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The Hon. Anthony Whealey QC

Chair

COAG Review of Counter-Terrorism Legislation

By email: CTReviewSubmissions@ag.gov.au

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Dear Chair,

COAG Review of Counter-Terrorism Legislation

Thank you for the opportunity to make a late submission to this review. My submission focuses on selected international law and criminal law aspects of the Commonwealth laws under review. For the sake of brevity it is confined to emphasising key points (though I am willing to elaborate further on request if that would assist).

By way of expertise, I am author of the research book, *Defining Terrorism in International Law* (Oxford University Press, Oxford, 2006) and *Terrorism: Documents in International Law* (Hart, Oxford, 2012), and practice as a barrister in security cases involving international law (including ASIO matters and the case of David Hicks). I hold an Australian Research Council Future Fellowship to write two books on terrorism and international law, involving interviews with terrorist organisations in 20 countries.

1. Definition of Terrorism

I note, but disagree with, criticisms of Australia's definition of terrorism by expert, non-political United Nations human rights bodies. For instance, the UN Human Rights Committee has criticised the vagueness of the definition of 'terrorist act' and recommended that Australia 'ensure that its application is limited to offences that are indisputably terrorist offences'.¹ In addition, the former UN Special Rapporteur on terrorism and human rights, Martin Scheinin, (accurately) suggested that the Australian definition exceeds the scope of the guideline definition in Security Council resolution 1566 (2004),² which is limited to offences in 'sectoral' (method specific) international treaties, and which does not endorse generic definitions as in Australian law.

¹ UN HR Committee, *Concluding Observations: Australia*, CCPR/C/AUS/CO/5, 7 May 2009, para. 11.

² Martin Scheinin, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Australia: Study on human rights compliance while countering terrorism*, 14 December 2006, A/HRC/4/26/Add.3, paras. 15-17.

In my view, informed by my primary analysis of most countries' terrorism definitions in my book, based on hundreds of state reports to the UN Security Council,³ Australia's legal definition of terrorism is actually amongst the most tightly-drafted and human rights-respecting definitions in the domestic laws of any country, though there remain some key defects. It is a compound definition which specifies certain forms of harm (or threatened harm), coupled with a special intent to coerce or intimidate a government or intimidate the public, and requiring a further special intent (also described as a motive) to advance a political, religious or ideological cause.

As I have written elsewhere, the cumulative elements of the definition ensure that it applies to a fairly narrow range of circumstances, and properly identifies the underlying policy objective to target certain forms of publicly-oriented (or motivated) violence, thus distinguishing terrorism from other kinds of political or common crime.

As I have written elsewhere,⁴ I am satisfied that the 'motive' element of the definition is consistent with Australia's international human rights obligations. While there are certainly risks of improper policing practices (such as ethnic or religious profiling), a democracy remains entitled to criminalise violence that is motivated by political or religious beliefs, without impermissibly infringing protected freedoms of political and religious expression. Beliefs connected to or inciting violence in a democracy are not protected by international human rights law. The exclusion of less harmful democratic protest from the definition is also a welcome additional safeguard.

There are, however, some key defects with the current definition.

(a) International organisations are not protected

The definition protects any Australian or foreign government from coercion or intimidation but does not similarly protect international organisations, whether United Nations bodies or others.⁵ While such bodies are partially protected by other regimes under international and Australian law, international law and practice strongly supports their inclusion and protection in the definition of terrorism *as well* (namely, the definition of terrorism in the Draft Comprehensive Terrorism Convention, and in Security Council resolution 1566 (2004)). There are also practical reasons for their inclusion. Terrorism has commonly attacked the international community of states by targeting its organisations. The fullest repression of terrorism requires their protection.

(b) Situations of 'armed conflict' are not excluded

Australia's definition does not exempt acts committed in an international or non-international 'armed conflict' under international humanitarian law. The lack of an exception is seriously problematic.

³ This view is based on my review of the terrorism definitions in almost every national jurisdiction world-wide, based on many hundreds of country reports to the United Nations Counter-Terrorism Committee after 9/11, and analysed in detail in my book, *Defining Terrorism in International Law* (2006).

⁴ Ben Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient – Or Criminalizing Thought?' in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, Sydney, 2007), pp 28-39.

⁵ A proposal to extend the definition to the UN was included in the Attorney-General's *National Security Legislation: Discussion Paper on Proposed Amendments* (July 2009) but was ultimately not adopted.

