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Submission on the *Anti-Terrorism Bill (No 2) 2005*

We welcome the opportunity to make a submission to this inquiry. The Bill proposes significant restrictions on the rights and freedoms of people in Australia. Laws that restrict rights should only be made after a fair opportunity for public debate and parliamentary scrutiny.

We acknowledge that some opinion polls suggest that many Australians are responsive to calls for new anti-terrorism laws and feel the need for more security from terrorist threats. We note, however, that Australians lack information about the nature and extent of the terrorist threat, which makes it difficult for citizens to determine what laws are necessary and justifiable.

The *Anti-Terrorism Bill 2005* introduces many and varied changes to Australia's national security laws, as well as some changes that have little to do with security or terrorism. In principle, we support reasonable measures to strengthen aviation security (Schedule 8), prevent terrorist financing (Schedules 3 and 9), and to confer stop, search and question powers on police in well-defined circumstances (Schedule 5).

We commend the government for its attempts to improve safeguards and supervision mechanisms in the Bill (including greater levels of judicial review), although this submission suggests how these might be further strengthened. We also welcome the omission from the Bill of changes to citizenship law proposed previously (Prime Minister, 'Counter-Terrorism Laws Strengthened', Media Release, 8 September 2005).

This submission directs its comments to those areas of major concern. It should not be assumed, however, that we regard any amendments not discussed below as unproblematic. This submission is prefaced by a summary of our main points.

Yours sincerely

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A The Structural Context

Some of the Bill's provisions are fashioned on British counter-terrorism laws. If Australian laws are really to reflect world's 'best practice' (as claimed by the Prime Minister: 'Counter-Terrorism Laws Strengthened', Media Release, 8 September 2005), then they must be adopted alongside an Australian *Human Rights Act* – as in Britain. The British courts can independently supervise the impact of terrorism laws on the rights of people in Britain.

Human rights law does not prevent effective responses to terrorism, since it allows rights to be limited or even suspended (in a public emergency threatening the life of the nation) if necessary to ensure security (see, eg, arts 4, 12, 17, 18 and 22 of the *International Covenant on Civil and Political Rights* 1966). Indeed, the UK courts have accepted the government's view that terrorism is a serious threat which may justify temporarily suspending some human rights (*A v Home Secretary* [2004] UKHL 56). Governments enjoy a margin of appreciation in evaluating the necessity of restricting or suspending rights, though they must precisely specify the nature of the threat and the reasons for restrictions. Derogation from rights must also be temporary and terminate once the emergency ends. Any restriction must also be *proportionate* to the threat.

At the same time, human rights law ensures that governments are accountable for restrictions placed on rights, thus enhancing public confidence in security measures. It provides a principled framework for evaluating terrorism laws, ensuring they are strictly necessary and proportionate to the threat, and preventing unjustifiable interference in liberty.

Unlike every other democratic nation, Australia lacks a bill of rights and is not part of a regional human rights system. The absence of binding human rights makes it more difficult to evaluate anti-terrorism laws, which are subject only to political judgment (which may be impaired by a climate of crisis) and limited constitutional protections. These are insufficient to provide a proper policy or legal assessment of such laws, or to ensure that rights and security do not tip dangerously out of balance. In the absence of entrenched rights protections in Australia, Parliament should proceed even more carefully before agreeing to further terrorism laws.

We note that the *Human Rights Act 2004* in the ACT has encouraged a robust and principled analysis of the Bill, and raised important questions about the need for, and proportionality of, its measures. This has encouraged governments to ensure that these measures are firmly justified as necessary and proportionate restrictions on the rights and freedoms of citizens and residents. We also note that in the absence of a constitutional or statutory human rights framework in federal law, meaningful and independent judicial review assumes the greatest importance.

B The Justification for the Bill

In evaluating whether new counter-terrorism laws are *objectively* needed, a number of factors must be considered. Since 2001, Australians have officially been told that there is a 'medium' risk of terrorist attack, meaning that 'a terrorist attack in Australia *could* occur'. The Alert Level has never been set at a 'high' risk of attack, nor an 'extreme' risk. We accept that the government has primary competence in evaluating security threats. However, given its geographic location and position in international affairs, the threat facing the United States and Britain is likely to be far higher than that facing Australia, yet in some respects Australia is planning to adopt laws that are more extensive and invasive than those in countries.

It is doubtful whether Australia faces 'a public emergency threatening the life of the nation', which would be necessary to allow Australia to suspend some basic rights under international law (such as freedom from arbitrary detention). An emergency must be actual or imminent, not merely anticipated, and threaten the whole population, the physical or territorial existence of the state, or the functioning of state institutions (see *Lawless* case (1 July 1961, Ser B: Report of the European Commission, No 90); *Greek* case (Report of the European Commission, (1969) YBECHR 12)). Australia has not notified the United Nations that it faces such an emergency, even though this is required under the ICCPR where a country seeks to suspend rights. Such derogation would be necessary to support the new powers of detention and control orders. Either Australia does not believe that the terrorist threat rationally amounts to a public emergency, or Australia may be breaching its international obligations.

The government has also not demonstrated that existing counter-terrorism laws are insufficient to meet the terrorist threat, which would be necessary to justify radical new laws. Australia has already given ASIO very extensive powers to question and detain for up to 7 days people who are not even terrorist suspects, while the Federal Police may hold suspects for an extended period of 24 hours. ASIO has also been given exponential increases in its staff and budget (see ASIO *Annual Report*, 2003-04, at 6), as well as new powers of surveillance and evidence gathering. Australia has created a large number of broad terrorist offences, as well as wide powers to ban terrorist organisations and prevent terrorist financing. Intelligence sources can be protected in court under new laws of evidence. State police have also been granted enhanced powers to deal with terrorism (see, eg, *Terrorism (Police Powers) Act 2002* (NSW)).

Despite the breadth of these powers, Australia has seldom made use of them, with only ten people being questioned in 2004-05 (and none detained) by ASIO (ASIO Annual Report 2004-05), and scarcely any prosecutions for terrorism. This may suggest that the threat facing Australia is not as acute as imagined, and also that further laws are unnecessary. Australians have also been told little about the effectiveness of terrorism laws. There has been no public disclosure of the usefulness of information obtained by ASIO questioning. While protecting intelligence is important, it is impossible for the community to evaluate the need for, and effectiveness of, laws if their use remains secret. This is exacerbated by harsh criminal penalties for disclosing information about ASIO interrogations, even where a journalist is seeking to report an abuse of power.

We note also that the Joint Standing Committee on ASIO, ASIS and DSD has not yet tabled its report on the review of Division III, Part 3 of the *ASIO Act 1979* (Cth), so it may be premature to extend counter-terrorism powers before appreciating whether existing powers should even continue. It is similarly premature to extend powers before the independent Security Legislation Review Committee, announced by the Attorney-General in October 2005, has had an opportunity to consider existing laws, conduct its public hearings, and report to the Parliament.

Finally, the focus on new laws deflects attention from practical measures. Making new law is no substitute for properly enforcing the existing law. Further, making new laws obscures efforts to address the structural causes of some terrorist violence.

C Schedule 1 – Definition of terrorist organisation etc.

Schedule 1 adds a new ground for proscribing terrorist organisations under s 102.1(2) of the *Criminal Code* where an organisation 'advocates the doing of a terrorist act'. Advocating is defined as (a) counselling or urging it; (b) providing instruction for it; or (c) directly praising it.

