GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

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ICJ Australia
Eminent Jurist Panel Project
2 Talfourd St Glebe

Dear Chair,

ICJ Eminent Jurists Panel – Terrorism, Counter-Terrorism and Human Rights

Thank you for the opportunity to make a submission to the Panel in respect of Australia's efforts to combat terrorism.

The following submission takes its structure from the Panel's own suggested list of specific issues in which it is interested. We have selected those which we feel are particularly relevant to the Australian experience and about which we are able to comment. Our remarks pertain to the Commonwealth government unless otherwise indicated.

With recognition of the panel's workload, we have opted for fairly succinct responses to those questions we have chosen to address. We are happy to provide greater elaboration on these issues at our appearance before the Panel on Wednesday, 15 March.

Yours sincerely,

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Specific issues

1. What relevance has been given by government to human rights norms in regard to counter-terrorism laws and policies? Has your government questioned the relevance of these norms in the fight against terrorism?

The Commonwealth government has regularly stated that it is committed to balancing counter-terrorism measures with human rights and civil liberties. But at the same time, it has made it very clear that the community should be prepared to sacrifice some rights which it has previously taken for granted. While that must perhaps be expected, the extent to which incursions are made upon existing freedoms is problematic in Australia due to the lack of a national Bill of Rights. Hence, the 'balancing' process is far from transparent and the dynamic between security and rights is rather one-sided.

Additionally, the Commonwealth Attorney-General has actually justified greater security measures by employing civil liberties arguments. In particular, the Attorney-General has claimed that such laws ensure the fundamental right of persons to live in safety and security. Thus the Government appears to be of the view that its laws comply with Australia's international obligations 'to protect human rights by protecting human security'.[1] This argument is not original, but it is regularly invoked in Australia as a 'trump card' played whenever concerns about other rights are raised.

Some specific acknowledgment of the efforts of the government of the Australian Capital Territory to evaluate proposed counter-terrorism laws in light of human rights concerns is warranted. The ACT is the only Australian jurisdiction with a Bill of Rights and it sought legal opinion - from its own Human Rights Office, leading academic commentators and practitioners – about the major proposals in the second half of 2005.

2. What is the impact of counter-terrorism laws, policies and practices on the full observance of international humanitarian law; Is the application of those laws denied, are there any positions taken which affect the distinction between combatants and non-combatants?

New sedition offences in federal law potentially interfere with international humanitarian law. The Anti-Terrorism Act (No 2) 2005 creates offences where a person urges another person to engage in conduct intended to assist an organization or country either at war with Australia, or engaged in hostilities against Australian forces (see new s 80.2(7) and (8) of the Criminal Code (Cth)). Extended geographical jurisdiction – category D applies to these offences, meaning that the offence applies (a) whether or not the conduct constituting the alleged offence occurs in Australia; and (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia (see s 15.4, Criminal Code).

Consequently, under these laws, commanders of enemy forces who order their troops to attack Australian forces in armed conflicts outside Australia may be liable to prosecution for sedition under Australian law. This gives rise to a plain conflict with international humanitarian law, under which combatants participating lawfully in an armed conflict are entitled to combatant

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[1] Philip Ruddock, 'Opening and Welcome Address' (Presented at the Security in Government Conference, Canberra, 10 May 2005). See also, Philip Ruddock, 'A New Framework – Counter-Terrorism and the Rule of Law' (2004) 16 *The Sydney Papers* 113, 117.

immunity and POW status upon capture. Under international law, Australia is not entitled to criminalize enemy commanders for directing their forces in conformity with international law.

A practical consequence is that Australian forces themselves become endangered by these laws as a result of reciprocity. If enemy forces know that they will not be treated as POWs upon capture and instead will be prosecuted under Australian domestic law for lawfully performing their role as combatants, such forces will be less likely to confer POW status on Australian forces and may also resort to prosecuting Australian forces for participating in armed conflict. Moreover, enemy forces will be more likely to resort to extreme measures which violate humanitarian law in order to avoid capture at all costs.

3. Have anti-terrorist laws been passed by the use of exceptional procedures which reduce the Parliamentary role? eg, by executive regulation, by expedited procedures, or by reference to Security Council resolutions. Extent of public information about the level of threat. Effectiveness of regular reviews of the laws.

