Submission to the Senate Legal and Constitutional Affairs Committee

Inquiry into the Anti-Terrorism Bill (No 2) 2005[1]

Introduction

1. Australian Lawyers for Human Rights welcomes the opportunity to make submissions on the *Anti-Terrorism Bill (No 2) 2005* to the Senate Committee on Legal and Constitutional Affairs. The Bill has far-reaching negative implications for the human rights of Australians and

2. The speed with which the committee has to conduct hearings and report is to be regretted. Despite the fact that the ACT Chief Minister released an earlier draft of the Bill it did not necessarily assist with preparing submissions because of the large number of amendments made to the earlier version of the Bill. Like many other organisations we have had only one week in which to form our position on the Bill as introduced. That time has been entirely inadequate to properly assess the ramifications of the Bill for human rights because the provisions of the Bill profoundly affect so many human rights.

3. The Bill has clearly not been drafted with the requirements of international human rights laws in mind and it suffers by unnecessarily infringing a number of such rights. This is a matter of profound regret which may be alleviated by redrafting to some extent but awaits a proper regime for the protection of

[1] As introduced into the House of Representatives on 3 November 2005.

human rights in Australia such as an act similar to the *Human Rights Act 1998* (UK).

4. A real difficulty in determining the appropriateness of the provisions of this Bill from a human rights perspective is the absence of detailed reasons by the Government for the new measures contained in the Bill. This is important not just to know as the base reason for the new laws but also in judging whether the new laws are proportionate in their impact on human rights.

5. The standard against which the new measures are to be judged is the *International Covenant on Civil and Political Rights* (ICCPR). As is well known to this Committee Australia has acceded to the Covenant but has yet to specifically incorporate it into domestic law. Nonetheless Australia by accession has agreed to be bound by its terms at international law.

6. The United Nations has specifically condemned terrorism and exhorted member states to take appropriate measures to counter terrorism. Importantly, it has considered the balance to be taken by member States between countering terrorism and protecting human rights. Specifically, the Security Council in *Resolution 1456* on 20 January 2003 resolved as follows:[2]

> *"6. States must ensure that any measure taken to combat terrorism comply with all their obligations under international law , and should adopt such measures in accordance with international law, in particular international human rights, refugee and international humanitarian law;"*

7. Human rights do not exist in a vacuum but must interact with other rights and, importantly, with the liberal democratic system typified by a Westminster system of government. The Covenant itself and the jurisprudence which arises from it allow for rights to be limited in certain proscribed circumstances such as times of war and public emergency. The limits placed on human rights are nonetheless strictly policed because of the fundamental nature of the rights

[2] Resolution 1456 (2003) Adopted by the Security Council at its 4688th meeting on 20 January 2003. See also resolutions of the UN Commission on Human Rights 2003/37 of 23 April 2003 and 2003/68 of 25 April 2003

concerned. Accordingly, human rights do not yield unnecessarily to laws passed by a democratic parliament. If a government makes laws which prima facie infringe a human right then, in the application of human rights jurisprudence, that law will be judged consistent with the principle of proportionality.

8. The principle of proportionality is well known and established in human rights jurisprudence both internationally and in domestic law of the UK and Canada. The United Kingdom Joint Committee on Human Rights is charged with the responsibility of considering human rights matters in the United Kingdom and with certain functions in relation to the *Human Rights Act 1998*. The United Kingdom Joint Committee on Human Rights,[3] in a review of criminal laws, said that the following factors are relevant in considering whether a measure is proportionate:

(a) an interference in rights must not take away the very essence of a right;

(b) there must be a sufficient factual basis for believing that there was a real danger to the interest which the State claims there was a pressing social need to protect;

(c) the State's measure or act must interfere with the right in question no more than is reasonably necessary in order to achieve the legitimate aim;

(d) measures are likely to be regarded as disproportionate if they impose heavy burdens on one individual or group, apparently arbitrarily, in order to achieve a social benefit, or if they impose measures which appear to be excessive in relation to the circumstances to which they relate;

(e) the effectiveness of any legal controls over the measures in question, and the adequacy of compensation or legal remedies for those affected

[3] The United Kingdom Joint Committee on Human Rights is a Parliamentary Committee established to consider 'matters relating to human rights in the United Kingdom' and to consider remedial orders to be made under the United Kingdom's *Human Rights Act. 1998.*

by the measures, will be relevant to the proportionality of any interference.[4]

9. The comments which appear below analyse the provisions of the Bill from the point of view of human rights standards applying the principle of proportionality. As the reader will see that process is hampered by the lack of a clear and detailed statement from the Government as to the need for the measures proposed.

