young lawyers for law reform

promoting human rights and social justice through law reform

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COAG Counter Terrorism Review Secretariat
Security Law Branch
3–5 National Circuit
BARTON ACT 2600
By email

Dear Committee Members

Submission of Young Lawyers for Law Reform to the Council of Australian Governments' Review of Counter-Terrorism Legislation[1]

Young Lawyers for Law Reform (YLLR) is a newly established Melbourne-based advocacy body. It comprises law graduates who are committed to using their legal skills to promote human rights and social justice by making contributions to law reform processes in Australia.

Young Lawyers is grateful for the opportunity to make a submission to the Council of Australian Governments' (COAG) Review of Counter-Terrorism Legislation (the Review).

Young Lawyers' submission will focus on the following aspects of the Review:

- Definition of terrorism;
- Control orders;
- Preventative detention;
- Power to search and seize items without a warrant; and
- Power to stop, search and question.

We will review Commonwealth legislation with respect to the above.

Young Lawyers' submission on the key reform proposals can be summarised as follows:

- Broad definition of terrorism must be amended. The current definition does not distinguish between terrorist conduct and ordinary criminal conduct , and it includes acts the commission of which go beyond an intention of causing death or serious bodily injury, or taking of hostages.

- Control orders – Safeguards are required to ensure that control orders are used as a last resort. Currently, the provisions do not encourage use of control orders as a 'last resort', or order terms that are is necessary and proportionate in the circumstances.

- Control orders – Enable the right to challenge a control order. Currently, a person's right to challenge a control order is seriously limited. The person the subject of the order, or their lawyer, may not be permitted to know the grounds upon which the order is based. The minimum of 48 hours' notice is insufficient to enable a person to adduce evidence or formulate submissions in time for the confirmation of interim control order hearing.

[1] In making this submission, YLLR gratefully draws from the rich academic material that has reviewed and commented on this area, as well as work undertaken by the Human Rights Law Centre.

- Control orders – Criminal standard of proof must be adopted

- Preventative detention – Amendments are required to ensure basic procedural fairness and key safeguards. Currently, the provisions deny the accused access to evidence that forms the basis of the order, enables the denial of access to legal representation, and fails to contain appropriate review by the judiciary.

- Power to search and seize items without a warrant – Current threshold of 'reasonable suspicion' is disproportionate to infringement of rights authorised. Amendment required to ensure emergency powers not extended to non-terrorism related offences.

- Power to stop, search and question – Amendments required to ensure higher standard of proof and adequate safeguards for declaration of a 'prescribed security zone'. The duration of a declaration should be limited to 14 days, and the power to make a declaration should require a clear connection between the declaration and an imminent terrorist act, and reasonable grounds for the Minister's decision.

It is Young Lawyers' submission that many proposals in the Discussion Paper limit the right to liberty, the right to freedom of movement, the right to a fair trial, and the right to privacy under articles 9, 12, 14 and 17 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party. This means the Government must demonstrate that the limitation of rights is reasonable and demonstrably justified in a free and democratic society.[2] Young Lawyers' submission is informed by this standard (explained further in the Annexure).

INTRODUCTION

This consultation presents an important and timely opportunity to review a raft of laws that were passed several years ago. The laws are symptomatic of what many academics have coined as a 'culture of control'[3] that has emerged since the events of September 11 2001, and the subsequent terror attacks in Bali, Madrid and London. While the shock and horror of those events has begun to subside, at a domestic level we are still coming to terms with how to manage our national security and maintain well established common law and criminal principles. In the wake of the international terrorism tragedies, legislative changes were made to the Criminal Code Act 1995 (Cth), the Crimes Act 1914 (Cth) and their state equivalents to accommodate the concept of terrorism. In doing so the laws also broadened the powers of the executive and their control and surveillance powers. Herein lies the battle between security and liberty - a tension that flavours much of the commentary to date.

The introduction of counter terrorism laws have seriously blurred the roles of courts and the executive and risk 'normalizing' what should remain extraordinary powers. YLLR submit it is concerning that laws that were introduced as temporary responses to then perceived imminent threat would acquire a permanent place in both legal and political fabric.[4] While it is heartening that

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[2] See for example section 7 of the Victorian Charter of Human Rights and Responsibilities Act, section 1 of the Canadian Charter of Rights and Freedoms, section 5 of the New Zealand Bill of Rights Act, section 36 of the South African Constitution. For a detailed explanation of the proportionality test see Human Rights Law Centre, 'Review of Australia's Counter-Terrorism and National Security Legislation: Submission to the Independent National Security Legislation Monitor', 26 October 2011.

