

11 November 2005

The Secretariat
Senate Legal & Constitutional Committee
Parliament House
Canberra ACT 2600

By Fax (02) 6277 5794

By Email: legcon.sen@aph.gov.au

Dear Sir/Madam,

INQUIRY INTO THE PROVISIONS OF THE ANTI-TERRORISM BILL (NO 2) 2005

This submission is made on behalf of the NSW Council of Civil Liberties in respect of the abovenamed legislation.

The Council is concerned about the provisions of this Bill and the general thrust of the legislation. The bill strikes at very basis of the British legal system we inherited, because people can be detained in secret without being guilty of a crime, without the benefit of reasonable doubt & not being able the challenge all the evidence against you. It effective repeals basic common law rights and even provisions of the Magna Carta. Having regard to the very strict time restrains to be imposed in relation to the making of submissions on this Bill we make the following general points and would be happy to elaborate further.

Financing Terrorism

Schedule 3 of the Bill adds an offence of financing a terrorist. Division 103.2 is added to the Criminal Code and is in the following terms:

103.2 Financing a Terrorist

1. A person commits an offence if:

-
- a. The person intentionally:
 - i. Makes funds available to another person (whether directly or indirectly); or
 - ii. Collects funds for or on behalf of, another person (whether directly or indirectly); and
 - b. The first mentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.
2. The penalty is imprisonment for life. Sub-section 2 provides that a person commits an offence under sub-section 1 even if a terrorist attack does not occur or the funds will not be used to facilitate or engage in a specific terrorist act or the funds will be used to facilitate or engage in more than one terrorist act.
 3. This is of great concern. It means that if a person is reckless as to who might end up being the ultimate recipient of funds, then they have committed an offence for which they can be imprisoned for life. Schedule 3 of the Bill deals with financing terrorism. While the object of preventing the financing of terrorist organisations may be laudable, the proposed law is very poorly drafted and could mean that people innocently providing funds could be found guilty of financing a terrorist or terrorist organisation, for which the penalty is imprisonment for life. Under this section, a person could be imprisoned for life if they indirectly made funds available to another person and was reckless as to whether the other person might use the funds for terrorism. Recklessness in this context means the person is aware of a substantial risk that the funds would be used for terrorism and, having regard to circumstances known to them, it is unjustifiable to take the risk.
 4. The person need not intend that the funds be used for terrorism, nor must they have knowledge that the funds will be used for the purpose. The offence is committed even if a terrorist act does not occur or the funds will not be used for a specific terrorist act.
 5. This makes it impossible for any person to know the scope of their legal liabilities with any certainty. Terrorists may obtain financing from a range of sources including legitimate institutions, such as through banks. They could employ a variety of deceptive means to secure funding.
 6. This proposed law will require every Australian to be extremely vigilant in considering where their money might end up before donating to a charity, investing in stocks, depositing money with a bank or even giving money as a birthday present.
 7. Some examples might highlight the potential danger to ordinary people in these proposed laws.
 8. You might have an idealistic daughter who travels to Nepal to seek spiritual enlightenment. She might become involved in a spiritual movement opposed to capitalist materialism or the like, headed by a particular guru. You might send money to your daughter and she may give it, or some of it, to her guru. In those circumstances, you may have committed a crime punishable by life imprisonment, even if the money you send is not spent on terrorist activities and no terrorist act occurs, because you have been reckless as to the ultimate beneficiary of your funds.
 9. Another scenario might involve fund managers with investment portfolios. Most fund managers invest money on behalf of parties whom they cannot identify. As the fund manager cannot identify ultimate clients, they can never be sure that the funds are not being collected on behalf of terrorists. This legislation would leave legitimate fund managers with doubt and potentially open to prosecution. A fund manager might invest money in businesses which they do not control. A person may, for example, consider investing in a nitrogen fertiliser plant. The fertiliser may be intended for entirely peaceful uses, but it is certainly possible that it might be used for explosives,
-

even though there might be tight government regulatory controls on access to the product.

10. The wording of the bill is very broad. It only requires that the funds provided cannot “facilitate” a terrorist act.
11. Mobile telephones could be considered to facilitate terrorist acts (that is how terrorists talk and sometimes even trigger their bombs). Does this mean that investors cannot provide money to a telephone company without exposing themselves to the risk of prosecution and a possible life sentence?

Control Orders And Preventative Detention Orders

12. Under Schedule 4, sub-section 100.1(1) of the Criminal Code is amended by inserting a definition for “issuing authority”. In relation to initial preventative detention orders, that means a senior Australia Federal Police member. For continued preventative detention orders, that means a person appointed under Section 105.2. Section 105.2 allows the Minister to appoint a judge, a federal magistrate or a person who has served as a judge for five years and who no longer holds a commission or a deputy or president of the Administrative Appeals Tribunal as long as that person is a legal practitioner enrolled for at least five years, as an issuing authority for continued preventative detention orders. That person must consent in writing to being appointed. Constitutional challenges to the proposal that judges can act as issuing authorities have been foreshadowed and may have some merit. The proposed function is not a judicial one and may be invalid under the *Commonwealth of Australia Constitution Act 1900*. Again, division 4 proposes to confer non-judicial powers on federal courts. It is our view that conferring both executive and judicial power in a court would remove an important constitutional safe-guard. Judicial power must be exercised in accordance with the judicial process including rules of natural justice. Control orders are proposed to be made in the absence of the person affected by them and, as will be discussed below, the person affected will not be entitled to all of the information upon which the application for the control order is based.
13. Accordingly, there is an absence of basic measures in accordance with the rules of natural justice.
14. Clause 21 of the Bill will amend sub-section 100.1(1) of the Criminal Code to insert a definition of “senior AFP member”, which includes the commissioner and deputy commissioner of the AFP or an AFP member of, or above, the rank of superintendent. It should be noted that this means that an AFP member of or above the rank of superintendent will have the power to issue interim preventative detention orders and have the power to request an interim control order.

