: *Charter of the United Nations Act 1945* (Cth) ss 20-1.

¹⁴⁵ See Tham, above n 24.

A Covert searches

Queensland, Victoria and New South Wales all make provision for covert police searches. South Australia has indicated it will follow suit. Victoria¹⁴⁶, Queensland¹⁴⁷ and New South Wales¹⁴⁸ share the following features, giving police the power to:

- enter premises covertly, or by force or impersonation, and search for, seize, substitute, copy, photograph or record any thing, operate electronic equipment to print or record, or install listening devices.
- enter adjoining premises for purpose of access.
- warrant is issued by the Supreme Court for a period of up to 30 days.

In addition, Queensland police are empowered to seize vehicles, and open locks.¹⁴⁹

The grounds in both NSW and Victoria, which must be made out for the warrant to be issued include:

- the police must suspect on reasonable grounds, that a terrorist act has been or is likely to be committed; and,
- the entry and search of premises would substantially assist in preventing or responding to the terrorist act or suspected terrorist act and,
- it is necessary for that entry and search to be conducted without the knowledge of the occupier of the premises.

In NSW, the NSW Crime Commission is empowered alongside police to obtain and execute coercive warrants.¹⁵⁰

In determining applications for warrants, the NSW, Victorian and Queensland courts must have regard to:

- the nature and gravity of the terrorist act or suspected terrorist act; and
- the extent to which the exercise of power under the warrant would assist the prevention of, or response to the terrorist act or suspected terrorist act; and
- the extent to which the privacy of any person is likely to be affected; and

¹⁴⁶ *Terrorism (Community Protection) Act 2003* (Vic).

¹⁴⁷ *Police Powers and Responsibility Act 2000* (Qld) as amended by the *Terrorism (Community Safety) Amendment Act 2004* (Qld).

¹⁴⁸ *Terrorism Legislation Amendment (Warrants) Act 2005* (NSW).

¹⁴⁹ *Police Powers and Responsibility Act 2000*, (Qld) s 155.

¹⁵⁰ *Terrorism Legislation Amendment (Warrants) Act 2005* (NSW) s 27 D, F, O.

- any conditions to which the warrant may be made subject.

NSW law also requires consideration of the reliability of information, the nature of the source, whether there are alternate means of obtaining the information, and whether there is a connection between the terrorist act and the kind of things that are proposed to be searched for, seized, substituted etc.¹⁵¹ The Queensland statute requires consideration of the benefits derived from any previous covert search warrants, or surveillance warrants in relation to the relevant person or place.¹⁵²

Queensland, with its history of covert search warrants in relation to investigating organised crime, provides for a Public Interest Monitor (an independent official appointed by the governor in council) to be present at the application and to make submissions on the appropriateness of the application, gather statistics for its annual report, and monitor police for compliance with the Act.¹⁵³ While the person subject to the warrant or anyone who may alert that person cannot attend the court, the public interest monitor may have a lawyer present.¹⁵⁴ In contrast, Victorian applications occur in a closed court.

B *Erosion of civil liberties and criminal justice standards*

The NSW Legislation Review Committee noted that the warrants made no requirement for imminent threat and that the threshold of ‘reasonable grounds’ would inevitably lead to interference against innocent people.¹⁵⁵ The Committee also warned that covert search powers are triggered by activity which may have no connection to violent harmful acts, such as association or membership of a proscribed organisation which has no explicit terrorist objectives. The Committee signaled this as a ‘highly undesirable consequence’ and also pointed to the fact that persons not suspected of a terrorist act occupying the same premises as the person suspected, will be subject to the full force of the warrant.¹⁵⁶ The NSW legislation allows for items to be seized, if they are in relation to a ‘serious indictable offence’, including where there are grounds to believe an offence will be committed in the future.¹⁵⁷ While the

¹⁵¹ Ibid s 27K.

¹⁵² *Police Powers and Responsibility Act 2000* (Qld) s150.

¹⁵³ Ibid, s 159.

¹⁵⁴ Ibid, s149.

¹⁵⁵ New South Wales Legislative Review Committee, *Legislation Review Digest No 8: Terrorism Legislation Amendment (Warrants) Bill 2005* (2005) 41.