[3] McGarrity, N., Lynch, A., Williams,G. (eds) Counter Terrorism and Beyond (Routledge, 2010), 1.

[4] Greg Carne 'Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting the Anti-Terrorism Act (no 2) 2005 (Cth)' (2007) 10 Flinders Journal of Law Reform, 1.

'sunset clauses' were incorporated into the laws, the reluctance to roll back laws is worrying. The entrenchment of these laws would need to be coupled with other measures to ensure they are considered as a 'last resort', rather than alternative to current, well established laws.

Meaningful review is required to ensure that the laws are current and examination to ensure that the law has been effective in either preventing, or responding to any terrorist threat. Specifically, YLLR ask whether the existing criminal and civil laws available could have been used to prosecute any perceived threat successfully? The issue of creating a new suite of laws to attack a perceived threat was referred to as 'legislative inflation'. The potential 'seepage'[5] of these laws into established laws risks weakening the safeguards that normally accompany those mechanisms, leaving simply the aggressive features of the Act to be misapplied in a situation where it was not designed to operate. This concern goes to the heart of the 'culture of control' that such powers proliferate. In this context, YLLR implore a review of the counter-terrorism laws that seeks to be proportionate, pay homage to the rule of law and upholds human rights and civil liberties.

HUMAN RIGHTS DIMENSION

The United Nations has articulated a clear message with regards to striking this balance between liberty and security.[6] As stated in the United Nations Global Counter-Terrorism Strategy (part IV), effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing ones. The defence of human rights is essential to the fulfilment of all aspects of a global counter-terrorism strategy.

This is an inquiry of fundamental importance. The potential impact of the measures proposed on the human rights and civil liberties of all Australians is immense. YLLR is concerned that a number of the reforms ignore Australia's international law obligations to respect, protect and fulfil human rights, in particular the right to liberty and to a fair trial, protected in article 9 of the International Covenant on Civil and Political Rights (ICCPR) to which Australia is a party, and the right to privacy, protected in article 17 of the ICCPR.

Each of these proposals has the potential to limit the human right to liberty, to a fair trial and to privacy and needs to be advanced on the basis of rigorous evidence and after balancing the benefits of the proposal against the human rights impacts. Young Lawyers acknowledges that some of these proposals may be justified once this balancing exercise has been undertaken.

However, there is a heavy onus on governments to justify any interference with human rights. Given this, Young Lawyers is particularly concerned at the lack of evidence adduced to support the proposals, the overly broad nature of many of the powers, and the lack of existing proportionality and accountability measures.

[5] McGarrity, N., Lynch, A., Williams,G. (eds) Counter Terrorism and Beyond (Routledge, 2010), 1.
[6] [From UN Special Rapporteur's report] States have a duty to protect their societies and to take effective measures to combat terrorism. States are also obliged, by reason of their international obligations and as emphasized within various documents of the United Nations, including resolutions of the Security Council, to counter terrorism in a manner that is consistent with international human rights law.

DRAWING FROM EXISITING CASE LAW

Existing case law that relies on the new provision is perhaps most significant not for 'what they prohibited but in what they appeared to permit'.[7] YLLR note that some key cases that have applied the counter terrorism legislation illustrate the issues this submission seeks to address. In particular, the case of Thomas v Mowbray[8] highlighted how far traditional methods of law enforcement could be bent to meet challenges of the time.

Particularly relevant for the purposes of this consultation and the submission by YLLR, the judgment of the High Court debated the efficacy and legality of control orders. The majority found that parliament had made constitutionally valid law (Kirby J dissenting). The Judges noted that the nature of control powers was not exceptional and drew analogies to the court's readily used discretion to grant apprehended violence orders, and other coercive powers as a matter of prevention. However, Justice Kirby delivered a highly critical dissenting judgment, observing that:

> "In the face of contemporary dangers from terrorism, it is essential that this Court should insist on the steady observance of settled constitutional principles. It should demand adherence to the established rules governing the validity of federal laws and the deployment of federal courts in applying such laws".[9]

