GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

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National Human Rights Consultation Secretariat
Attorney-General's Department
Central Office
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Sir/Madam,

Submission on National Security and Terrorism

We send you the attached submission for consideration by the Consultation Committee, chaired by Father Frank Brennan AO, and constituted also by Mary Kostakidis, Mick Palmer AO APM and Tammy Williams.

We are making this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

We acknowledge the main submission to the Committee from our colleague, Mr Edward Santow, Director of the Centre's Charter of Human Rights Project. This submission offers supplementary arguments made in the specific context of national security and terrorism.

If you have any questions relating to this submission, or if we can be of any assistance to the Consultation Committee, please do not hesitate to contact us.

Yours sincerely,

Dr Ben Golder, Dr Andrew Lynch, Ms Nicola McGarrity and Mr Christopher Michaelsen

Terrorism and Law Project

SYDNEY 2052 AUSTRALIA
Email: a.lynch@unsw.edu.au
Telephone: +61 (2) 9385 2875
Facsimile: +61 (2) 9385 1175
Web: www.gtcentre.unsw.edu.au

PART I: RESPONDING TO TERRORISM IS ABOUT PROTECTING HUMAN RIGHTS

States have an obligation to provide protection against terrorism. Human rights standards impose positive obligations on states to ensure the right to life, protection from torture, and other human rights and freedoms. Acts of terrorism are likely to infringe on all of the rights that it is part of a state's positive duty to protect. This does not necessarily mean that an act of terrorism amounts to a failure to protect by the state. However, if the state fails to take adequate and appropriate measures to protect those rights, the state itself bears some responsibility for the violation. An effective counter-terrorism strategy can therefore be regarded as part of a state's human rights obligations.

Terrorism *per se* is an anathema to human rights. Modern human rights standards are rooted in four simple values that were most famously articulated by US President Franklin D. Roosevelt as "the four freedoms". They are: freedom from want; freedom from fear; freedom of belief; and freedom of expression. These freedoms form the core principles of the Universal Declaration of Human Rights (UDHR), which sets out the fundamental elements of international human rights accepted by United Nations member states and elaborated in many subsequent human rights treaties. The UDHR is accepted as a common standard of achievement for all peoples and all nations and many of its principles have been incorporated into legally binding instruments such as the International Covenant on Civil and Political Rights.

The random nature of terrorist acts undermines human rights and fundamental freedoms and, consequently, the international human rights framework. This is not because human rights represent a pacifist doctrine. Even the UDHR accepts that people may 'be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression'. Still, even extreme circumstances cannot justify the use of random acts of violence or threats of violence against civilians. Human rights standards envisage a society that is based on the rule of law and democratic values. Therefore, even in the pursuit of such a society, using acts of terrorism, which are themselves in direct contradiction with those values, is never justified.

Internationally recognized human rights standards require governments to take into account and implement certain key universal principles. This imposes a level of discipline and rigour upon government agencies when responding to threats such as terrorism. If they ignore or misapply those human rights standards, they are to be held accountable before an independent and impartial court. A failure by states to provide judicial review may itself constitute a violation of obligations under international law including treaty obligations under the International Covenant on Civil Political Rights (ICCPR) to which Australia is a party. This means that Australia can be held accountable before international bodies such as the Human Rights Committee, a quasi judicial body overseeing the implementation of the ICCPR.

As a general principle, the more severe the potential human rights violation, the greater the scrutiny that should be carried out by both decision makers and courts. It is thus of the utmost importance to consider human rights standards when developing and implementing counter-terrorism policy. It is essential to recognise in this context that human rights do not impede effective counter-terrorism policy. As the former UN Secretary-General, Kofi Annan, has pointed out:

> [h]uman rights law makes ample provision for strong counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective – by ceding to him the moral high ground, and provoking tension, hatred and mistrust of

> government among precise those parts of the population where he is more likely to find recruits.

Counter-terrorism mechanisms and human rights standards are intimately linked and mutually re-enforcing. Counter-terrorism laws and practice that damage human rights are self-defeating and unacceptable in a society governed by human rights, the rule of law and democratic values. A federal charter of rights would create a helpful tool for the development of robust and proportionate counter-terrorism measures. At the same time it would create a valuable reference point against which to examine the implementation of existing counter-terrorism law and policy.