¹⁵⁶ Ibid.

¹⁵⁷ *Terrorism Legislation Amendment (Warrants) Act 2005* (NSW), s 27O(h).

relevant thing must substantially assist in responding to or preventing a terrorist act, the breadth of this provision demonstrates the dangers of abuse of these exceptional powers.

C Accountability measures

In each jurisdiction, the Chief Commissioner of Police must submit an annual report to the respective Minister, which must then be tabled in Parliament. The Victorian report must outline the number of applications made, warrants issued, warrant applications made by telephone, warrants refused, premises covertly entered and the number of occasions in which items were seized, placed or occasions on which electronic equipment was operated.¹⁵⁸ The NSW report must review the policy objectives of the act and determine whether the terms of the act are still appropriate.¹⁵⁹ A degree of independent monitoring is provided for in NSW and Queensland. In NSW the Ombudsman must monitor and report on the covert warrant regime for its first two years only.¹⁶⁰ Whereas the Public Interest Monitor must provide an annual report to parliament within 4 months of each financial year.¹⁶¹

However, limited accountability measures have already been delayed and circumvented. Victoria only released its 2003/2004 annual report on 6 September 2005, even though the Commissioner of Police is required to submit the report as soon as practicable after the end of each financial year, and the Minister must table the report to parliament within twelve sitting days of its receipt.¹⁶² The 2004/2005 report has not been tabled. While covert search warrants only recently came into operation in NSW, the relevant Minister has yet to release the required annual review of the use of the 'special powers', which were first required to be tabled within twelve months of the Act's assent in 2002. The Victorian report reveals that the covert powers have not been used. In NSW, we understand from the Attorney General's Department that the NSW special powers have also not been used, demonstrating that there has been no just cause, to date, for their exercise. This raises the danger that exceptional laws will remain on the statute books for wholesale use in the general criminal law.

¹⁵⁸ *Terrorism (Community Protection) Act 2003* (Vic), s.13.

¹⁵⁹ *Terrorism Legislation Amendment (Warrants) Act 2005* (NSW), s.36.

¹⁶⁰ *Terrorism Legislation Amendment (Warrants) Act 2005* (NSW), s27ZC.

¹⁶¹ *Police Powers and Responsibility Act 2000* (Qld) s 160.

¹⁶² *Terrorism (Community Protection) Act 2003* (Vic) s 13.

D Search without warrant

While accountability measures are varied across States, and on the whole a limited balance to the serious invasion of freedom and privacy, judicial oversight by way of issuing the warrant, is a fundamental requirement of our criminal justice system. The West Australian proposal for police search powers, upon approval by the Police Commissioner and without warrant, is a serious threat to basic democratic principles.

The Terrorism (Police Powers) Act 2002 (NSW) gives police ‘special powers’ for up to seven days, without a warrant, when the Police Commissioner or the Deputy Commissioners give a special authorization for searches against ‘targets’, (that is, persons, vehicles, or areas,) if there is a ‘credible threat’ of a terrorist act or if there is a terrorist incident.¹⁶³ The special powers apply to pre-emptive investigations as well as during and after a terrorist act and force people to identify themselves. Authorisation is made by the minister rather than by warrant approved by a judge. There is no capacity for people to bring legal challenges against the Minister’s decision. The legislation provides that:

[a]n authorisation may not be challenged, reviewed, quashed, or called into question on any grounds whatsoever before any court, tribunal body, or person in any legal proceedings or restrained, removed or otherwise affected.¹⁶⁴

This extends to the denial of administrative review, or even complaints to the Ombudsman, with the exception of the NSW Police Integrity Commission. Unchallengeable executive decision making into operational policing breaches the separation of powers and underscores political use of the laws in the practice of determining ‘targets’.¹⁶⁵ These provisions contravene Article 17 of the International Covenant on Civil and Political Rights which assert that everyone has the right to the protection of the law against arbitrary or unlawful interference with their privacy. The NSW emergency powers have been described as reminiscent of the excesses of state police special branches.¹⁶⁶ Present provisions are unjustified, exceptional and unnecessary in relation to the present terrorist threat in Australia.

