**SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL COMMITTEE**

**INQUIRY INTO PROVISIONS OF THE ANTI-TERRORISM BILL (No. 2)**

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This submission responds to a request from the Committee's secretary to the Centre of International and Public Law, ANU Faculty of Law.

***Executive Summary***

This paper deals with two aspects of the bill: the preventative detention orders and the new sedition offence. It does not touch on the problematic control orders.

The bill that was introduced into the House on 3 November is considerably tighter than the original version (as posted on the website for ACT Chief Minister, Jon Stanhope) with respect to key issues such as giving the detainee information concerning the reasons he or she is in detention, spelling out the right to seek a judicial remedy, and imposing requirements on the issuing authority to ensure that the preventative detention order is a proportionate measure. These are very important and welcome safe-guards. Nevertheless, the bill still provides for the orders to be granted *ex parte*, i.e., without a hearing in the first instance. It still envisages situations in which adequate reasons might not be granted, including through the invocation of national security. Moreover, it is unclear what the judicial 'remedy' envisaged by the bill would be and what its time frame would be. There are thus lingering questions as to whether Australia could argue that all cases of detention are justified, and therefore consistent with its obligations under Article 9 of the International Covenant on Civil and Political Rights. The possibly short duration of the detention does not necessarily mean that the detention is justified.

One of the most egregious aspects of the previous bill – the operation of the disclosure offence with respect to parents of a young person – has been dealt with, probably satisfactorily. However, the semi-incommunicado nature of the detention is still of concern for the detainee, and for the nature of Australian society. Kafkaesque elements remain evident in the new version of the bill.

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The detention of young persons remains of grave concern, given Australia's obligations not to detain anyone under the age of 18 excepting as a "last resort".

The new sedition offence of "urging violence within the community" deserves greater thought and debate. In particular, the quick move in the context of terrorism to the criminal law, and away from the framework of the Human Rights and Equal Opportunity Commission with its emphasis on conciliation and education ought to be debated properly, especially since the defences relating to the sedition offences are narrower than those available under the existing racial vilification provisions.

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## SUBMISSION

### Preventative Detention Orders

The preventative detention order regime raises a number of concerns. I will highlight the possibility of arbitrary detention, the semi-incommunicado nature of preventative detention, and the issue of the detention of young persons.

Preventative detention orders, which are dealt with in schedule 4, are made for short periods in order to

a) prevent an imminent terrorist attack occurring; or
b) preserve evidence of, or relating to, a recent terrorist attack.[1]

An imminent terrorist attack is one that will occur within 14 days,[2] while a recent terrorist attack is one that has occurred in the last 28 days.[3] Preventative detention may be ordered for up to 24 hours in the first instance.[4] The "initial preventative detention order" may then be extended and further extended, although the entire period of detention, as extended, or further extended, is to **total** 24 hours.[5] A "continued preventative detention order" may then be issued, and this too may be extended and further extended, although the entire period of detention under the initial preventative detention order **and** the continued preventative detention order as extended and further extended, is to **total** 48

[1] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.1.
[2] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.4 (5) (b).
[3] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.4 (6) (a).
[4] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.8 (5).
[5] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.10(5) provides that "The period as extended, or further extended, must end no later than 24 hours after the person is first taken into custody under the order."

hours.[6] The States and Territories are then to legislate to permit detention from day 3 to 14.

While a continuing preventative detention order may be issued by a Federal Judge or a Magistrate and by State and Territory Judges,[7] they only sit in a personal capacity rather than as a court.[8] Moreover, this is not required for an initial preventative detention order. Thus, as is made crystal clear by the bill that was introduced into parliament on 3 November, a senior AFP member (hereafter "the AFP") is the issuing authority for an initial preventative detention order.[9] In each case, then, there is no court hearing of the issues at the time that the order is issued. This has not changed in the version of the bill introduced into parliament on 3 November, although the bill now specifically refers to the fact that a detainee may apply to a court for a remedy in relation to "(a) a preventative detention order; or (b) the treatment of a person in connection with the person's detention under a preventative detention order".[10] As pointed out in the advice by Lex Lasry QC and Kate Eastman (available on Jon Stanhope's website), who clearly had access to a relatively late version of the bill, it is unclear what this 'remedy' might be.[11]

In the previous version of the bill which was made available on the ACT Chief Minister's website, the right to apply to a court for a remedy was not spelt out. Instead, the original clause ousted the jurisdiction of State and Territory Courts so long as the preventative detention order was in force. Under the new version of the bill, it is still the case that State and Territory Courts cannot hear a case while the order is in force,[12] and, while the new version of the bill allows review by the AAT, application for review cannot be made while the order is in force.[13] However, the AAT can determine that the decision to issue the preventative detention order is void and that compensation should be paid.[14]

In the case of an initial preventative detention order relating to an imminent attack, the original bill merely required **the AFP** to be "satisfied that:

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[6] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.12(3) read with clause 105.12 (5).

