NSW Council for Civil Liberties Inc.

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Submission to COAG Review of Australia's Counter-Terrorism Legislation 2012

The New South Wales Council for Civil Liberties (CCL) is one of Australia's leading human rights and civil liberties organisations. Founded in 1963, NSWCCL is a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. To this end the NSWCCL attempts to influence public debate and government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies.

CCL is grateful for the opportunity to lodge a late submission to the Inquiry. If the Inquiry Committee would like us to make a submission in person, we would be glad to do so.

> 'The claim that if you want security you must give up liberty has become a mainstay of the revolt against freedom. But nothing is less true. There is, of course, no absolute security in life. But what security can be attained depends on our own watchfulness, enforced by institutions to help us watch – i.e. by *democratic institutions* which are devised to enable the herd to watch, and to *judge the watch dogs'.* (Karl Popper, *The Open Society and Its Enemies:* Volume One, Routledge Publishers, London, page 355, ISBN 041523731).

Introduction

In recent years Australia has in unprecedented ways attracted the interest of terrorists and there are now citizens born in Australia who are attracted to the idea of performing terrorist actions here. Here is not the place to examine why this has come about; CCL acknowledges that the threat of mass murder requires our response to concentrate on the prevention of the crime, not just on its detection and punishment.

Although terrorism has been a problem for hundreds of years, the Twin Tours attack in New York and the London and Bali bombings led to the passage of a great deal of legislation which might have been justified if the problem, like a war, could be expected to be concluded in a few years. However, it is plain—indeed, it was always plain— that terrorism is not going away. Included in the laws are measures which reduce civil liberties, and others which place liberties under serious threat. It is time to consider which of the laws we have passed should be kept, which modified, and which should be repealed.

The need for a Bill of Rights

Since the events of 11 September 2001, democratic parliaments across the world have passed legislation to combat the threat of terrorism at home and abroad. Australian legislation is a particular threat to freedom, for in all other democratic jurisdictions the legislation is open to judicial review with respect to a Bill of Rights.

For example, in the UK the House of Lords found that the indefinite detention of foreign nationals without trial under the *Anti-terrorism, Crime and Security Act 2001* is a breach of the European

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Convention of Human Rights.[1] The Canadian Supreme Court has struck down similar legislation that authorised the non-reviewable indefinite detention of non-citizens for security reasons.[2]

Without a Bill of Rights, the courts in Australia are unable to protect people in this way from laws that violate fundamental principles of international human rights law; that expose Australians and aliens to risks to their liberties.

The anti-terrorism legislation is not balanced.

It is easy to make such a comment about the laws in question, and easy to respond that all the measures are balanced. If this part of the discussion is not to merely reflect intuition or subjective assessment, an account is needed of what balancing is.

The distinguished philosophers Tom L. Beauchamp and James F. Childres give the following account of the right way to deal with conflicts between basic principles.

i. Better reasons can be given for acting on the overriding norm than on the infringed norm.
ii. The moral objective justifying the infringement must have a realistic prospect of achievement.
iii. The infringement is necessary in that no morally preferable alternative actions can be substituted.
iv. The infringement must be the least possible infringement, commensurate with achieving the primary good of the action.
v. The agent must seek to minimize any negative effects of the infringement.
vi. The agent must act impartially in regard to all affected parties; that is, the agent's decision must not be influenced by morally irrelevant information about any party.[3]

A decision or a piece of legislation which deals with a conflict of basic principles or rights counts as balanced only if it meets all of these requirements.

These conditions appear obvious and non-controversial.) Every counter-terrorism law ought to meet these criteria. However, serious public discussion of the legislation has been (for the most part) limited to the first and third.

Some preliminary discussion is in order.

Criterion i. CCL accepts accept that value of the lives of persons is a more important norm than that of liberty. There are however many who have argued that liberty is worth dying for. It has cost many lives to establish and to defend the liberties which these laws have reduced. It is also to be

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[1] *A & others v Secretary of State for the Home Department* [2004] UKHL 56.

[2] *Charkaoui v Canada* (2007) SCC 9.

[3] Tom L. Beauchamp and James F. Childres, Principles of Biomedical Ethics, Fifth Edition, Oxford University Press 2001

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remembered that the liberties and rights which Australia's counter-terrorism legislation reduces are of great importance in protecting a country from tyranny. In that way, they also protect lives. Weakening them threatens to reduce the public apprehension of their importance. Deriding them in political debate is irresponsible.

There is a further the risk that in the hands of a future government or police force, the powers granted in the legislation will be used to conceal wrongdoing that is costing lives. We need to be careful, then, in asserting that the laws are justified *simpliciter* because lives matter more than liberty.

Criterion ii. If the aim of the legislation is to prevent terrorist action in Australia, then it is not achievable, and the second condition is not met. More plausibly, the aim is to reduce likelihood of a terrorist attack. It is not obvious that it will do this. The more people that are unjustly confined to their homes, for example, (or the more people who are thought to be unjustly confined to their homes), the more passions will be aroused. Experience in Northern Ireland with the use of such powers as preventative detention against the Irish Republican Army was that it was counter-productive.

iii. This principle is infringed by many of the powers the legislation has granted. Existing powers can be used to achieve the ends for which it is supposed that this legislation is needed.

iv. The requirement that the legislation involve the least possible infringement of civil rights which is commensurate with its goals being met is clearly not met.

v. There are other safeguards which should be added, if the laws are to be retained.

vi. We make no comment about this. The principle is mainly intended to exclude self-interested choices.

If the above brief remarks on principles ii and iii apply to any measure, the measure should be repealed. If the conditions are, after all, met, but the comments on principles iv. and v. are correct, the measure should be modified.

Developments over time

It is important that measures that are only justified to protect from mass murder are not used against lesser threats—in relation to drug offences for example. In the case of telecommunications interception legislation—which is outside the scope of the present inquiry—the pattern has been to steadily increase the scope of the powers granted to police, and to add to the organisations that possess the powers.

It is important that the measures that are taken to protect us from mass murder do not increase the threat of mass murder by creating bitterness and feelings of rejection.

And it is vital that measures that were thought to be justified as temporary in the face of an immediate threat are revised now it is plain that the threat is not going to go away any time soon.

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The definition of 'terrorist act'.

In the Council for Civil Liberty's views, the definition of 'terrorist act' is too wide, and should be narrowed. We are aware that an effort has been made to capture only genuine terrorist activity; but it is our view that that definition should be changed, in view of the potentially oppressive powers that are created by it.

1. Foreign governments.

The definition presupposes that violent action against foreign governments is always wrong. The definition includes just wars, and just revolutionary actions against tyrannical governments. Such actions may not be 'advocacy, protest, dissent or industrial action'.

An extended critique of the definition was provided by Patrick Emerton, in his submission to the Sheller Committee. Parts of that submission are reproduced in the Appendix to this submission. To his examples above we may add the following: the bombing of civilian areas by national air forces with the intention to persuade enemies to surrender such as the fire bombing of Dresden and Tokyo, the atomic bombing of Hiroshima and Nagasaki, and the shock and awe tactics used at the start of the Iraq war.[4] The overthrow of dictators has rarely been achieved without bloodshed.

The point is that violent action in the pursuit of political ends is sometimes justified and sometimes open to debate.[5] Nothing has been done, so far, to fix this problem of definition. It is important, for while it is there, combined with division 102, it makes possible the banning of any organisation—the RSL or the Liberal Party for example, that praises a violent tactic. While it is there, it encourages the demonisation of refugees and their indefinite detention.

The point is not that in some future time the Liberal Party or the RSL might be banned. It is unlikely that the Attorney General, the Executive Council and both houses of parliament would all accept such a proposition. It is that, if even the Liberal Party is caught by this

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[4] It may of course be argued whether they were unjustified, and that they were terrorist acts. But that is not the point.

[5] [5] 'Whether the Kurdish people have a right to self-determination under international law is an open question. However, the international law has increasingly come to recognise the legitimacy of the struggle of peoples for liberation to use all means, including armed struggle. While this does not justify violence which breaks the rules that apply to armed conflicts of this nature or other violations of human rights, it does acknowledge and reflect the complexity of political violence and the fundamental importance of respect for the rule of law.' Parliamentary Joint Committee (Commonwealth) on Intelligence and Security, quoted in the Sheller Report, p.19.

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definition, the way is open for smaller, but innocent, organisations to be affected. All that would be needed is a programme of demonisation. To believe that his is fanciful is to ignore the history of the twentieth century—to ignore Joseph McCarthy for example.

