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International Commission of Jurists
Eminent Jurists Panel

Sydney Public Hearings: 14 – 15 March 2006

Written outline of submissions

The New South Wales Council for Civil Liberties ('CCL') thanks the Eminent Jurists Panel for the opportunity to present this summary. We would be happy to also provide copies of the submissions we made to the Federal and State Governments concerning their legislation if the panel so wishes.

Australia has a federal system of government, with power divided between the Federal (i.e. national) Government, six state governments, two mainland territory governments, and Norfolk Island.

This submission is confined to the Acts and actions of the Federal and New South Wales governments.

<i>The threat of terrorism in Australia since 2001</i>	2
<i>The protection of human rights in Australian law</i>	3
<i>The Australian governments' response</i>	4
<i>Offences Relating to "Terrorist Acts"</i>	5
<i>Offences Relating to "Terrorist Organisations"</i>	6
<i>Control orders and Preventative Detention Orders</i>	8
Detention without charge – Federal Laws	9
Detention without charge – NSW Laws	14
Control orders	17
Compliance with International Law	21
<i>Financing a terrorist organisation</i>	22
<i>Search & Seize Powers</i>	24
<i>Sedition</i>	24
<i>Impact on the role of the judiciary</i>	26
<i>Treatment of terrorism suspects in NSW – Category "AA" inmates</i>	27
<i>Other Laws</i>	30
<i>Conclusion</i>	31
<i>Appendices</i>	33



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The threat of terrorism in Australia since 2001

Australia has not had any terrorist attacks on its soil since 2001. The “National Counter-Terrorism Alert Level” has been at “Medium” since the inception of the four-tier system in June 2003.¹

In 2004 Jack Roche pleaded guilty to charges under s 8(3C)(a) of the *Crimes (Internationally Protected Persons) Act 1976* (Cth) of conspiring to bomb the Israeli embassy in Canberra and on 1 June 2004 was sentenced to nine years in prison.² On 6 April 2005 Zaky Mallah was acquitted by a jury of charges of committing an act in preparation for or in the planning of terrorist act, contrary to s 101.6 of the *Criminal Code Act 1995* (Cth) ('CCA'). He pleaded guilty to a charge of threatening to kill a Commonwealth officer and was sentenced to 2.5 years imprisonment.

On 26 February 2006 a jury found Joseph Terrence Thomas guilty of receiving funds from a terrorist organisation and using a falsified passport. He was acquitted of two charges of providing resources to a terrorist organisation.³ Mr Thomas is due to be sentenced on 31 March 2006, and his lawyers have indicated that they intend to appeal his convictions.

On 8 November 2006, 17 people were arrested on terrorism related charges in simultaneous raids in Sydney and Melbourne.⁴ As discussed below, the suspects arrested in NSW are being held in a maximum security facility as a matter of course although they are yet to be found guilty of any offence. This arguably breaches Article 10 (2) (a) of the *International Covenant on Civil and Political Rights* (ICCPR) which states that accused persons shall be subject to separate treatment appropriate to their status as unconvicted persons. A lawyer acting for nine of the Sydney accused has claimed publicly that his clients are being denied adequate medical treatment.⁵

A number of Australians died following bombings at Bali in 2002 and 2005. It is widely believed that Bali was chosen by the bombers because it was a popular holiday destination for Australians. There has also been an attack on the Australian embassy at Jakarta in 2004.

Two Australian citizens were held at Guantanamo Bay. One, David Hicks, is still there. The Australian Government rhetoric echoes that of the United States—that Hicks trained as a terrorist, that he should be tried by a military commission, and that the proposed trial is fair. This is in sharp contrast to the actions of the United Kingdom government in demanding and securing the release of its nationals from

¹ The levels are “Low”, “Medium”, “High” and “Extreme”.

<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/F2ED4B7E7B4C028ACA256FBF00816AE9?OpenDocument>

² See: *R v Roche* [2005] WASCA 4 (appeal against sentence)

³ ³ “The 70 files of evidence central to case against 9 terror accused”, Sydney Morning Herald (online), 26/02/2006, <http://www.smh.com.au/news/national/70-files-of-evidence-against-9-terror-accused/2006/02/25/1140670304204.html> (accessed February 2006).

⁴ “Raids disrupt ‘imminent’ attack”, The Age (online), 08/11/2005, <http://www.theage.com.au/news/national/terrorist-attack-disrupted/2005/11/08/1131212027799.html> (accessed February 2006).

⁵ “The 70 files of evidence central to case against 9 terror accused”, Sydney Morning Herald (online), 26/02/2006, <http://www.smh.com.au/news/national/70-files-of-evidence-against-9-terror-accused/2006/02/25/1140670304204.html> (accessed February 2006).

Guantanamo Bay. The Australian government's response, or lack thereof, to the predicament of its citizens at Guantanamo Bay is relevant to the domestic response to terrorism as it clearly demonstrates its willingness to sacrifice fundamental principles of due process and the rule of law where accusations of terrorism are involved.

The protection of human rights in Australian law

In evaluating Australia's response to the threat of terrorism it is critical to recognise that Australian law offers less protection for basic human rights than any other Western democracy.

Australia is unique amongst Western democracies in lacking a statutory or constitutional bill of rights.⁶ The Australian Constitution protects very few fundamental rights. The limited protections that do exist generally apply only to the Federal government, and not to State governments. Indeed, in enacting recent anti-terrorism legislation constitutional "restrictions" were openly cited as the reason for obtaining State cooperation in implementing a regime for extended preventative detention without charge.⁷

Although Australia has acceded to the ICCPR, international treaty obligations are not part of Australian law unless enacted in domestic legislation.⁸ Neither the ICCPR nor other international human rights treaties to which Australia is a party have been comprehensively enacted into domestic law. It should also be noted that while article 4 of the ICCPR provides a mechanism by which signatory states may derogate from certain obligations under the treaty, this exception only applies "in time of public emergency which threatens the life of the nation". The state of emergency must also be declared and the Secretary-General of the United Nations notified.⁹ In Australia's case neither of these pre-conditions have been met.

The common law also inadequately protects human rights. There is a presumption in statutory interpretation that the legislature does not intend to abrogate common law rights without clear and unambiguous language.¹⁰ However, this does not protect against legislation that deliberately impinges fundamental rights. The inability of the common law to protect fundamental rights was starkly illustrated in the recent case of *Al-Kateb*,¹¹ where the High Court held by a 4-3 that a failed asylum seeker with no reasonable prospects of being deported could be held in immigration detention indefinitely, potentially for life.

As a consequence, fundamental human rights in Australia are precariously placed. The absence of a bill of rights means that the courts are ill equipped to protect rights against executive and legislative incursions. The legislature must therefore be especially vigilant in ensuring that measures that impinge basic rights are

⁶ Thampapillai V., *A Bill of Rights for New South Wales and Australia*, The Law Society of New South Wales, Discussion Paper (2005).

⁷ Prime Minister John Howard, "Counter-Terrorism Laws Strengthened", Media Release, 08 September 2005. http://www.pm.gov.au/News/media_releases/media_Release1551.html (accessed February 2006).

⁸ *Kioa v West* (1985) 159 CLR 550 at 570 (Gibbs CJ)

⁹ ICCPR Article 4(3).

¹⁰ *Coco v R*, (1994) 179 CLR 427

¹¹ *Al-Kateb v Godwin* [2004] HCA 37

measured, proportionate and adequately justified. The CCL does not believe that the legislature has adequately discharged this duty.

The Australian governments' response

Australia's legislative response since 2001 is characterised by substantial increases in the powers of the security services, the police and the Federal Attorney General, and the over-ruling of important human rights with limited safeguards. At least 29 Acts dealing with terrorism have been passed by the Federal Parliament,¹² and a further bill is before the Parliament at the time of writing.¹³

There has been a good deal of opposition to a number of the changes, mainly from civil libertarians, legal organisations and some sections of the media. There has also been opposition within the parliaments, from a few members of the major political parties, together with most of the minor parties. These protests have led to a few additional safeguards being inserted in the laws. However, the majority of the Liberal, National and Australian Labor Party members of parliament have consistently supported the changes.¹⁴

As a party to the ICCPR, Second Optional Protocol to the ICCPR, the Convention against Torture and the Convention on the Rights of the Child, Australia has international obligations to ensure that the death penalty, torture, cruel, inhuman or degrading treatment are prohibited. Disturbingly these obligations are being undermined by government policy and legislation. CCL is concerned that leading Australian politicians (including the Prime Minister and Opposition Leader) have welcomed the death penalty for terrorists such as the Bali Bombers and Osama bin Laden.¹⁵ CCL is also concerned about reports that Australian authorities have participated in the United States' extraordinary rendition programme with respect to Mamdouh Habib.¹⁶

CCL is deeply disturbed by (unconfirmed) press reports that Australia has signed a memorandum of understanding with the United States relating to the use of air marshals on international civilian flights that permits extradition of terrorist suspects to the United States from Australia without the need to obtain a guarantee that the suspects will not be tortured or executed.¹⁷

Anti-terrorism laws have been passed according to the usual parliamentary processes, except that with some, very little time for response by parliamentarians and members of the public was allowed. This was especially the

¹² See appendix 1

¹³ The Telecommunications (Interception) Amendment Bill 2006. A Bill of overlapping concern is The Australian Citizenship Bill 2005, which proposes to give the Australian Security Intelligence Organisation veto powers over applications for citizenship—powers which allow no discretion to the minister. Its reasons for its decisions will be kept secret.

¹⁴ The Liberal and National parties form a coalition government in the Federal Parliament and the opposition in each state and territory. The Australian Labor Party is in office in each parliament except the Federal one, where it forms the opposition. Members of the Greens and Australian Democrats parties take a consistently pro-rights position.

¹⁵ see http://www.nswccl.org.au/issues/death_penalty/aust_policy.php
<http://www.nswccl.org.au/issues/death_penalty/aust_policy.php>

¹⁶ SBS-TV, 'The extraordinary rendition of Mamdouh Habib', *Dateline* (9 March 2005),
<http://news.sbs.com.au/dateline/index.php?page=archive&artmon=03&fyear=2005#>
<<http://news.sbs.com.au/dateline/index.php?page=archive&artmon=03&fyear=2005#>>

¹⁷ Michael McKenna, 'Extradition covers death penalty', *Courier Mail* (Brisbane), 21 September 2004.]

case with the *Anti-Terrorism Act (No. 2) 2005* (Cth) and related state legislation such as the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW) (together the '2005 Amendments').