On the question of whether control orders constituted a breach of the separation of powers two judges dissented. Their judgments provide important feedback for legislators. In their dissenting judgments, Justice Hayne and Justice Kirby separately reached the conclusion that the Parliament was asking he judiciary to use a quasi executive function.[10] Of particular importance to the question of legislative reform for this section, YLLR draw attention to the comments by Justice Hayne that the laws under s 104 for control orders are too broad and do not give Jurist's enough guidance. Justice Hayne lamented that The impugned provisions offer no legal standard against which an application for a control order is to be judged."[11] His Honour went on to consider that the court "… is necessarily left to decide the case according to nothing more definite then its prognostication about the order's achieving, or tending to achievement of, "the purpose of protecting the public from a terrorist act."[12]

Further, the complexities of the definition of 'terrorist act' arguably led to Mr Thomas' acquittal, based on the tenuous linkage needed between supporting a terrorist organisation and the complex and nebulous concept of a 'terrorist act'. For the purposes of this consultation Thomas v Mowbray illustrates both the juridical and ethical concerns of control orders and the difficulty jurists have in both applying the provision as it stands.

As the only person who has been convicted of a 'terrorist act' offence under the Commonwealth Criminal Code, R v Lodhi[13] provides important information for legislative reform in this area. His prosecution was controversial and involved the retrospective application of s 106.3 of the Criminal Code, a provision that has been designated for review by this consultation. Ultimately, it was found that this could not be allowed, but the concern over the applicability and use of 106.3 remain.

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[7] K D Ewing and J C Tham, 'The continuing futility of the Human Rights Act' [2008] Public Law 668, 681.
[8] (2007) 233 CLR 307.
[9] Thomas v Mowbray (2007) 233 CLR 307, [388].
[10] Denise Meyerson 'Using Judges to Manage Risk: The Case of Thomas v Mowbray' 8 (2008) 36(2) Federal Law Review 209.
[11] Thomas v Mowbray (2007) 233 CLR 307, [499].
[12] Ibid.
[13] (2006) 199 FLR 364.

Further, at the trial below of Mr Lodhi,[14] Justice Whealy's judgment indicates that the mental knowledge requirement for a connection with a terrorist act is very tenuous. The implication is that intention to commit a terrorist act with be inferred even where the actual evidence showing this connection is only preparatory in nature. YLLR submit this is an unsatisfactory outcome and goes against basic principles of evidence and intelligence outlined above.

1 DEFINITION OF TERRORISM

Criminal Code Act 1995 (Cth): Section 100.1

We urge the Australian Government to reconsider its broad definition of a 'terrorist act'. We support the recommendations of the United Nations Special Rapporteur and the Human Rights Law Centre in this respect.[15] In particular, we note that the current definition:

- fails to distinguish between terrorist conduct and ordinary criminal conduct;[16]
- goes beyond the United Nations Security Council's prescription;[17]
- includes acts the commission of which go beyond an intention of causing death or serious bodily injury, or taking of hostages;[18] and
- includes acts not defined in international conventions and protocols relating to terrorism.[19]

2 CONTROL ORDERS

Criminal Code Act 1995 (Cth): Division 104

(a) Exception to established legal principles

The proliferation of control orders with regard to terrorism offences has been a drastic change 'to the qualities of the democratic relationship between the citizen and State'.[20] It is an established principle of our legal system that individuals are deprived of their liberty on the basis of evidence of their past conduct.[21] The current control order provisions under Division 104 of the Criminal Code

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[14] R v Lodhi [2006] NSWSC 584 (Unreported, Whealy J, 14 February 2006) [82]-[83].
[15] See Martin Scheinin, Report of the 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, UN Doc A/HRC/4/26/Add.3 (2006), available at http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx; see Human Rights Law Centre, 'Submission to the Independent National Security Legislation Monitor, December 2011: Review of Australia's Counter-Terrorism and National Security Legislation', 10, available at http://www.hrlc.org.au/content/submission-to-independent-national-security-legislation-monitor-sept-2012/.
[16] Under section 100.1(2), definition of 'terrorist acts' include certain criminal activity, such as the interference with an information system. Scheinin notes, at [15], that, 'although it is permissible to criminalize such conduct it should not be brought within a framework of legislation intended to counter international terrorism unless that conduct is accompanied by an intention to cause death or serious bodily injury.'
[17] See Sheinin at [15].
[18] See Scheinin at [15]; see Criminal Code Act 1995 (Cth), s 100.1(2).
[19] See Scheinin at [15].
[20] Anthony Reilly 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001-2005' (2007) 10 Flinders Journal of Law Research 81.
[21] See the dissenting judgment of Kirby J in Thomas v Mowbray [2007] HCA 33 at [357].

present an exception to this, by permitting a court to issue and confirm control orders curtailing a person's freedoms on the basis of some prediction of what may occur in the future. These incursions are particularly exceptional under the current provisions as no nexus to that person's behaviour or future behaviour may be required. Interim control orders can be requested, made, and confirmed, on the basis that "making the order would substantially assist in preventing a terrorist act[22], potentially committed by someone else, in the future.