PART II: THE POST-9/11 PARLIAMENTARY DIALOGUE

The legislative response to the perceived threat of terrorism in the years after 11 September 2001 has been voluminous and rapidly enacted. Crucially, this response has for the most part been conceived and implemented in an environment unconducive to reasoned, reflective democratic debate. As a result, it is our submission that many aspects of the counter-terrorist legislative framework have been enacted without adequate consideration for human rights issues and indeed in a manner which undermines the principles of deliberative parliamentary democracy.

Whilst several nation states already had counter-terrorism legislation in place on 11 September 2001 (reflecting their own particular historical experience of dealing with political violence) many states only began to legislate on the subject of terrorism after this date. Australia was one of the countries which had no national laws on the subject of terrorism prior to the events of 11 September 2001. The Commonwealth's post-11 September 2001 legislative response to the threat of terrorism has been conditioned by many different factors, but two important factors are its international and domestic obligations. As Resolution 1373 of the United Nations Security Council puts it, states have a duty to 'take the necessary steps to prevent the commission of terrorist acts'. This formal international obligation is amplified by the domestic obligation to respond urgently to the underlying public demand for increased security measures. Against the backdrop of its assumed international obligations and the significant public and media pressure brought to bear upon the government to protect the citizenry from perceived attack, the Commonwealth has legislated at great length and in great haste to develop a body of counter-terrorism law. As one recent study has observed, in the period from 11 September 2001 to 11 September 2006 alone, the Federal Government enacted a total of 42 different pieces of legislation whose specific aim is to combat terrorism. The development of Australian counter-terrorism law has been aptly described as a clear instance of legislative inflation.

Importantly, the Commonwealth's legislative programme has taken place in a climate of induced fear and public anxiety over the prospect of imminent terrorist attacks and the felt necessity for the government to take decisive action. In line with this, there has been a corresponding shift in parliamentary discourse surrounding counter-terrorism from a criminal justice to a security model – the overriding imperative of parliamentary action is to safeguard 'security' (often through preventive or pre-emptive means which derogate substantially from traditional rule of law and criminal justice notions). Indeed, the attainment of security is seen to underpin (and is a precondition for) the very protection of human rights. The former Commonwealth Attorney-General, the Hon. Philip Ruddock MP, attested to this security framework when, in his contribution to the Second Reading debates on the *Anti-Terrorism Act 2004* (Cth), he observed:

> Security is not anathema to freedom and liberties. I might say, if you read the Universal Declaration of Human Rights, it gives primacy, amongst other matters, to the responsibility

of governments to secure a person's right to life – a person's entitlement to live in a situation of safety and security.

The primacy of security concerns has in fact led to an emphasis on the purported effectiveness of counter-terrorism measures as opposed to a reasoned deliberation on the human rights implications of any planned legislation.

This emphasis on effectiveness has often been allied with a claim of urgency on the government's part. The recall of Parliament to hastily enact the *Anti-Terrorism Act [No 1] 2005* (Cth) is an extreme example of this trend. However, it is also in many ways emblematic of the general pattern of legislating such laws. Both the initial *Security Legislation Amendment (Terrorism) Act 2002* and *Anti-Terrorism Act (No 2) 2005* were rushed through the Parliament.

In the context of counter-terrorism legislation, which necessarily involves complex questions of balancing competing interests and policy imperatives (often with national significance), such exigent legislative processes ultimately do damage to the democratic process itself. The expedited enactment of counter-terrorism laws, which should be (and have on occasions been) the subject of sustained community engagement and parliamentary discussion, prevents a reasoned, deliberative and dispassionate debate. We submit that the implementation of a human rights charter at the federal level would produce significant improvements in this area of the law not only in a substantive sense (that is, in terms of the protection of particular human rights) but in a procedural one as well. An instrument which required federal policy makers and parliamentarians to weigh the human rights implications of any planned legislation would constitute an important bulwark against ill-conceived and hastily-enacted legislation and would guarantee an important element of the democratic process.

