AMCRAN
Australian Muslim Civil Rights Advocacy Network

Monitoring the Impact of Terrorism Laws on Muslim and Culturally and Linguistically Diverse Communities

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1. Introduction

This report provides an overview of the ways in which counter-terrorism laws and police practice operate to discriminate against Muslim and culturally and ethnically diverse constituencies

AMCRAN submits that Australia's anti-terrorism laws have a profoundly disempowering effect on the Muslim community. In summary our report identifies the following key issues:

- The legislation contributes to the normalisation of Islamaphobia in government policy and in the general community
- The discretionary use of the legislation in targeting so called Muslim 'extremism' licenses the over-policing of Muslim people
- Specific offences relating to financing, training and the terrorist organisation offences disproportionately criminalises the political and religious activity of Muslims: activity which would otherwise be legal and desirable in a democracy

AMCRAN continues to monitor the impact of terrorism laws on Muslims and ethnically diverse communities. We would be pleased to provide updates of the impact of the laws.

1.1. The laws contribute to social exclusion and Islamophobia

Australia's anti-terrorism laws foster a climate of fear of political repression and censorship. We submit that this amounts to a profound increase in social exclusion for some sections of the Muslim community, especially those associated with having so-called 'extremist' views. Significantly, a climate of Islamophobic government policy in relation to counter-terrorism, migration and religious tolerance, escalates the negative impact of the laws. While this is a process that can by no means be reduced to unitary causes or to the laws alone, our direct involvement with communities leads us to conclude that the laws and their application contribute significantly to this process.

The laws contribute to Muslims feeling fearful and socially excluded. Firstly, there is general uncertainty in the community as to the effect and reach of the laws. Some members of the Muslim community who have contacted AMCRAN have said that they do not know whom they can speak to, for fear that they may have unwittingly committed the association offence. Others are afraid of being associated with certain people, and this includes those at mosques and in teaching environments. We believe that this is fuelled by uncertainty about concepts such as informal membership and association, and the fear of the extraordinary powers of ASIO.

A symptom of the fear also manifests itself in the reluctance of some members of the community to provide assistance to people who may be loosely connected to those who may have a perceived connection to terrorism, no matter how remote. For example, AMCRAN has spoken to some of the families of those who have been arrested and/or charged, and many are experiencing financial difficulties. While in our experience the Muslim community is generous, these families are not getting the support they need from the Muslim community. Instead, they have had to turn to traditional non-Muslim charities for assistance.

More importantly, we believe that there is a perception in the community that the laws are designed to single out and to harass Muslims, particularly because the Government has not gone to any length to provide reasons or justifications for different aspects of the laws. While many in the community do not dispute the need for laws for the safety of the community, provisions such as the association, membership and sedition offences, and in particular, "advocating terrorism" being a criteria for proscription, appear to target seemingly innocent activities not at all associated with acts of *terrorism*. It is inevitable that the community feels targeted

when there is no justification for the laws or any clear pronouncement of the intention behind specific aspects of the legislation and the harm that they purport to address.

2. Definition of terrorist act and the structure of terrorist offences

2.1 Terrorist act

The definition of a 'terrorist act' necessarily criminalises politically, religiously and ideologically motivated acts only, particularly insofar as committing a 'terrorist act' is an offence in itself. Two people detonating of two identical bombs in a public place resulting in the same number of deaths, may be charged with a terrorist offence or a non-terrorist offence, depending on their motivation (for example, political or extortion).

2.1 Funding Offences

There are a number of concerns related to the offences introduced by the *Suppression of Financing Terrorism Act*. The first is related to the broad definition of "terrorist act" given in section 100.1 of the *Criminal Code* and the related definition of a "terrorist organisation" in section 102.1. Terrorist organisations are treated as monolithic entities in the legislation, and even if a "terrorist organisation" provides humanitarian services, such as hospitals or social welfare services, donations to such causes are considered to be financing such an organisation. For example, it is known that Hamas consists of different sections, such as the Al-Qassam Brigade known for its attacks on Israeli people, but also consisting of significant welfare services to Palestinians living in the occupied territories, such as hospitals and food. Under the current legislation a donation to support a hospital run by Hamas is treated the same way as providing funds for Hamas to be used for other purposes. A person may not even know that a particular hospital is operated and/or controlled by Hamas, and yet find himself or herself falling foul of this legislation.