The definition should be amended to exclude actions taken against legitimate military targets in war; and to exclude actions taken against governments that engage in torture or murder, which execute or incarcerate persons without trial, or which break the laws of war. Should those actions themselves break the laws of war, or should there be planning in Australia for actions which break the laws of war, the persons should be charged under the appropriate laws; not detained for prevention purposes.

2. Destroying property in Australia.

Precautions which are designed to protect the public against acts of arbitrary mass murder should not be available merely to protect property or electronic systems. Extreme measures are for extreme circumstances.

Criminal actions that damage property or electronic systems but do not threaten persons should be excluded from the definition, so that only actions that harm persons or are intended to harm persons should count as terrorist actions. Wrong as such property damage is, it is not properly seen as terrorism. Even when (as section three requires) the intention is to intimidate a section of the public in support of a political, religious or ideological cause, and the act is not advocacy, protest, dissent or industrial action, the situation should be dealt with under ordinary laws.

Accordingly, if the emergency powers granted by these acts are to continue, the definition should be amended so that only actions which threaten or take lives count as terrorist acts.

Preventative detention orders

Preventative detention orders may be obtained either by use of the provisions of the Criminal Code Act 1995 (Cmth) (the criminal code) or one of the parallel state acts. This submission confines itself to the criminal code and the Terrorism (Police Powers) Act 2002 (NSW) (the NSW act). We deal principally with the NSW act.

The erosion of civil liberties.

The Criminal Code permits a person to be held without charge for 48 hours; and Part 2A of the NSW act permits a person to be held in detention, , for two weeks at a time.

At the end of that time, and despite section 26K (5) and (7) only the libertarian views of a judge prevent the person from being held for a further two weeks. Recent High Court cases do not encourage the view that judges can be relied upon to favour liberty.

The evidence against detainees may (and undoubtedly will) be kept secret from them, even though the detention order must include a summary of the reasons for the detention. It can be made impossible for innocent persons to defend themselves successfully.

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b. The standard of evidence required is too low. The courts are expected to send people to jail on the basis of merest (rational) suspicion.

c. Of further concern is that contact with another person, including one's lawyer, may only take place if it is conducted in such a way that the contact, and the content and meaning of the communication that takes place during the contact, can be effectively monitored by a police officer exercising authority under the preventative detention order. Although evidence gained from lawyer/client conversations are not admissible in legal proceedings, they do mark a severe imposition on an accused person's freedom to consult with their legal representative. In addition, they increase the oppressive nature of the detention as the accused is prohibited from conducting private conversations with anybody outside their place of detention.

d. The draconian nature of preventative detention orders is exacerbated by the extremely wide net that it casts in relation to the people that may be subject to them. A subject need not be suspected of planning or preparing for such an act, but may instead be a person who merely has evidence or access to or control over or some connection with evidence relating to a terrorist act, that is sought to be preserved. This means that a person with no knowledge at all of a terrorist act which has occurred can be detained pursuant to these provisions. This is a state of affairs that is completely inconsistent with all notions of liberal democracy and the rule of law.

e. The powers granted are open to substantial misuse. They could be used by a government against its political opponents—say by arranging for the arrest of a prominent member "by mistake", during an election campaign. They can be misused by police—through ignorance, prejudice or malice.[6] They may be used to silence or to discredit critics. It is also possible that individuals, acting from malice, will give police false information about terrorist plots.

It might be responded that it is unlikely that the law would be misused. But again this is to ignore history. It is to forget that in the aftermath of a terrorist attack, authorities will be tending to panic, and also prone to pressure to be seen to do something. Nor should we forget the mistreatment of Dr Mohamed Haneef.

But the greatest likelihood is the simple mistake. For example, there might be two John Smiths in your apartment building, and you are detained instead of the correct one. Or 'a member of your family innocently calls the mobile phone number of a person who runs a dog-walking business regularly for a number of months - a person who happens to be suspected by authorities of being a terrorist. That family member is then locked up for two weeks due to 'reasonable suspicion' arising from regular contact with a suspected terrorist…. There would be no realistic opportunity to challenge

[6] The record of police forces in Australia is too chequered for these things to be ruled out.

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the detention [in either case].'[7]

Preventative detention is contrary to international law.

Article 9 of the International Covenant on Civil And Political Rights (ICCPR) requires that '1. Every one has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention….2. Anyone who is arrested shall be informed, at the time of the arrest, of the reason for his arrest and shall be promptly informed of any charges against him.'

That law was enacted partly to limit countries' responses to terrorism. Countries which devised and signed them were under more threat than Australia is now.

When the Senate Legal and Constitutional Affairs Committee was inquiring into what was then proposed as the Criminal Code provisions, former judge[8], the Hon. Alastair Nicholson AO RFD QC argued that in international law it makes no difference whether detention is for punitive or preventative purposes. Accordingly, *inter alia*, everyone has the right to be tried in his presence and to defend himself if person or through legal assistance of his own choosing. (14.3.d). Everyone has the right to examine or have examined the witnesses against him. (14.3.e) Everyone shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law (14.5).

These provisions were established in the light of terrorist threats to France by dissidents from its colonies and to England by the Irish Republican Army and its offshoots. Both countries adhered to them in spite of terrorist attacks.

Article 4: derogation.
The ICCPR was developed in the knowledge that states would wish to infringe these rights in order to guarantee security. There is accordingly a let-out clause in the ICCPR that allows derogation in times of national emergency. That let-out is limited to times of national emergency which threaten the life of the nation; where such an emergency is officially proclaimed. Despite the current threats of terrorist attack, no such proclamation exists, because there is no threat to the life of the nation.

The Human Rights Committee explains. '...if so-called preventative detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and it must be based on grounds and procedures established by law (para. 10, information of the reasons must be given (para. 2) *and court control of the detention must be*

[7] Both examples come from a press release by the former President of the Human Rights and Equal Opportunity Commission, made during debate on the Commonwealth legislation.

[8] of the Victorian Supreme Court, of the Federal Court of Australia, Former Chief Justice of the Family Court, and Judge Advocate General of the Australian Defence Forces

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available (para. 4) as well as compensation in the case of a breach (para. 5).'[9] (Emphasis added.)

Constitutional problems

Preventative detention orders raise serious legal questions not only because of their affront to civil liberties and to international law, but also because of their erosion of the separation of powers and judicial integrity that lie at the heart of the rule of law and the democratic system of this country.

The Australian Constitution makes the adjudication and punishment of criminal guilt the exclusive domain of the judiciary. This principle is enshrined in the judgement of Brennan CJ, Deane and Dawson J in Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 27:

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

Yet a person can be subject to a control order or preventative detention order even though they have not committed any offence. Indeed, the measures are designed to deal with situations where there is insufficient evidence to charge a person with a criminal offence.

The separation of powers and judicial integrity are crucial elements of the rule of law. They ensure that each individual is treated equally before the law. Preventative detention and control orders by their design and effect work to undermine this principle of equality and neutrality of the law. They confer non-judicial powers on courts, which removes an important constitutional safeguard.

The fact that preventative detention orders have not so far been used is an indication that they are unnecessary, at least in preventing a terrorist act.
And worse, decisions made in relation to preventative detention orders are not reviewable on the ground of natural justice or procedural fairness under the Administrative Decisions Act.

A Public Interest Monitor

CCL supports the involvement of a Public Interest Monitor, and recommends that the Federal Government and the other states follow the examples of the Queensland and Victorian Governments in this respect. The Queensland Monitor has the support of both sides of politics, and plays a useful role in ensuring that the interests of persons suspected of terrorist acts are properly represented. It is unacceptable that the liberties of a person may be restricted in a hearing in which that person is not able to see and challenge all the crucial evidence. If those situations are to be permitted, there should be present at the hearing a qualified barrister with the role of defending the interests of the person; with power to make submissions and with access to all of the evidence. A Public Interest Monitor or

[9] Quoted by The Hon. Alastair Nicholson AO RFD QC et al in their submission to the Senate Legal and Constitutional Committee in relation to the Federal Bill.

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the Ombudsman should be present for every court hearing of preventative detention cases.

The following material concentrates on the Terrorism (Police Powers) Act 2002 (NSW); but much of it is also relevant to the Criminal Code Act 1995 (Cth).

Recommendations for Amendment: Part 2A.

If the Part is to be retained, then a substantial number of changes should be made.

Section 26A

Subsection (a). It is of importance that the object is to prevent an *imminent* terrorist attack. The only arguments adduced publicly, whether in news media or in the Senate hearings into the various Commonwealth Acts, suppose that the powers are needed to prevent an attack which is due to take place *within a few hours*. Were it further off, there would be plenty of time for the ordinary processes of the law to take effect. Since the principal point of this Part is to *extend* the time that a person can be held from 48 hours under the Commonwealth corresponding Act to two weeks, a different justification of it is called for.