Although concerns existed in respect of the Commonwealth's initial timeline for the passage of its major *Anti-Terrorism Bill 2005* through the federal Parliament, in the end the bulk of its provisions were before the legislature for several weeks. During that time, the Senate's Legislation and Constitutional References Committee conducted an inquiry which, while brief, received close to 300 submissions, held three days of oral evidence, and produced a substantial report recommending certain amendments.

A few of the original Bill's provisions – which aimed to widen the offence of preparing or planning a terrorist act so that no specific plan need be established by the prosecution to have existed – were passed separately in the first week of November with very little debate after the Prime Minister announced that those amendment provisions were urgently required in order to assist authorities to arrest suspects who posed an immediate threat to our safety. Arrests were subsequently made and those cases are soon to be before the courts. The incident highlighted the difficulty of debating new national security laws without even a basic sense as to the extent of the threat. On the Government's national security website, the alert level has remained fixed at 'medium' since its creation.

So far as reviews of laws are concerned, the Attorney-General's Department has established an independent Security Legislation Review, in accordance with the statutory requirement in laws passed in 2002 that this would take place three years after their commencement. The Committee's task is somewhat complicated by the fact that many of the provisions which are to receive scrutiny have been superseded by later amendment.

The Parliament's Joint Committee on ASIO, ASIS and DSD was required to review the operation of the questioning and detention regime conferred upon Australia's intelligence services, before its expiry under a three year sunset clause. The Committee produced its report on 22 January this year and has made a number of recommendations to the detail of the scheme. The Commonwealth has yet to respond to the report.

The operation of some aspects of the *Anti-Terrorism Act (No 2) 2005* is to be reviewed after 5 years, in an agreement made between the Commonwealth and States and Territories. Other parts of that law, where federal co-operation is not required, are exempt from that process. However, the enactment of a revamped law of sedition was made with the promise of review

shortly after and the Attorney-General has since referred those particular provisions to the Australian Law Reform Commission for it to consider.

4. Impact of counter-terrorism laws on the role of the judiciary? Have the judiciary's powers to oversee the operation of the law, to ensure legality of actions been reduced? Has recourse to judicial remedies been diminished? What justification is given?

The Commonwealth's approach to the judiciary's role in respect of counter-terrorism might be best described as seeking to involve courts and alternatively, judges in their personal capacity, in the making of various orders – for questioning and detention of persons believed to have relevant information, and for orders of control and preventative detention. This trend, while worrying, has not really seen a commensurate diminishment of the scope of judicial review. It is worth noting, though, that the preventative detention orders under Division 105 of the *Criminal Code Act* are exempt from the statutory scheme of judicial review of administrative decisions (s 105.51).

What poses more risk of inhibiting the effectiveness of judicial review, is the limited access to information which people seeking to challenge a warrant or order have under many of the schemes. For instance, a person subject to a control order under the scheme introduced into the *Criminal Code Act* by last year's *Anti-Terrorism Act (No 2),* is only entitled to a summary of the grounds upon which the order has been made by the court.

5. Have there been changes in criteria for declaring state of emergency, and have any declarations or derogations from human rights occurred as a result?

There have been no formal changes to criteria for declaring a state of emergency in Australia. Australia has not notified the United Nations that it faces a public emergency threatening the life of the nation requiring it to derogate from its international human rights obligations. However, it has been argued that the new preventative detention orders and control orders, under the Anti-Terrorism Act (No 2) 2005, may amount to a derogation or suspension of rights such as freedom from arbitrary detention. In contrast, the United Kingdom has notified its derogated from its treaty obligations in order to support its enactment of similar control orders. It is noteworthy that preventative detention orders are even more invasive than control orders, yet Australia has not seen fit to derogate in relation to either of these measures.

The Australian Parliament is currently considering the *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006*, which regulates the circumstances in which the military can be called upon the support civilian law enforcement efforts within Australia. The concept of a 'public emergency' does not trigger the involvement of the military, which hinges instead on the occurrence of certain adverse events in particular areas. Before authorizing the use of the powers, the relevant Minister(s) must "have regard to Australia's international obligations" (clauses 51SC and 51ST(8)), which may include consideration of article 4 of the ICCPR. The Bill was recently the subject of a Senate Committee inquiry, which issued a report on the Bill.