First, it criminalises acts that are *lawful* under international humanitarian law (specifically acts of lawful hostility by combatants in international conflict – including violence by Australia’s own forces or other state armed forces as licensed by the law of war).⁶ In principle this renders Australian soldiers liable but for reliance on a defence of lawful excuse (that is, authority under defence legislation); and politicised prosecutors (who are unlikely to prosecute allied forces, and thus make highly selective political decisions not to prosecute, despite violence by foreign state armed forces clearly meeting the definition of terrorism).

Secondly, the definition criminalises acts which are not authorised by international law but which are not criminal (specifically violence against military objectives by non-state armed forces, such as rebels or insurgents, in civil war, which does not harm civilians). Thus violence by Syrian or Libyan rebels against authoritarian regimes is terrorism, even if it is confined to discriminate, proportionate attacks on military objectives. Again, this interferes in the law of war, and forces prosecutors to make political choices about whether to prosecute rebel movements which the executive may well support.

Such criminalisation is not consistent with Australia’s obligations under international humanitarian law. The criminalisation of non-state groups eliminates the (already weak) incentives under international humanitarian law for such groups to comply with the law, inevitably undermining civilian protection. *It is also not supported by international counter-terrorism law, which specifically exempts armed conflicts from the definition.*⁷ Illegitimate violence against civilians already constitutes war crimes in Australian law.

(c) The definition criminalises all violence against authoritarian governments

Some violence falling within the terrorism definition, and not covered by the democratic protest exception (or any additional armed conflict exception that may be added) may nonetheless be widely or popularly regarded as ‘legitimate’ in exceptional cases. Classically, these might include attempted revolutions or rebellions (beneath the threshold of armed conflict) against authoritarian governments which suppress human rights and freedoms, or lone assassins of dictators (the American political philosopher Michael Walzer gives the example of Hitler’s assassin – who would object? Hannah Arendt too notes that most democracies were founded in violent crimes against *ancien* regimes). The international community acknowledges the legitimacy of violent resistance to unjust rule in the preamble of the *Universal Declaration of Human Rights*.

An intractable problem in the Australian definition is that it not only protects democratic, rights-respecting governments, but also criminalises political violence against any foreign state, including tyrannical or genocidal regimes, *and even where such violence is proportionately and discriminately directed only against the state’s agents of repression* (such as military personnel or secret police). It is one thing for Australia’s democracy to protect itself and other democratic, rights-respecting regimes by criminalising terrorism (whether attacks on civilians or the state); it is quite another matter to extend that protection to propping up brutal undemocratic dictatorships.

⁶ It is internationally lawful for State armed forces to use violence to coerce a foreign government for political purposes, which is the essence of the Australian definition of terrorism.

⁷ Terrorist Financing Convention 1999, article 2(1)(b)); Terrorist Bombings Convention 1997, article 19(2); Nuclear Terrorism Convention 2005, article 4; UN Special Tribunal for Lebanon (Appeals Chamber), *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/I, 16 February 2011.

Herein lies the essential difficulty of attempting to universally (and extraterritorially) apply a definition of terrorism to shield all governments from political violence. Historically, laws and courts in western liberal democracies did not extraterritorially criminalise most political violence against foreign states, and also recognised a ‘political offence exception’ to extradition requests where political violence constituted crimes under foreign domestic law. Such approach was designed to ensure that one state did not interfere in the resolution of political disputes in another state.

Australia’s current terrorism definition overturns some centuries of legal convention in this area. Certainly innocent civilians in autocratic foreign states should always be protected from terrorist violence by Australia’s law, but the law should not go further by protecting violent or repressive foreign states from legitimate violent resistance. **There are a number of legal means of drawing such a distinction:**