The permitted terms of a control order can amount to a grave restriction on a person's liberty, freedom of movement and association. For example, house arrest is a possible imposition under a control order (section 104.5 (3) (a) and (c)). We are concerned that these grave conditions may be imposed:

- in circumstances where the person the subject of the order, or their lawyer, is not permitted to know the grounds upon which the order is based, and unable to effectively challenge the order; and
- upon satisfaction of a civil 'balance of probabilities' test, rather than the criminal standard of 'beyond reasonable doubt'

(b) Terms of order

The obligations, prohibitions and restrictions that can be imposed on a person under section 104.5 vary enormously in their restrictive and coercive powers. They range from the requirement that a person allow fingerprints to be taken[23], to a requirement that a person remain at a specified premises,[24] and wear a tracking device.[25]

There is no hierarchy or level of severity assigned to these conditions. Importantly, there is no obligation on the AFP member requesting the order, or the Attorney-General consenting to the order, to ensure that only the least invasive or least severe measures necessary in the circumstances are imposed. Without such an obligation, the terms of the legislation do not encourage the AFP or Attorney-General to request the restriction that is necessary and proportionate in the circumstances.

We recommend that the AFP be permitted only to request terms, and the Attorney-General consent to terms which, in the circumstances:

- are necessary and proportionate; and
- place the least severe restrictions or obligations on the person

(c) Issue of order by court

We support the requirement under section 104.4(2) that a court must look to whether the requested terms of the order are reasonably appropriate and adapted, and must take into account the impact of the obligation, prohibition or restriction on the person's circumstances.

However, as explained above, the differing severity of each of the possible terms are not categorised and the legislation does not state that least invasive measures should be preferred. This means there is scope for disproportionate restrictions or obligations to be placed upon a person, and for the control order to be subject to abuse.

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[22] Criminal Code Act 1995 (Cth), s 104.4(1)(c)(i).
[23] Criminal Code Act 1995 (Cth), s 104.5(3)(k).
[24] Criminal Code Act 1995 (Cth), s 104.5(3)(c).
[25] Criminal Code Act 1995 (Cth), s 104.5(3)(d).

We recommend that that section 104.4(2) be amended to explicitly require the court to look to whether the obligation, prohibition or restriction is the least invasive option in the circumstances.

(d) Ability to challenge grounds upon which order is based

We support the two-step process, in which a court is required to confirm an interim control order that has previously been issued, if desired by the AFP.[26] We believe this provides a check on the interim control, which may have been issued as a matter of urgency, without the person against who the order is made having an opportunity to respond to the allegations against them.

However, the right of the person to adduce evidence, or make submissions to the issuing court under section 104.14(1) in relation to the order is rendered illusory if:

- the person or their lawyer does not know the ground upon which the order has been made, if this information is allegedly likely to prejudice national security under section 104.5(2A); or
- the person is not given sufficient time to obtain legal representation or prepare such evidence or submissions.

(e) Grounds

An interim control order must set out a summary of the grounds on which the order is made.[27] The ostensible purpose of such a provision is so that a person understands the allegations against them.

It is not clear how detailed this 'summary' must be. If the grounds are not sufficiently set out in the order, then the person against whom the order will not be able to effectively challenge the decision.

The summary of grounds is not required to include information which is likely to prejudice national security.[28] There is no provision for the person's legal representative to access this information for the purposes of challenging the order, even if it is withheld from the personal against whom the order is made. This effectively means that the order can be made on the basis of secret information, with insufficient judicial safeguards of transparency and due process.

(f) Timing of hearing to confirm interim control order

The court hearing to confirm an interim control order must be held as soon as practicable, but at least 72 hours after the order has been made.[29] We welcome the intention of this provision to enable the interim control order to be reviewed in more detail within a reasonable time. However, this must be balanced against the person's interest in ensuring they have enough time to prepare for the confirmation hearing, and to challenge allegations against them, so that the hearing provides a meaningful review of the interim control order, and functions as a safeguard against abuse.

While desirable, the 'as soon as practicable' standard is vague, and provides an inadequate safeguard against inordinate delays in the date of the confirmation court hearing. We recommend that a maximum time limit for the date of the hearing be specified as 3 weeks after the date of the order.