Section 26D

Subsection 1. Again, an action which is not expected for 14 days is not imminent. This is not a mere matter of words. An action that is as much as 48 hours away can be prevented by the use of existing laws. If a sufficient case can be made for this Part at all, the powers granted should be limited to detention for 48 hours, with no possibility of renewal.

Paragraph (1)(a). The standard of evidence is too low. Grounds for suspicion may be no more than an occasional meeting between two people, one of whom is under suspicion because of occasional meetings with a known conspirator. Innocent people are going to be caught by this legislation.

Section 26K

Subsection (2). The period of 14 days is utterly unjustified. For a person to be held so long, without charge, without the opportunity to seek bail, and in some (probably most) cases not knowing the evidence on which the decision to detain them is based, is intolerable.

Subsection (7). There are significant logical problems with the notion of ‘the same terrorist act’ when we are discussing future plans. While there is no difficulty with the application of this expression to past actions, it is logically impossible to individuate merely possible future ones. That is, it is impossible to develop clear criteria to determine when one is referring to two actions and when there is only one, referred to by different descriptions.

Subsection (7) attempts to deal with this problem. Suppose though that it is alleged that a conspiracy has taken place for a bridge to be bombed, some day in the next two months. Using the criteria in (7), 61 separate actions are planned. The same piece of planning could thus be used to repeatedly detain a

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person. Thus the intention of subsection (5) would be frustrated.

Similarly, while paragraph (7)(b) attempts to address the problem, it leaves the reference of the term 'the act' obscure.

The CCL accepts that it is better to have such a clause included than to ignore the problem. Nevertheless, the impossibility of obviating the problem is a reason for preventing repeated detention. No matter what phrasing is used, with a compliant judge, the power can be misused.

Section 26M

The section requires that the police officer detaining a person must apply for the revocation of preventative detention if the officer is satisfied that the grounds on which the order was made have ceased to exist. There is however no sanction to give that "must" significance. There should be a severe penalty for failing to produce evidence that demonstrates a detainee's innocence.

The case of the Guildford six in England illustrates the point. The six were held in detention, and in the course of the detention police extracted false confessions. A piece of evidence that confirmed the alibi of one of the six was concealed. As a result, he spent a number of years in jail, until the evidence was brought to light.

Subsection (3). This section prevents the detainee from applying a first time to have a preventative detention order set aside unless the person has fresh evidence to present. This is unreasonably restrictive. It is desirable, for instance, that a person can include in an appeal a demonstration of bias, legal mistake or unreasonable assumptions and reasoning by the first judge.

In the case of a mistaken or malicious application to the court, where a police officer has a greater interest in concealing their evidence from the detainee, effort will be made to discourage the court from revealing details of what is alleged.

In a case where under section 26O a court has decided at the initial hearing to admit hearsay evidence, a detainee or his lawyers should be entitled during an application for revocation of an order to cross examine the original provider of the evidence.

The section guarantees that the court orders will be seen as unfair. It will foster disrespect for the law.

Subsection (4). This subsection limits further applications for review. It should instead be made plain that there is an appeal to superior courts both on the merits of the case and on the interpretation of the law.

In a normal appeal situation, where a person has been found guilty beyond reasonable doubt in a trial with all the usual safeguards and a prisoner has exhausted the standard appeal process, it is reasonable to refuse to reopen the case unless fresh evidence has been discovered or there are changes in the legal situation (e.g. in judgements by the High Court).

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This however is far from the case with preventative detention. A person who resists the detention order at the initial court hearing is not in a position to know the significance of already adduced facts. Indeed, the detainee may not be told what facts have been adduced.

Section 26N Prohibited contact orders.

Subsections (4) and (6), and cf. 26Y(3) and 26Z(3). How is a person who is denied knowledge that a prohibited contact order has been made able to seek to have it revoked?

Subsection (7). As in the case of subsection 26M(2), the absence of a penalty here is striking—and without justification. A police officer who fails to take this action should be liable to a penalty of up to three years imprisonment.

Section 26O Rules of evidence.

Subsection (2). This subsection imposes a new standard of evidence. The court is to take into account 'any evidence or information that the Court considers credible or trustworthy in the circumstances, and, in that regard, is not bound by principles or rules governing the admission of evidence.' Presumably it is to be read with subsection 26D(1), which requires that there be reasonable grounds to suspect the person against whom a detention order is sought.

The interpretation of this is unclear, and will be a matter for decision. For a start, it appears to be pragmatically self-contradictory. Any judge that attempts to follow it is following a rule or creating a rule.

There are likely to be lengthy delays while the courts determine what the new standard is.

The point of the existing rules is that they exclude evidence which is not credible or trustworthy. For example, courts will have to determine whether hearsay evidence can be credible. The major reason for the normal restriction on hearsay evidence is precisely that it is not trustworthy. This is both because of the likelihood of errors being made when the evidence is explained to the court, and because cross-examination and questioning by the court are rendered impossible.

What is added by the words 'in the circumstances"? Evidence that is not credible is not made credible by circumstances.

This section should be repealed. The court should be bound by the usual rules of evidence.

Section 26P. Restrictions on publication.

This section excludes the public from all proceedings in relation to preventative detention orders. It allows the Court to suppress publication of part or all of the proceedings; and disclosure is subject to a penalty of imprisonment for up to five years.

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These restrictions, though understandable, make the rapid exposure of misuse impossible. There are risks involved, not only to innocent detainees, but also, as argued above, of threats to democracy.

Substantial safeguards therefore should be introduced.

(i) The Ombudsman should be empowered to and required to investigate *every* application and every granting of a preventative detention order. For in every case a person's civil rights have been infringed. Even if the infringement were justified, it would still be the case that the rights would be infringed.

(ii) A Public Interest Monitor (if one is appointed) and the Ombudsman should be exempted from the secrecy requirement, and empowered to reveal directly to the public (i.e. not through the Attorney General) cases of abuse of the powers granted in this Bill.[10]

(iii) The Public Interest Monitor or the Ombudsman should attend every court hearing of an application for preventative detention including interim detention orders, and be empowered to cross-examine witnesses, address the court and have all the powers that a lawyer would have in a normal trial.

Subsection (4). The court should be required to set a time limit on the secrecy requirement, other than on particulars that would identify informants and security agents. In particular, the detainee or former detainee should have a copy of the full grounds for the order as soon as the need for secrecy has passed.

The section limits disclosure more than is reasonable. Disclosure should be permissible (i) when a lawyer briefs a barrister or a colleague; and (ii) to the Ombudsman, the Police Integrity Commission and the Independent Commission Against Corruption, providing identifying material is omitted.

Section 26X. Holding detainees in prison.

This section permits detainees to be held in prisons, and child detainees to be held in juvenile correctional centres. This clause is contrary to article 10 paragraph 2(a) of the ICCPR, and the Convention on the Rights of the Child. Both of these require that persons who are accused and have not been found guilty should not be held together with convicted criminals.

The reasons for this include the safety of persons who may be innocent, but may be subject to physical attack from other prisoners. In the case of juveniles, it is also to prevent their corruption by association with hardened criminals.

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[10] Section 26ZC, while saving the powers of the Ombudsman under other acts, may not override a secrecy requirement imposed by the court.

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The young people who will be detained need not have committed any crime at all. They may not have planned, or been associated with the planning of a crime. They need only be in possession of information.

We understand from the Ombudsman's Issues Paper *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, that at that stage it was proposed that any young people detained under this act will be housed at the Kariong Correctional Centre. This is a centre used for those young people who have committed the most serious crimes, and for those whose behaviour has made them too difficult to manage at detention centres. This proposal is intolerable.

It is made worse by the proposal to give the officers of centres where detainees are held the same powers as the police officers in charge of detainees to determine the conditions in which the detainees are held. There is an ethos amongst such officers which is formed by their having to deal with dangerous and difficult prisoners. It is asking too much to expect them to change their behaviour when they are dealing with persons who are not even accused of crimes, especially under the circumstances where a terrorist attack is being investigated.

There is no reason whatever for the inclusion of this section. It should be replaced by one which *prevents* detainees from being held in prisons, and prevents juveniles from being held in detention centres or juvenile correction centres. If necessary, special detainment centres should be built for the purpose.

Section 26Y subsection (3) and Section 26Z subsection 3. Information about prohibited contact orders.

Subsection (3) in each case may be used to prevent a detainee from knowing about the restrictions to which that person is expected to adhere (see subsection 26N(4). A breach of these restrictions may be punished. This is intolerable.

Ignorance of the restriction will prevent a detainee from appealing against it.