The last ground indicates an intention to cover *indirect* incitement of terrorism, or statements which, in a very generalised or abstract way, somehow support, justify or condone terrorism. Advocating or praising terrorism is a basis for proscribing groups and does not, of itself, impose criminal liability. Nevertheless, since it is an offence to be a 'member' of a terrorist organisation (10 years imprisonment) or to 'associate' with one (3 years imprisonment) (ss 102.3 and 102.8, *Criminal Code*), a member or associate could be imprisoned merely because their organisation praised terrorism. This could occur even if the organisation has no other involvement in terrorism; even if the praise did not result in a terrorist act; and even if the organisation praising terrorism did not intend to cause further terrorism.

This is an extraordinary extension of the power of proscription and of criminal liability, since it collectively punishes members of groups for the actions of their associates beyond their control. It is also a misapplication of criminal law to trivial harm, when criminological policy presupposes that criminal law should be reserved for the most serious social harms.

While it may be legitimate to ban groups which actively engage in, or prepare for, terrorism, it is not justifiable to ban whole groups merely because someone in it praises terrorism. It is well-accepted that speech which directly incites a specific crime may be prosecuted as incitement. It is quite another matter to prosecute a third person for the statements of another; even more so when such statements need not be directly and specifically connected to any actual offence.

This proposal raises the possibility that places of religious worship, where they qualify as 'organisations' (meaning a body corporate or unincorporated body: s 100.1, *Criminal Code*), may be closed down merely because someone in it praised a terrorist act, such as where a preacher asks God to grant victory to the *mujahedeen* in Iraq. This would collectively punish all worshippers for the view of a wayward leader. It may also infringe the express constitutional protection of the free exercise of religion (s 116, *Constitution*; see below on sedition). It could also violate Australia's obligation to protect freedom of association (art 22, *ICCPR* 1966), since it is *disproportionate* to restrict the association of the harmless many to suppress the association of a harmful few. In any case, a statement such as this does not deserve criminal sanction, unless it provoked another to commit (or attempt to commit) violence (see below on sedition).

It is also unclear when an organisation can be said to be 'praising' terrorism. For example, must the organisation as a whole formally praise terrorism, or are the words of a leader (or even a single member) attributable to the organisation as a whole? Further, it is not made clear whether praise must take place publicly, or whether praise expressed in private is sufficient.

Lastly, we acknowledge that this Schedule (particularly items 6 and 10) brings conformity with the *Anti-Terrorism Bill (No 1) 2005* and implements the Prime Minister's objectives ('Ant-Terrorism Bill', Media Release, 2 November 2005). However, while Divisions 101 and 102 are now consistent, we are concerned about these changes. While preparatory conduct should be an offence, the amendments criminalise people for conduct committed before a specific criminal intent has formed. This is contrary to ordinary principles of criminal responsibility, since people who think in a preliminary or provisional way about committing crimes may change their mind and not go ahead, and ought not be prosecuted before a genuine criminal intent has crystallised.

D Schedule 3 – Financing terrorism

We acknowledge that UN Security Council resolution 1373 (2001), and earlier and subsequent resolutions, imposed binding obligations on Australia to combat terrorist financing. The new offence of financing a terrorist (cl 103.2) would allow a person to be imprisoned for life if the person *indirectly* makes funds available to another person, or *indirectly* collects funds for another, and the person is *reckless* as to the whether the other person will use the funds for terrorism. In federal law, a person is reckless if he or she 'is aware of a substantial risk' that the funds will be used for terrorism, and 'having regard to the circumstances known to him or her, it is unjustifiable to take the risk' (s 5.4, *Criminal Code*). A person need not *intend* that the funds be used for terrorism, nor must a person have *knowledge* that the funds will be used for terrorism. The offence is committed even if a terrorist act does not occur or the funds will not be used for a specific terrorist act (cl 103.2(2)).

This proposed offence extends criminal liability too far, and makes it impossible for any person to know the scope of their legal liabilities with any certainty. Terrorists obtain financing from a range of sources, including legitimate institutions (such as money laundering through banks), and employ a variety of deceptive means to secure funding. This offence would require every Australian to vigilantly consider where their money might end up before donating to a charity, investing in stocks, depositing money with a bank, or even giving money as birthday present.

E Schedule 4 – Control orders and preventative detention orders

(1) Division 104 – Control Orders

At the outset, it is noted that the provisions on control orders contain additional requirements not found in the earlier draft Bill and which improve access to information and scrutiny of both the Attorney-General when consenting to the AFP applying for such an order (s 104.2 (3) and (4)) and the issuing court when making such an order (s 104.4(1)(b) and (2)). There are also welcome improvements to the right of an affected individual to know the basis upon which the AFP has sought a control order (ss 104.12(1)(a)(ii); 104.26(1)(a)(ii)). A corresponding right in respect of the person's lawyer is also now recognised (ss 104.13(1)(b); 104.21(1)(b)).

However, despite these developments, fundamental problems with the scheme remain.

(a) Possible invalidity - breach of constitutional separation of judicial power

The involvement of the Federal Court, the Family Court or the Federal Magistrates Court as issuing courts (Sch 4, item 11) may be constitutionally invalid.

The exercise of judicial power under Chapter III of the *Commonwealth Constitution* is to be kept strictly separate from the use of non-judicial power: *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. So a law which requires a Chapter III court to exercise a non-judicial function will be prohibited.

The making of control orders, as understood by the possible features outlined in cl 104.5, against persons absent any finding of criminal guilt, is not obviously within the parameters of judicial power. As Justice Gummow said in *Fardon v Attorney-General (Queensland)* (2004) 210 ALR 50 at 74, exceptional cases aside, 'the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that

citizen for past acts'. Although that case concerned detention, the function of control orders is, while stopping short of incarceration in a facility, also to substantially deprive the subject of his or her liberty. They can certainly encompass 'house arrest' under cl 104.5(3)(c).

The ability to deprive a person of their liberty is, however, subject to several exceptions which will not breach the constitutional separation of judicial power where the Executive acts for a non-punitive purpose, such as to protect the Australian community from the unauthorised entry of non-citizens: *Al-Kateb v Godwin* (2004) 208 ALR 124. Detention may be justified as necessary for the detainee's own protection, as in the case of the mentally ill. The High Court has found that the 'categories of non-punitive, involuntary detention are not closed' (*Kruger v Commonwealth* (*Stolen Generations Case*) (1997) 190 CLR 1 at 162, Gummow J).

While those decisions confirm the ability of the Executive to curtail the freedoms of movement and association of particular persons, it is clear that the basis upon which those deprivations managed to withstand constitutional objection was that they involved only the use of non-judicial power. Thus no breach of the separation of judicial power occurred. But the scheme attempted in Division 104 is not at all analogous. A federal court cannot exercise that same non-judicial power to deprive an individual of his or her liberty on grounds which are purely protective and which do not involve elements of punishment and deterrence. This revised Bill contains a new section explaining the object of the control order scheme (cl 104.1), but this expressly confirms that the power conferred upon the federal courts is non-judicial in nature.

The suggestion that control orders are equivalent to Apprehended Violence Orders ignores the fact that the latter are made by State courts which enjoy a more fluid division of judicial and non-judicial powers. A control order may also not be likened to forms of anticipatory injunctive relief, which require the identification of a precise substantive legal right that is threatened.

The High Court's decision in *Fardon* that the legislative conferral of power to make orders of preventative detention upon State Supreme Court judges was valid does not enable us to say with any confidence that Federal courts may be invested by the Commonwealth with a power to make control orders. Beyond the basic difference of detention, that case is distinguishable on at least two grounds. First, the persons subject to the Supreme Court's orders under the Act in question had already been found guilty of an offence and so it was argued that the ability to further deal with them under the legislation arose from that circumstance. Second, there is no strict prohibition on the ability of State courts to exercise judicial and non-judicial power under State constitutions and the inhibiting effect of the separation of judicial power under the Commonwealth Constitution upon the powers of State legislatures in this regard is nowhere near as stringent as it is in respect of federal courts. Two members of the High Court were explicit in saying that had the law been passed by the Commonwealth in respect of the federal courts it would have been constitutionally invalid.

