5 October 2012

The Hon. Anthony Whealy QC
Chair
COAG Review of Counter-Terrorism Legislation
Attorney General's Department
Robert Garran Offices
3-5 National Circuit
Barton ACT 2600

Dear Mr Whealy,

RE: Submission to COAG Review of counter-terrorism legislation

Thank you for the letter of 21 August 2012 (copy attached as Appendix 1) inviting a submission to the COAG Review of counter-terrorism legislation. Please find enclosed my submission to the COAG Review.

I note from the letter of invitation that the review will conduct hearings in Perth in the second half of October 2012.

I confirm that I would be interested in attending the Perth hearings and making a public statement on my submission.

This submission concentrates on Division 104 (Control Orders) and Division 105 (Preventative Detention) as implemented in the Criminal Code (Cth) by the Anti-Terrorism Act (No 2) 2005 (Cth), as being examples of legislation included within the scope of the COAG review.¹

Reference is also made in this submission to State and Territory enacted preventative detention legislation, primarily the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) and the Terrorism (Preventative Detention) Act 2006 (WA).

A copy of the article "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 17-79 is attached as Appendix Two to this submission, as reference to the article's content is made in this submission.

My apologies for this slightly late submission because of existing university work commitments upon receipt of the letter of 21 August 2012 and subsequently.

Yours faithfully

(Dr) Greg Carne

¹ See ‘Scope of the Review’ Terms of Reference Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation
COAG Review of counter-terrorism legislation

Locating the source and meaning of the language of the goals of the COAG Review

The purpose of the Review is that the Committee should review and evaluate the operation, effectiveness and implications of the relevant amendments in each jurisdiction

The goals of this Review include recommendations by the Committee as to whether the laws the subject of the Review:

- are necessary and proportionate
- are effective against terrorism by providing law enforcement, intelligence and security agencies with adequate tools to prevent, detect and respond to acts of terrorism
- are being exercised in a way that is evidence based, intelligence-led and proportionate, and
- contain appropriate safeguards against abuse

The goals of the Review (and in particular the language of those goals) are directly traceable to the content of the 27 September 2005 COAG Communique and to the language in media releases from the ACT Chief Minister.

The ACT Chief Minister media releases articulate before the COAG meeting principles that should, according to the ACT Government, be adhered to, and following the COAG meeting, highlight assurances provided by the Prime Minister at that meeting, and assert that the ACT principles had been met.

---

2 See 'Purpose of the Review' Terms of Reference Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation

3 See under the heading 'Purpose of the Review' Terms of Reference Council of Australian Governments' (COAG) Review of Counter-Terrorism Legislation.

4 COAG Communique ‘Council of Australian Governments’ Special Meeting on Counter-Terrorism’ 27 September 2005: ‘Strengthening Counter-Terrorism Laws’: ‘Leaders agreed that any strengthened counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse such as parliamentary and judicial review and be exercised in a way that is evidenced based, intelligence-led and proportionate. Leaders also agreed that COAG would review the new laws after five years and that they would sunset after 10 years’

5 John Stanhope ACT Chief Minister Media Release 26 September 2005 ‘ACT Approach To COAG Meeting On Counter-Terrorism’: ‘This meant that any new counter-terrorism laws should be based on clear evidence that they were needed in a democratic society and that the desired effect could not be achieved in less intrusive or onerous ways; be effective against terrorism; conform to the principle of proportionality; comply with all of Australia’s obligations under International law – in particular its obligations as a signatory to the International Covenant on Civil and Political Rights; involves rigorous safeguards against abuse, including respecting the principle of non discrimination; be subject to judicial review; and contain sunset clauses’.

6 John Stanhope ACT Chief Minister Media Release 27 September 2005 ‘COAG Agreement A Victory For Human Rights’: ‘The guarantees delivered by the Prime Minister today in relation to the most contentious of these laws, the preventative detention orders, mean that these orders will only be used in exceptional circumstances, and that they will meet every one of the human-rights demands made by the ACT’; ‘Mr Stanhope said the guarantees given by the Prime Minister meant that the laws would be; based on clear evidence that they were needed in a democratic society and that the desired effect could not be achieved in less intrusive or onerous ways; be effective against terrorism; conform to the principle of proportionality; comply with all of Australia’s obligations under International law – in particular its obligations as a signatory to the International Covenant on Civil and Political Rights; involve rigorous safeguards against abuse,'
These sources of the language of the Goals of the COAG Review are immediately important for how the COAG Review of Counter Terrorism Legislation Committee fulfills its purposes and mandate.\(^7\)

The advocacy and language of the ACT before and after the 27 September 2005 COAG meeting and communiqué was necessarily shaped by the presence within the ACT of the Human Rights Act 2004 (ACT), domestically implementing articles of the International Covenant of Civil and Political Rights. Central to the operation of the ICCPR and the testing for conformity with its human rights articles are the principles of prescription by law, necessity, proportionality and reasonableness.

It is these characteristics which are reflected in the ACT executive responses, following the COAG meeting, to the Commonwealth legislation, as drafted and subsequently enacted as the Anti-Terrorism Act (No 2) 2005 (Cth). These executive responses further involved the obtaining of senior legal opinions about the compliance of this Commonwealth legislation with Australia’s human rights obligations under the ICCPR. As such, these senior legal opinions remain relevant to the present COAG review.\(^8\)

Similarly, the provisions of the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) were crafted within the requirements of the articles of the ICCPR, as reflected in the Human Rights Act 2004 (ACT). This ACT legislation imposes a range of more stringent human rights standards\(^8\) in relation to 14 day preventative detention legislation than exist in the in the legislation of the other state and territory jurisdictions.

It can therefore be strongly argued that the stated goals of the present COAG Review, demonstrably and historically informed by the language and advocacy of the ACT approach, can effectively be responded to by drawing upon both the ACT executive responses and legal commentary before and after the COAG communiqué.

Furthermore, the provisions of the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) are a useful resource for prescribing improvements and additional safeguards in state based preventative detention legislation, such as the Terrorism (Preventative Detention) Act 2006 (WA).

Accordingly, in providing improvements and amendments of existing legislation, it is suitable to refer to both the ACT documentation relating to the Anti-Terrorism Act (No 2)

---

\(^7\) Terms of Reference Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation

\(^8\) See Advice of ACT Human Rights Commissioner to ACT Chief Minister 19 September 2005 Re: Council of Australian Government’s meeting – potential human rights implications of proposed measures to strengthen counter-terrorism laws; Advice of Professor Byrnes (UNSW) Professor Charlesworth (ANU) and Ms Gabrielle McKinnon (ANU to ACT Chief Minister 18 October 2005 ‘Human rights implications of the Anti-Terrorism Bill 2005’; Advice of ACT Human Rights Commissioner to ACT Chief Minister 19 October 2005 Re: Commonwealth Anti-Terrorism Bill 2005; Advice of ACT Director of Public Prosecutions to ACT Chief Minister 20 October 2005 Anti-Terrorism Bill 2005; Advice/Opinion of Stephen Gageler SC 26 October 2005 to ACT Chief Minister In The Matter Of Constitutional Issues Concerning Preventative Detention In The Australian Capital Territory; and Memorandum of Advice Lex Lasry QC and Kate Eastman to ACT Chief Solicitor ACT Government Solicitor 27 October 2005 Anti-Terrorism Bill 2005 (Cth) and the Human Rights Act (2004) ACT.

\(^9\) See 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 17, 59-60 (Copy of article attached to this submission as Appendix 2)
2005 (Cth),\textsuperscript{10} as well as to the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT).