Control Orders

15. Division 104 deals with control orders. The object of the division is stated to be to allow organisations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act.
 16. A senior AFP member may request an interim control order and may do so, in urgent circumstances, without first obtaining the Attorney General’s consent. Subdivision C regulates the circumstances under which an urgent interim control order can be made. In particular, if a request was made for a control order, the Attorney General’s consent
-

must be obtained within four hours of the AFP member making the request, pursuant to Section 104.10. This raises the question of whether it is necessary to allow a request to be made without the Attorney General's consent if that consent is to be required within four hours in any event.

17. An interim control order may be requested if a senior AFP member considers on reasonable grounds that it would substantially assist in preventing a terrorist act, or if the member suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation.
 18. Of great concern is that together with the draft request that must be submitted to the Attorney General in seeking his consent, there is no requirement that evidence upon which the reasonable grounds are founded. All that is required is a statement of the facts relating to why the orders should be made "if a member is aware of any" the facts relating to why the orders should not be made, together with an explanation as to why each of the obligations, prohibitions and restrictions should be imposed on the person. Again, if the member is aware of any, any facts as to why those should not be imposed should also be included. Any previous requests and outcomes in relation to control orders or preventative detention orders should also be provided.
 19. Interestingly, information, if any, that the member has about any periods for which the person has been detained under an order made under a corresponding state preventative prevention law must also be provided. Nowhere is it defined what is meant by "information (if any) that the member has". This begs the question as to whether there is any obligation upon the AFP member to make enquiries to ascertain any such information. As presently drafted, there would appear to be no such obligation.
 20. A senior AFP member may seek the Attorney General's consent to an interim control order even if such a request has previously been made in relation to the same person.
 21. If the Attorney General consents to the request, then the AFP member may approach a federal court to make the interim control order.
 22. The request must be the same as the draft request given to the Attorney General "except for the changes (if any) required by the Attorney General" and must be accompanied by a copy of the Attorney General's consent.
 23. This raises concern in that it appears to be possible for the Attorney General to make changes to the draft request but it is not clear upon what basis the Attorney General is able to exercise that power. Further, there is no provision to require the person affected by the control order to be given any reasons or basis for any such changes.
 24. Further, this means that the court may have information which was different to the information with which the Attorney General was provided at the time the Attorney General considered whether to give his consent to the request.
 25. The issuing court may make an order only if it is satisfied on the balance of probabilities that making the order would substantially assist in preventing a terrorist act or that the person has provided training to, or received training from, a listed terrorist organisation and is satisfied on the balance of probabilities that the order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.
 26. In making the determination the court must take into account the impact of the control order on the affected person, including upon the person's financial and personal circumstances.
 27. Clearly, the order can be made in the absence of the person who is the subject of the order and without the court necessarily having to be provided with any evidence
-

- which gave rise to the senior AFP member's request. This represents a serious departure from the rules of natural justice (see clause 104.4).
28. Clause 104.5 provides that the order does not begin to be in force until it is served personally on the person affected and must specify a date on which the person may attend the court for the court to confirm the order. Of course, the court may also declare the interim order void or revoke it on that date.
 29. The period during which the confirmed control order is to be specified and that must not be longer than twelve months after the date on which the interim control order is made. It must also state that the person's lawyer may attend a specified place in order to obtain a copy of the interim control order.
 30. Of further concern is that sub-clause 2 of clause 104.5 specifically states that successive control orders may be made in relation to the same person. Therefore, although the time limit of a control order is twelve months, there is nothing to prevent further successive control orders of twelve months at a time being made in relation to the same person, so that the control order could extend indefinitely.
 31. The obligations, prohibitions and restrictions able to be imposed are set out in sub-clause 3 and are, by any measure, extremely intrusive in nature. Indeed, a prohibition or restriction on the person carrying out specified activities including in respect of his or her work or occupation is allowed and the person's ability to contact any other person can also be restricted. Sub-section 5 states that the person has the right to contact, communicate or associate with their lawyer unless the person's lawyer is a specified individual as mentioned in paragraph 3(e). The Bill does not, however, set out what criteria are to operate in enabling a person's lawyer to be specified in that way. This could operate to exclude the lawyer of choice of choice of the affected person without there being any valid or reasonable grounds for doing so. The right to engage a lawyer of choice is, it is submitted, an important one in ensuring a fair process.
 32. Sub-division C enables the making of an urgent interim control order via a request by telephone, facsimile, email, or other electronic means. The Attorney General's consent, as is stated above, is not required before the request is made but is required within four hours. An explanation as to why the making of the interim control order is urgent is required. The information and the explanation does not need to be sworn or affirmed at the time that the court makes any such order but must be sworn or affirmed within twenty-four hours.
 33. It is considered that this measure is unnecessary and at the very least, the Attorney General's consent should be required before an urgent request can be made.
 34. Clause 104.8 deals with circumstances where the senior AFP member does not have to first obtain the Attorney General's consent. That is, when the member considers it necessary to request the order without the consent because of urgent circumstances, and the member either "considers or suspect" on reasonable grounds that the order would substantially assist in preventing a terrorist act or that the person has provided training to or received training from, a listed terrorist organisation.
 35. The test of "considered or suspect" on reasonable grounds is not an exact one. The basis of the reasonable grounds appear not to be required to be disclosed to the issuing court in the sense that no evidence is required. A mere statement from the senior AFP member is all that is required.
 36. There is also some concern as to the operation of clause 104.10(2). The intention of that sub-section is that if after four hours of the request being made the Attorney General refuses consent, then the order immediately ceases to be enforced. The AFP member can, however, vary the request and seek the Attorney General's consent to
-