A further problem with this offence relates to the "reckless" component as introduced by the recent *Anti-Terrorism Act (No. 2)* 2005. In many cases there are dire emergencies in areas of the world where there are terrorist groups active. To give an example of how this may become a problem for the Muslim community, consider two

recent natural disasters. The tsunami of 26 December 2004 killed several hundred thousand people, many of them in the Aceh region of Indonesia. Muslims around Australia collected funds to assist the victims of the tsunami, but had to be extremely careful about how to get the money to the victims. Many of the charities that operate in Australia have Christian missionary leanings (and so it is generally considered not preferable to donate through them), and it is very difficult to donate through formal Government channels since corruption is endemic in some Muslim countries. Therefore many Muslims prefer to collect donations for a cause and then pass them through personal connections to trusted people in the affected areas.

There is however, a very real possibility that the funds in this example could end up in the hands of the Free Aceh movement (GAM), which is an Acehnese liberation movement. Although not currently on the proscribed list of organisations, it could arguably meet the criteria for proscription under s102.1 of the *Criminal Code*. However, someone unaware of GAM may unintentionally provide the funds to one of their representatives, not realising that a small portion could be used for matters relating to political violence.

This is not a unique situation. A very similar situation occurred with the earthquakes in the Indian subcontinent, particularly in Kashmir. Several proscribed organisations, such as Lashkar-e-Tayyiba (LeT), operate in Kashmir, so it is quite possible that someone sincerely donating to help their Muslim brethren in Kashmir might inadvertently provide funds to such an organisation. Yet another example is the earthquakes that happened in Bam in Iran.

Hence a person who innocently tries to assist those in need in other parts of the world could find themselves facing life imprisonment. Furthermore, laws like these are likely to lead to a decrease in charity within the Muslim community. Anecdotally, since September 11, 2001, the Muslim community has become overly fearful about donating – even to legitimate charities – because of the fear that it may incriminate them. Even if it does not lead to charges, they fear that such activities could attract the attention of intelligence agencies or police officers. Several members of the Muslim community have contacted AMCRAN after being visited by ASIO after they made what they believed to be totally legitimate donations.

These laws act as a deterrent to charity because people simply cannot be fully certain that their money will go to the intended recipients. This concern extends

beyond the Muslim community. However, because of the uncertainty of the law we have seen many donors shy away from fundraising dinners and the like. One concrete example we have come across is a person who asked to see copies of the organisation's constitution as well as their audited financial reports for the last two years before he would even accept an invitation to the organisation's fundraising dinner.

3. Terrorist organisations and the proscription regimes

In our view, the criminalisation of activity or political or financial support, associated with armed liberation struggle, is a major source of the social exclusion and discriminatory targeting under the laws of Muslims in Australia.

3.1 Terrorist organisation

There is great confusion surrounding exactly what constitutes a "terrorist organisation" within the Muslim community. Given the already expansive definition of "terrorist act", the definition of "terrorist organisation" in s 102.1 broadens and makes subjective the criteria for deciding whether an organisation is a terrorist organisation.

The difficulty for the Muslim community – especially at this stage where the common law interpretation of ss 100.1 and 102.1 is non-existent - is that it may adversely impact on legitimate activities, and lead to *de facto* retroactive criminalisation as to the status of an organization and its members or associates.

3.2 Charter of the United Nations Act 1945

The UN Act has greatly contributed to the criminalisation of the support for a diverse range of distinct and unique liberation struggles such as Palestine, Sri Lanka, Turkey and the Philippines. These struggles are on the whole contained to civil disputes and can be distinguished from 'international terrorism' associated with organisations such as Al Qaeda.

The UN list freezes the assets of those listed and applies penalties of up to five years imprisonment for those who deal with these freezable assets in any way. At the time of writing [26 March 2006] there were 1,617 individuals and organisations listed.

These provisions also cause organisations to attract the attention of the authorities. Recent raids of people said to be associated with the Tamil Tigers for the purchase of a hang glider is an example of the deleterious impact of listing. No evidence has been tendered that the purchase of the hang glider was to be used for violent acts which threaten Australia's security. We submit the UN list is undemocratic and counter productive, greatly stigmatising association with struggles which are in effect equated with terrorism.

3.3 Proscription under the Criminal Code

To date, 19 organisations have been listed as terrorist organisations under the proscription regime in the *Criminal Code*. Eighteen of these organisations are self-identified as Islamic organisations. Under the *Criminal Code*, people who associate with terrorist organisations are liable for criminal prosecution, regardless of the nature of that association or the intention of the individual to engage in terrorist acts. This is "guilt by association", and as such violates one of the basic principles of criminal law, which holds that guilt should only attributed to individuals on the basis of their own actions, not the actions of others. That the majority of the organisations listed are Muslim, disproportionately exposes people of the Muslim faith to guilt by association and the terrorist organisation offences.