Further, detainees should be told whom they may not contact for reasons of humanity, because refusal by a person supervising them to allow a contact to be made will otherwise be seen as an arbitrary abuse of power, and give rise to resentment and disrespect for the law in the communities of which the detainee is a member.

In general, explanations of such restrictions should be given. It is not enough for a person to be told 'the law says you may only contact a single family member, and you may not contact any other family member'.[11]

[11] See also remarks on Sections 26ZE and 26ZH

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The subsections should be repealed.

Section 26ZA. Compliance with the obligation to inform.

Subsection 1. It is true that police officers have civil rights, like anyone else. They should indeed not be punished for failing to do what is impossible. This clause, however, will lead to abuse. Subsections 26Y(1) and 26Z(1) already include the words 'as soon as practicable'. That properly leaves an onus on the officer to provide the information required once it becomes practicable to do so. The subsection should be repealed.

Section 26ZB. Denial of documents.

Subsection (7). This subsection denies to lawyers the right to be given a copy of, or even to see, any document other than the detention order. It is entirely obnoxious—a grave breach of rights, not justified by security considerations. Lawyers should have automatic access to all the evidence presented in an application for preventative detention (and any application for variation or such an order), unless for the gravest security reasons, a court orders otherwise.[12] Such an order should have a time limit on the suppression.

In any such case, the law should provide for access to the material by some other person who can speak for the potential detainee (e.g., a security cleared lawyer) and the Public Interest Monitor/Ombudsman. The clause should be amended accordingly.

Section 26ZC. Humane treatment.

Subsection (2). This clause sets a maximum sentence of two years' imprisonment for any person who subjects a detainee to cruel, inhuman or degrading treatment, or failing to treat them with humanity and respect for human dignity. As a penalty possibly to be used for torture, the two years' imprisonment is startlingly light, given that there is a five-year penalty for a monitor who reveals the content of a detainee's discussion with a lawyer. We recognize however that federal law against torture will still apply.[13]

Sections 26ZD, E, F and G. Permitted contacts.

These sections determine the contact that a detainee is permitted to make with other people. A list of permissible contacts is provided, including a permission for the police officer detaining the person to allow further contacts.

In accordance with international law, the list should be expanded to permit visits by the detainee's

[12] It would then be open to a court, for instance, to order the suppression of identifying particulars of security agents or informers; or in extreme cases, of sections of documents.

[13] E.g. s. 268.13 and Division 274 of the Criminal Code.

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doctor and such medical specialists as the doctor recommends; and it should permit the detainee to contact a fiancé(e). If the detainee is not fluent in English, an interpreter should be provided at all times to assist with these contacts and his/her other interactions.

Section 26ZF. Contacting the Ombudsman and the PIC.

The CCL supports this provision. In accordance with the argument above in relation to section 26P, the Ombudsman should automatically and expeditiously contact every person who is subject to preventative detention.

Section 26ZI. Monitoring contact.

Subsection (6). The procedure of monitoring will inhibit full and frank disclosure by the detainee to his or her lawyer. This will affect the lawyer's advice in ways that may be adverse not only to the client, but adverse to the purposes of the detention. The section should be repealed.

26ZN. Annual reports.

The invasions of civil liberties included in this Part are so severe and the threats to democracy and public order from misuse of the provisions are so significant that more extensive monitoring is required. Long periods between reports allow the development of a culture in which abuses become entrenched. Should the attempt be made to use the powers this Part provides to corrupt democratic processes, reporting needs to be immediate.

In the United Kingdom, reports are required every three months. The Police Commissioner here, likewise, should have to report at least that often.

26ZO. Monitoring by the Ombudsman

The Ombudsman's role is crucial. If abuse is to be eliminated before it becomes widespread, if discontent is to be assuaged, and if wrongs to individuals are to be stopped, the Ombudsman must play a substantial and public role.

(A). As argued above, a Public Interest Monitor (PIM) or the Ombudsman (or his representative) should be present for every court hearing of preventative detention cases.

(B). Every application for preventive detention orders should be reported to the PIM and the Ombudsman when it is made.

(C) As laid down in clause (2), the Ombudsman should be able to require information from the Commissioner of Police.

(D) The Ombudsman should be able to report directly to the public, through the press or other media, or in such other manner as may become necessary, as well as reporting through Parliament.

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(E) The Ombudsman, like the Commissioner of Police, should report every three months.

(F) For these reasons, also, the roles of the Ombudsman and the PIM should continue through the life of the Part.

26ZS Sunset clause

The Part 2A creates powers which are dangerous to the freedom and reputation of innocent persons. It denies fair treatment to those who are not innocent. It sets democratic processes at risk. As argued above, false accusations could be used to silence critics, or to destroy their credibility. Elections could be swayed by strategic detention of key figures. Indefinite detention of people without trial without their having knowledge of what they are accused, and having no power to challenge the evidence, is possible.

Part 2A weakens Australia's defences against it becoming a "managed democracy", like Singapore or Malaysia. It should not have been passed into law. But since it has, there should be a sunset clause repealing it in one year.

Part 2 of the NSW law: Special Powers: to require disclosure of identity, to search persons, vehicles and premises without warrant, and to seize and detain things.

The special powers given to police in this Part are made available once a person, a vehicle, a premises or an area is targeted.

The legislation for this Part was rushed through Parliament in a climate of fear and horror following the Bali bombing. There was little time for the details to be considered, nor for amendments to be proposed—nor indeed for a serious debate about the need for the legislation.

If this Part is to continue to be the law, then there are five respects in which, we submit, it should be amended.

Section 5. The indefinite 'near future'.

This section has been amended so that an authorisation for the exercise of the special powers conferred by this Part may be given if the police officer giving the authorisation is satisfied that there are reasonable grounds for believing that there is a threat of a terrorist act occurring in the near future, and is satisfied that the exercise of those powers will substantially assist in preventing the terrorist act. We urge a change back to the requirement that the attack be imminent. 'In the near future' is vague, and allows the authorisation to be given when alternative means would do as well.

Section 13. Challenging authorisation.

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This section is of great concern. It prevents a court from reviewing an authorisation during its life. It also prevents any investigatory body (apart from the Police Integrity Commission) questioning the authorisation after the event. This is plainly unsatisfactory. Extraordinary powers are open to extraordinary abuse. They require extraordinary supervision.

The section is also contrary to international law. Clause 3 of Article 2 of the International Covenant on Civil and Political Rights requires States Parties (a) 'to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy…' and (b) 'to ensure that any person claiming such a remedy shall have his right determined by competent judicial, administrative or legislative authorities, or by another competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy'.

In a situation where the Police Minister is unavailable, a senior police officer could repeatedly and mistakenly (or corruptly) authorise targeting for 48 hours each time, and no challenge would be possible. In a situation where the Police Minister is misled, the authorisation might be for 14 days. Section 13 should be repealed.

Sections 17, 18 and 19. Search powers.

These sections give power to a police officer to search any premises that are within a targeted area, or any person or vehicle that is within it, about to enter it or about to leave it. There need be no grounds for suspecting that there is any connection with intended or past terrorist actions. The CCL is concerned about possible misuse of this power; in particular where a police officer acts upon prejudice. If a vehicle or a person is not targeted, the power to search should only be available if the police officer has reason to believe that the search is necessary to prevent an imminent terrorist attack, or to apprehend those responsible for one that has just occurred.

Section 29. Protection of police.

This section protects a police officer who acts in accordance with an authorisation against any legal action even if the officer knows that the person who gave the authorisation did so improperly, or lacked the jurisdiction to do so. The section should be reworded.

Persons as targets.

The reference to persons as targets should be changed. Language shapes attitudes.

The absence of safeguards.

Overall the Council remains concerned that the whole legislative processes dealing with the terrorism legislation in Australia, unlike any other common law democracy, is not supervised by the overarching requirements of a Bill of Rights.

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Therefore, it is a matter of particular concern in Australia when extra legislation is produced to take away citizens' rights, great care is needed to examine that there is a need for this legislation and that the affect is not to permanently remove freedoms that Australians have always enjoyed.

[14]

The proscription of organisations: Criminal Code Act Division 102

Summary
The CCL is opposed in principle to the proscription of organisations. The law should criminalise those who plan or engage in terrorist acts, but should not criminalise membership of an organisation whose leaders use it to engage in such activities.

The power of the Attorney General to make membership of an organisation a crime is dangerous. The procedures of the Parliamentary Joint Committee on Intelligence and Security improve the situation (though we understand that these procedures were opposed by the Attorney general's Department); but the power is still more dangerous than it need be because there is no judicial review on the merits.

If the listing of organisations is to continue, proscription should be done by a court, with provision for appeal and review on the merits.