request a new interim control order in relation to the same person. That means that the senior AFP member can keep applying every four hours even if the Attorney General refuses. This would mean that the order would remain enforced during each successive four hour period. This, we assume cannot have been the intention of the drafters of the bill.

37. Of grave concern is the effect of clause 104.12 set out in Schedule 4 of the Bill in subdivision D. The only documents required to be served personally on the person affected by the order is the order and a summary of the grounds on which the order is made. That is, the person affected is not provided with all of the supporting documents upon which the issuing court made the decision. This is a denial of natural justice and is opposed.
 38. Clause 104.12(1)(c) provides that an AFP member must ensure that the person affected by the order understands the information provided to them, taking into account the persons age, language skills, mental capacity and any other relevant factor. Sub-clause 4, however, goes on to say that a failure to comply with that requirement does not make the control order ineffective to any extent. This means, in other words, that even if the person affected does not understand because of their age, language skills, mental capacity or other relevant factor, what the meaning of the order is or its contents, the order still binds them. This is a clear abrogation of a fundamental right and is a denial of natural justice.
 39. Sub-clause 4 provides that the court may confirm the order if the court is satisfied on the balance of probabilities that the order was properly served on the person, in the absence of the affected person. This means, that even if the person was personally served but did not understand that nature of the order because of failure to understand the language, by reason of their age, mental capacity or other valid reason, then the issuing court may confirm the order. This is a denial of natural justice and an abrogation of a basic right.
 40. A confirmed control order must also specify the period during which the order is to be enforced, which must not end more than twelve months after the day on which the interim control order was made (see clause 104.16). Again, nothing prevents the making of successive control orders in relation to the same person. In other words, successive control order can be made every twelve months so that a person may be subject to a control order indefinitely.
 41. Clause 104.23 in subdivision F of the Bill provides that the Commissioner of the AFP may cause an application to be made to an issuing court to vary a confirmed control order by adding one or more obligations, prohibitions or restrictions. It does not appear to require the Attorney General's concurrence. The Commissioner must consider on reasonable grounds (that is, he does not have to be satisfied, he must only consider) that the varied control order would substantially assist in preventing a terrorist act. The Commissioner does not have to provide evidence of this. He merely has to provide an explanation as to why the variation should occur and "if the Commissioner is aware of any facts" as to why those should not be imposed, a statement of those facts must be provided. If the court makes the variation, then the Commissioner must cause written notice to be given to the person.
 42. The court must be satisfied on the balance or probabilities that each of the additional obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.
-

43. Nevertheless, in satisfying itself on the balance of probabilities, the court can do this in the absence of the affected person and appears not to have to take into account any actual evidence other than the statement of the Commissioner.
44. The manner of service of the varied control order has the same problems in terms of the person affected understanding it as the service of a confirmed order.
45. There are special rules for young people. A control order cannot apply to a person who is under the age of sixteen years. If a person is sixteen but under eighteen, then the control order cannot be in force for longer than three months at a time. Again, however, what is of great concern is that clause 104.28(3) states that successive control orders in relation to the same young person may be made. This means that a young person between the ages of sixteen to eighteen may be subject to a control order for an indefinite period by the imposition of successive three months of control orders.
46. Division 104 is subject to a sunset provision of ten years. This means that the “indefinite” period for which a person may be subject to a control order is up to ten years.
47. It is considered that ten years is far too long a period for any sunset provision. While we oppose the Bill in its entirety, if the Bill is to proceed in some form, then the sunset provision should be limited to two years at the most.

Division 105 - Preventative Detention Orders

48. Clause 105.1 sets out the object of the division, which is to allow a person to be taken into custody and detained for “a short period of time” in order to:
 - c. Prevent an imminent terrorist act occurring; or
 - d. Preserve evidence of, or relating to, a recent terrorist act.
49. As outlined earlier, the Minister may appoint a judge, a federal magistrate or a former judge or the president or deputy president of the Administrative Appeals Tribunal to be an issuing authority. The possible constitutional problems in that regard are outlined above.
50. Clause 105.4 sets out the bases for applying for and making preventative detention orders. An AFP member may apply for a preventative detention order and it can only be made by an issuing authority if:
 - e. There are reasonable grounds to suspect that the subject:
 - i. Will engage in a terrorist act; or
 - ii. Possess a thing that is connected with the preparation for, or the engagement of a person in a terrorist act; or
 - iii. Has done an act in preparation for, or planning a terrorist act; and
 - f. Making the order would substantially assist in preventing a terrorist act occurring; and
 - g. Detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph b.
51. A terrorist act in that context means one that is imminent and must be one that is expected to occur at some time within the next fourteen days.
52. Alternatively, an AFP member may apply for an issuing authority may make a preventative detention order if he or she is satisfied that:
 - h. A terrorist attack has occurred within the last twenty-eight days; and
 - i. It is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and