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[26] Criminal Code Act 1995 (Cth), s 104.12A.
[27] Criminal Code Act 1995 (Cth), s 104.5(1)(h).
[28] Criminal Code Act 1995 (Cth), s 104.5(2A).
[29] Criminal Code Act 1995 (Cth), s 104.5(1A).

Under Section 104.12, an AFP member must serve a copy of the order on the individual as soon as practicable, but at least 48 hours before the hearing to confirm the interim control order.

Most likely, service of the order on the individual will be the first time that the individual is made aware of the order against them, and the grounds upon which the order has been made. We are concerned that this 48 hour period, which may occur over a weekend, as the time period is not limited to business days, does not provide adequate time for a person to:

- retain adequate legal representation of their choice; and
- sufficiently assess the order grounds; and
- gather relevant evidence; and
- prepare submissions in time for the hearing.

We are concerned that the current provisions do not strike an adequate balance between the speedy confirmation of an interim control order, and the ability for an individual to challenge an order made against them, in a way as to make this review right meaningful. We are therefore concerned that the current confirmation of interim control order provisions do not provide adequate safeguards against orders based on erroneous grounds, unnecessary or disproportionate control orders.

3 PREVENTATIVE DETENTION

Criminal Code Act 1995 (Cth): Division 105

Preventative detention orders (PDOs) are an exception to the well-established principle that involuntary detention of an individual 'exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[30]

The primary limit on the issue of PDOs is that they are 'reasonably necessary'[31] to 'substantially assist in preventing a terrorist act form occurring'.[32] This standard is insufficient to encourage use of PDOs only as a 'last resort', or order terms that are is necessary and proportionate in the circumstances.

We are concerned that the current PDO provisions under Division 105 of the Criminal Code lack sufficient safeguards from abuse. As currently drafted, PDO orders may:

- be effectively immune from appeal or challenge by the person the subject of the order;
- be based on secret information that is withheld from the individual subject to the order, and the individual issuing the preventative detention order;[33]
- be issued by a senior member of the Australian Federal Police with no safeguard of judicial scrutiny or checks and balances;[34]
- be issued based on vaguely defined grounds[35]; and
- prevent an individual from contact with their lawyer through a 'prohibited contact order[36] or monitoring of communication.[37]

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[30] Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, 27.
[31] Criminal Code Act 1995 (Cth), s 105.4(4)(c).
[32] Criminal Code Act 1995 (Cth), s 105.4(4)(b).
[33] Criminal Code Act 1995 (Cth), ss 105.7(2A), 105.8(6A), 105.11(3).
[34] Criminal Code Act 1995 (Cth), s 105.8.
[35] Criminal Code Act 1995 (Cth), s 105.4(4)(a).

We recommend that the provision be amended to address the above concerns.

4 POWER OF ENTRY AND SEIZURE WITHOUT A WARRANT

Crimes Act 1914 (Cth): Section 3UEA

Young Lawyers has two main concerns with the search and seizure powers under s 3UEA of the Crimes Act 1914 (Cth). First, the threshold of reasonable suspicion. Secondly, the expansion of 'emergency' search powers to non-terrorism related offences.

We are generally concerned at the breadth of the power granted to the Australian Federal Police (AFP) and the lack of judicial scrutiny over its exercise. Section 3UEA authorises significant interference with an individual's right to privacy, protected in article 17 of the ICCPR. The Government must demonstrate that interference with human rights – particularly without judicial scrutiny – is justified and proportionate to the public good to be achieved. We agree with the Human Rights Law Centre that no evidence has been provided to demonstrate the need for such extensive powers to protect public safety.[38]

(a) Reasonable suspicion

Under section 3UEA, an AFP officer can enter a premises without a warrant, if the officer has:

- a 'reasonable suspicion' that searching the property or seizing an item is 'necessary' to prevent a thing on the premises from being used in connection with a terrorism offence; and[39]
- a 'reasonable suspicion' that it is necessary to exercise the power without a search warrant because there is a serious and imminent threat to a person's life, health or safety.[40]

Once in the premises, the officer may search the premises for the 'thing' and seize the thing if he or she finds it there.[41]

As no warrant is required, the standard of proof is the only safeguard for the exercise of the power in section 3UEA. Currently, the standard is 'suspects on reasonable grounds'. This standard is manifestly inadequate. It does not reflect the gravity of the infringements of rights authorised by section 3UEA, nor does it ensure that there are 'appropriate safeguards against abuse'.[42]

Australian case law demonstrates the low standard of 'reasonable suspicion'.

