



## **Submission to the International Commission of Jurists Eminent Jurists' Panel**

### **Terrorism, Counter-Terrorism and Human Rights**

#### **Introduction**

1. Australian Lawyers for Human Rights (“ALHR”) is a network of Australian lawyers active in furthering awareness, understanding and recognition of human rights in Australia. It was established in 1993, and incorporated as an association in NSW in 1998.
2. ALHR has approximately 1,200 members nationally a large majority of whom are practising lawyers. Membership also includes judicial officers, academics, policy makers and law students. ALHR is comprised of a National Committee with State and Territory committees.
3. ALHR promotes the practice of human rights law in Australia through training, publications and advocacy. We work with Australian and international human rights organisations to achieve this aim. It is a member of the Australian Forum of Human Rights Organisations and is regularly consulted by government including through the Attorney-General and Minister for Foreign Affairs NGO forums.
4. ALHR has played an active role in advocating for the protection of human rights with respect to counter-terrorism legislation passed in the wake of September 11, 2001. It has made written and oral submissions to the Senate Committee on Legal and Constitutional Committee on such legislation since it was first considered in 2002. Most recently ALHR appeared before that Committee into what has become the *Anti-Terrorism Act (No. 2) 2005* and before that the *Law and Justice Legislation Amendment (Video Evidence and Other Measures) Act 2005*. ALHR also made similar submissions with respect to State legislation enacted to complement that federal legislation. ALHR has actively contributed to the media and through various seminars on those issues.

5. Australian Lawyers for Human Rights welcomes the opportunity to make submissions on the ICJ's Eminent Jurists' panel on terrorism, counter-terrorism and human rights.
6. The UN Human Rights Commission issued a statement on 27 February 2002 calling on all nations implementing anti-terrorism measures<sup>1</sup> to abide by these safeguards for human rights. States should only enact measures:
  - necessary for public security or public order;
  - proportionate to the threat;
  - necessary in a democratic society;
  - appropriate to achieve their aim;
  - that are as less intrusive as possible; and
  - are not arbitrary.
7. Those safeguards are not new but flow from over 40 years of jurisprudence from the European Court of Human Rights in Strasbourg, the Human Rights Committee established under the International Covenant on Civil and Political Rights and Inter-American Court of Human Rights.
8. Human rights protections remain weak in Australia because the *International Covenant on Civil and Political Rights* ("ICCPR") has not been incorporated into domestic law except in the mildest form. The only Territory in Australia to incorporate the said Covenant is the ACT. The influence on the debate on counter-terrorism measures of the *Human Rights Act 2004* (ACT) has been welcome and noticeably absent from the debate over similar legislation in other States.
9. ALHR's submissions on the various bills which have introduced new counter-terrorism measures into Australian law are available on its website or from the Secretary. These submissions aim to reduce those submissions to the following areas:
  - (a) Preventative detention orders;
  - (b) Control orders;
  - (c) Detention for questioning by ASIO;
  - (d) Sedition; and
  - (e) Proscription of terrorist organisations.
10. What is beyond the scope of the organisation is comprehensive consideration of all the other allied pieces of legislation which have been passed in support of counter-terrorism measures. It is with some regret that we cannot comment in detail on the new stop, search and seizure powers.

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<sup>1</sup> Following Resolution 1373 of the UN Security Council (28 September 2001)

## Preventative detention orders

11. The *Anti-Terrorism Act (No 2) 2005* institutes a regime of executive preventative detention. A person may be detained for up to 48 hours under its provisions. An order by a police officer of the rank of superintendent or above may be made for detention for up to 24 hours (“initial preventative detention order”). Then a person, called an “issuing authority”, acting in his or her personal capacity may extend the initial order by up to a further 24 hours (a “continuing preventative detention order”). Persons who may be an issuing authority are Federal Court judges or Federal magistrates, retired judges from the States or the AAT President.
12. The Act does not provide for 14 days preventative detention but this is provided for in allied State and Territory legislation.