-
- j. Detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph b.
53. In other words, the person to be subject of a preventative detention order need not be a suspect planning or preparing for such an act but may also be a person who merely has evidence or access to or control over or some connection with evidence that is sought to be preserved relating to a terrorist act which has occurred.
54. This means that a person with no knowledge at all of a terrorist act which has occurred, but who somehow has some connection with evidence sought to be preserved in relation to that terrorist act, can be detained pursuant to these provisions. This is a state of affairs that is completely inconsistent with all notions of democracy as a rule of law.
55. Further, this provision will enable the detention of a person even if there is no evidence that would lead to their being able to be arrested or convicted for any criminal offence. Again, this is unprecedented in Australia and is contrary to established notions of the rule of law.
56. Clause 105.6 provides that if an initial preventative detention order is made, another one cannot be applied for within the period that such order is active. It will, however, be possible for a successive initial preventative detention order to be made thereafter.
57. It should be noted that the issuing authority for an initial preventative detention order would include senior AFP members. An ordinary AFP member may apply to an issuing authority for an initial preventative detention order. It must be in writing, it must set out the facts and other grounds on which the AFP member considers that the orders should be made and must specify the proposed period for which the order is to be active. Because preventative detention orders cannot apply to people under the age of sixteen years, it has to set out information (if any) that the applicant has about the person's age. If the applicant is mistaken and the person is in fact under the age of sixteen years, then there are concerns that a person under that age could in fact be detained pursuant to the provisions of the Bill. This eventuality is more likely where that person does not speak English, or has some intellectual disability which impairs their understanding.
58. The application must also set out details of the outcomes and particulars of any previous applications for preventative detention or control orders and any information that the applicant "has" about any periods for which the person has been detained under an order made under a corresponding state preventative detention law. Again, there is concern that the person making the application need not make any enquiries in that regard. The clause only refers to such information which the person "has".
59. Clause 105.8 provides that an issuing authority, including a senior AFP member, may make an initial preventative detention order. This is an order that the person specified in the order may be:
- k. Taken into custody; and
 - l. Detained during the period that:
 - i. Starts when the person is first taken into custody under the order; and
 - ii. Ends a specified period of time after the person is first taken into custody under the order.
60. The order must be in writing and the period of time specified in the order must not exceed twenty-four hours. Nevertheless, this period may be extended or further extended for periods of up to twenty-four hours pursuant to clause 105.10.
61. An interim preventative detention order may apply to a person under the age of eighteen years but over the age of sixteen years, however, each day the person is
-

-
- detained, they are entitled to have contact with another person for a minimum of two hours.
62. Clause 105.11 provides that if an initial preventative detention order is in force, an AFP member may apply to an issuing authority for continued preventative detention orders in relation to the same person. Judges, federal magistrates, retired judges and certain AAT members are issuing authorities for the purpose of continued preventative detention orders.
 63. Again, there is concern that there is no requirement to provide any evidence in support of an application. All that is required is that the application must be in writing and set out the facts and other grounds upon which the AFP member considers that the orders should be made. There are other formal requirements, however, that is the only substantive manner that needs to accompany the application other than outcomes and details relating to previous applications for preventative detention orders or control orders.
 64. Again, our concern is repeated in relation the sub-paragraph 2 of clause 105.11. The application must set out information that the applicant “has” about any periods for which the person has been detained under an order made under a corresponding state preventative detention law, but without requiring the AFP member to have made any enquiries in that regard.
 65. Clause 105.11(3) provides that there is no need for the application to set out details in relation to the application that was made for the initial preventative detention order in relation to which the continued detention order is sought. Surely, the issuing authority should have all the information so that the application for the continued preventative detention order may be assessed on the basis of the fullest information available.
 66. Clause 105.12 enables an issuing authority to make a continued preventative detention order if an initial preventative detention order is in force and the person as been taken into custody under that order.
 67. The issuing authority must consider afresh the merits of making the order before making the order. The issuing authority must be satisfied after taking into account all relevant information (including any information that his become available since the initial preventative detention order was made) before making the order. This appears inconsistent with the provisions of sub-clause 3 of clause 105.11 referred to above.
 68. A continued preventative detention order starts at the end of the period during which the person may be detained under the initial preventative detention order and must not exceed forty-eight hours. Clause 105.13, however, contemplates that the forty-eight hours can be extended and further extended, presumably indefinitely.
 69. Again, the continued preventative detention orders apply to a person over the age of sixteen but under the age of eighteen years, however, that person must be allowed contact with another person of a minimum of two hours per day during the period of detention.
 70. Clause 105.14 enables an AFP member to apply to an issuing authority for an extension or a further extension of the period of a continued preventative detention order.
 71. The issuing authority may extend or further extend the period of detention if satisfied that the extension or further extension is reasonably necessary for the purposes for which the original order was made.
 72. Sub-clause 6 provides that the period as extended, or further extended, must end no later than forty-eight hours after the person is first taken into custody under the initial preventative detention order. This seems inconsistent with the notion that a person can be detained initially for twenty-four hours and the continued order can be for a
-

further forty-eight hours. It is unclear as to how there can therefore be a maximum limit of forty-eight hours of custody, if the continued preventative detention orders can be extended and further extended.

