The Anti-Terrorism Bill 2005
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As a group of legal academics at the ANU with a broad range of interests spanning criminal law, constitutional law, criminology and human rights, we welcome the opportunity to make a submission to the Senate Legal and Constitutional Committee regarding the proposed anti-terrorism legislation.

Introduction

As with any proposed expansion of the criminal law, legislators should critically examine whether criminalisation and expanded state powers are the most appropriate way to respond to the identified harm (which includes potential harm). Laws which impinge on liberty or have coercive elements must be drafted carefully so that they do not have unnecessary or unintended adverse consequences. In the years since the original addition of Part 5.3 to the Commonwealth Criminal Code, there has been an incremental expansion of the breadth and reach of federal terrorism offences. In 2004 alone, there were three Anti-Terrorism Acts passed by the Federal Parliament. It has been estimated that more than 100 offences have been enacted to deal with terrorism.[1] To date, and notwithstanding recent raids, very few of those laws have been tested in the courts. We do not yet know how effective our current and extensive anti-terrorism regime is – yet the government seeks, without proper public or parliamentary debate, to further expand it.

Unlike earlier reforms, the current bill represents a significant shift in criminal justice approach. The bill envisages a range of new powers for law enforcement based on prevention and disruption. These new strategies displace traditional approaches taken to crime and criminal justice which usually reply on powers of prosecution and punishment for individuals engaged in terrorist acts or related activities.

In our view, the proposed preventative powers – and we focus on control orders, preventative detention and offences related to proscription and sedition – must be considered from three perspectives:

- Intended Aims
- Efficacy (Will these powers work? Are these powers cost-effective? Will these powers have unintended or counterproductive effects?)
- Legality (in terms of constitutionality and conformity with international human rights treaties such as the ICCPR and conventional principles of criminal law and criminal justice).

[1] B McSherry, "Terrorism Offences in the *Criminal Code* (Cth): Broadening the Boundaries of Australian Criminal Laws" (2004) 27(2) *University of New South Wales Law Journal* 354.

I. Intended Aims

The rationale for these new powers is based on prevention, and more specifically, disruption. Both control orders and preventative detention are not triggered by conviction. Such a model is not unknown in our justice system – for example, for the purpose of confiscation of assets legislation, a person's property can be forfeited occur without proof of conviction.[2] That said, these powers of confiscation are not regarded as a form of punishment; they are considered fundamentally civil measures designed to ensure that the offenders do not profit from their crime.[3] In the context of this bill however the state is imposing severe restrictions on personal liberty, not merely seizing property.

The displacement of the ordinary criminal justice system by the use of a prevention and disruption system continues a trend evidenced by the earlier extension of ASIO powers to detain for the purpose of gathering intelligence. The proposed powers in the bill would preclude questioning of those detained under prevention orders, but they do reinforce a shift in thinking such that detention is now being justified for the purpose of control rather than as part of a process of criminal prosecution and punishment.

The important difference between a prevention and disruption system and a system aimed at prosecution and punishment is role of procedural and evidentiary rules. Civil and political rights are more easily accessible and effectively protected through an open and public trial process than the proposed administrative safeguards envisaged by the prevention and disruption approach. For example, exclusionary rules of evidence applying to detention and questioning ensure that the rights of the accused will be respected. If treatment is inappropriate during such detention, the penalty is the inability to use evidence gained during this detention. However, the overuse of preventative detention or the inappropriate treatment of those in preventative detention is not constrained by the threat of a prosecution failing at a later stage. Therefore, switching aims from criminal prosecution to prevention and disruption is problematic and, arguably, the interests of those subject to detention will be less well protected. The application of human rights norms to preventative detention is strained since much of the jurisprudence on civil and political rights has been developed in response to managing the excesses of criminal investigation and prosecution, and the resultant unfairness of trials. (See the submission by our colleague Dr Pene Mathew to this inquiry where she explores the strain evident when civil and political rights treaties are used to argue that preventative regimes amount to "arbitrary detention").