1. The appropriateness of proscription.
The power to proscribe an organisation is open to substantial misuse. It creates a manifest risk of arbitrary, and politically motivated abuse. In a severe case, it can be used to ban opposition parties and to suppress dissent. It is too dangerous a power to be entrusted to governments.[15]

1.1 The lists of proscribed organisations are a recipe for arbitrary and politically motivated decision-making. Hundreds of groups and individuals have now been criminalised around the world and the various lists are expanding as states attempt to add all groups engaged in resistance to occupation or tyranny. Amongst them, those exercising what many people around the world see as a legitimate right to self-defence and determination are increasingly being treated—on a global basis—the same way as Osama Bin Laden and Al Qa'ida.

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[14] It would be open to the Parliament to pass a fresh bill at that stage. If that were to happen, the sunset clause should again be for one year.

[15] In the words of Professors Bill Bowring and Douwe Koriff, proscription legislation 'is a recipe for arbitrary, secretive and unjust executive decision-making, shielded for the scrutiny of the courts, and equally removed from public debate precisely because of the 'chilling' effect of the use of the term 'terrorism'.' (Bill Bowring and Douwe Koriff, **Statewatch News,** February 2005.)

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1.2 Proscription of an organisation criminalises those who remain its members. It is tempting to governments, for it is often easier to demonstrate that persons are members of or have supported a proscribed organisation than it is to prove that that they have engaged in terrorist actions or in actions in preparation for such actions.
But ease of conviction is not a good basis for determining legislation, especially for policies that threaten fundamental rights. Proscription of organisations makes it more likely that persons who are innocent of any terrorist intentions will be convicted and punished.

1.3 For the most part, it is possible to protect Australia and Australians against terrorist acts by the use of the laws against murder, kidnapping, aiding and abetting, attempt, incitement, grievous bodily harm, criminal damage, arson, conspiracy and treason, and conspiracy to commit these offences.

For these reasons, the Council is opposed in principle to the proscription of organisations.

The listing provisions or section 102.1 of the Criminal Code Act should be repealed.

2. The criteria for proscription.

'Terrorist act' and 'advocating the doing of a terrorist act'.

2.1 The current criteria specified under subsection (2) depend on the definition of 'advocates' in subsection (1A) and of 'terrorist act' in section 100.1. The defects of the latter have been argued above.

2.2 Political bodies are said to be protected by the legislation in three ways. First, in order for their defence of these actions to count as advocating as terrorist action, the praise must be done in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of Section 7.3) that the person might suffer) to engage in a terrorist act. Second, the Attorney General must seek a regulation and the Governor-General must agree to it. Thirdly, the Parliamentary Joint Committee on Intelligence and Security (the PJCIS) must review a proscription, and either house of parliament can disallow a regulation once it is made.

2.3 The first protection is nearly useless. Making a recording a university lecture available in a library, giving a television interview, or discussing an issue in a newspaper are not protected, because the audience is not known.

2.4 The second protection depends on the decency and good sense of the Attorney General and the government of the day. It is not good policy to have to rely on either. Nor does history support the idea that they can be relied upon.

2.5 That leaves the Parliament. The PJCIS has followed a procedure which requires certain criteria to be met before its members will report in support of a proscription. They have also made sure that the members of an organisation, or anyone else who cares to, can make input

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into their deliberations. We note, though, that their request that such input be allowed before and organisation is banned has not been granted.

The Parliament has long periods when it does not meet. (Besides which, it can be prorogued.) A great deal of mischief can be done, and a great deal of political benefit obtained, before Parliament can disallow a regulation. Also the government of the day will control the lower house and the PJCIS; and so, much will rely on persuading a majority of the Senate to look closely at a proscription. In a McCarthyist climate, that may not be easy.

2.6 An appeal to the courts is possible on procedural grounds, especially since the processes followed do not follow the principles of natural justice. But there is no such appeal on the merits of the case.

2.7 Therefore this process remains essentially a political rather than an evidence based process.

2.8 If the listing provisions are retained, then, the definitions of 'terrorist act' and of 'advocates' need to be restricted.

2.9 It is doubtful, however, that even much tighter restrictions could be found that would not restrict legitimate debate. Subsection (1A) and clause (b) of subsection (2) should be repealed.

2.10 If that is not done, then at the least, clause (c) of subsection (1A) and should be repealed.

If proscription is to continue, these principles should apply.

2.11 For proscription to be admissible, the organisation must be engaged in preparing, planning or assisting in terrorist actions, have threatened to perform them or have already committed them.

2.12 An organisation should not be banned unless its commitment to performing terrorist actions is current. It is a reason to resist proscription that the organisation is involved in peace or mediation processes. (We note that the PJCIS includes this in its criteria for endorsing a prescription.)

2.13 It is also important that the definition of 'terrorism' should not encompass justified armed struggle against tyrannical or repressive regimes, or legitimate struggles against occupation and for self-determination.

2.14 Since actions in the prosecution of a war, including a war of liberation, are subject to the laws of war and the law of treason, attacks on military targets during a war should not be treated as terrorism.

2.15 Care should be taken lest refugees are criminalised for the same reasons that they are granted asylum.

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2.17 Given the consequences which follow from proscription of an organisation, the definition of 'terrorist actions' for the purposes of proscription should be limited to those that are designed cause terror. Where lives are not put at risk, criminal actions that seek to put pressure on governments by attacking property, or communication systems, or transport systems, or the economy, wrong though they may be, do not justify the same precautions nor the same penalties that acts of arbitrary mass murder do.

2.18 Proscription decisions should also take account of the following:

- how close the links are between the Australian part of the organisation and those parts involved in terrorist activities;
- whether there are links to other terrorism groups or networks;
- whether there are threats to Australians;
- whether the United Nations has proscribed the organisation
- whether the organisation seeks, by its participation in a peace process, to end the occasion and the practice of terrorist activity.

2.20 It is not acceptable that the members of an organisation should be forced to leave it because of intemperate, provocative or indeed illegal statements by the leaders of the organisation.[16] Unless statements are made repeatedly by the acknowledged leader of an organisation, on official stationery or on official occasions, and the other members know of these things and do nothing about it, it should not be taken that the organisation advocates terrorism.

3. The process of proscription.

3.1 The current process for proscription is subject to substantial defects which were pointed out by the Sheller Committee. As noted above the current process is essential a political one involving the government and the Parliament. There is no provision of an opportunity for members of an organisation to present a case against proscription until after the event, or for intervention by members of the public or interested organisations. The provision for a merits review in subsection 17 is an appeal from Caesar to Caesar.

3.2 There is no current requirement in the legislation for the organisation to be informed of the reasons for its proscription. Unless they are so informed, the opportunity to make an application for de-listing may be rendered otiose.

3.3 As the PJCIS has repeatedly noted, there are no measures in place (other than its own procedures) for informing the members of an organisation that it has been proscribed beyond the issue of a press release.

3.4 Proscription should be done by a Federal judge, in open court, on application by the Federal Attorney-General. An appeal should lie with a superior court on the merits as well as

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[16] For example, a mosque or a church should not be shut down because of the sermons of an imam or a clergyman.

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the lawfulness of the proscription. This should be the only method by which an organisation may be proscribed.

3.5 The criteria for proscription should be determined by the legislation.

3.6 The process should be transparent, and provide members of the organisation that it is proposed to proscribe, other persons affected and members of the public with notification that it is proposed to proscribe the organisation, and to provide them with the right to be heard and to present evidence in opposition.

3.7 The proscription must be followed by widespread publicity of the fact that it has occurred, and of the reasons for it; sufficient for people who may be associated with the organisation to learn that joining or remaining a member of the organisation may expose them to prosecution.

3.8 In view of the risks of abuse of the process for political or vindictive ends, and in view of the grave consequences for individuals, the use of secret evidence (i.e. evidence that is made available to the court but not to the organisations at risk of proscription) should not be allowed. Such proceedings should not be subject to the National Security Information (Criminal and Civil Proceedings) Act 2004.

4. The effectiveness of proscription.

The Sheller Report raised some issues concerning the effectiveness of proscription in combating terrorism. In this regard, the CCL notes that it would be open to the members of a listed organisation to disband and create a new organisation comprising the same members. In its *Response to Questions on Notice from the Review,* the Australian Federal Police noted 'As stated in our submission these offences are somewhat ineffective given the difficulties of establishing that persons and/or assets are connected to a proscribed entity. This is largely because terrorist organisations either lack any formal organisational and membership structure or adapt and change their names once they are proscribed.'[17]

5. The need for further review.

5.1 The CCL considers that there are other features of the listing provisions that are likely to cause injustice. In particular, we are concerned about the offences that are created by the listing of an organisation. Quoting Patrick Emerton again:

> Division 102 creates a number of offences which criminalise virtually any sort of involvement with 'terrorist organisations'.
>
> If an organisation is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)',[13] then it is an offence for anyone, anywhere in the world, to be a member of the organisation, to direct it, to train with it, to recruit for it, to supply it with funds, other

[17] Australian Federal Police, Response to questions on notice from the AFP's appearance on 8 February 2006, p. 6. Cf. also p. 3.