### Basis for Detention

13. The Act states that the object of the preventative detention order regime is to prevent an imminent terrorist act occurring or to preserve evidence relating to a terrorist act: s.105.1. In order for a police officer to make a preventative detention order he or she must be satisfied that there are “reasonable grounds to suspect” that the subject:
  - will engage in a terrorist act;
  - possesses something connected to a terrorist act; or
  - has done an act in preparation for a terrorist act..
14. Making the order must substantially assist in preventing a terrorist act and detention must be reasonably necessary for that purpose. The terrorist act must be expected to occur within 14 days.
15. In addition, a detention order may also be made where it is necessary to detain a subject to preserve evidence relating to a terrorist act which has occurred in the last 28 days and detention is necessary for that purpose.
16. The basis of the power to detain is one removed from the basis that would normally allow a police officer to arrest a person. That is, it allows for detention not because there is a reasonable suspicion of an offence having been committed but on the basis that there is a reasonable suspicion that certain acts will occur. Hearsay evidence is likely to be the foundation for such a suspicion.
17. It is worth noting that the three matters set out in s.105.5(4)(a) (in dot points above) may also be covered by existing offences in the *Criminal Code*. That is if the police officer has a reasonable suspicion that those factual circumstances have arisen then the person may be arrested and charged with the offence and then taken before a judicial officer.<sup>2</sup> As a police officer is not required to take a detainee before a judicial officer it is likely that he or she will *prefer* the lesser requirements of these preventative detention provisions notwithstanding

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<sup>2</sup> See s.352(2) *Crimes Act 1900* (NSW) for example.

that he or she may have reasonable cause that the person has committed a serious indictable offence.

### Issuing Authority

18. There is no requirement in the 48 hours of the operation of a detention warrant for the detainee to be taken before a judicial officer operating in that capacity. In the first 24 hours the detention order is completely in the hands of the police. Thereafter a continuing detention order may be made by a *persona designata* who may be a judge or retired judge. Such persons are not “judicial officers” and do not exercise judicial power. Importantly, at no time is the detained person required to be taken before a court.
19. Article 9 of the ICCPR protects a person’s right to liberty. Article 9(2) specifically requires that a person detained be “brought promptly before a judge or other officer authorised by law to exercise judicial power”. The failure of the Act to provide for that to occur means that it breaches Article 9 of the ICCPR.
20. The Act envisages a system of executive warrant for both an interim and a continuing detention order. Regarding interim orders, the Act sets out a procedure for certain information and documentation to be put before an issuing authority: s.105.7. There is no apparent reason why the same application could not be made to a judicial officer for the issue of a warrant for the detention of a person on the same basis given the detail which is required to be given to a senior AFP officer. Police both State and Federal are experienced in applying for warrants at short notice so this should not be an operational impediment.
21. The use of an executive warrant (rather than a judicial warrant) may be characterised as disproportionate to the aim of detaining a person and in that way is characterised in human rights jurisprudence as “arbitrary” even though it is *prima facie* authorised at law. Accordingly, the executive warrant process breaches Article 9(1) of the ICCPR.

### Lack of Merits Review

22. Part of the guarantee for detained persons contained in Article 9(3) is that the detainee must be able to challenge the grounds for his or her detention before a judicial officer. As the Bill is currently drafted all a detainee could do is seek to challenge the preventative detention order in a limited way. That is, by way of an application to the Federal Court for a writ for habeas corpus the detainee could only challenge the detention on the basis of legality or narrow procedural grounds. Even the judicial review grounds available under the *Administrative Decision (Judicial Review) Act 1977* are denied to the detainee: Schedule 4, Part 2, Item 25.
23. Full merits review of the basis of the detention is required by operation of Article 14 (right to a fair trial). The interim and continuing detention procedures are *ex parte* and at no stage is it envisaged that the detainee can challenge the basis for his or her detention on an *inter partes* basis. That is, the real reason for the detention is unreviewable in any substantive way. The restrictions placed on review are, accordingly, a breach of Article 14(1) of the ICCPR which applies to adjudication of such detentions.

### Detention of Children

24. Detention orders are available for children aged 16 to 18 but not for children under 16. The *Convention on the Rights of the Child* (CROC) includes children who are under 18 years old and therefore the provisions of the Bill affecting 16 and 17 year olds are caught by its provisions. Article 37(b) of CROC requires that detention be used for children as a last resort.
25. It is the definition of “last resort” which is important here. The primary basis for preventative detention is that a police officer holds a suspicion on reasonable grounds of certain matters. Clearly there are some steps to go before the suspicions are resolved and, therefore, logically the “last resort” has not been reached. If the suspicion is resolved to the extent that the child may be arrested on suspicion of having committed an offence then normal criminal procedures may be used for the arrest and, subject to a bail hearing, the child may be remanded in custody.