[7] Originally, only Federal Judges and Magistrates were contemplated: original Anti-Terrorism bill as posted on ACT Chief Minister, Jon Stanhope's website clause 105.2. The class of issuing authorites has been extended under the new version of the bill: see Anti-Terrorism bill (No. 2) 2005, clause 105.2 (1) (a) and (d) through (e). Now State and Territory Supreme Court judges, retired judges, the President and Deputy President of the AAT (so long as he or she is on the rolls of a Federal Court or a State or Territory Supreme Court) may serve as an issuing authority.

[8] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.18(2).

[9] In the bill placed on Jon Stanhope's website, the reader had to have noted that the issuing authority in the case of an initial preventative detention order was the AFP. The Anti-Terrorism bill (No. 2) 2005, clause 105.8 is clearly headed "Senior AFP member may make initial preventative detention order", and note 1 flags the fact that "Senior AFP members are issuing authorities for initial preventative detention orders (see the definition of *issuing authority* in subsection 100.1 (1)."

[10] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.51 (1).

[11] Ms Eastman and Mr Lasry mention several possible remedies that might be applied for, however, as will be indicated later in this paper, the real question is what a Court would actually do given the broad powers granted to issuing authorities and the national security context.

[12] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.51 (2).

[13] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.51(5).

[14] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.51 (7) (a) and (b).

(a) there are reasonable grounds to suspect that the subject:
(i) will engage in a terrorist act; or
(ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
(iii) has done, or will do, an act in preparation for, or planning, a terrorist act; and
(b) making the order would substantially assist in preventing a terrorist act occurring."[15]

The new version of the Bill deletes the words "or will do" from point iii above, and adds an important criterion to those listed above:

(c) 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).[16]

This criterion brings in consideration of some measure of proportionality – an important requirement concerning limitations on rights under international human rights treaties. However, it is still the issuing authority which has to be "satisfied" that the measure is proportionate and in the case of the initial preventative order, the issuing authority is still the AFP. The grounds for detention are very broad. In particular, note that someone may be placed in detention because the AFP had "reasonable grounds to suspect" that the detainee "possesse[d] a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act." The grounds with respect to preservation of evidence seem very broad indeed. The AFP need only be satisfied that "it is necessary to detain the subject to preserve evidence of or relating to, the terrorist act,"[17] which act may have occurred as long as 27 days before the detention order is made. (Again, the AFP must be satisfied that detention for the relevant period is "reasonably necessary".) Finally, note that while the AFP may apply for revocation of the order, the detainee may not.[18]

There is a lingering question as to the quality of the reasons given to a person, and the point at which reasons are given under the new version of the bill. The absence of reasons rightly attracted criticism in the preliminary advice given by Professors Byrnes and Charlesworth, and Ms McKinnon to the ACT Chief Minister, Jon Stanhope (the advice is available on the Chief Minister's website), on the basis that the detention would be arbitrary under Article 9 of the International Covenant on Civil and Political Rights.

The bill requires that the detainee be informed about "the fact that the preventative detention order has been made in relation to the person", but this does not deal with the **reasons** for which the order was made.[19] Under clause 105.32(1)(b) a summary of the

[15] Anti-Terrorism bill posted on Jon Stanhope's website, clause 105.4 (2) – these criteria applied to any issuing authority. For the provisions concerning preservation of evidence in relation to a recent attack, see clause 105.4 (4) of the original bill.
[16] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.4 (4). In relation to preservation of evidence concerning recent attacks, see clause 105.4 (6).
[17] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.4 (6) (b).
[18] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.17.
[19] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.28(2)(a).

grounds on which the order is made must also be supplied, but it is unclear how far this summary might go beyond, say, information that the order was imposed to prevent an imminent attack or to preserve evidence of a past attack. Moreover, clause 105.32(2) provides that "paragraph (1)(b) does not require information to be included in the summary if the disclosure of the information is likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004)." Thus it may be that adequate reasons for the detention are not promptly given to the person. The situation may not improve if the matter goes before a Court. In relation to state and territory courts, the new version of the bill provides that if the matter goes before a court for review of a state order, "the court may order the Commissioner of the [AFP] to give the court, and the parties to the proceedings, the information that was put before the person who issued the Commonwealth order when the application for the Commonwealth order was made."[20] Again, information will not be given to the court or the parties "if the disclosure of the information is likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004)."[21] In relation to federal courts, one would have to rely on the courts' ordinary ability to compel production of documents.