There is no precedent to suggest that the ability to make control orders is a judicial function which may be properly exercised by a Chapter III court. The Bill's attempt to confer that power upon the courts is open to challenge as constitutionally invalid. There is a real risk that the regime would be struck down by the High Court.

None of this means that a scheme of control orders is necessarily beyond the power of the Commonwealth Parliament to establish. It is simply to say that the making of such orders is not a function which a Chapter III court can exercise. The Parliament could confer power to make such orders upon the Executive, or some independent body or group of persons (eg, retired members of the federal judiciary). While that might be thought to reduce the level of judicial

oversight, this need not be so. Indeed, there are strong arguments in favour of keeping the Courts out of the process of making such orders and instead leaving intact their full powers under the *Administrative Decisions (Judicial Review) Act 1977* to review the decisions made by those charged with granting, varying and revoking the orders.

(b) Other constitutional restrictions not going to validity but scope of the control order

It should be noted that the extent to which the making of a control order – by any arm of government – can prevent discussion of political communication may well be restricted by the implied freedom to engage in such communication arising from those provisions of the *Commonwealth Constitution* which establish representative and responsible government: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

The conferral by sub-cl 104.5(3)(e) and (f) of a power to impose restrictions upon political communication must be understood as subject to the proportionality test attached to the constitutional freedom.

Additionally, the use of powers to restrict movement and association in sub-cl 104.5 (3) (a), (c) and (e) may be similarly confined by an implied freedom of movement and association arising from the constitutional system of representative and responsible government: *Kruger v Commonwealth* (1997) 190 CLR 1, per Justices Gaudron and Toohey, though see also *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582.

(c) Extent of judicial review

As mentioned above, the new draft of the *Anti-Terrorism Bill (No 2)* improves significantly on the degree of judicial oversight of the control order scheme. It now much more closely resembles the provisions of the United Kingdom's *Prevention of Terrorism Act* 2005. Specifically, the fact that confirmation of an interim control order now requires an *inter partes* hearing at which the person affected is able to adduce evidence (cl 104.14) to challenge the grounds upon which the order has been made and which he or she has a right to know (cl 104.12(1)(a)(ii)) is a substantial advance upon the earlier position.

At present none of the decisions made under Division 104 (apart from cl 104.2) are expressly exempted from the operation of the *Administrative Decisions (Judicial Review) Act 1977,* but that Act does not apply, of course, to the decisions of a judicial body such as the issuing court.

The individual may apply to the issuing court for revocation or variation of an order under cl 104.18. It is not entirely clear what is to be gained by returning to the issuing court and asking it to review its own decision in preference to simply appealing the confirmation of the interim order to the Court of Appeal of the Federal Court under s 24 of the *Federal Court of Australia Act* 1976. While the latter route is not foreclosed by the Bill, it seems necessary that the individual apply for revocation prior to appealing the initial making of the order. Presumably then, the decision properly appealed from is that which refused revocation. This seems a somewhat needless duplication of process.

(d) Further Safeguards

The requirement under cl 104.29 that the Attorney-General report to Parliament on the operation of Division 104 has been strengthened since the earlier draft by a more precise list of matters to be covered in that document. However, the frequency of reporting is inadequate. The

Bill's requirement of a report only annually may be contrasted with the quarterly reports received by the English Parliament under its *Prevention of Terrorism Act* 2005.

The sunset clause in cl 104.32 is excessively deferred. This is true of the sunset clauses in the Bill generally (see Part J below), but particularly so in the context of control orders – a scheme utterly unfamiliar and untested in Australia and now regarded by some as largely redundant in the UK given that only one control order remains in force. It would be preferable that Parliament is required to revisit this matter much sooner than a decade from now.

(e) Justification for the scheme

The Attorney-General has admitted on several occasions that the control orders are necessary because of a lack of resources for covert surveillance by intelligence agencies. This is a remarkably poor justification for the introduction of such a dramatic new scheme. It reveals that economic priorities, rather than a proper concern for effective counter-terrorism strategies, underlie this part of the Bill. There are strong arguments against the use of control orders on security grounds: they may actually inhibit the ability of intelligence agencies to crack open terrorism networks and they can create "martyrs" for alienated members of the community. Thus, they may not improve our safety relative to traditional surveillance methods. This is in addition to their objectionable effect in reducing the civil liberties of members of the Australian public who have not been convicted of any crime.

It is simply intolerable that such a scheme be introduced not because it is the best means of ensuring security, but simply because it is cheaper than the alternatives.

(2) Division 105 – Preventative Detention

This Division is also much developed from its earlier manifestation in the draft Bill. It is particularly good to see explicit recognition in the new sections of the (forthcoming) corresponding preventative detention laws of the States (cl 105.6(4)(5)(6), 105.7(4) and 105.52(2)). This enables a clearer picture as to how the individual's rights will stand in respect of the conjunction of the two schemes. There have also been marked enhancements of the rights of the detainee to access information and seek review of the order.

However, a number of concerns remain and merit further consideration of the scheme.

(a) Possible invalidity - breach of constitutional separation of judicial power

Unlike the situation with respect to control orders, a very clear attempt to avoid problems of unconstitutionality has been made by enlarging the range of persons eligible for appointment as an issuing authority under cl 105.2. The addition of the persons described in sub-cl (d) and (e) presents no difficulty under the Constitution, but problems remain with the Bill's persistence in seeking to confer the power to order detention upon members of the federal judiciary (sub-cl (b) and (c)). The addition of judges of State or Territory Supreme Courts (sub-cl (a)) also potentially poses constitutional difficulties.

The involvement of members of the federal judiciary as issuing authorities may be constitutionally invalid. Despite the words of cl 105.18(2), stating that this function is conferred upon those persons in their personal capacity, if it is incompatible with a judge's role as a

member of a Chapter III court, then the conferral will nevertheless be invalid: *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

There are good reasons to suspect that the function of issuing preventative detention orders is fundamentally incompatible with an individual's status as a federal judge. The position may be contrasted with that in *Grollo v Palmer* (1995) 184 CLR 348. In that case, the non-judicial task of issuing warrants for telephone interceptions was not seen as incompatible with the Justice's judicial role and was thus valid. But the function in Division 105 is significantly more confronting to the integrity of judicial office. It requires the making of an order to detain a person absent a finding of criminal guilt or even the laying of a charge of criminal offence. That is difficult to view as compatible with the issuing authority's judicial function.

To consider again the decision of *Fardon v Attorney-General (Queensland)*, although concerned with the conferral of power upon a court, there was far from an overwhelming endorsement of the idea that preventative detention sat comfortably with the concept of judicial power. It is quite possible that members of the High Court would find the powers conferred in Division 105 incompatible with a federal court judge's judicial status.

It has been suggested that the proposal is not dissimilar to the existing power of federal judges to issue questioning and detention warrants under Part III, Division III of the amended *ASIO Act* 1979 (Cth). Under that scheme, a federal magistrate or a judge may consent to being appointed as an 'issuing authority' for the purpose of issuing ASIO questioning warrants (ss 34AB and 34D). But this analogy is not of much value. We have previously raised the problem of the lack of separation of judicial power in respect of these powers (see George Williams and Ben Saul, Submission to the Joint Parliamentary Committee Review of the Part 3, Division III of the *ASIO Act 1979* (Cth), March 2005). Due to the scarce use of these powers, the High Court has not yet had the opportunity to consider challenges to them.