### Communication with and by Family Members

26. The communication by adult detainees with family provision set out at s.105.35 is unnecessarily restrictive in four ways: only one family member may be contacted, the contacted person may not communicate with other family members, the manner of communication is very restricted (fax, email or telephone) and the communication is monitored. The provision is clearly drafted on the apparent assumption that any communication with a family member is likely to be damaging to an ongoing investigation or police operation. If that is the case then it should be explicitly made a test in s.105.35 for the police officer to establish prior to preventing communication rather than the blanket way with which communication is prohibited.
27. An available scenario would be that a detainee is able to communicate by writing his or her name on a pro forma fax provided by the AFP that merely says that the person is “safe” and “is not able to be contacted for the time being”. Without more detail that the person is being detained by the police and for how long, that communication is likely to create more hysteria than calm the family member contacted. In fact, there is no right for the detainee to talk to any family member as the word “contact” is used rather than “communicate”. The result is that the person is effectively held incommunicado. (The provisions for contact with a lawyer do not give the person a *right* to be visited by a lawyer as opposed to contact in some other way.)
28. Further a parent, spouse or child of an adult detainee, other than the person who is contacted by the detainee under s.105.35, cannot be informed of the detention at all. Section 105.41(6) prohibits a family member who is contacted by a detainee from providing to other family members the fact of the detention, the period of detention or “any information” that a person detained communicates to the family member. This means that a wife contacted could not contact the couple’s children or the detainee’s parents.

29. Incommunicado detention has been the subject of adverse comment by the Human Rights Committee with respect to the ICCPR because it is in those circumstances that torture has taken place.
30. As regards child detainees the guardians who may visit a child detainee may only stay, as of right, with the detainee for 2 hours within a 24 hour period. One can clearly envisage a very frightened 16 year old who is detained incommunicado without contact with his family for 22 hours out of 24. Again there are offences imposed for telling other siblings or grandparents and relatives about what has happened to the child.
31. The prohibitions on communication are extreme and by no means necessarily called for by the situation. Communication with family members should be allowed as of right unless there is clear and cogent evidence that the communication will prejudice investigations or an operation. Otherwise the current restrictions because of their disproportionately contravene the right to family life (Art 17).

#### Communications with Lawyers

32. Communications between lawyer and detainee are monitored by the police and must be in English for this purpose (unless an interpreter is available). The privileged and confidential nature of communications with a lawyer is a necessary concomitant of the right to a fair trial (Art 14(3)). It is well recognised in Australian common law and also in human rights jurisprudence that access to a lawyer allows for the proper presentation of a client's case to a court. The reason is clear. If the content of the communications with a lawyer are provided to the other side then the person being represented will not be able to freely and completely seek the advice of the lawyer concerned. This in fact may hamper the ability of a court to resolve the matter whether in the prosecution's favour or not.
33. This measure is extreme. It must be remembered that detainees are not persons suspected of having committed an offence and so therefore the safeguards for such persons should be greater than those charged with offences not less.

#### Freedom to Report Detentions

34. The same provision which prevents family members contacted by a detainee also makes it an offence for the media to report a detention while it is taking place: s.105.41(6). Provision of such information to the media serves a number of legitimate public purposes not necessarily inimical to the police or the Government. It exposes to the public the fact that there is a threat of some description with respect to which the police are taking action. It means that the public, including the person's relatives, know of the detention of a person who would otherwise be held incommunicado. The media may also monitor detentions which might be unlawful and assist in exposing illegality or malfeasance by public officers (including the police).
35. Again this provision is extreme because it assumes that media coverage will be detrimental to the police operation. That assumption is disproportionate to

the apparent threat posed by the communication and hence it offends freedom of speech (Art 19(2)).