¹⁶³ *Terrorism (Police Powers) Act NSW 2002*, (NSW), ss8, 9.

¹⁶⁴ *Ibid* s 13.

¹⁶⁵ Anderson, ‘Terrorist Laws in NSW: Disproportional and Discriminatory’ (March 2003) *Current Issues in Criminal Justice*, 313.

¹⁶⁶ Jenny Hocking, *Terror Laws*, above n 45, 239.

E *Conclusion in relation to State police powers*

The full implications of this panoply of existing and proposed State legislation dealing with the policing of terrorism has not yet become clear. When this is borne in mind, however, it becomes even more apparent that no case has been made by the Prime Minister establishing the need for additional counter-terrorism legislation in Australia.

V CONCLUSION

This report has evaluated the Federal Government's proposed counter-terrorism measures. The proposals, overall and also in terms of their specifics, lack adequate detail. Despite this lack of detail, it is clear that the proposals, if adopted, will mark serious breaches of key liberal democratic principles and raise constitutional problems. Most importantly, the Government has not made a serious attempt to justify these far-reaching proposals.

In these circumstances, our key conclusion is that the Government should immediately withdraw these proposals. If it intends to propose any changes to Australia's anti-terrorism laws, it should:

- provide adequate detail;
- ensure that the proposals conform with key principles of a liberal democracy;
- ensure that the proposals are free from significant doubts as to their constitutionality;
- justify how proposed measures are necessary in efforts to prevent ideologically or religiously motivated violence; and
- provide for adequate public discussion of the proposals.

In our view, the best way to ensure that these criteria are met is to allow the public reviews under the *Security Legislation Amendment (Terrorism) 2002* (Cth) and the *Intelligence Services Act 2001* (Cth) to run their course prior to the adoption of any new counter-terrorism laws.



PRIME MINISTER

COUNTER-TERRORISM LAWS STRENGTHENED

In anticipation of the special Council of Australian Governments (COAG) meeting on counter-terrorism to be held on 27 September, I announce a number of proposals to further strengthen Australia's counter-terrorism laws. These proposals are designed to enable us to better deter, prevent, detect and prosecute acts of terrorism.

Following the terrorist attacks on the London transport system in July, law enforcement and security agencies were asked to examine whether further legislative reforms could be made that would enable Australia to better respond to the threat of terrorism.

Consistent with the Government's comprehensive response to the post-11 September security environment, the proposed legislation is a combination of best practice from overseas and innovative solutions that respond to Australia's security needs.

Some of those amendments – such as enhanced use of closed circuit television – draw directly from the experience and observations of the Australian Federal Police, state police and the officials from the Department of Transport and Regional Services who travelled to London after the bombing.

Other amendments such as modernising the existing sedition offences target those inciting violence against the community.

The Government will grant increased powers to law enforcement and security agencies to enhance their capacity to prevent attacks. Importantly, control orders will be available to our

law enforcement agencies in circumstances where a person might pose a risk to the community but cannot be contained or detained under existing legislation.

Law enforcement agencies have advised the Government that the introduction of a regime allowing preventative detention during terrorist situations might be critical in preventing an escalation of the incident or subsequent attacks. Similar powers have been available to police in the United Kingdom for some time.

Accordingly, I will seek the agreement of State and Territory leaders at our special COAG meeting to introduce a new national regime, similar to that applying in the United Kingdom, allowing for preventative detention in a terrorism situation. Such a scheme would require the States and Territories to enact legislation complementing the work of the Commonwealth and I will be seeking their agreement to do this as a matter of priority.

In addition, I will call on the States to extend police powers at transport hubs and places of mass gatherings outside Commonwealth jurisdiction, and to consider under what circumstances they would support the use of random baggage searches.

While we have been fortunate not to suffer a terrorist attack on our soil, Australians have been the victims of attack overseas and Australia itself has been a target for terrorists in the past.

Governments cannot afford to be complacent. Our terrorism laws have so far proven to be effective, resulting in the arrest and conviction of a number of people here in Australia. However terrorists have demonstrated that they are innovative and determined and we have to make sure our laws stay one step ahead of them.

The reforms I have announced today will ensure Australia's counter-terrorism legislative regime remains at the forefront of international efforts to counter the global threat of terrorism.