This most recent legislation is of particular concern to the CCL as it introduces a regime of preventative detention and control orders that signals a radical departure from the long established principles that a finding of criminal guilt must precede the deprivation of individual liberty in a liberal democracy. This regime also abandons principles of due process and procedural fairness in the issuance of such orders. The 2005 Amendments also introduced excessively broad and ill-conceived definitions of a range of "terrorist related" offences including, sedition, financing terrorism and offences related to "terrorist organisations".¹⁸

Offences Relating to "Terrorist Acts"

All state and territory governments follow the Federal definition of 'terrorist act' set out in s 100.1 of the CCA.¹⁹

A 'terrorist act' is defined as an action or threat of action where the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and the action is done or the threat is made with the intention of:

- (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
- (ii) intimidating the public or a section of the public.

The action must cause (or threaten to cause) serious harm to persons or property, create a serious risk to the health or safety of the public or a section of the public or seriously interfere with, seriously disrupt or destroy an electronic system. Electronic systems include, *inter alia*, information systems, a telecommunications systems and financial systems. There is an exemption from the definition where the action is advocacy, protest, dissent or industrial action that is not intended to cause serious physical harm, death, endanger the life of another person or create a serious risk to the health or safety of the public or a section of the public.

The definition is arguably too broad, including as it does property damage and disruption of a transport system, an information system or a telecommunications system. The potential over-reach of the breadth of the definition is highlighted by the wide range of offences related to a "terrorist act".

The following relevant offences are included in the CCA:

Section 101.1 of the Code makes it an offence to commit a terrorist act;

Section 101.2 makes it an offence to be involved in training related to a

¹⁸ Through the expansion of the definition of "terrorist organisation"

¹⁹ The full definition is contained in Appendix 2

terrorist act where the person knows or is reckless as to the training being connected to a terrorist act. The offence is still made out if no terrorist act occurs or there is no specific terrorist act the training relates to;

Section 101.4 makes it an offence to possess a thing connected with the commission of a terrorist act where the person knows or is reckless as to the thing being connected with a terrorist act. The offence is still made out if no terrorist act occurs or there is no specific terrorist act that the thing relates to;

Section 101.5 makes it an offence to collect or make documents likely to facilitate a terrorist act where the person knows or is reckless as to the document being connected with a terrorist act. The offence is still made out if no terrorist act occurs or there is no specific terrorist act that the document relates to;

Section 101.6 makes it an offence to do any act in preparation for, or planning of, a terrorist act. The offence is still made out if no terrorist act occurs or there is no specific terrorist act that the document relates to;

These offences carry penalties ranging from 10 years for recklessly collecting or making documents under section 101.5, to life imprisonment for commission or planning of a terrorist act under sections 101.1 and 101.6. For each of the sections listed the jurisdiction is extended, by operation of section 15.4 of the CCA, to actions wherever they occur (not limited to Australia).

Offences Relating to "Terrorist Organisations"

Section 100.1 of the CCA defines a terrorist organisation to include an organisation that '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)'.

Under the 2005 Amendments this definition was expanded to include an organisation that 'advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)'. Advocating a terrorist act involves directly or indirectly counselling, urging or providing instruction on the doing of a terrorist act; or directly praising 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 that the person might suffer) to engage in a terrorist act.

It is notable that there need only be "a risk" (not a substantial or reasonable risk) that the praise "might" lead someone to engage in a terrorist act. It is arguable that there will always be *some* risk that a person (especially one of limited age or capacity) might engage in a terrorist act in response to such praise, therefore this qualification is arguably of little effect.

An organisation can be officially labelled a 'terrorist organisation' by a court or by the federal Attorney-General. Nineteen organisations are presently listed as

terrorist organisations – eighteen one of them are Muslim and all have been nominated by the Attorney- General.²⁰

Not only is the definition of “advocates” very unclear and too broad but it is not clear who within the organisation can be defined for that purpose to have said to have advocated terrorism.

Offences in the CCA relating to such organisations include:

102.2 Directing the activities of a terrorist organisation

Penalty: Imprisonment for up to 25 years

102.3 Membership of a terrorist organisation

Penalty: Imprisonment for up to 10 years.

102.4 Recruiting for a terrorist organisation

Penalty: Imprisonment for up to 25 years.

102.5 Training a terrorist organisation or receiving training from a terrorist organisation

Penalty: Imprisonment for up to 25 years.

102.6 Getting funds to or from a terrorist organisation

Penalty: Imprisonment for up to 25 years.

102.7 Providing support to a terrorist organisation

Penalty: Imprisonment for up to 25 years.

102.8 Associating with terrorist organisations

Penalty: Imprisonment for up to 3 years.

As detailed above, it is a criminal offence to be a member of a terrorist organisation or to associate with one. The broadened definition of a terrorist organisation arguably means that, when an organisation's leaders praise a terrorist act, every member of that organisation instantly becomes a criminal. ‘Praising’ a terrorist act does not mean that the organisation is actively engaged in organising or inciting terrorist acts, presumably it will be enough simply to express one’s opinion. Such an opinion, in the current climate, is a dissenting opinion. This provision criminalises such dissent.

It is the CCL’s view that any incitement to violence or preparation for a terrorist act should be dealt with under offences specifically directed at that activity and at the persons engaged in that activity. The present laws have a flavour of political suppression about them which is unacceptable in any democracy. Banning of

²⁰<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>

organisations on the basis of alleged advocacy rather than activities is fraught with danger.

The expanded definition places with active terrorist organisations those organisations not involved in any terrorist activity but rather expressing opinions about terrorist activity. This is clearly unacceptable. Any Tamil or Palestinian support organisations could be banned under these provisions. The consequences of the banning under these particular provisions are such that the persons who are members including even informal members are subject to long terms of imprisonment and other persons are not even able to consort with members of this organisation and also face imprisonment. These drastic provisions, if they have any place at all, should only apply to organisations which are active terrorist organisations, that is organisations which are actively involved in the preparation of terrorist acts.

People innocent of any terrorist activity could find themselves suddenly facing many years in prison having done nothing more than join a support organisation out of sympathy for, for instance, the Palestinian or Tamil causes. This is clearly a disproportionate response to the threat of terrorism and is opposed by the CCL.

This poorly drafted and over-reaching definition of "terrorist organisation" breaches an individual's freedom of expression, including potentially the freedom of political expression, and freedom of association. This arguably breaches ICCPR articles 18, 19 and 22.

Control orders and Preventative Detention Orders

Control orders allow for rolling 12 month orders that impose a range of restrictions on what a person may do, including subjecting a person to house arrest. Preventative detention orders allow for a person to be detained without charge for up to 14 days, and potentially indefinitely if sequential orders are sought.

A person can be subject to a control order or preventative detention order even though they have not have 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. Constitutional difficulties restrict the Federal (but not necessarily the State) government's ability to detain people without charge.

Specifically, the separation of powers set out in the Constitution makes the adjudication and punishment of criminal guilt for *Federal* offences the exclusive domain of the judiciary. According to Brennan CJ, Deane and Dawson J in *Lim*:²¹

[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.

Rather than acknowledge and uphold the importance of this protection to individual liberty, the Federal and State governments instead colluded in an attempt to circumvent the Constitution. This was purportedly achieved by limiting

²¹ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 per Brennan CJ, Deane and Dawson JJ.

to two days the length of time a person can be preventatively detained under Federal law and introducing comparable state legislation with a 14 day limit.²²

Detention without charge – Federal Laws

In 2003 the Australian Security Intelligence Organisation (ASIO) was given the power to detain a person for 48 hours for questioning.²³ Written permission must be obtained from the Federal Attorney General, and a warrant then obtained from a list of former judges. It could not be made by a court for constitutional reasons relating to the separation of powers doctrine. Detainees can complain to the Inspector General of Security Services, who can report to the Parliament.

Last year, the Federal and State governments passed legislation providing for the detention, on the basis of "reasonable suspicion" that the detention will prevent a terrorist act.²⁴ Each new possible act can be the basis of a fresh Preventative Detention Order.

Section 105.1 of the CCA sets out the object of the division, which is to allow a person to be taken into custody and detained for "a short period of time" in order to:

- a. Prevent an imminent terrorist act occurring; or
- b. Preserve evidence of, or relating to, a recent terrorist act.

Section 105.4 sets out the bases for applying for and making preventative detention orders. An Australian Federal Police (AFP) member may apply for a preventative detention order and it can only be made by an issuing authority if:

- a. There are reasonable grounds to suspect that the subject:
 - i. Will engage in a terrorist act; or
 - ii. Possess a thing that is connected with the preparation for, or the engagement of a person in a terrorist act; or
 - iii. Has done an act in preparation for, or planning a terrorist act; and
- b. Making the order would substantially assist in preventing a terrorist act occurring; and
- c. Detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph b.

A terrorist act in that context means one that is imminent and must be one that is expected to occur at some time within the next fourteen days.²⁵

Alternatively, under sub-section 6 an AFP member may apply for an issuing authority may make a preventative detention order if he or she is satisfied that:

- a. A terrorist attack has occurred within the last twenty-eight days; and

²² Notwithstanding this, there are arguably still grounds for a constitutional challenge to the validity of both control orders and preventative detention orders.

²³ The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003

²⁴ The Anti-Terrorism Act (No. 2) 2005 (Commonwealth) and the Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005 (NSW)

²⁵ Section 105.4(5)

- b. It is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and
- c. Detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph b.

In other words, the person to be subject of a preventative detention order need not be a suspect planning or preparing for such an act but may also be a person who merely has evidence or access to or control over or some connection with evidence that is sought to be preserved relating to a terrorist act which has occurred.

This means that a person with no knowledge at all of a terrorist act which has occurred, but who somehow has some connection with evidence sought to be preserved in relation to that terrorist act, 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.

Further, this provision enables the detention of a person even if there is no evidence that would lead to their being able to be arrested or convicted for any criminal offence. Again, this is unprecedented in Australia and is contrary to established notions of the rule of law.