- (i) Leave the definition unchanged and rely upon prosecutorial discretion not to prosecute in cases of ‘legitimate’ political resistance. While attractive for its flexibility, the disadvantage of this approach is to politicise prosecutors. Political selectivity in application brings the law into disrepute: no-one can trust that it will be applied impartially to conduct it is supposed to regulate;
- (ii) Amend the definition of terrorism to exclude proportionate, discriminate attacks on foreign state personnel, thus limiting terrorism to violence against ordinary civilians in foreign states (and all violence against the Australian state). This approach has the advantage of legal certainty, but is overbroad in failing to protect foreign democracies from attacks on their institutions;
- (iii) Amend the definition of terrorism by introducing some kind of exception clause for violent acts against repressive or authoritarian regimes, perhaps measures according to whether such regimes have severely breached international law standards on human rights and international crimes. This approach most accurately addresses the policy concern, but has the disadvantage of introducing a level of subjectivity into the judicial process;
- (iv) Provide for prospective executive designation or certification of repressive, autocratic foreign states (such as those which systematically violate human rights, or commit international crimes), for the purpose of excluding the Australia’s terrorism definition to conduct committed against such states. Such approach appropriately empowers the executive with political, foreign policy decisions about the legitimacy of violence against foreign states, preventing the courts from being politicised. One disadvantage is that it introduces political selectivity into the application of a legal definition, though this is done in other contexts in the United States (by the Secretary of State) and, in differently, under Australia’s *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth)). Terrorism is, however, an inherently political area of law and it may be preferable to overtly recognise this rather than concealing political dimensions under an apparent (but unreal) legal objectivity. Designations may, however, be out of date unless often updated;
- (v) Require the Attorney-General’s consent to any prosecution of terrorist act committed against foreign state personnel. This is the simplest (and my preferred) solution, and is a device already used for the prosecution of international crimes (such as war crimes or crimes against humanity) under

the *Criminal Code* (Cth). Again it properly reposes political decisions in the executive, and quarantines the judicial process from politicisation;

- (vi) Provide the Attorney-General with a power to pardon (or give amnesty to) those convicted of terrorism against repressive foreign states, to be used sparingly in cases where the violence is widely recognised as legitimate. A pardon after the fact has the advantage that the legal system is still able to express its condemnation of violence, while recognising that the consequences or penalties should be mitigated because of the compelling political or moral reasons for action (that is, as ‘illegal but justifiable’). Again the executive is properly charged with political decision-making.

(d) Removal and relocation of ‘threat of action’ from the definition

I agree with the Commonwealth Director of Public Prosecutions, in his submission to your Review, that ‘threat of action’ be removed from the definition of terrorism and relocated to a separate offence of threatening to commit terrorism, for the reasons of better legislative drafting and the reasons given by the CDPP.

2. Preparatory or Inchoate Offences

Here I do not address the technical detail of the various inchoate offences but rather make three broader legal and policy points. **First**, UN Security Council Resolution 1373 (2001) provides quasi-legislative guidance to States concerning the extended modes of criminal participation in terrorism. It requires states to criminalise not only the ‘perpetration’ (commission) of terrorist acts, but also participation in the ‘financing, planning, [or] preparation’ of such acts.

Beyond that bare instruction, the Council did not stipulate the scope of offences, but left the manner of implementation to national discretion (subject to each state’s international human rights law obligations). It is not accurate to imply, as the Australian Government has often done (see, eg, ASIO’s submission to your Review), that Australia’s various anti-terrorism offences *as legislated* are specifically required by its UN Security Council obligations; and they are certainly not permitted where they interfere unlawfully with human rights.

Secondly, such offences are premised on a risk-based, precautionary policy, designed intervene earlier than usual in the criminal enterprise and capture deep preparatory acts. The idea is that the clandestine nature of terrorist networks, and the possibility of catastrophic harm, differentiates the policing of terrorism from ordinary crime. The authorities cannot wait until targets crystallise, weapons are acquired, the time of attack is agreed, or conspiracies materialise. The result is a stricter liability, by which the law transmits stronger signals of deterrence towards those contemplating terrorist acts.

Their contentious aspect is, however, precisely how far back the criminal law *should* reach into the chain of causation – and how much faith can be placed in the law’s capacity to make reliable probability judgments about a person’s likely future conduct. Not all terrorism is catastrophic; indeed, most of it is not and is more ‘garden variety’. Offences that are apt for catastrophic terrorism may not be suited to the ‘normal’ case.

Further, the earlier the criminal law intervenes, the higher the risk of capturing conduct which is remote from any actual or imminent terrorist harm. Downloading an extreme religious document from the internet (and doing nothing with it), providing a mobile phone to one's relative, or donating money to a charity abroad assumes a new, criminal complexion, whereas previously such action fell within the ambit of lawful activity. Over-reach by the criminal law brings legitimacy costs and risks of being counter-productive, if legal controls are socially perceived as too intrusive or too harsh, and if they stimulate blow-back from minority communities upon which law enforcement depends for a continuing flow of criminal and security intelligence.

I note, and endorse, in this regard that the NSW Director of Public Prosecutions has made the point to your Review that he is 'anxious... that terrorist offences and prosecutions aren't so radically different from the form and prosecution of regular offences so as to lead to a perception that long held safeguards that are the key features of the rule of law have been expediently abandoned'.