10. Given time constraints ALHR has addressed only the major parts of the Bill concerning new offences, control orders, preventative detention orders and the proposed sedition laws. There are a number of other comments ALHR would have normally made about the new search and seizure powers and the financial transaction reporting but time does not permit.

New Offences (Schedule 1)

11. The proposal contained in Item 22 of Schedule 1 (new s.106.3 Criminal Code) makes those offences recently passed in the *Anti-Terrorism Act 2005* retrospective. That is, the item makes it an offence to have committed an act after the commencement of the section which is being amended. In most cases the amendments will capture acts which occurred between 5 July 2002[5] or 27 May 2003[6] and the commencement date of the Anti-Terrorism Bill 2005 (4 November 2005).

12. The retrospective operation of the provision is a clear breach of Article 15(1) of the *International Covenant on Civil and Political Rights*:

> *"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. ..."*

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[4] As defined by the Joint Committee on Human Rights, United Kingdom, First Report of the Joint Committee on Human Rights, Annex 2, Session 2000-01, Criminal Justice and Police Bill UK, 26 April 2001.

[5] *Security Legislation Amendment (Terrorism) Act 2002*

[6] *Criminal Code Amendment (Terrorism) Act 2003*

13. Such a principle is well known to Australian legislators because of the fundamental unfairness it practices on those accused of such offences. The precedent such a measure sets effectively mean the legitimised use of ex post facto laws to wield executive power. It is no good argument to say that the amendments achieve what was intended in the original legislation because the legislation – as a matter of law – does not say what the Government now says was intended. By this amendment the Government concedes that is the case.

14. Items 9 and 10 of Schedule 1 allow certain organisations to be prescribed as terrorist organisations (by regulation) if the Attorney-General is satisfied of certain matters concerning the organisation. Section 102.1 already requires the Attorney to be satisfied that the organisation is directly or indirectly engaged in acts related to a terrorist act before an organisation may be prescribed. The amendment expands the circumstances where an organisation may be prescribed to include organisations that "advocate the doing of a terrorist act". The provision is widely drafted so as to include the direct or indirect counselling or urging "the doing of a terrorist act", the direct or indirect provision of instruction on the doing of a terrorist act, and the direct praising of the doing of a terrorist act. It should be noted that membership of such an organisation is an offence punishable by 10 years imprisonment: s.102.3(1).

15. These laws must be considered as an extension of the new offences of sedition found at Schedule 7 of the Bill. A substantial criticism is set out below with respect to Schedule 7. However, it can clearly be seen that this provision severely and disproportionately curtails freedom of expression. Particular concern should be aimed at the making of "indirect" counselling or urging of the doing of a terrorist act an offence because of its impact on the work of a journalist or an artist. Coverage of a story or creation or an artwork sympathetically depicting terrorists could be seen as indirect support for a similar act to occur. Under the proposed amendments an organisation could be prescribed as a terrorist organisation on the basis of such work done for the organisation. Similar comments could be made for the organisations that directly praise the doing of a terrorist act. There have been a number of dissenting political opinions expressed which state that the events of

September 11, 2001 were necessary to remind the USA of the opposition to its policies in the Arab world. Arguably such a comment would be a reasonable basis for the Attorney to conclude that the organisation was advocating the doing of a terrorist act and the organisation would be prescribed.

16. In any event the terms of the Criminal Code already make it an offence to train a person to do a terrorist act and that would include providing instruction: s.102.5 Criminal Code. Where a specific terrorist act is contemplated then the person who directly incites another to do the act would fall within the current law prohibiting incitement: s.11.4 Criminal Code.

Control Orders (Schedule 4)

17. Schedule 4 of the *Anti-Terrorism Bill (No 2) 2005* allows a senior Australian Federal Police officer to apply to a court for a control order over a person. Control orders are made by a court at an *ex parte* hearing called an "interim control order" which is then, at an unspecified time, subject to a hearing to confirm the order. After an interim control order is made the controlled person (or the police officer) may apply to have the order revoked or varied.

