

Submission to the Inquiry into Exposure Draft Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT) conducted by the Standing Committee on Legal Affairs of the Legislative Assembly for the Australian Capital Territory.

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Introduction

1. We would like to thank the Standing Committee for their invitation to make a submission on the exposure draft of the Terrorism (Extraordinary Temporary Powers) Bill 2005. We must also commend the ACT Legislative Assembly and the Stanhope Government in particular for making draft documents available to facilitate public, academic analysis of counter-terrorism law. Without this, the ability to digest rapidly-changing legislation in a considered manner is challenging for all. What follows are our preliminary reactions to the Exposure Draft of the Bill.
2. Some of the authors may be available to give evidence in person to the Committee. However, Professor Simon Bronitt is on leave and will be away from Canberra from 23 January – 1 February. Dr Mark Nolan will be on leave and away from Canberra between 25 January -1 February.

The Submission Authors

3. The first three authors teach criminal law at the ANU. The fourth author is a long standing research assistant who has worked with us on many projects including the 2nd Edition of S Bronitt and B McSherry, *Principles of Criminal Law* (Pymont: LBC, 2005). Prita has also provided research assistance for Simon Bronitt on a range of terrorism, policing and criminal law issues, as well as assisting with work done under an Australian Research Council Discovery Grant by the first three authors and colleagues Dr Penelope Mathew (ANU College of Law), Dr Gabriele Porretto (ANU College of Law), Professor Andrew Byrnes (now at Faculty of Law, UNSW) and A/Prof Russell Hogg (now at School of Law, UNE). See <http://law.anu.edu.au/terrorismlaw/> for details of this research.

4. Professor Simon Bronitt has provided advice to the NSW Legislative Review Committee commenting on the Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005 (NSW).
5. The first three authors also joined with A/Prof. John Williams (ANU College of Law) to make a submission to the Senate Legal and Constitutional Committee's Inquiry into Anti-Terrorism Bill (No. 2) 2005. That submission is attached as an Annex to this submission and is also available as submission No. 210 available at http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/submissions/sublist.htm

Structure of Comments

6. After some general reactions to the approach endorsed by this bill, we turn to specific drafting concerns we have relating to the proposed regime of preventative detention orders and prohibited contact orders. Aspects of the special police powers to be granted under this bill are also discussed.

General Reaction to Counter-Terrorism Law in Australia

Necessity, Preventative Policing, and Regulatory Focus

7. In our Senate submission we expressed our general concerns about the necessity of the Commonwealth's amendments. We reiterate those concerns to the ACT Standing Committee on Legal Affairs in relation to the ACT bill, which purports to implement the COAG agreement.
8. It must be stated at the outset that, on its face, the ACT bill, in contrast to the Commonwealth amendments, does not seem to simply allow motivations such as secrecy, urgency, or a desire to act without documented reasonable suspicion to trump the need for procedural justice and respect of citizens within a culture of human rights. In addition, the special needs of detainees are thoroughly and explicitly catered for in the bill (subject to some queries expressed at paras 51-53 below). Of course, this may be the heartening consequence of being the only jurisdiction in Australia with a legislative bill of rights.
9. However, we still believe that this bill shifts the regulatory focus from *reacting* to offending to *preventing* offending. The desire to prevent offending persuades some of the need to criminalise inchoate acts allegedly preparatory to offending. This is arguably a troubling trend in modern criminal law, especially in the area of counter-terrorism law. Some scholars have referred to this as an attempt to adopt a precautionary principle in criminal law. When prevention, interference, and intelligence gathering become the motivation for criminal law amendments, careful scrutiny must be paid to whether the proposed procedures and substantive offences are inconsistent with the history and principles of our criminal law. Careful note should also be taken of the failures of such counter-terrorism approaches in other common law countries pre-9/11 (see our Senate submission for more detail here). For these reasons,

unjustifiable overuse of the "preservation of evidence" (sub-cl 17(5)(b), (c), and (d)) or "preventing a terrorist act" (sub-cl 17(b)(i)-(iii)) as triggers for preventative detention - in contrast to the "responding to a terrorist act in the last 28 days" (cl 17(5)(a)) trigger - would be unfortunate.