The circumstances of the Senate Committee review and Commonwealth Parliament enactment of the Anti-Terrorism Act (No 2) 2005 (Cth).

A further source of potential improvements to the existing Commonwealth legislation is to be found in the unimplemented recommendations of the Senate Legal and Constitutional Legislation Committee Report Provisions of the Anti-Terrorism Bill No 2 2005.\textsuperscript{11} These matters are highlighted in more detail below.

Further examination of the Senate Legal and Constitutional Legislation Committee recommendations is justified in the particular circumstances of the Senate review and its application. The compressed time frame for the Senate Committee review, even with the important concession of a later reporting date "still created considerable difficulties for thorough review of the bill, participation in public debate and deliberations of the Senate Committee,"\textsuperscript{12} “Wider criticisms were made about the intense time frame and pressures under which the Committee review was conducted, the compromising of process producing potentially inferior legislation, attitudinal arrogance towards the legislative and public participatory process engendered by the Government Senate majority and the overt politicization of national security matters."\textsuperscript{13}

The rushed passage of the legislation is a further consideration supportive of full consideration in the present COAG review of the above sources of potential reform to the Commonwealth legislation, including reconsideration of the Senate Committee report recommendations. As with other terrorism legislation, a primary executive consideration was urgent passage of the legislation, with review and amendments to be considered later.\textsuperscript{14} This was reflected in the limited allocation of time for debate of the Commonwealth legislation and its declaration as an urgent bill.\textsuperscript{15}

The point to be made for the present COAG review is that the Commonwealth legislation was enacted in circumstances which compromised the Senate’s ability to adequately scrutinize that legislation and to negotiate the incorporation within that legislation of most of the recommendations of the Senate Legal and Constitutional Legislation Committee Report. The Senate Committee report was handed down on 28 November 2005 and the legislation passed the Senate on 6 December 2005.

This makes re-considering the recommendations of the Senate Legal and Constitutional Legislation Committee Report worthwhile in the present COAG review, as a source of potential amendments for refining the existing Commonwealth legislation.

\textsuperscript{10}This legislation amended the relevant legislation referred to under the heading “Scope of the Review” in the present Terms of Reference – Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation, namely the Criminal Code Act 1995 (Cth), the Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth), the Crimes Act 1914 (Cth), the Financial Transaction Reports Act 1988 (Cth) and the Administrative Decisions (Judicial Review) Act 1977 (Cth).

\textsuperscript{11}A copy of the recommendations of the Senate Legal and Constitutional Legislation Committee is included at Appendix 3 to this submission.

\textsuperscript{12}Carne, FJLR, 45

\textsuperscript{13}Carne, FJLR, 46

\textsuperscript{14}Carne, FJLR 48

\textsuperscript{15}Carne FJLR 49-50. The Commonwealth bill received only a total of 6 hours and 24 minutes of parliamentary debate
The Senate Committee Report made a total of 25 recommendations in relation to the bill containing preventative detention and control orders. Many of these recommendations were not implemented.

Recommendations accepted in their entirety:

Only a few of these recommendations appeared to have been accepted in their entirety – the ability of detainees to make representations to the nominated senior AFP member concerning revocation of the preventative detention order; oversight of the preventative detention regime by the Ombudsman; the prohibition on hearsay evidence in a proceeding for a grant of a continued preventative detention order; an obligation on police officers to ensure access to a detainee by a lawyer and interpreter as necessary in cases where there are reasonable grounds to believe that the detainee is unable to understand fully the effect of the preventative detention order because of inadequate knowledge of the English language or a disability; an amendment concerning persons not entitled to be contacted, in relation to an impermissible disclosure offence by a parent/guardian; and the requirement that the control order hearing confirmation day be set as soon as reasonably practicable after the making of the order.

The remainder of the recommendations are most conveniently divided into those which were rejected outright and those which appear to have been implemented in the legislation in a more restrictive, indirect or minimal manner.

Recommendations rejected outright:

1. Removal of restrictions on lawyer-client communications and the right to consult a lawyer privately

2. Modifications to the ability of the AFP officer to monitor lawyer-client communications

3. Requirements that the Attorney General report to the Parliament on preventative detention orders and control orders every six months

4. A requirement for a public and independent five year review of preventative detention orders and control orders

5. A five year sunset clause

6. A requirement that the AFP officer, the Attorney General and the issuing Court each be satisfied that the control order sought is the least restrictive means of achieving the purpose of the order

7. The prohibition of reliance on hearsay evidence in a proceeding for the grant of a continued control order

---

16 See s.105.31 (3) and 105.37 (3A) of the Criminal Code (Cth)
17 See s.105.41(3)(c) of the Criminal Code (Cth)
18 The language settled upon in s.104.5 (1A) of the Criminal Code (Cth) is that "The day specified for the purposes of paragraph (1)(e) must be as soon as practicable, but at least 72 hours, after the order is made".
19 See the classification of these two sets of recommendations in Carne FJLR, 47.
Recommendations only partly implemented or implemented in a more restrictive, indirect or minimal manner:

. Custodial protections for minors between the age of 16 and 18 years subject to preventative detention orders

. An obligation on police officers to ensure provision of interpreter assistance and legal assistance in the service, explanation and notification of an interim control order20

. An express right, with legal representation, to present information to the issuing authority for a continued preventative detention order

. Contact with family members

. The provision of reasons for decisions for preventative detention and control orders, including materials on which the order is based, subject to redaction or omission on national security grounds

. The elaboration of grounds for a prohibited contact order

. The involvement of the Australian Human Rights Commission (with the Ombudsman and Inspector General of Intelligence and Security) in developing a Protocol governing minimum conditions of detention and standards of treatment of persons subject to a preventative detention order

. The videotaping of any questioning that takes place during the period of preventative detention

Pointers towards further reforms deriving from the Senate Legal and Constitutional Legislation Committee report recommendations

The status of the above recommendations and absence of their comprehensive implementation in the legislation points to opportunities in the present COAG review to tighten and refine the legislation by recommendations. The following matters help provide focus on some necessary reforms

. The above categorization of recommendations rejected outright and recommendations only partly implemented or implemented in a more restrictive, indirect or minimal manner points to a greater implementation of the recommendations in relation to preventative detention than in relation to control orders.

. The Queensland Public Interest Monitor is assigned a role in relation to control orders—see s.104.12 (5), 104.12A(2)(b) and s.104.14 (1)(e), (4)(iii) and (5) of the Criminal Code. A modest reform, building upon the present role of the Public Interest Monitor, would be to make provision for the appointment of Special Counsel, security cleared, to make representations to decision makers in relation to both control orders and preventative detention orders, and to receive full, non redacted copies of the documentation upon which the various applications for (including confirmation of and variations of a control order and a continued preventative detention order) control orders and preventative detention orders are made.

The role of such Special Counsel would add an additional element of accountability and contestation, particularly at those points in relation to control orders (see s.104.12A (2) and

20 S.104.12 of the Criminal Code (Cth) falls short of the more detailed and specific content of Recommendation 21.
(3) Election to confirm control order) and preventative detention orders (see s.105.3 (6) and (6A) summary of grounds on which initial preventative detention order made; s.105.11 (1), (2) and (3A) application for continued preventative detention order; s.105.12 (6) and (6A) making of a continued preventative detention order; s.105.28 exercising various rights subsequent to being taken into custody under an initial preventative detention order; s.105.29 exercising various rights after the making of a continued preventative detention order) where information is withheld from the potential subject or subject of the orders, inhibiting the capacity of the subject or potential subject of the orders, even with legal representation, to effectively contest the premises upon which the application is made.