18. The Attorney-General's approval is needed before a "request" for an interim control order can be made by a police officer to a court. A wide variety of control orders are available to the police including detaining a person at home; requiring a person to wear a tracking device; and prohibiting a person from communicating by telephone or internet, stopping them leaving Australia or approaching certain persons or places. A controlled person may also be photographed, fingerprinted or subject to specified counselling or education. Control orders may last up to 12 months and may be reissued repeatedly. Breaching a control order is punishable by 5 years imprisonment.

19. For an order to be made the police officer must make a request to a court (the Federal Court, Federal Magistrates Court or the Family Court). There is no requirement that the person to whom the order will apply has to be told of the request or given an opportunity to hear the evidence and reply to it. The order is made *ex parte*, that is, by the court hearing only the police case. The

primary test for an order to be made is that the court must be satisfied on the balance of probabilities that either:

(a) the making of the order would substantially assist in preventing a terrorist act; or

(b) the person has provided training to, or received training from, a listed terrorist organisation. (s.104.4(1)(c))

20. The obligations, prohibitions or restrictions must be reasonably necessary, reasonably appropriate and adapted to protect the public from a terrorist act: s.104.4(1)(d)

21. However, the court may have only limited information before it. The Bill requires that the court be given a statement of facts and other grounds upon which the police officer considers it necessary that the order be made. The evidence provided to the court is in the form of a statement sworn by a police officer which is most likely to be hearsay as there is no requirement for primary evidence to be adduced. The police officer must also state why the order is necessary.

22. At a time unspecified in the legislation but which must be specified by the court the interim control order must return to the court for confirmation. At this 'confirmation hearing' the person controlled may appear represented, adduce evidence and contest the interim control order.

23. It is obvious from the nature of the powers available with respect to control orders that they could have a major effect on a person's life. The order could be used to prevent a person contacting members of his or her own family, to require a person to undergo home detention (and be unable to work), and to not attend a place of worship and so be unable to practice his or her religion. In the current Australian legal system orders of similar magnitude can only be made after conviction for a criminal offence.

24. On its face the control order provisions at s.104.5(3) breach a number of human rights as set out in the *International Covenant on Civil and Political Rights*:

(a) Article 9: right to liberty;

(b) Article 12: freedom of movement;

(c) Article 14: right to a fair trial;

(d) Articles 17 and 24: right to family and private life;

(e) Article 21: right to freedom of association;

(f) Article 27: right of a minority to practice his or her religion.

25. In addition, control orders may have adverse ramifications for the right to work (Article 6, *International Covenant on Economic, Social and Cultural Rights*) and certain rights of the child such as the right not to be detained except as a measure of last resort (Article 37(b) *Convention on the Rights of the Child*).

26. ALHR is yet to see any detailed discussion of why the control orders (or preventative detention orders) are needed. So far the Government's justification for both primary measures has been generally as follows:

(a) The government needs to respond to the threat posed by the London bombings of July 2005;

(b) There is a danger of 'home grown' terrorism in Australia; and

(c) Measures are needed to prevent terrorism where the police do not have sufficient evidence with which to charge a person.

27. A reasonable conclusion that one may come to is that there are people who the police believe pose a threat of committing a terrorist act but *that evidence is lacking* to charge them with having committed an offence. Indeed control orders are based on the *threat* of terrorism not any specific act of terrorism or act in preparation for such a violent act. The criminal law is based on

completed acts which constitute an offence, in contrast to these orders. In a human rights context this means that as human rights will be infringed by such orders when no offence has been committed then the safeguards for those human rights should be strictly adhered to. If, for example, freedom of movement (Art 12) is to be infringed by a control order which requires home detention then the basis for the order must be appropriately justified. Application of the ICCPR to this context means that the imposition of control orders should be subject to the same safeguards as for the criminal law. Hence, Article 14 (right to a fair trial) needs to be strictly adhered to.