The issuing authority for an initial preventative detention order which provides for detention for up to 24 hours, includes senior AFP members.²⁶ An ordinary AFP member may apply to an issuing authority for an initial preventative detention order.²⁷ This raises the prospect of a decision to detain a person without charge for 24 hours being authorised by a request from one police officer to another, without the involvement of an independent body.

While preventative detention orders cannot apply to people under the age of sixteen years and the applicant must disclose any information they have about the person's age, there is no requirement for the applicant to take active steps to confirm the person's age.²⁸ If the applicant is mistaken and the person is in fact under the age of sixteen years, then a person under that age could in fact be detained. This eventuality is more likely where that person does not speak English, or has some intellectual disability which impairs their understanding.

While an initial preventative detention order is in force, under s 105.11 an AFP member may apply to an issuing authority for a continued preventative detention order to detain the person for up to a total of 48 hours (as discussed below this is extended to 14 days under comparable state legislation). Judges, federal magistrates, retired judges and certain AAT members are issuing authorities for the purpose of continued preventative detention orders.²⁹

There is no requirement to provide any evidence in support of such an application. All that is required is that the application must be in writing and set out the facts and other grounds upon which the AFP member considers that the orders should

²⁶ See section 100.1(1)

²⁷ Section 105.7(2)

²⁸ Section 105.7(2)(d)

²⁹ Section 100.1(i)

be made.³⁰ The application must set out information that the applicant “has” about any periods for which the person has been detained under a corresponding state preventative detention law, without requiring the AFP member to make any enquiries in that regard.³¹

The person the subject of a preventative detention order may be detained in an ordinary prison or remand centre.³² That is, a person may be held with convicted criminals even though that person has not committed any crime themselves. Particularly in circumstances where a person can be held in detention because of protection of evidence, this is clearly unacceptable.

While a person is being detained under a preventative detention order there are severe restrictions on their ability to contact others.³³ The person is entitled to contact one of his or her family members and his or her spouse or flat mate and a person with or for whom he or she works but solely for the purpose of letting the person contacted know that he or she is safe but is not able to be contacted for the time being.

The person being detained is specifically stated not to be entitled to disclose the fact that a preventative detention order has been or the fact that the person is being detained or the period for which they are being detained. In other words, a person is not entitled to give any other details as to why they are unable to be contacted. They cannot say that they are being detained. One can only imagine the distress and concern this could cause to a spouse or close family member or indeed business partners or work mates.

The person is entitled to contact the Commonwealth Ombudsman or their lawyer, but they may only contact their lawyer for certain limited purposes. Again, if the lawyer is subject to a prohibited contact lawyer, then the person is not entitled to contact the lawyer of his or her choice.³⁴ Of further concern is that contact with another person, including ones 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.³⁵

Although any communication between a person and their lawyer is not admissible in evidence against the person in any proceedings in court,³⁶ and under s 105.50 does not affect legal professional privilege, the ability for a person to freely communicate with his or her lawyer to enable their lawyer to take proper instructions to mount a challenge against the preventative detention order will be severely hampered by the presence and monitoring of the contact by the police officer.

An AFP member may apply for a prohibited contact order that prohibits the subject of a preventative detention order from contacting a specified person.³⁷

³⁰ Section 105.11(2)

³¹ Sections 105.11(2)(e) and (f)

³² Section 105.27

³³ Section 105.34

³⁴ Section 105.37(3)

³⁵ Section 105.38

³⁶ Section 105.38(5)

³⁷ Section 105.15

This could include the person's chosen lawyer or any member of the person's family or a de-facto spouse. There is no requirement that person being detained be informed that a prohibited contact order has been made or the name of the person specified in a prohibited contact order. This raises the question as to how the person is to know, respond to or query the nature of the orders made against them either in a court or via the ombudsman. This is a breach of natural justice.

There is a requirement that the police officer must arrange for the assistance of an interpreter if the police officer has reasonable grounds to believe that the person is unable, because of inadequate knowledge of the English language or a physical disability, to communicate with reasonable fluency in that language.³⁸ However, that the lawfulness of the person's detention is not affected by a failure to comply with that requirement. In other words, even if a person does not understand why they are being detained, then the detention is lawful. This is an abrogation of natural justice and is objectionable.

Section 105.32 requires that a copy of the order be provided to the affected person as soon as practicable after the person is first taken into custody including a summary of the grounds on which the order is made. It does not, however, require information to be included in the summary if the disclosure of the information is likely to prejudice national security. Nor does the police officer have to produce a copy of the order to the person being taken into custody at the time the person is taken. Again, this is an abrogation of the rule of law and natural justice.

Section 105.32(6) provides that a person who is being detained may request that copy of the order or the summary be given to the person's lawyer, of course, as long as that lawyer has not been specified as a person not to be contacted. Nothing entitles the lawyer to be given a copy of or see a document other than the order, the summary or the extension or further extension.

This is of great concern, because it means that a person and their lawyer need not be given all the information upon which the detention order is based. This will mean that the detained person is at a grave disadvantage in challenging the validity of the preventative detention order.

Section 105.39 provides that special contact rules apply to people under the age of eighteen or who are incapable of managing their own affairs. Such a person is entitled to have contact with a parent or guardian (including, if applicable, two parents or guardians) or another person who is able to represent the person's interest.

As opposed to other persons, people under the age of eighteen or who are incapable of managing their own affairs are entitled to disclose to the contactable person the fact that the order has been made that they are being detained and the period of the detention.³⁹ The person is entitled to have that contact for not less than two hours per day during the period of detention.⁴⁰ Again, the contact must be monitored in terms of its meaning and content by a police officer.⁴¹

³⁸ Section 105.31

³⁹ Section 105.39(3)(b)

⁴⁰ Section 105.39(5), CCA

⁴¹ Section 105.39(7), CCA

Section 105.41 provides that the person the subject of the order commits an offence if they disclose to any other person the fact that the order has been made, that they are being detained or the period of the detention. The penalty is imprisonment for five years. It only applies while the person is being detained.

In relation to lawyers, a lawyer may not disclose to any other person the fact that a preventative detention order has been made, the fact that the detainees being detained or the period or any other information that the detainee gives the lawyer during the course of the period that the person is being detained unless the disclosure is made for the purpose of court proceedings for a remedy, or by way of a complaint to the Commonwealth Ombudsman or other authority about the detainee's treatment in detention.⁴² The penalty is five years imprisonment.

Similarly, a parent or guardian of a person under the age of eighteen or who is incapable of managing their own affairs commits an offence if they make similar disclosures unless for the purpose of proceedings or complaints. Imprisonment for five years is the maximum penalty.⁴³

In relation to a parent or guardian, they do not contravene this prohibition if they let another person know that the detainee is safe but is not able to be contacted for the time being.⁴⁴ The same defence does not appear to apply to lawyers. Accordingly, a lawyer is not in a position to tell a family member who contacts them and is concerned for the welfare of the detained person that the person is safe but unable to be contacted for the time being. This is an extraordinary provision.

If the detained person tells someone else that they have been detained, then the person who has been given that information commits an offence if they pass on the fact that a preventative detention order has been made, the person is being detained, the period for which they are being detained or any other information given to them by the detained person.⁴⁵ This carries a penalty of five years gaol.

This means that if the spouse of a detained person knew that the person had been detained and told the detained person's mother, for instance, of the fact that the person had been detained, the spouse could be liable to five years imprisonment. This provision is harsh and unconscionable.

Section 105.42 deals with questioning of a person while under detention. Questioning is only allowed for limited purposes. Nothing, however, prevents the person's detention being interrupted pursuant to a questioning warrant issued to an officer or an employee of the Australian Security Intelligence Organisation.

It is noted that detention orders apply to material witnesses as well as the suspects in certain circumstances. Yet material witnesses who are completely innocent of any crime will be treated in exactly the same way as a terrorist suspect. This includes restrictions on contacting their own family members and employer. These secrecy restrictions apply automatically whether there is any

⁴² Section 105.41(2), CCA

⁴³ Section 105.41(3), CCA

⁴⁴ Section 105.41(4), CCA

⁴⁵ Sections 105.41, CCA

requirement for them or not. These provisions run counter to the principle that there should be public accountability in the administration of justice unless some reason is shown otherwise. Parties cannot usually get a suppression order in court matters unless there is a reason to do so. Therefore it seems completely unnecessary to have automatic secrecy provisions apply irrespective of whether there is any need for secrecy or not.

Furthermore, the secrecy provisions are so onerous that it is the view of the CCL that they are set up to fail. In this regard many persons living in large a family unit would simply find it impossible not to tell other members that one of the members of the family unit had been detained. It is the view of the CCL that the effect of these provisions is to criminalise innocent people who are simply concerned about their family members and want to express that concern to other members of their family and these members have effectively disappeared. Such people will be turned into criminals facing up to five years in gaol for simply telling another member of their family about their detention. This is an unbelievably draconian piece of legislation to turn innocent family members into criminals liable for prosecution.

A further matter of concern is although secrecy provision applies to the detainee and even members of their family, it would seem that the Government and Government agencies responsible would be able to release information to the public and media at a whim thus creating a spin on such information was the detainee and his family and representatives would be of a clear disadvantage effective of any such spin.

Detention without charge – NSW Laws

As outlined above, due to Constitutional restrictions on the ability of the Commonwealth government to detain a person without charge, the State and Territory governments introduced legislation implementing a parallel preventative detention scheme allowing for detention without charge for up to 14 days.

The permits the NSW Supreme Court to issue a preventative detention order on the application of a policeman if it is thought that that might prevent a terrorist act. This requires that a person be put in jail, without charge, for two weeks at a time. No proof is required—just reasonable grounds for suspicion.

There has been no public justification for the need for such an lengthy period of detention without charge. Under s26A of the *Terrorism (Police Powers) Act 2002 (NSW)* the object of the preventative detention regime is stated as:

to allow a person to be taken into custody and detained for a short period of time in order to:

- (a) prevent an imminent terrorist act, or
- (b) preserve evidence of, or relating to, a recent terrorist act.

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.

By no means can 14 days be reasonably classed as a "short period of time". This should be contrasted with normal detention following arrest where a person must be brought before a judicial officer or released within 4 hours.⁴⁶

A detainee need not intend harm to any person. Under the very broad definition of 'terrorism' adopted by Australian governments, damage to property or planning to disrupt a transport system will do, provided that the intention is to achieve political change through intimidation.