PART III: HUMAN RIGHTS 'GAPS' IN AUSTRALIA'S COUNTER-TERRORISM LAWS

Many of the Commonwealth and complementary State and Territory counter-terrorism laws adopt extraordinary measures, which derogate from ordinary principles of criminal justice and limit fundamental human rights, to deal with the threat posed by terrorism. These measures include: pre-charge detention; proscription of terrorist organisations; and criminalisation of preparatory acts. We accept that extraordinary measures such as these *may* be appropriate to deal with the threat of terrorism. However, as outlined below, we have concerns about whether the Australian laws are sufficiently targeted to the threat of terrorism and whether their impact upon fundamental human rights is justified by this threat.

- Excessive breath of the terrorism offences

    - Division 102 of the *Criminal Code Act 1995* (Cth) contains a range of 'terrorist organisation offences'. These offences hinge upon executive proscription of a terrorist organisation (discussed below) or a judicial finding that a group satisfies the (extremely broad) definition of a terrorist organisation. The core problem as we see it with these offences is the attempt made to attach criminal liability to persons not on the basis of any activity committed by the individual but rather their status as a member (which includes an 'informal' member) or associate of the organisation. Furthermore, other offences, such as the offence of 'training' with a terrorist organisation, are insufficiently targeted at the threat of terrorism. The training offence, for example, makes no distinction between various types of training, for example, training that may assist with the carrying out of a terrorist attack, such as

training in the use of explosives or firearms, as opposed to training in the use of office equipment.

- The tendency in Australia towards drafting anti-terrorism laws of excessive width is not limited to the proscription context. Division 101 of the *Criminal Code Act 1995* (Cth) sets out a range of general terrorism offences. Most of these offences are focused not upon the commission of a terrorist act but upon preparation for a terrorism act. These offences go further than the offences of 'attempt' or 'incitement' under the ordinary criminal law in that they do not require the prosecution to establish that the defendant planned to commit a particular terrorist act. There are two key objections to this expansion of the criminal law. First, it is contrary to ordinary principles of criminal responsibility, since people who think in a preliminary or provisional way about committing crimes may always change their mind and not implement their plans. Second, by casting the net so broadly, a range of innocence activities may be exposed to criminal sanction.

- The treatment of Dr Mohamed Haneef in July 2007 provides a good example of the breadth of the terrorism offences. Haneef was charged with providing support or resources to a terrorist organisation on the basis of the seemingly innocuous act of giving his second cousin his mobile SIM card when he left England.

- In our opinion, the criminal law should be enacted with precision so as to catch only those acts that are crucial to the furtherance of terrorist plans. As Professor Clive Walker, a UK terrorism expert, has said: 'penalising equivocal actions ... will leave room for claims of people being victimised for their views or even their stupid curiosity' – or, in Haneef's case, the conduct of his relatives several months after he left the country.

- Pre-charge detention

  - Even when sought for an ostensibly investigative purpose, extended pre-charge detention or detention without charge, is commonly justified as limiting the liberty of individuals in order to protect society from the threat of terrorism. A clear tension exists between this conception of the law as serving a preventative purpose and the fundamental principle of the criminal law that a person is innocent until proven guilty. This tension means that legislators must be careful to ensure that the limits on a person's liberty go no further than is justified by the need to prevent terrorist acts. Stand-alone rights provisions would assist in this regard, providing guidelines for the sensible design of counter-terrorism measures (see the discussion of the relationship between respect for human rights and effective security strategies in Part I above). The fact is that, in the absence of stand-alone rights provisions, Australian legislation authorising pre-charge detention has not been sufficiently tailored to the threat of terrorism.

  - Under the *Crimes Act 1914* (Cth), the Australian Federal Police (AFP) has a power to detain a person whom they *suspect* of committing a terrorism offence for the purposing of investigating whether he or she committed that offence or another terrorism offence. The human rights 'gaps' in this pre-charge detention regime were amply demonstrated by its operation in the case of Dr Mohamed Haneef. The 'dead time' provisions in the *Crimes Act* enabled Haneef to be held in detention for 12 days (from 2 to 14 July 2007). This is despite the fact that the legislation *generally*

imposes a 4 hour time limit on pre-charge detention (which may be extended to 24 hours by a Magistrate or Justice of the Peace). The 'dead time' provisions mean that this time limit ceases to be an effective safeguard for the rights of the detainee and the detainee is subjected to the possibility of indefinite detention.