### **Control Orders**

36. Schedule 4 of the *Anti-Terrorism Act (No 2) 2005* allows a senior Australian Federal Police officer to apply to a court for a control order over a person. Control orders are made by a court at an *ex parte* hearing called an “interim control order” which is then, at an unspecified time, subject to a hearing to confirm the order. After an interim control order is made the controlled person (or the police officer) may apply to have the order revoked or varied.
37. The Attorney-General’s approval is needed before a “request” for an interim control order can be made by a police officer to a court. A wide variety of control orders are available to the police including detaining a person at home; requiring a person to wear a tracking device; and prohibiting a person from communicating by telephone or internet, stopping them leaving Australia or approaching certain persons or places. A controlled person may also be photographed, fingerprinted or subject to specified counselling or education. Control orders may last up to 12 months and may be reissued repeatedly. Breaching a control order is punishable by 5 years imprisonment.
38. For an order to be made the police officer must make a request to a court (the Federal Court, Federal Magistrates Court or the Family Court). There is no requirement that the person to whom the order will apply has to be told of the request or given an opportunity to hear the evidence and reply to it. The order is made *ex parte*, that is, by the court hearing only the police case. The primary test for an order to be made is that the court must be satisfied on the balance of probabilities that either:
  - (a) the making of the order would substantially assist in preventing a terrorist act; or
  - (b) the person has provided training to, or received training from, a listed terrorist organisation. (s.104.4(1)(c))
39. The obligations, prohibitions or restrictions must be reasonably necessary, reasonably appropriate and adapted to protect the public from a terrorist act: s.104.4(1)(d)
40. However, the court may have only limited information before it. The Bill requires that the court be given a statement of facts and other grounds upon which the police officer considers it necessary that the order be made. The evidence provided to the court is in the form of a statement sworn by a police officer which is most likely to be hearsay as there is no requirement for primary evidence to be adduced. The police officer must also state why the order is necessary.

41. At a time unspecified in the legislation but which must be specified by the court the interim control order must return to the court for confirmation. At this 'confirmation hearing' the person controlled may appear represented, adduce evidence and contest the interim control order.
42. It is obvious from the nature of the powers available with respect to control orders that they could have a major effect on a person's life. The order could be used to prevent a person contacting members of his or her own family, to require a person to undergo home detention (and be unable to work), and to not attend a place of worship and so be unable to practice his or her religion. In the current Australian legal system orders of similar magnitude can only be made after conviction for a criminal offence.
43. On its face the control order provisions of s.104.5(3) potentially breach a number of human rights as set out in the *International Covenant on Civil and Political Rights*:
  - (a) Article 9: right to liberty;
  - (b) Article 12: freedom of movement;
  - (c) Article 14: right to a fair trial;
  - (d) Articles 17 and 24: right to family and private life;
  - (e) Article 21: right to freedom of association;
  - (f) Article 27: right of a minority to practice his or her religion.
44. In addition, control orders may have adverse ramifications for the right to work (Article 6, *International Covenant on Economic, Social and Cultural Rights*) and certain rights of the child such as the right not to be detained except as a measure of last resort (Article 37(b) *Convention on the Rights of the Child*).
45. A reasonable conclusion that one may come to is that there are people who the police believe pose a threat of committing a terrorist act but *that evidence is lacking* to charge them with having committed an offence. Indeed control orders are based on the *threat* of terrorism not any specific act of terrorism or act in preparation for such a violent act. The criminal law is based on completed acts which constitute an offence, in contrast to these orders. In a human rights context this means that as human rights will be infringed by such orders when no offence has been committed then the safeguards for those human rights should be strictly adhered to. If, for example, freedom of movement (Art 12) is to be infringed by a control order which requires home detention then the basis for the order must be appropriately justified. Application of the ICCPR to this context means that the imposition of control orders should be subject to the same safeguards as for the criminal law. Hence, Article 14 (right to a fair trial) needs to be strictly adhered to.

#### Ex Parte Nature of Interim Control Orders

46. The *ex parte* nature of the procedure is a fundamental departure from the way in which both civil and criminal proceedings are conducted in Australia. It is a primary right of litigants that they are able to put their case before the court and test the evidence of the other side. That right is enshrined in the common law and also in Article 14 of the ICCPR(1) and (3)
47. *Ex parte* court procedures are only ever used where there is extreme urgency and it is simply impractical to have the other party appear before the court. Such orders typically last only a very short time (sometimes only a matter of hours) and only until the other person can be represented so that both parties may then argue their case before the court.
48. As the Act provides for urgent interim control orders it is not clear why an interim control order should be made *ex parte*. That is, where urgency is properly established then an *ex parte* application may be necessary but otherwise the process, in order to protect the right to a fair trial, must allow for both parties to be before the court. This may be achieved by serving the “request” for an interim control order on the person concerned and specifying a short period before the matter comes before the Court for hearing of the request. We point out that if the procedures are justifiably urgent to necessitate an *ex parte* hearing it is unlikely they would fall foul of the right to a fair trial.