This apparent bias in proscription, combined with increased levels of racism and discrimination against Muslims, leaves the Muslim community feeling isolated and discriminated against (see *Isma'* Report (HREOC, *Isma' - Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians,* 2004). This does not help in creating a cooperative environment for addressing and fighting the modern challenges of terrorism, not to mention the adverse impact it is having on the sense of security and safety of the Muslim community.

According to the Parliamentary Joint Committee on Intelligence and Security,[1] ASIO

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[1] • the organisation's engagement in terrorism;
• the ideology of the organisation, and its links to other terrorist groups or networks;
• the organisation's links to Australia;
• the threat posed by the organisation to Australian interests;
• the proscription of the organisation by the United Nations or by like-minded countries;
• whether or not the organisation is engaged in a peace or mediation process.

relies upon six broad criteria in making recommendations to proscribe an organisation. The criteria and procedures in making such recommendations , details of which have not been made public. The invocation of these undefined criteria and wide-reaching Ministerial discretion have in practice resulted in inconsistent application of the listing power.

One criteria used for listing is the 'ideology' of the organisation, yet no information has been publicly provided as to which ideologies are considered 'terrorist' or what weight ASIO gives to particular ideologies. In relation to the listing of Palestinian Islamic Jihad, for example, ASIO gave evidence that while there was no evidence of its presence in Australia, people shared its ideology.

In addition, in proscribing an organisation it should be important to clearly identify its links to Australia and what threat it poses to Australian interests. The recent listing of the Kurdistan Worker's Party (PKK) as a terrorist organisation, despite there being no public evidence to suggest that PKK is any threat to Australia, is one example. This is likely to cause members of the community to conclude that organisations are listed due to foreign policy considerations rather than because of a genuine terrorist threat. We refer particularly to a research note, *The Politics of Proscription in Australia,* published by The Parliamentary Library. This research illustrates the arbitrary listing of organisations thus far. There has been listing of organisations that have no links to Australia, while other organisations that do have links with Australia have not been listed. For example, in the case of the listing and proscription of the Palestinian Islamic Jihad, ASIO expressly acknowledged that there were no financial or other links to Australia and that the organisation's proscription and listing was largely prompted by its proscription in other countries. Globalised Islamphobia is then evident in Australia through the proscription regime.

3.3.1 "Advocating terrorism as a ground for proscription"

The *Anti-Terrorism Act* (No. 2) 2005 expanded the grounds upon which an *organisation* may be listed as terrorist under the *Criminal Code*, where an *organisation* 'advocates terrorism'.

There are four major grounds where this expansion limits the democratic rights of Muslim and culturally and ethnically diverse people. Firstly, the provisions severely

limit free speech. For example, consider an organisation that advocates for an independent Palestinian State, and vocally supports resistance where non-violent means for achieving a just arrangement have failed, would this fall within the gamut of indirectly counselling a terrorist act?

The expansion of grounds will have a particular effect on Muslim community groups who may wish to express solidarity with Muslims who live under oppressive regimes or various kinds of occupying forces. This is particularly the case, as the definition of a terrorist act makes no distinction between legitimate liberation and independence movements and terrorism. Examples include human rights violations by the Israeli Defence Force against Palestinian civilians and groups calling, on the basis of things like the torture in Abu Ghraib, for America and its allies to be forced out of Iraq by any means necessary. It is our view that the above point of view, while unpalatable to some, should not be criminalized and subject to onerous terrorist *organisation* offences.

Secondly, there is vagueness as to what is meant by an *organisation* to "advocate" terrorism. Does it mean that the leader of the organisation has made comments on one occasion publicly "advocating terrorism"? Is there a requirement that the comments be made on multiple occasions? Is it sufficient for someone on the forums of a web site to have made statements advocating terrorism? Or is advocacy limited to it being stated as one of the doctrines of the organisation? This is very different from the doing of a terrorist act, which clearly requires logistical support and coordinated acts, rather than the speech of a single individual.

Thirdly, it raises questions of accountability, i.e., that a person should be held accountable for their own actions only and not for actions of others. If a person becomes a member of an organisation, and the leader of that organisation then makes pronouncements that qualify as "advocating terrorism" which results in the proscription of the organisation, then the person is being punished as a "member of a proscribed organisation" under s 102.1 of the *Criminal Code 1995* for the statements of the leader. The person may not have been consulted before the leader made those statements, and so the normal laws relating to conspiracy or joint enterprise would not apply.