Like the ASIO scheme, this Bill has the potential to seriously compromise the integrity, independence and reputation of judicial office, undermining public confidence in the judiciary. There is no strong judicial precedent to suggest that the conferral of this function upon members of the federal judiciary is compatible with their judicial role. It is open to challenge as constitutionally invalid.

The position in respect of the conferral upon judges of State or Territory Supreme Courts is arguably less vulnerable to constitutional challenge. But it should be borne in mind that as those Courts may exercise federal jurisdiction, they are not entirely disassociated from the strictures of the separation of judicial power under Chapter III of the *Commonwealth Constitution*: *Kable v DPP (NSW)* (1996) 189 CLR 51. Although recent decisions have indicated that the scope of the '*Kable* principle' is rather narrow, it remains open for the Court to take the view that a non-judicial function conferred upon a State or Territory judge who exercises power derived from Chapter III is incompatible with that jurisdiction. Of course, that possibility would be contingent upon a finding of incompatibility in respect of use of such powers by members of the federal judiciary itself.

In conclusion, significant doubt remains as to the constitutional validity of members of the federal judiciary issuing preventative detention orders in their personal capacity. By extension, it is possible that the conferral upon State or Territory judges in their personal capacity is also invalid.

Once again, this is not to say that the Commonwealth Parliament cannot necessarily provide for a scheme of preventative detention. The Executive wielded a much broader power of detention during both World Wars which survived constitutional challenge ((*Lloyd v Wallach* (1915) 20 CLR 299; *Ex parte Walsh* [1942] ALR 359) – though the absence of a declared state of war distinguishes those cases from the present circumstances. Additionally, later decisions (particularly *Australian Communist Party v Commonwealth* (1951) 83 CLR 1) suggest that the validity of executive detention requires the existence of a more meaningful form of judicial review than was present on those earlier occasions.

But in the immediate context of the Bill, it is primarily its employment of serving judicial officers in making these orders which risks invalidity. As said earlier in respect of control orders, there is much to be said for the role of the judiciary being solidly based in review of these decisions rather than the making of them.

(b) Extent of judicial review

In the earlier draft of the Bill the lack of meaningful judicial review of a preventative detention order was epitomised by the complete absence of any process for the subject of an order even to seek its revocation. The addition of cl 105.51 and 105.52 in this version are a marked improvement.

Under cl 105.51(5), an application may be made to the Administrative Appeals Tribunal for review of the decision by an issuing authority to make or extend a preventative detention order. While compensation may be ordered by the AAT if it determines that the decision should be made void (sub-cl (7)(b)), an application for review cannot be made while the order is still in force. Two things must be noted about this provision. First, while AAT review is welcome, it is nevertheless not judicial review, which was the safeguard agreed upon at the COAG meeting in late September. Second, all decisions made under Division 105 are expressly exempted from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* by cl 105.51(4) (NB. a typographical error in that subsection gives the year of that Act as '1997').

It appears that cl 105.52 compensates for these limitations by enabling review by State and Territory courts of the making of, and the person's treatment under, the Commonwealth order for preventative detention. But this will only apply if the Commonwealth order has then been followed by a corresponding State order: essentially, review of the former occurs merely as an incident to review of the latter. So persons detained solely under the Commonwealth scheme receive only the very limited right of judicial review outlined in the preceding paragraph.

Additionally, cl 105.52 only entitles the Court to conduct the review and grant remedies for the Commonwealth order in accordance with the scope of its powers in a similar respect under State law. As the State legislation has yet to be produced, the true extent of the guarantee of judicial review provided by cl 105.52 is presently unknowable.

Finally, the interrelationship between cl 105.51 and 105.52 might be made clearer. The latter's provision of review by State and Territory courts is expressly subject to cl 105.51(2), which denies jurisdiction to those courts in proceedings for a remedy in relation to a preventative detention order while still in force. This would appear to be an attempt to exclude direct judicial review of the Commonwealth order by those courts before a corresponding State order is issued. The position might be improved simply by amending (2)(b) to read 'the proceedings are commenced while the Commonwealth order is still in force'.

(c) Lack of consistency in protection of rights

So far as it is possible to commend the scheme of preventative detention which these amendments seek to introduce, the requirement in cl 105.33 that the person detained be accorded humane treatment on pain of criminal prosecution (cl 105.45) deserves recognition.

However, the importance of the detainee's right to human dignity which cl 105.33 might otherwise reflect is undermined by considering the surrounding provisions. The maximum penalty for an officer who commits an offence against that provision is a mere 2 years' imprisonment – by far the mildest penalty amongst the offences in the new Division. For example, the penalty for the disclosure offences under cl 105.41 – which would include the situation where a parent of a detained person reveals to other family members the fact of their child's detention (sub-cl (3)) – is a jail term of 5 years.

(d) Need for the scheme in light of existing laws?

If the stated purposes of preventative detention are to prevent a terrorist attack or the destruction of evidence, then it is arguable that those purposes can be achieved by less invasive means. As the House of Lords stated in *A v Home Secretary* [2004] UKHL 56, less drastic alternatives to detention are capable of preventing the commission of terrorist offences, such as electronic monitoring, home detention, telephone reporting, home surveillance, prohibitions on visitors or contact with others, and banning the use of computers and telephones. It has to be asked whether the preventative detention scheme is necessary in light of the existing powers of Commonwealth agencies.

Under cl 105.4, a preventative detention order may be made if:

(a) there are reasonable grounds to suspect that the subject:
- *(i) will engage in a terrorist act; or*
- *(ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or*
- *(iii) has done, or will do, 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 purposes referred to in paragraph (b).

But if sub-cl (a) can be satisfied, then as the law already stands the subject could be charged with and prosecuted for a number of existing offences under Division 101 of the *Criminal Code*, which would certainly avoid the intended terrorist act taking place (as contemplated by sub-cl (b)). A suspect could be held in custody pending trial, and could be subject to the presumption against bail for terrorism offences (see, eg, s 8A of the *Bail Act 1978* (NSW)).

Terrorism is already defined very broadly in federal law (s 100.1, *Criminal Code*), and the definition of a 'terrorist act' even includes mere threats to commit terrorism. Federal law then establishes a very wide range of preparatory or inchoate offences, including to train for terrorism (ss 101.2 and 102.5); possess 'a thing' connected with terrorism (s 101.4); collect or make a document connected with terrorism (s 101.5); or do acts preparatory to terrorism (s 101.6). These offences were recently widened by the swift enactment of the *Anti-Terrorism Act (No 1) 2005*, which allows prosecution of steps taken towards general rather than specific terrorist acts. The existing offences concerning terrorist organisations (ss 102.2-102.8

respectively) and the amendments to those contained in Schedule 1 of this Act, provide additional sections under which persons may be charged.

The purpose behind Division 105 might perhaps be to cover those circumstances where the authorities are not in possession of sufficient evidence to support laying a charge and having the matter dealt with by a court. But, then surely one must question whether detention in those circumstances could ever be described as justified by a 'reasonable suspicion'. Another purpose might be that authorities want to protect intelligence sources and not reveal security sensitive evidence in court. Yet, the *National Security Information (Criminal and Civil Proceedings) Act 2004* was enacted precisely to protect such evidence, whilst ensuring the rights of suspects. As a result, the real purpose behind preventative detention appears to be an attempt to avoid the regular judicial procedures for testing and challenging evidence in criminal trials.