Article 9 of the ICCPR, to which Australia is a party and which has been legislatively implemented in the ACT by s18 of the Human Rights Act, provides that:

1. Everyone has the right to liberty and security of person. No one shall be subjected to **arbitrary arrest or detention**. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is **arrested shall be informed, at the time of arrest, of the reasons for his arrest** and shall be promptly informed of any charges against him.

…

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

As the Byrnes, Charlesworth, McKinnon advice notes, the Human Rights Committee – the body of 18 independent experts who supervise the International Covenant on Civil and Political Rights (ICCPR) – has indicated in its general comment on Article 9,[22] that so-called preventative detention imposed for security reasons does not escape these provisions. Although Article 9 is partially directed to criminal proceedings (for example, Article 9(3) which requires that a person detained in relation to a criminal charge must be brought "promptly" before a court), the article pertains to all forms of detention. So, the detention should not be arbitrary or unfair. Is it sufficient to have a member of the AFP satisfied that detention is "reasonably necessary", particularly given the broad grounds for the order (a "reasonable suspicion" that someone "possesses of a thing" connected

[20] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.52 (3).
[21] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.52 (4).
[22] The general comments are a little like an advisory opinion stating the committee's views on a particular matter.

with a terrorist act)?[23] Information concerning the reasons for the detention must be given according to Article 9(2), and there may still be questions about the quality of the information given to the detainee and the point at which the detainee gains this information. The Human Rights Committee has specifically dealt with the situation where the only information given to the detainee was that a person was arrested "under prompt security measures without any indication of the substance" and the Committee determined that Article 9(2) was violated.[24] Finally, court control of the detention must be available. While the new version of the bill identifies the fact that courts may grant remedies in relation to detention and envisages that a summary of the grounds for the order will be revealed, it may still be questionable whether a court in any particular instance has been able to decide without delay on the legality of the detention, and there is still the possibility of an inequality of arms between the parties as the quality of the information may still be limited in the interests of national security.

It should be noted here that in the numerous decisions concerning Australia's violations of Article 9 of the Covenant in the context of immigration detention, the Human Rights Committee has held Australia to be in violation of Article 9(4) because judicial review is not meaningful. Thus in *A v Australia*, the Committee stated that:

> the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a "designated person" within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful', article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is "unlawful" either under the terms of domestic law or within the meaning of the Covenant. [25]

The Committee's "concluding observations" in relation to India's third periodic report under the International Covenant on Civil and Political Rights with respect to India's use of preventative detention in connection with national security are also instructive.

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[23] The situation is completely different from 'preventative detention' for convicted sex offenders, for example, where the period of detention is extended due to the likelihood of reoffending: See Rameka v New Zealand, CCPR/C/79/D/1090/2002.

[24] *Drescher Caldas v Uruguay*, U.N. Doc. Supp. No. 40 (A/38/40) at 192 (1983), para 13.2.

[25] Av Australia UN Doc CCPR/C/59/D/560/1993, para 9.5.

> 24. The Committee regrets that the use of special powers of detention remains widespread. … The Committee is … of the view that preventive detention is a restriction of liberty imposed as a response to the conduct of the individual concerned, that the decision as to continued detention must be considered as a determination falling within the meaning of article 14, paragraph 1, of the Covenant, and that proceedings to decide the continuation of detention must, therefore, comply with that provision. Therefore:
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> the Committee recommends that the requirements of article 9, paragraph 2, of the Covenant be complied with in respect of all detainees. *The question of continued detention should be determined by an independent and impartial tribunal* constituted and operating in accordance with article 14, paragraph 1, of the Covenant. …[26]