Fourthly, it fails the test of proportionality. Punishments for directing, financing, membership and even association are very severe[2], ranging from 3 years to life imprisonment. This could affect hundreds of individuals. Furthermore, even for the leader who made the "advocating" statements thus making the organisation liable to proscription, he or she may be subject to a severe punishment of 25 years imprisonment for "directing a terrorist organisation" under s 102.2 of the *Criminal Code*. This is highly disproportionate, even compared with the proposed punishment for sedition, which is 7 years imprisonment.

3.3.2 Case study: Hizb-ut-Tahrir

We would like to examine the group known as Hizb-ut-Tahrir (Arabic for the "The Party of Liberation") as a case study. After the London bombings in July 2005, the Attorney-General, Mr Ruddock raised the prospect of banning the organisation. The following is from the House of Representatives Hansard of 11 August 2005 discussing issues relating to the potential proscription of Hizb-ut-Tahrir.

> **Mr BALDWIN** (3.12 pm)—My question is addressed to the Attorney-General. Will the Attorney-General advise the House how the government and businesses are working together to protect Australia's critical infrastructure?
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> **Mr RUDDOCK**— … There is another matter, Mr Speaker, that I know you and honourable members are very much aware of, and that is that I asked ASIO for advice on whether there were currently grounds in Australia for listing the organisation Hizb ut-Tahrir. ASIO has advised me that at present there is no basis under current legislation for specifying Hizb ut-Tahrir as a terrorist organisation under the *Criminal Code*. As I understand it, Hizb ut-Tahrir members overseas have called for attacks in the Middle East and Central Asia, but here in Australia it is not known to have—and I use these words deliberately—planned, assisted in or fostered any violent acts, which are the current legislative tests under the *Criminal Code* for proscription. At this stage the government is not aware of any information that Hizb ut-Tahrir is connected to the London bombings, as has been suggested elsewhere.

[2] *Criminal Code Act 1995* s 102.

> The *Criminal Code* required that for a group to be specified as a terrorist organisation it must directly or indirectly engage in preparing, planning, assisting in or fostering the doing of a terrorist act. Under this act, in addition, there are separate offences for inciting a terrorist act. However, it remains of concern that some Hizb ut-Tahrir elements have called for attacks against coalition forces in Afghanistan, Iraq and the United States and Israeli interests elsewhere. More generally, Hizb ut-Tahrir espouse a very extreme and radical agenda. I can confirm that my department is reviewing the proscription provisions contained in the *Criminal Code* and looking at some possible ways to strengthen those provisions. Until I receive that advice and have considered it, I am not prepared to comment on whether this group or any other may be listed in the future.

Furthermore in an article in *The Age* on 30 August 2005[3], in relation to Hizb ut-Tahrir, the Attorney-General said that he would consider introducing laws similar to those introduced in the UK with respect to glorifying terrorism.

Given these statements, and that merely seven weeks later the new anti-*terrorism* laws were introduced including the new grounds of proscription of advocating terrorism, this has led some in the Muslim community to conclude that the "advocating terrorism" requirements were specifically tailored to cater for Hizb ut-Tahrir.

3.3.3 The impact of proscription – terrorist organisation offences

The Muslim community has, as a result of terrorist acts committed by those who claim to be Muslim, compounded by the anti-terrorism legislation, and the "Be Alert, but not Alarmed" campaign, suffered unprecedented levels of racism and discrimination[4]. One of the main effects of proscription is that it will create two further levels of isolation: it will create isolation between the Muslim community and the wider Australian community, since non-Muslim Australians will fear, rationally or irrationally, that they may be talking to a member of a terrorist organisation and will thus shun Muslims, and likewise within the Muslim community, it will lead to people not wanting to talk to one another, again, for fear of falling foul of this legislation. This

[3] "Ruddock plans expanded anti-terror laws", *The Age*, August 30, 2005.
[4] HREOC, *Isma Listen: National Consultations on eliminating prejudice against Arab and Muslim Australians*, 2004.

is at a time when both Muslim and non-Muslim Australians need to work together closely to prevent acts of violence in Australia,

We address how the proscription offences impact on Muslim and ethnically diverse people.

Associating with a terrorist organisation

It is an offence to associate (which is defined as 'to meet or to communicate') with a person who is a member, promoter or director of a banned terrorist organisation, if there is knowledge that they are involved with a terrorist organisation, and by associating with them there is an intention to provide support for the continued existence or expansion of the organisation.

The legislation allows for certain exemptions to the charge of association. These are:

- Where the association is with a close family member and communication relates only to a matter that could reasonably be regarded (taking into account the person's cultural background) as a matter of family or domestic concern;
- the association is at a place being used for public religious worship and takes place in the course of practising a religion
- association is only for the purpose of providing humanitarian aid
- association is for providing legal advice or legal representation in connection with criminal proceedings or related proceedings, or proceedings relating to whether the organisation is a terrorist organisation.