Additionally, the *Australian Security Intelligence Organisation Act* 1979 empowers ASIO, where an investigation may otherwise be hampered, to seek a warrant for the detention for seven days of *any* persons who may have information about a terrorism offence (including its planning). So if there is not enough evidence to charge a person for offences in Division 101 of the *Criminal Code*, then they could still be detained and questioned about what they know of any planned attack. That surely fulfils the purpose of prevention – indeed far more so than the proposed Division 105 under which the Australian Federal Police are *prohibited* from questioning the person detained (cl 105.42). Indeed, cl 105.26 provides for the overriding of a preventative detention order by an ASIO warrant in respect of the subject.

This demonstrates the very different purposes behind detention under Division 105 and its supposed inspiration, the UK *Terrorism Bill 2005*. That Bill refers not to 'preventative detention' but to 'detention without charge'. The latter is designed to enable police to hold an individual for questioning and investigation – very similar to the power which ASIO already enjoys here. The UK scheme is in aid of the criminal process, but Division 105 aims rather to lessen the chance of an attack taking place. With such a fundamentally different focus, it is clear that the Australian orders have a much wider potential operation upon citizens.

In light of the broad powers already existing which enable charging or questioning of persons before any terrorist act has occurred, it is unclear why Division 105 is necessary unless its real purpose is to facilitate detention on an even broader scale than is currently possible – for example, to allow detention based on group profiling, or where the sufficiency of the evidence would not normally satisfy a court. The apparent agreement of the States and Territories to pass laws for the extended detention of persons initially dealt with under Division 105 only heightens concerns over the potential for misuse of this new power.

(e) The Deeper Objection

Detention is the most invasive restriction on individual liberty and security of person. As such, it must be regarded as a last resort, after all feasible alternatives have been exhausted. The source of legal protection of liberty is not only international human rights law, but, more importantly in the Australian context, the common law and the underlying rule of law: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

As stated recently by Lord Hope of Craighead in the House of Lords decision in *A v Home Secretary* [2004] UKHL 56 at [100], in a case overturning the indefinite detention of non-citizens suspected of terrorism: 'It is impossible ever to overstate the importance of the right to liberty in a democracy'. Or as Baroness Hale of Richmond stated at [222]: 'Executive detention

is the antithesis of the right to liberty and security of person.' The right to liberty from the libertarian tradition in English common law dates back to the Magna Carta, the 1628 Petition of Right, the 1688 Bill of Rights, and habeas corpus. Liberty applies to all within jurisdiction, not just citizens (*A v Home Secretary*, Lord Rodger of Earlsferry, [178]).

Under international human rights law, which binds Australia, the right to liberty and security of person includes a prohibition on arbitrary or unlawful arrest or detention (art 9, *ICCPR*). Lawful detention may still be *arbitrary* if it is *unreasonable* (including where it is inappropriate, unjust or unpredictable) (see *van Alphen v Netherlands*, UN Human Rights Committee, 1990). Detention is considered unreasonable if it is unnecessary or disproportionate to the legitimate end being sought (*Toonen v Australia*, UN Human Rights Committee, 1994).

The preventative detention powers in the Bill seem inconsistent with basic democratic, judicial and rights-based principles. Individuals should not be detained beyond an initial short period except as a result of a finding of guilt by a judge or as part of the judicial process (such as being held in custody pending a bail hearing). Detention is only justifiable as part of a fair and independent judicial process resulting from allegations of criminal conduct, or where it serves a legitimate protective function and existing powers are insufficient.

F Schedule 6 – Power to obtain information and documents

The Bill proposes to allow an authorised Australian Federal Police officer to issue a written notice to produce where the officer 'considers on reasonable grounds' that a person has documents that 'are relevant to, and will assist the investigation of a serious terrorism offence' (cl 3ZQN). The power is plainly designed to circumvent the usual procedures for obtaining evidence under a search warrant, which include the requirements that a magistrate issue the warrant and only when satisfied by information on oath that there are reasonably grounds for suspecting that there is, or soon will be, evidence on the premises (Div 2, *Crimes Act 1914* (Cth)). The Bill does not provide the independent safeguard of an issuing magistrate, nor the additional evidentiary requirement that suspicion be based on information on oath.

Powers to issue notices to produce without the approval of a magistrate are already conferred on the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission (s 33, *ASIC Act 2001* (Cth); s 155, *Trade Practices Act 1974* (Cth)). However, the specific rationale for those powers is that the investigation of corporate wrongdoing is complicated by the high volume of corporate documentation and the dispersal of liability between many individual corporate officers. Both of these factors make it difficult for investigators to physically locate material themselves when executing a search warrant, so the exceptional procedure of notices to produce allow evidence to be located more easily.

The complexity of corporate entities does not apply in the same way to terrorist offences, so the rationale for notices to produce in the corporate context cannot be readily transplanted. While notice to produce powers may be helpful in investigating terrorism, departing from ordinary criminal investigative procedures (and their attendant protections for privacy and liberty) is only justifiable if accompanied by the independent safeguard of an issuing magistrate.

We note that the notice to produce scheme will also be extended to the investigation of other serious offences (cl 3ZQO), although subject to the satisfaction of a magistrate 'on the balance of probabilities'. We object to the inclusion of this power in anti-terrorism legislation. The measures in the Bill have been publicly justified as an exceptional response to the extraordinary

threat of terrorism. Extending special terrorism powers to investigate ordinary crime exploits the anti-terrorism justification for the Bill to significantly undermine regular criminal procedure. Exceptional threats are being manipulated to justify measures which would normally be considered an impermissible intrusion on privacy and liberty.

We welcome the conferral of use immunity in relation to these powers (cl 3ZQR). However, the Bill should also confer derivative use immunity, and protect legal professional privilege (rather than taking it away in cl 3ZQR(c)). In some cases, use immunity without legal professional privilege will be insufficient to ensure justice. For example, those who apply to the Department of Immigration for a protection visa are engaged in an administrative process, rather than a civil or criminal 'proceeding' which attracts use immunity. Refugee lawyers may be forced to disclose highly prejudicial information about their clients, which may then be used against them by administrative decision-makers. Similar concerns may apply to a range of administrative decision-makers across many areas of regulation not involving civil or criminal proceedings.

G Schedule 7 – Sedition

The Bill repeals existing sedition offences (ss 24A–D, *Crimes Act 1914* (Cth)) and replaces them with five new offences. The new offences partly implement the Gibbs Review of federal criminal law in 1991, including increasing the penalty from three to seven years in prison. Invoking the Gibbs Review is nonetheless selective and misleading, since Gibbs also recommended modernising (and narrowing) many of the other archaic 'offences against the government' in Part II of the *Crimes Act 1914*, including treason, treachery, sedition, inciting mutiny, unlawful (military) drilling, and interfering with political liberty. Gibbs further urged repeal of the offence of assisting prisoners of war to escape and the offences in Part IIA of the *Crimes Act 1914* (relating to 'unlawful associations' and industrial disturbances).

The government has not acted on these recommendations, resulting in ad hoc law reform which preserves some very broad and archaic security offences. While we welcome the foreshadowed departmental review of the new sedition offences in 2006, we make the following points:

(1) the review should be independent of the government, either by referring the matter to the Australian Law Reform Commission, an independent expert committee, or to a parliamentary committee;
(2) the review should consider all security offences in both the *Crimes Act* and the *Criminal Code*, since many offences overlap and some are redundant;
(3) the review should also consider the proper scope of defences to sedition, and the possibility of extending good faith defences to any other security offences that might be retained;
(4) the need for, and scope of, all security offences should be considered in light of the express constitutional protection of freedom of religion (s 116, *Constitution*), the implied freedom of political communication, and human rights standards on freedom of expression and association.