A person can also be detained to preserve evidence concerning a terrorist action that has already happened. As with the Federal legislation, an innocent person may be detained indefinitely.

Unless the person detained is younger than 18, they can be held in a prison, in company with convicted criminals. A young person (16-18) can be held in a juvenile detention centre or a juvenile correction centre.

Secrecy

The hearings, if held at all, will be held in secret. Revealing the details can lead to five years' imprisonment. The Act allows the courts to keep the evidence secret from detainees and their lawyers.

Restrictions on contact

A detainee may contact a family member and an employer or fellow worker, but not a fiancée or a doctor (unless the policeman in charge permits it). Each of these may be told of the reasons for the detention.

Prohibited contact orders

The court may also issue a prohibited contact order, prohibiting a detainee from contacting certain persons (which may include any of the above). The detainee need not be informed who they are, yet it will still be an offence for that person to make contact.

Access to lawyers

Although a detainee may be visited by a lawyer, the officer detaining them must be able to hear their conversation; and if it is not in English, an interpreter must be present to translate it.

The powers given under the Act are open to misuse.

A person who has been held for a fortnight can be released, then immediately rearrested and held for a further two weeks, and so on. All that is needed is that police choose a new date when a terrorist offence is supposed to be planned.

An innocent person may be detained by mistake, through carelessness or as a result of police malice. An innocent association with a person who turns out to be a terrorist may lead to detention. The powers could be used for political

⁴⁶ *Crimes Act 1900* (NSW) s 356D

purposes. The secrecy provisions would make it difficult for the wrong to be remedied.

There is no automatic right to contact a doctor.

Safeguards

1. In the normal situation, an application will be presented to the NSW Supreme Court. Persons against whom a preventative detention order or a prohibited contact order is sought will be present, with their lawyers. Applicants for orders will have to swear to their evidence, and thus make themselves liable to penalties if they swear falsely. Judges may refuse to issue orders.

But where the case is deemed urgent, these safeguards are omitted. Evidence can be given and an *interim* court order made over the telephone, and the police can then arrest and detain a person at once.

2. A detained person will be given a copy of the detention order, normally with the grounds on which it was made included. But if the information is deemed likely to prejudice national security, the grounds may be omitted. A detainee may *never* know what was alleged.

3. An interim order lasts at most 48 hours, unless a hearing is held sooner. But one interim order may be followed by another.

4. The police officer who applies for an order is required to disclose everything of which he/she is aware that would tell against the making of the order.

5. Permission to seek a detention order must be obtained from a senior police officer.

6. There are penalties for inhumane treatment (two years' imprisonment). What is said during detention cannot be used in evidence. These requirements reduce the likelihood of forced confessions being extracted.

7. Detainees who can produce new evidence can apply to the Supreme Court to have an order revoked. They may complain to the Ombudsman and the Police Integrity Commission (PIC) about their treatment.

8. The Commissioner of Police must report annually on: the number of successful and unsuccessful applications for orders of each kind, how many related to young people, and in each case, the duration of the order and of the detention, what kind of institution was used, particulars of complaints made to the Ombudsman or the PIC and the outcome of each complaint, and the number of successful and unsuccessful applications for revocation of an order. He must confirm the destruction of material used to identify detainees. The NSW Ombudsman is to report in 2007 and in 2010 on the detentions and orders made under this Act.

Control orders

Division 104 of the CCA allows control orders to be made by a court exercising Federal jurisdiction. The object of the division is stated to be to allow organisations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act.

Control orders may include:⁴⁷

- (a) a prohibition or restriction on the person being at specified areas or places;
- (b) a prohibition or restriction on the person leaving Australia;
- (c) a requirement that the person remain at specified premises between specified times each day, or on specified days;
- (d) a requirement that the person wear a tracking device;
- (e) a prohibition or restriction on the person communicating or associating with specified individuals;
- (f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the Internet);
- (g) a prohibition or restriction on the person possessing or using specified articles or substances;
- (h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
- (i) a requirement that the person report to specified persons at specified times and places;
- (j) a requirement that the person allow himself or herself to be photographed;
- (k) a requirement that the person allow impressions of his or her fingerprints to be taken;
- (l) a requirement that the person participate in specified counselling or education.

These orders amount to parole for innocent people - people who haven't even been charged with (let alone convicted of) an offence.

While all of these are provisions represent an unacceptable incursion on the rights of a person who has not been charged with any criminal offence, item (c) is of the greatest concern. It permits indefinite house arrest, without trial, on the basis only of reasonable belief about what a person will do. Again rolling orders can be made, until the sunset section outlaws further detention. Item (e) also could be

⁴⁷ Sub-section 104.5(3), Criminal Code Act 1997 (Cth)

misused, for example by preventing a person from consulting the lawyer of their choice.

An interim control order may be sought by a senior member of the AFP if he or she considers on reasonable grounds that the order would substantially assist in preventing a terrorist act, or suspects on reasonable grounds that the person has provided training to or received training from a listed terrorist organisation.⁴⁸

A senior AFP member may request an interim control order generally after obtaining the Attorney General's consent, and in urgent circumstances without first obtaining the Attorney General's consent.⁴⁹

Of great concern is that together with the draft request that must be submitted to the Attorney General in seeking his or her consent, there is no requirement that evidence upon which the reasonable grounds are founded. All that is required is a statement of the facts relating to why the orders should be made "if a member is aware of any" the facts relating to why the orders should not be made, together with an explanation as to why each of the obligations, prohibitions and restrictions should be imposed on the person.⁵⁰ Again, if the member is aware of any, any facts as to why those should not be imposed should also be included. Any previous requests and outcomes in relation to control orders or preventative detention orders should also be provided.⁵¹

Interestingly, information, if any, that the member has about any periods for which the person has been detained under an order made under a corresponding state preventative prevention law must also be provided.⁵² Nowhere is it defined what is meant by "information (if any) that the member has". There would therefore appear to be no obligation upon the AFP member to make enquiries to ascertain any such information.

A senior AFP member may seek the Attorney General's consent to an interim control order even if such a request has previously been made in relation to the same person.⁵³ If the Attorney General consents to the request, then the AFP member may approach a federal court to make the interim control order.⁵⁴

The issuing court may make an order only if it is satisfied on the *balance of probabilities* that making the order would substantially assist in preventing a terrorist act or that the person has provided training to, or received training from, a listed terrorist organisation and is satisfied on the *balance of probabilities* that the order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.⁵⁵ It is noteworthy that in making a control order that places severe restrictions on a person's freedom only a civil standard of proof is required. This is in contrast to ordinary criminal proceedings where the crown must establish guilt *beyond a reasonable doubt*.

⁴⁸ CCA s 104.2(2)

⁴⁹ CCA (Cth) s 104.2(1) and division C

⁵⁰ CCA (Cth) s 104.2(3)

⁵¹ *Ibid.*

⁵² CCA (Cth) s 104.2(3)(v)

⁵³ CCA s 104.2(5)

⁵⁴ CCA s 104.3

⁵⁵ CCA s 104.4(1)(c)

Clearly, the order can be made in the absence of the person who is the subject of the order and without the court necessarily having to be provided with any evidence which gave rise to the senior AFP member's request. This represents a serious departure from the rules of natural justice (see section 104.4).

Section 104.5 provides that the order does not begin to be in force until it is served personally on the person affected and must specify a date on which the person may attend the court for the court to confirm the order. Of course, the court may also declare the interim order void or revoke it on that date.

The period during which the confirmed control order is to be specified and that must not be longer than twelve months after the date on which the interim control order is made. It must also state that the person's lawyer may attend a specified place in order to obtain a copy of the interim control order.

Of further concern is that sub-section 2 of section 104.5 specifically states that successive control orders may be made in relation to the same person. Therefore, although the time limit of a control order is twelve months, there is nothing to prevent further successive control orders of twelve months at a time being made in relation to the same person, so that the control order could extend indefinitely.

The obligations, prohibitions and restrictions able to be imposed as set out above are, by any measure, extremely intrusive in nature. Indeed, a prohibition or restriction on the person carrying out specified activities including in respect of his or her work or occupation is allowed and the person's ability to contact any other person can also be restricted. Sub-section 5 states that the person has the right to contact, communicate or associate with their lawyer unless the person's lawyer is a specified individual as mentioned in paragraph 3(e).

The Act does not, however, set out what criteria are to operate in enabling a person's lawyer to be specified in that way. This could operate to exclude the lawyer of choice of choice of the affected person without there being any valid or reasonable grounds for doing so. The right to engage a lawyer of choice is, it is submitted, an important one in ensuring a fair process.

Of grave concern is the effect of section 104.12. The only documents required to be served personally on the person affected by the order is the order which includes only a summary of the grounds on which the order is made.⁵⁶ That is, the person affected is not provided with all of the supporting documents upon which the issuing court made the decision. This is a denial of natural justice.

Section 104.12(1)(c) provides that an AFP member must ensure that the person affected by the order understands the information provided to them, taking into account the persons age, language skills, mental capacity and any other relevant factor. Sub-section 4, however, goes on to say that a failure to comply with that requirement does not make the control order ineffective to any extent. This means, in other words, that even if the person affected does not understand because of their age, language skills, mental capacity or other relevant factor, what the meaning of the order is or its contents, the order still binds them. This is a clear abrogation of a fundamental right and is a denial of natural justice.

⁵⁶ See s 104.5(1)(h)

Section 104.14(4) provides that the court may confirm an interim order if the court is satisfied on the balance of probabilities that the order was properly served on the person, in the absence of the affected person. This means, that even if the person was personally served but did not understand that nature of the order because of failure to understand the language, by reason of their age, mental capacity or other valid reason, then the issuing court may confirm the order. This is a denial of natural justice and an abrogation of a basic right.

A confirmed control order must also specify the period during which the order is to be enforced, which must not end more than twelve months after the day on which the interim control order was made (see section 104.16). Again, nothing prevents the making of successive control orders in relation to the same person. In other words, successive control order can be made every twelve months so that a person may be subject to a control order indefinitely.

Section 104.23 provides that the Commissioner of the AFP may cause an application to be made to an issuing court to vary a confirmed control order by adding one or more obligations, prohibitions or restrictions. It does not appear to require the Attorney General's concurrence. The Commissioner must consider on reasonable grounds (that is, he does not have to be satisfied, he must only consider) that the varied control order would substantially assist in preventing a terrorist act.