- Under Division 105 of the Criminal Code, the AFP may obtain a Preventative Detention Order so as to hold a person in a prison for up to 48 hours (extended to 14 days by State legislation) where this is viewed as 'reasonably necessary' to prevent a terrorist act from occurring or to preserve evidence relating to a recent terrorist attack.

- The Australian Security and Intelligence Organisation (ASIO) has an even broader power to detain than the AFP. Under 2003 amendments to the *Australian Security and Intelligence Organisation Act 1979* (Cth), ASIO may detain a person for up to seven days under a questioning and detention. It is not necessary that the person be suspected of committing a terrorism offence. Rather, such a warrant will be granted by a federal magistrate or judge if it is seen as necessary to prevent the person from absconding or somehow compromising a terrorism investigation.

- Proscription of terrorist organisations

  - Division 102 of the *Criminal Code Act 1995* (Cth) gives the Commonwealth Attorney-General the power to proscribe (i.e. ban) an organisation. As mentioned above, the definition of a terrorist organisation is extremely broad. In failing to set out more detailed criteria for the Attorney-General to take into account in exercising his or her discretion to proscribe an organisation, Division 102 violates the rule of law. Central to the rule of law are the requirements that a law must be applied consistently and that persons are aware of the law.

  - Furthermore, there is no requirement of public notification of proscription decisions in Division 102 – let alone a requirement that an organisation or its members be accorded procedural fairness by the Attorney-General prior to exercising his or her discretion.

  - One of the grounds for the proscription of an organisation is that it advocates the doing of a terrorist act. Included in the definition of 'advocacy' is that an organisation praises terrorism (even if: the praise does not result in a terrorist act; it was not intended that a terrorist act would occur; and the organisation has no substantive involvement in terrorism). There need only be a risk that such praise might lead a person to engage in a terrorist act, regardless of that person's age or mental capacity. This definition is obviously too broad and has a chilling effect upon free speech. While it may be legitimate to ban groups which actively engage in, or prepare for, terrorism, it is not justifiable to ban whole groups merely because an individual within that group praises terrorism. Furthermore, if an individual within an organisation does praise terrorism, with the consequence that the organisation is a 'terrorist organisation', a member of the organisation or an associate of the member may be subject to serious criminal sanction (see below).

- Changes to trial processes

- The *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) aims to protect the disclosure of information that may prejudice national security. There are two fundamental problems with this Act. First, in deciding whether to limit access to the information, a judge is required to hold a closed hearing. He or she may exclude the defendant or even his or her legal representatives from the hearing if they do not have a security clearance at the necessary level. Second, s 31(8) provides that, in deciding what orders to make, the court must 'give greatest weight' to 'the risk of prejudice to national security' by the disclosure of the information. Any 'substantial adverse effect on the defendant's right to receive a fair trial, including in particular on the conduct of his or her defence' is only a subsidiary consideration.

- Control orders

  - Division 104 of the Criminal Code enables the AFP to obtain a control order against an individual if it can satisfy a federal court that on the balance of probabilities (i) making the order would 'substantially assist in preventing a terrorist act'; or (ii) that the person subject to the order has provided training to, or received training from, a listed terrorist organisation. Additionally, the court must be satisfied that obligations, prohibitions and restrictions to be imposed are 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act'. In determining these matters, the court must take into account the impact of the obligations, prohibitions and restrictions on the person's circumstances – including financial and personal.

  - The test of 'balance of probabilities' is a civil, not criminal, standard of proof. It is debatable whether this lower standard is appropriate given the serious consequences which an order may have upon an individual's freedom, which may potentially include house arrest. Although the High Court found interim control orders to be constitutionally valid, it is deeply worrying that these orders may be obtained against individuals who have not been charged, let alone found guilty of criminal conduct. Conversely, the use of an order to restrict the liberty of an individual (Jack Thomas) whose conviction had been quashed on appeal was also very concerning.