73. Clause 105.15 provides that an AFP member may apply for a prohibited contact order the issuing authority may make such an order if satisfied that making it will assist in achieving the purpose of the preventative detention order which has already been made. The prohibited contact order can state that the subject is not, while being detained under the preventative detention order, to contact that person specified in the prohibited contact order. This could include the person's chosen lawyer or any member of the person's family or a de-facto spouse.
 74. It should be noted that clause 105.21 provides that if a police officer believes on reasonable grounds that a person may be able to assist the police in executing a preventative detention order, the officer may request the person to provide his or her name and/or address to the police officer. If the person fails to comply with the request then there is a penalty of twenty units. There is a defence if the person has a reasonable excuse, however, the person being charged bears the evidential burden in relation to that excuse.
 75. On the other hand, if a police officer makes such a request and the person asks the police officer for his or her name, address, place of duty, identification or rank the police officer fails to comply with the request, the police officer is subject to a penalty of only five units. This does not appear to be consistent.
 76. Clause 105.27 gives rise to certain concerns. The person the subject of a preventative detention order may be detained in an ordinary prison or remand centre. That is, a person may be held with convicted criminals even though that person has not committed any crime themselves. Particularly in circumstances where a person can be held in detention because of protection of evidence, this is unacceptable. People held under preventative detention orders should be held separately from convicted criminals.
 77. Clause 105.28 requires the police to inform the affected person about the preventative detention order. Interestingly, there is no requirement that the police should use best endeavours to ensure that the person understands the order.
 78. Of concern is that the police officer is not required to inform the person being detained of the fact that any prohibited contact order has been made or the name of the person specified in a prohibited contact order that has been made in relation to the person's detention. This begs the question as to how the person is to know, respond to or query the nature of the orders made against them either in a court or via the ombudsman. It is a breach of natural justice.
 79. Clause 105.31 does require that the police officer must arrange for the assistance of an interpreter if the police officer has reasonable grounds to believe that the person is unable, because of inadequate knowledge of the English language or a physical disability, to communicate with reasonable fluency in that language. It is stated, however, that the lawfulness of the person's detention is not affected by a failure to comply with that requirement. In other words, even if a person does not understand why they are being detained, then the detention is lawful. This is an abrogation of natural justice and is objectionable.
 80. Clause 105.32 requires that a copy of the order be provided to the affected person as soon as practicable after the person is first taken into custody including a summary of the grounds on which the order is made. It does not, however, require information to be included in the summary if the disclosure of the information is likely to prejudice national security. Nor does the police officer have to produce a copy of the order to
-

the person being taken into custody at the time the person is taken. Again, this is an abrogation of the rule of law and natural justice.

81. Sub-clause 6 provides that a person who is being detained may request that copy of the order or the summary be given to the person's lawyer, of course, as long as that lawyer has not been specified as a person not to be contacted. Nothing entitles the lawyer to be given a copy of or see a document other than the order, the summary or the extension or further extension.
 82. This is of great concern, because it means that a person and their lawyer need not be given all the information upon which the detention order is based. This will mean that the detained person is at a grave disadvantage in challenging the validity of the preventative detention order.
 83. It should further be noted with concern that nothing requires a copy of a prohibited contact order to be given to a person. This means that such an order cannot be challenged.
 84. Clause 105.34 provides that while a person is being detained under a preventative detention order the person is not entitled to contact another person. This might include the person's family or their lawyer, if that person is subject to a prohibited contact order. Otherwise, that person is entitled to contact one of his or her family members and his or her spouse or flat mate and a person with or for whom he or she works but solely for the purpose of letting the person contacted know that he or she is safe but is not able to be contacted for the time being.
 85. In other words, a person is not entitled to give any other details as to why they are unable to be contacted. They cannot say that they are being detained. One can only imagine the distress and concern this could cause to a spouse or close family member or indeed business partners or work mates.
 86. The person being detained is specifically stated not to be entitled to disclose the fact that a preventative detention order has been or the fact that the person is being detained or the period for which they are being detained.
 87. If any of the people that they would otherwise be entitled to contact is the subject of a prohibited contact order, then they may not contact that person. Because it is not required that the person be provided with a copy of the prohibited contact order, then it is not open for that person to mount a proper challenge against such a contact order.
 88. The person is entitled to contact the Commonwealth Ombudsman or their lawyer, but they may only contact their lawyer for certain limited purposes. Again, if the lawyer is subject to a prohibited contact lawyer, then the person is not entitled to contact the lawyer of his or her choice (see clause 105.37(3)).
 89. Of further concern is that contact with another person, including ones lawyer, may only take place if it is conducted in such a way that the contact, and the content and meaning of the communication that takes place during the contact, can be effectively monitored by a police officer exercising authority under the preventative detention order.
 90. Although it provides that any communication between a person and their lawyer is not admissible in evidence against the person in any proceedings in the court, the ability for a person to freely communicate with his or her lawyer to enable their lawyer to take proper instructions to mount a challenge against the preventative detention order will be severely hampered by the presence and monitoring of the contact by the police officer.
 91. Clause 105.39 provides that special contact rules apply to people under the age of eighteen or who are incapable of managing their own affairs. Such a person is entitled to have contact with a parent or guardian or another person who is able to represent
-