It is, however, of concern that the Bill makes available to Defence Force personnel a defence of superior orders in certain circumstances cl 51WB). Although such a defence is available under the Rome Statute of the International Criminal Court, which Australia has ratified and enacted into domestic law, where the Australian military is assisting civilian authorities to quell *domestic violence*, it is not appropriate to make available a defence designed for the

circumstances of *armed conflicts*. Just as there is no defence of superior orders available to police officers in Australia who break the law, so too should there be no such defence available to military personnel, who may be acting against Australian citizens in Australia. There is a danger that such a defence would result in impunity for serious violations of the rights of Australian citizens and residents.

6. How are "terrorism". "terrorist act", and "terrorist organizations" defined in the law?

Under s 100.1 of the *Criminal Code Act 1995*, 'terrorist act' is defined as follows:

> ***terrorist act*** means an action or threat of action where:
> (a) the action falls within subsection (2) and does not fall within subsection (3); and
> (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
> (c) the action is done or the threat is made with the intention of:
> (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
> (ii) intimidating the public or a section of the public.
>
> (2) Action falls within this subsection if it:
> (a) causes serious harm that is physical harm to a person; or
> (b) causes serious damage to property; or
> (c) causes a person's death; or
> (d) endangers a person's life, other than the life of the person taking the action; or
> (e) creates a serious risk to the health or safety of the public or a section of the public; or
> (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
> (i) an information system; or
> (ii) a telecommunications system; or
> (iii) a financial system; or
> (iv) a system used for the delivery of essential government services; or
> (v) a system used for, or by, an essential public utility; or
> (vi) a system used for, or by, a transport system.
>
> (3) Action falls within this subsection if it:
> (a) is advocacy, protest, dissent or industrial action; and
> (b) is not intended:
> (i) to cause serious harm that is physical harm to a person; or
> (ii) to cause a person's death; or
> (iii) to endanger the life of a person, other than the person taking the action; or
> (iv) to create a serious risk to the health or safety of the public or a section of the public.
>
> (4) In this Division:
> (a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and
> (b) a reference to the public includes a reference to the public of a country other than Australia.

Under s 102.1 of the *Criminal Code Act 1995*, 'terrorist organisation' is defined as follows:

> ***terrorist organisation*** means:
>
> (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or
>
> (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)).
>
> *Definition of **advocates***
>
> (1A) In this Division, an organisation ***advocates*** the doing of a terrorist act if:
>
> (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or
>
> (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or
>
> (c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.
>
> *Terrorist organisation regulations*
>
> (2) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in this section, the Minister must be satisfied on reasonable grounds that the organisation:
>
> (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or
>
> (b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).
>
> (2A) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in this section, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation.
>
> (3) Regulations for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in this section cease to have effect on the second anniversary of the day on which they take effect. To avoid doubt, this subsection does not prevent:
>
> (a) the repeal of those regulations; or
>
> (b) the cessation of effect of those regulations under subsection (4); or
>
> (c) the making of new regulations the same in substance as those regulations (whether the new regulations are made or take effect before or after those regulations cease to have effect because of this subsection).
>
> (4) If:
>
> (a) an organisation is specified by regulations made for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in this section; and
>
> (b) the Minister ceases to be satisfied of either of the following (as the case requires):
>
> (i) that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);
>
> (ii) that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);

the Minister must, by written notice published in the *Gazette*, make a declaration to the effect that the Minister has ceased to be so satisfied. The regulations, to the extent to which they specify the organisation, cease to have effect when the declaration is made.

(5) To avoid doubt, subsection (4) does not prevent the organisation from being subsequently specified by regulations made for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in this section if the Minister becomes satisfied as mentioned in subsection (2).

(6) If, under subsection (3) or (4), a regulation ceases to have effect, section 15 of the *Legislative Instruments Act 2003* applies as if the regulation had been repealed.

(17) If:

(a) an organisation (the ***listed organisation***) is specified in regulations made for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in this section; and

(b) an individual or an organisation (which may be the listed organisation) makes an application (the ***de-listing application***) to the Minister for a declaration under subsection (4) in relation to the listed organisation; and

(c) the de-listing application is made on the grounds that there is no basis for the Minister to be satisfied that the listed organisation:

(i) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or

(ii) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);

as the case requires;

the Minister must consider the de-listing application.

(18) Subsection (17) does not limit the matters that may be considered by the Minister for the purposes of subsection (4).

7. What new criminal offences, based on the definition of terrorism or related to terrorism, have been introduced, and how have the laws been used?