10. The legislation already introduced and passed by some Australian Governments to implement the COAG agreement demonstrates how challenging it is to draft criminal procedure that permits preventative policing, without laying criminal charges, within a culture of human rights. Procedure aimed purely at prevention of offending should be shaped by civil and political rights (as the *Human Rights Act 2004* (ACT) suggests) and also by traditional criminal law principles of open justice, the presumption of innocence, the right to silence, the right to counsel, the concept of legal professional privilege, the use of clearly articulated standards of proof, and a commitment to a fair trial. We fear that unless effective procedural safeguards exist in this ACT bill and other COAG bills, the attempts to legislate for preventative policing (that is of questionable merit anyway) may give rise to nothing more than socially-dangerous racial, religious, and ethnic profiling. Encouraging law enforcement officials to apply for preventative detention orders, rather than arresting suspects, detaining them for questioning under standard criminal procedure, and charging suspects with offences and launching prosecutions, may further distress sections of the ACT community and other communities in this supposed "war on terror". The invocation of the broadest possible extraterritorial jurisdictional reach in both this ACT bill, other State and Territory law, and in the *Criminal Code ACT 1995* (Cth) (eg. Division 105), has important implications for all Australians. It has repercussions for all people potentially affected by a national agreement to endorse preventative policing of terrorism in preference to arrest for questioning followed by charging suspects with criminal offences.
11. Reassuringly, the ACT has taken our Territory's and our Nation's human rights obligations seriously when drafting procedures aimed at facilitating preventative policing and preventative criminal law. This is even evidenced by the somewhat cautious title of the bill that stresses both the "extraordinary" and "temporary" nature of the proposed powers. It is evident both in the wording of the preamble and the requirement for satisfaction on reasonable grounds that preventative detention be the least restrictive way of preventing a suspected terrorist attack (cl 17(3)(b)(ii)). The concern for rights is bolstered by the use of the Supreme Court as the issuing authority, the extent of the judicial review available, the transparency of the application process, the required documentation of reasons for suspicion on reasonable grounds, and the processes for managing the duration of the orders. In this sense, this ACT bill must be a model piece of COAG legislation amongst the legislative efforts to date. It would be a non-problematic "model", *if the Committee and the ACT Legislative Assembly were convinced that administrative detention without charge is justifiable more broadly*. Despite our praise for many aspects of this legislation, we still believe that the bill needs amendment before it should be passed, *if at all*.

12. The preamble to the ACT bill suggests that leaders present at the COAG meeting on 27 September 2005 agreed to the following:

“. . . that any strengthened counter-terrorism laws must be necessary, effective against terrorism, contain appropriate safeguards against abuse (such as parliamentary and judicial review), and be exercised in a way that is evidence-based, intelligence-led and proportionate.” (cl 3 of the Preamble to the bill)
13. It is useful for legislators to remind themselves of those words as consideration is given to how to amend this bill in order to strengthen the safeguards provided.
14. Simon Bronitt has previously suggested that, when legislatures contemplate proposed counter-terrorism amendments, they should adopt the approach: “when in doubt, don’t”. This advice is useful especially when procedural amendment creates a tension between investigation and prosecution in the policing of terrorism and weakens the core principles of our criminal law. For example, to what extent are the “intelligence-led” policing of terrorism and the “evidence-based” policing of terrorism opposing, or distinct, things? Even before proportionality, cost-benefit, or effectiveness is judged, should we consider just how far intelligence-led policing takes us from the traditional evidence-based practice of criminal investigation and prosecution? The granting of powers to detain persons of interest under the ASIO legislation is an example of how different intelligence-led policing is to evidence-based investigation aimed at prosecution.
15. We would hope that, in the quest for “intelligence-led” approaches to perceived terrorist threats, we never lose sight of how important the core principles of our criminal law are. These principles are in danger of being gradually eroded by the introduction of new criminal procedures that are ambitious, difficult to implement or contain tokenistic protection of human rights. Trying to work outside of the prosecutorial model, whilst still detaining citizens, is one obvious way to invite trouble. Weakening core criminal justice principles may cause both social unrest and decrease the legitimacy of the police and the State in the eyes of many citizens. Is this really a sound and safe way to manage the threat of terror attacks? It would be reassuring if new powers were used only as extraordinary and temporary powers. Overuse of these extraordinary powers may have disastrous consequences for us all.
16. It is encouraging to see a requirement for annual reporting on the effectiveness of the Act by the chief executive officer on advice from the chief police officer (cl 95). It is also encouraging to see that a review of the “operation and effectiveness of this Act is required after 3 years of operation (cl 98), and that a 5 year sunset clause is provided in cl 99. The drafting of the sunset clause is appropriate since the Act actually *does* expire (cl 99(1)). All existing orders expire (cl 99(2)) and all pending orders must not be made after the expiry date (cl 99(3)). In light of the debate surrounding the appropriateness of a 10 year sunset clause during the COAG meeting, the 3 year review requirement and the 5 year sunset clause is welcomed. Sunsetting is an approved mechanism for ensuring regular appraisal and review of extraordinary legislation. The

Committee must consider the adequacy of the proposed system of review and whether, parliamentary scrutiny of the need for these powers would be diminished by the proposed sunset clause of 5 years in conjunction with the Annual Review and 3 Year Review requirements.

