NSWCCL

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES INC

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29 November 2005

To Members of the NSW State Parliament

Re: Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005

The New South Wales Council For Civil Liberties urges you to reject the above Bill.

1. The Bill would be a substantial and dangerous erosion of essential civil liberties. It allows the detention of people on mere suspicion. It weakens one of the defences of democracy. Page 1

2. There are substantial problems with the details of the Bill. It allows detention without trial for up to ten years. There are insufficient protections against abuse. The standard of proof required is far too low. Innocent people will suffer. Page 1

3. The Bill is contrary to international law. International law explicitly limits the power to override civil rights to times of national emergency which *threaten the life of the nation.*[1] Page 9

4. Though protection from terrorist actions is itself a right, the Bill does not deal competently with the conflict of rights it is supposed exists. (That is, it is not balanced.) The rights it overrides help to protect a country from evils even greater than terrorism.

Many people died in order to obtain the rights this Bill would remove, and many more have died in defending them. Page 10

5. The Bill is likely to be counter-productive in the struggle against terrorism. Experience in England and Ireland and other countries has been that such powers are widely misused. The consequence is that discontent festers, and well-disposed people from targeted groups find it difficult to get a hearing. In this sense, preventative detention helped to bring about terrorist attacks. Page 12

6. The Bill is of no aid in protecting people from terrorist acts. No example, real or hypothetical, has been given in the public debate where existing powers would not be sufficient. Page 12

7. The Bill lends moral support, and attempts to give constitutional support, to a proposed act of the Commonwealth Parliament that is even more obnoxious than the NSW one. Page 12

Conclusion. The State Bill should be rejected. The Council for Civil Liberties urges you to vote against it, to press for those parties that support it to change their stance, and to publicly condemn its Federal counterpart. Page 12

[1] See the International Covenant on Civil and Political Rights Article 4 paragraph 1

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1. The Bill would be a substantial and dangerous erosion of essential civil liberties.

a. The Bill permits a person to be held in detention, without charge, for two weeks at a time. At the end of that time, there is nothing to prevent them from being held for a further two weeks, and then another, to a maximum of ten years.

The person will have an opportunity to be heard after some time—though the Bill does not specify when. But the evidence against them may (and undoubtedly will) be kept secret from them. It will be impossible for innocent persons to defend themselves successfully.

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

c. 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[2]. 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. 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 the detention [in either case].'[3]

The defences against misuse provided in the Bill are too slow, and the penalties are too light or not specified. The most important defence, the right of the accused person to know and to challenge what is alleged against them is effectively removed. So are the options of publicising misuse.

2. There are substantial problems with the details of the Bill

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 Federal Act, suppose that the powers are needed to prevent an attack 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 the NSW Bill is to *extend* the time that a person can be held from 48 hours under the Federal corresponding Bill, to two weeks, no serious effort at justification has been publicly attempted.

[2] The record of police forces in Australia, even at senior level, is too chequered for these things to be ruled out.

[3] Both examples come from a press release by John von Doussa QC, the President of the Human Rights and Equal Opportunity Commission, in relation to the Federal Bill.

Section 26D

Subsection 1. 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 24 hours away can be prevented by the use of existing laws. If a sufficient case can be made for passing the Bill at all—it has not been made yet—the powers granted should be limited to detention for 24 hours, with no possibility of renewal.

Subsection (1)(a). As argued above, 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.

Subsection (1)(b). This clause is inadequate to its purpose, which is to limit the legal use of the new police powers to those situations where lives can only be saved by their use. The requirement should therefore not be that detaining a person would *assist* in preventing a terrorist act, but that it is *essential* for that purpose. Anything else is open to substantial misuse.

Section 26 G

Unlike its Federal counterpart, this section does not require the police officer to provide any information she or he has that tells *against* the preventative detention of the person (contrary information). Since the person may not be given access to the grounds on which an order is made, it is an essential safeguard that this obligation lie on the police.

It is also essential that lying, failure to provide contrary information and recklessness with respect to the truth of their allegations by the police officers be made a crime. The penalties should be severe enough to underline the seriousness of such wrongdoing.

Section 26 I

Since the court is expected to jail people merely on the grounds that there is reasonable suspicion (not that it is reasonable to *act* on the suspicion) it will be next to impossible for persons with innocent relationship with other suspects to prove their innocence. The standard of evidence required by the court needs to be raised.

Section 26K

Subsection (2). As argued above, 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 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 weeks. Using the criteria in (7), 14 separate actions are planned. The same piece of planning could thus be used to repeatedly detain a person. Thus the intention of subsection (5) would be frustrated.