I am releasing the details of our proposal at this time to allow detailed work with State and Territory officials to commence as soon as possible and to give State and Territory leaders ample opportunity to consider the proposals in advance of the COAG meeting on 27 September.

The special COAG meeting will be an opportunity for State and Territory leaders to demonstrate their commitment to working cooperatively with the Commonwealth on national security. I look forward to a continuation of our productive relationship with the States and Territories in co-operatively fighting counter-terrorism.

* Details about the proposals are attached

8 September 2005

Counter-Terrorism Laws Strengthened

The terrorist attacks on the London transport system in July have raised new issues for Australia and highlighted the need for further amendments to our laws. The Government has comprehensively reviewed our existing laws and will move quickly to implement the following new regimes:

1. Control orders

A new regime to allow the AFP to seek, from a court, 12-month control orders on people who pose a terrorist risk to the community. These would be similar to apprehended violence orders but would allow stricter conditions to be imposed on a person such as tracking devices, travel and association restrictions. The Government will be conferring with the States and Territories about the details and administration of the orders.

2. Preventative Detention

A new preventative detention regime that allows detention for up to 48 hours in a terrorism situation. Preventative detention is to be contrasted with ASIO and police detention for the purposes of questioning which is limited by the intelligence available to allow proper questioning. As is the case in the UK, the focus of preventative detention is primarily about stopping further attacks and the destruction of evidence. At the 27 September COAG meeting, States and Territories will be asked to provide for longer detention periods, similar to those available in the UK which allow for up to 14 days detention, because there are constitutional restrictions on the capacity of the Australian Government to provide for this type of detention.

3. Notice to produce

A new notice to produce regime to facilitate lawful AFP requests for information that will assist with the investigation of terrorism and other serious offences.

4. Access to passenger information

Provide access to airline passenger information for ASIO and the AFP.

5. Stop, question and search powers

Extend stop, question and search powers for the AFP where there are reasonable grounds that a person might have just committed, might be committing, or might be about to commit a terrorism offence.

6. Exploring with the States and Territories about extending these powers to police at transport hubs and other places of mass gatherings as well as the use of random baggage searches and a National Code of Practice for Closed Circuit Television (CCTV) Systems for the Mass Passenger Transport Sector.

7. ASIO warrant regime

ASIO's special powers warrant regime is being refined to:

- clarify the definition of 'electronic equipment', and allow for entry onto premises, in the computer access warrant provisions
- extend the validity of search warrants from 28 days to 3 months
- extend the validity of mail and delivery service warrants from 90 days to 6 months
- amend the search warrant provisions to provide that material may be removed and retained for such time as is reasonable "for the purposes of security".

8. Strengthening existing offences and creating new offences

Create new offences for:

- leaving baggage unattended within the airport precinct, and
- inciting violence against the community to replace the existing sedition offence, to address problems with those who communicate inciting messages directed against other groups within our community, including against Australia's forces overseas and in support of Australia's enemies. This is consistent with the Gibbs Committee in its Review of Commonwealth Criminal Law in 1991 which recommended that the sedition offence should be updated and simplified and the maximum penalty increased from 3 to 7 years imprisonment.

9. Strengthen existing offences for financing of terrorism, providing false or misleading information under an ASIO questioning warrant and for threatening aviation security.

10. Terrorism offences in the Criminal Code will be clarified and the criteria for listing terrorist organisations extended to cover organisations that advocate terrorism. This will be another issue that will be discussed with the States and Territories.

11. Citizenship

We will continue to work on visa and citizenship security and character checking processes but will move immediately to strengthen our citizenship provisions including:

- extending the waiting period in order to obtain citizenship by 12 months to three years,
- security checking of citizenship applications, so that citizenship applications can be refused on security grounds; and
- strengthening the deprivation of citizenship provisions relating to serious criminal offences to include offences committed in the period between approval of an application and acquisition of citizenship.

12. Terrorist financing

Improve our terrorism financing regime to better implement criminalising financing of terrorism, alternative remittance dealers, wire transfers and cash couriers. The Government will investigate with the States and Territories better ways to ensure charities are not misused to channel funds to terrorists.