Thirdly, one might expect that earlier intervention would bring correlatively lower criminal penalties, and which are proportionate within the sentencing scheme for all crimes, yet overly-punitive sentences have sometimes characterised convictions for relatively low-level preparatory conduct. It is difficult to see why, for instance, a very early and not-so-serious terrorist conspiracy, which harms no-one and in which no-one was likely to have been harmed, should attract substantially higher penalties than, for instance, ordinary crimes causing death (such as manslaughter), or malicious wounding, or serious sexual assault.

3. Terrorist Organisations – Proscription

First, given the serious adverse consequences of the listing of a terrorist organisation, and the risk of executive abuse, the power to proscribe should be exercised by a court, and accompanied by sufficient procedural fairness to enable the affected organisation to effectively know and challenge the allegations against them. (Incidentally, such opportunity should also be afforded to organisations designated as a result of the UN Security Council's Resolution 1267 Committee Consolidated List).

Secondly, where an organisation is proscribed for advocating terrorism, the law should clarify the circumstances in which the views of an individual member (such as a senior leader) are to be taken as representative of the organisation. It is necessary to ensure that the wayward expressions of group members (for instance, a member of a church or mosque congregation) are not regarded as a reason to ban the organisation and to disproportionately interfere in the protected human rights of all members.

Thirdly, I note that ASIO has suggested to your Review that sometimes an organisation of concern may fall outside the power to proscribe where it 'goes to ground for a period of time, and as a consequence it cannot be shown, through either open source or classified reporting, to have undertaken terrorist activity for two or three years, but nonetheless has the potential to engage in terrorist activity in the future'. I would be very alarmed by any further suggestion that the duration of proscription should be extended in such cases, in the absence of even classified evidence of risk. That would amount to imposing a legal liability based on arbitrary speculation without evidence.

4. Terrorism Organisations – Offences

Some of the offences connected to terrorist organisations are problematic as follows:

(a) Receiving training from or provide training to a terrorist organisation

Any training provided to a terrorist organisation is a criminal offence, not only training to commit terrorism. For instance, it would be an offence to train members of a terrorist organisation to understand international humanitarian law or human rights treaties, or in conflict mediation and resolution, or training in basic medical first aid. Unfathomably, there is no exception to this offence. Both the Sheller Committee and the Parliamentary Joint Committee on Security in 2006 criticised the criminalisation of “innocent” training which does not support terrorist activities.

(b) Receiving funds or making available funds to a terrorist organisation

It is similarly an offence to provide any funds to a terrorist organisation, even where funds are not provided for the purpose of terrorism. For instance, it would be an offence to fund the medical services or hospitals run by terrorist organisations, including armed groups controlling territory and administering civilian communities and services in armed conflict (from Al Shabaab in Somalia to the LTTE in Sri Lanka). There is again no “humanitarian aid” exception.

(c) Providing support or resources to a terrorist organisation

It is an offence to provide support or resources to a terrorist organisation, where that support would help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act. The particular kinds of support captured by this offence are not specified. This results in vagueness or indeterminacy and raises the human rights problem of a failure to satisfy the principle of legality (that is, prospective certainty and predictability in the scope of liability) under article 15 of the *International Covenant on Civil and Political Rights* (protecting against freedom from retrospective criminal punishment). It would be preferable to define the forms of support that constitute ‘support or resources’, just as United States law does in relation to its offence of providing material support to a terrorist organisation.

(d) Associating with a terrorist organisation

I support the criticisms made by the Sheller Committee and the Parliamentary Joint Committee on Security in 2006 of the very existence of the association offence.

(e) Membership of a terrorist organisation

The offence of membership is unnecessary and should be repealed. If a person is engaged in acts preparatory to the commission of a terrorist offence, including in concert with members of a group, the existing inchoate or preparatory terrorism offences amply criminalise such conduct. There is perhaps a marginal deterrent value in singling out membership as a special form of criminal wrong, but it adds little to the practical repression of terrorism.

5. Control Orders

Control orders are unnecessary and should be repealed. Their preventive purpose can ordinarily be achieved by the arrest (and thus incapacitation) of a suspect, particularly because there now exist so many deeply preparatory or inchoate terrorism offences and it is feasible to apprehend a person well before an attack is imminent (including, for instance, where a person has previously trained for terrorism). If an attack has become imminent, it is almost certain that there will be sufficient evidence to arrest the person; it is difficult to see how the standard for issuing an order ('necessary') can be met in the absence of some certainty of evidence. There is also a presumption against bail in terrorism cases, so that detention following arrest is the norm, thus achieving the objective of preventing terrorism. Control orders are largely redundant, other than in very rare (and unlikely) cases where police cannot meet the standard for arrest.