Similarly, while Subsection (7)(b) attempts to address the problem, it leaves the application 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 rejecting the Bill. No matter what phrasing is used, with a compliant judge, the power will be misused.

Section 26L

One of the more serious misuses of the police powers offered in this bill is the possibility of repeated interim detention orders for "different" future actions, without the detainee ever being brought to court. It would be a useful safeguard if there were a clause added at this point to prevent a person being subjected to a second interim order.

Section 26M

The proposed section would require 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. Just as there needs to be a severe penalty for giving false information in order to obtain a preventative detention order, so there needs to be a severe penalty for failing to produce evidence, whether at the first hearing or subsequently, 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.

The police officers who present material to court should be required to swear to it, and the penalties for doing so falsely made substantial.

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. Until the initial hearing, detainees may have no knowledge whatever of what is alleged against them, and so have no idea what information about their recent doings should be presented to the court. They may also not know what the court's reasoning was, in concluding that their detention would help to prevent a terrorist act.

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. They will also suspect that the court misunderstood them the first time—particularly if there are language problems as well.

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. It will also prevent applications which challenge the reasoning of the court rather than the evidence presented.

Subsection (4). This clause limits further applications for review. It should instead be made plain that there is an appeal to superior courts both on the matters of fact adduced 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).

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, how is the detainee to know what facts have been adduced?

There is a risk that the clause will be interpreted as denying a right to appeal to a superior court. It should instead be made plain that appeals are possible both on grounds of the first court's findings of fact and on the law. It is desirable, for instance, that a person can include in an appeal a demonstration of bias or unreasonable assumptions and reasoning by the first judge.

Section 26N

Subsections (4) and (6). 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.[4]

Section 26O Rules of evidence.

Subsection (2). This subsection proses a new standard of evidence—neither the criminal (beyond reasonable doubt) nor the civil (on the balance of probabilities). 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.'

The interpretation of this is unclear, and will be a matter for decision. Presumably it is to read with subsection 26D(1), which requires that there be reasonable grounds to suspect the person against whom a detention order is sought.

[4] The penalty is less than that for offence against subsection 26M(2), because a limited contact order is not a severe a restriction on a person as the denial of liberty.

It might be that courts will hold in some cases that although the balance of evidence favours making an order, the evidence is not trustworthy. On the other hand, a court might agree to hear hearsay evidence.

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.

Section 26P

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 5 years.

These restrictions, though understandable[5], make the rapid exposure of misuse impossible. There are risks involved, not only to detainees, but, 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) 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.

(iii) A representative of the Ombudsman should attend every court hearing of an application for preventative detention and be empowered to cross-examine witnesses and have all the powers that a lawyer would have in a normal trial.

Subsection (4)(a). The court should be required to set a time limit, normally no longer than 28 days, 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.

Subsection (b)

This subsection 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 PIC and ICAC, providing identifying material is omitted.[6]

[5] The opportunity to restrict publication and public access has long been in the law.
[6] Section 26ZC, while saving the powers of the Ombudsman under other acts, may not override a secrecy requirement imposed by the court.

Section 26U Power to enter premises.

This section permits police to enter premises, by force if necessary, in order to apprehend the person against whom a preventative detention order has been issued. To reduce the temptation for police to use applications for interim detention for fishing expeditions, a subsection should prevent material found in the course of such an entry being used in court cases.

Section 26X

This section permits detainees to be held in prisons, and child detainees to be held in juvenile correction 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 criminals

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.

Section 26Y subsections (2)(c) and (3)(a) and (b), and **Section 26Z** subsections (2)(c) and (3)(a) and (b).

These subsections contain contradictions.

Subsection (3) in each case prevents 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. The subsection is unconscionable.

With the detainee in detention for the duration of the prohibited contact order and subject to controls over who may be contacted and what may be said or transmitted, the restriction is also unnecessary.

Further, detainees should be told whom they may not contact, for reasons of humanity, because refusal by a person to allow a contact to be made will 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 family member, and they may not contact any other family member'.[7]

Subsection (2)(d). To avoid misinterpretation, this should require a detainee to be told about '*the* rights a person has to complain to the Ombudsman' and not '….any rights'.

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

Section 26ZA

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.

Section 26ZB

Subsection (5). Lawyers who represent a detainee should have access to the full grounds of the detention order, and not merely a summary, as this section at present says. Even where full access is denied to the detainee, the lawyer should have full access. If they are not given it, they are not able to represent their clients fully, and they may mount an extensive case for revocation of an order, only to find that their arguments miss the points made by the court.