Prior to 2002, the offence of terrorism was only recognised in the jurisdiction of the Northern Territory. However, a raft of new offences have been introduced to Part 5.3 of the *Criminal Code Act 1995*. These include:

- Engaging in a terrorist act;
- Providing or receiving training connected with terrorist acts;
- Possessing things connected with terrorist acts;
- Collecting or making documents likely to facilitate terrorist acts;
- Directing the activities of a terrorist organisation;
- Membership of a terrorist organisation;
- Recruiting for a terrorist organisation;
- Training a terrorist organisation or receiving training from a terrorist organisation;
- Getting funds to, from or for a terrorist organisation;
- Providing support to a terrorist organisation; and
- Associating with terrorist organisations.

It should be noted that for many of these offences, it is not necessary that 'a terrorist act' occurs or that the activity was being carried out for 'a specific terrorist act'. That was made explicit by the amendments of the *Anti-Terrorism Act (No 1) 2005*. Importantly, a threat to commit a terrorist act qualifies itself as a terrorist act.

8. What changes have been made in arrest and detention provisions applicable to terrorism suspects? Have administrative detention, arbitrary arrest, restricted access to counsel, limit on right to be informed, etc been introduced?

Terrorism suspects may be made the subject of a court-issued control order under Division 104 of the *Criminal Code Act 1995*. That may amount to house arrest for a 12 month period. They may also be subject to a preventative detention order under Division 105 of that Act. The latter scheme is not limited to suspects as such. Under section 105.4(4), an order may be made where:

> (a) there are reasonable grounds to suspect that the subject:
> (i) will engage in a terrorist act; or
> (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
> (iii) has done an act in preparation for, or planning, a terrorist act; and
> (b) making the order would substantially assist in preventing a terrorist act occurring; and
> (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

Additionally, the questioning and detention scheme granted to the Australian Security Intelligence Organisation (ASIO) by the *ASIO Legislation Amendment Act 2003* enables detention, for up to 7 days, of non-suspects who may have knowledge of interest to the organisation.

There are limits on contact in respect of each of these schemes. For example, penalties apply for disclosing the fact of a detention order to anyone beyond a single family member and employer. Access to a lawyer is permitted by the various schemes but there are restrictions as to the information they can obtain which would assist them in challenging their client's detention. Also, contact between client and lawyer may be subject to monitoring by police.

9. What significant counter-terrorism prosecutions have there been and what has been the experience in regard to prosecutions? Have there been other proceedings, such as detention, control orders in regard to terrorism suspects?

There have been very few prosecutions for terrorism in Australia and even fewer convictions. Most investigations and prosecutions have related to preparatory or inchoate offences rather than to actual terrorist acts, none of which has occurred in Australia to date. Defence lawyers have raised concerns about the adequacy of access to their clients and their ability to obtain full disclosure of all the evidence against their clients.

ASIO has used its new power to question people about terrorist activities around a dozen times since 2002. No information has been made available as to whether such questioning led to any prosecutions. ASIO has never used its detention power as far as we are aware.

10. Are there any special courts for this outside the justice system, or military courts or tribunals? [Not relevant for Australia.]

11. Are there special jurisdiction inside the justice system, or special procedures, limiting the right to defence or other attributes of fair trial?

and

12. Have special evidence laws been introduced which may affect fair trial, and what justification is given for these?

Of particular note is the *National Security Information (Criminal and Civil Proceedings) Act 2004*. This Act gives the Attorney-General the power to intervene in any court matter so as to suppress evidence where judged necessary to protect national security. The Attorney-General can even block the prosecutor or defendant from calling a witness in a criminal proceeding, where their mere presence will be prejudicial to national security. The Act initially applied to criminal proceedings but was later extended to civil proceedings as well, although provisions differ slightly in those different contexts. The Act was the outcome of an inquiry by the Australian Law Reform Commission, which produced a report to Parliament, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (2004).

The *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005* changed certain evidentiary rules regarding proceedings for terrorism-related offences. It amended the *Crimes Act 1914* to create new provisions for the use of video link evidence, as well as making amendments to the *Foreign Evidence Act 1994* in order to facilitate the use of foreign evidence in these proceedings.

In respect of both schemes, the effect of the 2005 amendment is that if the defence has made the application, the court must direct or order the witness to give evidence 'unless the court is satisfied that it would be inconsistent with the interests of justice for the evidence to be given by video link'. This accords with the standard expression of judicial discretion on this question.