Finally, the jurisprudence of the European Court of Human Rights is important to consider, given that Article 5(1)(c) of the European Convention specifically refers to detention in order to prevent the commission of a crime. In the seminal *Lawless* case, which concerned detention of IRA members in Northern Ireland, the Court clearly held that detention without trial is impermissible. The following passage is particularly pertinent:

> 14. … [T]he wording of Article 5, paragraph 1 (c) (art. 5-1-c), is sufficiently clear … ; … it is evident that the expression "effected for purpose of bringing him before the competent legal authority" qualifies every category of cases of arrest or detention referred to in that sub-paragraph (art. 5-1-c); … it follows that the said clause permits deprivation of liberty only when such deprivation is effected for the purpose of bringing the person arrested or detained before the competent judicial authority, irrespective of whether such person is a person who is reasonably suspected of having committed an offence, or a person whom it is reasonably considered necessary to restrain from committing an offence, or a person whom it reasonably considered necessary to restrain from absconding after having committed an offence; … the meaning … arrived at by grammatical analysis is fully in harmony with the purpose of the Convention which is to protect the freedom and security of the individual against arbitrary detention or arrest; … it must be pointed out in this connexion that, if the construction placed by the Court on the aforementioned provisions were not correct, anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention; whereas such an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention …[27]

In *Sakik and Others v. Turkey*, the Court also stated that "the existence of a remedy must be sufficiently certain, failing which it will lack the accessibility and effectiveness

[26] CCPR A/52/40 (1997) at para 439.
[27] *Lawless v. Republic of Ireland* (No. 3), [1961] ECHR 2 (1 July 1961).

required for the purposes of Article 5(4)."[28] (Article 5(4) is the equivalent of Article 9(4) of the International Covenant on Civil and Political Rights.) The Court has also found that access to relevant documentation is essential in order to ensure equality of arms in relation to a decision to detain someone on remand.[29]

The government is clearly banking on the idea that the period of detention is so short under the Commonwealth legislation that this is all academic, particularly when the detention is "preventative" rather than "punitive", and giving the reasons for detention might be prejudicial to national security. The government may be relying on the fact that in the context of pre-trial detention, guidelines of a couple of days have been suggested in relation to bringing someone "promptly" before a court for the purposes of Article 9(3), while a few weeks has been suggested as a guideline for a "decision without delay" by a court for the purposes of Article 9(4).[30] However, there are cases where as little as four days detention has been found to violate Article 9(3)[31] and 6 days to violate Article 9(4),[32] which could be well be possible time-frames under the current bill and state counterparts. Joseph, Castan and Schultz note the case of *Hammel v Madagascar* in which "incommunicado detention for three days, during which time it was impossible for the author to access a court to challenge his detention, was held to breach article 9(4)."[33]

The jurisprudence of the European Court of Human Rights is also instructive. In *Aksoy v Turkey*, for example, where Turkey had **derogated** from some of its obligations because terrorist activity was such that it had created a public emergency threatening the life of the nation – and it must be noted that the terrorism alert level remains at medium as far as Australia is concerned and that there is no suggestion that Australia is invoking Article 4 of the International Covenant on Civil and Political Rights – the Court stated that:

> 78. Although the Court is of the view - which it has expressed on several occasions in the past (see, for example, the … Brogan and Others judgment) - that the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention. This period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture … . Moreover, the Government have not adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable.[34]

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[28] [1997] ECHR 95 (26 November 1997), at para 7.

[29] *Lamy v. Belgium*, [1989] ECHR 5 (30 March 1989), at paras 29.

[30] See the discussion of the Human Rights Committee's jurisprudence in Manfred Nowak, *U.N Covenant on Civil and Political Rights* (first edition, 1993) , at 176 and 179. See also, Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights, Cases and Commentary* (second edition 2004), at 325.

[31] See Freemantle v Jamaica, U.N. Doc. CCPR/C/68/D/625/1995 (2000), at para 7.4.

[32] See Kennedy v Trinidad and Tobago, U.N. Doc. CCPR/C/74/D/845/1998 (2002), at para 7.6.

[33] Note 30 *supra* at 331.

[34] [1996] ECHR 68 (18 December 1996).

In *Brogan's case*, the relevant period – which was also found to violate Article 5(3) of the European Convention on Human Rights – was four days and six hours.

In any event, I would suggest that the issue may be more complex. Firstly, the Human Rights Committee has said that these matters need to be determined on a case by case basis. Moreover, it is not just the length of the detention that determines whether or not it is arbitrary. Detention for as short a time as one day is capable of being arbitrary.

