Submission of the New South Wales Council for Civil Liberties (CCL)

Attorney General's Review of the Terrorism (Police Powers) Act 2002.

Introduction.

The Terrorism (Police Powers) Act provides the means to three sets of emergency powers for New South Wales Police. The need for targeting authorisations, for preventative detention and for covert searches has not been demonstrated.

In each case, the bills whose passage created this act were rushed through Parliament, with little time for debate, amendment and opposition. There are accordingly many respects in which they can be improved. However, the police have great powers independently of this Act. Unless it can be demonstrated that the powers are necessary, they should be withdrawn.

These powers are dangerous. They are properly described as extraordinary. They create their own dangers, to the liberty and safety of individuals and to democratic institutions. If they are to be kept, it is vitally important that they continue to be viewed as extraordinary, to be used only where other powers are inadequate to save life. Their use must never become routine.

Emergency circumstances must not be seen as providing a justification for police shrugging off supervision. Extraordinary powers require extraordinary supervision and oversight.

A Public Interest Monitor (PIM).

In Queensland, an important safeguard has been provided by the creation of the Public Interest Monitor. The office, created by the Borbidge Government, has the support of both sides of politics.

The major concern leading to the decision to introduce the office was that the issue of warrants by a judge in his or her chambers, with only a police lawyer present, was unduly closed and secretive. Queensland laws require applicants for surveillance warrants, covert search warrants, additional powers warrants and preventative detention warrants (whether for interim orders, final orders or extensions of either) to inform the Monitor, under arrangements determined by the Monitor. The advice must include the time and place of the hearing of the application. The requirement is the same for all applicants, whether they are police officers or officers of the Queensland Crime and Misconduct Commission.

The Monitor has the power to be present at hearings of these applications in the courts, where he or she may cross-examine or otherwise question the applicant and any witnesses. The judge is required to consider any submissions made by the Monitor, including representations made by telephone, fax or in any other reasonable way.

In the case of surveillance warrants and covert search warrants, the Monitor is required to monitor compliance with the laws in relation to matters concerning applications.

In the case of an emergency warrant, the Monitor must be advised within two days, when the applicant applies to the Supreme Court for approval of the exercise of the powers.

The Monitor possesses these powers and responsibilities both when the target is excluded from a hearing and when the target and the target's lawyer are entitled to be present, as in the issue of final warrants for preventative detention.

Similar arrangements apply when an application is made to revoke or vary an order, whether by a detainee or a police applicant.

Information obtained by surveillance or covert searches may be disclosed to the Monitor. Reports on the covert searches are required within seven days of execution, and must be given to the Monitor as well as to the Supreme Court judge who issued the warrant.

Under the Commonwealth Criminal Code section 104 subsections (12), (18), (19) and (23), if an interim control order is made concerning a resident of Queensland, or if the issuing court made the order in Queensland, a member of the Australian Federal Police must give a copy of the order to the Monitor. The Monitor must be given notification of a hearing to confirm an interim control order, or to vary or revoke a control order, and is empowered to adduce additional evidence (including calling witnesses) and to make submissions.

The CCL recommends that New South Wales follow the Queensland example, and create a position of Public Interest Monitor. The PIM should be a senior, experienced barrister, independent of Government, and with tenure arrangements like those of the Director of Public Prosecutions.

As in the Queensland case, the Monitor should be required by to give annual reports to Parliament via the minister on the use and effectiveness of surveillance warrants, covert search warrants, control orders and preventative detention warrants. A report should also be given to the Police Commissioner on non-compliance with any of these acts. For this purpose or for any other functions, the Monitor should have the power to inspect the police service and the Crime and Misconduct Commission records.

An alternative proposal is to expand the powers and the funding of the NSW Ombudsman, so that he or she can perform a similar function. While we consider this an inferior proposal, since the Ombudsman should have an independent supervisory role, it would nevertheless provide some safeguards we think are essential to limit the opportunities for the powers provided in this act to be misused.

The need for a Charter of Rights

Since the events of 11 September 2001, democratic parliaments across the world have passed legislation to combat the threat of terrorism at home and abroad. The big

difference between Australian legislation and foreign legislation is that in all other democratic jurisdictions the legislation is open to judicial review with respect to a Charter or Bill of Rights or similar.