However, when the prosecution makes an application, the court must direct or order the witness to give evidence unless it is of the view that to do so would have 'have a substantial adverse effect on the right of the defendant in the proceeding to have a fair hearing'.

While the admission of evidence by video link or foreign evidence would not, of itself, give rise to a contravention of the principles set out in Article 14(1) of the ICCPR, the imbalance created between the ability of the parties to call video evidence favours the prosecution – the Government admitted the defence had narrower grounds upon which to object to an application – and violates the principle of 'equality of arms' that finds expression in Articles 14(1) and 14(3)(e) of the ICCPR. The Senate inquiry into this legislation recommended use of single 'interests of justice' standard but that proposal was not adopted.

The Explanatory Memorandum to the Act was quite direct in justifying the narrowing of the discretion in the instance of applications made by the prosecution to use video link evidence:

> This ensures that, in a terrorism prosecution, where evidence from a witness may be critical to the prosecution's capacity to prove the guilt of the defendant beyond a reasonable doubt, the court will only be able to disallow video link evidence where there is a compelling reason to do so.

13. Have laws or policies increased the risk of torture? eg, coercive interrogation?

Various statutory provisions prohibit the 'cruel, inhuman or degrading treatment' of detainees by domestic authorities. These include s 34J of the *Australian Security Intelligence Organisation Act 1979* and s 105.33 of the *Criminal Code Act 1995*.

Australian evidence law varies between jurisdictions but generally precludes the admissibility in any proceeding of an "admission" which is "influenced by violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person or a threat of conduct of that kind" (s 84, Evidence Act 1995 (Cth, ACT, NSW)). An admission is defined as "a previous representation that is: (a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and (b) adverse to the person's interest in the outcome of the proceeding".

Where the evidence is not an admission (because the person tortured is not a party to the proceedings), s 138 provides that evidence "that was obtained improperly... is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained". Thus Australian courts will balance competing public interests to decide whether the evidence may be admitted. There is no rule of automatic inadmissibility. There is thus a discretion whether to admit evidence tainted by the torture of a third party, including if it occurs overseas.

Further, concern was expressed at the passage of the *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005*, that it did not adopt sufficient safeguards against the use by Australian courts of evidence from elsewhere which was tainted by torture.

The Australian Law Reform Commission (ALRC) recently reviewed uniform evidence law in Australia but did not make any recommendation to absolutely exclude torture evidence: see *Uniform Evidence Law* (2006) (chapter 16: Discretionary and Mandatory Exclusions).

Where foreign evidence obtained by torture is not being used in any "proceeding" – for example, in law enforcement activities or for security or intelligence purposes, to prevent a terrorist attack – there is no prohibition on the use of such evidence.

Finally, allegations have been made that Australian officials were present during the ill-treatment of an Australian citizen, Mamdouh Habib, whilst he was in the custody of foreign authorities. The Australian government denies the allegations.

14. Have any laws or policies contributed to enforced disappearances or arbitrary killings?

No.

15. Are there any changes in laws or policies in regard to return and transfer of persons in terrorist cases which may affect human rights, or increased risk of torture? eg, return, extradition or deportation to risk of unfair trial, death penalty

There have been no changes specifically relating to terrorist suspects. However, Australian law does not expressly incorporate the principle of *non-refoulement* to torture or ill-treatment. Neither the Convention against Torture (CAT) nor the ICCPR are incorporated into Australian

law. The Migration Act 1958 (Cth) does not prohibit returning a person to a place where they are at risk of torture or ill-treatment. Instead, where a non-citizen's application to stay in Australia has been rejected by the authorities, the Minister for Immigration has a discretionary power under s 417 of the Migration Act to substitute a favourable decision where it is in the "public interest" to do so. The Minister has published non-binding guidelines which identify Australia's obligations under the CAT, ICCPR and the Convention on the Rights of the Child.

This process is manifestly flawed because it is a non-reviewable, non-compellable discretionary power residing in a politician, rather than a legally enforceable right subject to judicial review. Moreover, s 417 can only be invoked after all other lawful grounds and procedures for permission to remain in Australia have failed, often after protracted periods of years, which prolongs the uncertainty faced by those who fear return to torture and impairs their ability to recover from past trauma associated with torture or ill-treatment. Finally, under the Convention against Torture, Australia has only assumed an obligation not to return a person to torture, and it is unclear whether Australia accepts a wider customary law obligation not to return a person to cruel, inhuman or degrading treatment or punishment (as in European law).