This is a point which successive Australian governments have stubbornly refused to acknowledge in the context of immigration detention. Australia has been found by the Human Rights Committee to have violated both Articles 9(1) and (4) of the ICCPR repeatedly. [35] However, in Australia's formal response to the Committee in the first of these cases, Australia criticized the Committee for not telling Australia "at what point in time the detention became arbitrary."[36] Whether preventative detention for a very short period is arbitrary will depend on whether, in the particular circumstances, the detention is necessary and proportionate to meet a rational objective. To ensure that this is the case, the courts are meant to act as a safeguard when the person is placed in detention, not some time after the period of detention is over. Moreover, in order to determine whether or not detention is justified, the Courts will need to know the reasons, as will the parties, and the Committee's General Comment clearly confirms that reasons must be given as stated in Article 9(2) of the Covenant, even in the context of preventative detention for security purposes.

It seems that Australia has not learned all its lessons when it comes to arbitrary detention. Lurching from one extreme to another, we have locked people up indefinitely in immigration detention and want to know at what point this became arbitrary; in some cases we have contemplated permanent detention simply because the detainees could not go anywhere else; and now apparently we think that if we only lock up people for a very short period of time for possibly vague security reasons it will be off the radar. What's important are **the reasons** for detention, and whether they withstand objective scrutiny as necessary and proportionate in the particular case to meet a rational and legitimate objective. It may be difficult, even in relation to the new version of the bill, for Australia to argue that there is adequate court control of preventative detention. While the bill shows an awareness of the jurisprudence relating to Article 9 of the ICCPR, it may be that it is a far too mechanistic and minimalist take on Australia's obligations. Australians ought to consider carefully whether this legislation is necessary to protect us, or whether it damages our society by dispensing with the freedoms we value, in turn alienating those

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[35] See Av Australia UN Doc CCPR/C/59/D/560/1993; Baban v Australia UN Doc CCPR/C/78/D/1014/2001; C v Australia UN Doc CCPR/C/76/D/900/1999; Bakhtiyari v Australia UN Doc CCPR/C/79/D/1069/2002.

[36] Response of the Australian Government to the Views of the Human Rights Committee in Communication No. 560/1993 (A v Australia), reprinted in 9 *International Journal of Refugee Law* (1997) p. 674 (at para 8).

communities who are most likely to become the subject of the law's enforcement.[37] Giving in to fear will only make us less secure.

One of the other features of the preventative detention regime that is very worrying is the fact that it borders on keeping someone incommunicado, which is a point brought out in the Lasry/Eastman advice. In general, the rights of contact with the outside world are extremely limited. In the case of adult detainees – there are different rules for those between 16 and 18[38] – contact with the outside world is prohibited with the exception of contact with one family member **and** one of the persons one lives with, one's employer, one of one's business partners or employees[39] and a lawyer[40] and the ombudsman.[41] The purpose of contact with family members and employers etc is solely to let the contacted person know that the detainee is safe.[42] The new version of the bill as introduced into parliament spells out that the detainee is not entitled to disclose that a preventative detention order has been made, that he or she is in detention, or the period for which they are being detained.[43] In connection with a preventative detention order that is either being sought or currently in force, it is possible to have a prohibited contact order.[44] Such an order provides that the person detained under a preventative detention order is not to contact certain persons.[45] Oddly, while the subject of the preventative detention order has certain rights, including the right to contact and to be informed of their right to contact a lawyer, the AFP is not required to inform the detainee that a prohibited contact order has been made in relation to the person's detention or the name of a person specified in the prohibited contact order.[46] In addition to contact being extremely limited, and there being a possibility of a prohibited contact order, others may commit offences carrying a sentence of five years by disclosing to others that someone is in preventative detention.[47] Under the original version of the bill, this would have affected the parents of a young person held in detention. The one member of the family who was contacted about a person's preventative detention could only inform other family members that the detainee was safe. The logic may have been that since the detainee could only tell the contacted person that the detainee was safe, no one would know that the person was in preventative detention so noone could disclose. We've all heard of the "don't ask, don't tell" policy in the context of gay men in the military – perhaps this was a "don't know, can't tell" kind of law.