If control orders are retained, stronger safeguards are needed:

- (a) Past conduct alone (such as training), without evidence of future intention, should not be a sufficient basis on which to issue an order;
- (b) A criterion for issuing an order should be that police must demonstrate that they have exhausted other means, or that such means would be ineffective, for achieving the security objective, such as surveillance or criminal charge;
- (c) Given that orders invasively restrict fundamental human rights, the standard of 'balance of probabilities' is too low, and should be raised;
- (d) A higher level of disclosure of adverse evidence or information should be provided to an affected person to ensure fairness (see Annex for details);
- (e) There should be an absolute statutory limit on the number of hours per day that a person may be confined to house arrest (for instance, 16 hours maximum);
- (f) A control order should not be imposed on the basis of the same evidence which sustained a criminal conviction that has already been served, where the expiation of guilt through punishment and rehabilitation is assumed by the criminal law.

Further details of some of these points is provided in the **Annex**.

6. Preventive Detention Orders

In my view preventive detention is unnecessary and should be repealed. The purpose of such detention is to prevent an imminent terrorist attack. That purpose can ordinarily be achieved by the arrest (and thus incapacitation) of a suspect, particularly because there now exist so many deeply preparatory or inchoate terrorism offences and it is feasible to apprehend a person well before an attack is imminent. If an attack has become imminent, it is almost certain that there will be sufficient evidence to arrest the person; it is difficult to see how the standard for issuing an order ('necessary') can be met in the absence of some certainty of evidence. There is also a presumption against bail in terrorism cases, so that detention following arrest is the norm, thus achieving the objective of preventing an imminent attack. The power of preventive detention is largely redundant, other than in very rare (and highly unlikely) cases where police suspect a person but cannot meet the standard for arrest.

If preventive detention is to remain in the law, stronger safeguards are necessary. Preventive detention in the absence of ordinary criminal justice procedures constitutes a particularly invasive restriction on internationally protected human rights, though it may be lawful under the right conditions.

In my view, if the power remains, it is preferable to refashion it within a special, temporary, emergency legal regime. Specifically, a Ministerial declaration should be required to 'activate' the preventive detention powers (for instance, in the context of a particular emergency situation), which would then be available in the usual way. Requiring political supervision of such powers brings an additional level of accountability and ensures that strong public justification must exist before use.

(Finally, a trivial point of spelling: the relevant legislation should use the word 'preventive' not 'preventative'. The additional 'at' is otiose, though the word is correct.)

7. *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth), section 6*

This law criminalises a citizen, resident or other person connected to Australia who engages in, or enters with intent to engage in, hostile activity in that foreign State. The offence does not apply to a person serving in the armed forces of a foreign state, or any other armed force declared by the Minister. The exception for service with foreign State forces does not apply if the person is involved with a prescribed organisation, which means an organisation involved in serious human rights violations, armed hostilities against Australia or its allies, terrorism, or acts prejudicial to Australia's security, defence or international relations.

I agree in principle with an executive prescription model for both permissible service with non-state armed forces exempted by the Minister, and impermissible service with organisations associated with states declared by the Minister. Such an approach gives appropriate deference to the executive branch in key security and foreign policy issues.

However, in the light of the use of the declaration powers to date, I am confident that the discretion is yet being used in conformity with international law, and perhaps needs to be more firmly guided by international law standards or guidelines. Most importantly, **I do not see why it should be presumptively an offence for Australians to join rebel, revolutionary or insurgent movements in countries in which such groups are opposing authoritarian or rights-abusing governments.** Resistance to oppressive, violent regimes is not prohibited by international law, and accepted under both international human rights law and international humanitarian law.

Criminalising such activities is a species of the problem raised earlier, namely extraterritorially criminalising participation in foreign hostilities which are governed by international humanitarian law. Australia should not make rebellion a crime, at least when rebels confine themselves to proportionate attacks on military objectives in conformity with international humanitarian law.

Most Australians would not think it acceptable for Australian law to criminalise those who attempted to overthrow brutal regimes in Nazi Germany, or Franco's fascism in Spain, or the many foreign causes which Australia itself has supported in recent years, including internal revolts in Saddam Hussein's Iraq, or rebels in Libya or Syria.