It is also notable that detention regimes attached to ordinary criminal process have already been extended in Australia in cases of terrorism. Under these new laws, we now deal with terror suspects and their right to liberty in ways different to those suspected of non-terrorist offences. For example, the likelihood that terror suspects will be granted bail has been reduced by recent reforms. The permissible maximum period of detention for the questioning of terror suspects has also been extended from 8 hours to 20 hours. These

[2] There is however concern over the over the efficacy and fairness of this systems: S Bronitt and B McSherry, *Principles of Criminal Law* (2nd ed, LBC, 2005) discuss this research at 836ff.
[3] M Bagaric, "The Disunity of Sentencing and Confiscation" (1997) 21 Crim LJ 191.

reforms suggest that we already have unprecedented powers of detention for those suspects arrested on suspicion of committing terrorism offences. Beyond these extended powers granted for the furtherance of criminal prosecution, we must ask why a separate regime of detention, not constrained by the conventional rules and procedures governing criminal prosecution, is required at all. Perhaps only this questionable shift to a focus on prevention and disruption explains why standard criminal justice principles and fundamental values can be either ignored or trumped by national security concerns

In our view, the system of detention and control envisaged in the bill is intended to displace and circumvent the ordinary criminal justice system. The new offences enacted in the post-9/11 era are directed largely to preparatory behaviours – criminalising association, membership, financing of terrorism. Most of these are untested. It is hard to accept that these laws, coupled with existing offences relating to conspiracy, murder, attempt, incitement, are inadequate to the task. The net effect is that under the proposed bill, pursuant to a policy of prevention rather than prosecution and punishment, individuals will be subject to severe coercive powers even though there is insufficient evidence of their involvement in terrorism to warrant prosecution – indeed, if there was evidence of such involvement, clearly law enforcement officials would be under a duty to apprehend and prosecute. Under this model of regulation, the focus is not on establishing a case against suspects by obtaining or preserving evidence of their involvement in crime there is intention for the applicant to be put on trial for any offence against the criminal law. These powers are triggered by assessing the person's *potential* to engage in specific criminal behaviour. The Bill's criminalisation provisions further reinforce a model of coercive state control derogating from the more conventional approach to police-citizen interaction: in several places, a person's refusal to cooperate with law enforcement officials is made an offence, an approach which we know from other areas (viz State or Territory 'move on' powers) is likely only to further damage the legitimacy of community based policing and lead to over-policing of 'suspect' communities. Damage to the legitimacy of policing in the UK has already been seen with the arrest of otherwise innocent commuters such as Londoner David Mery for causing a public nuisance. Mery was arrested by police on suspicions of being a terrorist due to police observing his calm demeanour, his wearing of clothes too heavy for the season, his use of a mobile phone, having a backpack, and being seen watching people who entered and exited a London tube station.[4]

This net-widening aim is apparent in the hasty enactment of the *Anti-Terrorism Act 2005*. Whilst this was characterised as a minor but necessary change to the existing laws, its effect is potentially substantial in extending the reach of the criminal law into inchoate and preparatory behaviour. The concept of 'terrorist act' is already very broadly defined in s 100.1 of the federal Criminal Code. It already includes threats of terrorist actions (as well as the acts themselves). Prior to last week's amendments, terrorist act offences could be committed even if the planned terrorist act did not occur. Now, very early steps taken towards terrorist activity of a generic (rather than specific) nature is covered. Given that the focus of the expansion of terrorist act offences in this way is on allowing early arrest and prosecution (ie to criminalise behaviour undertaken at the very early stages of

[4] http://www.abc.net.au/rn/talks/lnl/s1500457.htm.

planning of any terrorist act), there is already a heavy focus on prevention in the terrorism laws as they now stand. Within this context, and given the questioning powers that ASIO already has, what justification can there be for enacting a scheme of preventative detention? The only possible answer to this question is that preventative detention scheme is intended to allow authorities to detain people who are not yet genuinely suspects because insufficient evidence is available to prosecute them either for even the most preliminary of preparatory acts or for membership or association with a member of a terrorist organisation.