The new version of the bill does deal with the situation of parents of a young person in preventative detention. Clause 105.39(3) of the bill now provides that the detainee is

[37] Paddy Hillyard, "The 'War on Terror': lessons learned from Ireland", Essays for civil liberties and democracy in Europe (available on the European Civil Liberties Network website): http://www.ecln.org/essays/essay-1.pdf.
[38] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.39.
[39] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.35 (1).
[40] Anti-terrorism bill (No. 2) 2005, schedule 4, clause 105.37.
[41] Anti-terrorism bill (No. 2) 2005, schedule 4, clause 105.36.
[42] Anti-terrorism bill (No. 2) 2005, schedule 4, clause 105.35 (1).
[43] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.35 (2).
[44] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.15.
[45] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.15(4).
[46] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.28(3).
[47] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.41.

entitled to have contact with both parents or guardians. Nevertheless, the bill in its new form still retains enough of the *ex parte* and semi-incommunicado elements of detention to resemble the arrest in Kafka's *The Trial*. It begins with K asking why his landlady did not come into the room where he is sitting with the warders who have come to arrest him.

"Why didn't she come in?" he asked. "She isn't allowed to," said the tall warder, "since you're under arrest." "But how can I be under arrest? And particularly in such a ridiculous fashion?" "So now you're beginning it all over again?" said the warder … . "We don't answer questions like that." "You'll have to answer them," said K. "Here are my papers, now show me yours and first of all your warrant for arresting me." "Oh, Good Lord" said the warder. "If you would only realize your position, and if you wouldn't insist on uselessly annoying us two, who probably mean better by you and stand closer to you than any other people in the world."… [w]e're quite capable of grasping the fact that the high authorities we serve, before they would order such an arrest as this, must be quite well informed about the reasons for the arrest and the person of the prisoner. There can be no mistake about that. Our officials, so far as I know them, and I know only the lowest grades among them, never go hunting for crime in the population, but, as the Law decrees, are drawn toward the guilty and must then send out us warders. That is the Law. How could there be a mistake in that?" "I don't know this law," said K. "All the worse for you," replied the warder. … Franz interrupted: "See, Willem, he admits he doesn't know the Law and yet he claims he's innocent."[48]

That passage underscores the need for adequate judicial control of the executive's actions, and yet, what we have in this bill, as Justice Von Doussa has so eloquently stated, is an attempt to escape the fundamental safeguards of judicial control,[49] and, one might go further, even to coopt the judiciary into functioning as part of the executive. The passage also underscores the need for contact with the outside world as an aspect of the humane treatment of prisoners in order to prevent the person from cracking.[50]

The fact that we are going to be detaining children – persons between 16 and 18 years old[51] – is a particularly worrying aspect of the bill. One major point of difference between the regime for adults and that for youngsters between 16 and 18 is that greater contact with the outside world, namely parents or guardians, is permitted. But it is still limited. Furthermore, as a matter of international human rights law, the threshold for detention is higher than it is for adults. Under Article 37(b) of the Convention on the Rights of the Child, detention of minors is to occur only as a last resort. The

[48] Franz Kafka, *The Trial* (New York, The Modern Library, Random House, © 1956, 1964), pp 9 - 10.
[49] Speech by Justice Von Doussa, President of the Human Rights and Equal Opportunity Act, Forum on Terrorism, ACT Legislative Assembly, 31 October 2005.

[50] Standard Minimum Rules for the Treatment of Prisoners, paragraphs 37 – 39, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[51] For the purposes of the Convention on the Rights of the Child, the age of majority is generally 18: Article 1.

Commonwealth Parliament has finally awakened to this fact in the context of immigration detention, with the inclusion of s4AA in the Migration Act as a result of the backbench revolt. Parliament has now rightly affirmed that detention of foreign children in immigration detention will only be as a last resort, and has sensibly decided to reassert some control over the executive by having this spelt out clearly in the Migration Act. And yet, under the Anti-Terrorism Bill we are now going to lock up Australian children on the basis of an AFP suspicion, without necessarily giving them adequate reasons for the order, and pursuant to what may amount to inadequate judicial control.

**Comment on the new sedition offence**

I will conclude with a brief comment on the new sedition offence. In schedule 7, the bill provides for a new sedition offence as follows:

> "A person commits an offence if:
>
> (a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and
> (b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth."[52]

The offence carries a penalty of imprisonment for 7 years.

The leader of the Opposition, Kim Beazley has made some interesting comments on the issue, arguing for stronger racial vilification laws. I certainly think it is interesting that the offence of "urging violence in the community" appears in the bill as the crime of sedition, rather than in the context of vilification laws.