From the Muslim perspective, these defences are totally inadequate, the main reason being that Muslim communities, like many ethnic communities, are tightly knit. The defences are inadequate in that they do not cover many of the usual activities that would occur within the Muslim community.

Firstly, with respect to the first exemption, family is very important in almost all Arab and Islamic cultures, in particular extended family bonds (cousins, aunts, uncles, grandparents). It is not uncommon for several generations of families to be living in

the same household[5]; or for a group of related families to live on the same street. It is not unusual, for example, for cousins and uncles to meet each other on a daily basis and to share their experiences and problems[6].

The current legislation would have a huge social impact if it were to sever forcibly the ties between cousins and uncles, for example, and effectively undermine and destroy one of the most important stabilising influences in many Muslims' lives.

Secondly, with respect to the exemption that the meeting occur within a place of worship, this too is inadequate. Here are some typical examples of interactions within the Muslim community that would not be covered by the exemption solely for places of worship.

- The Muslim community has two large religious festivals a year, called *Eids*. Traditionally, a prayer is performed at an outdoor venue, rather than a traditional place of worship such as a mosque, though for practical reasons in Australia this is not always adhered to. One typical outdoor prayer took place in Bicentennial Park, Homebush, Sydney, in 2002. It was attended by approximately 2,000 people. Since a park where such a prayer is held would not be considered a typical "place of worship," meeting people at such a location for the purpose of worship would not be covered.
- Regular classes and Qur'an study groups are frequently conducted in people's homes, or sometimes in hired schools and venues. These venues are also not covered.
- Two celebrations which are religiously and socially important are the celebration of a marriage (a *walimah*) and a celebration of the birth of a new child (an *aqiqah*). Both of these events occur typically in a public place, e.g. a hall, or occasionally a park (with a barbeque). It is considered extremely rude, and indeed anti-social to refuse an invitation to either of these two events.

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[5] Farhat Moazam, *Family, Patients, and Physicians in Medical Decision-Making: A Pakistani Perspective.* The Hastings Center Report, Nov 2000 v30 issue 6 p. 28.
[6] Carolan, M, T., Bagherinia, G., Juhari, R., Himelright, J., & Mounton-Sanders, M. (2000). *Contemporary Muslim families: research and practice*. Contemporary Family Therapy, 22, 1, 67-79. One quote from the above document reads: 'A qualitative research analysis of contemporary Muslim families showed that extended families were viewed beyond the normal family support systems, i.e., in terms of marriage selection and decision-making, there is an "expressed trust and respect for the choices and influence of elders in the form of parents, aunts and uncles".'

In his second reading speech, the Hon Philip Ruddock said that the offence sets out parameters 'without unnecessarily encroaching upon individual rights and freedoms'[7]. However, in all of the above cases, individuals would have no defence under the current legislation. The offence of association would effectively control such simple acts as social engagements as illustrated above.

The impact of proscription on refugees

The listing of the PKK highlights the devastating impact of proscription on refugee communities. The Turkish state has been engaged in armed conflict with Kurdish groups, including the PKK since the 1980s. The actions of the Turkish state in this conflict have included the destruction of Kurdish villages, extra-judicial killings, torture of Kurdish arrestees, the banning of political *organisation*s, the banning of publications calling for Kurdish self-determination, and the active prevention of the use of Kurdish language and insignia.

These actions have already been found by the Australian government to amount to persecution, and have led to many Turkish Kurds being granted permanent protection in Australia. Now, claims of persecution due to real or alleged association with the PKK or related organisations will expose refugees to criminal prosecution for membership or a number of other serious offences. It also exposes refugees to the revocation of visas or even permanent residency through ministerial discretion under the broad character provisions in the *Migration Act 1958*.

4. Preventative detention and control orders

The *Anti-Terrorism Act (No. 2)* 2005 introduced control orders and preventative detention measures. Of particular concern to the Muslim community is that the low test for control orders potentially opens the door for racial or religious profiling to take place, whether officially or unofficially. It is our belief that there is the potential for racial and religious profiling to affect the application in two different areas: grassroots policing and in the courtroom.

[7] Second Reading Speech, p.3.