#### Standard of Proof

49. At both the interim control stage and at the confirmation stage of the proposed control order procedure the court must be only satisfied on the “balance of probabilities” that the relevant test (at s.104.1(1)) is made out. It is clear from the nature of the orders that may be made by a court that they are similar to a sentence that a person in the normal legal system would receive for a conviction for a criminal offence. Merely because the Bill only requires proof to the civil standard does not exempt the control order provisions (or the preventative detention provisions) from the requirements imposed by the ICCPR on a State Party (namely Australia) with respect to criminal charges. Those requirements are that the criminal standard of proof should be applied to charges which are for the purposes of the ICCPR criminal in nature.<sup>3</sup>

#### The Training Test

50. A control order may be imposed upon a person on the basis that he or she has received training from a terrorist organisation and the order will protect the public from a terrorist act. The provision may be criticised because it effectively punishes a person retrospectively for an act (training with a terrorist organisation) which may not have been illegal at the time of commission and the person poses no current risk: contrary to Article 15(1) ICCPR.
51. Training with a terrorist organisation may involve training in the manufacture and use of weapons or explosives with respect to a terrorist act. However,

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<sup>3</sup> Advice provided to the ACT Chief Minister by Professors Lynch, Charlesworth and McKinnon, 18 October 2005; *Engel v Netherlands* (1976)

unlike s.101.2, “training” is not defined. Training may include a person who receives religious training from such an organisation but the person trained is not directly involved in specific training about violence or a terrorist act. The provision does not contemplate a person who has received non-violent training and presents no risk in terms of committing a terrorist act. No risk may be posed by a person who was misled (naively or otherwise) into training but realised its nature and left the training as soon as he or she could.

52. The control measures allow for an inference to be made that because the person has received training the public will *necessarily* need to be protected. Accordingly, the test in s.104.4(1)(d) only requires the court to determine the appropriateness of the measure not whether the person who has trained is a current risk to the Australian public.

#### Provision of Evidence to Controlled Person

53. Once an interim control order has been granted by a court the police are required to serve the control order and “a summary of the grounds” on the person controlled and to inform him or her of its contents, length and that his or her lawyers may contact the police for a copy of the order. So long as the proposed process involves an *ex parte* hearing this is a further way in which the right to a fair trial is breached. That is, it is a requirement under Article 14(1) of the ICCPR that the person know the nature and cause of the case against him or her. The interim control order procedure does not allow for this to occur.
54. The police are not required to supply the evidence (sworn or otherwise) upon which the order was made to the controlled person. This means that when the matter first comes before the court for confirmation, on an *inter partes* basis, the controlled person will only be armed with a copy of the order and the grounds supplied by the police. The controlled person may only have had those documents for 48 hours prior to the confirmation hearing: s.104.12(1).
55. At the confirmation hearing the controlled person’s lawyer could have a notice to produce issued immediately (or a subpoena) and apply for the hearing to be adjourned until the relevant material can be produced. At that stage the police will have to produce the relevant material subject, of course, to the *National Security Information (Civil and Criminal Proceedings) Act 2004*. The procedure of obtaining confirmation would clearly be less intrusive of the controlled person’s right to a fair trial if the material provided to the court in support of the interim control order was provided to the controlled person at the time of service of the order (subject to the just mentioned Act).

## Detention for Questioning by ASIO

56. Amendments made to the *Australian Security and Intelligence Organisation Act 1979* (“ASIO Act”) in 2003<sup>4</sup> introduced a compulsory questioning regime for people with information about a terrorist offence. People taken for questioning are not necessarily suspects in terrorist offences, it may be merely that they might possess information that would assist the “collection of intelligence that is important in relation to a terrorist offence”: s. 34C(3)(a). The definition of terrorist offence is sufficiently wide to include acts preparatory to a terrorist act such as the provision of funding to a terrorist organisation or the provision of training. Accordingly, a person who has information in relation to a terrorist offence may be considerably divorced from any terrorist act or proposed such act.
57. An important aspect of the power is that it is with respect to intelligence not evidence. A person taken before a prescribed authority for questioning may be questioned by ASIO officers (or their legal representatives) and must answer such questioning. A failure to answer or providing a false answer is made a criminal offence. If a person declines to appear before an authorised officer he or she may be arrested and detained so that the questioning may occur.
58. The powers of arrest for the purpose of questioning proposed in the ASIO Act are powers which all Australian jurisdictions have *not* given to their respective police forces, even for the investigation of murder. The requirements for the issuing of an arrest warrant are set out at s. 34C(3)(c)(i)-(iii) of the ASIO Act: the person of interest may alert a person involved in a terrorism offence of the investigation; or he or she may not appear before a prescribed authority; or he or she may destroy or damage a thing relevant to collection of intelligence in relation to a terrorism offence.
59. Each of those matters is commonly - and preferably - dealt with in other ways. Firstly, for example, it is an offence in many criminal laws to conceal a serious offence.<sup>5</sup> Secondly, where a person summonsed fails to appear then a warrant may issue for their arrest. And thirdly, tampering with evidence is also a serious offence.<sup>6</sup> By contrast, the ASIO Act provides that where the Minister has a reasonable belief that such matters will occur then there exists a power to arrest.
60. ALHR maintains that the proposed power of arrest is disproportionate to the evil which it is aimed at because it applies to persons who have done no wrong and are not suspected of doing any wrong.
61. A further problem with the compulsory questioning and detention powers is the lack of accountability of an intelligence organisation. Police forces are given special powers in relation to the arrest of persons and the gathering of evidence so that crimes may be properly investigated and prosecuted before a court of law. The actions of police are subject to the scrutiny of the public via