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resources or support, or to receive funds from it.[14] Again, the penalties for these offences are extremely severe: up to 25 years imprisonment for knowingly directing, recruiting for, getting funds to or from or providing support to an organisation; up to 25 years imprisonment for knowingly or recklessly training with an organisation;[15] up to 15 years for recklessly directing, recruiting for, getting funds to or from or providing support to an organisation; and up to 10 years for knowingly being a member of an organisation. Even 'informal membership' or the taking of steps to become a member of a 'terrorist organisation' is punishable by up to ten years in prison.[16]

These penalties are quite excessive, given that these offences can be committed whether or not the offender had any violent intention, and with the exception of the offence of providing support to an organisation,[17] offences can be committed even if the offender's involvement with the organisation was in no way itself connected, even indirectly, to 'terrorist acts'. One example that illustrates this point is the following. The Indonesian island of Aceh was one of the regions most devastated by last year's Boxing Day tsunami. At that time, parts of Aceh were under the control of the rebel Free Aceh Movement, clearly a terrorist organisation under the act. Thus, anyone sending money to the rebels to help them with tsunami relief, or anyone teaching them health or construction techniques to cope with the aftermath of the tsunami, would have been committing crimes under Australian law punishable by very lengthy terms of imprisonment. Criminalising this sort of behaviour has nothing to do with protecting communities from politically motivated violence.

Indeed, if we combine the breadth of the concept of ' terrorist act' with the breadth of the concept 'indirectly fostering', we can see that a very large number of organisations satisfy the definition of 'terrorist act': not only organisations such as Al-Qa'ida or Hamas, but also the armed forces of most nations, which (by training for, and adopting a posture of readiness for, military activity) are indirectly fostering the commission of 'terrorist acts'. Likewise, any organisation that offers support to political protestors who clash with police is likely to constitute a 'terrorist organisation', on the grounds that it is indirectly fostering politically motivated activity which is intended to intimidate a government, and which both is intended to, and does, create a serious risk to the health and safety of a section of the public (by provoking the police to attack them). Similarly, a charitable organisation, which among its various activities offers succour to the families of those who have been arrested or killed for undertaking acts of political violence, is also a candidate 'terrorist organisation', on the grounds that it is indirectly fostering such violence, which in turn constitutes a terrorist act under the legislation….[The legislation] extends far beyond criminal gangs plotting bombings or hijackings. And, as was indicated above (at 1.1), a picket by nurses could potentially amount to a terrorist act. From this possibility, it follows that a trade union offering advice to nurses as to how they might go about establishing a picket might well be a terrorist organisation, as it might well be at least indirectly assisting the doing of a terrorist act.

A final set of examples, which might be considered by some as absurd, in fact demonstrates the absurd breadth of this statutory definition of a terrorist organisation. The governments of the United States, the United Kingdom and Australia are directly engaged in the planning of politically motivated military activity in Iraq. This action is

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being undertaken with the intention of coercing a government (namely, the former government of Iraq) and of a section of the public (namely, those Iraqis who continue to oppose the invasion of that country). Furthermore, that action was intended to cause, and indeed has caused, a great deal of danger to health and safety, as well as many deaths. Thus, each of these governments (together with many other governments around the world) is a terrorist organisation. Indeed, even such an organisation as the Liberal Party of Australia (which at least indirectly fostered the use of political violence in Iraq) satisfies the statutory definition.

What these examples show is that, merely from the fact that an organisation satisfies the statutory definition of a terrorist organisation, next to nothing can be known about its moral character, or the criminality of its conduct. Some governments are perhaps criminal – the invasion of Iraq has indeed been predicated upon the claim that the former government of that country was criminal – but very few people would regard the governments of Australia, the United Kingdom or the United States as criminal organisations. Likewise, some charities may be criminal, but few people would have regarded charities offering succour to the families of resistance fighters in East Timor as criminal organisations deserving to be banned – despite the fact that, as was pointed out above, if they were in operation now they would probably count as terrorist organisations under the *Criminal Code*. And to return to another example given above, the mere fact that a group supports those who clash with police does not show it to be a criminal group that ought to be banned – what if the group is a group of Iranian students, and the police are Iranian police attempting to enforce the repressive laws of that country? Division 102 of the *Criminal Code* makes criminals of the members of many quite ordinary and fundamentally innocent organisations, such as the ordinary members of trade unions, or the members of organisations offering support to foreign political organisations.

Once again, this excessive breadth means that prosecution for these offences will inevitably be highly discretionary. Organisations deemed legitimate will not be prosecuted, despite the fact that those involved with them will be guilty of criminal offences under the *Criminal Code*. As was explained above (at 1.2),[18] this sort of discretionary approach to the policing of political activity is inimical to democracy.

In the context of these 'terrorist organisation' offences, the threat of politically discriminatory policing is particularly great, because those involved with organisations operating in Australia can become liable to prosecution on the basis of those organisations' connections to political activity overseas. For example, there is no doubt that any organisation providing succour to an overseas resistance movement would constitute a 'terrorist organisation', as any resistance movement is necessarily engaged in politically motivated violence intended to intimidate a government. In the past, for example, the Australian Anti-Apartheid Movement would have constituted a terrorist organisation, on account of its open support for the African National Congress, which was waging an armed struggle against the apartheid government of South Africa. The existence of broad 'terrorist organisation' offences therefore opens the door to the prosecution of the members of these groups, although they pose no threat to the

[18] See Appendix A.

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wellbeing of Australia or Australians.[19]

5.3 Although some of these matters have been the subject of recommendations by the Senate Legal and Constitutional Committee, the Sheller Committee and the Joint Parliamentary Committee on Intelligence and security,[20] no improvements have been made to the legislation.

Control Orders

Unlike preventative detention provisions, control orders have been used, but at least in the case of David Hicks, were clearly misused. CCL calls strongly for their abolition.

Judicial power must be exercised in accordance with judicial process including the rules of natural justice. But control orders are made in the absence of the person affected by them and the persons affected will not be entitled to all, or even any, of the information upon which the application for the control order is based. Accordingly, the right of persons to a fair trial in accordance with the rules of natural justice is infringed.

The limited use of control orders might be used as evidence that the extra-ordinary powers contained in these regimes are non-threatening and should remain. However, these elements of the counter-terrorism laws remain a loaded gun within our legal system. If they were utilized to their full potential they could create an oppressive and secretive system of detention that would be totally abhorrent to any person with a commitment to liberal democracy.

CCL commends to the Inquiry the extracts below from the joint Bar Association of Queensland and Queensland Law Society submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Anti-Terrorism Bill (no. 2) 2005—submission 222. The whole submission is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2004-07/terrorism/submissions/sublist.htm.

CCL supports the general objection to control orders, and if they are to stay, believes that the changes recommended below to *the Anti-Terrorism Bill* are still important, and should be made to *the Criminal Code*.

5 Control orders

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[19] Loc. cit.

[20] E.g. Parliamentary Joint Committee on Intelligence and Security, *Review of the Re- Listing of Al Qa'ida and Jemaah Islamiyah as Terrorist Organisations* at 1.11 and 1.12

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38. The notion that a person can be deprived of their liberty without trial and conviction for a substantive offence for which the sanction is imposed is dangerous and unwelcome as it is contrary to the fundamental principle of detention only be applied when a person is to be charged an tried. Yet, that is the effect of these provisions.

40. The repugnance of these provisions is compounded by fundamental denials of rights to liberty which have been the cornerstone of our democracy.

41. Control orders, once made, have the effect of imposing significant and disturbing restrictions on the liberty of the person subject to those orders. These orders restrict the rights of a person subject to the order to engage in a range of activities which are not only ordinarily accepted as the right of the citizen to carry out unrestricted but are, in some cases, necessary activities.
9
For instance, orders can be made preventing a person from earning an income by restricting the ability to work. Restrictions can be imposed on a person's right to move freely in Australia or overseas, attend certain events or places, possess certain items of property or from using telephones, internet or any other form of technology. The subject may be ordered to wear a tracking device and to remain at their home or some other "specified place". The order also will have an impact on third parties who will not be given a right to be heard as it affects the ability of the subject to associate with others. In addition, the person can be required to undertake "specified counselling or education". Without any need for an arrest, the database that the authorities hold on the subject can be with photographs and fingerprints even though the supplemented person never has to appear before a Court on a criminal matter.