II. Efficacy

The question of likely efficacy or effectiveness has not been adequately canvassed in much of the discussion about the Bill. The demand for these laws is drawn mainly from a *perception* in government and law enforcement circles that preventative action is preferable – few can dissent from the idea that prevention and early intervention against terrorism is preferable. Drawing parallels with crime prevention strategies in the other criminal justice fields, there is a general belief that disruption activities based on high visibility policing will prevent criminal behaviour and also deter others from this behaviour – this is apparent in the high levels of publicity around the arrests. There is little evidence to suggest that these disruption strategies – the periodic rounding up persons of interest when community concern demands action, coupled with detention for short periods for non-investigative purposes – will have any deterrent effect. Available evidence from Northern Ireland in the early 1970s suggests that the widespread use of preventative detention had no beneficial effects: more than 2000 young overwhelmingly Catholics were held in internment camps on preventative grounds between 1971 and 1974. Indeed, there is evidence that this had counterproductive effects. It should be noted that, from 1973 onwards, internment orders issued in Northern Ireland did include a quasi-judicial element – the orders of internment were to be reviewed by an independent "Commissioner" who was a person of legal experience. However, as an official inquiry ordered by the UK Government later revealed, the procedures were farcical and unsatisfactory: "the quasi-judicial procedures are a veneer to an enquiry which, to be effective, inevitably, has no relationship to common law procedures".[5]

The general view is that the internment policy of preventative detention was both effective and counterproductive. As Kieran McEvoy's study concluded,

> Apart from the political fallout, in purely military terms internment was an unmitigated disaster. The degree and intensity of the violence in the aftermath internment has not been matched either before or since. The principal justification for internment had been to take the principal players out of action and then make further inroads on their operations by gaining intelligence through interrogations. In the seven months prior to internment, eleven soldiers, and seventeen civilians died; in the five months following internment, thirty-two British soldiers, five members

[5] Lord Gardiner, The *Report of a Committee to Consider in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland* Cmnd 5847 (HMSO 1975), discussed in K McEvoy, *Paramilitary Imprisonment in Northern Ireland* (OUP, Oxford, 2001), 214 ff.

> of the Ulster Defence Regiment, and ninety-seven civilians were either shot dead or blown up. The intended objectives of internment had clearly not been achieved.[6]

The denial of due process, derogating from the ordinary process of prosecution, and limiting access to the courts severely damages the legitimacy of the state and the law enforcement agencies tasked with the using these powers. Paddy Hillyard in a recent essay to note the launch of a new European civil liberties network reflected on the lessons of waging a war on terrorism in the 1970s that dispensed with fundamental rights:

> The lessons from Ireland are clear. Widespread violation of human rights in the so called 'war against terrorism' is counterproductive. It erodes democracy by undermining the very principles on which social order is based and alienates the communities from whom the authorities need support in dealing with political violence.[7]

[We have included in this submission a short essay by a leading criminal justice researcher in the United Kingdom, Professor Paddy Hillyard reviewing the lessons learned from Northern Ireland].

The legislature must be cautious in accepting the case for preventative powers. Indeed, the UK proposal has recently been withdrawn by the government due to concerns about compliance with the Human Rights Act 1998, with a rethink of the whole policy.

Criminologists have demonstrated that proactive policing based on prevention and disruption is not as effective as commonly believed by law enforcement or 'law and order' politicians. In the field of public order and gang related crime, far away from the realm of terrorism, it is often claimed that proactive zero tolerance policing has been responsible for driving down crime rates in the US and Australia. Empirical research shows otherwise.[8] Worse still, the strategies based on preventative and proactive law enforcement often leads to over-policing of vulnerable and marginalised communities. Saturation policing of 'suspect communities' leads to more complaints against police and human rights violations – it also leads, as the riots in France suggest, to violent backlash by these communities against the police. There is a real danger that these new powers will damage the significant and successful strides towards community policing in Australia, and will reinforce a sense of marginalisation and radicalisation within these communities.

[6] K McEvoy, *Paramilitary Imprisonment in Northern Ireland* (OUP, Oxford, 2001), 214-215.
[7] P Hillyard, "The 'War on Terror': Lessons from Ireland" (2005) *European Civil Liberties Network*, p 4. (www.ecln.org)
[8] S Bronitt and B McSherry, *Principles of Criminal Law* (2nd ed, LBC, 2005) discuss this research at 745 ff.

III. Legality

We believe that the legislature should only turn to the following questions of legality *after* it has been assured that that the aims and efficacy of the proposed legislation are sound both in terms of legal policy and principle.