The Commissioner does not have to provide evidence of this. He merely has to provide an explanation as to why the variation should occur and "if the Commissioner is aware of any facts" as to why those should not be imposed, a statement of those facts must be provided.⁵⁷ If the court makes the variation, then the Commissioner must cause written notice to be given to the person.⁵⁸

The court must be satisfied on the balance or probabilities that each of the additional obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.⁵⁹

Nevertheless, in satisfying itself on the balance of probabilities, the court can do this in the absence of the affected person and appears not to have to take into account any actual evidence other than the statement of the Commissioner.

The manner of service of the varied control order has the same problems in terms of the person affected understanding it as the service of a confirmed order.

There are special rules for young people. A control order cannot apply to a person who is under the age of sixteen years. If a person is sixteen but under eighteen, then the control order cannot be in force for longer than three months at a time. Again, however, what is of great concern is that section 104.28(3) states that successive control orders in relation to the same young person may be made. This means that a young person between the ages of sixteen to eighteen may be subject to a control order for an indefinite period by the imposition of successive three months of control orders.

⁵⁷ Section 104.23(2)

⁵⁸ Section 104.23(3)

⁵⁹ Section 104.24

Division 104 governing control orders is subject to a sunset provision of ten years. This means that the "indefinite" period for which a person may be subject to a control order is up to ten years. It is considered that ten years is far too long a period for any sunset provision.

It should also be noted that even the limited information required to be provided to the person the subject of a control order (or his or her representative) can be withheld on national security grounds.⁶⁰ This raises the prospect of a person being subject to indefinite house arrest (due to successive control orders) without any information on the reasons for their detention.

Even more alarming is that interim control orders may be issued over the telephone, without the Attorney-General's consent and without a hearing. (Those matters, however, must be subsequently attended to.)

The CCL is vehemently opposed to the use of control orders to circumvent the usual safeguards and procedures that protect persons accused of committing a criminal offence. The prospect of persons being subject to harsh restrictions on their individual liberty without being found guilty of any crime, without being able to challenge the evidence against them and based merely on a civil standard of proof is offensive to notions of liberal democracy. These powers are a disproportionate response to the threat of terrorism and are open to abuse. If they are abused the way police powers were misused in Northern Ireland, they may very well produce the kind of anger that fosters terrorism.

Compliance with International Law

The control order and preventative detention order regime is likely to place Australia in breach of its obligations under, *inter alia*, the International Covenant on Civil and Political Rights 1966, the International Covenant on Social Economic and Cultural Rights 1966 and the Convention on the Rights of the Child 1989.

In relation to control orders, neither the person affected by the order nor their lawyer is given the full documentation. This is contrary to article 9, which states that anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Preventative detention orders suffer the same defect. This means that the person affected by the order is unable to mount any proper challenge against the order.

The powers in relation to control orders and preventative detention orders deny freedom and impose restrictions and prohibitions under circumstances where no charges have been laid. They are designed to control and detain people who are not guilty of any criminal offence. If they were guilty of a criminal offence, then sufficient evidence would exist to justify them being charged and they would go through the usual process of arrest and prosecution. They may be detained and would be entitled to apply for bail.

⁶⁰ Sections 104.2(3A), 104.5(2A), 104.12A(3), 104.23(3A).

These powers erode fundamental rights and breach international standards such as Article 14. In particular, Article 14 provides that everybody is entitled to a fair and public hearing, that they have the right to be presumed innocent until proved guilty according to the law, they should be informed promptly and in detailed in a language which they understand the nature and cause of the charge, they should be able to communicate with a lawyer of their own choosing, they should be tried while present and in a position to defend themselves in person or through a lawyer of choice and to examine witnesses against them. None of these measures to ensure due process and natural justice exist in the new laws.

The substance of the orders violate Article 9 of the ICCPR (the right to liberty and security of the person and freedom from arbitrary arrest or detention), article 17 (freedom from arbitrary or unlawful interference with privacy), article 18 and 22 (freedom of thought and freedom of association) and article 12 (freedom of movement).

It is essential to the notion of rule of law that a person is entitled to due process. This entails knowledge of the allegations made, the facts supporting the allegations and determination of the allegations by a court which is independent of the executive government.

Imprisonment without charge is offensive to our notions of democracy and should not have any place in Australian law. Citizens should not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence nor to unlawful attacks on their honour and reputation (Article 17).

In relation to the Convention on the Rights of the Child 1989, the introduction of control orders and preventative detention in respect of children between the ages of sixteen and eighteen years in circumstances where no criminal offence has been committed breaches Article 3 of the Convention

Financing a terrorist organisation

Section 103.2 of the CCA states that:

103.2 Financing a Terrorist

1. A person commits an offence if:
 - a. The person intentionally:
 - iv. Makes funds available to another person (whether directly or indirectly); or
 - v. Collects funds for or on behalf of, another person (whether directly or indirectly); and
 - b. The first mentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.

The penalty is imprisonment for life. Sub-section 2 provides that a person commits an offence under sub-section 1 even if a terrorist attack does not occur or the funds will not be used to facilitate or engage in a specific terrorist act or the funds will be used to facilitate or engage in more than one terrorist act.

This is of great concern. It means that if a person is reckless as to who might end up being the ultimate recipient of funds, then they have committed an offence for which they can be imprisoned for life.

While the object of preventing the financing of terrorist organisations may be laudable, the law is very poorly drafted and could mean that people innocently providing funds could be found guilty of financing a terrorist or terrorist organisation, for which the penalty is imprisonment for life.

Under this section, a person could be imprisoned for life if they indirectly made funds available to another person and was reckless as to whether the other person might use the funds for terrorism. Recklessness in this context means the person is aware of a substantial risk that the funds would be used for terrorism and, having regard to circumstances known to them, it is unjustifiable to take the risk.

The person need not intend that the funds be used for terrorism, nor must they have knowledge that the funds will be used for the purpose. The offence is committed even if a terrorist act does not occur or the funds will not be used for a specific terrorist act.

This makes it impossible for any person to know the scope of their legal liabilities with any certainty. Terrorists may obtain financing from a range of sources including legitimate institutions, such as through banks. They could employ a variety of deceptive means to secure funding.

This proposed law will require every Australian to be extremely vigilant in considering where their money might end up before donating to a charity, investing in stocks, depositing money with a bank or even giving money as a birthday present.

Some examples might highlight the potential danger to ordinary people in these proposed laws.

A parent might have an idealistic daughter who travels to Nepal to seek spiritual enlightenment. She might become involved in a spiritual movement opposed to capitalist materialism or the like, headed by a particular guru. The parent might send money to their daughter and she may give it, or some of it, to her guru. In those circumstances, the parent may have committed a crime punishable by life imprisonment, even if the money sent is not spent on terrorist activities and no terrorist act occurs, because the parent has been reckless as to the ultimate beneficiary of the funds.

Another scenario might involve fund managers with investment portfolios. Most fund managers invest money on behalf of parties whom they cannot identify. As the fund manager cannot identify ultimate clients, they can never be sure that the funds are not being collected on behalf of terrorists. This legislation would leave legitimate fund managers with doubt and potentially open to prosecution. A fund manager might invest money in businesses which they do not control. A person may, for example, consider investing in a nitrogen fertiliser plant. The fertiliser may be intended for entirely peaceful uses, but it is certainly possible that it might

be used for explosives, even though there might be tight government regulatory controls on access to the product.

The wording of the bill is very broad. It only requires that the funds provided cannot "facilitate" a terrorist act.

Mobile telephones could be considered to facilitate terrorist acts (that is how terrorists talk and sometimes even trigger their bombs). Does this mean that investors cannot provide money to a telephone company without exposing themselves to the risk of prosecution and a possible life sentence?

Search & Seize Powers

Schedules 5 & 6 of the *Anti-Terrorism Act (No. 2) 2005* (Cth) give police extraordinary powers to search, seize and demand details from anyone in a prescribed security zone – without the requirement of reasonable suspicion. So if the Attorney-General were to declare Sydney International airport a prescribed security zone, then everyone in the airport could be searched, have items seized and their personal details recorded. The CCL opposes the removal of the requirement of reasonable suspicion. It should not be a crime simply to be in a public Commonwealth place.

The provision also makes it an offence to fail to provide a police officer with evidence of one's identity. This amounts to a requirement that every Australian must carry with them identification at all times.

There should be provision for the information gathered (name and address) under these extraordinary powers to be destroyed after four weeks, or whenever the prescribed security zone is revoked. This personal information, belonging to innocent citizens, should not be allowed to remain sitting on the databases of police or other agencies.

The provisions also extend beyond the professed purpose of the Bill (to prevent terrorism) and will apply to all federal indictable offences. There is no justification for extending these extraordinary powers to non-terrorist offences.

This overreach is even more pronounced in Schedule 6, which provides for the obtaining of information and documents. Not only does it apply to non-terrorist offences, but is not subject to a sunset section. These non-terrorism powers will remain in force for more than ten years. If the information and documents is sought from the person under suspicion, then any material produced should not be admissible in a court of law. Otherwise, the right to silence would be undermined

Sedition⁶¹

Despite vocal opposition, the Federal government amended the offence of sedition in the 2005 Amendments. This was despite a recommendation by the government's own Senate Legal and Constitutional Committee that the changes not be made.

⁶¹ On 2 March 2006 the Federal Attorney-General announced a review of the sedition provisions by the Australian Law Reform Commission.

The CCL believes offence of sedition should be abolished. We note that there are already provisions in various vilification laws around the country that deal with acts of incitement by way of civil proceedings and that the major activities that might be sought to be governed by a sedition law are now covered by such offences as treachery in s 24AA of the *Crimes Act 1914* (Cth) or violently interfering with elections as covered by s 327 of the *Commonwealth Electoral Act 1918*.

What is of particular concern is that rather than abolishing sedition, the December 2005 legislation actually extended the operation of sedition into many uncharted areas and the potential impact on freedom of speech in Australia is immense.

The 2005 Amendments introduced recklessness into the crime of sedition, which is a crime of simply spoken words or urging. More so than any other area of the criminal law, it is submitted that there should be a clear criminal intention in order to find any conviction particularly bearing in mind as the proposed new law makes no distinction between public or private utterances. An exception is given in relation to a humanitarian aid, but is that it is clearly arguable that a mere demonstration against the Iraq war is giving moral support to the insurgency and is therefore assisting in any means whatever.