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<sup>4</sup> *Australian Security and Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*

<sup>5</sup> See, for example, s 316 of the *Crimes Act 1900* (NSW).

<sup>6</sup> See s 317 of the *Crimes Act 1900* (NSW).

the courts which conduct their proceedings under the gaze of the public. By its very nature ASIO's work is not subject to such direct scrutiny. The public must rely on indirect accountability such as by the Inspector-General of Intelligence and Security and ministerial responsibility. Unfortunately, and inadequately, such accountability must rest on the commitment of those individuals to propriety in the use of such powers.

62. ALHR draws specific attention to the following breaches of human rights that will flow from the utilisation of powers under the ASIO Act:
- Article 9(1) ICCPR: arbitrary detention;
  - Article 10 ICCPR: incommunicado detention;
  - Articles 7 and 10 ICCPR: length of detention; and
  - Article 37 Convention on the Rights of the Child: protection of children.
63. Arbitrary detention occurs where the detention exhibits inappropriateness, injustice and lack of proportionality.<sup>7</sup> An eminent commentator, Nowak, has said that the detention must not include injustice, unpredictability, unreasonableness or lack of proportionality.<sup>8</sup> ALHR considers that any detention of persons who are not suspected of committing an offence or otherwise endangering the Australian public would be contrary to Article 9(1) of the ICCPR. The absence of a process of summons and review by a court where a summons is contravened reinforces this submission.
64. Persons arrested pursuant to this power may be held incommunicado. The ASIO Act allows for communication with an approved lawyer, but even that communication may be limited where the lawyer is suspected. Of most concern is the possibility that a person could "disappear" for up to a week without any communication to the person's family. There is no requirement on the Director-General to inform the family of persons arrested and the lawyer is not permitted to communicate with the family of the detainee. There is no requirement that the Director-General form an opinion that such communication would endanger the investigation of a terrorism offence. ALHR is confident that this is a breach of Article 10 of the ICCPR because the detention is not for the purpose of arresting a suspect but merely for gathering information.
65. The ASIO Act allows for detention of such persons for up to 7 days or 168 hours. A useful comparison can be made between this power and s 23C of the *Crimes Act 1914* (Cth) which only allows for detention of a suspect up to 4 hours for questioning prior to a suspect being taken before a judicial officer for review of the detention. By contrast the ASIO Bill allows for detention for up to 168 hours of a person who may only have information in relation to a terrorism offence. ALHR submits that such a power is disproportionate in

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<sup>7</sup> *Van Alphen v Netherlands* (1988) Decision of the Human Rights Committee 305/88

<sup>8</sup> *UN Covenant on Civil and Political Rights - CCPR Commentary*, 1993, p 172.

regards to the power under s 23C and to the emergency it is intended to combat.

66. Article 37(b) of the Convention on the Rights of the Child requires arrest and detention to be used “as a measure of last resort and for the shortest available time”. The ASIO Act still allows children between the ages of 16 and 18 to be detained for the maximum period of 168 hours. The Act allows for parents to be present during questioning and for “contact” to be made generally. There are no provisions for a parent or guardian to stay with the child during the period of detention. ALHR considers that the ASIO Act will lead to breaches of Article 37(b).
67. There are numerous examples in Australia of statutory investigative bodies other than the police, which provide a mechanism for compulsorily questioning persons who may have information in relation to a criminal offence. The Australian Crime Commission is one such commission. Due consideration should be given to establishing such a commission - or giving appropriate powers to the ACC.