  - Although no individual is currently subject to a control order, the continued availability of such a device presents easy potential for human rights abuses. Additionally, extreme measures such as this have a clear normalising effect in other areas of the law, as discussed in the following Part of this submission.

PART IV: NORMALISATION OF EXTRA-ORDINARY MEASURES

In December 2008, the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights of the International Commission of Jurists released a report entitled 'Assessing Damage, Urging Action'. The Panel accepted that terrorism *may* pose a threat sufficient to justify exceptional responses by States to protect their populations. The Panel continued:

> However, it is equally clear in practice that [emergency] powers, once introduced, have often been abused, and have undermined basic principles of democracy and the rule of law. Often, powers introduced to deal with an emergency or temporary crisis, have become permanent.

For example, the introduction of anti-terrorism laws in Australia was justified by reference to the '[extraordinary] evil at which they are directed' (former Commonwealth Attorney-General, Daryl Williams MP, 21 March 2002) and were 'necessary because will live in unusual times' (former Prime Minister, John Howard MP, 18 October 2005). However, this language of exceptionalism has since been replaced by rhetoric such as that of the former Vice President of the United States, Dick Cheney, that 'emergency is the new normalcy'. Such rhetoric makes it almost impossible for extraordinary laws to be repealed, and emphasises the need for careful consideration in the first instance of whether extraordinary laws are justified by the security threat.

There is another aspect to the normalisation of extraordinary laws not dealt with by the Panel. Once extraordinary laws are adopted in a particular context, it becomes much easier for them to be adopted in other contexts where the threat is considerably lower. For example, in September 2008, the South Australian *Serious and Organised Crime (Control) Act 2008* came into effect. At the heart of this Act is the establishment of a regime for the executive proscription of organised crime groups. The Act also creates derivative offences for 'associating' with an organised crime group and enables courts and serious police officers to issue control and public safety orders respectively. This proscription regime draws heavily on Divisions 102 and 104 of the *Criminal Code Act 1995* (Cth), which respectively create a regime for the proscription of terrorist organisations and enable the issuing of control orders in relation to suspected terrorists.

The South Australian Act was justified by the Premier of that State, Mike Rann, on the basis that organised crime groups 'are terrorists within our community'. By broadly equating the organised crime and terrorism contexts, it was unnecessary for legislators to undertake a precise assessment of the threat posed by serious and organised crime groups and whether this threat in fact justifies the proscription of such groups.

There is little resistance at the community level to the priority given by legislators to effectiveness over human rights considerations. In fact the heightened level of fear in the community post 9/11 places pressure on the legislature to take action – any action – to protect the community against security threats (terrorist and otherwise). Given the inadequacy of any political method of accountability, it is important that a culture of restraint be fostered amongst legislators themselves. Central to this culture is the exercise of extreme caution before extraordinary laws are enacted which derogate from the ordinary criminal processes or infringe fundamental human rights such as the right to liberty, the presumption of innocence, and the freedoms of speech and association. One way in which this culture could be created is to establish a national Human Rights Charter which forces legislators to take into account human rights considerations before enacting legislation.

The normalisation of extraordinary powers (and the shift in the dialogue about these) is *also* apparent from events in New South Wales over the last three months. The Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009 was introduced into the Legislative Assembly on 4 March 2009. After less than two hours of debate on 11 March 2009, the Bill was passed by the Legislative Assembly. The Bill was introduced into the Legislative Council on the same day. After less than five hours of debate on 24 March 2009, the Bill was passed (with limited amendments) by the Legislative Council.

The lack of careful consideration of the Bill is of great concern given the subject-matter with which it was concerned. The Bill replicated provisions of the *Terrorism (Police Powers) Act 2002* (NSW) which gave police the power to conduct covert searches of premises for investigation of terrorism offences but extended these powers to *any* offence carrying a sentence of seven years imprisonment or more. Covert search warrants that authorise the entry and search of peoples' homes without their knowledge – indeed, the people will remain unaware of the search for up to