Nothing inherent in an Australian's citizenship or duty of loyalty to Australia implies that good Australian citizens should sit idly by while foreigners are butchered by their governments, in circumstances where the international community has failed to act effectively through the United Nations, humanitarian intervention, or other means.

In my view, section 6 should operate in reverse – it should not be an offence to join rebel movements overseas, unless the group has been designated by Ministerial declaration, for instance on the same grounds that association with state forces may become an offence: violation of human rights (or international humanitarian law for that matter), hostilities against Australia terrorism, or acts prejudicial to Australia's security. At present, the Act assumes that fighting with all rebel groups is harmful and criminal, unless such groups are rescued from crime by the Minister. That is indefensible.

Further, the scope of the Act is unclear in other respects. Can a prescribed organisation include state armed forces (where they violate human rights etc), or only organisations associated with them? If the former, how does the Act reconcile with the combatant immunity from foreign prosecution accorded to state armed forces under international humanitarian law, including Australia's obligations under the Geneva Conventions of 1949? Equally, how does the Act reconcile with the same immunity for irregular forces 'belonging' to state forces under Geneva Convention III, article 4? The rationale for the liability is not entirely clear, given that there are no nationality requirements for combatant status of foreign armed forces under international law.

Please be in touch if you require any further assistance.

Yours sincerely

A handwritten signature in cursive script that reads "Ben Saul".

ANNEX – Defects in Control Orders

Australia’s International Human Rights Obligations

Article 14(1) of the ICCPR provides for a fair civil hearing as follows:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

A procedure for imposing a control order attracts the right to a fair hearing: see *Secretary of State for the Home Department v AF and another* [2009] UKHL 28 (concerning article 6 of the European Convention on European Rights, which is functionally equivalent to the protection in article 14 of the ICCPR). In that case, the ‘special advocate procedure’ in the UK, pursuant to which security sensitive evidence could be withheld from an affected person and their lawyer, was deemed incompatible with a fair hearing.

While a control order proceeding might be characterised as civil rather than a criminal proceeding (because it does not involve the imposition of a criminal penalty: *Secretary of State for the Home Department v AF* and *Secretary of State for the Home Department v MB* [2007] UKHL 46, for the purposes of determining ‘the minimum of disclosure necessary for a fair trial’, the more stringent standard of fairness applicable in criminal trials applies: *Secretary of State for the Home Department v AF and another* [2009] UKHL 28, at para. 57.

The proceedings for the imposition of a control order may not be fair hearings for the purposes of article 14 of the ICCPR for the following reasons.

1. Low standard of proof

A control order is made on *the balance of probabilities* that the order is reasonably necessary, appropriate and adapted for the purpose of protecting the public from a terrorist act (Criminal Code, s. 104.4). Considering the seriousness of the rights restrictions which may be imposed by a control order, the civil standard of proof is inappropriate: UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, Report to the General Assembly, 6 August 2008, A/63/223, para. 42. Some of the conditions which may be imposed by control orders are harsher than those imposed as penalties for breaching the criminal law. Considering their restrictive character, the court should be required to be satisfied to a higher standard of proof that the order is necessary.

2. Evidence may not be adequately tested due to non-disclosure of essential evidence

A person may not be able to fully test the evidence brought by the authorities and upon which the order was issued, because of restrictions on access to evidence. In the issuing of a control order, Australia is not required to disclose any information if that disclosure was 'likely to prejudice national security' within the meaning of *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth): *Criminal Code* (Cth), ss. 104.2(3A), 104.5(2A), 104.12(3)(a) and 104.23(3A)(a).

The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), Part 3A, relevantly provides for the non-disclosure in a civil proceedings of any information that is 'likely to prejudice national security'. Section 8 of the Act defines 'national security' as 'Australia's defence, security, international relations or law enforcement interests'. Many of those terms are in turn separately defined in ss. 9-11 of the Act, as follows:

- (a) 'security' has the same meaning as in the *Australian Security Intelligence Organisation Act 1979* (Cth), namely (in s. 4): '(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from: (i) espionage; (ii) sabotage; (iii) politically motivated violence; (iv) promotion of communal violence; (v) attacks on Australia's defence system; or (vi) acts of foreign interference... and (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a)'.
- (b) 'international relations' means 'political, military and economic relations with foreign governments and international organisations';
- (c) 'law enforcement interests' includes: '(a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence; (b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence; (c) the protection and safety of informants and of persons associated with informants; (d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies'.