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[36] Criminal Code Act 1995 (Cth), ss 105.15, 105.16.
[37] Criminal Code Act 1995 (Cth), s 105.38.
[38] Human Rights Law Centre, 'Submission to the Independent National Security Legislation Monitor, December 2011: Review of Australia's Counter-Terrorism and National Security Legislation', 10, available at http://www.hrlc.org.au/content/submission-to-independent-national-security-legislation-monitor-sept-2012/.
[39] Crimes Act 1914 (Cth), s 3UEA(1)(a).
[40] Crimes Act 1914 (Cth), s 3UEA(1)(b).
[41] Crimes Act 1914 (Cth), s 3UEA (2).
[42] Council of Australian Governments' Review of Counter-Terrorism Legislation, Terms of Reference, p 2.

- Reasonable suspicion is a much lower standard than 'reasonable belief'. The High Court of Australia in George v Rockett [1990] 170 CLR 104 held that 'the facts which can reasonably ground a suspicion may be quite insufficient to ground a belief'.[43]

- Reasonable suspicion may be distinguished from an otherwise 'arbitrary' standard on the basis that 'some factual basis for the suspicion must be shown'.[44]

- The High Court has endorsed the definition of reasonable suspicion as 'more than a mere idle wondering', but equivalent to 'a positive feeling of actual apprehension or mistrust', amounting to 'a "slight opinion, but without sufficient evidence".[45] It has also referred with approval to the definition of the term as 'a state of conjecture or surmise where proof is lacking'.[46]

A standard that is equivalent to a 'slight opinion', a 'state of conjecture' or based on 'some' factual basis is not an adequate safeguard for the exercise of the power to enter an individual's premises and seize an item without a warrant. It is disproportionate to the gravity of the interference with right, even in the case of an emergency. We submit that the standard of 'reasonable belief' should be substituted for 'reasonable suspicion'. Reasonable belief would require an appropriate level of objective evidence, while still permitting emergency search and seizure in appropriate cases.

(b) Expansion of emergency powers to non-terrorism related offences

Subsection 3UEA(5) extends 'emergency' search and seizure powers to non-terrorism related offences. The provision represents a concerning 'mission creep' in which derogation from ordinary principles of criminal law – ordinarily reserved for extreme situations of imminent terrorist threat – are applied to situations of non-imminent threat, not involving terrorist offences. Frequent and unjustified suspension of the operation of criminal process must be strongly cautioned against. On what basis can the Government justify the suspension of ordinary criminal processes where a non-terrorism related offence is concerned – or even, as explained below, the commission of no offence at all?

Subsection 3UEA(5) provides that, in the course for searching a premises for 'the thing', an AFP officer may seize 'any other thing' if:

- the officer has a 'reasonable suspicion' that it is 'necessary' to do so to protect a person's life, health or safety; and
- the officer has a 'reasonable suspicion' that it is 'necessary' to do so 'without the authority of a search warrant because the circumstances are serious and urgent'.

The following aspects of this provision are concerning:

- it is not limited to the likely commission of a terrorist offence;
- it is not limited to the commission of any stated offence;

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[43] George v Rockett (1990) 170 CLR 104, at 115.
[44] R v Rondo [2001] NSWCCA 540 (2001) 126 A Crim R 562 per Smart J (Spiegelman CJ and Simpson J concurring) (emphasis added).
[45] Original definition by Kitto J in Queensland Bacon Pty Ltd v Rees (1966) 115 CLR 266 at 303. The High Court of Australia approved this definition in George v Rockett (1990) 170 CLR 104, at 115-116.
[46] In George v Rockett, the High Court also, at 115, cited with approval the definition of 'reasonable suspicion' articulated by Lord Devlin in Hussein v Chong Fook Kam [1970] AC 942 at 948.

- the terms 'a person's life, health or safety' are vague and ambiguous and lead to unpredictability in its implementation;
- the standard of reasonable suspicion applies;
- it is exercised without judicial scrutiny; and
- no justification has been provided as to why an 'emergency' power is necessary in a non-terrorism context.

Our concerns expressed regarding the standard of 'reasonable suspicion' apply with greater force to this situation. Any justification for this low standard of proof is further diminished when the connection with a terrorist offence – or any offence – is removed.