-
- the person's interest. That person must, however, be acceptable both to the person subject of the order and to the police officer who is detaining the person.
92. As opposed to other persons, people under the age of eighteen or who are incapable of managing their own affairs are entitled to disclose to the contactable person the fact that the order has been made that they are being detained and the period of the detention. The person is entitled to have that contact for not less than two hours per day during the period of detention.
 93. Again, the contact must be monitored in terms of its meaning and content by a police officer.
 94. Clause 105.41 provides that the person the subject of the order commits an offence if they disclose to any other person the fact that the order has been made, that they are being detained or the period of the detention. The penalty is imprisonment for five years. It only applies while the person is being detained.
 95. In relation to lawyers, a lawyer may not disclose to any other person the fact that a preventative detention order has been made, the fact that the detainees being detained or the period or any other information that the detainee gives the lawyer during the course of the period that the person is being detained unless the disclosure is made for the purpose of court proceedings for a remedy, or by way of a complaint to the Commonwealth Ombudsman or other authority about the detainee's treatment in detention. The penalty is five years imprisonment.
 96. Similarly, a parent or guardian of a person under the age of eighteen or who is incapable of managing their own affairs commits an offence if they make similar disclosures unless for the purpose of proceedings or complains. Imprisonment for five years is the maximum penalty.
 97. In relation to a parent or guardian, they do not contravene this prohibition if they let another person know that the detainee is safe but is not able to be contacted for the time being. The same defence does not appear to apply to lawyers. Accordingly, a lawyer is not in a position to tell a family member who contacts them and is concerned for the welfare of the detained person that the person is safe but unable to be contacted for the time being. This appears to be an extraordinary state of affairs and is opposed.
 98. If the detained person tells someone else that they have been detained, then the person who has been given that information commits an offence if they pass on the fact that a preventative detention order has been made, the person is being detained, the period for which they are being detained or any other information given to them by the detained person. This carries a penalty of five years gaol. This would mean that if the spouse of a detained person knew that the person had been detained and told the detained person's mother, for instance, of the fact that the person had been detained, the spouse could be liable to five years imprisonment. That provision is harsh and unconscionable.
 99. Clause 105.42 deals with questioning of a person while under detention. Questioning is only allowed for limited purposes. Nothing, however, prevents the person's detention being interrupted pursuant to a questioning warrant issued to an officer or an employee of ASIO.
 100. It is noted that clause 105.50 states that this division does not affect the law relating to legal professional privilege. While that may be the case, it is still a fact that a lawyer will not be able to take proper instructions from his or her client while the contact between the lawyer and the client is subject to monitoring in the manner proposed in the Bill.
-

101. It is noted that clause 105.53 imposes a ten year sunset period. Again, we regard this period as being far too long and while the provisions for preventative detention orders are opposed in their entirety, if the Bill proceeds, then at the very least the sunset provision should be limited to two years. Indeed, the provisions of the Bill in relation to financing terrorism and sedition should also be subject to a sunset provision.
102. It is noted that detention orders apply to material witnesses as well as the suspects in certain circumstances. Yet material witnesses who are completely innocent of any crime will be treated in exactly the same way as a terrorist suspect. This includes restrictions on contacting their own family members and employer.
103. These secrecy restrictions apply automatically whether there is any requirement for them or not. These provisions run counter to the principle that there should be public accountability in the administration of justice unless some reason is shown otherwise. Parties cannot usually get a suppression order in court matters unless there is a reason to do so. Therefore it seems completely unnecessary to have automatic secrecy provisions apply irrespective of whether there is any need for secrecy or not.
104. Furthermore, the secrecy provisions are so onerous that it is the view of the Council that they are set up to fail. In this regard many persons living in large a family unit would simply find it impossible not to tell other members that one of the members of the family unit had been detained. It is the view of the Council that the effect of these provisions is to criminalise innocent people who are simply concerned about their family members and want to express that concern to other members of their family and these members have effectively disappeared. Such people will be turned into criminals facing up to five years in gaol for simply telling another member of their family about their detention. This is an unbelievably draconian piece of legislation to turn innocent family members into criminals liable for prosecution.
105. A further matter of concern is although secrecy provision applies to the detainee and even members of their family, it would seem that the Government and Government agencies responsible would be able to release information to the public and media at a whim thus creating a spin on such information was the detainee and his family and representatives would be of a clear disadvantage effective of any such spin.
106. These automatic and draconian secrecy provisions are unnecessary and both anti-family and anti-democratic

Other Comments

Right to Compensation

107. Absent from the Bill is any right to a person affected by control orders or preventative detention orders to compensation for misuse or abuse of executive power. Effective judicial remedies of that sought are required including compensation for human rights violations, wrongful detention and the like. Similar powers ought be given to the Commonwealth Ombudsman.

Inadequate Safeguards

108. There are insufficient checks and balances in relation to making control or detention orders.
109. An issuing authority has limited capacity to test the so called facts upon which the application for an order is founded. There is no requirement for evidence to be put to the issuing authority.