National Uniformity and Jurisdictional Choice

17. Neither the ACT bill, nor the Commonwealth Criminal Code, include an explicit mechanism that determines jurisdictional issues arising in the new, national regime of preventative detention. On the one hand it would seem sensible for uniformity to be achieved in the implementation of the COAG agreement. Sadly, such uniformity as a result of true collaborative federalism has been elusive in the course of the Model Criminal Code project. Importantly, in terms of regimes of preventative detention, control orders, and contact orders, there is no strong reason why the *ease* of detention or the *quality* of preventative detention should be different between the Australian jurisdictions. This is especially so if all Australian Governments are motivated by the same COAG agreement on perceived threat, necessity, and desired proportionality of proposed measures.
18. If, however, the sovereign legislative power of Australian States and Territories *is* exercised differently, as seems possible under proposed legislation to date despite the COAG agreement, then providing explicit mechanisms to resolve jurisdictional conflict seems sensible. Otherwise, we are at a loss to see what mechanism will resolve jurisdictional conflicts when all available preventative detention legislation asserts universal jurisdiction. Will it be the Commonwealth who chooses which State or Territory a person will be detained in following 48 hours of detention under Division 105 of the Commonwealth Criminal Code? The possibility of arbitrary and opportunistic choices of jurisdiction being made would be alarming for those subject to the orders, especially when the safeguards offered in the preferred jurisdiction are weaker than those offered in others. Preventative detention by the Commonwealth is not required before preventative detention occurs in a State or Territory. Therefore, will perceived procedural “efficiency”, from the perspective of the applicant, determine which State or Territory jurisdiction should be chosen for initial preventative detention (since all State and Territory jurisdictions are empowered, due to asserted extraterritoriality, to exercise their own preventative detention powers)? Furthermore, to what extent will preventative detention under the Commonwealth Criminal Code become the default jurisdiction for initial detention? Given that the safeguards under the Commonwealth’s regime are inconsistent with those the Legislative Assembly would like to extend under ACT law, the issue of jurisdiction is a live and fraught one.
19. If the ACT bill as drafted is a high water mark in protecting human rights and providing sound procedural safeguards, it would be useful to ensure that detention occurs under the ACT regime *as often as possible*. The existence in the ACT of strong legislation that is consistent with civil and political rights may neither be enough to uphold Australia’s human rights obligations nor to prevent social unrest if that legislation is in fact rarely invoked. We should

ask how easy it will be for the ACT regime to be bypassed by an applicant motivated to use another State or Territory's detention regime to exploit that other regime's ease of access and less stringent procedures. Would the ability for ACT residents to be detained in another State be an unsatisfactory result when their human rights could have been better protected by preventative detention in the ACT?

20. Legislation to date has not established detainee exchange agreements between the various Australian jurisdictions. Therefore, the negative impact on detainee health and well-being could be substantial when opportunistic decision-making about location of a person in preventative detention is tolerated. From the perspective of the detainee, out of home State or Territory preventative detention would reduce the likelihood of contact with family, friends, trusted mental health professionals, and lawyers. These considerations would be relevant to the choice of locating remandees under existing, standard, criminal law. Examples that trigger concerns over the unspecified resolution of jurisdictional conflict may include: (i) an ACT resident visiting another State or Territory, or, (ii) someone from another State or Territory visiting the ACT at the time of application for a preventative detention order.

Resource Implications for the ACT

21. Related to the issue of uniformity under an alleged national scheme is the issue of resourcing and management of the detention centres and requisite health and support services. If each state contracts detention centre managers independently, national standards in the provision of detention services and related care would surely be advisable. Differences have emerged in the administrative detention of asylum seekers and refugees around Australia due to a myriad of pressures related to location and budget. The ACT bill suggests that preventative detention would need to be consistent with human rights (cl 40(3)) and would have to occur in the ACT (cl 40(4)). At the moment we are unsure where such detention could occur in the ACT. Home detention is not mooted in the draft bill so real and immediate resource implications exist for the Territory Government. Some of these problems could be solved by using the Civic watch-house, Belconnen Remand Centre, NSW correctional facilities, and the Alexander Maconochie Centre, once built. However, the bill provides challenges under cl 40(5) relating to the segregation of detainees from others in custody. It is noted that the NSW Supermax facility at Goulburn has already been used to detain remandees facing terrorism charges. We believe that Supermax is an inappropriate site for preventative detention to occur. To achieve the goal of cll 40(3) and 40(5), thought must be given to whether any of the locations referred to in this paragraph would be appropriate sites for preventative detention in the ACT.
22. Also related to the jurisdictional issues discussed above, there is a notable absence from the bill of any mutual recognition provisions between the ACT and other Australian jurisdictions. Such arrangements would allow transfer of detainees to other jurisdictions in the way currently done not only for convicted criminals but also for those subject to reporting obligations, or

supervision and/or treatment obligations under domestic violence or mental health orders. Such mutual recognition spreads demand on resources between the jurisdictions and helps to minimise jurisdictional conflict.

Specific Drafting Concerns: Preventative Detention Orders (Part 2)

Offence Definitions

23. There are no fewer than five new offences specified in Part 2. Clauses 11, 53(11), 55(2), and 45 expose to criminal liability the following people: police officer applicants; police officers monitoring contact; persons managing preventative detention; or others with access to detainees. Clause 35(4) makes persons who do not assist police criminally liable when those officers believe on reasonable grounds that the person may be able to assist the police officer in the execution of a preventative detention order. This is an offence of strict liability.
24. The first four offences should be amended since, under the existing drafting, unnecessary uncertainties exist in relation both to fault elements and to the availability of defences. Because fault elements are currently unspecified in these offences, the default fault element provisions under s 22 of the *Criminal Code 2002* (ACT) will be relied on perhaps with undesirable and/or unclear results. In terms of offence classification and the availability of defences, the Committee needs to ask whether the offences drafted were intended to be absolute liability or strict liability offences (in which case the penalties may be excessive) or were, in fact, intended to trigger the relevant default fault elements.
25. If the latter is the case, then clear articulation of the relevant fault elements in the offence is preferable to reliance on default fault elements. However, if the legislative intent is to create strict or absolute liability offences, then, under ss 23 and 24 of the *Criminal Code 2002* (ACT) this must be specified in the offence provision. In some cases, the provision of explicit duties on police or others to behave in prescribed ways may be desirable and these duties should be incorporated into the bill. Merely relying on (the incompletely drafted) offence provisions as the only way to regulate behaviour is inadequate. Adding duties for police to observe would be commensurate with existing State and Territory legislation that binds police officers to act in particular ways as a result of arresting or detaining a suspect for questioning during a standard criminal investigation process.