The first two new sedition offences occur where a person encourages another to violently overthrow the *Constitution* or any Australian government, or to violently interfere with federal elections. Neither offence is necessary, since such conduct can already be prosecuted by combining the existing law of incitement to commit an offence (s 11.4, *Criminal Code* (Cth)) with the existing offence treachery (s 24AA, *Crimes Act* 1914 (Cth)) or the offence of disrupting elections (s 327, *Commonwealth Electoral Act* 1918).

The third new offence is where a person urges a racial, religious, national or political group to use violence against another group, where the violence threatens 'peace, order and good government'. This is welcome because it would criminalise, for the first time in federal law, incitement to violence against racial, religious, national, or political groups, as required by Australia's human rights treaty obligations (art 20(2), *International Covenant on Civil and Political Rights* 1966; art 4, *International Convention on the Elimination of all Forms of Racial Discrimination* 1969). The Human Rights and Equal Opportunity Commission has long argued that incitement to religious hatred should be made unlawful, particularly since prejudice against Muslim Australians increased after 9/11 (HREOC, *Isma ع (Listen): National consultations on prejudice against Arab and Muslim Australians*, 2004; HREOC, *Article 18: Freedom of Religion and Belief* (1998)).

Even so, the new offence is too narrow for a number of reasons:

1. it only covers incitement to religious *violence*, and not to religious hatred or vilification;
2. it only protects groups from incitements which urge *other* groups to violence, and so excludes incitements aimed to provoke individuals, or groups not mentioned in the Bill;
3. the requirement that incitement must threaten peace, order and good government leaves groups unprotected from incitements which do *not* threaten these interests, such as sporadic, isolated, or less intense incitements.
4. It is confined to criminalising *incitement* to group-based violence, but there is no attempt to criminalise *actual* group violence. While violence against group members can always be prosecuted under ordinary criminal law, treating group-based violence or 'hate crime' as ordinary crime ignores the additional psychological or motive element involved.

Importantly, presenting this offence as a counter-terrorism law also stigmatises group violence as terroristic, reinforcing the stereotyping of certain ethnicities or religions as terrorist. It is also an error to classify this offence as sedition, which is more about rebellion against political authority than inter-group or communal violence. The Bill manipulates international human rights protections for groups by recasting them as efforts against sedition and terrorism. The appropriate place for such an offence is in anti-vilification law (here we note, but do not consider, the Opposition's recent *Crimes Act Amendment (Incitement to Violence) Bill* 2005).

Whereas incitement to *racial* discrimination and vilification is unlawful in federal law, even after the adoption of the new sedition offence there would remain no federal (or NSW) protection from *religious* discrimination or vilification, where such conduct does not incite to violence. The *Catch the Fire Ministries* case [2004] VCAT 2510 in Victoria illustrates the utility of broader laws against religious hatred. An evangelical Christian group and two pastors incited 'hatred against, serious contempt for, or revulsion or severe ridicule of' Victorian Muslims (s 8, *Racial and Religious Tolerance Act* 2001 (Vic)). They did so by claiming that Muslims are violent, terroristic, demonic, seditious, untruthful, misogynist, paedophilic, anti-democratic, anti-Christian and intent on taking over Australia. The statutory exemptions for conduct engaged in reasonably and in good faith were unavailable, since the respondents had made fun of Muslims in a 'hostile, demeaning and derogatory' way, not in a balanced or serious discussion, and had not distinguished moderate from extremist beliefs. (The case is on appeal.)

The final two new offences involve urging a person to assist organisations or countries fighting militarily against Australia – even if Australia has invaded another country unlawfully. Countries or organisations need not be formally proclaimed as enemies. If opposing Australian aggression is interpreted to constitute tacit support for its enemies, Australians may be prosecuted for condemning illegal violence by their government, or for seeking to uphold the

United Nations Charter. The new offences are also redundant because such conduct is already covered by applying the existing law of incitement to the existing federal offences of treason (s 80.1, *Criminal Code*), treachery (s 24AA, *Crimes Act 1914*) and offences in ss 6–9 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).

Thus it is an offence to incite a person to commit *treason*, which covers levying or preparing war against Australia; assisting 'by any means' an enemy at war with Australia or a country or organisation fighting Australian forces; and instigating a non-citizen to invade Australia (s 80.1, *Criminal Code*). It is also an offence to incite *treachery*, which includes assisting 'by any means' a person opposing Australian forces overseas, or assisting proclaimed persons (s 24AA(2), *Crimes Act 1914*). Inciting treachery also covers urging someone to do anything to overthrow the *Constitution* by revolution or sabotage, or to overthrow by force or violence an Australian government or a proclaimed country (s 24AA(1)(a)).

Further, within Australia, inciting treachery includes urging a person to levy war against a proclaimed country; to assist a proclaimed enemy; or to instigate a person to invade a proclaimed country (s 24AA(1)(b)). It is also a crime to incite a person to commit any of the offences under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), which include to engage in hostile activities in a foreign State (s 6(1)); to commit acts preparatory to hostile activities (s 7); or to recruit persons to join organisations or armed forces engaged in hostile activities against foreign States (ss 8–9) – which includes doing any act with intent to facilitate or promote recruitment to such forces (s 9(1)(d)).

(a) Positive Features

The Bill is positive in that it simplifies the convoluted existing law of sedition, and narrows it in some respects. Presently, it is an offence to engage in a seditious enterprise (s 24B-C) or to write, print, utter or publish any seditious words (s 24D), with the intention of causing violence or creating a public disorder or disturbance. Both of these offences require a *seditious intention* (s 24A) to: (a) bring the Sovereign into hatred or contempt; (d) 'excite disaffection against' the Government, Constitution, or Parliament; (f) 'excite Her Majesty's subjects' to unlawfully alter 'any matter in the Commonwealth established by law'; or (g) 'to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth'.

The new sedition offences avoid the vague and oppressive concepts in the existing law of exciting 'disaffection', promoting feelings of 'ill-will', or 'contempt' of the Sovereign. Anyone who supports a republic could be prosecuted under existing law. It also narrows the existing scope of sedition by establishing statutory defences (below), which are currently unavailable.

We note also that the United Nations Security Council recently encouraged all countries to prohibit incitement to terrorism and repudiate its justification or glorification (Resolution 1624 (2005)). A 2005 treaty of the Council of Europe has also required states parties to criminalise 'public provocation' of terrorism, which includes not only directly inciting terrorism, but even praising, supporting, or justifying it.

(b) Need for Sedition Offences

Aside from the duplication of existing offences (discussed above), and the selective implementation of the Gibbs Review, the new offences raise important issues of concern. Old-fashioned security offences are little used because they are widely regarded as discredited in a

modern democracy which values free speech. Paradoxically, the danger in modernising these offences is that prosecutors may seek to use them more frequently, since they are considered more legitimate. A better approach is to abandon archaic security offences altogether in favour of using the ordinary law of incitement to crime, particularly since security offences counter-productively legitimise ordinary criminals as 'political' offenders.

The Gibbs review observed that the UK Law Commission found that a crime of sedition was unnecessary, since seditious conduct is already captured by the ordinary offence of incitement to crime. Reviews of criminal law in Canada and New Zealand omitted sedition offences altogether. Considering the broad definition of terrorism in federal law (s 100.1, *Criminal Code*) and the extensive array of terrorism offences (ss 101-102), the existing law of incitement already covers a wide range of facilitative or preparatory conduct.