Recklessness

110. It is noted that recklessness has been set in the Bill as the standard for criminal responsibility in relation to financing terrorism. Because this offence carries such along prison term, direct knowledge and intention should be the measure of guilt.
111. At s.5.4, the Criminal Code defines recklessness as knowledge of a substantial risk of a circumstance existing or knowledge of a substantial risk that a circumstance or result will occur.
112. The examples given above in relation to financing terrorism indicate that unintended consequences could occur so that unjust consequences might occur. These laws run a real risk of creating uncertainty and producing unjust consequences.
113. A penalty of life imprisonment appears to be totally disproportionate to an offence unknowingly committed by an individual.

International Standards

114. Several measures in the Bill are likely to breach a number of international standards under the International Covenant on Civil and Political Rights 1966 and the International Covenant on Social Economic and Cultural Rights 1966 and the Convention on the Rights of the Child 1989.
 115. In relation to control orders, neither the person affected by the order nor their lawyer is given the full documentation. This would be contrary to article 9, which states that anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
 116. Preventative detention orders suffer the same defect.
 117. This means that the person affected by the order is unable to mount any proper challenge against the order.
 118. The powers in relation to control orders and preventative detention orders deny freedom and impose restrictions and prohibitions under circumstances where no charges have been laid. They are designed to control and detain people who are not guilty of any criminal offence. If they were guilty of a criminal offence, then sufficient evidence would exist to justify them being charged and they would go through the usual process of arrest and prosecution. They may be detained and would be entitled to apply for bail.
 119. These powers erode fundamental rights and breach international standards such as Article 14. In particular, Article 14 provides that everybody is entitled to a fair and public hearing, that they have the right to be presumed innocent until proved guilty according to the law, they should be informed promptly and in detailed in a language which they understand the nature and cause of the charge, they should be able to communicate with a lawyer of their own choosing, they should be tried while
-

-
- present and in a position to defend themselves in person or through a lawyer of choice and to examine witnesses against them.
120. None of these measures to ensure due process and natural justice exist in the Bill.
 121. It is essential to the notion of Rule of Law that a person is entitled to due process. This entails knowledge of the allegations made, the facts supporting the allegations and determination of the allegations by the court which is independent of the executive government.
 122. If a person is to be imprisoned, they are entitled to know the nature and detail of the allegations against them.
 123. Imprisonment without charge is offensive to our notions of democracy and should not have any place in Australian law.
 124. Citizens should not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence nor to unlawful attacks on their honour and reputation (Article 17).
 125. In relation to the Convention on the Rights of the Child 1989, the proposal to introduce control orders and preventative detention in respect of children between the ages of sixteen and eighteen years in circumstances where no criminal offence has been committed breaches Article 3 of the Convention. Children ought not be the subject of such orders and these laws are opposed.
 126. If the laws do proceed, then the detention of children in cells or in the company of convicted child offenders or other offenders is also opposed

Sedition

127. The Council opposes the proposed changes to the law on sedition.
 128. The Council believes the present law on sedition does need attention and is particularly archaic. Our view the best way of dealing with this problem is to abolish the offence of sedition. We note that there are already provisions in various vilification laws around the country that deal with acts of incitement by way of civil proceedings and that the major activities that might be sought to be governed by a sedition law are now covered by such offences as treachery in s 24AA of the *Crimes Act 1914* (Cth) or violently interfering with elections as covered by s 327 of the *Commonwealth Electoral Act 1918*. What is of further concern in the proposals, is the modification the law that actually extends the operation of sedition into many unchartered areas and are potentially a massive impact on freedom of speech in Australia. The Gibbs Report did recommend a reform of this offence by making it more specific as to what it relates to but the current proposals in fact go far beyond what was recommended by the Gibbs Report and indeed opens up much greater areas of uncertainty. It should also be noted that under the old law of sedition usual criminal intent would have been required.
 129. It is of particular concern of introducing the element of recklessness into the crime of sedition which is a crime of simply spoken words or urging. More so than any other area of the criminal law, it is submitted that there should be a clear criminal intention in order to find any conviction particularly bearing in mind as the proposed new law makes no distinction between public or private utterances. The proposals to extend law sedition or urging to assist organisations or country who is in armed hostilities against the Australian Defence Force with “by any means whatever” are particularly disturbing. An exception is given in relation to a humanitarian aid, but is that it is clearly arguable that a mere demonstration against the Iraq war is giving moral support to the insurgency and is therefore assisting in any means whatever.
-