In the case of grassroots policing, it is possible that police officers subconsciously draw conclusions about people based on their appearance or dress. This is not a theoretical possibility and one specific example in practice is the case of Bilal Tayba[8]. Bilal Tayba was accompanying another person suspected of involvement of terrorism and parked his car unintentionally behind the AFP offices in Sydney. His steps were dogged by news cameramen. Shortly after midnight that day, the AFP raided his home and and asserted that Tayba had been recording footage of the AFP offices preparatory to some kind of terrorist activity. This was denied. When the case came before court, the charges were withdrawn, and the AFP paid Mr Tayba's legal costs. While being a specific example, it does illustrate the general problem of how religious and racial profiling can affect the police's perception of guilt and innocence.

In the courtroom, there is a real possibility that the fact that a person prays at a particular mosque, or that they are devout Muslims, could be used as evidence to support claims of involvement in terrorism. For example, evidence that a person attends a mosque regularly is not likely to meet the standard of "beyond reasonable doubt". However, we fear that in the context of a "balance of probabilities" test and under pressure to make an urgent decision, circumstantial evidence such as attendance at a particular mosque, or associating with a particular group, could become a "short cut" way of influencing the balance of probabilities.

We are also deeply concerned that that there is no limit on the number of successive control orders that can be placed on a person[9]. This is an extraordinary measure and means that people could be held under house arrest year after year. This means, paradoxically, that a person who has been subject of a full judicial process to determine guilt or innocence, could be subject to a lesser punishment than someone who has merely had a short session with a judge based on "the balance of probabilities".

It is also disturbing that s 104.2(2)(b) means that a person could be the subject of a control order merely because he or she trained with a "terrorist organisation" in the past. This is an extremely unusual measure.

There is already an existing offence for "training with a terrorist organisation" either recklessly or intentionally under s101.2(1) and (2) of the *Criminal Code*. Accordingly,

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[8] Hall Greenland, "Operation Terror", *The Bulletin,* March 2005.
[9] S 104.5(2)

there is serious concern that control orders could be used as a means of depriving people of their liberty if there is insufficient evidence to charge a person with the existing offence of training with a terrorist organisation and meet the “beyond reasonable doubt” test, but have sufficient evidence to meet the “balance of probabilities” test for a control order. Clearly, use of this “back-door” mechanism to meet a lower level of proof is not desirable or appropriate.

4.1 Preventative detention

In his second reading speech, the Attorney-General repeatedly stated that there are appropriate safeguards. However, it is extremely disturbing to see that the “preventative detention orders” are, at a pragmatic level, concerned with avoiding the safeguards that would exist if the people were held under existing criminal laws.
A particular concern for the Muslim community is that preventative detention extends previous legislation by allowing someone who is not even suspected of being involved in crime, but may merely possess information in the event of a terrorist attack, to be detained for up to 14 days. [10]

The only other situation in which a person not even suspected of an offence can be detained on the basis that they may have evidence is the power under Section 34D of the *ASIO Act* with a questioning and/or detention warrant. However, the powers granted here far exceed the extensive powers given even to ASIO. Firstly, a questioning warrant requires approval from the Director-General of ASIO, and the Attorney-General himself and an issuing authority. A preventative detention warrant requires only the approval of a senior police officer. Secondly, in considering the application of a questioning warrant, the issuing authority must be convinced that there is no other mechanism for retrieving the information other than through questioning and/or detention. Thirdly, the maximum period for detention is seven days, not 14 days.

In the tragic event of a terrorist attack, these provisions, requiring the approval only of a senior police officer, could be used to cast a wide net. Muslims would likely – due to racial profiling – be severely affected by this. This is not mere speculation, but a concrete fear having observed the application of the notorious “material witness”

[10] Schedule 4, Item 24 104.4(6)

measures in the US after the attacks of September 11. Under the material witness laws, individuals who have not committed any crime themselves may nonetheless be detained for extensive periods of time[11]. The preventative detention measures, while not as severe, raise the spectre of the material witness measures in the US.

Two months after the September 11 attacks, up to 1,100 people, mostly Muslim, were detained under the material witness provisions[12]. The exact number is not known, as there is no requirement that the US report on people detained. Even as late as 2005, it is believed that up to 70 people are still being held as material witnesses[13]. Many of the people detained had nothing at all to do with terrorism. Similar measures in Australia could clearly be misused, which could lead to massive community tension and be extremely detrimental to the harmony of the community, not to mention a gross deprivation of liberty for the individuals concerned.

5. Sedition

Sedition will have a significant impact on freedom of speech in Australia which is likely to disproportionately impact upon the Muslim community.