It is very odd that the Bill effectively preserves the old definition of sedition in the *Crimes Act* for the purpose of declaring as unlawful associations which advocate a seditious intention (by inserting a new cl 30A into the *Crimes Act 1914* (Cth)). This results in two inconsistent meanings of sedition in federal law (one in the *Crimes Act*, and another in the *Criminal Code*). Further, it directly conflicts with the recommendation of the Gibbs review to repeal the provisions on 'unlawful associations' altogether – and not to extend them as this Bill does. The law on unlawful associations is a remnant of an anti-democratic colonial era. Such laws were used, for example, in emergency situations in the British mandate of Palestine in the 1940s.

(c) Indirect Incitement and Freedom of Expression

The new sedition offences also widen the existing law of sedition in troubling ways. The existing offences require an intention to utter seditious words or engage in seditious conduct (with a seditious intention), with the further intention of causing violence or creating a public disorder or disturbance. *The new offences require no such further intention to cause violence.* The Bill expressly provides that the first three offences may be committed where a person *recklessly* urges others to commit violence, without any specific intent to cause violence.

The fourth and fifth offences in the Bill do not even require that a person urge violence, let alone intend its commission. It is sufficient that a person urges another to 'engage in conduct' that is intended 'to assist, by any means whatever' an organisation or country at war with Australia, or engaged in armed hostilities against Australia. The Bill also extends the geographical scope of the offences beyond Australia to create a quasi-universal jurisdiction, even though international law does not support universal jurisdiction over such conduct.

The existing law of incitement can be applied to existing terrorism and other security offences to prosecute much of the conduct falling within the new sedition offences. Currently, the federal offence of incitement (s 11.4, *Criminal Code*) is committed where '[a] person… urges the commission of an offence' and the person intends that the offence incited be committed, even where the offence is not actually committed. Requiring that an inciter intend that the offence be committed reflects the vital normative idea that responsibility for criminal harm should primarily lie with the perpetrators, who are free agents not bound to act on the words of others.

Federal law is consistent with the meaning of incitement (or *instigation*) under international law, which requires direct and explicit encouragement, along with a direct intent to provoke the offence (or an awareness of the likelihood that the crime would result) (see *Kordić and ČCerkez*, ICTY-95-14/2-T (2001) at [387]). The incitement must aim to cause a specific

offence, and vague or indirect suggestions are not sufficient (*Akayesu*, ICTR-96-4-T (1998) at [557]). There must be a 'definite causation' between the incitement and a specific offence.

At the same time, the law on incitement is not impractically narrow. Plainly, a person who tells another to kill a third person and intends that result will be liable for incitement to murder, but so too will a person who less specifically incites another to 'take care of' a victim where such a statement implies that the person should be killed. For example, the International Tribunal for the former Yugoslavia found that the expression 'go to work' in the context of the Rwandan genocide really signified 'go kill the Tutsis and Hutu political opponents' (*Ruggui* case, ICTR-97-32-I (2000)). Incitement may be implicit where its meaning is not in doubt, in light of the cultural and linguistic context and the audience's understanding of the message.

However, the Attorney-General has stated that the new sedition offences aim to avoid the requirements under the existing law that a person 'intend' the offence to be committed, and that there be a connection between the incitement and a particular terrorist crime ('Question & Answer Brief on Incitement', October 2005). This might criminalise indirect incitement or generalised expressions of support for terrorism, without any specific intention to encourage violence or any connection to a particular offence.

Examples might include distasteful comments such as 'Osama is a great man', '9/11 was a hoax', or 'America had it coming'. It may also include genuine beliefs such as 'we must resist the occupiers', or Cherie Blair's view that some Palestinians believed they had 'ho hope' but to blow themselves up. Other statements which might be prosecuted include the 'barbaric ideas' identified by the British Prime Minister, such as calling for westerners to leave Muslim countries, the elimination of Israel, or establishing Islamic law.

Criminalising indirect or vague expressions of support for terrorism, which do not encourage a specific crime, unjustifiably interferes in legitimate free speech – including attempts to understand the causes of terrorism. While the right of free speech is not absolute and may be limited to prevent serious social harms, it cannot be restricted because of mere speculation that it leads to terrorism. Only incitements which have a direct and close connection to the commission of a specific crime are justifiable restrictions on speech.

Extending the law to cover reckless urgings which do not necessarily intend violence also runs counter to the development of the federal *Criminal Code*, which was adopted after a long, intensive and rational process of law reform. Its drafters deliberately excluded recklessness to limit the impact on free expression: 'Incitement does not extend to… recklessness with respect to the effects which speech or other communication might have in providing an incentive or essential information for the commission of crime' (Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Australian Institute of Judicial Administration, March 2002, 271).

The drafters also narrowed the common law meaning of incitement (which extended to counselling, commanding or advising) by an exclusive reference to *urging* a crime. This is the same expression used in the new sedition offences. Previously, the broader concept of 'incitement' at common law had been interpreted by courts in various jurisdictions by its ordinary textual (or dictionary) meaning, such as to urge, spur on, stir up, prompt to action, instigate or stimulate (see *R v Crichton* [1915] SALR 1 (Way CJ); *Catch the Fire Ministries* case [2004] VCAT 2510 at [18]; *Brown v Classification Review Board of the Office of Film and Literature Classification* (1998) 50 ALD 765 at 778); or simply to request or to encourage (*R v Massie* [1999] 1 VR 542 at 547).

There is a danger that criminalising the general expression of support for terrorism will drive such beliefs underground. Rather than exposing them to public debate, which allows erroneous or misconceived ideas to be corrected and ventilates their poison, criminalisation risks aggravating the grievances underlying terrorism and thus increasing it. Suppressing *public* incitement may succeed only in intensifying *private* incitement, which may be more damaging precisely because of the atmosphere of secrecy and the psychological pressure in close relationships. While some extreme speech may never be rationally countered by other speech, the place for combating odious or ignorant ideas must remain in the cut and thrust of public debate. The criminal law is ill-suited to reforming expressions of poor judgment or bad taste.

Speech is the foundation of all human communities and without it politics becomes impossible. Unless we are able to hear and understand the views of our political adversaries, we cannot hope to turn their minds and convince them that they are wrong, or even to change our own behaviour to accommodate opposing views that turn out to be right.

At the same time, as Hannah Arendt argued, 'speech is helpless when confronted with violence' (*On Revolution* (Penguin, London, 1990), 19) and freedom of speech reaches its natural limit when it urges unlawful violence against a democracy. Quite rightly, the criminal law has always allowed the prosecution of those who directly encourage another person to commit a specific crime, including terrorism.

In contrast, extending the law of incitement is a hasty and imprudent overreaction which inevitably criminalises valuable (and less valuable, but nonetheless worthy) contributions to public discussion. While every society has the highest public interest in protecting itself and its institutions from violence, no society should criminalise speech that it finds distasteful when such speech is remote from the actual practice of terrorist violence by others. A robust and mature democracy should be expected to absorb unpalatable ideas without prosecuting them.

(d) Defences to Sedition

The danger of criminalising political opponents is reduced by the Bill's five 'good faith' defences. These protect speech that points out the mistakes of political leaders; errors in governments, laws, or courts; or issues causing hostility between groups. The defences also protect encouraging lawful attempts to change the law or government policies or practices, or statements about industrial matters.

While these defences seem wide, they only protect political expression, at the expense of other speech, and some of them even require criticism to also be constructive ('with a view to reforming those errors or defects'). In contrast, wider defences in anti-vilification law protect statements made in good faith for academic, artistic, scientific, religious, journalistic or public interest purposes. Such statements may not aim to criticise political mistakes or errors, group hostility, or industrial issues. They may not aim to constructively offer solutions. The range of human expression worthy of legal protection is much wider than that protected by the Bill's narrow defences, which are more concerned with not falling foul of the implied constitutional freedom of political communication than with protecting speech as inherently valuable.