In relation to the above, the looseness of the legislative drafting in s.105.31 of the Criminal Code and the principle of substantive compliance with the obligations under s.105.28 (1) and s.105.29 (1) of the Criminal Code to inform the person preventively detained is unsatisfactory – notice of these matters, which include important rights of complaint, review and remedy, should be accessible given both verbally and in writing.

A further concern is the scope of the potential application of preventative detention in relation to the preservation of evidence of or relating to a terrorist act, under s.105.4 (6) of the Criminal Code. This aspect of preventative detention is more properly identified as an evidence preservation order and should be re-titled as such. Unlike the ordinary requirements of a preventative detention order under s.105.4 (4) indicating some level of involvement in a prospective terrorist act,21 with detention then substantially assisting the prevention of a terrorist act occurring,22 no reasonable grounds of suspicion of involvement in a terrorist act preface the requirements for a preventative detention order directed towards the preservation of evidence.

Accordingly, entirely innocent persons having no involvement with the past terrorist act can be preventively detained (including presumably victims of terrorist activity and bystanders to terrorist activity), if (a) a terrorist act has occurred within the last 28 days; and (b) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and (c) detaining the subject for a period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).23 It is noted that the ACT legislative scheme provides for detention for evidence preservation purposes in the decidedly narrower circumstances where it is the only effective way of preserving the relevant evidence.24 This is an amendment that could be adopted for the Criminal Code (Cth) provision on this point.

The continuing existence of the control orders regime under Division 104 of the Criminal Code needs to be examined. Within Australia, only two control orders have been issued – one in relation to Jack Thomas, following his acquittal on retrial of all charges, with the exception of a conviction for a passport offence; the other in relation to David Hicks, following his release from an Australian prison having served a sentence imposed upon a guilty plea before the US Military Commission in Guantanamo Bay.

Two salient points arise. First, the control orders regime has not been invoked where it might have provided a more suitable alternative to existing detention arrangements – for example, in relation to 51 adult refugees detained in Immigration detention who have received an adverse ASIO security assessment, and who can neither be deported, or

---

21 S.105.4 of the Criminal Code (Cth) states that "A person meets the requirements of this subsection if the person is satisfied that (a) there are reasonable grounds to suspect that the subject (i) will engage in a terrorist act; or (ii) possesses a thing that is connected with the preparation for, or for the engagement of a person in, a terrorist act; or (iii) has done an act in preparation for, or planning, a terrorist act"
22 S.105.4 (4)(b) of the Criminal Code (Cth)
23 S.105.4 (6) of the Criminal Code (Cth)
because of the adverse ASIO security assessment, released into the community on a protection visa. Proceedings were brought in the High Court against five defendants challenging the validity of the continuing detention. The low use of control orders in Australia, their use in both instances as a supervision mechanism post expiration of custodial arrangements, and the fact that control orders have not been sought in circumstances where continuing indefinite immigration detention remained feasible (and where control orders in some instances might provide a compromise allowing release into the community), points to the inherently discretionary character of executive applications for the control orders and in the conditions sought to be imposed under the orders, as well as different institutional priorities of the Commonwealth executive bodies intersecting with national security issues.

Second, the introduction of control orders was justified by their earlier introduction in the United Kingdom. Indeed, the existing United Kingdom legislation in the form of the Terrorism Act 2000 (UK) and the Prevention of Terrorism Act 2005 (UK) linked to the tragic experience of the London terrorist bombings of 7 July 2005, figured prominently in the reasons for introducing the control orders and preventative detention provisions into Australian law. However, in 2011 the UK control orders legislation was subject to review and replacement by new measures. In a range of cases, the imposition of certain conditions in the UK control orders were found not to be consistent with the European Convention of Human Rights principles enshrined in the Human Rights Act 1998 (UK).

Furthermore, control orders in the UK were originally introduced in response to the decision of the House of Lords in A and others v Secretary of State for the Home Department, which involved persons presenting a threat to the security of the United Kingdom who could not be deported to a third country, or for reasons of risk of torture or cruel and inhuman treatment could not be deported to their country of origin. Yet this circumstance is very similar to the situation in recent High Court of Australia litigation, but remote from the two circumstances in which control orders have been sought in Australia — namely in the situations of post conviction expiration or retrial and acquittal.

... The delays in instigating the present COAG review are both the product of concerns about how the review might overlap with the new role of the Independent National Security Monitor, but also the insufficient specificity of obligation to conduct the review, which

---

25 ASIO's Director-General, the officer in charge of Melbourne Immigration Transit Accommodation, the Secretary of the Department of Immigration, the Minister for Immigration and the Commonwealth of Australia. See Plaintiff M47/2012 v Director General of Security and Others [2012] HCA 46 (5 October 2012).
26 On 5 October 2012, a majority of the High Court found invalid a regulation made under Migration Act 1958 (Cth) which prevented the grant of a protection visa to a refugee if ASIO assessed the refugee to be at risk to security, meaning that the decision to refuse the plaintiff a protection visa had not been made according to law: Plaintiff M47/2012 v Director General of Security and Others [2012] HCA 46.
27 Came, FJLR, 51 and see further commentary under the heading “VII Beyond The Parliamentary Process A. False Comparisons: Claimed Derivation from the United Kingdom Model,” FJLR 51-59.
30 [2004] UKHL 56, [2005] 3 All ER 169
31 S.23(c) of the Anti-Terrorism Crime and Security Act 2001 (UK) provided that a suspected international terrorist could be detained under specified provisions of the Immigration Act 1971 (Cth) despite the fact that removal of that person from the UK was prevented temporarily or indefinitely. The provision was found by a majority of the House of Lords to be in breach of the non discriminatory Art 14 of the Convention’s application to Art 5 the right to liberty, and not justifiable under the public emergency derogation of Art 15 of the Convention.
32 Plaintiff M47/2012 v Director General of Security and Others [2012] HCA 46
left much to the bare terms of the COAG communique. It is apparent that the obligation to review the legislation, the membership of the review panel (which should be composed of membership similar to the Sheller Committee profile), the scope of the review (including its terms of reference) and its consultation and reporting timelines should be specified in amended legislation, including the requirement for review by a panel every five years.

The above amendments for a legislated review structure and process should also be integrated with and reinforced by a five year sunset clause which clearly sunsets the content of the Anti-Terrorism Act (No 2) 2005 (Cth) content in the absence of re-enactment, through a timeline (say of six months) connected to the legislated timeline for the review panel report. In this method, certainty is given to the expiration of the legislation in the absence of re-enactment, but sufficient opportunity is also afforded to incorporate the review panel recommendations in the re-enactment of that legislation.

The scope and purposes of the present preventative detention provisions need to be holistically assessed from the perspective that the legislation also allows the shifting of the detainee into forms of questioning and detention other than preventative detention. This assessment is important as the various legislated methods of detention enacted under Australian law post 9/11 may, though serial and incremental legislative enactment, have created legislative duplication and overreach, and potential seeking of an application of detention powers by different agencies for competing ends – prevention, law investigation and enforcement and intelligence gathering.

The most obvious example is the obligation of the detaining police officer in the legislation where a person is being detained under a preventative detention order to give priority to a s.34 D warrant under the Australian Security Intelligence Organisation Act 1979 (Cth). Similarly, the legislation also contemplates release from preventative detention so that the person may be dealt with under the Investigatory provisions of Division 4 of Part 1AA of the Crimes Act 1914 (Cth). In each instance, the preventative detention provisions take on a preparatory, precursor role above their legislatively articulated purposes in s.105.4 (4) and s.105.4 (6) of the Criminal Code (Cth) in facilitating removal of the detainee to a subsequent intelligence gathering or investigative process, freed initially from the higher thresholds under the ASIO Act 1979 (Cth) and the Crimes Act 1914 (Cth).