The new sedition laws also introduce a "good faith" defence, however the accused bears the onus of proof.⁶² While the good faith defences may have been designed to protect political expression the CCL is of the view that they clearly fail in this way. First, the good faith defences are far too narrowly defined and again make reference to the requirement of good faith without defining that expression. Thirdly, it is incumbent upon the defendant to raise these defences effectively meaning that a person has to prove their innocence.

The requirement for good faith in the various defences set out suggest that if any action was taken for an ulterior motive, then the defences would not apply even though to any other observer it would appear that the person was engaged in legitimate political activity. Starkly missing from the proposed defences is any exception for artistic, academic and journalistic purposes. Such exceptions are routinely included in the laws in Australia dealing with racial and other vilification offences. Even the way the sections have been drafted, it would appear that any accused person having to effectively prove their innocence by trying to bring themselves within one of the good faith defences that have been proposed. Even without any prosecution this broad law would have an effect on freedom of speech in Australia and deny legitimate political discussion in dissent.

We submit that if any law in the nature of sedition should exist at all then it should be addressed to urgings to violence and clear criminal intention that the urging should be to violence. The new law turns legitimate political activity and dissent into prima facie criminal behaviour wherein persons would then have to seek to prove their innocence before a court. There would appear to be no defence available to journalists, academics, teachers, cartoonists and satirists who would be criminalised under what is clearly intended to be an overarching and broad provision.

⁶² Section 80.3

Any law dealing with freedom of expression should be clearly drafted so that it is known exactly what type of material is proscribed and should only apply to deliberate acts of such a serious anti-social nature that they deserve criminal sanction. The new law clearly fails this test.

Strangely, given the abolition of the old definition of sedition and seditious intent in the actual crime, the old definition of seditious intent in relation to unlawful association has been retained. The reinvigoration of this provision at this time is a matter of massive concern. Prima facie it would appear that organisations such as the Australian Republican Movement could be declared an unlawful association under the new laws. It is clear that Australia has moved on from a time when an organisation which might be said to be causing disaffection with the Sovereign should be banned. Most Australians would be surprised to find that any such provision still is on the statute books in Australia. Given that opinion polls show that the majority of Australians would like a Republic it is clear that this definition of seditious intent is completely out of step with any modern thinking in Australia and should be repealed entirely.

Impact on the role of the judiciary

Federal control orders and state preventative detention orders can be issued by the courts. Federal preventative detention orders can also be issued by judges acting in a personal capacity. The use of judges and the courts may on the face of it provide some protection for people who are to be subject to such orders. There is, however, a real risk that the use of the judiciary to sanction measures such as control orders and preventative detention orders that run counter to fundamental principles of due process and the rule of law will undermine public confidence in the independence of the judiciary.⁶³ The judiciary should not be seen to be doing the bidding of the executive government, and the involvement of the judiciary may give a sense of legitimacy to what are illegitimate denials of natural justice.

The use of secret evidence

Under s39B of the Administrative Appeal Tribunal Act, if the Attorney-General certifies, by writing signed by him or her, that the disclosure of information concerning a specified matter, or the disclosure of any matter contained in a document, would be contrary to the public interest:

- (a) by reason that it would prejudice the security, defence or international relations of Australia;
- (b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or
- (c) for any other reason specified in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the matter contained in the document should not be disclosed,

then the matter cannot be disclosed to people who have not been given the appropriate level of clearance

⁶³ See *Kable v DPP* (1996) 189 CLR 51

A lawyer may have an appropriate security clearance to have access to secret information and still be prevented from viewing documents or hearing evidence used against his or her client. Recently, in *Traljesic v Attorney-General*⁶⁴ a Federal Court judge upheld the right of the Attorney-General to prevent a solicitor with an appropriate security clearance from having access to evidence to be used against his client. This was despite there being no challenge to the solicitor's integrity and despite an extensive undertaking being offered by the solicitor not to reveal security classified information to his client. Rather, it was deemed that the possibility of *inadvertent* disclosure was sufficient to prevent access to such material.⁶⁵

The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the NSI Act) extends the use of security certificates issued by the Federal Attorney-General to criminal and civil proceedings generally. This allows the Attorney General to exclude unauthorised persons, including the defendant in a criminal trial, the parties in a civil case and their lawyers. It is meant to protect information the disclosure of which might threaten national security.⁶⁶

The provisions of the NSI Act might well be applied to a trial for terrorist offences which carry a penalty of life imprisonment.

The Attorney-General may also issue a certificate which declares that a witness, whether for the prosecution or for the defence is likely to give evidence that would prejudice national security. The court may order that the witness may not give evidence; or it may reject the Attorney-General's advice and order that the witness be heard. Nevertheless, although the court is to take into account whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence, it must give greatest weight to the question of whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security. A recent Constitutional challenge to the validity of the NSI Act failed at first instance.⁶⁷

The CCL strongly opposes the use of secret evidence in trials. It is essential to the conduct of a fair trial that an accused or his or her representative are present while evidence is being adduced. As officers of the court, lawyers are accountable to the courts and professional bodies for any misconduct, including releasing sensitive information to their client or third parties if the court directs otherwise. CCL finds it especially offensive and contrary to due process that legal representatives with the requisite security clearances can be excluded merely on the basis that they may *inadvertently* reveal classified information.

Treatment of terrorism suspects in NSW – Category "AA" inmates

CCL is extremely concerned that terrorist suspects are being treated contrary to international human rights standards by being automatically categorised as "AA" inmates and placed in maximum security prisons while on remand awaiting trial.

⁶⁴ *of the Commonwealth of Australia* [2006] FCA 125 (9 February 2006)

⁶⁵ The appeal concerned a decision by the Minister of Foreign Affairs to cancel the passport of Mr. Hopper's client.

⁶⁶ The definitions of 'national security' and of 'security' are in Appendix 2

⁶⁷ *R v Lodh*, NSWSC 1094/2005 (7 February 2006) unreported.

The introduction in 2004 of the new "AA" security classification for men and "Category 5" for women is a disturbing development.⁶⁸ "Category AA" male and "Category 5" female inmates are those who:⁶⁹

in the opinion of the Commissioner, represent a special risk to national security (for example, because of a perceived risk that they may engage in, or incite other persons to engage in, terrorist activities) and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment.

The recently arrested terrorist suspects are being held at the High Risk Management Unit at Goulburn Gaol. CCL has seen several complaints from inmates of the HRMU. There have been reports of self-harm and hunger strikes. Particularly disturbing allegations include:

- no access to fresh air
- no direct sunlight
- inmates are being racially segregated
- no heating in the cells
- limited access to communications facilities to stay in touch with family and lawyers
- no hot food in the cells after 3 p.m.

To CCL's knowledge, these complaints have never been investigated in a satisfactory manner by an independent body.

Terrorist suspects, like all unconvicted accused, should be presumed innocent⁷⁰ and be treated differently from convicted inmates.⁷¹ Furthermore, bail-refused terrorist suspects should be housed, like other accused people, in a general *remand* facility, unless they represent a rational threat to the security and good order of the institution.

The policy behind the "AA" classification is oppressive and violates Australia's international human rights obligations. The UN Standard Minimum Rules⁷² permit remand inmates to be treated differently from other remand inmates only on the grounds that it is 'necessary in the interests of the administration of justice and of the security and good order of the institution'.⁷³ In international law, national security is not a legitimate ground upon which to discriminate against remand inmates.

Such discrimination is only permitted under the International Covenant on Civil and Political Rights in a time of proclaimed public emergency 'which threatens the

⁶⁸ NSW Minister of Justice, 'Minister Announces Tough New Management Regime for Terrorist Inmates' (Media Release, 27 October 2004) <<http://www.dcs.nsw.gov.au/media/releases/20041027Terrorist.pdf>>.

⁶⁹ Crimes (Administration of Sentences) Regulation 2001 (NSW) rr.22 & 23, as updated by Crimes (Administration of Sentences) Amendment (Category AA Inmates) Regulation 2004.

⁷⁰ ICCPR Article 14(2).

⁷¹ ICCPR Article 10(2)(a).

⁷² UN *Standard Minimum Rules for the Treatment of Prisoners*, approved by UN Economic and Social Council in July 1957. Text of Guidelines available at: <<http://www.ohchr.org/english/law/treatmentprisoners.htm>>.

⁷³ UN Standard Minimum Rules, n **Error! Bookmark not defined.**, rr.84-93.

life of the nation' and which has been officially notified to the UN Secretary-General.⁷⁴ These pre-conditions have not been met and therefore NSW is in violation of Australia's international human rights obligations.

Also as a matter of policy, the grounds on which the Commissioner of Corrective Services may exercise his discretion to classify an inmate as a Category AA or Category 5 inmate are extremely disturbing. This decision is not reviewable in a court of law. Given the oppressive conditions under which Category AA inmates are treated, this is grossly inappropriate. The Commissioner of Corrective Services is not a court of law. He is not a judicial officer. He is an administrator. He is not the appropriate person to decide who is and who is not a terrorist. Nor is the Commissioner the competent authority to decide who is and who is not a 'special risk to national security'.

In relation to practice and procedure, Commissioner Woodham, in evidence to a NSW Parliamentary Standing Committee Inquiry into Issues Relating to the Operations and Management of the NSW Department of Corrective Services ("the Standing Committee"), outlined the extreme consequences of an AA classification.⁷⁵

In summary, according to Hagbarth Strom:⁷⁶

...another alarming effect of the regulation is that Category AA prisoners are subjected to a severe form of segregation. Prisoners are not allowed any contact visits unless it is "deemed safe", and all mail not to or from defined 'exempt bodies' is screened. Furthermore, "AA inmates would have no recourse to the 'official visitor' provisions available to other NSW prisoners".⁷⁷

As a result, remand prisoners wrongly accused of terrorist offences could be held in isolation for long periods of time with limited access to lawyers and other aid.