The defences are also anachronistic, since they are based closely on the defences to English common law crimes of sedition found in a famous English criminal law text book of 1887 (Sir James Fitzjames Stephen, *A Digest of the Criminal Law*, 3rd ed, 1887, article 93). They are defences for a different era – less rights-conscious, and eager to protect the reputation of Queen Victoria. Such narrow defences have no place in a self-respecting modern democracy.

Further, the defences provide no express immunity for journalists who simply report, in good faith, the views expressed by others (in contrast to those deliberately publishing hate-filled propaganda). This is contrary to the 1995 Johannesburg Principles on National Security, Freedom of Expression and Access to Information, which argue that: 'Expression may not be prevented or punished merely because it transmits information issued by or about an organisation that a government has declared threatens national security'. These laws may also have the effect of chilling artistic and religious expression, and even comedy or satire.

(e) Constitutional Issue

In the absence of a human rights framework, the *Australian Constitution* impliedly protects only *political* communication (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520) and not speech more generally. This means that Australian courts are less able to supervise sedition laws for excessively restricting free expression. The absence of an Australian bill of rights has also hampered the evolution of a sophisticated jurisprudence on the circumstances in which the existing crime of *incitement* can legitimately restrict free expression.

In international law, it is recognised that freedom of expression 'carries with it special duties and responsibilities' and may be limited by law if necessary to secure 'respect of the rights or reputations of others' or to protect 'national security … public order… public health or morals' (art 19(3), *ICCPR*,). Incitement to racial or religious hatred is specifically prohibited by art 20 of the *ICCPR*, while direct and public incitement to genocide is also prohibited (art 3(c), *Genocide Convention 1948*).

In addition, prohibiting ordinary criminal incitement may also be seen a permissible restriction on free expression on public order grounds (the prevention of crime: A Ashworth, *Principles of Criminal Law* (3rd ed, Oxford University Press, Oxford, 1999) at 481). Suppressing speech which proximately encourages violence is a justifiable restriction in a democratic society, since the protection of life is a higher normative and social value which momentarily trumps free expression – but only to the extent strictly necessary to prevent the greater harm. Human rights law does not permit one person to exercise their rights to destroy the rights of another (art 5, *ICCPR*), but any restriction on freedom of expression must not jeopardise the right itself (UN Human Rights Committee, General Comment 10 (1983) at [4]).

In Australia, incitement has only been examined in relation to its impact on the more limited implied constitutional freedom of political communication. While the implied freedom was invoked in *Deen v Lamb* [2001] QADT 20 to shield a Queensland election campaign leaflet which vilified Muslims, that decision is at odds with subsequent case law. In *Jones v Scully* (2002) FCA 1080, Justice Hely found that freedom of communication is not absolute, but 'is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*'. Justice Hely applied the test for the validity of restrictions on free communication laid down in *Lange* (at 561-562), and found that (1) the legislative object of eliminating racial discrimination is compatible with maintaining responsible and representative government, and (2) the law is reasonably appropriate and adapted to achieving the elimination of racial discrimination.

Further, in *Brown*, the Full Federal Court found that a law prohibiting the classification of a publication that 'instructs in matters of crime' was a permissible restriction on the implied freedom. Applying *Lange*, such a law was compatible with representative and responsible government and was appropriate and adapted to achieving that end (at [238E], [246G], [258C-D]). There was, however, controversy about whether the publication (an article advising how to

shoplift) was even part of *political* discussion (Heerey and Sundberg JJ (at [246A-B] and [258B-C]) found that the article was not political while French J found it was (at [238D-E]).

The problem in these cases is that the question of whether a law is compatible with representative and responsible government is too narrowly drawn to supply general guidance as to when incitement laws may legitimately restrict freedom of expression generally. The Australian test protects speech only as an incident of protecting the constitutional system, whereas American constitutional law values and protects speech as an end in itself, even where it is unrelated to politics.

In the leading case of *Brandenburg v Ohio*, 395 US 444 (1969), the US Supreme Court found that the First Amendment to the US Constitution did not 'permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'. The twin requirements of the imminence and likelihood (or probability) of crime ensure that speech is not prematurely restricted; there must be a sufficiently proximate connection or causal link between the advocacy and the eventuality of crime.

Such a test would likely invalidate attempts to criminalise indirect incitement of terrorism in the US. Whereas the ordinary criminal law of incitement aims to protect against imminent criminal harm, there is no comparable proximity between indirect incitement and actual terrorist harm. In contrast, not only does Australian law fail to protect non-political speech, under the more subjective and deferential Australian proportionality test even political communication could be restricted by laws criminalising indirect incitement, since it would be open to the courts to find that such a law is both compatible with responsible and representative government and appropriate and adapted to preventing terrorism.

The US test is not, however, ideal, since it permits speech to be restricted to prevent *any* lawless action. Arguably, the *Brandenburg* test should be supplemented by a requirement that only very serious criminal harms should permit the restriction of speech; a proportionality element might allow that free speech could be restricted more readily where the consequences of an incitement are greater. Not all acts of terrorism are equally serious, particularly acts of preparation or support; for example, it is difficult to see why, under Australian law, inciting a person to collect a document to be used in a threat to commit terrorism should be criminalised.

The express constitutional protection for freedom of religion in Australia (s 116, *Constitution*) may raise a different challenge to the third new sedition offence of incitement to *religious* violence. The Commonwealth cannot make any law 'for prohibiting the free exercise of religion'. There is little case law on the scope of this speech aspect of s 116 and it remains to bee seen whether the 'free exercise' of religion would protect religious speech.

H Schedule 10 – ASIO powers

Tripling the length of ASIO search warrants from 28 days to three months (cl 27A(3)(a)), and both mail and delivery service warrants from 90 days to 6 months (cl 27(4) and 27 AA(9)) cannot be justified. Reasonably short time limits on warrants are designed to ensure that warrants are not abused by the authorities to conduct fishing expeditions over extended periods, where there is insufficient evidence of specific criminal conduct. Where suspicion of criminal activity continues over a protracted period of time, a new warrant should be made on the basis of any current and accurate information which justifies the continuing need for the warrant.

I Sunset clauses

We welcome the Bill's inclusion of sunset clauses for control orders, preventative detention, and stop, question and search powers. Given the continuing or permanent nature of some of the other new powers, we accept that there may be no need for sunset clauses concerning terrorism financing offences, financial transaction reporting, and aviation security amendments.

However, we believe that sunset clauses should be included for the new sedition offences (Schedule 7), the banning of organisations for advocating terrorism (Schedule 1), and the extension of ASIO warrant powers (Schedule 10). The purpose of placing time limits on terrorism powers is to ensure that exceptional intrusions on personal liberty are strictly necessary to counter the particular terrorist threat faced at any point in time, and do not exceed that threat. Exceptional powers can always be renewed before they expire if the threat still justifies the response, and the case for them can be properly made.

Expiry clauses of ten years' duration do not qualify as genuine sunset clauses. The nature and extent of the terrorist threat cannot possibly be predicted over the forthcoming ten year period, and the government has not presented evidence to suggest that the threat to Australia will be remain constant or will increase over that period. The uncertainty and speculation involved in such predictions point to the need for sunset clauses of reasonably short periods. We suggest sunset clauses of three years' duration to replace the ten years proposed in the Bill.

Yours sincerely,

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