There are many in the Muslim community who feel that the sedition offences are designed to limit their freedom to speak out against injustice. While we accept that any speech inciting violence is indefensible, we note that laws already exist that make it an offence to incite violence; indeed, it is already a terrorism-related offence, punishable by life imprisonment, to threaten politically motivated violence with the intention of intimidating a section of the public.[14] Further, existing provisions also prohibit incitement to commit a crime[15], and racial or religious vilification offences already exist in different jurisdictions that prohibit the incitement of violence or hatred against different groups of people.

The sedition offence would have a significant impact on the ability of the Muslim community as well as the wider community to express its views. Some of the views

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[11] Levenson, L. *Detention, Material Witnesses & The War On Terrorism,* Loyola of Los Angeles Law Review, Vol 35 Jun 2002.
[12] PBS Newshour, *Locked Up,* 11 November 2001, http://www.pbs.org/newshour/bb/terrorism/july-dec01/detainee2_11-8.html
[13] Human Rights Watch
[14] Section 100.1, *Criminal Code Act 1995 (Cth)*
[15] Section 101.4, ibid

that were canvassed in the section on “advocating terrorism” would also be covered by the sedition offences. An example of this view is that “Iraqis have the right – indeed the duty – to resist the occupation of their country by Western forces.” While unpalatable to some, this view is part of a healthy debate on Australia’s involvement in the Iraq war.

We are concerned that the current climate of institutionalised Islamophobia, may lead to the criminalisation of statements made by Muslims as ‘incitement’ where there may otherwise be no evidence of violent acts which threaten the safety of the public. Indeed, as has been pointed out by the UK Islamic Human Rights Commission, “Certain statements made by Muslims will be regarded as ‘glorification’ due to the Muslim audience. Similar comments made by members of other communities will not be held to the same standard of accountability.”[16] There is an imminent danger that the vague and politicised concept of ‘extremism’’ will be deployed to target the political beliefs of Muslims and unduly read these as ‘terrorist’. Indeed, it is well established that Australian counter-terrorism intelligence agencies have historically operated on a continuum approach informed by the philosophy of counter-insurgency. That is, that ‘subversive’ views are a short step from politically motivated violence.[17]

6. ASIO detention and questioning

6.1 Threat of use of ASIO powers as a means of coercion

With the fear and paranoia that has been generated in the community about the scope and extent of the anti-terrorism laws, members of the community are often alarmed when contacted by ASIO. In such circumstances, they are often reluctant to talk to ASIO officers. Anecdotally, the officers explain that they can force cooperation by obtaining a questioning or detention warrant, which, combined with the operation of s34JBA (allowing a person’s passport to be seized during the period of the warrant) is a potent method of coercing persons to cooperate. Hypothetically, ASIO may wish to question a person who is an expatriate returning to Australia for a short period of time. Officers approach the person requesting an informal meeting. The

[16] Fahad Ansari, Islamic Human Rights Commission, op cit at p13
[17] Hocking, J, Beyond Terrorism, the Development of the Security State, Allen & Unwin, St Leonards, 1993, pp18-22

person may not wish to discuss anything with the officers, and refuses. However, the ASIO officers go on to explain that they could obtain a warrant to compel the person to cooperate, and that their travel plans could be disrupted because the person's passport would have to be surrendered under the warrant[18].

Alarmingly, it has in fact been reported that ASIO officers threatened a person with detention for three days under the Act if the person did not cooperate with a raid[19].

While this may deliver short-term results, it is likely to create animosity in the very people whose cooperation may be most important for the gathering of intelligence. We submit that a person's cooperation under these circumstances could more closely be identified as cooperation under duress, and that the use of the laws in such a manner should not be allowed. We submit that to use the law in this way by threatening the issuing of a warrant under which a passport can be taken away is an abuse of the power.

7.Police powers

7.1 Racial profiling and police discretion

In the last year the writers of this submission have conducted community legal education sessions on counter-terrorism legislation with Muslim groups. We are also aware of significant experiences through the conducting of legal casework in this area by community legal centres. Through these activities it has come to our attention that the Muslim community has been targeted by law enforcement officials and national security agencies as a result of the existing counter-terrorism laws. Disturbingly, the vast majority of Muslim people we have encountered through our work have either known someone or have themselves been contacted for questioning by ASIO. Anecdotally, Muslim people have expressed feeling harassed by ASIO's intelligence-gathering operations; some have described harassment by law enforcement officials. The over-policing of Muslim people, by virtue of

[18] The Act, s 34JBA.

[19] In a media interview on the ABC on 1 November 2003, Mr Stephen Hopper, a Sydney lawyer representing a person whose home was raided by ASIO, stated that officers threatened his client with detention for three days under the ASIO Act if he did not cooperate with the raid. Transcript available online: http://www.abc.net.au/am/content/2003/s980064.htm

‘intelligence gathering’ in a pre-emptive criminal justice framework, raises concerns about the arbitrary nature of such contact. There is, however, such a level of fear regarding our existing laws, not to mention the secrecy provisions which expressly silence people that community members have not spoken out widely about these experiences.