In 1995, the Commonwealth enacted limited racial vilification provisions to implement, at least partially, Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination.[53] The racial vilification provisions are **not** criminal offences. Rather complaints may be made to the Human Rights and Equal Opportunity Commission, and the President attempts conciliation. Under international human rights law, religious hate speech that incites violence should also be outlawed. Article 20 (2) of the International Covenant on Civil and Political Rights provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[54]

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[52] Anti-Terrorism bill (No. 2) 2005, schedule 7, clause 80.2 (5).
[53] It should be noted that Australia still has a reservation to Article 4.

[54] Australia has a reservation to Article 20 as follows: "Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order ( *ordre public* ), the right is reserved not to introduce any further legislative provision on these matters."

I think that the quick move in the context of terrorism to sedition – a set of offences that are closely connected to treason and bringing down the government – instead of some form of anti-vilification law is interesting to explore for three reasons. The first is the past reluctance to bring in racial vilification laws at all. Secondly, the focus in the racial vilification laws is on the educative process of conciliation in the first instance, and civil actions at the end of the day, rather than the criminal law. Thirdly, the defences under the racial vilification provisions are broader than those contained in the sedition offence in the anti-terrorism bill.

On the history, let's just go back to 1994 - 1995. Back then, many politicians quoted Voltaire's famous aphorism, "I may disagree with what you have to say, but I shall defend, to the death, your right to say it." Exactly why one would think racist speech is worth defending to the death is beyond me, but the philosophical point that outlawing speech may not be the best tactic is of course a respectable one.

Note that most politicians back then were unwilling to criminalize speech. and interestingly, this was the line that the current Attorney-General, Philip Ruddock, took at the time.[55] So the unlawful acts form part of the softer more educative law of equal opportunity, by which a complaint may be registered and conciliation will be attempted in the first instance. What has changed? Well, in part, the explanation could be the fact that the focus of the crime is on incitement to violence, not merely speech that is likely – for example, to offend someone.[56] But again, it is interesting to interrogate this apparent difference. What came first? Why didn't the racial vilification legislation deal with incitement to violence?[57] HREOC's National Inquiry into Racist Violence argued that racist speech and racist violence were linked,[58] but perhaps most politicians did not perceive the links back then. Now, it appears that they do. Has something changed, or is the difference that the speech we're thinking about now targets the majority, rather than a vulnerable religious or racial minority?

As I have indicated, the defences to the new sedition offence are much more limited than those under the racial vilification laws. Section 18D of the Racial Discrimination Act provides that it is not unlawful to do or say anything "reasonably and in good faith":

> (a) in the performance, exhibition or distribution of an artistic work; or
> (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

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[55] See Luke McNamara, *Regulating Racism, Racial Vilification Laws in Australia* (2002), at 46.
[56] Section 18C(1) of the Racial Discrimination Act makes it unlawful for "a person to do an act, otherwise than in private, if: (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group."
[57] See the discussion of a 1992 bill and provisions in the original 1994 bill dealing with threats against persons and property in McNamara, n 55 *supra*, at 40 – 41.
[58] Human Rights and Equal Opportunity Commission, National Inquiry into Racist Violence, *Racist Violence: Report of National Inquiry into Racist Violence in Australia* (Canberra, AGPS, 1991).

(c) in making or publishing:
(i) a fair and accurate report of any event or matter of public interest; or
(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

The defences to the new sedition offence include: a) a good faith attempt to show that members of government (for example) are mistaken; b) a good faith effort to point out errors or defects in government, legislation or administration of justice; c) urging in good faith someone to lawfully procure changes to law; d) pointing out in good faith matters that are tending to produce feelings of ill-will or hostility between different groups in order to remove those matters; or e) doing anything in good faith in connection with an industrial dispute or matter. These seem to be a fairly narrow set of defences.

I am not a proponent of unlimited speech. I think that there need to be provisions concerning racial vilification, especially in a country such as Australia where there is an unfortunate history of racism. But I think that the different histories behind the proposed new sedition offences and the earlier racial vilification laws suggest that we need – no pun intended – a very serious debate about the best ways in which to deal with speech that raises the prospect of violence. One begins to understand the fears of those who always advocate unlimited free speech, because laws limiting speech may impact detrimentally on the minorities who most need protection.