## Sedition

68. As well as reformulating the existing offences of incitement to treachery, incitement to treason, and interfering with political liberty, the *Anti-Terrorism Act (No. 2) 2005* introduced new offences of:
  - (a) urging a group or groups, whether distinguished by race, religion, nationality or political opinion, to use violence against another such group or groups (within or outside Australia) that would threaten the peace, order and good government of the Commonwealth;<sup>9</sup>
  - (b) urging a person to assist an enemy country or organisation;<sup>10</sup> and
  - (c) urging a person to assist an organisation or country engaged in armed hostilities against the Australian Defence Force.
69. The existing offences of urging the overthrow of the Constitution or the Government by force or violence,<sup>11</sup> and of urging another person to interfere by force or violence with lawful electoral processes<sup>12</sup> are maintained with the changes noted below. All the offences set out in s.80.2 are punishable by 7 years imprisonment.
70. There are a number of key differences between the existing law and the new offences. Firstly, there is no requirement under the proposed offences that a person have an intention to promote ill-will and hostility. It is enough to act recklessly. Further, the requirement that there be incitement connected to

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<sup>9</sup> *Criminal Code 1995* (Cth), s 80.2(5) – (6).

<sup>10</sup> *Criminal Code 1995* (Cth), s 80.2(7) – (8).

<sup>11</sup> *Criminal Code 1995* (Cth), s 80.2(1) – (2).

<sup>12</sup> *Criminal Code 1995* (Cth), s 80.2(3) – (4).

actual violence or resistance or a disturbance of some kind is no longer required. It will be enough that a person urges ‘another person’ to do any of the acts that are proscribed, regardless of whether the other person acts on those words or not.

71. A narrow defence of ‘good faith’ is available, with the defendant bearing the onus of proof. It is a defence to show that the accused:
- (a) tries in good faith to show that members of the Executive or their advisers are mistaken in their policies or actions;
  - (b) points out in good faith, errors or defects in Territory, State or Commonwealth Governments, the administration of justice or legislation in Australia or in another country, or the Commonwealth Constitution;
  - (c) urges in good faith another person to attempt to lawfully procure a change to any matter established by law in a Territory, a State, or the Commonwealth, or another country;
  - (d) points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters;
  - (e) does anything in good faith in connection with an industrial dispute or an industrial matter;
  - (f) publishes in good faith a report or commentary about a matter of public interest.<sup>13</sup>
72. The proposed sedition laws potentially breach the following rights protected by the ICCPR:
- (a) Freedom to hold opinions without interference: Article 19(1);
  - (b) Freedom of expression including the freedom to seek, impart and receive information in any media: Article 19(2) and (3); and
  - (c) Freedom of thought, conscience and religion and freedom to manifest one's religion or beliefs: Articles 18(1) & (3).
73. Some of the rights outlined above are susceptible to limitation where necessary to protect public safety and/or public order but such limitations are subject to the application of a proportionality test.
74. If we accept that the Government’s purpose is to limit speech of conduct capable of inciting violence, then, we must ask, is that aim a legitimate one? ALHR agrees that it is. It is consistent with Australia’s obligations under Article 20(2) of the ICCPR. That is, it is properly concerned with vilification.

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<sup>13</sup> *Criminal Code 1995* (Cth), s 80.3.

75. However, the new sedition powers do not achieve that aim in a way which has a minimal effect on human rights particularly freedom of speech. Those laws have the possibility to shut down politically contentious material which may be represented as assisting, for example, the insurgents in Iraq. That is, the provisions are drafted with such ambiguity that persons wishing to publish an argument that may be seen as supportive to the insurgents in Iraq, for example, would be advised to do otherwise until the full ambit of the new offences are determined by the courts.
76. The defence contained in s.80.3 remains narrowly drafted. Protections were provided to journalists by the last minute introduction of s.80.3(1)(f). Two points may be made about this. First, it is a defence which must be proved by the person defending the charge. Secondly, the defence does not cover art works or religious discussion which does not fall easily into the category of a report or commentary about a matter of public interest.
77. ALHR, however, does support laws that protect community members from national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence in accordance with the requirements of the ICCPR. Notably, Article 20(2) of the ICCPR obliges States Parties, such as Australia, to prohibit such things by law. The Commonwealth is yet to legislate to protect national or religious vilification.
78. The defence provided in 80.3 has not been sufficiently expanded to deal with the breadth of the new laws. A defence along the lines of that available for race hatred would seem an appropriate avenue to explore to draft a reasonable defence which allowed for freedom of expression: see s.18D of the *Racial Discrimination Act 1975*.
79. The sedition provisions recently included in the *Criminal Code 1995* have been referred to the Australian Law Reform Commission for brief inquiry.