The Prohibition on Investigative Questioning: A Covert Loophole?

26. Clause 55 aims to deter investigative questioning of detainees, and contains offence provisions and a general bar on the admissibility of evidence where questioning has taken place beyond the narrow range of permitted exceptions. This is consistent with the dominant purpose of detention under the Act which is prevention rather than gathering of evidence to be used in prosecution. That said, however, the prohibition relates only to *questioning* (and answers given to that questioning). It does not address the admissibility of evidence that may

be gathered by listening to or overhearing conversations between detainees. Indeed, there is no prohibition of the use of surveillance devices, use of informers or covert operatives in detention facilities. Presumably a listening device could be lawfully used to passively exercise surveillance over a person detained who is otherwise a suspect. Participant monitoring and other forms of passive covert surveillance should be addressed expressly by the Act. In our view, all forms of covert surveillance should be expressly prohibited, except for non-covert surveillance (via CCTV) for the exclusive purpose of ensuring the safety of detainees and corrective services staff.

Vague Offences and Uncertain Defences

27. We note that in cl 11 a police officer who breaches (2)(a) or (b) may be guilty of an offence, though no fault element is specified. (See paras 24 and 25 for a discussion of the implications of this). Is the intention of the legislature to make this an absolute liability offence? If so, this must be specified under s 24 of the Criminal Code. However, the imposition of absolute liability would hold officers to a very high standard of care in relation to treatment of minors. This would only be appropriate if the obligations placed on police are clear and precise. In our view, police should be placed under a 'check list' of obligations that requires them to ask, in all cases, for proof of age of detainees, and if none can be furnished, to take immediate steps to ascertain the age of the detainee. Police should be placed under a 'due diligence' obligation to determine the age of the detainee. Once the police officer is satisfied that the person is not an adult, that person should be released, not immediately as suggested in cl 11(2)(b), but as soon as practicable into the care of their parents, guardian or some other suitable adult responsible for their welfare.
28. We note that cl 35(5) expressly states that the 35(4) offence is a strict liability offence. This statement is the only express offence classification in this Part of the bill. However, the defences available for other offences are unclear (see possibilities in Division 2.3.4 and s 43 of the *Criminal Code 2002* (ACT)). For cl 35(4), it would be preferable to add a general reasonable excuse defence, in addition to the mistake of fact defence provided by ss 23 and 36 of the Code. This is the approach taken in other equivalent legislation where it is an offence to refuse to comply without reasonable excuse: s 563(2), *Crimes Act 1900* (NSW).
29. We note that cl 45 criminalises any inhuman treatment of detainees by a person exercising authority and this is consistent with other prohibitions on unjustifiable use of force (cl 37) and the inadmissibility of evidence obtained under torture (cl 93). However, this offence provision again fails to specify the fault element (see comments above). The duty is not limited expressly to persons exercising authority. In our view, the offence would need further specificity to justify absolute liability (again, if that is intended). It should apply to specific persons responsible for the detention, that is, the relevant custody officer, and should regulate such things as the physical and psychological mistreatment of the detainee (eg. verbal abuse), and the denial of reasonable access to legal representation, family, or medical treatment etc. If an unspecified and 'broad-brush' approach to this 'mistreatment' offence is

retained, then the breach offence should contain an express fault element based on intention or recklessness, especially since the offence is a serious one carrying two years imprisonment.

Criminalising Refusal to Provide Name and Address

30. The failure to cooperate with police is not generally a crime (cf. offences related to deliberate obstruction or interference with police exercising their duties). This reflects the important principle of liberty where, at common law, there is no legal obligation to cooperate with or furnish identification to police. Statutes do however impose a legal duty to provide such information in specific contexts (eg when driving a motor vehicle). The exceptional nature of this type of offence, and potential to interfere with citizens' liberty, suggests that police should be required to comply with basic procedural safeguards. Therefore, to deter abuse of power, the police officer should be placed under a positive legal duty to comply with these safeguards *before* refusal by the person to cooperate becomes an offence. In addition, each request under this section should be recorded (along with the reason for its use), and there should be data kept and published on the use of powers. Such obligations on police to comply with procedural safeguards and record reasons are part of the NSW 'move on' powers regime and could provide an appropriate model: see s28F *Summary Offences Act 1988* (NSW). Perhaps this is the type of regime envisaged by the drafters who included the cl 89 obligation on the chief police officer to keep records under Part 3 of the bill regarding use of the proposed special powers.