The Australian Attorney-General's Department is currently reviewing the entirety of Australia's extradition law and practice, including fundamental issues such as whether to abolish the political offence exception to extradition and rules on return to torture. The review arose from concerns about the threat of terrorism and transnational organized crime. It is not yet known what reforms the government will propose and whether these give rise to a risk of torture.

Recently, there has also been concern over the fate of the "Bali 9". The Australian Federal Police supplied the Indonesian police with information which led to the arrest of suspected drug smugglers in Bali, on offences which could carry the death penalty. Australian police arguably had the opportunity to arrest the suspects in Australia, where the death penalty would not apply. The federal police have been criticized for cooperating with foreign authorities in circumstances where this exposed Australian citizens to the death penalty. The *Mutual Assistance in Criminal Matters Act* (Cth) provides the authorities with a discretion whether to cooperate with foreign authorities in certain cases involving the death penalty.

16. Are there counter-terrorism laws which limit the right to freedom of expression? eg, censorship or incitement laws, laws about praise of terrorism, etc

There are three key areas in which recent counter-terrorism laws impact upon free speech. First, speech is relevant to the grounds upon which the Attorney-General may rely in proscribing terrorist organisations under s 102.1(2) of the *Criminal Code*. As recently amended by the *Anti-Terrorism Act (No 2) 2005*, before the regulation specifying an organisation can be made, the Minister must be satisfied on reasonable grounds that the organisation:

> *(a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or*
> *(b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).*

'Advocates' is defined in s 102.1(1A) as occurring if:

(a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or
(b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or
(c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.

Although, following recommendations by the Senate Legal and Constitutional Legislation Committee, this is a significant improvement upon the original proposal, legitimate concerns persist about this new ground for proscription.

In particular, s 102.1(1A)(c) indicates an intention to cover *indirect* incitement of terrorism, or statements which, in a very generalised or abstract way, somehow support, justify or condone terrorism. The effect of proscribing an organisation on this basis has serious consequences under the accompanying criminal provisions. Individuals, be they either a member (*Criminal Code*, s 102.3) or an associate ((*Criminal Code*, s 102.8), could be prosecuted merely because someone in their organisation praised terrorism – even if the organisation has no other involvement in terrorism; even if the praise did not result in a terrorist act; and even if the person praising terrorism did not intend to cause terrorism. This is an extraordinary extension of the power of proscription and of criminal liability, since it collectively punishes members of groups for the actions of their associates beyond their control. Conversely, it is likely to have a 'chilling' effect upon free speech.

Second, and more directly, the Commonwealth has updated the offence of sedition in s 80.2 of the *Criminal Code Act*. Sedition may take numerous forms but includes urging a person to assist the enemy or those engaged in armed hostilities. It is made clear that these provisions do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature. Additionally, there is a broadly framed defence of 'good faith'. There was wide concern about these provisions at the time of their enactment in the *Anti-Terrorism Act (No 2) 2005*, with the Senate Inquiry recommending they not be passed. (Our earlier submission to that inquiry dealt at length with the impact of these proposals on freedom of expression and a copy of that submission is available upon request; see also Ben Saul, 'Speaking of Terror: Criminalizing Incitement to Violence' (2005) 28 University of NSW Law Journal 868). A compromise was reached and the Attorney-General agreed to establish a review into the provisions in the New Year, which he has done by referring the matter to the Australian Law Reform Commission. Some of the new sedition offences partially incorporate Australia's international human rights obligations to prevent and punish racial and religious hate speech.

Lastly, as averred to above, some of the strongest new powers have been granted to ASIO. It can now seek to have any Australian citizen questioned, and even detained for up to a week, on grounds that include that the person might 'substantially assist the collection of intelligence that is important in relation to a terrorism offence'. The law states that it a crime, for two years after someone has been detained, to disclose 'operational information' about the detention. The penalty for doing so, even if the information is provided to the police for investigative purposes or as part of a media story on the detention regime, is imprisonment for up to five years. This means that two years must pass before abuses involving the operational activities of ASIO can be exposed through media reporting.

17. Are there counter-terrorism laws which impose limits on freedom of association, assembly, religious expression? eg, proscription of organizations, etc. How are these justified?