For example, in the United Kingdom and Canada the courts have upheld fundamental civil liberties by striking down the excesses of counter-terrorism laws which (ironically) threatened their free and democratic societies. In the UK the House of Lords found that the indefinite detention of foreign nationals without trial, under the *Anti-terrorism, Crime and Security Act 2001,* is a breach of the European Convention of Human Rights.[1] The Canadian Supreme Court has struck down similar legislation that authorised the non-reviewable indefinite detention of non-citizens for security reasons.[2]

Without a Charter or Bill of Rights, legislation passed by the NSW Parliament is not subject to this important check-and-balance, which is a feature of all other free and democratic societies. The courts in NSW are unable to protect people from laws, duly passed by Parliament, that violate fundamental principles of international human rights law.

The NSW Council for Civil Liberties recommends that the Attorney-General follow the example of his Victorian and ACT counterparts by sponsoring a Charter or Bill of Rights which institutes an important democratic check-and-balance. This will help to ensure that when Parliament passes legislation to protect our way of life from terrorist attacks, it does not inadvertently destroy our civil liberties in the process.

Recommendations for Amendment: Parts 1 and 2.

Part 1.

The definition of 'terrorist act'. (Section 3.)

In the Council for Civil Liberty's view, the definition of 'terrorist act' is too wide, and should be narrowed. We are aware that the definition is the outcome of consultation between State, Territory and the Commonwealth Attorneys General, and that it parallels the definition in Part 5.3 of the Commonwealth Criminal Code. It is our view that that definition should be changed. If that cannot be done for all laws, at least changes should be made in respect of this Part, in view of the potentially oppressive powers that are created by it.

1. Foreign governments.

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

[1] *A & others v Secretary of State for the Home Department* [2004] UKHL 56.
[2] *Charkaoui v Canada* (2007) SCC 9.

industrial action'.[3] The definition should be amended to exclude actions taken against legitimate military targets in war; and to exclude actions taken against governments (and not against innocent persons) that engage in torture or murder, which execute or incarcerate persons without trial, or which break the laws of war. Should those actions themselves break the laws of war, or should there be planning in Australia for actions which break the laws of war, the persons should be charged under the appropriate laws; not detained for prevention purposes.

2. Destroying property in Australia.

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

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

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

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

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

The legislation for this Part was rushed through Parliament in a climate of fear and horror following the Bali bombing. There was little time for the details to be considered, nor for amendments to be proposed—nor indeed for a serious debate about the need for the legislation. We note the information in the letter inviting our submission that a targeting authorisation has only been made once, during operation Pendennis, and that the powers thus provided were not in fact needed.

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

[3] Arguably the bombings of Dresden and Nagasaki and the shock and awe tactics at the start of the Iraqi war count as terrorist acts under this definition. The overthrow of dictators has rarely been achieved without bloodshed.

Section 13. Challenging authorisation.

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

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

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

Section 29. Protection of police.

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

Sections 17, 18 and 19. Search powers.

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

Section 5. The indefinite 'near future'.

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

Persons as targets.

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

Part 2A Preventative detention.

Introduction

This Part is likely to be counter-productive. It is contrary to international law. Its passage was a dangerous erosion of civil liberties. It does not balance the rights of freedom and safety. It is of no aid in protecting people from terrorist acts. We recommend that it be repealed.

1. **The Part is likely to be counter-productive.**

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

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

2. International law.

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

Detention without trial is not acceptable. '4. Anyone who is deprived of his liberty by arrest of detention shall have be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'

Former judge the Hon. Alastair Nicholson AO RFD QC argues that in international law it makes no difference whether detention is for punitive or preventative purposes.[4]

We should not take it that the Covenant was devised in peaceful times, and that the present circumstances provide reason to ignore it. The ICCPR was established in the

[4] He quotes the Human Rights Committee, in a submission made to the Senate Legal and Constitutional Committee during its inquiry into to the corresponding Commonwealth law.

light of terrorist attacks in France by dissidents from its colonies and in England by the Irish Republican Army and its offshoots. Both countries adhered to it in spite of those terrorist attacks.