In relation to the ASIO Act 1979 (Cth), which also includes a questioning only warrant, the need for the continuing inclusion within the ASIO Act 1979 (Cth) of a questioning and detention warrant appears redundant, given the preventative detention provisions under the Criminal Code (Cth) and state legislation, and the ability to apply a ASIO questioning only warrant to a preventative detainee so detained.

Furthermore, there is no prohibition on the one person acting as both the prescribed authority for an ASIO questioning warrant and as the issuing authority in relation to a continuing preventative detention order – there is an overlap between categories of

---

35 See Anti-Terrorism Act (No 2) 2005 (Cth) s.4 (1) The Council of Australian Governments agreed on 27 September 2005 that the Council would, after 5 years, review the operation of (a) the amendments made by Schedules 1, 3, 4 and 5; and (b) certain State laws. If a copy of the report in relation to the review is given to the Attorney-General, the Attorney-General must cause a copy of the report to be laid before each House of Parliament within 15 sitting days after the Attorney-General receives the copy of the report.”
36 See Council of Australian Governments Communique ‘Special Meeting on Counter-Terrorism 27 September 2005’ under the heading ‘Strengthening Counter-Terrorism Laws’: ‘Leaders also agreed that COAG would review the new laws after five years and that they would sunset after 10 years’.
37 S.105.25 of the Criminal Code (Cth).
38 S.34F (4)(d) of the ASIO Act 1979 (Cth) in relation to an ASIO detention and questioning warrant. 39 Division 4 of Part 1AA of the Crimes Act 1914 (Cth).
40 S.34C (3) of the ASIO Act 1979 (Cth)
41 See Carne, FJLR, 67-68.
appointees, creating potential conflicts of interest, particularly in the smaller jurisdictions in the Commonwealth. This is a further area in need of legislative reform.

A further advisable amendment arises in relation to the s.105.33 Criminal Code obligation of humane treatment of a person being detained. It is desirable that Recommendation 10 of the Senate Committee Report be implemented in full, so that s.105.33 is amended to include consultation by the Minister in the development and subsequent amendment of a protocol regarding preventative detention – to create an obligation to consult with the Australian Human Rights Commission, the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security. The Australian Human Rights Commission is the body with the requisite expertise to assess compliance of this practical aspect of the legislation’s implementation with Australia’s core United Nations international human rights treaty obligations.

Considering the reform of state enacted preventative detention legislation – additional model safeguards and compliance with international human rights standards

The opening section of this submission identified the link between the language of the stated goals of the present review and the advocacy and language of the ACT approach leading up to the COAG communiqué of 27 September 2005:

It can therefore be strongly argued that the stated goals of the present COAG Review, demonstrably and historically informed by the language and advocacy of the ACT approach, can effectively be responded to by drawing upon both the ACT executive responses and legal commentary...that the provisions of the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) are a useful resource for prescribing improvements and additional safeguards in state based preventative detention legislation.

In the event that state and territory based preventative detention provisions are to be retained, the ACT legislation, crafted as far as possible for conformity with ICCPR articles, provides a model for additional safeguards.

The preamble to the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) conveniently raises the critical elements in the difficult but necessary reconciliation of protection against terrorism with the maintenance of human rights. To help achieve such objectives, a number of key additional features were included in the ACT legislation.

41 Council of Australian Governments Communiqué’ Special Meeting on Counter-Terrorism 27 September 2005
42 Principally to ensure ‘counter-terrorism measures that are consistent with international human rights obligations’ (Preamble, paragraph 7), ‘measures to protect our community against terrorist activity...and promote the values reflected in, and the rights and freedoms guaranteed by, the International Covenant on Civil and Political Rights’ (Preamble, paragraph 8) and to preserve Australia’s fundamental legal principles (such as the rule of law, respect for the legal process, the separation of powers and respect for human rights) (Preamble, paragraph 9)
It is with this approach in mind that various accountability and safeguard improvements can be made in the West Australian Preventative Detention legislation – Terrorism (Preventative Detention) Act 2006 (WA).

. Authority to issue the preventative detention order – administrative or judicial activity.

. If the system of preventative detention orders is to be retained, consideration should be given to a model whereby the Supreme Court itself issues both interim (ex parte) preventative detention orders and preventative detention orders, rather than the present administrative based decision making model of an application for a preventative detention order being made to an issuing authority in a private capacity, the issuing authority making the preventative detention order, then the order being subject to review by the Supreme Court.

The involvement of the Supreme Court from the outset would emphasize the exceptionality and gravity of the prospect of detention in the absence of proof of criminal suspicion or culpability. An assessment of the most recent issues arising for state courts in the application of the Chapter III Commonwealth Constitution separation of judicial power issues (from the control order context) of South Australia v Totani and Wainohu v New South Wales as against the High Court of Australia principles approved in Fardon v A-G Queensland would need to be made to assess the constitutional reliability of moving to this more stringent threshold control in the application for and issuing of a preventative detention order.

The present arrangements in Division 105 of the Criminal Code (Cth) for issuing authorities for preventative detention orders reflect a categorization of the issuing of such orders as being administratively based, as well as concerns raised by some of the State premiers that the appointment of serving members of the judiciary to this role, even in a consensual personal capacity, might infringe Chapter III Commonwealth Constitution principles.

. Requirement for the statement of reasons for the making of a preventative detention order.

The ACT legislation requires that the reasons for the making of the preventative detention order to be stated, providing greater ability for the detainee to seek to vary or contest the order. This is a desirable additional capacity over the bare description of ‘a summary of the grounds on which the order is made’ which can in turn be restricted by claims that disclosure of information would be likely to prejudice national security. The statement of reasons for the making of a decision is consistent with judicial practice and for the basis of further review. It is a desirable amendment to the WA legislation.

---

45 S.11(2) and s.7 Terrorism (Preventative Detention) Act 2006 (WA)
46 S.13 Terrorism (Preventive Detention) Act 2006 (WA)
47 S.22 Terrorism (Preventative Detention) Act 2006 (WA)
48 (2010) 271 ALR 662
49 (2011) 278 ALR 1
50 (2004) 223 CLR 375
51 S.18(8) Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)
52 S.37(1)(b) Terrorism (Preventative Detention) Act 2006 (WA)
54 Note also s.37(7) Terrorism (Preventative Detention) Act 2006 (WA) which confirms that the lawyer for the person subject to a preventative detention order is not entitled to see or be given a copy of a document other than the order or summary.
Additional threshold requirement confining the making of a preventative detention order to more limited circumstances

Consistent with the principles of proportionality of response and necessity of the measure under ICCPR principles, the ACT legislation respectively confines the making of preventative detention orders to circumstances where they are the least restrictive means to prevent a terrorist act OR where detaining the person under the order is the only effective way of preserving evidence. In both these instances, the period for which the person is to be detained has to be reasonably necessary to achieve the stated objective thereby providing a further element of proportionality.

These additional requirements added to the bare existing requirements of sections 9, 11 and 13 of the WA legislation would ensure greater adherence to and consistency with human rights principles of proportionality and necessity, than the more broadly based threshold purposes of substantially assisting in preventing a terrorist act occurring or preserving evidence.

Age thresholds for the application of preventative detention orders

The ACT legislation does not permit the making of preventative detention orders in relation to a child (i.e., an individual under the age of 18 years). The WA legislation prohibits the application of or making of a preventative detention order in relation to a person who is under 18 years of age. It is preferable that for compliance with international human rights obligations under the Convention of the Rights of the Child that the age threshold for preventative detention be set at 18 years; in the alternative, the arrangements for detention of 16 and 17 year olds need to be assessed for compliance with those international obligations, and a more explicit legislative role for the Inspector of Custodial Services be written into the legislation.