This part of the submission concentrates upon the constitutional issues that relate to the proposed legislation. Much has already been publicly stated with respect to question of the Bill's effect on Australia's international human rights obligations, and we refer you to the advice prepared by our colleagues, Professor Charlesworth and Pene Mathew as well as submissions by other respected public law scholars. This submission focuses on the following issues; the Control Orders (Div 104), the Preventative Detention orders (Div 105) and Proscription (Div 102) the Sedition amendments (Part 5.1)

We support a number of submissions to this committee that have argued the legal issues comprehensively. Notably, we are in general agreement with the submissions by Drs Andrew Lynch, Ben Saul and Prof. George Williams. We would simply add the following points for additional emphasis.

Detention

Issues surrounding the characterisation of and challenges to the nature of Australian immigration detention aside, it is worth noting that we have other operative schemes of preventative detention in Australia. These schemes remain controversial, have been subject to constitutional challenge, and are intrinsically-linked to criminal prosecution. For example, a majority of the High Court of Australia (Kirby J dissenting) decided in *Attorney-General (Qld) v Fardon* [2004] HCA 46 to dismiss the constitutional challenge to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). This decision allowed the Supreme Court of Queensland to subject Robert John Fardon to a "continuing detention order", reviewable after 12 months, on the basis that Fardon is a serious risk to the community and that there is an unacceptable risk that he will commit a serious sexual offence if released from custody after serving his sentence for 14 years for a sexual assault.[9]

Controversial constitutional aspects of this Queensland scheme are set out in an article by A/Prof Patrick Keyser, Cathy Pereira, and Stephen Southwood QC[10], and these concerns could apply to preventative detention schemes under the proposed bill. More alarming though, and of constitutional importance, is the fact that the detention regimes proposed in the Anti-Terrorism Bill (No. 2) 2005 (Cth) do not require any criminal conviction for detention to be ordered. There is not even a requirement, as there is under the Queensland continuing detention order scheme, that (perhaps dubious) psychiatric or

[9] *Attorney-General (Qld) v Fardon* [2005] QSC 137, [115]-[116].
[10] P Keyser, C Pereira, and S Southwood, 'Pre-emptive Imprisonment for Dangerousness in Queensland Under the Dangerous Prisoners (Sexual Offenders) Act 2003: The Constitutional Issues' (2004) 11(2) *Psychiatry, Psychology and Law* 244.

psychological assessments be done to clinically assess the likely dangerousness of a person subject to detention without charge.

It is clear from the apparently inconsistent reasoning by the High Court in *Kable v Director of Public Prosecutions (NSW)*[11] and *Fardon*, that a case by case approach is needed to determine exactly which regimes purporting to exercise judicial power of the Commonwealth will cause Chapter III problems. This approach surely invites the comparison to be made in any constitutional challenge to detention orders and control orders under the proposed bill, and the submission that the detention in *Fardon* is very different to the proposed detention regimes. The Fardon-type detention is unusual though is potentially easier to justify due to a reliance on clinical assessment of risk, a history of proven criminal behaviour and evidence of poor rehabilitation. However, the same link to the criminal justice system or clinically-assessed risk is absent when a preventative detention order or a control order is issued under the proposed legislation. Operational assertions, or perhaps "guesses" about (potential) involvement in terrorist acts or organisation is the weaker basis upon which detention is justified.

Notwithstanding the attempt to tailor, say, control orders to the potential terrorist threat the issuing court is required on the 'balance of probabilities' to determine what is in the public interest. As noted by Gaudron J in *Kable*:

> They [the orders made under the State Act] do not involve the resolution of a dispute between contesting parties as to their respective legal rights and obligations. And as already indicated, the applicant is not to be put on trial for any offence against the criminal law. Instead, the proceedings are directed to the making of a guess - perhaps an educated guess, but a guess nonetheless - whether, on the balance of probabilities, the appellant will commit an offence of the kind specified in the definition of 'serious act of violence'. And, at least in some circumstances, the Act directs that that guess be made having regard to material which would not be admissible as evidence in legal proceedings.[12]

Unlike the situation in *Kable* or *Fardon*, the orders made under Part 104 are not made subsequent to some finding of criminal guilt, yet the restrictions of liberty for the subject have all the hallmarks of punishment (home detention, restrictions on movement and association). In that sense they are preventative detention subject to apprehended conduct and run the risk of offending Chapter III. As Gummow J stated in *Fardon* when discussing the notion of executive detention:

> Another of the well-understood exceptions to which the Court referred in *Lim*, with a citation from Blackstone, was committal to custody, pursuant to executive warrant of accused persons to ensure availability to be dealt with by exercise of the judicial power. But detention by reason of apprehended conduct, even by judicial

[11] (1996) 189 CLR 51.
[12] Para 22.