28. Having said that, the ICCPR and human rights jurisprudence may usefully be used to achieve the same aims of legsilators but in a manner less intrusive to human rights. Application of the principle of proportionality allows one to ask whether the same aim can be achieved through means which do not intrude upon a person's rights to the extent proposed. Many of the comments below are made on the basis that if the measure is supported by legislators then there is a way in which the measure can be implemented in a way which is less intrusive to human rights.

<u>*Ex Parte* Nature of Interim Control Orders</u>

29. The *ex parte* nature of the procedure is a fundamental departure from the way in which both civil and criminal proceedings are conducted in Australia. It is a primary right of litigants that they are able to put their case before the court and test the evidence of the other side. That right is enshrined in the common law and also in Article 14 of the ICCPR(1) and (3)

30. *Ex parte* court procedures are only ever used where there is extreme urgency and it is simply impractical to have the other party appear before the court. Such orders typically last only a very short time (sometimes only a matter of hours) and only until the other person can be represented so that both parties may then argue their case before the court.

31. As the Bill provides for urgent interim control orders at proposed Subdivision C (of Division 104) it is not clear why an interim control order should be made *ex parte*. That is, where urgency is properly established then an *ex parte*

application may be necessary but otherwise the process, in order to protect the right to a fair trial, must allow for both parties to be before the court. This may be achieved by serving the "request" for an interim control order on the person concerned and specifying a short period before the matter comes before the Court for hearing of the request. We point out that if the procedures are justifiably urgent to necessitate an *ex parte* hearing it is unlikely they would fall foul of the right to a fair trial.

32. Further, the Bill does not require a confirmation hearing of an interim control order to occur within a specific period (although the date must be specified in the control order): s.104.5(1)(e). If the *ex parte* nature of that procedure is maintained then its impact on the right to a fair trial of a person controlled should be militated by reducing the period between the interim order and its confirmation to a matter of days, certainly no more than seven.

33. In addition, the way in which prejudice to an unrepresented party has traditionally been ameliorated in ex parte hearings has been for the person seeking the order (typically an injunction) to give "an undertaking as to damages". No such undertaking is required for interim control orders and so a person wrongly the subject of a control order must seek relief by separate proceedings. It is appropriate that such an undertaking be given by the police seeking an interim control order.

Standard of Proof

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

Those requirements are that the criminal standard of proof should be applied to charges which are for the purposes of the ICCPR criminal in nature.[7]

Onus

35. The Bill requires that an interim order be confirmed after it has been made and at a time determined by the court concerned: s.104.14. While one would expect that the police bear the onus of establishing that a control order it originally requested should be confirmed there remains an argument that the person controlled bears the onus. That is because the *status quo* is with the police in the sense that they have an order in their favour so that the controlled person must dislodge the interim order. This point is important because as the Bill stands the confirmation hearing is the first time that both parties are before the court. If the controlled person bears the onus then, effectively, the presumption of innocence will have been abrogated (Article 14(2) ICCPR). Confirming that the police bear the onus of confirming an interim control order will make the process similar to an *order nisi* (the interim order) and *order absolute* (confirmed order) process.

Power to Revoke, Vary or Confirm

36. Section 104.14(7) sets out the power of the court with respect to confirmation of an interim control order. The power given to the court relies on the four part test that must be satisfied under s.104.4(1) to grant an interim control order. The last two parts of that test are substantive: that the court is satisfied on the balance of probabilities of the relevant facts (s.104.4(1)(c)) and the court is also satisfied to that degree that the order is appropriate etc to protect the public from a terrorist act (s.104.4(1)(d)). Curiously the court in confirming the interim order does not have the same power. That is, if the court is satisfied that s.104.4(1)(c) is met but not s.104.4(1)(d) then it may vary the order *but it may not revoke it*: s.104.14(7)(b). It is only empowered to revoke the order where s.104.4(1)(c) is not made out: s.104.14(7)(a).

[7] Advice provided to the ACT Chief Minister by Professors Lynch, Charlesworth and McKinnon, 18 October 2005; Engel v Netherlands (1976)

37. The effect of this drafting is that an interim control order could remain in force even though the court was not satisfied that the obligations, prohibitions or restrictions passed the s.104.4(1)(d) test of reasonable necessity, appropriateness and adaptation. This may be cured by giving the court the general power to declare void, confirm, vary or revoke an interim control order if the test in s.104.4(1)(c) and (d) is not met.