Soon after the Prime Minister’s initial media release relating to the proposals now contained in the *Anti- Terrorism Act (No. 2) 2005*, the Police Federation of Australia openly stated that these proposals will inevitably lead to racial profiling with respect to the Muslim community.[20] In his appearance at public hearings before the Parliamentary Joint Committee on ASIO, ASIS and DSD on 18 May 2005, then head of ASIO Dennis Richardson, expressly confirmed that ASIO were targeting the Muslim community in its intelligence gathering activities. To date, all but one of the organisations proscribed by the Government using its proscription powers self-identify as Muslim organisations. Despite Governmental assurances that the law is not aimed directly at the Muslim community, it is clear that it has had an overwhelming impact on Muslim people in its application. While the law itself may not specifically refer to Muslim people, they are the community group that will bear the brunt of this legislation. Naturally, legislation that has the effect of targeting one particular racial or religious group in this way is a matter of grave concern.

7.2 Stop and search powers

The *Crimes Act 1914 (Cth)* was recently amended by the *Anti-Terrorism Act* (No. 2) 2005 to provide all police officers with powers to stop, question and search people with respect to terrorist acts. Firstly, these powers are invoked in relation to people who are present in a Commonwealth place, that is, a place where the Commonwealth has the power to make laws. In order to exercise the powers with respect to a person in this environment, a police officer must suspect on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act. The powers may also be exercised *carte blanche* in a ‘prescribed security zone’. That is, no reasonable suspicion regarding the commission of a terrorist act is required.

[20] Milovanovic, Selma, ‘ Suburbs may be “left exposed”’, *The Age*, 28 September 2005.

In addition, some States have enacted mirror legislation which provide for similar stop and search powers for state police, which can be conferred in relation to events or areas, once the police apply to the Supreme Court for an authorisation to be granted in relation to the event/area (for example, *Terrorism (Community Protection) Act 2003 (Vic)*).

Where the above circumstances apply, police will have the power to ask a person for his or her name, address and proof of identity. Police may also require the person to explain why they are in that particular place. Police will further have the power to stop and detain a person for the purpose of conducting a search for a terrorism related item, as well as powers to seize items found.

State police are also generally able to stop and question a person where it is reasonably suspected that the person is committing or has just committed a criminal offence. In our opinion police powers with respect to terrorism offences are already overly coercive and expansive. Many of the powers provided for in Schedule 5 of *Anti-Terrorism Act (No.2) 2005* already exist in some form and are sufficient in themselves. The additional powers sought under the anti-terrorism legislation are in our view an excess of police power.

As discussed above, the definition of a 'terrorist act' is quite expansive. Police would also be offered very broad discretion in that, pursuant to Section 3UB(a) of the *Anti-Terrorism Act (No.2) 2005* they need only suspect on reasonable grounds that a person '*might* have just committed, be committing or be about to commit such an act." Both the concept of 'reasonable suspicion' and the term 'might' give rise to the extremely broad discretion here. As a result, it is almost certain that these powers will cause far more people to come into contact with police, including a majority who do not pose any threat to the community. This is particularly concerning given the humiliating impact public police searches and questioning may have on people that are subject to this kind of policing. The discretionary nature of these powers is such that there is also the danger that the powers will be misused. We are concerned that these powers may be used for collateral purposes that are not aimed at apprehending criminal offenders, for example to gather intelligence or for harassment or targeting of individuals.

The stop, search and question powers will be particularly prone to racist or discriminatory exercise. We are particularly worried about discriminatory use of the

powers in prescribed security zones, where no reason for exercising the powers to stop, search and question is required.

There is already a disproportionate focus on the Muslim community by the media, law enforcement agencies, intelligence gathering agencies and the broader community whenever the issue of terrorism is raised. We are concerned that the Muslim community will be subject to further disproportionate and arbitrary police interference as a result of these powers. Police targeting of the Muslim community is clearly an undesirable outcome and may even have a counter-productive effect with respect to criminal investigation, insofar as an alienated community is less likely to be cooperative with police investigations.

Most importantly, however, over-policing along racial or religious lines that is facilitated by legislation amounts to officially sanctioned racial and religious discrimination. It also has the danger of perpetuating and even exacerbating racial and religious prejudice in the broader community. This should be something that our society is working to counteract, rather than enacting laws that are inherently prone to discriminatory application such as these.