three years afterwards – necessarily interfere with the right to home and privacy in Article 17 of the International Covenant on Civil and Political Rights. For this reason, in 2002, the then New South Wales Premier, Bob Carr, stated that the power to conduct covert searches was 'confined to limited circumstances' and was 'not intended for general use'. Mr Carr implicitly recognised that the infringement of the rights to home and privacy could only be justified where the threat was grave – as the threat posed by terrorism is – and covert searches are necessary for investigations to be effective. The most concerning aspect of the expansion of these powers to the general policing context is the failure of the New South Wales Parliament to consider whether the same could be said of the threat posed by offences carrying a term of imprisonment of seven years or more. Instead of requiring a compelling justification to be demonstrated before the rights to home and privacy could be infringed, the New South Wales Parliament seemed to rely wholly upon effectiveness considerations. But if these are the only considerations to be taken into account, it's surely a very small step to the elimination of a requirement of warrants (which are fundamental to the protection of the public against abuse of power by the police) altogether.

Another example is the *Crimes (Criminal Organisations) Control Act 2009* (NSW). The government initially said that this Bill would not be introduced until June. However, with no notice, the Bill was introduced into the Legislative Assembly on 2 April 2009. In contravention of the usual procedure for urgent legislation, which requires parliamentarians to have five days' notice, the Bill was debated for just under two hours and then transmitted to the Legislative Council. It was passed by the Legislative Council just before midnight. Dr John Kaye expressed the concern of a number of parliamentarians about the speed with which the Bill was being considered by the Legislative Council:

> If the suspension of standing orders goes ahead it will mean not only that this House will not have the right to give proper consideration to the legislation but also that the people of New South Wales will not have an opportunity to see it. The first time the Greens saw it was this morning. We have not yet seen in print the Minister's second reading speech, and we have not yet been able to read the debate in the other House. Under these circumstances it is impossible to give legislation of this nature – which has such draconian implications not only for biker gangs but also for everyone throughout New South Wales – the consideration it deserves, given the principles it undermines.

The law is indeed draconian. It is based on the South Australian legislation (discussed above), and allows for the proscription of organisations by the courts if, for example, the organisation is a risk to public safety and order in New South Wales. On such an application, the rules of evidence do not apply, with the court being able to receive hearsay evidence and evidence of *suspected* criminal activities, and the standard is 'on the balance of probabilities' rather than 'beyond reasonable doubt'. Once proscribed, a control order may be issued in relation any member of an organisation. It is an offence for two people, both under control orders, to associate with one another. The penalty is two years imprisonment for a first offence. This legislation clearly violates the freedom of association. However, more than this, the hearing procedures violate the right to a fair trial, which includes the presumption of innocence, the right of a person to know the case against them, the right of a person to be present and test the evidence against them and the right of all citizens to equality before the law.

Despite the urgency with which this legislation was passed, like the South Australian legislation, no organisation has yet been proscribed. Presumably this reflects either the adequacy of the pre-existing criminal laws in dealing with organised criminal activity or the ineffectiveness of a law that penalises association. These are questions that would have been addressed had more time been given to discussion of this legislation in the New South Wales Parliament, along with the

fundamental one of whether the suspension of such essential liberties is actually justified by the nature of the threat posed by organised crime groups.

PART V: COMPARISON WITH THE EFFECTIVENESS OF THE *HUMAN RIGHTS ACT 1998* (UK)

Finally, through brief consideration of the British experience, we wish to discuss the impact that a Human Rights Act may have upon public and parliamentary debate on 'security' issues. The United Kingdom enacted the *Human Rights Act* (HRA) in 1998 and it entered into force in 2000. The HRA implements the United Kingdom's obligations under the European Convention of Human Rights and enables domestic courts to hear challenges to legislative and executive acts on the ground of incompatibility with a Convention right. The HRA is a legal instrument of rights protection that meets the description of a 'moderate' form of the statutory dialogue model. The features of this form of human rights legislation are fully explained in the submission of our colleague, Mr Edward Santow, to the Consultation Committee.