Subsection (8). This subsection denies to lawyers the right to be given a copy of, or even to see, any document other than the detention order and the summary of grounds. 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.[8]

Such an order should, as before, have a time limit on the suppression.

Section 26ZC

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. Either the penalty should be a maximum of ten years' imprisonment, or there should be a section declaring that to remove doubt, other acts that punish torture and lesser forms of physical suasion are not overridden.

Sections 26ZD, E, F and G.

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.

The section is in some respects more enlightened than that in the corresponding Federal Bill, in that there is no restriction on one member of a detainee's family informing another. Nevertheless, in case the sections are misinterpreted or subsequently amended, this right should be made clear. Further, the list should be expanded to include the detainee's doctor,

[8] 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.

such medical specialists as the doctor recommends, a fiancé(e), and since many people are employed by organisations rather than individuals, a representative of the employer.

The CCL particularly welcomes subsection (2) of section 26ZE, which at least ensures that employers and others are given a credible reason for the employee's absence.[9]

Section 267F. Contacting the Ombudsman and the PIC.

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

Section 26ZI. Monitoring contact.

Subsection (6). Given the restrictions on disclosure of the content of a lawyer's discussions with a detained client (which the CCL welcomes), it is not clear what function the monitoring is supposed to serve.

Section 26ZL.

Subsections 7, 8 and 9. These subsections suppose that a minor, a person who is not of an age to make decisions of a legally significant nature, might nevertheless waive a right, provided one of his/her parents agrees.

This is unacceptable, and startling. Young people should not be allowed to waive their rights. The point of denying legal adult status is that they are too inexperienced and too little in control of their emotions to be able to make such decisions wisely.

Parents on thew other handhave no right to waive the rights of their children. This position is well established both in morality and in law.[10] The rights of parents are derived from the rights of their children to have their interests protected. Thus no right is given to allow parents to exercise their children's rights in a way that is contrary to those interests. The clause allowing parents and detainees together consent to waiving the young person's rights should be withdrawn.

26ZN Annual reports.

The invasions of civil liberties proposed by this Bill are so severe and the threats to democracy and public order from misuse of the provisions is 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 Bill would provide to corrupt democratic processes, reporting needs to be immediate.

[9] What would be the impact of projected Federal legislation on industrial relations if an employer dismissed an employee for absence from work in a case of unjustified detention?
[10] They have no right, for instance, to volunteer their children for medical experiments where there is any degree of risk; nor to require their child to donate a kidney, even to save the life of a sibling. They are not permitted to waive the child's entitlement to the duty of care owed by a school, on an excursion.

In the United Kingdom, reports are required every three months. The Police Commissioner here, likewise, should have to report 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, the Ombudsman or a representative should be present for every court hearing of preventative detention cases.

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

(C) As laid down in subclause (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 is such other manner as may become necessary, as well as reporting through Parliament.

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

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

26ZS Sunset clause

The Bill proposes 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. The Bill; weakens Australia's defences against it becoming a "managed democracy", like Singapore's or Malaysia's.[11] It should not be passed into law.

But if it is, there should be a sunset clause repealing it in one years.

3. The Bill is contrary to international law.

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.

[11] In both of these countries provisions originally designed to protect security have been used to prevent or inhibit opposition to government policy. In neither has their been a change of gevernment for decades.

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 of detention….2. Anyone who is arrested shall be informed, at the time of arrest, of the reason for his arrest and shall be promptly informed of any charges against him.'

Former judge[12] the Hon. Alastair Nicholson AO RFD QC argues that in international law it makes no difference whether detention is for punitive or preventative purposes.[13] Accordingly, accused persons should be separated from convicted persons and accused juveniles must be brought as speedily as possible for adjudication. (Article 10 b.) Everyone should have the right to be presumed innocent until proven guilty. (Article 14.2.) Everyone has the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him. (14.3.) 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. Everyone shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law.

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 exceptions in times of national emergency. That let-out is limited to times of national emergency which threaten 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 available (para. 4) as well as compensation in the case of a breach (para. 5).'[14]

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.

4. Conflict of Rights.

The Bill does not deal adequately with the conflict of rights between the right to life and the right to liberty that is its supposed justification. It does not balance these rights.

It is of course easy to make such a comment, and easy also to respond that the bill is balanced. If this part of the discussion is not to merely reflect intuition or subjective assessment, an account is needed of what balancing is.

[12] 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

[13] ibid.