Limitations on the monitoring of communications with legal representatives whilst in preventative detention

The ACT legislation provides a more structured and accountable approach to the monitoring of contact between a person detained under a preventative detention order and their lawyer, requiring that a senior police officer hold a belief on reasonable grounds that nominated consequences will happen if that contact is not monitored and requiring consultation with the Public Interest Monitor and the taking into account any submissions made by the Public Interest Monitor.

Again, the ACT legislation provides a preferable alternative which integrates human rights balances in the sets of interests of the risks of disclosure of information by a person detained under a preventative detention order against the right for full and private communication with a lawyer in an extended custodial situation. Its starting point is that such conduct may not be monitored, but then establishes a justificatory process for such monitoring, the process itself not risking the disclosure of sensitive information.

55 S.18(4)(c) Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)
56 S.18(6)(c) Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)
57 S.18(4)(d) and s.18(6)(d) Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT), See similar aspect in s.13(1)(b) of the Terrorism (Preventative Detention) Act 2006 (WA).
58 S.13(1)(b)(i) and (ii) of the Terrorism (Preventative Detention) Act 2006 (WA)
59 S.33(1)(b) and (2), (3) and (4) and s.45 of the Terrorism (Preventative Detention) Act 2006 (WA)
60 S.34 Terrorism (Preventative Detention) Act 2006 (WA)
61 S.56(1) and (2) Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)
62 S.56(3) and (4) Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)
As such, it is preferable to the WA legislation, the starting point of which is that communications have to be conducted in a way that the communication (including the content and meaning of the communication that takes place during the contact) can be effectively monitored, unless either the senior police officer nominated under s.24(2) approves otherwise or that the lawyer for the person detained under the preventative detention order has a Secret level security clearance, a permissive exception which can be overridden by an order made by the issuing authority.

. Person subject to preventative detention order contacting family members

The WA legislation adopts the procedures included in the ASIO Act 1979 (Cth) S.34D detention warrants, restricting contact to a highly abstracted and artificial formula of words ‘solely for the purposes of letting the person contacted know that the detainee is safe but is not able to be contacted for the time being’ and prohibiting disclosure of facts that a preventative detention order has been made, that the detainee is in detention and the period of the detention.

In contrast, the ACT legislation permits disclosure of basic information cognizant of family rights and ancillary to the protection of the welfare of the detainee and humane treatment of the detainee - comprising disclosure to a family member or person with whom they live, the fact of detention under a preventative detention order, the period of detention and for the purposes of contact with the family member or person with whom they live, and the place of detention for purposes of contact. These very limited disclosure mechanisms also aid accountability mechanisms such as contact with lawyers and external complaints processes.

. The provision of legal aid to a person the subject of a preventative detention order

The ACT legislation includes a basic right to contact a lawyer. The ACT legislation also includes provisions for a right of contact with the legal aid commission, the legal aid commission to provide reasonable assistance to a person detained under a preventative detention order to choose a lawyer (including by arranging for a suitable lawyer to contact and act for the person if the person asks it to make the arrangements) and if the person cannot afford the cost of obtaining assistance from a private lawyer, upon the request of legal assistance from the person, must provide the representation or arrange for it to be provided.

These measures preferably provide for a disinterested intermediary body (instead of the responsibility residing with the police officer who is detaining the detainee, which has the potential for conflicts of interest) to provide assistance in contacting and obtaining legal assistance, and in the event of a lack of financial means, to provide or arrange that assistance itself. In addition, the measures through effectuating better access to legal advice, help facilitate the range of other review rights and accountability mechanisms in the legislation.

---

63 S.44(1) Terrorism (Preventative Detention) Act 2006 (WA)
64 S.44(2) Terrorism (Preventative Detention) Act 2006 (WA)
65 S.44(7) Terrorism (Preventative Detention) Act 2006 (WA)
66 S.44(7) Terrorism (Preventative Detention) Act 2006 (WA)
67 S.41(1) Terrorism (Preventative Detention) Act 2006 (WA)
68 S.50 Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)
69 S.44 (2) Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)
70 S.52(3) Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)
71 S.52(4) Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)
72 S.52(5) Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)
These arrangements could be profitably adopted in the WA legislation, above the present bare requirements of an entitlement to contact a lawyer with the police officer detaining the detainee required to give reasonable assistance in choosing a lawyer (in specified circumstances) and no reference to the availability of legal aid assistance for a person subject to a preventative detention order who is unable to afford the cost of obtaining assistance from a private lawyer. Again, such amendments would assist in the functionality of existing and amended accountability and review mechanisms under the WA legislation.

Inclusion of a public interest monitor to exercise critical functions in relation to preventative detention decision making

The ACT legislation includes the appointment of a Public Interest monitor panel with security clearances to exercise legislated roles in relation to Part 2 preventative detention applications and in relation to decision making of the senior police officer regarding monitoring contact of the person subject to the preventative detention order with a lawyer.

The advantages of the inclusion of this role and office at strategic decision points in the preventative detention arrangements are obvious — the capacity to provide disinterested advice and submissions, informed by access to documents and materials not available to the person subject to the preventative detention order, for security reasons, and to ensure that the public interest in reconciling and integrating the twin goals of protection against terrorism with the maintenance of human rights is achieved in the operation of the legislative mechanisms. Again, the role of Public Interest Monitor will also ensure better working of the other accountability mechanisms in the legislation.

The WA legislation should be modified to replicate the office and functions of the Public Interest Monitor in the ACT Legislation. This would be a modest and effective amendment, and pick up similar provisions in the Commonwealth legislation regarding the role of the Queensland Public Interest Monitor in relation to control orders. The addition of this measure and the other measures above, modeled on the ACT legislation, if included in the WA legislation, would incidentally assist in fulfillment of the new role of the Inspector of Custodial Services of WA being the devolved National Preventative Mechanism under Article 17 of OP-CAT.

I would be pleased to make a public statement as to my submission at the Perth COAG Committee hearings.

Yours faithfully,

(Dr) Greg Carne
Faculty of Law – UWA.

73 S.35 (2)(h) and s.43 Terrorism (Preventative Detention) Act 2006 (WA)
74 S.43 (3) Terrorism (Preventative Detention) Act 2006 (WA)
75 S.62 Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)
76 S.62 (2)(c) Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)
77 S.14 Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT). Part 2 applications are defined as applications (a) for a preventative detention order for a person (b) to extend, or further extend, the period for which a preventative detention order (including an interim order) is to be in force for a person (c) to reinstate a preventative detention order (d) to set aside or amend a preventative detention order (including an interim order) made for a person (e) an application for a prohibited contact order, or to set aside a prohibited contact order, made in relation to a person’s detention under a preventative detention order
78 S.56 Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)
Submission to COAG Review of Anti-Terrorism Laws

Dr Greg Carne, Faculty of Law, University of Western Australia

Appendices to the submission:

1. Letter of 21 August 2012 ‘COAG Review of counter-terrorism legislation: invitation to make a submission’


12/12819

21 August 2012

Dr Greg Carne
Law School
The University of Western Australia
35 Stirling Highway
CRAWLEY WA 6009

Dear Dr Carne

COAG Review of counter-terrorism legislation: invitation to make a submission

The Prime Minister recently announced the start of the COAG Review of counter-terrorism legislation. The role of the Review is to evaluate the operation, effectiveness and implications of key Commonwealth, State and Territory counter-terrorism laws. The full list of legislation and the Review’s terms of reference can be found on the website: www.coagctreview.gov.au.