### **Proscription of Terrorist Organisations**

80. The Commonwealth *Criminal Code 1995* provides for an organisation to be proscribed as a “terrorist organisation”. Proscription may occur by incorporation in the legislation or by the making of a regulation which specifies the organisation. For the latter to occur the Attorney-General must be satisfied on reasonable grounds that the organisation concerned has directly or indirectly engaged in, prepared, planned, assisted or fostered the doing of a terrorist act (whether or not the act has occurred) or, following recent amendments, advocates the doing of a terrorist act.
81. As regards the effect on individuals, s.102.3(1) makes it a criminal offence punishable by 10 years imprisonment to be a member of a terrorist organisation. There is no requirement for an individual to have engaged in any of the activities that were required to satisfy the Attorney for the purpose of proscription. Further, there is no need for the individual to have engaged in any such activity subsequent to joining the terrorist organisation. The length of

the term of imprisonment provided for in the section marks this offence out as at the more serious end of criminal offences.

82. The provision clearly has restrictive consequences for the freedom of association and freedom of expression. In many ways it is a blunt instrument ill-adapted for its purpose because a person may be a member of a proscribed organisation for reasons other than the support of terrorism. Three organisations which have been proscribed fall into this category: Hamas and the Kurdistan Workers' Party. A person may be a member of such an organisation because they support the political aims of Hamas (but not its terrorism) in Palestine or a person may be a member of the second organisation because they supported Kurds as a people over Saddam Hussein's regime and continue to do so in the nature of an autonomous region of Iraq or Turkey. For the membership provisions to catch such persons who support the organisations but abhor terrorism is disproportionate to the aim sought to be achieved, namely to restrict support for terrorism. The measure is poorly adapted because it seeks to stop organisational support for terrorism but captures those who support such organisations for other reasons other than terrorism.
83. The recent amendment to the proscription regime expands the circumstances where an organisation may be proscribed to include organisations that "advocate the doing of a terrorist act". The provision is widely drafted so as to include the direct or *indirect* counselling or urging "the doing of a terrorist act", the direct or indirect provision of instruction on the doing of a terrorist act, and the direct praising of the doing of a terrorist act. It should be noted that membership of such an organisation is an offence punishable by 10 years imprisonment: s.102.3(1).
84. Particular concern should be aimed at the making of "indirect" counselling or urging of the doing of a terrorist act an offence because of its impact on the work of a journalist or an artist. Coverage of a story or creation or an artwork sympathetically depicting terrorists could be seen as indirect support for a similar act to occur. Under the proposed amendments an organisation could be proscribed as a terrorist organisation on the basis of such work done for the organisation. Similar comments could be made for the organisations that directly praise the doing of a terrorist act. There have been a number of dissenting political opinions expressed which state that the events of September 11, 2001 were necessary to remind the USA of the opposition to its policies in the Arab world. Arguably such a comment would be a reasonable basis for the Attorney to conclude that the organisation was advocating the doing of a terrorist act and the organisation could be proscribed.
85. One feels confident that the Government would not go out of its way to proscribe such organisations but there remains the possibility that it could. The danger of such laws, apart from their use in a different political and social context, is that people adjust their behaviour to prevent there being any prospect of being caught by such a provision. That is, a gallery that exhibits political art including art related to the Iraqi war might think twice about continuing to do so if the art could be interpreted as indirectly urging the doing of a terrorist act.

## **Conclusion**

86. In the absence of strong human rights protections in Australia counter-terrorism measures have routinely overstepped the mark in the Government's attempts to protect Australians from terrorism. Human rights jurisprudence, through the use of the proportionality principle, allows for those laws to be weighed against the imposition upon human rights that they occasion. This is a process that is unavailable, in a judicial sense, in Australia and so a number of non-government organisations (and the Human Rights and Equal Opportunity Commission) have sought to argue from this basis in the public arena. This has met with limited success because each human right needs to be justified from base principle. In many cases the Government has simply said that certain human rights need to be overridden to prevent the occurrence of terrorism in Australia. Hopefully some of the examples set out above will assist in illustrating how the aims of counter-terrorism laws may be achieved in a way which is less intrusive to human rights.

Simeon Beckett

President

15 March 2006