Definition of Terrorist Act

31. We note that the essential elements from the current definition of terrorist act in s 100.1 of the *Criminal Code Act 1995* (Cth) are captured by the reorganisation of these Commonwealth provisions into cl 6 of the bill. The lack of simple and straightforward referencing to the Commonwealth provisions is problematic for national uniformity in the implementation of the COAG agreement; especially if in the future other jurisdictions' definition of terrorist act were to differ from that in the ACT's bill. In contrast, there *is* simple and straightforward referencing to the Commonwealth Criminal Code provisions in other parts of the ACT bill (eg. references to Part 5.3 and Division 104 of the Commonwealth Criminal Code in cl 29(3)(e) of the ACT bill).
32. Persons subject to preventative detention orders in the ACT may benefit from a definition of terrorist act that is not linked to the Commonwealth Criminal Code definition. Since the ACT legislation would not allow automatic incorporation of any Commonwealth amendments to the definitions of terrorist act (or other definitional terms), any Commonwealth amendments making it easier to define physical acts as terrorist acts would require independent amendment in the ACT. Proposed ACT amendments would be subject to the legislative procedural requirements provided by the *Human Rights Act 2004* (ACT). This could operate in the interest of potential

detainees. It could even result in the ACT *resisting* any Commonwealth amendments that make it easier for preventative detention order applications to succeed.

33. The bill also does not refer to any definition of "terrorist organisation" as set out in the *Criminal Code Act 1995* (Cth), s 102.1. Instead, the drafting establishing the proposed regime in cl 19(3) would appear to mean that persons cannot be detained merely due to their (remote or indirect) association with, membership of, or funding of, a proscribed terrorist organisation. Instead, the proposed regime focuses on actions and intentions of the individual persons. We welcome the fact that such drafting precludes preventative detention based on an alleged connection with a terrorist organisation. It appears that only clear proof of individual involvement in the planning, preparation, or execution of terrorist acts will be enough to justify preventative detention being ordered.

Self-incrimination and Right to Silence

34. The bill provides that a police officer must not question the detained person except in limited circumstances related to determining the identity or ensuring the safety and well-being of the person being detained or for administrative purposes relating to the detention under the Act (cl 55(1)). It should be noted here that the drafting of cl 55(1)(a) could be tightened to clarify whether a person can be asked only their name or whether "deciding whether the detained person is the person stated in the order" permits a broader range of questions about a person's associations and prior activities. It is an offence for a police officer to breach the prohibition on questioning (see cl 55(2) as discussed above). This prohibition on questioning underscores that the detention is for preventative purposes and not for the purposes of investigation. Therefore, it should be noted that more extensive questioning of any detainee would be possible if the detained person were released at any time under cl 28 in order for them to be arrested on the basis of reasonable suspicion that they have committed a terrorist offence.
35. Although interviewing by police cannot take place, the bill provides inadequate safeguards regarding the admissibility of statements made during detention by detained persons. The bill only states that statements made by detained persons are inadmissible in subsequent proceedings *if a person questions someone in contravention of cl 55(5)*. It may be more satisfactory to make *any* statement made during detention *prima facie* inadmissible; especially when any questioning in detention may motivate a detainee to volunteer admissions spontaneously in answer to otherwise permissible lines of questioning under cl 55(5). It could be a requirement that even cl 55(5) questions can only be asked and be admissible if a *separate* questioning order is approved by the Supreme Court (see the suggestion in paragraph 40 below).
36. Importantly, we should note that controlling questioning in detention via admissibility rules alone is rather blunt in this context. This is especially so if many of those under preventative detention may never be prosecuted. In these cases, regulation of questioning during detention relies solely on the fact that

the police may be prosecuted for an offence under cl 55(2). The reality of prosecutorial discretion means that a decision to prosecute police officers here is not an automatic one. Therefore, the sanction created by inadmissibility provisions will not be and can not be an effective deterrent for those motivated to question a detainee inappropriately.

37. Covert interviewing is used extensively by Australian police (using undercover police or informers, fellow prisoners, and even complainants in sexual assault cases) to obtain statements from suspects or persons of interest in both custodial and non-custodial settings. Since there is no express bar on non-police questioning in the bill (ie. cl 55 refers to “persons” as potential questioners not only police officers), it may be anticipated that police officers will use civilians (either informers or fellow detainees) to undertake questioning for both intelligence and evidence gathering purposes. The High Court in *Swaffield and Pavic* (1998) 192 CLR 159 has identified that the unfair or improper covert elicitation of statements from suspects will violate the privilege against self incrimination and courts should refuse to admit such evidence.¹
38. The privilege against self incrimination is an important rule of law and a basic human right.² However, the privilege is inadequately protected by the bill in a number of respects. The bill does not require the police officer to caution the detained person that they have the right to remain silent and that anything they do say may be used in evidence against them. A caution plays an important role in advising detained persons, who may be psychologically vulnerable and pressured, of their rights; putting them on notice that they need not speak to state officials and encouraging them to consult a lawyer before making any statements.
39. Allowing quasi-investigative questioning, including permissible cl 55(1) questioning, without forcing questioners to observe traditional procedural safeguards for questioning in detention weakens the privilege against self-incrimination, and the notion of legal professional privilege. We should not lose sight of the fact that any questioning during preventative detention *is not the same as* investigative interviewing in detention post arrest. Some of the procedures provided in existing State, Territory, and Commonwealth legislation for the questioning of arrested persons in detention should be incorporated into a preventative detention regime where any questioning is permitted. For example, communicating to the detainee that they are entitled to counsel and/or a support person to be present during questioning should be a condition precedent to such questioning occurring at all in preventative detention.