The ICCPR was developed in the knowledge that states would wish to infringe these rights in order to guarantee security. There is accordingly a let-out clause in the ICCPR that allows exceptions in times of national emergency. That let-out is limited to times of national emergency which threaten the life of the nation. While some terrorist attacks may do that, it is clear, given the broad definition in section 3, that not all do.

3. The erosion of civil liberties.

a. The Part permits a person to be held in detention, without charge, for two weeks at a time.

At the end of that time, only the libertarian views of a judge prevent the person from being held for a further two weeks, and then another, to a maximum of ten years. Recent High Court cases do not encourage the view that judges can be relied upon to favour liberty.

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

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

c. The powers granted are open to substantial misuse. They could be used by a government against its political opponents—say by arranging for the arrest of a prominent member "by mistake", during an election campaign. They can be misused by police—through ignorance, prejudice or malice.[5] They may be used to silence or to discredit critics. It is also possible that individuals, acting from malice, will give police false information about terrorist plots.

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

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

case].'[6]

4. Balancing conflicting rights.

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

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

The distinguished authors Tom L. Beauchamp and James F. Childres give the following account.

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

A decision, or a piece of legislation which deals with a conflict of basic principles or rights counts as balanced only if it meets all of these requirements.[7]

These conditions appear obvious and non-controversial. The powers granted in the Part need to meet each of these requirements. They do not.

i. Much effort has gone into public assertions that the right to life is more important than freedom from detention without trial. Even so, that case is not complete. There is a traditional value that freedom is worth dying for. But this submission does not depend on that traditional Australian[8] value.

There is a risk that in the hands of a future government or police force, the powers granted in this Part will be used to conceal wrongdoing that is costing lives. It is also to be remembered that the liberties and rights which this Part proposes to reduce are of great importance in protecting a country from tyranny. In that way, they also protect lives. Weakening them threatens to reduce the public apprehension of their

[6] Both examples come from a press release by the President of the Human Rights and Equal Opportunity Commission, made during debate on the corresponding Commonwealth legislation.
[7] Tom L. Beauchamp and James F. Childres, **Principles of Biomedical Ethics**, Fifth Edition, Oxford University Press 2001
[8] and American and European

importance. Deriding them in political debate is irresponsible.

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

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

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

iii. It is unlikely that the proposed act will save a single life that will not be as effectively saved by the use of other powers. There are laws already in existence that give powers of arrest, but do not deny the rights of those arrested. There are laws that enable people to be arrested, remanded and then tried if they are planning to commit violent actions. There are laws against incitement, and against conspiracy to commit crimes, including terrorist crimes, murder, and causing harm. There are new laws giving power to ASIO. These laws can already be used to prevent harm.

It must be shown therefore that this law will prevent some *other* harms. To our knowledge, that has not been done publicly.

iv. Since the powers are not necessary at all, the principle of minimal infringement should not come into account. However, we include below a number of changes that would reduce the infringements.

v. Similarly, there is much that should be done to minimise the negative effects. Some of these, also, are outlined below.

vi. The most worrying risks of partiality lie in the operation of the Part, not in its substance. The prejudices which have been fostered recently add to those which have been with us for decades, and may have impact on police perceptions.

5. The powers are not necessary.

The Part is of no aid in protecting people from terrorist acts. No example, real or hypothetical, has been given in the public debate where existing powers would not be sufficient. The police already have great powers.

Recommendations for Amendment: Part 2A.

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

Section 26A

Subsection (a). It is of importance that the object is to prevent an *imminent* terrorist attack. The only arguments adduced publicly, whether in news media or in the Senate hearings into the Commonwealth Act, suppose that the powers are needed to prevent

an attack which is due to take place *within a few hours*. Were it further off, there would be plenty of time for the ordinary processes of the law to take effect. Since the principal point of this Part is to *extend* the time that a person can be held from 48 hours under the Commonwealth corresponding Act to two weeks, no serious effort at justification has been publicly attempted.

Section 26D

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

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

Section 26K

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

Subsection (5). Clause (b) of this subsection appears to contradict the first sentence. Clause (b) should be repealed. Except where a hearing is continuing, there should be no question of one interim order being followed by another.