These conditions become even more outrageous when it is observed that Commissioner Woodham, in evidence to the Standing Committee, acknowledged that all terrorist suspects are automatically classified as Category AA inmates.⁷⁸

This is extremely disproportionate and a gross violation of civil rights. It amounts to inmate classification by offence charged, rather than by risk assessment on a case-by-case basis. There is no rational reason why all terrorist suspects or offenders necessarily represent an actual risk to the general prison population or staff. There is also no rational reason why they need to be detained in 'special facilities'. The UN Human Rights Committee has made it very clear that this kind of confinement is only to be used in 'exceptional circumstances'.⁷⁹

These conditions are not rationally connected to any legitimate aim. They are disproportionate. As such, the automatic classification of terrorist suspects and offenders as Category AA inmates is arbitrary and a violation of fundamental civil rights.

⁷⁴ ICCPR Article 4 (derogations).

⁷⁵ Evidence (8 December 2005), n 5, 39-40.

⁷⁶ in an upcoming CCL background paper on prisoners' rights

⁷⁷ Stephen Gibbs 'Top gaol rating for terrorism suspects', Sydney Morning Herald (Sydney), 30 October 2004

⁷⁸ Evidence (8 December 2005), n 5, 39.

⁷⁹ UN Human Rights Committee, Concluding Observations on Denmark (1996) UN Doc CCPR/C/79/ADD.68, [12].

CCL is also concerned about the use of orange uniforms for terrorist suspects. The UN Standard Minimum Rules state that (*italics added*):

17(1): Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. *Such clothing shall in no manner be degrading or humiliating.*

The Australian Standard Guidelines conveniently leave out the last sentence above.⁸⁰

There is absolutely no rational reason why terrorist suspects or offenders, especially remand inmates, should wear a different uniform from other inmates. Given the obvious connotations of the US military's detention camp at Guantanamo Bay, in CCL's view this amounts to degrading and humiliating clothing. This unnecessary practice should cease immediately.

Perhaps more significantly, Article 7 of the ICCPR prohibits 'cruel, inhuman or degrading treatment'. National security can never be used to excuse cruel, inhuman or degrading treatment.⁸¹ The use of orange uniforms can only serve to humiliate and degrade the inmate, who must be presumed innocent. It is not reasonable to argue that these orange uniforms in some way preserve and protect Australia's national security. CCL submits that the use of these bright orange uniforms constitutes degrading treatment, in violation of the International Covenant on Civil and Political Rights.

Categories AA and 5 should be removed from the Regulations. There is no rational reason to treat those suspected or convicted of terrorist offences in a manner different from people suspected or convicted of other crimes. National security is not a legitimate ground upon which to discriminate against remand inmates. If the Categories are to remain, then terrorist suspects must not be automatically classified as Category AA or Category 5 inmates.

This automatic classification is arbitrary and violates the individual's right to the presumption of innocence. It also amounts to inmate classification by offence charged, rather than on an objective case-by-case basis. The use of orange prison uniforms for inmates suspected or convicted of terrorist offences is degrading and humiliating and should cease immediately.

Other Laws

A range of other laws are proposed in the wake of a perceived increase in the "terrorist threat" to Australia. Some of these are briefly discussed below.

Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006

This legislation will expand the power of the Federal government to call out the Australian Defence Force (ADF) in purely domestic situations. The CCL believes that this legislation signals a permanent militarisation of what are, and should remain, domestic policing issues. The bill also gives ADF personnel in such situations "shoot to kill" powers to protect property designated as "critical

⁸⁰ *Standard Guidelines for Corrections in Australia*, n 4, [5.50]

⁸¹ ICCPR Article 4(2)

infrastructure" where there is no direct threat to human life, arguably in contravention of ICCPR Article 6 (the right to life). The Senate Legal and Constitutional Committee recommended that the bill be passed subject to minor amendments.

Australian Citizenship Bill 2005

This bill overhauls Australia's citizenship regime. Of particular concern is that, presumably due to terrorism fears, the bill will prohibit the Minister from granting citizenship to a person where that person has received an adverse Australian Security Intelligence Organisation assessment. This arguably breaches Australia's obligations under the Statelessness Convention as the Minister is unable to prevent a person from becoming stateless. It also transfers far too much power to a secret organisation, and while an adverse decision can be subject to appeal, the applicant and his or her legal team can be removed from the hearing while secret evidence is adduced. The lack of transparency and potential for abuse is highlighted by the recent deportation of US peace activist Scott Parkin following an adverse ASIO assessment.⁸²

Anti-Money Laundering and Counter-terrorism draft exposure bill

This draft exposure bill contains the first tranche in what is intended to be a significant expansion in the Australian government's financial surveillance regime. The proposed regime will extend compulsory identification procedures and reporting of all foreign money transfers, amounts over \$10,000 and "suspicious" transactions from banks and other financial institutions to, *inter alia*, financial planners, lawyers and real estate agents. It is also an example of how the rhetoric of terrorism is being increasingly used to justify the expansion of government surveillance into unrelated areas. For example, there are no legislative restrictions on the use of collected information in pursuing minor crimes, and the information is accessible to an increasingly wide range of agencies including social security and taxation departments.

Conclusion

The Australian government's response to the perceived increase in the threat of terrorism since 2001 has been to introduce a raft of draconian laws that undermine many of the fundamental values of an open and democratic society. The effect of such legislation in Australia is more drastic than in other Western countries as Australia lacks a bill or charter of rights that provides a mechanism by which the courts can test the compatibility of such laws with fundamental human rights.

The principal argument put by the Federal Government for over-riding civil and political rights has been that terrorists attack the most fundamental of rights, the right to life and personal security. Federal Attorney-General, Philip Ruddock, has often used the Universal Declaration of Human Rights ('UDHR') in an attempt to justify his government's national security legislation.

For example, in May 2005 the Attorney-General said in a radio interview that "Article 3...speaks of the state's obligation to provide for the right to life and

⁸² "Deported activist not violent, admits ASIO chief," Sydney Morning Herald (online), 1 November 2005, <http://www.smh.com.au/news/national/deported-activist-not-violent-admits-asio-chief/2005/11/01/1130720518428.html> (accessed February 2006)

personal security and safety of its people".⁸³ However, Article 3 of the UDHR does not guarantee life, safety and security. It actually says:

"Everyone has the right to life, liberty and security of person."

Mr Ruddock leaves out the fundamental right to liberty. The major premise is that any invasion of rights is permissible if it protects the right to life or personal security. However, this view fundamentally misrepresents the fact that the human rights are directed in large part to protecting individuals against the state itself, and that "measures to counter terrorism must be in strict conformity with international law, including international human rights standards and obligations."⁸⁴

Assertions are made in response to criticism that the legislation is balanced. No effort is made to spell out what that might mean, nor to use such an account in justifying the detail of the laws. A further appeal is made to laws that have been made or are contemplated in the United Kingdom. The argument concerning ignores the facts that the UK is bound not only by its own Human Rights Act, but is also subject to the jurisdiction of the European Court of Human Rights.

The threat of terrorism is real. However, the response so far by the Australian government has been disproportionate and undermines the very values that we ought to be fighting to protect.

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⁸³ See <http://www.nswccl.org.au/stories/story2005-05.php>

⁸⁴ United Nations General Assembly Resolution 58/174 (10 March 2004).

Appendices

Appendix 1 - List of Federal Government Acts dealing with security and terrorism issues

Anti-Terrorism Act 2004
Anti-Terrorism Act (No 2) 2004
Anti-Terrorism Act (No. 2) 2005
Anti-Terrorism Act (No. 3) 2004
Australian Federal Police and Other Legislation Amendment Act 2004
Australian Protective Service Amendment Act 2003
Australian Security Intelligence Organisation Amendment Act 2004
Australian Security Intelligence Organisation Legislation Amendment Act 2003
Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003
Aviation Transport Security (Consequential Amendments and Transitional Provisions) Act 2004
Aviation Transport Security Act 2004
Border Security Legislation Amendment Act 2002
Crimes Amendment Act 2002
Crimes Amendment Act 2005
Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002
Criminal Code Amendment (Espionage and Related Matters) Act 2002
Criminal Code Amendment (Offences Against Australians) Act 2002
Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002
Criminal Code Amendment (Terrorism) Act 2003 (Constitutional Reference of Power)
International Transfer of Prisoners Amendment Act 2004
Maritime Transport and Offshore Facilities Security Act 2003
National Security Information (Criminal and Civil Proceedings) Act 2004
National Security Information Legislation Amendment Act 2005
Security Legislation Amendment (Terrorism) Act 2002
Suppression of the Financing of Terrorism Act 2002
Surveillance Devices Act 2004
Telecommunication (Interception) Amendment (Stored Communications) Act 2004
Telecommunications Interception Amendment Act 2002
Telecommunications (Interception) Amendment Act 2004

Appendix 2 - Definitions

From the Criminal Code Act 1995, as amended to December 2006

terrorist act means an action or threat of action where:

(a) the action falls within subsection (2) and does not fall within subsection (3);
and

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

(c) the action is done or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

(ii) intimidating the public or a section of the public.

(2) Action falls within this subsection if it:

(a) causes serious harm that is physical harm to a person; or

(b) causes serious damage to property; or

(c) causes a person's death; or

(d) endangers a person's life, other than the life of the person taking the action;
or

(e) creates a serious risk to the health or safety of the public or a section of the public; or

(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

(i) an information system; or

(ii) a telecommunications system; or

(iii) a financial system; or

(iv) a system used for the delivery of essential government services; or

(v) a system used for, or by, an essential public utility; or

(vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it:

(a) is advocacy, protest, dissent or industrial action; and

(b) is not intended:

(i) to cause serious harm that is physical harm to a person; or

(ii) to cause a person's death; or

(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

(4) In this Division:

(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and

(b) a reference to the public includes a reference to the public of a country other than Australia.

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

(a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or

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

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

terrorist organisation means:

(a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or

(b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4))

Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section, the Minister must be satisfied on reasonable grounds that the organisation:

(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

(b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

(2A) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation.

(3) Regulations for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section cease to have effect on the second anniversary of the day on which they take effect. To avoid doubt, this subsection does not prevent:

(a) the repeal of those regulations; or

(b) the cessation of effect of those regulations under subsection (4); or

(c) the making of new regulations the same in substance as those regulations (whether the new regulations are made or take effect before or after those regulations cease to have effect because of this subsection).