¹ See S Bronitt, "The Law in Undercover Policing: A Comparative Study Of Entrapment and Covert Interviewing in Australia, Canada and Europe" (2004) 33(1) *Common Law World Review* 35-80. <http://eprints.anu.edu.au/archive/00002395/>

² The law and policy governing the right to silence is reviewed in the Legislation Review Committee's Discussion Paper, *The Right to Silence* (2005).

A Separate Questioning/Monitoring Order Should be Sought from the Court

40. The privilege against self-incrimination and the notion of legal professional privilege could be honoured at a more general level by requiring a separate, *ex-parte* application to the Supreme Court before (i) *any* questioning *at all* occurs, and (ii) before *any* monitoring of *any* conversation between the detainee and another (including lawyers) occurs in the preventative detention centres. On current drafting, a senior police officer, not the Supreme Court, is the authority able to direct that contact between the detained person and their lawyer be monitored *by a police officer* (cl 53(2)). The grounds for allowing monitoring (in sub-cll 53(2)(a)-(f)) seem fair. However, desirable independence would result if the Supreme Court were to determine whether these grounds exist for monitoring. Granting a senior police officer the ability to authorise monitoring of contact creates clear conflicts of interest.
41. Under the bill, the level of protection conferred by legal professional privilege could be enhanced in a number of ways. First, the monitoring of communications need not be conducted ‘live’ by police or their interpreters. Rather such communications may be recorded electronically, sealed and dispatched immediately to the judge who granted the preventative detention order. The judge would then review the communications for the purposes of ascertaining whether these or further communications should be disclosed to police or monitored under cl 53(2). A similar system is currently applied to material ostensibly protected by legal professional privilege that has been seized under search warrant, in which case *de facto* protection is ensured by the adoption procedures agreed between the Law Council of Australia and specified law enforcement agencies for executing warrants over lawyers' offices.³
42. Legal professional privilege is a common law right in Australia and is acknowledged by the High Court to be a fundamental human right or civil right.⁴ Furthermore, the rationale behind the breadth of protection under the common law is not solely the importance of privacy of communications. Legal professional privilege relates more fundamentally to the proper administration of justice, as the High Court has observed:

“[Legal professional privilege] plays an essential role in protecting and preserving the rights, dignity and freedom of the ordinary citizen - particularly the weak, the unintelligent and the ill-informed citizen - under the law”.⁵ In the same case it was held that the privilege is not a “mere rule of evidence, it is a substantive and fundamental common law principle”.⁶

³ see “Search Warrant Guidelines” (1990) 25(9) *Australian Law News* 58-59. Updated guidelines were issued on 3/3/97.

⁴ *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543: “Australian courts have classified legal professional privilege as a fundamental right or immunity”: at 563 per McHugh J; “Legal professional privilege is also an important human right deserving of special protection” at 575 per Kirby J.

⁵ *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 133, per Deane J.

⁶ *Ibid*, at 132, per Deane J.

43. The absence of requirements to apply for derivative use certificates is a missed opportunity to clarify and regulate adequately the use of information gathered during any questioning of a person subject to a preventative detention order.

Who Can Question and How Should Questioning Be Recorded?

44. The bill contains inadequate prohibitions on the questioning of detained persons *by persons who are not police officers*; especially since, depending on time and resourcing constraints, these civilians may or may not be acting under police direction in this regard. The Supreme Court, under a separate inquiry related to the issuing of a questioning order, could determine *who* was permitted to ask detainees questions.
45. The Supreme Court, rather than the police, would also be better placed to independently determine the adequacy of relying merely on audio recordings as suggested by cl 55(3). Relying on audio recording alone would seem to be an unjustified retrograde step in investigative practice; a step that brings back the days of heightened defence counsel suspicion and challenge of investigative practice. Audio and video taping of questioning protects police and other questioners from challenge as well as protecting the rights of those questioned. It is difficult to see why it would ever be clearly "not practicable to make a video recording of the questioning" (cl 55(3)) in the modern era of portable ERISP units (to use the NSW term), digital cameras with audio *and* video recording functionality, and laptops with external or built-in video cameras. Surely any detention centre would also have live CCTV feeds for security and health-monitoring of detainees. This provides a further source of possible video recording. Granting "persons" the power to question detainees in the absence of video recording would seem to be an unnecessary relaxation of high standards and best practice that took much time to secure in the ACT.