We agree with the Law Council of Australia's analysis that 'poorly defined, overly broad offence provisions can never be justified on the basis that, despite their potentially wide application, they are intended to be utilised by the authorities in the most limited and serious circumstances'.[47] We recommend that the subsection be amended to address the above concerns.

5 STOP, SEARCH AND QUESTION POWERS

Crimes Act 1914 (Cth): Division 3A

Young Lawyers has four key concerns with the stop, search and question powers in section 3UD:

- the standard of proof in s 3UB(1)(a);
- the grounds for a declaration of a 'prescribed security zone';
- the duration of a declaration; and
- the non-binding requirement for public notification.

Search powers are by nature invasive to an individual's right to privacy, protected by article 17 of the ICCPR. Section 3UD authorises an Australian Federal Police (AFP) officer to conduct 'strip searches' (removal of all clothing), 'ordinary searches' (removal of bulky clothing), and searches of any vehicle operated by the person.[48] When seeking to limit human rights, the Government must demonstrate that any interference with a person's right is necessary, proportionate and limited to the greatest extent possible.

The power to stop, question and search a person under section 3UD is exercisable in two situations:

- where an officer reasonably suspects that a person might have just committed, might be committing or might be about to commit, a terrorist act;[49] or
- where a person is in a 'prescribed security zone' (as declared by the Attorney-General).[50]

[47] Law Council of Australia, Submission on the Anti-Terrorism Laws Reform Bill 2009, 8.
[48] Crimes Act 1914 (Cth), s 3UA.
[49] Crimes Act 1914 (Cth), s 3UB(1)(a).
[50] Crimes Act 1914 (Cth), s 3UB(1)(b).

(a) Standard of proof under section 3UB(1)(a)

We appreciate that in certain emergency circumstances it may be necessary to authorise AFP officers to conduct searches of individuals suspected of committing terrorist acts. However, we are concerned that section 3UB(1)(a) contains a low probability of illegal conduct ('might'), a low standard of proof ('reasonable suspicion') and no requirement of 'imminence' for the terrorist act.

An AFP officer may conduct a strip or ordinary search on a person if the person is in a Commonwealth place, and the officer suspects, on reasonable grounds, that the person might have just committed, might be committing, or might be about to commit, a terrorist act.[51]

The verb form 'might' includes the mere 'possibility' that conduct will occur.[52] As discussed above, 'reasonable suspicion' is equivalent to a 'slight opinion', a 'state of conjecture' or based on 'some' factual basis. We submit that this standard is disproportionate to the invasive nature of the search power. The standard also does not contain a requirement of imminence. As currently drafted, the power could be used in situations where the commission of a terrorist offence is not imminent. Furthermore, the terms 'about to commit' and 'just committed' are vague. Such vagueness renders the power open to abuse, and does not ensure that searches are 'evidence-based' – a key area of consideration for the Committee.

We submit that the provision be reformed to remove the word 'might' and to ensure a clear requirement of imminence.

(b) Grounds for declaring a 'prescribed security zone'

An AFP officer may search a person if the person is in a 'prescribed security zone', as declared by the Attorney-General. The Attorney-General has a broad power to declare a 'prescribed security zone' if he or she considers the declaration would 'assist' 'in preventing a terrorist act occurring' or 'in responding to a terrorist act that has occurred'.[53] The search power does not require the person to be a suspect.

We submit that the grounds for declaring a prescribed security zone do not contain 'sufficient safeguards against abuse'. In particular,

- there is no requirement that the terrorist act be 'imminent' or 'foreseeable'
- there is no requirement that the declaration 'substantially assist' in preventing the terrorist act; and
- the Minister does not need to demonstrate 'reasonable grounds' for the declaration.

In the absence of the above requirements, there is no assurance that the power to declare a prescribed security zone will be exercised in an 'evidence-based' manner and only in limited circumstances. We submit that the section should be amended to require a clear connection between the declaration and an imminent terrorist act, and to require reasonable grounds for the Minister's decision.

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[51] Crimes Act 1914 (Cth), s 3UB(1)(a). (Emphasis added)
[52] The Oxford English Dictionary defines 'might' as a verb 'to express possibility'.
[53] Crimes Act 1914 (Cth), s 3UJ.

(c) Duration of a declaration

Currently, a declaration lasts for 28 days, unless revoked by the Minister.[54] We submit that the duration should be shortened to 14 days, as recommended by the UN Special Rapporteur and the Human Rights Law Resource Centre.[55] A declaration permits invasive searching of all people within such a zone merely on account of their presence. The operation of such an undefined search power for a month poses an unnecessary and disproportionate interference with innocent non-suspect's right to liberty and security. It suggests that the power is not appropriately adapted to the needs of responding to an imminent security threat.

