GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

13 June 2007

Mr Bruce Barbour
Ombudsman
NSW Ombudsman
Level 24, 580 George St
SYDNEY NSW 2000

Dear Mr Barbour,

Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002*

Thank you for providing the Gilbert + Tobin Centre of Public Law with the opportunity to comment on the Issues Paper for this review.

In this submission we have provided answers to selected questions from the Issues Paper on preventative detention orders. However, we wish to note at the outset our objection to preventative detention orders.[1]

Detention is the most invasive restriction on individual liberty and security of person. As such, it must be regarded as a last resort, after all feasible alternatives have been exhausted. Preventative detention powers are inconsistent with basic democratic, judicial and rights-based principles. Individuals should not be detained beyond an initial short period except as a result of a finding of guilt by a judge or as part of the judicial process (such as being held in custody pending a bail hearing). Detention is only justifiable as part of a fair and independent judicial process resulting from allegations of criminal conduct, or where it serves a legitimate protective function and existing powers are insufficient.

In addition, other avenues are open to police to prevent a terrorist attack. Less drastic alternatives include electronic monitoring, home detention, telephone reporting, home surveillance, prohibitions on visitors or contact with others, and banning the use of computers and telephones. A person could also be charged with and prosecuted for a number of preparatory offences under Division 101 of the *Criminal Code* (Cth), which would certainly avoid the intended terrorist act taking place. A suspect could be held in custody pending trial, and could be subject to the presumption against bail for terrorism offences. Additionally, the *Australian Security Intelligence Organisation Act 1979* (Cth) empowers ASIO, where an investigation may otherwise be hampered, to seek a warrant for the detention for seven days of

[1] If more detail of our objections to preventative detention orders is of interest to the Review, we would be happy to provide a copy of our earlier submission to the Senate Legal and Constitutional Committee, Parliament of Australia for its *Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005*, 10 November 2005, 10-15.

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any persons who may have information about a terrorism offence (including its planning). So even if there is not enough evidence to charge a person for offences in Division 101 of the Criminal Code, provision still exists under the law for their detention and questioning about what they know of any planned attack.

3 What are your views as to the present application process for preventative detention orders?

The interaction of the Commonwealth and State schemes remains confusing. This is contributed to by the disparity between the schemes in different jurisdictions. However, we wish to commend the NSW Parliament on adopting a judicial scheme that provides additional safeguards.

6 What are your views as to the present 'maximum period of detention' provisions in section 26K of the Act? Are these provisions:
d. Adequate in length to achieve the purpose of preventative detention?

Preventative detention orders can only be obtained to protect against *imminent* attack (section 26D). Any extension in time would cast doubt over this purpose and raises concerns about the use of preventative detention orders to hold people without trial or charge.

7 What are your views on the provision of information to people in preventative detention? In particular:
e. Should a detainee be entitled to know of the existence of a prohibited contact order?

We support the earlier comments of Ms Lee Rhiannon MLC and PIAC that are outlined in the Issues Paper. As they noted, there is no rationale for not informing a detainee of the existence of a prohibited contact order. As such, a detainee should be entitled to know of the existence of a prohibited contact order.

13 Are the powers of police to question persons the subject of preventative detention and obtain identification material sufficient and appropriate? In particular:
a. Is it appropriate that police be restricted to asking questions only relating to determining whether the person detained is the person specified in the order, or for health and welfare purposes? Or, should police be able to generally question a person detained — similar to the powers of police in the United Kingdom? Does the interaction between Part 2A of the *Terrorism (Police Powers) Act* and Part 9 of the *Law Enforcement (Powers and Responsibilities) Act* provide sufficient flexibility for police in questioning detained persons?

It is not appropriate to adopt the powers of police in the United Kingdom into this scheme. Adopting such powers would substantially change the nature of the NSW scheme from its public justification of prevention to investigation. As noted in the Issues Paper, investigative powers already exist under other State laws as well as, of course, the *Australian Security Intelligence Organisation Act 1979* (Cth). The UK scheme was designed to fill a lacuna in investigatory powers which does not exist in Australia due to the presence of these other laws.

22 Should any of the features of preventative detention legislation in other jurisdictions be incorporated into the New South Wales regime, and if so, why?

We commend the NSW Parliament on including additional safeguards in the NSW preventative detention model that are not included in the Commonwealth model. These include the role of the Supreme Court in confirming orders, the entitlement of detainees to give evidence before a hearing of the court and the right of detainees to apply to have an order revoked. These safeguards would be appropriate in any preventative detention scheme but are all the more necessary in the NSW scheme, given that it provides for a longer period of detention and greater deprivation of liberty than the Commonwealth scheme.

The ACT's requirement that the court only make a preventative detention order where detaining the person is the least restrictive way of preventing the specified terrorist act from occurring should also be incorporated into the NSW regime. This would ensure that detention – the most invasive restriction on individual liberty and security of person – is only used as a last resort when all other feasible alternatives have been exhausted. Other ACT features such as the obligation of the legal aid commission to arrange for a suitable lawyer to represent the person subject to the application, and the requirement that facts and other grounds relied on in the application must not have been obtained through torture should also be incorporated to ensure fair proceedings and treatment of detainees.

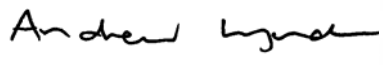
In addition to the differences across jurisdictions outlined in the Issues Paper, we note that detention regimes in Victoria, the ACT, the United Kingdom and Canada are all subject to a significant safeguard that is absent in NSW – a charter of rights. In the United Kingdom, the charter of rights has played a role in ensuring that terrorism detention and control order schemes do not infringe basic human rights. In *A v Secretary of State for the Home Department* [2005] 3 All ER 169 the House of Lords declared the indefinite detention of non-citizens suspected of terrorist activities to be a disproportionate and discriminatory departure from the European Convention on Human Rights and the United Kingdom's own *Human Rights Act 1998*. The introduction of a NSW charter of rights would provide an important safeguard to NSW preventative detention order model. It would provide an effective mechanism to determine whether rights have been unduly undermined by anti-terrorism laws.

36 Should special counter terrorism powers be subject to ongoing scrutiny? If so, what form should that scrutiny take?

Counter-terrorism powers in all Australian jurisdictions should be subject to review by an Independent Reviewer in line with the recommendations of the Commonwealth's Parliamentary Joint Committee on Intelligence and Security in their 2006 report on the *Review of Security and Counter Terrorism Legislation*. Ideally, this person would be appointed federally and review Commonwealth and State and Territory laws, such as the *Terrorism (Police Powers) Act*. Debate and consideration of existing and proposed legislation is currently hindered by the reactive nature of amendments, limited access to security intelligence and an unwillingness to oppose amendments for fear of being seen to expose the community to danger. Under the Independent Reviewer model, consideration is given to the operation and effectiveness of current and proposed amendments to ensure that counter-terrorism laws and amendments are necessary and appropriate. This would result in a more sustainable counter-terrorism framework, with carefully targeted offences and sufficient enforcement powers subject to adequate safeguards and forms of review.

The Ombudsman should also have an ongoing scrutiny role with regards to the exercise of police powers in NSW. As noted in the Issues Paper, preventative detention powers are of an extraordinary nature and have not yet been used in NSW. An ongoing scrutiny role is necessary for the Ombudsman to effectively review the use of powers under the Act, which may be used infrequently or not at all within the current review period and once used have ongoing obligations, such as the destruction of identification material taken from a detainee after 12 months.

Yours sincerely,



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