-
130. Indeed the proposed good faith defences reinforce this interpretation of the main section of the law of sedition. While the good faith defences may have been designed to protect political expression the Council is of the view that they clearly fail in this way. First, the good faith defences are far too narrowly defined and again make reference to the requirement of good faith without defining that expression. Thirdly, it is incumbent upon the defendant to raise these defences effectively meaning that a person has to prove their innocence. The requirement for good faith in the various defences set out suggest that if any action was taken for an ulterior motive, then the defences would not apply even though to any other observer it would appear that the person was engaged in legitimate political activity. Starkly missing from the proposed defences is any exception for artistic, academic and journalistic purposes. Such exceptions are routinely included in the laws in Australia dealing with racial and other vilification offences. Even the way the sections have been drafted, it would appear that any accused person having to effectively prove their innocence by trying to bring themselves within one of the good faith defences that have been proposed. Even without any prosecution this broad law would have an effect on freedom of speech in Australia and deny legitimate political discussion in dissent.
 131. We submit that if there is any law to be included in the nature of sedition then this law should be addressed to urgings to violence and clear criminal intention that the urging should be to violence. The proposed law turns legitimate political activity and dissent into prima facie criminal behaviour wherein persons would then have to seek to prove their innocence before a court. There would appear to be no defence available to journalists, academics, teachers, cartoonists and satirists who would be criminalised under what is clearly intended to be an overarching and broad provision.
 132. Any law dealing with freedom of expression should be clearly drafted so that it is known exactly what type of material is prescribed and should only apply to deliberate acts of such a serious anti-social nature that they deserve criminal sanction. The proposed law clearly fails this test.
 133. Strangely, given the abolition of the old definition of sedition and seditious intent in the actual crime, it is proposed to continue the old definition of seditious intent in relation to unlawful association. The reinvigoration of this provision at this time is a matter of massive concern. Prima facie it would appear that organisations such as the Australian Republican Movement could be declared an unlawful association under the proposed laws. It is clear that Australia has moved on from a time when an organisation which might be said to be causing disaffection with the Sovereign should be banned. Most Australians would be surprised to find that any such provision still is on the statute books in Australia. Given that opinion polls show that the majority of Australians would like a Republic it is clear that this definition of seditious intent is completely out of step with any modern thinking in Australia and should be repealed entirely.

Definition of Terrorist Organisations.

134. The Council is also concerned about the new definition of terrorist organisation and include organisations which might advocate terrorism. In particular the definition of advocate includes the praising of the doing a terrorist act and also applies to indirect counselling or providing instruction in relation to the doing of a terrorist act. Not only is the definition of advocates very unclear and too broad but it is not clear who
-

within the organisation can be defined for that purpose to have said to have advocated terrorism. The provision seeks to place with active terrorist organisations organisations not involved in any terrorist activity but are expressing opinions about terrorist activity. This is clearly unacceptable. Any Tamil or Palestinian support organisations could be banned under these provisions. The consequences of the banning under these particular provisions are such that the persons who are members including even informal members are subject to long terms of imprisonment and other persons are not even able to consort with members of this organisation and also face imprisonment. These drastic provisions present apply only to organisations which have been said or declared to have been said to be active terrorist organisations, that is organisations which are actively involved in the preparation of terrorist acts.

135. To apply these provisions to organisations which are simply said to discuss matters but do not take any steps in the preparation of a terrorist attack is clearly a ridiculous overkill in this legislation. People who have joined organisations such as Tamil organisations or Palestinian organisations suddenly find themselves and their family members facing criminal prosecutions, even though they joined such organisations with no terrorist intent but find that the organisation is then classed as an organisation which is advocating terrorism. People innocent of any terrorist activity could find themselves suddenly facing many years in prison having done nothing more than join a support organisation out of sympathy for instance the Palestinian or Tamil examples is clearly wrong and should not be proceeded with.
136. Any incitement to violence or preparation for a terrorist act should be dealt with under offences specifically directed at that activity and at the persons engaged in that activity. The present proposals have a flavour of political suppression about them which is unacceptable in any democracy. Banning of organisations on the basis of alleged advocacy rather than activities is fraught with danger

Search & Seizure

137. Schedules 5 & 6 deal with the proposed increased powers of search, seizure and demanding name and address are excessive. They give police extraordinary powers to search, seize and demand details from *anyone* in a prescribed security zone – without the requirement of reasonable suspicion. So if the Attorney-General were to declare Sydney International airport a prescribed security zone, then everyone in the airport could be searched, have items seized and their personal details recorded. The requirement of reasonable suspicion should not be removed. It is not a crime simply to *be* in a public Commonwealth place.
138. The provision also makes it an offence to fail to provide a police officer with evidence of one's identity. This amounts to a requirement that every Australian must carry with them identification at all times. This is an Australia Card by stealth.
139. There should be provision for the information gathered (name and address) under these extraordinary powers to be destroyed after four weeks, or whenever the prescribed security zone is revoked. This personal information, belonging to innocent citizens, should not be allowed to remain sitting on the databases of police or other agencies.
140. The provisions also extend beyond the professed purpose of the Bill (to prevent terrorism) and will apply to **all** federal indictable offences. There is no justification for extending these extraordinary powers to non-terrorist offences.

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

Overall Conclusion

State and criminal laws deal with terrorism and preparing for terrorism acts. Long standing laws dealing with conspiracy allow the police to arrest people who are preparing for such acts or conviction of such people to long terms of imprisonment. It is further reinforced with other provisions that now exist in the Federal Criminal Code and which have been recently used in raids in Sydney and Melbourne. Given these provisions and powers the Council is of the view that there is no need for further power to be given to the police in respect of these matters that there is a danger in the preventative detention and control of the system became a method of effectively retaining people without ever having to face a criminal charge or trial the provisions dealing with advocacy and sedition have a negative effect, freedom of expression in Australia inconsistent with that of a healthy democracy.

In general, the Council submits that these proposed amendments are an unwarranted massive intrusion of the civil liberties of Australian citizens and should be totally rejected. We apologise for the quality of our submission given the limited amount of time in which submissions could be made. We would be happy to elaborate further on the above points if required.

Yours faithfully,

David Bernie
Vice President
NSW Council for Civil Liberties