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

Subsection (7) attempts to deal with this problem. Suppose though that it is alleged that a conspiracy has taken place for a bridge to be bombed, some day in the next two months. Using the criteria in (7), 61 separate actions are planned. The same piece of planning could thus be used to repeatedly detain a person. Thus the intention of subsection (5) would be frustrated.

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

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

Section 26M

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

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

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

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

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

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

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

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

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

Section 26N Prohibited contact orders.

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

revoked?

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

Section 26O Rules of evidence.

Subsection (2). This subsection poses a new standard of evidence. The court is to take into account 'any evidence or information that the Court considers credible or trustworthy in the circumstances, and, in that regard, is not bound by principles or rules governing the admission of evidence.'

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

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

The point of the existing rules is that they exclude evidence which is not credible or trustworthy.

Presumably it is to be read with subsection 26D(1), which requires that there be reasonable grounds to suspect the person against whom a detention order is sought.

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

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

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

Section 26P. Restrictions on publication.

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

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

Substantial safeguards therefore should be introduced.

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

(ii) The Public Interest Monitor and the Ombudsman should be exempted from the secrecy requirement, and empowered to reveal directly to the public (i.e. not through the Attorney General) cases of abuse of the powers granted in this Bill.[9]

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

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

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

Section 26X. Holding detainees in prison.

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

The reasons for this include the safety of persons who may be innocent, but may be subject to physical attack from other prisoners.

In the case of juveniles, it is also to prevent their corruption by association with hardened criminals.

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

We understand from the Ombudsman's Issues Paper *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, that it is likely that any young people detained under this act will be housed at the Kariong Correctional Centre. This is a centre used for those young people who have committed the most serious crimes, and for those

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

whose behaviour has made them too difficult to manage at detention centres. This proposal is intolerable.

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

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

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

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

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

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

In general, explanations of such restrictions should be given. It is not enough for a person to be told 'the law says you may only contact a single family member, and you may not contact any other family member'.[10]

The subsections should be repealed.

Section 26ZA. Compliance with the obligation to inform.

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

Section 26ZB. Denial of documents.

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

Subsection (7). This subsection denies to lawyers the right to be given a copy of, or even to see, any document other than the detention order. It is entirely obnoxious—a grave breach of rights, not justified by security considerations. Lawyers should have automatic access to all the evidence presented in an application for preventative detention (and any application for variation or such an order), unless for the gravest security reasons, a court orders otherwise.[11] Such an order should have a time limit on the suppression.

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

Section 26ZC. Humane treatment.

Subsection (2). This clause sets a maximum sentence of two years' imprisonment for any person who subjects a detainee to cruel, inhuman or degrading treatment, or failing to treat them with humanity and respect for human dignity. As a penalty possibly to be used for torture, the two years' imprisonment is startlingly light, given that there is a five-year penalty for a monitor who reveals the content of a detainee's discussion with a lawyer. Either the penalty should be a maximum of ten years' imprisonment, or there should be a section declaring that to remove doubt, other acts that punish torture and lesser forms of physical suasion are not overridden.

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

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

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

Section 26ZF. Contacting the Ombudsman and the PIC.

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

Section 26ZI. Monitoring contact.

Subsection (6). The procedure of monitoring will inhibit full and frank disclosure by the detainee to his or her lawyer. This will affect the lawyer's advice in ways that

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

may be adverse not only to the client, but adverse to the purposes of the detention. The section should be repealed.

Section 26ZL. Waiving rights.

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

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

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

26ZN. Annual reports.

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

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

26ZO. Monitoring by a Public Interest Monitor, and by the Ombudsman

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

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

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

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

(D) The Ombudsman should be able to report directly to the public, through the press

or other media, or is such other manner as may become necessary, as well as reporting through Parliament.

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

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

26ZS Sunset clause

The United Kingdom's *Prevention of Terrorism Act 2005* has a one-year sunset clause. (Section 13) In addition to the parliamentary scrutiny that this provides, there must be an annual review of the Act. (Section 14)

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

Part 2 weakens Australia's defences against it becoming a "managed democracy", like Singapore or Malaysia. It should not have been passed into law.