60 There should also be provision for the person to be compensated in the event that an interim order is found to be unjustified and the person has suffered damage as a result. In that regard, the applicant should provide an undertaking to the Court as to damages.

61. This is an important element given the well publicised difficulties of Cornelia Rau and Vivian Solon to achieve any expeditious resolution of what are clearly justifiable claims for compensation in circumstances where each had her liberty infringed in a most fundamental way.

87. Apart from the order itself, a person's lawyer is presently only entitled to be provided with a copy of the summary of the grounds on which the order is made (Clauses 104.12 and 104.13). Peculiarly, it is not the issuing Court that prepares the summary (although it should be), but a member of the AFP, and then not necessarily the one who made the application. The summary may or may not reflect the true basis for the grant of the interim or confirmed order. For example, the Court may have received further material at the interim hearing stage. In that case, the summary will not reflect the true position.

88 Non-disclosure of the summary is presently allowed at the discretion of the AFP where it is contended that the information is likely to prejudice national security (Clause 104.12(2)). There ought be no basis to refuse to supply it unless a Court so orders. For all intents and purposes those representing the persons subject to such orders, and the persons themselves have no practical capacity to resist confirmation of the order without it.

114. The Bill makes it an offence for communications with a person subject to a preventative detention order to be disclosed in a number of circumstances. Liability for

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disclosures may arise for detainees, their lawyers, their parents or guardians, interpreters who assist in the monitoring and possibly even police officers who communicate regarding the detainee.

116. What provision is made, for example, for a detainee who suffers from a medical condition that requires ongoing treatment from a doctor?

117. There is no provision in the Bill for the detainee's doctor to be contacted by or communicate with and treat a detainee.

118. There is no provision in the Bill for the Doctor to be contacted by a family member or lawyer. Presumably medical treatment for the detainee is left to the direction of the AFP.

119. According to section 105.41(2) there appears to be no scope under the Bill for an interpreter to be utilised *other* than for monitoring a detainee. If a detainee cannot communicate in English and their lawyer cannot communicate in their native tongue, how can proper instructions and advice be communicated? How could they even communicate at first instance? In view of the explanatory memorandum and its construction on 105.37 it would be an offence for a lawyer to, through an interpreter, repeat in the form of advice any information that the detainee gives the lawyer in the course of the contact. It would also be an offence for the interpreter to translate that information and disclose it to the detainee.

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Appendix A

The definition of 'terrorist act'

Problems with the definition have been repeatedly pointed out, perhaps most cogently by. Patrick Emerton of Monash University.[21].

> At the centre of the regime established by Part 5.3 of the *Criminal Code* is the concept of a 'terrorist act'.[1] 'Terrorist act' is a term whose meaning is defined extremely broadly, to extend far beyond acts like bombing and hijackings. It is defined to include any action or threat of action where the following four criteria are met:
> • the action is done, or the threat made, with the intention of advancing a political, religious or ideological cause;
> • the action is done, or the threat made, with the intention of coercing, or influencing by intimidation, any government, Australian or foreign, or any section of the public of any country anywhere in the world;
> • the action does, or the threatened action would:
> ◦ cause serious physical harm, or death, to a person; or,
> ◦ endanger the life of a person other then the one taking the action; or,
> ◦ create a serious risk to the health and safety of the public, or of a section of the public; or,
> ◦ cause serious damage to property; or,
> ◦ destroy, or seriously interfere with or disrupt, an electronic system;
> • the action is, or the threatened action would be:
> ◦ action that is not advocacy, protest, dissent or industrial action; or,
> ◦ intended to cause either serious physical harm, or death, to a person; or,
> ◦ intended to endanger the life of a person other then the one taking the action; or,
> ◦ intended to create a serious risk to the health and safety of the public, or of a section of the public.
> This definition includes virtually all actual, attempted or threatened politically or religiously motivated violence, in Australia or overseas, whether undertaken by a government or by private individuals, whether undertaken in support of or in opposition to democracy, whether undertaken aggressively or defensively, and whether undertaken with or without justification. Thus, it undoubtedly includes within its scope such conduct as the attacks upon New York and the Pentagon of September 11, 2001. However, it also includes within its scope much action that many do not wish to condemn, including the following:
> • The invasion of Iraq by Australia, the United States and the United Kingdom (which was politically motivated intimidation of the former Iraqi government causing, and intended to cause, the deaths of many persons);
> • The American Revolution (which was the politically motivated coercion of the government of Great Britain causing, and intended to cause, the deaths of many persons);

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21 Patrick Emerton, Submission to the Security Legislation Review Committee (The Sheller Committee) February 2006.

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• The activities of the African National Congress (which was the politically motivated intimidation of the government of apartheid South Africa causing, and intended to cause, serious physical harm and death).

These examples also show that it may not always be correct to say, as the Parliamentary Joint Committee on ASIO, ASIS and DSD said in its *Review of the listing of the Palestinian Islamic Jihad*, that 'political violence is not an acceptable means of achieving a political end in a democracy'. Taken literally, such a statement would preclude the use of force by Australia to defend itself from an invading power; it would likewise preclude the use of force by the police to restrain violent protestors, or by citizens to prevent an attempt at a coup or other sort of anti-democratic revolution. It is worth remembering that some of the world's great democracies, such as France and the United States, were founded by political violence; that in the case of the United States, the extension of democracy into those states which had hitherto enslaved around a third of their inhabitants was achieved by political violence; and that the ongoing invasion of Iraq is said to be justified, in part, by the necessity of such violence for the introduction of democracy into Iraq.

As well as these events which are fundamental to the political ideals of many of us today, a host of other activity is apt to be caught up in the definition of 'terrorist act', although it does not necessarily seem criminal or worthy of condemnation. Some examples are the following:

• The holding of a student or union demonstration deliberately causing damage to property, and thereby intended to provoke the authorities to retaliate, thus showing their true political colours – a common tactic in trying to bring about political change in authoritarian states (which would be politically motivated intimidation or coercion of the government in question, causing serious property damage and intended to cause a serious risk to the health and safety of the public);

• The exercise, by the citizens of the Federal Republic of Germany, of their constitutional right to resist an attack on the constitutional order of that country (which could quite possibly involve politically motivated intimidation of the unlawful government, causing harm and intended to cause harm to the agents of that government).

At its margins, the definition even embraces certain acts of industrial action, like the picketing of a public hospital by nurses.

The point of these examples is to show that, from the mere fact that certain conduct satisfies the definition of 'terrorist act' under the *Criminal Code*, nothing can be confidently inferred about its moral character: the students in the example above might be Iranian students, and their opponents Iranian police attempting to enforce the repressive laws of that country.

‘1.2 The danger of excessive discretion

‘This breadth in the definition of 'terrorist act', and the fact that it covers a range of activity which is not deserving of condemnation, makes it inevitable that the policing and prosecution of offences and the exercise of statutory powers based upon this definition of terrorism will be highly discretionary.

‘Excessive discretion in policing and prosecution is always undesirable, opening the door

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as it does to discriminatory application of the law, and to the potential for undermining the independence of the police and prosecuting authorities. When the key concept at the heart of the discretion – 'terrorist act' – is defined by reference to political, religious or ideological motivation, added to the potential for discriminatory application is the potential for that discrimination to be politically or ideologically motivated.

'The connections between terrorism, as statutorily defined, and political and ideological motivation, make the investigation of such offences a particular challenge for a democracy. A democracy, while it must protect the lives and well-being of its people, is also committed to political openness and political pluralism. Indeed, if sufficiently many members of a democracy come to hold a particular political view, a democracy must be open to the possibility that that view will become part of its mainstream, even if that view has at one time been associated with political violence (in this regard one can think of the African National Congress in South Africa, for instance, or of the leaders of the American Revolution, or even of the more extreme abolitionists prior to the American Civil War). On the other hand, if a small group in a democracy poses a threat of violence to the rest, the policing of this threat must be undertaken in a way that is not seen simply to be an attack upon the dissent and diversity that is always a legitimate part of a democracy.

'In a democracy the criminal law ought not to be used simply as a tool for enforcing political preferences. Yet it is precisely this possibility that is enlivened by the definition of 'terrorist act' in the *Criminal Code*. The definition is so broad, the inevitable discretion therefore so great, that there is a real threat that political activity deemed undesirable by the government and authorities will be made subject to investigation and prosecution, while other political activity, which satisfies the statutory definitions but is deemed acceptable, will go uninvestigated and unpunished.