Right to Counsel and Bases for Providing or Denying Access to a Lawyer

46. The bill suggests that detainees have a right to legal counsel: cl 49(1). Notable in its absence is a positive duty on the questioner to advise the detainee of this right. Compliance with such a positive duty to inform detainees of their right to counsel could be encouraged via a clearly-drafted offence provision and/or an admissibility penalty. Beyond the omission of a duty to inform detainees of their right to counsel, contact with a lawyer is limited in several respects by the bill.
47. First, contact with a lawyer is permissible *solely* for the purpose of seeking advice and arranging legal representation in relation to challenging the legality of the preventative detention order or the treatment under that order (cl 49(1)). This seems unduly restrictive since a person detained may also be under investigation for terrorist offences. As charges may be pending or imminent, the lawyer, during contact with a client in a preventative detention centre, should be able to advise his or her client in relation to *any* criminal legal matters that are in reasonable prospect.

48. It is encouraging to see that so much of cl 49 encourages contact between the detainee and the legal aid commission. However, it seems too directive and restrictive to suggest that "an appropriate security clearance" (cl 49(7)) "may" fetter the otherwise free discretion given to the legal aid commission to choose and prioritise the availability of counsel for a successful applicant. This would be more alarming had the drafting indicated that the legal aid commission "must give priority to lawyers who have been given an appropriate security clearance".
49. The need for a senior police officer to apply separately to the Supreme Court for a prohibited contact order under cl 29 is an encouraging protection of detainees' rights. However, to the extent that cl 29 allows a prohibited contact order to be made against a lawyer of the detainee's choice, this is an undesirable restriction on the right to counsel.
50. The use of the term "jeopardising" in cl 29 is also a curious choice. Thankfully, the Supreme Court would scrutinize whether the senior police officer is "satisfied on reasonable grounds that the prohibited contact order is reasonable and necessary" for the purposes listed in sub-cll 29(3)(a)-(e). It will be interesting to see how the Court will inform itself of the meaning of "jeopardising action that is being taken to prevent a terrorist act" (cl 29(3)(a)) or "jeopardising arrest" (cl 29(3)(e)(i)), "jeopardising the taking into custody" (cl 29(3)(e)(ii)), or *jeopardising* the service of a Commonwealth control order (cl 29(3)(e)(iii)). More standard terms such as "obstructing", "substantially interfering with", or "impeding" may be better understood under existing legislation and at common law. It would appear easier to satisfy a test of "jeopardising" rather than the more demonstrable allegation of, say, obstructing; making it easier to deny contact with counsel or others subject to a prohibited contact order.

Catering for Detainees' Special Needs

51. We have already commented on the adequacy of the offence provision proposed under cl 11 used to encourage adequate inquiries about the person to be subject to a preventative detention order. In addition to those concerns about the drafting of the offence, questions remain about whether the focus on decision-making capacity alone in cl 18(1)(g) should be the only age-relevant dimension.
52. The requirement under cl 18(1)(g) for the applicant to set out the information they have about age and cognitive capacity seems to invite consideration of actual mental age rather than mere chronological age. If this information is to be provided by the police applicant, a better system would be to require that mental health professionals conduct the assessment of potential detainees before preventative detention order applications are made. Such involvement of mental health professionals could help confirm the classification of a detainee as someone to be protected by cll 50 and 51.
53. Involvement of mental health professionals would also seem an appropriate safeguard when it is possible that access to the public advocate for those with

impaired decision-making capacity (as required under cl 51) can be dispensed with based on the loosely-defined risk analysis outlined in cl 18(2)(b). Under this sub-clause it appears that the police applicant must state why the contact with the public advocate "would significantly increase the risk of a terrorist act happening or seriously undermine the effectiveness of the order". To the extent that this becomes a clinical assessment of a person's likelihood of offending, more involvement of mental health professionals appears warranted. Assessing the future risk of offending is a controversial area of clinical, actuarial, and intelligence-led prediction. The Committee must satisfy itself whether it is appropriate for a relatively undefined method of risk analysis, which potentially reduces the availability of independent procedural support for a detainee who has impaired decision-making capacity, to be performed by an intelligence analyst or a police officer.

Specific Drafting Concerns: Special Powers (Part 3)

Divisions 3.2 and 3.3: A Senior Judicial Officer Must Receive Sworn Affidavits

54. The ability to obtain preventative and investigative authorisation is safeguarded by a requirement that an application be signed by the Chief Minister (cll 61(c) and 68(c) respectively), and that the granting authority be a judicial officer (cll 61 and 68 respectively). Bearing in mind the seriousness of these powers and their exceptional character, we believe that the granting power should be exercised by a senior judicial officer, such as the Chief Magistrate or Chief Justice of the Supreme Court. For consistency with Part 2 of the bill, the Supreme Court rather than the magistracy could be used for these approvals.
55. We believe that only sworn evidence should be adduced to support such applications. It is inadequate for so much discretion about the form of and receipt of relevant evidence to be given to the court (see cll 64 and 71). More detailed and predictable manner and form is required here for clarity, efficiency, and transparency.

Divisions 3.2 and 3.3: Subsequent Authorisations to be Applications *De Novo*

56. The limit of 7 days without extension for preventative and investigative authorisation is a desirable way to regulate the powers granted (cll 67(1) and 74(1)). However the provision to grant a new authorisation that can start immediately after the original authorisation ends (cll 67(2) and 74(2)) functions as an effective extension. In any event, a subsequent authorisation after the expiry of the original authorisation should be treated as an application *de novo*. That is, the Act should explicitly require the second application to be as complete as the first, and to be justified on its own terms. This procedure would force a justification from the applicant as to why back to back or multiple 7 day authorisations are now needed.