The Training Test

38. A control order may be imposed upon a person on the basis that he or she has received training from a terrorist organisation and the order will protect the public from a terrorist act.

39. Training with a terrorist organisation may involve training in the manufacture and use of weapons or explosives with respect to a terrorist act. However, unlike s.101.2, "training" is not defined. Training may include a person who receives religious training from such an organisation but the person trained is not directly involved in specific training about violence or a terrorist act. The provision does not contemplate a person who has received non-violent training but presents no risk in terms of committing a terrorist act. No risk may be posed by a person who was misled (naively or otherwise) into training but realised its nature and left the training immediately.

40. The control measures arguably allow for an inference to be made that because the person has received training the public will necessarily need to be protected. Accordingly the test in s.104.4(1)(d) only requires the court to determine the appropriateness of the measure not whether the person who has trained is a current risk to the Australian public. As it stands the provision may be criticised because it effectively punishes a person retrospectively for an act (training with a terrorist organisation) which was not illegal at the time of commission and the person poses no current risk.

41. The control order regime may be more precisely achieved (without unnecessarily infringing human rights further) by either removing s.104.4(1)(c)(ii) (and thereby relying solely on s.104.4(1)(c)(i)) or including in

s.104.4(1)(c)(ii) a requirement that the person pose a risk of committing a terrorist act.

Provision of Evidence to Controlled Person

42. Once an interim control order has been granted by a court the police are required to serve the control order and "a summary of the grounds" on the person controlled and to inform him or her of its contents, length and that his or her lawyers may contact the police for a copy of the order So long as the proposed process involves an *ex parte* hearing this is a further way in which the right to a fair trial is breached. That is, it is a requirement under Article 14(1) of the ICCPR that the person know the nature and cause of the case against him or her. The interim control order procedure does not allow for this to occur.

43. The police are not required to supply the evidence (sworn or otherwise) upon which the order was made to the controlled person. This means that when the matter first comes before the court on an *inter partes* basis for confirmation the controlled person will only be armed with a copy of the order and the grounds supplied by the police. The controlled person may only have had those documents for 48 hours prior to the confirmation hearing: s.104.12(1).

44. At the confirmation hearing the controlled person's lawyer would have a notice to produce issued immediately (or a subpoena) and for the hearing to be adjourned until the relevant material can be produced. At that stage the police will have to produce the relevant material subject, of course, to the *National Security Information (Civil and Criminal Proceedings) Act 2004*. The procedure of obtaining confirmation would clearly be less intrusive of the controlled person's right to a fair trial if the material provided to the court in support of the interim control order was provided to the controlled person at the time of service of the order (subject to the just mentioned Act).

45. [Omitted].

46. [Omitted].

Preventative Detention Orders (Schedule 4)

47. The *Anti-Terrorism Bill (No 2) 2005* proposes to institute a regime of executive preventative detention. A person may be detained for up to 48 hours under the provisions of the Anti Terrorism Bill (No 2) 2005. An order by a police officer of the rank of superintendent or above may be made for detention for up to 24 hours ("initial preventative detention order"). Then a person, called an "issuing authority", acting in his or her personal capacity may extend the initial order by up to a further 24 hours (a "continuing preventative detention order"). Persons who may be an issuing authority are Federal Court judges or Federal magistrates, retired judges from the States or the AAT President.

48. The Bill does not provide for 14 days preventative detention but it has been foreshadowed that this will be provided for in State and Territory legislation.

Basis for Detention

49. The Bill states that the object of the preventative detention order regime is to prevent an imminent terrorist act occurring or to preserve evidence relating to a terrorist act: s.105.1. In order for a police officer to make a preventative detention order he or she must be satisfied that there are "reasonable grounds to suspect" that the subject:

- will engage in a terrorist act;
- he or she possesses something connected to a terrorist act; or
- the person has done an act in preparation for a terrorist act..

50. Making the order must substantially assist in preventing a terrorist act and detention must be reasonably necessary for that purpose. The terrorist act must be expected to occur within 14 days.

51. In addition, a detention order may also be made where it is necessary to detain a subject to preserve evidence relating to a terrorist act which has occurred in the last 28 days and detention is necessary for that purpose.