(c) Non-binding requirement of public notification

Finally, we commend the Government for requiring public notification of a declaration of a prescribed security zone.[56] However, we are concerned at the non-binding nature of the requirement. If the Government fails to comply with public notification, it does not invalidate the declaration.[57] This renders any protection illusory. It is crucial that members of the public know when an area is prescribed as their presence in the zone has significant implications for their privacy. We submit that section 3UJ(6) be repealed and notification made mandatory for all declarations

Thank you for the opportunity to make this submission. This submission was prepared by Louise Brown, Gemma Leigh-Dodds and Lucy Maxwell. Please contact us at younglawyersforlawreform@gmail.com if we can provide any further information or assistance. This is a public submission and is not confidential.

[54] Crimes Act 1914 (Cth), s 3UJ(3).
[55] Martin Scheinin, Report of the 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, UN Doc A/HRC/4/26/Add.3 (2006), available at http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx.
[56] Crimes Act 1914 (Cth), s 3UJ(5).
[57] Crimes Act 1914 (Cth), s 3UJ(6).

ANNEXURE: PERMITTED LIMITATIONS ON HUMAN RIGHTS

Right to liberty: Article 9 of the ICCPR provides that:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Right to freedom of movement: Article 12 of the ICCPR provides that:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country.

Right to a fair trial: Article 14 of the ICCPR provides, relevantly, that:

> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) To be tried without undue delay;

> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
>
> (g) Not to be compelled to testify against himself or to confess guilt.
>
> …
>
> 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Right to privacy: Article 17 of the ICCPR provides that:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks upon his honour and reputation.

A government bears a heavy onus when it seeks to limit human rights. Under the ICCPR, each of the rights can be limited, but only in particular circumstances and to the extent necessary. A restriction must meet certain fundamental criteria. It must:

- be contained in law;
- achieve an objective that is important to a free and democratic society; and
- be proportionate to the achievement of the objective.

First, the restriction must be provided for in law. This means that the laws authorizing the application of restrictions should use precise criteria and not confer unfettered discretion on those charged with their execution.

Second, the restriction must achieve an objective that is important to a free and democratic society (the supervening objective). The supervening objective must be sufficiently important to justify limiting the right.[58] Examples of supervening objectives include protection of national security, public order, public safety or the protection of the rights of others. Courts have held that the objective needs to be a 'pressing and substantial' objective.[59] The Inter-American Commission on Human Rights has stated that the purpose of national security may be relied upon if:

> …its genuine purpose or demonstrable effect is to protect a country's existence or its

[58] R v Oakes [1986] 1 SCR 103, [69] – [71] (Dickson CJ), cited with approval by Bell J in Kracke v Mental Health Review Board [2009] VCAT 646, [145]. The decision of the Supreme Court of Canada established the 'Oakes test', an analysis of the limitations clause of the Canadian Charter of Rights and Freedoms that allows reasonable limitations on rights and freedoms through legislation if it can be demonstrably justified in a free and democratic society.

[59] The Supreme Court in Canada (Attorney-General) v Hislop [2007] 1 SCR 429, [44]. See also R v Oakes [1986] 1 SCR 103.

> territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as military threat, or an internal source, such as incitement to the violent overthrow of the government.[60]

Third, the means used to achieve the supervening objective – such as the law or the regulation – must be proportionate to the achievement of that objective. This involves considering several issues:[61]

- whether the law is carefully designed to achieve the objective;
- whether the law impairs the right 'as little as possible'; and
- whether there is proportionality between the effects of the measures and the objective.

The onus of establishing that a limitation is reasonable and demonstrably justified falls on the party seeking to rely on the limitation – this is usually the government.[62] The extent of justification required will depend on the seriousness of the limitation. The more serious the limitation on rights, the more important the objective of the limitation of those rights must be to a free and democratic society, and the higher the standard of proof will be for the government.[63]

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[60] Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, 2002, para 277.

[61] The following factors are derived from the decision in R v Oakes [1986] 1 SCR 103, 43 which contains the most widely accepted test of proportionality in common law human rights jurisdictions. See also UN Human Rights Committee, General Comment 27, para 14.

[62] Ibid, 66. Kracke v Mental Health Review Board [2009] VCAT 646, 108.

[63] See Warren CJ in Re an application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381.