Division 3.4: Right to Information

57. The foremost concern with this division pertains to the adequacy of the affected persons' right to information in the context of such intrusive powers.
58. It is noted that once an authorisation is granted the powers may be used by *any* police officer (cl 75(1)) and, significantly, without any other authority and without the officer being required to carry a copy of the authorisation with them whilst executing it (s 75(2)). In this context, it is important to note that a police officer has no duty to tell the affected person the reason the power is being exercised *unless asked* (s 75(3)), and, furthermore, police seem to be under no duty to even prove their status as a police officer to affected persons unless they are executing the authorisation whilst in plain clothes (s 75(3)).

Division 3.4: Place Police Under Clear Procedural Duties

59. We have already noted our concerns above about the importance of imposing procedural duties on police to clearly inform citizens of the legal basis of the police powers being executed and for officers to clearly identify themselves in *all interactions*. This is important for legal *and* social reasons; especially bearing in mind the potentially coercive nature of these powers and the perceptions some groups in the community may hold that they are being targeted by police using such new and extensive powers in a discriminatory fashion.
60. The outcome of the provisions as drafted is that there is *no duty or obligation* on police officers exercising these powers to explain their actions, to explain the import of their actions, to prove their authority as a police officer, or to prove that the special powers being exercised are authorised.

Division 3.4: Use of Force

61. An authorisation allows police officers to use as much force as is reasonable and necessary (including force reasonable and necessary to break into premises or a vehicle or anything in or on premises, a vehicle or a person) (cl 83) to carry out the following actions:
- obtaining personal details (name, date of birth and address) (cl 76);
 - stopping and searching people, and detaining them for as long as is necessary to do so (cl 77);
 - stopping and searching vehicles and any person in, entering or leaving the vehicle, detaining the persons and or the vehicle for as long as necessary to do so (cl 78);
 - moving vehicles, and entering vehicles with force if required (cl 79);
 - entering and searching premises and detaining any person in, entering or leaving the premises (cl 80);
 - cordoning the target area and either detaining those inside an area or refusing entry to an area (cl 81);
 - seizing all things (including vehicles) (cl 82);

62. These actions are all highly intrusive and have the potential to be psychologically and or physically harmful. Accordingly it is critical that clear procedural duties are imposed upon police officers performing these actions and that affected person's right to information is strengthened. The explicit duties to minimise harm (cl 83(2)) and to minimise damage (cl 84) during the exercise of authorised special powers are commendable, as is the requirement of human rights training for police officers (cl 90).

Division 3.4: Offence Definition

63. As in Part 2, the current drafting of the offences under cll 76, 77 and 81 is problematic. The precise fault elements intended for these offences as well as the defences intended to be available are often unclear (despite a reasonable excuse defence being defined for all offences: cll 76(4), 77(5) and 81(6)). This means that the thrust of our criticisms of offence definition under Part 2 applies here also. Again, if strict liability offences are intended, the offence would need to make this clear. However, it seems inappropriate to create strict liability offences without a requirement that the affected person be told that failure to comply is an offence.

Division 3.4: Procedural Duties, and Communication About Remedies

64. There is neither a duty to inform the affected person that failure to comply is an offence, nor is there a duty to explain that the person may have a right of compensation under cl 85 for loss or expense incurred as a result of "the exercise, or purported exercise, of a power under [Part 3]" (cl 85(1)). The police may also be subject to other residual administrative law, common law or constitutional remedies for wrongful use of these special powers. Clearly, the drafting in this bill does not require police exercising special powers to inform those affected by the exercise of the powers of the availability of *any* remedies.

65. It is appropriate that persons have the right to seek compensation (cl 85), to have any legal and not unsafe items returned (cl 87), and to seek a written report (cll 75(4) and 92). However, we are concerned that the remedy might be illusory if there is no duty on police officers exercising the powers to inform affected persons of these rights to redress. Although it is potentially unwieldy to read out a string of rights when trying to exercise the powers, it must be taken into account just how intrusive these powers are and that they are exercised without any duty to provide reasons *to those affected by the powers* (reporting obligations under cl 89 aside). Surely extraordinary times requiring extraordinary measures dictate making extraordinary attempts to communicate the nature of special police powers to the public. It is also significant that people are not commonly aware of the extent of standard police powers, let alone these proposed special powers, and will typically not be aware of their avenues for complaint and remedy.

Conclusion

66. We thank the Committee for the opportunity to bring our concerns about this draft bill to the Committee's attention. As stated at the outset of our submission, we commend the drafters for the many safeguards evident in this bill (eg. the use of interim preventative detention orders, the provision of a public interest monitor, and the express reference to human rights norms and concerns about humane treatment). However, we believe that the human rights of those subject to these proposed new powers may still be vulnerable to violation unless many of our suggestions for amendment are realised. The integrity of the principles of criminal law as well as social harmony may depend on such amendment.

Yours sincerely,

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25 January 2006