(4) If:

(a) an organisation is specified by regulations made for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section; and
Repeal the paragraph, substitute:

(b) the Minister ceases to be satisfied of either of the following (as the case requires):

(i) that the 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);

(ii) that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);

the Minister must, by written notice published in the *Gazette*, make a declaration to the effect that the Minister has ceased to be so satisfied. The regulations, to the extent to which they specify the organisation, cease to have effect when the declaration is made.

(5) To avoid doubt, subsection (4) does not prevent the organisation from being subsequently specified by regulations made for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section if the Minister becomes satisfied as mentioned in subsection (2).

(6) If, under subsection (3) or (4), a regulation ceases to have effect, "section 15 of the *Legislative Instruments Act 2003* ".applies as if the regulation had been repealed.

From the National Security Information (Criminal and Civil Proceedings) Act 2004.

national security means Australia's defence, security, international relations or law enforcement interests.

In this Act, *security* has the same meaning as in the Australian Security Intelligence Organisation Act 1979.

And in that Act, security means

a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

(i) espionage;

(ii) sabotage;

(iii) politically motivated violence;

(iv) promotion of communal violence;

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).

Division 101—Terrorism offences in the Criminal Code

101.1 Terrorist acts

(1) A person commits an offence if the person engages in a terrorist act.

Penalty: Imprisonment for life.

(2) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).

101.2 Providing or receiving training connected with terrorist acts

(1) A person commits an offence if:

- (a) the person provides or receives training; and
- (b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
- (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

Penalty: Imprisonment for 25 years.

(2) A person commits an offence if:

- (a) the person provides or receives training; and
- (b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
- (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).

Penalty: Imprisonment for 15 years.

(3) A person commits an offence under this section even if:

- (a) a terrorist act does not occur; or
- (b) the training is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
- (c) the training is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.

(4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.

(5) If, in a prosecution for an offence (the *prosecuted offence*) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the *alternative offence*) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

101.4 Possessing things connected with terrorist acts

(1) A person commits an offence if:

- (a) the person possesses a thing; and
- (b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
- (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

Penalty: Imprisonment for 15 years.

- (2) A person commits an offence if:
- (a) the person possesses a thing; and
 - (b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
 - (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).

Penalty: Imprisonment for 10 years.

- (3) A person commits an offence under subsection (1) or (2) even if:
- (a) a terrorist act does not occur; or
 - (b) the thing is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
 - (c) the thing is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.
- (4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.
- (5) Subsections (1) and (2) do not apply if the possession of the thing was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).

- (6) If, in a prosecution for an offence (the *prosecuted offence*) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the *alternative offence*) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

101.5 Collecting or making documents likely to facilitate terrorist acts

- (1) A person commits an offence if:
- (a) the person collects or makes a document; and
 - (b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
 - (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

Penalty: Imprisonment for 15 years.

- (2) A person commits an offence if:
-
-

- (a) the person collects or makes a document; and
- (b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
- (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).

Penalty: Imprisonment for 10 years.

- (3) A person commits an offence under subsection (1) or (2) even if:
 - (a) a terrorist act does not occur; or
 - (b) the document is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
 - (c) the document is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.
- (4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.
- (5) Subsections (1) and (2) do not apply if the collection or making of the document was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).
- (6) If, in a prosecution for an offence (the *prosecuted offence*) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the *alternative offence*) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

101.6 Other acts done in preparation for, or planning, terrorist acts

- (1) A person commits an offence if the person does any act in preparation for, or planning, a terrorist act.

Penalty: Imprisonment for life.

- (2) A person commits an offence under subsection (1) even if:
 - (a) a terrorist act does not occur; or
 - (b) the person's act is not done in preparation for, or planning, a specific terrorist act; or
 - (c) the person's act is done in preparation for, or planning, more than one terrorist act.
- (3) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).

Offences in relation to terrorist organisations in the Criminal Code.

102.2 Directing the activities of a terrorist organisation

- (1) A person commits an offence if:
- (a) the person intentionally directs the activities of an organisation; and
 - (b) the organisation is a terrorist organisation; and
 - (c) the person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.

- (2) A person commits an offence if:
- (a) the person intentionally directs the activities of an organisation; and
 - (b) the organisation is a terrorist organisation; and
 - (c) the person is reckless as to whether the organisation is a terrorist organisation.

Penalty: Imprisonment for 15 years.

102.3 Membership of a terrorist organisation

- (1) A person commits an offence if:
- (a) the person intentionally is a member of an organisation; and
 - (b) the organisation is a terrorist organisation; and
 - (c) the person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 10 years.

- (2) Subsection (1) does not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.

Note: A defendant bears a legal burden in relation to the matter in subsection (2) (see section 13.4).

102.4 Recruiting for a terrorist organisation

- (1) A person commits an offence if:
- (a) the person intentionally recruits a person to join, or participate in the activities of, an organisation; and
 - (b) the organisation is a terrorist organisation; and
 - (c) the first-mentioned person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.

- (2) A person commits an offence if:
- (a) the person intentionally recruits a person to join, or participate in the activities of, an organisation; and
 - (b) the organisation is a terrorist organisation; and
 - (c) the first-mentioned person is reckless as to whether the organisation is a terrorist organisation.

Penalty: Imprisonment for 15 years.

102.5 Training a terrorist organisation or receiving training from a terrorist organisation

- (1) A person commits an offence if:
- (a) the person intentionally provides training to, or intentionally receives training from, an organisation; and
 - (b) the organisation is a terrorist organisation; and
 - (c) the person is reckless as to whether the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.

- (2) A person commits an offence if:
- (a) the person intentionally provides training to, or intentionally receives training from, an organisation; and
 - (b) the organisation is a terrorist organisation that is covered by paragraph (b), (c), (d) or (e) of the definition of *terrorist organisation* in subsection 102.1(1).

Penalty: Imprisonment for 25 years.

- (3) Subject to subsection (4), strict liability applies to paragraph (2)(b).

- (4) Subsection (2) does not apply unless the person is reckless as to the circumstance mentioned in paragraph (2)(b).

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3)).

102.6 Getting funds to or from a terrorist organisation

- (1) A person commits an offence if:
- (a) the person intentionally receives funds from, or makes funds available to, an organisation (whether directly or indirectly); and
 - (b) the organisation is a terrorist organisation; and
 - (c) the person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.

- (2) A person commits an offence if:
- (a) the person intentionally receives funds from, or makes funds available to, an organisation (whether directly or indirectly); and
 - (b) the organisation is a terrorist organisation; and
 - (c) the person is reckless as to whether the organisation is a terrorist organisation.

Penalty: Imprisonment for 15 years.

- (3) Subsections (1) and (2) do not apply to the person's receipt of funds from the organisation if the person proves that he or she received the funds solely for the purpose of the provision of:

- (a) legal representation for a person in proceedings relating to this Division; or
 - (b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.
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Note: A defendant bears a legal burden in relation to the matter in subsection (3) (see section 13.4).

102.7 Providing support to a terrorist organisation

- (1) A person commits an offence if:
- (a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of *terrorist organisation* in this Division; and
 - (b) the organisation is a terrorist organisation; and
 - (c) the person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.

- (2) A person commits an offence if:
- (a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of *terrorist organisation* in this Division; and
 - (b) the organisation is a terrorist organisation; and
 - (c) the person is reckless as to whether the organisation is a terrorist organisation.

Penalty: Imprisonment for 15 years.

102.8 Associating with terrorist organisations

- (1) A person commits an offence if:
- (a) on 2 or more occasions:
 - (i) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and
 - (ii) the person knows that the organisation is a terrorist organisation; and
 - (iii) the association provides support to the organisation; and
 - (iv) the person intends that the support assist the organisation to expand or to continue to exist; and
 - (v) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation; and
 - (b) the organisation is a terrorist organisation because of paragraph (b), (c), (d) or (e) of the definition of *terrorist organisation* in this Division (whether or not the organisation is a terrorist organisation because of paragraph (a) of that definition also).

Penalty: Imprisonment for 3 years.

- (2) A person commits an offence if:
- (a) the person has previously been convicted of an offence against subsection (1); and

- (b) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and
- (c) the person knows that the organisation is a terrorist organisation; and
- (d) the association provides support to the organisation; and
- (e) the person intends that the support assist the organisation to expand or to continue to exist; and
- (f) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation; and
- (g) the organisation is a terrorist organisation because of paragraph (b), (c), (d) or (e) of the definition of *terrorist organisation* in this Division (whether or not the organisation is a terrorist organisation because of paragraph (a) of that definition also).

Penalty: Imprisonment for 3 years.

(3) Strict liability applies to paragraphs (1)(b) and (2)(g).

(4) This section does not apply if:

- (a) the association is with a close family member and relates only to a matter that could reasonably be regarded (taking into account the person's cultural background) as a matter of family or domestic concern; or
- (b) the association is in a place being used for public religious worship and takes place in the course of practising a religion; or
- (c) the association is only for the purpose of providing aid of a humanitarian nature; or
- (d) the association is only for the purpose of providing legal advice or legal representation in connection with:
 - (i) criminal proceedings or proceedings related to criminal proceedings (including possible criminal proceedings in the future); or
 - (ii) proceedings relating to whether the organisation in question is a terrorist organisation; or
 - (iii) a decision made or proposed to be made under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*, or proceedings relating to such a decision or proposed decision; or
 - (iv) a listing or proposed listing under section 15 of the *Charter of the United Nations Act 1945* or an application or proposed application to revoke such a listing, or proceedings relating to such a listing or application or proposed listing or application; or
 - (v) proceedings conducted by a military commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America and entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism"; or

- (vi) proceedings for a review of a decision relating to a passport or other travel document or to a failure to issue such a passport or other travel document (including a passport or other travel document that was, or would have been, issued by or on behalf of the government of a foreign country).

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3).

- (5) This section does not apply unless the person is reckless as to the circumstance mentioned in paragraph (1)(b) and (2)(g) (as the case requires).

Note: A defendant bears an evidential burden in relation to the matter in subsection (5). See subsection 13.3(3).

- (6) This section does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

Note: A defendant bears an evidential burden in relation to the matter in subsection (6). See subsection 13.3(3).

- (7) A person who is convicted of an offence under subsection (1) in relation to the person's conduct on 2 or more occasions is not liable to be punished for an offence under subsection (1) for other conduct of the person that takes place:

- (a) at the same time as that conduct; or
 - (b) within 7 days before or after any of those occasions.
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