The Review Committee will examine these various laws and make recommendations on whether the laws:

- are necessary and proportionate
- are effective against terrorism by providing law enforcement, intelligence and security agencies with adequate tools to prevent, detect and respond to acts of terrorism
- are being exercised in a way that is evidence-based, intelligence-led and proportionate, and
- contain appropriate safeguards against abuse.

As Chair of the Review Committee, I would like to invite you to consider making a submission to the COAG Review, as I believe your interest and expertise in this area would be beneficial to the Review Committee’s deliberations. Details of how to make a submission can be found at: www.coagctreview.gov.au/submissions. Submissions are due by 21 September 2012. The Committee also intends to hold public hearings in Sydney, Melbourne, Brisbane, Adelaide and Perth in the second half of October 2012. Details on these hearings will be made available on the website closer to the time. Please let me know in your submission if you would be interested in attending and making a public statement on your submission.

Yours sincerely

The Hon. Anthony Whealy QC
Chair
COAG Review of Counter-Terrorism Legislation

www.coagctreview.gov.au
PREVENT, DETAIN, CONTROL AND ORDER?: LEGISLATIVE PROCESS AND EXECUTIVE OUTCOMES IN ENACTING THE ANTI-TERRORISM ACT (NO 2) 2005 (CTH)

GREG CARNE†

I INTRODUCTION

The enactment of the Anti-Terrorism Act (No 2) 2005 (Cth), in particular its preventative detention and control order regimes, can be seen as significantly transforming traditional common law assumptions in Australia about the liberty of the individual save in circumstances of arrest on reasonable suspicion of the commission of an offence. Representing a shift to principles of pre-emption and interdiction, preventative detention and control order provisions under the legislation have the potential of promoting over time, fundamental and exponential changes to the qualities of the democratic relationship between the citizen and State.

This article commences with a synopsis of the control orders and preventative detention provisions. A conceptual overview follows of the transformative characteristics of the concentration of executive power and its democratic consequences which the control orders and preventative detention legislation signifies as a recent example of counter-terrorism legislation. The article then examines various aspects of the debate surrounding the legislation so as to identify and illuminate the transformative shifts in executive power it represents. The role of the Council of Australian Governments as the constitutional and political forum through which the legislation was steered is analysed. Consideration is given to constitutionality issues that emerged during the debate, also reflecting similar tensions in the democratic assumptions underpinning enactment of the legislation.

† Faculty of Law, University of Tasmania. The author would like to thank the anonymous referee for comments on an earlier version of this article.

1 Division 101 [ss 104.1–104.32] of the Anti-Terrorism Act (No 2) 2005 (Cth) contains the Control Orders provisions and div 105 [ss 105.1–105.53] of the Anti-Terrorism Act (No 2) 2005 contains the Preventative Detention Orders provisions. Upon enactment, these provisions were incorporated into the Criminal Code (Cth). Subsequent references in footnotes to the Anti-Terrorism Act (No 2) 2005 (Cth) in this article will be to the relevant provision of the Criminal Code (Cth).
An examination is subsequently made of the review mechanisms for the bill and the consequences of the review, particularly the contributions of the Attorney-General's Backbench Committee and the Senate Legal and Constitutional Legislation Committee, where the legislation was subjected to an intense reporting timeframe. Procedural aspects of the parliamentary debate of the bill are highlighted as another dimension of the executive concentrated nature of the control orders and preventative detention provisions.

Beyond the legislative process itself, consideration is given to other aspects which illuminate the concentration of executive power to be found in control orders and preventative detention. An analysis is made of improper comparisons between, and claimed derivations of, the Australian legislation from the human rights based United Kingdom model. This selectivity is confirmed by subsequent adverse Commonwealth reaction to the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT), which similarly incorporates international human rights principles. The Commonwealth assertion of great detail in the control orders and preventative detention legislation as a practical and pragmatic realisation of human rights is also critiqued. Illustrations are provided of how the Commonwealth has failed to both incorporate significant detail in adoption of human rights safeguards and adhere to its own framework human rights document. Such detail as was incorporated in the legislation arose as an indirect consequence of public debate from the unauthorised release of a draft of the bill. Indeed, real human rights detail would have more closely confined executive discretion.

Executive discretion within the preventative detention regime is also examined in both its linkages with other forms of detention under the ASIO Act 1979 (Cth) and Crimes Act 1914 (Cth) and in operational considerations, in severely limiting forms of judicial and administrative review and in enlarging the role of administrative discretion, which is now re-conceived as a positive check upon the exercise of the powers. The article concludes with a preliminary appraisal of some broader democratic institutional and procedural consequences for the introduction of control orders and preventative detention as a major aspect of counter-terrorism legislation, and speculates upon future changes to and consequences from that legislation.

II A SYNOPSIS OF THE CONTROL ORDERS AND PREVENTATIVE DETENTION

An outline of the most important features of control orders and preventative detention orders will provide useful background in arriving at an understanding of their potential consequences for the Australian legal and political systems.  

A Control Orders

A control order is intended to allow obligations, prohibitions and restrictions to be imposed upon a person for the purpose of protecting the public from a terrorist act. 3 There are two types of control orders — interim control orders and confirmed interim control orders. The making of an interim control order commences with a written request by a senior member of the Australian Federal Police ("AFP") including a draft of the interim control order and various statements, information and explanations, seeking the Attorney-General’s written consent to request an interim control order on either of two alternative grounds. 4 The Attorney-General’s consent may be made subject to changes being made to the draft request (including the draft of the interim control order to be requested). 5

On obtaining the Attorney-General’s consent, the senior AFP member may request an interim control order from an issuing court — being the Federal Court, Family Court or Federal Magistrates Court. The interim control order application is heard ex parte. For an issuing court to issue an interim control order, the court must be satisfied, on the balance of probabilities, of two major criteria. 7 The legislation establishes a range of terms that the issuing court must include in the interim control order. 8 Significant amongst these terms is the requirement to specify a day (as soon as practicable, but at least 72 hours after the order is made) on which the person may attend the court for the court to (i) confirm (with or without variation) the interim control order; or (ii) declare the interim control order to be void; or (iii) revoke the interim control order, as well as to set out a summary of the grounds on which an order is made. 11 The interim control order must also specify

17. For a commentary on the most far reaching aspects of the then bill, see Michael Head, ‘Editorial: Detention under the Anti-Terrorism Legislation’ (2005) 9 University of Western Sydney Law Review 1, 5–7.

3 Criminal Code (Cth) s 104.1 (Object of this Division).

4 Criminal Code (Cth) s 104.2(2): A senior AFP member may only seek the AG’s written consent to request an interim control order in relation to a person if the member: (a) considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act; or (b) suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation.

5 Criminal Code (Cth) s 104.2(4).

6 Criminal Code (Cth) s 104.3.

7 Criminal Code (Cth) s 104.4(1)(c)(i) that the making of the order would substantially assist in preventing a terrorist act; or (ii) that the person has provided training to, or received training from, a listed terrorist organisation and s 104.4(1)(d) the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. For the latter requirement, the court must take into account the impact of the obligation, prohibition or restriction on the person’s circumstances: s 104.4(2).