The successful terrorist attack on 7 July 2005 and later foiled plots leave no doubt that the threat of terrorist violence is very real in the United Kingdom. Yet the existence of the HRA, rather than inhibiting the capacity of the state to guard against political violence, has provided a means by which government responses may be continually assessed for their proportionality and effectiveness as measures that protect the community. Undoubtedly, the United Kingdom authorities did introduce some counter-terrorism strategies, such as the indefinite detention of aliens suspected of terrorist activity and the controversial 'shoot to kill' policy, which proved to be of questionable value in security terms while being fatally injurious to human rights. But the role that the HRA has enabled other actors – the Parliament, the courts and monitoring bodies such as the Independent Reviewer of Terrorism Laws – to play has ensured that such extreme responses were either discarded or ameliorated. In short, the United Kingdom experience is a sound demonstration of the arguments we made in Part I of this submission about the importance of respecting human rights as part of a sensible and effective counter-terrorism strategy.

The impact of the HRA upon the quality of democratic deliberation in the United Kingdom also serves to emphasise the points we made in Part II. Although that jurisdiction has not been without the experience of legislative brinkmanship in the face of urgent security needs asserted by the executive, there has been a far more robust and independent quality to the way parliamentarians have approached terrorism bills. It is notable that many members of the Blair government refused to support some of its more controversial measures and that the House of Lords played a major role in securing improvements to terrorism legislation. Of course, the political culture, not to mention the institutional features, which prevails in the Westminster Parliament is quite distinct from that of Canberra. But even noting such differences, the HRA has clearly ensured that anti-terrorism laws have received a far more intelligent and sustained scrutiny there than those enacted in Australia.

However, it is important to recognise that in some quarters scepticism exists as to the real contribution that the HRA has made to the operation of the United Kingdom's national security laws. In particular, there has been some dismay at the record of the judiciary in the protection of human rights in this context. Although the issuing by the House of Lords of a declaration that the indefinite detention of non-nationals suspected of terrorist activity was incompatible with articles 5 (right to liberty) and 14 (prohibition on discrimination on grounds of race or nationality) of the ECHR led the Blair government to abandon that scheme, their Lordships have been rather more accommodating towards the system of control orders which replaced it. British control orders are generally similar to those available in Australia (having in fact been the inspiration for the latter),

though they need not be obtained from a court. The Home Secretary has been sparing in the use of control orders (no more than 20 individuals have been subject to an order) but the conditions imposed have been highly intrusive for the individuals, their families and neighbours. Despite early defeats for the government in the lower courts, on appeal the House of Lords has effectively condoned orders imposing 16 hour a day home detention on their subjects. Additionally, their Lordships declined to declare the special court procedures involved in judicial confirmation of the orders as incompatible with article 6 of the ECHR (right to a fair trial). On both issues, the Parliamentary Joint Committee on Human Rights has expressed grave misgivings and disagreed with the judicial assessment. However, judicial approval appears to have lent legitimacy to the use of control orders to effect what, on any rational view, can only be seen as a serious denial of human rights.

On one level the later decisions by the House of Lords might be seen as confirmation, perhaps unpalatable, that the existence of a Charter of Rights is far from an impediment to so-called 'strong' state action in responding to terrorism. But it is rather too easy to dismiss the HRA as 'futile' on this basis alone. For one thing, laws affecting national security are always, and have traditionally been, treated with great deference by the courts. The operation of the HRA extends well beyond that context and the courts must be judged on their application of it overall. Second, as Professor David Bonner has recently argued, the very availability of judicial scrutiny of the rights implications of security measures is a vast improvement from the past when government-ordered detention went unchecked as a matter of course. Finally, the courts, while a powerful actor in the HRA's operation, are but a part of the picture. The HRA gives the United Kingdom Parliament, independent watchdogs and the broader community a platform from which to continue mounting objections to government policy which they believe is inconsistent with the formal commitment to certain rights. In short, while the United Kingdom's human rights record in responding to terrorism in recent years has been far from perfect, more moderation and scrutiny has been enabled by the HRA than would have occurred in its absence.

PART VI: CONCLUSIONS

In summary:

1. Far from being antithetical, effective national security and respect for human rights go hand in hand;
2. A Human Rights Act would improve the quality of democratic deliberation surrounding the introduction of new security measures;
3. Australia's anti-terrorism laws possess numerous features which are deficient in terms of human rights protection;
4. Increasingly, the negative aspects of security laws are becoming normalised through application in other contexts, thus further diminishing respect for rights; and
5. The experience of the United Kingdom illustrates that human rights can be accorded more express weight without compromising national security.