52. The basis of the power to detain is one removed from the basis that would normally allow a police officer to arrest a person. That is, it allows for detention not because there is a reasonable suspicion of an offence having been committed but that reasonable suspicion of certain acts which if established will provide the basis for a lawful arrest. Hearsay evidence is likely to be the foundation for such a suspicion.

53. It is worth noting that the three matters set out in proposed s.105.5(4)(a) (in dot points above) may also be covered by existing offences in the *Criminal Code*. That is if the police officer has a reasonable suspicion that those factual circumstances have arisen then the person may be arrested and charged with the offence and then taken before a judicial officer.[8] As a police officer is not required to take a detainee before a judicial officer it is likely that he or she will *prefer* the lesser requirements of these preventative detention provisions notwithstanding that he or she may have reasonable cause that the person has committed a serious indictable offence.

Issuing Authority

54. There is no requirement in the 48 hours of the operation of a detention warrant for the detainee to be taken before a judicial officer operating in that capacity. In the first 24 hours the detention order is completely in the hands of the police. Thereafter a continuing detention order may be made by a persona designata who may be a judge or retired judge. Such persons are not "judicial officers". However, at no time is the detained person required to be taken before a court.

55. Article 9 of the ICCPR protects a person's right to liberty. Article 9(2) specifically requires that a person detained be "brought promptly before a judge or other officer authorised by law to exercise judicial power". The

[8] See s.352(2) *Crimes Act 1900* (NSW) for example.

failure of the Bill to provide for that to occur means that it breaches Article 9 of the ICCPR.

56. The Bill envisages a system of executive warrant for both an interim and a continuing detention order. Regarding interim orders, the Bill sets out a procedure for certain information and documentation to be put before an issuing authority: s.105.7. There is no apparent reason why the same application could not be made to a judicial officer for the issue of a warrant for the detention of a person on the same basis given the detail which is required to be given to a senior AFP officer. Police both State and Federal are experienced in applying for warrants at short notice so this should not be an operational impediment.

57. The use of an executive warrant (rather than a judicial warrant) may be characterised as disproportionate to the aim of detaining a person and in that way is characterised in human rights jurisprudence as "arbitrary" even though it is prima facie authorised at law. Accordingly, the executive warrant process breaches Article 9(1) of the ICCPR.

Information to Detainee

58. Once in custody the detained person must be informed of the detention order and his or her ability to contact a lawyer and the right to apply to a court. The detained person is given a copy of the order and the grounds upon which the detention order was sought. He or she is not allowed to communicate with anyone except certain limited classes of person. Even then the detainee may be prohibited from contacting particular persons such as a specific lawyer without a security clearance or a specific family member.

59. Somewhat anomalously the detainee is not informed that he or she may contact a family member as is envisaged by s.105.35. This is an unnecessary and disproportionate infringement on the detainee's right to family life (Art 17) because the detainee may assume that contact is not possible or, worse, prohibited.

Lack of Merits Review

60. Part of the guarantee for detained persons contained in Article 9(3) is that the detainee must be able to challenge the grounds for his or her detention before a judicial officer. As the Bill is currently drafted all a detainee could do is seek to challenge the preventative detention order in a limited way. That is, by way of an application to the Federal Court for a writ for habeas corpus the detainee could only challenge the detention on the basis of legality or narrow procedural grounds. Even the limited judicial review grounds available under the *Administrative Decision (Judicial Review) Act 1977* are denied to the detainee: Schedule 4, Part 2, Item 25.

61. Full merits review of the basis of the detention is required by operation of Article 14 (right to a fair trial). The interim and continuing detention procedures are *ex parte* and at no stage is it envisaged that the detainee can challenge the basis for his or her detention on an *inter partes* basis. That is, the real reason for the detention is unreviewable in any substantive way. The restrictions placed on review are, accordingly, a breach of Article 14(1) of the ICCPR which applies to adjudication of such detentions.[9]

Detention of Children

62. Detention orders are available for children aged 16 to 18 but not for children under 16. The *Convention on the Rights of the Child* (CROC) includes children who are under 18 years old and therefore the provisions of the Bill affecting 16 and 17 year olds are caught by its provisions. As mentioned above Article 37(b) of CROC requires that detention be used for children as a last resort.