'… this danger is increased by the fact that the regime established by the *Criminal Code* establishes even further opportunities for the exercise of discretion, and also by the fact that the offences that are established on the basis of this definition of 'terrorist act' impose criminal liability in circumstances that go far beyond participation in acts of catastrophic violence such as bombings and hijackings.'

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Appendix B.

Extract from a submission by Professor George Williams and Dr. Andrew Lynch, to the Security Legislation Review, February 2006, concerning the proscription of organisations.

Absent judicial interpretation of those provisions, we remain concerned at the width of some of the offences in this Division. The core problem as we see it is the law's attempt to attach criminal liability to persons not on the basis of any activity committed by the individual beyond simply their membership (including 'informal') or other connection with a particular group which engages in terrorist activities about which they may not have actual knowledge.

In some ways this problem was not as pronounced in the Acts presently under review, as it has become through later amendment. For example, Sch 1 of the *Security Legislation Amendment (Terrorism) Act 2002* inserted the original offence of membership of a terrorist organisation in the following form:

102.3 Membership of a terrorist organisation (1) A person commits an offence if:

1. *(a) the person intentionally is a member of an organisation; and*
2. *(b) the organisation is a terrorist organisation because of paragraph (c) of the definition of terrorist organisation in this Division (whether or not the organisation is a terrorist organisation because of another paragraph of that definition also); and*
3. *(c) the person knows the organisation is a terrorist organisation.*

The reference in 102.3(1)(b) to paragraph (c) of the definition of terrorist organisation meant, at that time, 'an organisation that is specified by the regulations for the purposes of this paragraph' i.e. one which the Attorney-General had specified by regulation after identification of the body by the UN Security Council as one engaged in terrorism. That was a clearly ascertainable criterion.

That restriction on the identification of a 'terrorist organisation' for the purpose of this offence has since been removed so that the effect is far wider and consequently far less certain for the individual. Listing of the organisation is no longer a precondition to offending under most of Division 102. It is now enough that persons belong to an organisation which is not listed under the regulations but which is subsequently shown to have been 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs)'– something they then bear the onus of showing they did not know at the time.

In this context, it is interesting to note that the offence of associating with a terrorist organisation in section 102.8 of the *Criminal Code* 1995 (which was not introduced by any of the laws under review) is only infringed by a person when the organisation in question is one specified by the Regulations. Although the proscription process now enables organisations to be listed by the Attorney-General which have not been so identified by the UN Security Council (providing a not unsuitable level of flexibility at a domestic level), the requirement for a listing of the organisation before a person can be charged with the offence of association ensures a much higher degree of certainty than if the organisation need only be classified as 'terrorist' at the time of or after arrest. While association involves perhaps a lower level of familiarity with an organisation than being a member of it or providing it with services, that distinction need not always hold true.

Of course terrorist organisations will not always oblige us with neat categories and clear identification – indeed the signs are that modern terrorism is going to be far less regimented than in the past – but

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even so we must recognise that criminalisation of membership of a terrorist group is likely to be very cumbersome as a matter of evidence in a criminal prosecution when the law seeks to extend to 'organisations' which are so loosely defined (though again, this is something which will be better appreciated after the trials of Melbourne's alleged terrorists). It also risks injustice to persons attached to groups about whose every activity they are not as aware as perhaps they should be. This was emphatically *not* a danger under the original form of the offence which thus was preferable to its present version.

Recommendation:

The offences relating to terrorist organisations in Div 102 of the *Criminal Code* should be confined to only those organisations which have been specified under the regulations made by the Minister.

Following on from this point, some comment upon the expanded grounds which the Attorney-General may rely in proscribing terrorist organisations under s 102.1(2) of the *Criminal Code* is warranted. As recently amended by the *Anti-Terrorism Act (No 2) 2005,* before the regulation specifying an organisation can be made, the Minister must be satisfied on reasonable grounds that the organisation:

1. *(a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or*
2. *(b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).*

'Advocates' is defined in s 102.1(1A) as occurring if:

1. *(a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or*
2. *(b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or*
3. *(c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.*

Although, following recommendations by the Senate Legal and Constitutional Legislation Committee, this is a significant improvement upon the original proposal legitimate concerns persist about this new ground for proscription.

In particular, s 102.1(1A)(c) indicates an intention to cover *indirect* incitement of terrorism, or statements which, in a very generalised or abstract way, somehow support, justify or condone terrorism. The effect of proscribing an organisation on this basis has serious consequences under the accompanying criminal provisions. Individuals, be they either a member (Criminal *Code,* s 102.3) or an associate ((Criminal *Code,* s 102.8), could be prosecuted merely because someone in their organisation praised terrorism – even if the organisation has no other involvement in terrorism; even if the praise did not result in a terrorist act; and even if the person praising terrorism did not intend to cause terrorism.

This is an extraordinary extension of the power of proscription and of criminal liability, since it collectively punishes members of groups for the actions of their associates beyond their control. While it may be legitimate to ban groups which actively engage in, or prepare for, terrorism, it is not justifiable to ban an entire group merely because someone affiliated with it praises terrorism. It is well-accepted that speech which directly incites a specific crime may be prosecuted as incitement. It

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is quite another matter to prosecute a third person for the statements of another, even more so when such statements need not be directly and specifically connected to any actual offence.

Recommendation:

The definition of 'advocates' in s 102.1(1A) of the *Criminal Code,* which affects the operation of the proscription process and consequential offence provisions introduced by the legislation under review, should be amended by the deletion of subsection (c).

C Width of certain preparatory offences in the *Criminal Code 1995,* Pt 5.3, Divs 101, 102 and 103

Many of the terrorism offences introduced to the *Criminal Code* by the *Security Legislation Amendment (Terrorism) Act 2002* (and re-enacted by *Criminal Code Amendment (Terrorism) Act 2003)* and the *Suppression of Financing of Terrorism Act 2002* were subject to a minor textual amendment by the *Anti-Terrorism Acts* of 2005. This was popularly referred to as the '"the" to "a" change' and was motivated by concern that preparatory acts could only be prosecuted under the offences as originally drafted if they pointed to some specific planned terrorist act. This interpretation of the provisions was expressly excluded by amendments to subsections 101.2(3); 101.4(3); 101.5(3); 101.6(2) and 103.1(2) made by *Anti-Terrorism Act (No 1) 2005;* and subsections 102.1(1)(a) and (2) made by *Anti-Terrorism Act (No 2) 2005.*

Assuming that change was necessary in order to have such an effect, these provisions now expressly have the effect of criminalising people for conduct committed before any specific criminal intent has formed. While preparatory conduct should certainly constitute an offence, two key objections may be raised to an attempt to provide for this in the absence of an intention to pursue a sufficiently detailed plan.

First, this is contrary to ordinary principles of criminal responsibility, since people who think in a preliminary or provisional way about committing crimes may always change their mind and not implement their plans. This amendment allows a person to be prosecuted before a genuine criminal intention has taken shape.

Second (and once more, we acknowledge that this assertion will benefit from seeing what transpires in the courts in respect of recent arrests), as a matter of the practicality of securing a criminal conviction, the width of the offences as amended seems hardly helpful. Indeed it might be said to encourage authorities to act precipitately. Of course, with delay may lie danger, but to arrest persons on the basis of activities or possessions which cannot, at that point in time, be connected to any specific terrorist act risks failure in convincing the courts that a crime was in fact being prepared. It also, by corollary, might be said to expose a range of innocent activities to criminal sanction by casting the net so very wide.

Recommendation:

The usefulness of the amendments to the provisions outlined above which relate to preparatory offences should be further considered.

Yours sincerely,

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Anthony Mason Professor and Centre Director

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Appendix C.

Further material from the joint Bar Association of Queensland and Queensland Law Society submission to the Senate Legal and Constitutional Affairs Committee.

7. Public interest monitor

126. There is a vital role to be played by a Public Interest Monitor (PIM) in all aspects of the operation of any law that provides for control orders and preventative detention orders.

127. The PIM should be involved at **all stages** of the processes by which these orders are obtained and reviewed. The PIM also should monitor their enforcement.

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

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

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

131. The PIM has described his task as requiring a balance to be struck between two competing expectations:
"The *first is the community expectation that modern investigative agencies will have appropriate powers and technology available to them in combating contemporary crime.*
"The second expectation is that the erosion of fundamental rights of the individual that the granting of such powers necessarily involves will be minimised to the greatest extent possible by ensuring that the process of approving and using those powers is done strictly in accordance with the restrictions expressed by the Parliament."

132. The Bill would be considerably improved by imposing a requirement for a similar balance to be struck with respect to applications for control orders and preventative detention orders.