8 Criminal Code (Cth) s 104.5.

9 Criminal Code (Cth) s 104.5 (1)(e).

10 Criminal Code (Cth) s 104.5 (1)(g).

11 Criminal Code (Cth) s 104.5 (1)(k).

12 Criminal Code (Cth) s 104.5 (1)(o).
all of the obligations, prohibitions and restrictions\textsuperscript{13} to be imposed on the person by the order. A separate subdivision contains further procedures for the making of an urgent interim control order.\textsuperscript{14}

Further provisions deal with the confirmation of an interim control order\textsuperscript{15} before the issuing court. Of importance, given the ex parte nature of the interim control order application, is the provision for service, explanation and notification of the interim control order.\textsuperscript{16} Where the senior AFP officer elects to confirm the control order, the AFP must serve various documents on the subject of the control order,\textsuperscript{17} which will "enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order"\textsuperscript{18} before the court. On the day where it has been elected to confirm an interim control order, the AFP, the person subject to the control order or representatives of that person "may adduce evidence (including by calling witnesses or producing material), or make submissions, to the issuing court in relation to the confirmation of the order".\textsuperscript{19} The court is empowered to declare the order void,\textsuperscript{20} revoke it,\textsuperscript{21} confirm and vary it,\textsuperscript{22} or confirm the order without variation.\textsuperscript{23} Where the issuing court confirms the interim control order, it must make a corresponding order.\textsuperscript{24} Where the interim control order is declared to be void, revoked or confirmed, the AFP member must serve the declaration, revocation or confirmation of the control order personally on the person.\textsuperscript{25} Various other matters exist in relation to control orders — including applications by the subject of the control order\textsuperscript{26} or by the AFP Commissioner\textsuperscript{27} for revocation or variation of a control order, applications by the AFP Commissioner for the addition of obligations, prohibitions or restrictions to a confirmed control order\textsuperscript{28} and an offence for contravening a control order.\textsuperscript{29}

\begin{footnotesize}
\begin{enumerate}
\item[C13] Criminal Code (Cth) s 104.5 (3)(a)-(l). Examples include prohibitions or restrictions upon movement, communication and association, the possession of certain items and the carrying out of specified activities. Requirements may include remaining at specified premises at particular times, the wearing of a tracking device, reporting requirements, photography and fingerprinting and participation in counselling or education.
\item[C14] See Criminal Code (Cth) ss 104.6-104.11.
\item[C15] See Criminal Code (Cth) ss 104.12-104.17.
\item[C16] Criminal Code (Cth) s 104.12.
\item[C17] Criminal Code (Cth) s 104.12A 2(1)-(6).
\item[C18] Criminal Code (Cth) s 102.12A 2(ii).
\item[C19] Criminal Code (Cth) s 104.14.
\item[C20] Criminal Code (Cth) s 104.14 (6).
\item[C21] Criminal Code (Cth) s 104.14 (7)(a).
\item[C22] Criminal Code (Cth) s 104.14 (7)(b).
\item[C23] Criminal Code (Cth) s 104.14 (7)(c).
\item[C24] Criminal Code (Cth) s 104.16 (1)(a)-(e).
\item[C25] Criminal Code (Cth) s 104.17.
\item[C26] Criminal Code (Cth) s 104.18.
\item[C27] Criminal Code (Cth) s 104.19.
\item[C28] Criminal Code (Cth) s 104.23.
\item[C29] Criminal Code (Cth) s 104.27.
\end{enumerate}
\end{footnotesize}
B Preventative Detention Orders

The object of a preventative detention order is to allow a person to be taken into custody and detained for a short period of time in order to (a) prevent an imminent terrorist act occurring; or (b) preserve evidence of, or relating to, a recent terrorist act. There are two types of preventative detention orders — an initial preventative detention order, of up to 24 hours duration, made by an issuing authority where an initial preventative detention order is in force in allows an issuing authority to make an initial preventative detention order, subsequent to an initial preventative detention order, of up to a further 24 hours duration, made by issuing authority as described under s 105.2.

An AFP Member may make an application for a preventative detention order, setting out the criteria outlined above. Section 105.4 allows an issuing authority to make an initial preventative detention order, subject to the criteria outlined above. Section 105.11 allows an AFP member to apply to an issuing authority where an initial preventative detention order is in force in relation to a person, for a continued preventative detention order, setting out various requirements for that application. An issuing authority is empowered to

30 Criminal Code (Cth) s 105.1 (Object).
31 See Criminal Code (Cth) s 105.7.
32 See Criminal Code (Cth) s 105.8(5).
33 Criminal Code (Cth) s 105.1: meaning (a) the Commissioner of the Australian Federal Police ('AFP'); or (b) a Deputy Commissioner of the AFP; or (c) an AFP member of, or above, the rank of Superintendent.
34 See Criminal Code (Cth) ss 105.10A, 105.11.
35 Criminal Code (Cth) s 105.11(6) states that '[t]he period as extended, or further extended, must end no later than 48 hours after the person is first taken into custody under the initial preventative detention order'.
36 As issuing authorities for continued preventative detention orders, the Minister may by writing appoint (a) a person who is a judge of a State or Territory Supreme Court; or (b) a person who is a (Federal) Judge; or (c) a person who is a federal magistrate; or (d) a person who (i) has served as a judge in one or more superior courts for a period of five years; and (ii) no longer holds a commission as judge of a superior court; or (e) a person who (i) holds an appointment to the Administrative Appeals Tribunal ('AAT') or President or Deputy President; and (ii) is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory; and (iii) has been enrolled for at least five years.
37 Criminal Code (Cth) s 105.4 (4) states the requirements are that the person is satisfied (a) that there are reasonable grounds to suspect that the subject (i) will engage in a terrorist act; or (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or (iii) has done an act in preparation for, or planning a terrorist act; and (b) making the order would substantially assist in preventing a terrorist act occurring; and (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b). Section 105.4(5) then states that 'a terrorist act referred to in subsection (4)(b) must be one that is imminent; and (b) must be one that is expected to occur, in any event, at some time in the next 14 days'.
38 Criminal Code (Cth) s 105.4(6) states the requirements are that the person is satisfied (a) a terrorist act has occurred within the last 28 days; and (b) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).
39 That is, the Criminal Code (Cth) ss 105.4, 105.5, 105.6.
40 Criminal Code (Cth) s 105.11(2)(a)-(g).
make a continued preventative detention order, provided the same alternative criteria of s 105.4(4) and s 105.4(5), or s 105.4(6) are satisfied — this "requires the issuing authority to consider afresh the merits of making the order and to be satisfied, after taking into account relevant information (including any information that has become available since the initial preventative detention order was made ..." 41 As with an initial preventative detention order, 42 there is an obligation upon the police officer detaining the person to explain the effect of the continued preventative detention order. 43

Extensive restrictions upon contact with other people are imposed upon persons subject to both forms of preventative detention orders. The starting point is that a person being detained under a preventative detention order (a) is not entitled to contact another person and (b) may be prevented from contacting another person. 44 In turn, this restriction is subject to some limited contact capacities in relation to family members, employers and business partners, 45 the Commonwealth Ombudsman, 46 a lawyer, 47 as well as special contact rules for persons under 18 years of age or incapable of managing their own affairs. 48 Those limited contacts for persons subject to preventative detention orders are (with the exception of contact with the Commonwealth Ombudsman) potentially "further subject to any prohibited contact order made in relation to a person's detention"). 49 An issuing authority — either for initial preventative detention orders, or continued preventative detention orders — may make a prohibited contact order 50 and apply it to the person preventatively detained if satisfied that the making of the prohibited contact order is reasonably necessary for a range of specified reasons. 51

While a preventative detention order is in force, any police officer may detain and take the person into custody. 52 An important feature of the preventative