> determination on a *quia timet* basis, is of a different character and is at odds with the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct.[13]

In light of the discussion above there are real questions surrounding the constitutionality of the control orders.

Issuing Authority

Further constitutional concerns relate to the highly-selective process that may result when apparent operational urgency dictates the selection of an available (and, even sympathetic) issuing authority from a broad group of potential issuing authorities. Some of the identified issuing authorities would be acting in their personal capacities in light of relevant qualifications or previous judicial experience or quasi-judicial appointments. Others would act as issuing authorities whilst serving as judicial officers.

We would argue that even the use of retired judges does not avoid potential problems with Chapter III of the Constitution completely. The use of these retired judicial officers certainly implies something about the suitability of sitting judicial officers and may, in turn, impact on perceptions of their judicial role and the confidence the public holds in their work. For example, if many orders are approved by retired rather than sitting judicial officers, surely this can be seen as an affront to the integrity of the judicial office of those not asked to perform such an important role as the authorisation of preventative detention in the absence of criminal charge.

The separation of judicial and non-judicial power under the Australian Constitution is a fundamental aspect of its design.[14] While containing few express or implied rights in the Constitution the separation of powers remains a powerful limitation on the legislature and the executive. As Justice Deane noted in *Street*[15]:

> The most important of them [express and implied guarantees] is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the 'courts' designated by Ch.III (s.71).[16]

This fundamental division of authority and functions is at the heart of the constitutional issues that surrounds both the Control and Preventative detention regimes being proposed.

Under Div 104 of the *Criminal Code* an 'issuing court' (Federal Court of Australia, Family Court and Federal Magistrates Court) (cl 100.1(1)) can make control orders under cl 104.5 and 104.14. These orders can result in the obligations, prohibitions and

[13] Para 84.
[14] *Boilermakers* (1956) 94 CLR 254 (Dixon J)
[15] *Street v Queensland Bar Association* (1989) 168 CLR 461.
[16] Para 47.

restrictions mentioned in cl 104.5(3) being made against a subject. In making these and other determinations the issuing court must be exercising the judicial power of the Commonwealth.

In exercising this power the issuing court must not be prevented from doing so in a manner that is consistent with what is understood and essential features of judicial power. (see Mason, Murphy, Brennan and Deane JJ in *Fencott v Muller*.[17]

At base that requires the issuing court to be able to exercise its authority in the 'ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.'

At this point it must be noted that the revised version of the bill makes greater allowance for independent ascertainment of the facts and their application to the law (see for example new cl 104.4) than was the case with the version released by the Chief Minister of the ACT. Those revisions are welcome but they may not however secure the Bill's constitutionality.

The proposed initial determinations by the issuing court will be done on the basis of the facts provided by the senior AFP member (cl 104.2) without hearing from the person subject to the orders. The facts presented are not subject to the normal rules of evidence, the issuing court has, beyond their own understanding of the 'balance of probabilities' are applying no established legal criteria. Moreover, in light of the nature of the potential orders, prohibitions and restrictions to be applied to the subject (themselves influenced by the facts provided by the AFP) the issuing court is to have recourse to what is 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.' (cl 104.4(1)(d) subject to cl 104.4(2)).

Preventative detention orders are made to prevent an immediate terrorist act occurring or to preserve evidence of such an act (cl 105.1). These orders are made by an 'issuing authority' who under cl 105.2 is alternatively a State or Federal judge, a retired judge or member of the Administrative Appeals Tribunal.

The division between Federal, State and retired judges and members of the AAT raise their own particular issues. Again, as with the control orders, at the heart of the matter is whether the functions being given to these individuals offend the separation of powers under the Commonwealth Constitution.

Leaving to one side the argument, taken at its highest, that retired judges could be vested with non-judicial functions without always breaching the separation of powers as a result of the implication their decision-making has for non-utilized sitting judges, the issue remains as to what functions can be vested in Federal and State judges.