[14] 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. Available on the Federal Parliamentary website at http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/submissions/sublist.htm

The noted writers Tom L. Beauchamp and James F. Childres give the following account.

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.[15]

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. (They bear obvious relation to the traditional discussion of just wars.) The powers granted in the Bill need to meet each of these requirements. They do not.

i. Much effort has gone into public assertions that the right to life is more important than freedom from detention without trial. Even so, that case is not complete. There is a traditional value that freedom is worth dying for. But this submission does not depend on that traditional Australian[16] value.

There is a risk that in the hands of a future government or police force, the powers granted in this bill will be used to conceal wrongdoing that is costing lives. It is also to be remembered that the liberties and rights which this Bill proposes to reduce 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.

We need to be careful, then, in asserting that the bill is justified, in that lives matter more than liberty. It has cost many lives to establish and many more to defend the liberties which this bill seeks to reduce.

The case from the Federal and State governments for the other requirements has been slight.

ii. The struggle against terrorism is not a struggle that can be finally won. The bill does nothing, in any case, towards halting or slowing the production of would be terrorists. Indeed, it is likely to be counterproductive in that respect.[17]

In respect of principle ii, then, the Bill must be judged by its capacity to save lives in spite of the harms it will cause and those it will permit.

[15] Tom L. Beauchamp and James F. Childres, **Principles of Biomedical Ethics**, Fifth Edition, Oxford University Press 2001
[16] and American and European
[17] See section 5 below.

iii. It is unlikely that the proposed act will save a single life that will not be as effectively saved by the use of other powers. There are laws already in existence that give powers of arrest, but do not deny the rights of those arrested. There are laws that enable people to be arrested, remanded and then tried if they are planning to commit violent actions. There are laws against incitement, and against conspiracy to commit crimes, including terrorist crimes, murder, and causing harm. There are new laws giving power to ASIO. These laws can already be used to prevent harm, as is witnessed by the recent arrest of people alleged to have plotted an attack. It must be shown that this law will prevent some *other* harms. To our knowledge, that has not been done publicly.

iv. Since in this submission we argue that the powers are not necessary at all, the principle of minimal infringement should not come into account. In section 2 above, however, are included a number of changes that would reduce the infringements.

v. Similarly, there is much that should be done to minimise the negative effects. Some of these, also, are outlined in section 2.
vi. The most worrying risks of partiality lie in the operation of the Bill, not in its substance. Consideration should be given to minimising actual and perceived targeting of Muslims alone.

5. The Bill is likely to be counter-productive.

It is almost inevitable, first, that the power will be abused. It will be used, at some time, when a policeman is certain that a suspect is guilty, does not have proof, and will make up the evidence. It may be used, as was argued above, for revenge or for political advantage.

It is also worth noting at this point the opinion of Michael Howard, Leader of the Opposition of the House of Commons, in the just completed debate on extending the time a person may be detained. He referred to experience in Northern Ireland of the complete failure of detention orders to diminish terrorist acts, and their tendency to increase people's sense of grievance. These things fertilise the ground on which terrorists grow. They do this by encouraging the strident voices in favour of action, any action, that will attack the source of the grievance, and by making it difficult for people with more moderate views to get themselves listened to.

6. The use of other powers.

The Bill is of no aid in protecting people from terrorist acts. No example, real or hypothetical, has been given in the public debate where existing powers would not be sufficient. The points here have been made repeatedly in relation to the Bill's Federal counterpart.

7. The Federal counterpart.

The Bill, bad as it is, is not as bad as its Federal counterpart. That bill would permit house arrest for a year, with no appeal to a higher court. It would probably permit indefinite house arrest. Its secrecy clauses will prevent the inevitable misuses that will occur from being discussed; in particular, they will prevent publication of them, except as an act of civil disobedience.

The Federal Bill also prevents people from instituting proceedings to halt detention. Its sedition laws criminalise legitimate democratic activity.[18] . The bill is full of mistakes, ill-defined terms, misunderstandings, and unnecessary and dangerous attacks on fundamental freedoms. Many of its provisions do not balance the conflicting fundamental principles it deals with.

By passing the New South Wales Bill, the State Parliament would give constitutional support to this Federal one, and give it moral support as well.

Conclusion. The State Bill should be rejected. The Council for Civil Liberties urges you to vote against it, to press for those parties that support it to change their stance, and to publicly condemn its Federal counterpart.

Martin Bibby, for the Council for Civil Liberties

[18] For example, demanding that an incompetent or immoral monarch abdicate; declaring that a governor general or a prime minister is stubborn or prejudiced; advocating the abolition of the Senate.