63. It is the definition of "last resort" which is important here. The primary basis for preventative detention is that a police officer holds a suspicion on reasonable grounds of certain matters. Clearly there are some steps to go before the suspicions are resolved and, therefore, logically the "last resort" has not been achieved. If the suspicion is resolved to the extent that the child may be arrested on suspicion of having committed an offence then normal criminal

[9] See commenst of the Human Rights Committee quoted by Charlesworth et al at p5 note 17.

procedures may be used for the arrest and, subject to a bail hearing, the child may be remanded in custody.

Communication with and by Family Members

64. The communication by adult detainees with family provision set out at s.105.35 is unnecessarily restrictive in four ways: only one family member may be contacted, the contacted person may not communicate with other family members, the manner of communication is very restricted (fax, email or telephone) and the communication is monitored. The provision is clearly drafted on the apparent assumption that any communication with a family member is likely to be damaging to an ongoing investigation or police operation. If that is the case then it should be explicitly made a test in s.105.35 for the police officer to establish prior to preventing communication rather than the blanket way with which communication is prohibited.

65. An available scenario would be that a detainee is able to communicate by writing his or her name on a pro forma fax provided by the AFP that merely says that the person is "safe" and "is not able to contacted for the time being". That communication is likely to create, without more detail that the person is being detained by the police and for how long, more hysteria than calm the family member contacted. In fact, there is no right for the detainee to talk to any family member as the word "contact" is used rather than "communicate". The result is that the person is effectively held incommunicado. (The provisions for contact with a lawyer do not give the person a *right* to be visited by a lawyer as opposed to contact in some other way.)

66. Further a parent, spouse or child of an adult detainee, other than the person who is contacted by the detainee under s.105.35, cannot be informed of the detention at all. Section 105.41(6) prohibits a family member who is contacted by a detainee from providing to other family members the fact of the detention, the period of detention or "any information" that a person detained communicates to the family member. This means that a wife contacted could not contact the couple's children or the detainee's parents.

67. Incommunicado detention has been the subject of adverse comment by the Human Rights Committee with respect to the ICCPR because it is in those circumstances that torture has taken place.

68. As regards child detainees the guardians who may visit a child detainee may only stay, as of right, with the detainee for 2 hours within a 24 hour period. One can clearly envisage a very frightened 16 year old who is detained incommunicado without contact with his family for 22 hours out of 24. Again there are offences imposed for telling other siblings or grandparents and relatives about what has happened to the child.

69. The prohibitions on communication are extreme and by no means necessarily called for by the situation. Communication with family members should be allowed as of right unless there is clear and cogent evidence that the communication will prejudice investigations or an operation. Otherwise the current restrictions because of their disproportionately contravene the right to family life (Art 17).

Communications with Lawyers

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

71. This measure is extreme. It must be remembered that detainees are not persons suspected of having committed an offence and so therefore the safeguards for such persons should be greater than those charged with offences not less.

Freedom to Report Detentions

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

73. Again this provision is extreme because it assumes that media coverage will be detrimental to the police operation. That assumption is disproportionate to the apparent threat posed by the communication and hence it offends freedom of speech (Art 19(2)).

Sedition (Schedule 7)

74. The proposed section 80.2 of the *Criminal Code* repeals the existing sedition offences, and creates a range of offences, punishable by a maximum of seven years' gaol.

75. As well as reformulating the existing offences of incitement to treachery, incitement to treason, and interfering with political liberty, the Bill introduces new offences of:

    (a) urging a group or groups, whether distinguished by race, religion, nationality or political opinion, to use violence against another such group or groups (within or outside Australia) that would threaten the peace, order and good government of the Commonwealth;[10]

[10] Anti-Terrorism Bill (No 2) 2005 (Cth), clause 80.2(5) – (6).

(b) urging a person to assist an enemy country or organisation, by 'any means whatever';[11] and

(c) urging a person to assist an organisation or country engaged in armed hostilities against the Australian Defence Force, by 'any means whatever'.

76. The existing offences of urging the overthrow of the Constitution or the Government by force or violence,[12] and of urging another person to interfere by force or violence with lawful electoral processes[13] are maintained with the changes noted below.