Under the bill the detention orders made by issuing authorities in their 'personal capacity' (cl 105.18(2)). Notwithstanding that *persona designata* is a well known exception to

[17] (1983) 152 CLR 570.

separation of powers concerns, the non-judicial function must still be compatible with the office of a judge of a Chapter III court.

The concept of incompatibility has been discussed in detail in *Grollo.*[18] In sum the question of the compatibility goes to the nature of the function being exercised, the degree of independence, the nature of discretion to be exercised and the overall public perception as to the distance between the Executive and the Judiciary. Moreover, the nature of the functions being undertaken in *Grollo* (phone tapping) is of a magnitude wholly dissimilar to what is contemplated under Part 5.

While the categories of exceptions (such as executive detention on the grounds of mental illness, infectious disease and alienage) to the strict separation of judicial and non-judicial power are not closed, the assumption behind the Part 5 is that something akin to 'national security' detention is possible. Many individuals were detained under security Acts during the First and Second Wars; however that was done at a time of total war and prior to the intensification of Chapter III jurisprudence.

Given the closeness of the relationship between the police and the judicial issuing authority, and the nature of the detention, we believe that there are significant questions as to the constitutionality of the current detention scheme.

Moreover, the fact that retired judges and Federal Judges are both issuing authorities further clouds the distinctiveness of the judiciary's functions and may raise concerns in the public consciousness that the courts are acting at the behest of the Executive. While not dissimilar to other appointment processes for judicial officers to act in their personal capacity, when seen in light of the totality of the bill the ability of the Minister to 'pick and chose' (subject to their consent) which retired judges or serving judges the Minister wishes to act as issuing authorities raises further concerns as to the independence of these decision-makers.

Secrecy

The violations of standard canons of criminal procedure due to secrecy or national security concerns provided by the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) has already led to startling modification of standard criminal process and the relationship of the defence advocate The now adjourned prosecution of Joseph Terrence Thomas is a case in point, and many protests have been made by the advocates involved about the principle of fair trial[19] and the ability of defence counsel to defend terror suspects adequately under existing counter-terrorism law. Arguably, the extent to which secrecy provisions can be invoked within the course of a criminal prosecution is disproportionate and gives an unprecedented and privileged position to operational intelligence. This development is anathema to the principle of open justice that operates when many operationally-sensitive prosecutions are conducted for other

[18] *Grollo v Palmer* (1995) 184 CLR 348.

[19] I Munro and S Gibbs, 'QC Says Fair Trial is Impossible for Client' *The Sydney Morning Herald* (1 November 2005).

types of serious offending (e.g. drugs offences, child sex offences by those in paedophilic rings etc).

In light of the current proposals, it is concerning whether the same national security legislation would effectively deplete the record of decisions about preventative detention or control orders to such an extent that any of the promised judicial review becomes handicapped by want of detail relevant to the operation of decision-making power. More detail in the proposed legislation about the logistics of preserving record for the purpose of judicial review is surely needed to reassure all that the inclusion of judicial review is a real promise and more than mere tokenism.

Proscription of a terrorist organisation

The bill adds a new basis upon which terrorist organisations can be proscribed under s 102.1(2) of the Criminal Code. The basis for proscription is that an organisation "advocates the doing of a terrorist act". The definition of advocating is directly or indirectly counselling or urging, or providing instruction on the doing of a terrorist act; or directly praising a terrorist act. There are significant problems with the concept of executive proscription that have been canvassed extensively in the literature on the current law. Furthermore, there has been no clarification of the required relationship between the words or actions of an individual member of an organisation and the words or actions of the organisation itself. Notwithstanding these objections and difficulties with the existing regime, the extension of grounds for proscription to advocating the doing of a terrorist act, once again has significant consequences. Given that membership of a terrorist organisation and associating with members of a terrorist organisation are serious offences under the legislation, it is conceivable that a person could be liable for utterances or actions of a member of an organisation when they are not even aware of those words or actions and in no way endorse them. Again, the problem of overcriminalisation through this form of "guilt by association" goes well beyond the proper boundaries of the criminal law.

Sedition

The bill defines the 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.[20]

The offence carries a penalty of imprisonment for 7 years.

We are concerned about the decision to revive the offence of sedition which, although legally extant in some jurisdictions, has been described as a “dead-letter” in Australia.[21]

[20] Anti-Terrorism bill (No. 2) 2005, schedule 7, clause 80.2 (5).