The availability of the non-disclosure provisions to the Australian authorities substantially impairs a person's right to a fair hearing for the following reasons:

- (a) The definition of 'national security' and its sibling definitions are cast so widely and ambiguously so as to potentially enable the non-disclosure of a wide range of innocuous or non-sensitive information which has no material bearing on Australia's national security, and which could prevent an affected person from knowing and challenging the full circumstances of the case alleged against them, or accessing exonerating or exculpatory information. The Australian Senate Legal and Constitutional Affairs Committee has described the definition as 'broad in the extreme', 'unhelpful or unworkable' for an affected person, and susceptible to abuse by the authorities.⁸

⁸ *Report of Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004*, 19 August 2004, at paras. 3.20 and 3.22.

- (b) The Act protects national security information through the use of closed hearings, ministerial certificates and security clearances. However, as the Australian Law Reform Commission noted in its report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (which led to the proposal of the legislation), other measures are available to achieve the same objective of protecting sensitive information (see ALRC recommendation 11-10). In particular, measures that interfere less in the ordinary conduct of civil proceedings should be considered before resorting to the more intrusive measures;
- (c) The Act requires certain proceedings to be held in closed session, rather than leaving the courts with the discretion whether to close the court (as the ALRC recommended), which would be an approach more capable of balancing the right to a fair hearing with national security interests in particular cases;⁹
- (d) The Act regards a disclosure as ‘likely to prejudice national security’ where ‘there is a real, and not merely a remote, possibility that the disclosure will prejudice national security’ (s. 17). However, a more appropriate standard for ensuring the fairness of the hearing would be to require a showing of a *probability* or *likelihood* of prejudice, rather than the much lower standard of a ‘real possibility’;
- (e) The Act permits the court to exclude a party and their legal representative from a closed hearing to determine whether to order the non-disclosure of information, where the person lacks the required security clearance: s. 38I(3). However, the judicial discretion to exclude a person is not accompanied by a requirement on the court to equally consider the adverse impact of the exclusion upon an affected person’s right to a fair hearing.¹⁰ The provision is accordingly likely to undermine the principle of equality of arms in the proceeding, to the detriment of a person seeking to contest a control order.
- (f) The Act’s requirement that counsel be security cleared is not compatible with the rights under 14(3)(b) and (d) of the ICCPR to communicate with a counsel of one’s own choosing and to defend oneself through legal assistance of one’s own choosing, particularly as the court has no discretion whether to permit access to non-cleared lawyers;¹¹
- (g) In deciding to make an order of non-disclosure under the Act, the court is directed to consider whether an order would have a substantial adverse effect on the substantive hearing in the proceeding (s. 38L(7)(b)), but is also directed to ‘give greatest weight’ to the likelihood of prejudice to national security (s. 38L(8)). A general direction to prioritise the protection of national security over the protection of the right to a fair hearing, regardless of the context and individual circumstances, is not compatible with article 14 of the ICCPR;

⁹ Australian Human Rights Commission, *Submission to the Australian Senate Legal and Constitutional Committee Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004*, 2 June 2004, at pp. 5-6.

¹⁰ Australian Human Rights Commission, *Submission to the Australian Senate Legal and Constitutional Committee Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004*, 2 June 2004, at p. 7; see also Australian Senate Legal and Constitutional Affairs Committee, *Report into the provisions of the National Security Information Legislation Amendment Bill 2005*, 11 May 2005, Recommendation 9.

¹¹ Australian Human Rights Commission, *Submission to the Australian Senate Legal and Constitutional Committee Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004*, 2 June 2004, at p. 5.

- (g) The Act imposes strict criminal liability for a failure to notify the Attorney-General of the existence of information potentially prejudicial to national security, regardless of whether a party unintentionally, inadvertently or mistakenly failed to so notify, and in circumstances where the definition of ‘national security’ information is so broad as to make it impossible for any person to know what information they are supposed to legally disclose.

3. A control order may not actually be necessary to prevent terrorism

First, under human rights law, the necessity of restricting a person’s rights cannot not be effectively determined in the absence of a fair hearing, as detailed above. The procedural defects of the hearing may impair the ability of a court to be properly informed of, and to accurately assess, whether a person posed a genuine threat.