77. There are a number of key differences between the existing law and the new offences. Firstly, there is no requirement under the proposed offences that a person have an intention to promote ill-will and hostility. It is enough to act recklessly. Further, the requirement that there be incitement connected to actual violence or resistance or a disturbance of some kind is no longer required. It will be enough that a person urges 'another person' to do any of the acts that are proscribed, regardless of whether the other person acts on those words or not.

78. A slightly more narrow defence of 'good faith' will be available, with the defendant bearing the onus of proof. It is a defence to show that the accused:

(a) tries in good faith to show that members of the Executive or their advisers are mistaken in their policies or actions;

(b) points out in good faith, errors or defects in Territory, State or Commonwealth Governments, the administration of justice or legislation in Australia or in another country, or the Commonwealth Constitution;

[11] Anti-Terrorism Bill (No 22005 (Cth), clause 80.2(7) – (8).
[12] Anti-Terrorism Bill (No 22005 (Cth), clause 80.2(1) – (2).
[13] Anti-Terrorism Bill (No 22005 (Cth), clause 80.2(3) – (4).

(c) urges in good faith another person to attempt to lawfully procure a change to any matter established by law in a Territory, a State, or the Commonwealth, or another country;

(d) points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters;

(e) does anything in good faith in connection with an industrial dispute or an industrial matter.[14]

79. Non-nationals convicted of sedition will face deportation.[15]

Human rights implications

80. The proposed sedition laws potentially breach the following rights protected by the ICCPR:

(a) Freedom to hold opinions without interference: Article 19(1);

(b) Freedom of expression including the freedom to seek, impart and receive information in any media: Article 19(2) and (3); and

(c) Freedom of thought, conscience and religion and freedom to manifest one's religion or beliefs: Articles 18(1) & (3).

81. Notably, Article 20(2) of the ICCPR prohibits advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and obliges States Parties, such as Australia, to prohibit such things by law. The Commonwealth is yet to legislation to protect national or religious vilification.

82. Some of the rights outlined above are susceptible to limitation where necessary to protect public safety and/or public order. This requires the application of a proportionality test as outlined above. As discussed human rights are not automatically excluded by considerations of national security.

[14] Anti-Terrorism Bill (No 22005 (Cth), clause 80.3.
[15] *Migration Act 1958* (Cth), section 203(1)(c).

83. ALHR does not address derogation in this submission given that the Government has not proclaimed any state of emergency that threatens the life of the nation, nor sought to derogate from its international legal obligations.

84. If we accept that the Government's purpose is to limit speech of conduct capable of inciting violence, then, we must ask, is that aim a legitimate one? ALHR submits that it is. It is consistent with Australia's obligations under Article 20(2) of the ICCPR. That is, it is properly concerned with vilification.

85. However, the new sedition powers do not achieve that aim in a way which has the minimal effect on human rights particularly freedom of speech. Recent advice from Bret Walker SC and separately from Peter Gray SC point to the ramifications of those laws for journalists and artists particularly. Those laws have the possibility to shut down politically contentious material which may be represented as assisting, for example, the insurgents in Iraq. That is, the provisions are drafted with such ambiguity that persons wishing to publish an argument that may be seen as supportive to the insurgents in Iraq, for example, would be advised to do otherwise until the full ambit of the new offences are determined by the courts.

86. Far too little time has been spent on investigating the breadth of these new laws because the Parliament has been overwhelmed by discussion of control and preventative detention orders. ALHR suggests that these provisions be excised from the Bill and considered through separate inquiry. ALHR, however, does support as part of that process laws that protects community members from hatred, contempt, ridicule or violence on the basis of their nationality, birth, social origin and religion in accordance with the requirements of the ICCPR.

87. The defence provided in 80.3 has not been sufficiently expanded to deal with the breadth of the new laws. A defence along the lines of that available for race hatred would seem an appropriate avenue to explore to draft a reasonable defence which allowed for freedom of expression: see s.18D of the *Racial Discrimination Act 1975*.

Conclusion

88. ALHR expresses its strong concern about the number of human rights that will be breached by the proposed laws. Such laws should only be enacted after careful consideration of the requirements of international human rights law. Without such consideration including appropriate balance the risk is that those parts of the community most affected by the laws will become alienated and disaffected by the ability of the Australian State to look after their rights and interests. Rather than quell unrest these laws may well inflame the situation.

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