The proposed offence would have an obvious chilling effect on political and press comment, and this will no doubt be canvassed in many other submissions including its potential incompatibility with the implied constitutional freedom of political communication.

In our view the offence is legally redundant – inciting individuals or groups to use force or violence (in the typical form of an unlawful assault) is already a crime under State and Territory laws.[22] In these cases, it is better for the state to use ordinary crimes rather than crimes which have a pedigree and reputation for oppressing unpopular political minorities including, most famously, the use of sedition charges against the political activities of members of the Australian Communist Party in the 1940s: *R v Sharkey* (1949) 79 CLR 121; *Burns v Ransley* (1949) 79 CLR 101. There are also crimes related to racial vilification available to State prosecutors. Typical of these offences is the offence contained in the *Racial Vilification Act 1996* (SA):

Section 4 Racial vilification
A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race by
(a) threatening physical harm to the person, or members of the group, or to property of the person or members of the group; or
(b) inciting others to threaten physical harm to the person, or members of the group, or to property of the person or members of the group.

Maximum penalty
If the offender is a body corporate — $25 000.
If the offender is a natural person — $5000, or imprisonment for 3 years, or both.

In New South Wales, the offence is framed as one of "serious racial vilification", contained in s 20D of the *Anti-Discrimination Act 1977* (NSW). The vilification likewise must manifest itself by a "public act" (s 20B) and occur by means which include threats of physical harm towards persons or groups of persons or property or inciting others to perpetrate such threats (s 20D).

There is clearly no shortage of offences to deal with such conduct.

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[21] See S Bronitt and B McSherry, *Principles of Criminal Law* (2nd ed, LBC, 2005) 779, where the authors note: "Except for its brief renaissance to combat Communism in the late 1940s, leading to the prosecution of agitators such as Burns and Sharkey, the offence of sedition seems to be a dead-letter. This may be contrasted with the widespread use of seditious libel charges during the colonial period to deal with individuals, including prominent lawyers and newspaper editors, who criticised various institutions of government, including governors and judges: see G Woods, *A History of Criminal Law in New South Wales* (Sydney: Federation Press, 2002), pp 50-56".

[22] While such threats and incitement could be prosecuted under the general criminal law, the racial motivation behind such conduct would be deemed legally irrelevant to the issue of culpability: HREOC, *Racist Violence* (Canberra: AGPS, 1991), p 276. It could however influence the severity of the sentence imposed.

IV. Conclusion

The debate on terrorism often takes place within the context of a metaphor of balancing the rights of suspects and the wider community. The legislative process is characterised as a process which balances competing needs and perspectives: the need to put in place highly effective measures to counteract terrorism on the one hand; and the need to protect human rights on the other hand. At the same time, we are told that this 'balancing act takes place within the context of a "war on terror". Accordingly, the circumstances of 'war' have been utilised to tip the scales in favour of strong anti-terrorism legislation. So, the argument goes, while there is a desire not to unduly infringe on human rights, what is *undue* infringement depends on the circumstances. In times of war, significant infringement may be permissible.

In reality, both the balancing metaphor and the context of war are highly suspect as justifications for further extension of anti-terrorism legislation. We are not at war. We have not derogated from our international law obligations because of a state of war. Officially, the level of risk of a terrorist attack to which Australia is exposed remains steadfastly at "medium". Furthermore, the metaphor of balance presumes that considerations of crime control must, directly and inevitably, be weighed against respect for due process. In fact, research suggests that laws which enhance and protect human rights and constitutional values may also produce more efficient outcomes for law enforcement – it is not a 'zero sum' game. In the end, the use of balancing metaphors simply encourages sloppy reasoning and poor policy development.

It remains our belief that the preventative rationale of the bill requires further consideration. The recent withdrawal of the UK bill proposing preventative detention orders should prompt our legislature to pause. Cross-party concerns over the policy behind the UK bill and its compatibility with the *Human Rights Act 1998* has prompted a fundamental rethink by the Blair government. The UK bill was heralded by the Federal government as a model of international best practice upon which our bill has been drafted. In light of these recent events, our legislature should be careful not to adopt a flawed and potentially counterproductive model that has been rejected elsewhere.