But since it has, there should be a sunset clause repealing it in one year.

Part 3 Covert Searches.

The Council holds that this power is unwarranted, and dangerous. This Part of the Act should be repealed.

The CCL agrees with the Legislation Review Committee of the NSW Parliament that the Act will inevitably lead to the covert entry and search of premises of innocent people.

If the power is to remain, the Act needs to be amended to minimise the possibilities of misuse.

1. Membership of terrorist organisations.

The definition of 'terrorist act' for this Part includes membership of a proscribed terrorist organisation. The CCL has opposed the proscription of organisations on the following grounds:

The power to proscribe an organisation is open to substantial misuse. It creates a manifest risk of arbitrary, and politically motivated abuse. In a severe case, it can be

used to ban opposition parties and to suppress dissent. It is too dangerous a power to be entrusted to governments.[12]

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

Proscription of an organisation criminalises those who remain its members. It is tempting to governments, for it is often easier to demonstrate that persons are members of or have supported a proscribed organisation than it is to prove that that they have engaged in terrorist actions or in actions in preparation for such actions.

But ease of conviction is not a good basis for determining legislation, especially for policies which threaten fundamental rights. Proscription of organisations makes it more likely that persons who are innocent of any terrorist intentions will be convicted and punished.

For the most part, it is possible to protect Australia and Australians against terrorist acts by the use of the laws against murder, kidnapping, aiding and abetting, attempt, incitement, grievous bodily harm, criminal damage, arson, conspiracy and treason, and conspiracy to commit these offences. This list might be supplemented by the inclusion of an offence of mass murder.

There is also the risk that members of a legitimate organisation will find their membership made illegal because of the actions of the leaders of the organisation.

We echo the concern of the Legislation Review Committee of the NSW Parliament, that the procedures by which the Governor-General comes to specify that an organisation is a terrorist organisation is open to abuse, with the possibility that an organisation may be proscribed for political reasons rather than for its criminal activities. We hold that if proscription is to occur, the following processes should be followed:

Proscription should be done by a Federal judge, in open court, on application by the Federal Attorney-General. An appeal should lie with a superior court on the facts as well as the lawfulness of the proscription. This should be the only method by which an organisation may be proscribed.

The criteria for proscription should be determined by the legislation.

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

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

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

In view of the risks of abuse of the process for political or vindictive ends, and in view of the grave consequences for individuals, the use of secret evidence (i.e. evidence that is made available to the court but not to the organisations at risk of proscription) should not be allowed.

None of these procedures are followed. Though a parliamentary review of a proscription is possible, an organisation remains proscribed until that review takes place.

Because the arrangements for proscription are not satisfactory, and proscription itself is a dubious activity, we recommend that membership of a terrorist organisation should not be a criterion for allowing a covert search to go ahead.

2. The threshold.

The threshold is too low. A reasonable ground for suspicion is much lower than a reasonable ground for belief. The eligible judge should have to determine that there are good grounds for the belief.

A requirement for the issue of a warrant should include that there is an imminent threat of a terrorist act, with danger to human life.

3. Public Interest Monitor.

If covert searches are to occur, the Public Interest Monitor or the Ombudsman should be present at the hearings of applications for covert search warrants. It should be a requirement upon the applicant to inform the PIM when and where the application is to be heard. The Monitor should be able to cross-examine the applicant and any witnesses, and to make submissions to the issuing judge, who in turn should be obliged to take them into account.

4. Provision of records.

There needs to be a means by which the record of police in asking for warrants and in the execution of warrants, can be laid before the issuing authority when a new application is made.

5. Supervision of searches.

Members of the Office of the Ombudsman should be required to observe each covert search. It should be a condition of the legality of such searches and of the subsequent use of what is found in evidence that they do so observe. The Ombudsman's Office should prepare a report on each search, to be given to the owner/occupier of the premises searched at the same time that the occupier's notice is given.

6. Reporting.

Section 27S requires that a report be provided to the judge who issued a covert search warrant within ten days of its execution. However it does not provide any penalty for non-compliance. Such a penalty should be included.

Martin Bibby, Assistant Secretary