Secondly, the legislation does not require the court to determine whether other less invasive methods were available to the authorities for achieving the same purpose of preventing terrorism, for example, by assessing whether surveillance or other methods of crime prevention were reasonably capable of controlling the risk. For instance, during the control order hearings for David Hicks, Magistrate Donald stated that ‘the means of... [for example, mounting surveillance of Mr Hicks] are unknown to the Court’ (Confirmation Order, para. 47). A control order could thus be imposed even if it were unnecessary for the reason that less restrictive forms of crime prevention could have achieved the same end.

By contrast, the UK House of Commons Home Affairs Committee concluded that control orders ‘no longer provide an effective response’ because of the UK courts’ concerns about their compatibility with human rights, and that security services should instead ‘rely on other forms of monitoring and surveillance’.¹²

Thirdly, because the definition of terrorism includes lawful hostilities by armed forces or armed groups under international humanitarian law, some control orders may not be necessary to prevent violence against civilians (as opposed to criminalising war fighting).

Fourthly, prior training alone should not be a sufficient justification for an order, without evidence of any continuing intention on the part of the affected person to engage in terrorism. Otherwise, a person’s prior conduct, unrelated to their present intentions and circumstances, and regardless of their intervening behaviour (including renunciation of terrorism) would forever expose a person to liability to a control order. An order may not be necessary.

Fifthly, where a person has served a criminal sentence for terrorist-related conduct, evidence of the same past conduct should not be relied upon to impose a control order. Following a conviction and the serving of a prison sentence, the ordinary presumption of the legal system is that a person has discharged their legal responsibility for past conduct, absent evidence of any continuing threat. The purpose of criminal punishment is to specifically deter the convicted person from future criminal activity and to rehabilitate that person.

¹² *The Home Office’s Response to Terrorist Attacks*, Sixth Report of Session 2009-10, 26 January 2010, HC 117-I, p. 20.

The presumption of expiation of guilt following the serving of a criminal sentence is supported by international human rights law. The imposition of a control order on the basis of the same evidence may contravene the *ne bis in idem* principle – that a person should not be tried or punished twice for the same offence. For example, prior to the imposition of David Hicks’ control order, the UN Special Rapporteur on human rights and terrorism, Martin Scheinin, had presciently warned Australia against offending the principle:

It is an offence, by way of example, for a person to receive or provide training connected with a terrorist act. Upon completion of sentence, it is conceivable that a person convicted of such an offence (because of the conviction) may thereafter be made the subject of a control order, including conditions of house arrest. The Special Rapporteur urges Australia to ensure that control orders are not imposed in a manner that would offend the *ne bis in idem* principle. (UN Special Rapporteur Martin Scheinin, *Australia: Study on human rights compliance while countering terrorism*, 14 December 2006, A/HRC/4/26/Add.3, para. 40).

Likewise, in another area of international law, a person should not be excluded from protection as a refugee (under article 1F of the 1951 Refugee Convention) for past criminality where ‘expiation of the crime is considered to have taken place’;¹³ and providing further:

This may be the case where the individual has served a penal sentence for the crime in question, or perhaps where a significant period of time has elapsed since commission of the offence. Relevant factors would include the seriousness of the offence, the passage of time, and any expression of regret shown by the individual concerned.

Criminal justice becomes superfluous if the punishment of conduct no longer discharges the person’s legal responsibility for that conduct. As the UK’s Independent Reviewer of terrorism laws has noted, control orders are only appropriate where there is ‘robust information’ that a person is a ‘considerable risk to national security’ *and* where ‘conventional prosecution is not realistic’.¹⁴ Otherwise a person is effectively required to prove that they are *no longer* a threat, despite having completed a criminal sentence, rather than the police being required to prove that he *was still* a threat (instead of relying on old information about past conduct which had already been punished).

Sixthly, a control order should not be imposed where an organisation with which a person trained was not proscribed in Australian law at the time and the person could not know at the time that their conduct would later attract a liability under a future law.

In circumstances where a control order is neither necessary nor imposed in a procedurally fair manner, the restrictions resulting from the conditions of the order may arbitrarily and unlawfully interfere in protected international human rights under the ICCPR, namely: freedom of movement, non-interference in the home, correspondence, privacy and family life, freedom of expression and freedom of association.

END

¹³ UN High Commissioner for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses – Article 1F of the 1951 Convention Relating to the Status of Refugees*, at HCR/GIP/03/05, 4 September 2003, at para. 23.

¹⁴ Lord Carlisle of Berriew QC, *Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (UK)*, 1 February 2010, p. 1.