As indicated above, it is a criminal offence to be a member of, provide support to or associate with a 'terrorist organisation' under Division 102 of the *Criminal Code Act 1995*. It is not necessary for the organisation to have been proscribed in order for charges to be laid under those provisions. However, where proscription has occurred, the procedure is as set out in that part of s 102.1 extracted above in respect of question 6. It is worth noting that the Attorney-General is not limited to the proscription of those organisations identified by the UN Security Council as terrorist in character.

The Anti-Terrorism Act (No 2) 2005 also provides that an organization can be banned as an "unlawful association" where it expresses a "seditious intention" (see new s 30A, Crimes Act 1914 (Cth)). A seditious intention is an intention to, by force or violence: (a) bring the Sovereign into hatred or contempt; (b) urge disaffection against (i) the Constitution, (ii) the federal Government, or (iii) either House of the Parliament; (c) urge another person to attempt to unlawfully change any matter established by Commonwealth law; or (d) promote feelings of ill-will or hostility between different groups so as to threaten the peace, order and good government of the Commonwealth.

As with terrorist organizations, members and leaders of unlawful associations may be criminally prosecuted and the assets of such associations are forfeited to the government. It is also an offence for a person to allow an unlawful association to meet in the person's building or premises.

Both of these powers to ban organizations are potentially disproportionate restrictions on freedom of association, assembly, and religious expression. They may allow a whole mosque or religious institution to be closed down, and its members prosecuted, to prevent and punish the statements of a single wayward individual. The law does not specify who represents an organization or association for the purpose of attributing responsibility for either praising terrorism or expressing a seditious intention. Thus an organization may be banned on the basis of statements which do not represent the official position of the organization as a whole.

18. Are there counter-terrorism laws affecting the right to privacy? Eg, surveillance laws, laws about collection and sharing of data. What is their justification?

Australia has long had detailed laws regulating the authorization and use of telephone intercept warrants for criminal suspects by law enforcement authorities, usually issued by judges in their personal capacity. The government proposes to supplement these powers with the current Telecommunications (Interception) Amendment Bill 2006, which introduces powers to intercept communications of non-suspects (with whom suspects may communicate), and to clarify powers on the interception of stored communications (such as emails and SMS). There is currently a parliamentary inquiry into this Bill, to which the Gilbert + Tobin Centre for Public Law has made detailed submissions (available on request).

The Anti-Terrorism Act (No 2) 2005 allows the Federal Police to issue on any person a written notice to produce certain kinds of information in relation to terrorism investigations. The power is designed to by-pass the procedural protections governing the collection of evidence through the ordinary search warrant procedure, which requires a magistrate to issue the warrant.

Allowing the police to issue a written notice to produce without the approval of a magistrate departs unjustifiably from ordinary criminal investigative procedures and diminishes essential legal protections. Legal professional privilege is not fully preserved.

19. Do any counter-terrorism laws make distinctions on the ground of nationality, race, ethnicity, religion etc? Eg, racial or ethnic profiling, citizenship laws.

No.

20. What procedures are used to control finances of terrorists, or to criminalize the financing of terrorism, eg freezing assets? What are the justification for these?

As noted in question (7) above, new offences of financing terrorism were adopted in 2002, in part to implement Security Council measures against the financing of terrorism in resolution 1373 (2001). The Anti-Terrorism Act (No 2) 2005 adds a further offence (with life imprisonment) where a person intentionally makes funds available to another person (directly or indirectly), or collects funds for another person (directly or indirectly), where that first person is "reckless" as to whether the other person will use funds for terrorism.

This new offence of financing a terrorist even in the absence of an *intention* to finance extends criminal liability too far and makes it impossible for any person to know the scope of their legal liabilities with any certainty. It requires people to consider whether their money might eventually end up supporting terrorism whenever they spend or donate money.

21. Do counter-terrorism laws result in any reduction in accountability for human rights violations or lead to impunity, or reduction in access to remedies?

Australia's counter-terrorism laws have, as eventually enacted after public and parliamentary debate, tended to ensure some recourse for the accused/detained. In addition to access to the courts, complaints may be raised with bodies such as the Administrative Appeals Tribunal, the Inspector-General of Intelligence Services and the Commonwealth Ombudsman. However, the ability of these entities to provide relief may be adversely affected by difficulties in accessing information and evidence pertaining to national security matters.

In addition, there is no constitutional or statutory bill of rights in Australian law and judicial remedies are not available for breaches of international human rights and freedoms. Given the invasive character of some of Australia's counter-terrorism laws, the absence of formal procedures and remedies for the protection of human rights is of some concern.