---

41 Criminal Code (Cth) s 105.12(2).
42 Criminal Code (Cth) s 105.28(1) and the range of matters covered in the Criminal Code (Cth) s 105.28(2)(a)-(l).
43 See Criminal Code (Cth) s 105.29(1) and the range of matters covered in the Criminal Code (Cth) s 105.29(2)(a)-(l).
44 See the Criminal Code (Cth) s 105.34.
45 Criminal Code (Cth) s 105.35.
46 Criminal Code (Cth) s 105.36.
47 Criminal Code (Cth) s 105.37.
48 Criminal Code (Cth) s 105.39.
49 Criminal Code (Cth) s 105.40.
50 Criminal Code (Cth) s 105.14A(2). A prohibited contact order may also be obtained from an issuing authority in relation to a preventative detention order already in force: Criminal Code (Cth) s 105.16.
51 Criminal Code (Cth) s 105.14A(4)(a) to avoid a risk to action being taken to prevent a terrorist act occurring; or (b) to prevent serious harm to a person; or (c) to preserve evidence of, or relating to, a terrorist act; or (d) to prevent interference with the gathering of information about (i) a terrorist act; or (ii) the preparation for, or the planning of, a terrorist act; or (e) to avoid a risk to: (i) the arrest of a person who is suspected of having committed an offence against this Part; or (ii) the taking into custody of a person to whom a preventative detention order is in force, or in relation to whom a preventative detention order is likely to be made; or (iii) the service on a person of a control order.
52 Criminal Code (Cth) s 105.19.
detention powers is the nomination of a senior AFP member, 'not involved in the making of the application for the preventative detention order'\(^{53}\) 'to oversee the exercise of powers under, and the performance of obligations in relation to, the preventative detention order'.\(^{54}\) An extensive array of prohibition of disclosure offences,\(^{55}\) affecting the person being detained,\(^{56}\) lawyers,\(^{57}\) parents and guardians,\(^{58}\) interpreters\(^{59}\) and disclosure recipients\(^{60}\) are included. Access to legal forums for the seeking of redress or challenge to the preventative detention order is restricted in a variety of ways.\(^{61}\)

### III A CONCEPTUAL OVERVIEW AND SOME GENERAL OBSERVATIONS

The above synopsis provides a brief outline of the main features of control orders and preventative detention. However, the form and substance of the control orders and preventative detention provisions can be better comprehended as the product of a broader agenda executive inspired counter-terrorism law reform,\(^{62}\) promoting as a legitimate subject matter protection of the community from terrorism, a more narrowly conceived, formalist type of democracy. The realities of such changes emerge from the enhancement and concentration of executive power, both in the process of legislative enactment and from the text of the present legislation.

\(^{53}\) Criminal Code (Cth) s 105.19(6).

\(^{54}\) Criminal Code (Cth) s 105.19(5).

\(^{55}\) These offences involve disclosures to another person of (i) the fact that a preventative detention order has been made in relation to the subject; (ii) the fact that the subject is being detained, and in the case of disclosures by the person other than the person being detained, any information the detainee has given that other person during the course of the contact.

\(^{56}\) Criminal Code (Cth) s 105.41(1).

\(^{57}\) Criminal Code (Cth) s 105.41(2).

\(^{58}\) Criminal Code (Cth) s 105.41(3).

\(^{59}\) Criminal Code (Cth) s 105.41(5).

\(^{60}\) Criminal Code (Cth) s 105.41(5).

\(^{61}\) See Criminal Code (Cth) s 105.31(2) (State and Territory courts not having jurisdiction in relation remedies to preventative detention orders or treatment there under); Criminal Code (Cth) s 105.51(5) (exclusion of applications made under the Administrative Decisions (Judicial Review) Act 1977); Criminal Code (Cth) s 105.51(5) (exclusion of applications to the AAT for review of decisions of issuing authorities to make a preventative detention order or to extend or further extend the period for which the order is in force, whilst the preventative detention order is in force).

Several distinctive features of this broader phenomenon are evident. There is a serious impairment of accountability through the practice of control of information by legislative prohibitions and penalties for its release, so that informed public debate, on an ongoing reform topic, is severely curtailed or limited. An identification of the threat of terrorism as generalized and indefinite, rather than as a specific threat, has facilitated the dismantling of the suspect–non suspect threshold as justification for detention, enabling a very broad reach of counter-terrorism legislation, increasing the scope for intervention in the lives of citizens. A further manifestation has been in the sense of urgency with which additional counter-terrorism reform has been pursued, including an increasingly abbreviated role for parliamentary scrutiny and debate. In addition, the cultivation of fear has emerged as a powerful political mechanism to facilitate the passage of legislation, producing a dynamic where serial change becomes both routine, expected and insufficiently scrutinised. Both the urgency of reform

63 On this topic, see Joo-Cheng Tham and Julie McCulloch, 'Secrecy, Silence and State Terror' (2005) Arena Magazine 46, 46–47 and 'Secret State, Transparent Subject: The Australian Security Intelligence Organisation in the Age of Terror' (2005) 38 Australian and New Zealand Journal of Criminology 400, 401, 404–06. The prohibition against disclosure of Australian Security Intelligence Organisation ('ASIO') questioning and detention and questioning warrants is relevant in restricting information flow to the media for up to two years after the expiry of the warrant; see s 34ASASIO Act 1979 (Cth). The disclosure of information about preventative detention orders is likewise prohibited whilst the detainee is being detained under the order; see Criminal Code (Cth) s 105.41. Note also the potential effect of the prohibited contact orders issued when issued alongside the preventative detention orders: see Criminal Code (Cth) ss 105.14A, 105.15, 105.16.


65 See Greg Cameron, 'Detaining Questions Or Compromising Constitutionality?: The ASIO Legislation Amendment (Terrorism) Act 2003 (Cth)' (2004) 27 University of New South Wales Law Journal 524, 523. The ASIO powers have an intelligence-gathering focus and accordingly are disconnected from the familiar standard of detention as being one of reasonable suspicion of criminal involvement. As a parallel, the preventative detention provisions focus upon acts, not intentions, rely upon very broadly based concepts of terrorist acts and terrorism offences and apply in the broadest based geographical circumstances. These aspects are discussed in the section of the article 'False comparisons: claimed derivation from the United Kingdom model'.

66 The target population of national security measures has been substantially broadened, particularly from the perspective of the sources potentially possessing information relevant to security, so that a capacity for generalized, pre-emptive surveillance becomes the norm — fundamentally changing the operating assumptions of citizenship and democracy. This is facilitated by the breadth of concepts discussed in the section of the article 'False comparisons: claimed derivation from the United Kingdom model'.

67 This aspect is examined in the sections of the article 'Debate of the Bill in Parliament' and 'Senate Legal and Constitutional Legislation Committee: The Committee Inquiry'.


69 As evidenced in the extensive legislative activity of the Commonwealth Parliament in relation to terrorism: see the text above n 62.

70 This characteristic of rapid, serial change can itself be seen as a rejoinder to measured and deliberative parliamentary process, with compromised and negotiated outcomes: on this point, see
and the cultivation of fear, as conducive to further reform, have been amplified by a contraction of opportunities for informed public debate. 71

Traditional due process and rule of law expectations become fragile and contingent, increasingly relying for their maintenance upon the manner in which executive discretions are exercised, as well as the personal proprieties and ethics of relevant executive decision makers 72 as relevant to those discretions. Expanded discretions, often linked to ambiguous statutory language, rather than being problematic in accountability terms, 73 are inverted to be positively presented as an effective executive safeguard over new powers — implicitly meaning that the existence of discretion, rather than a fixed legal obligation, is a sufficient check.

Such issues reflect the breadth and variation by which democratic institutions and their associated assumptions and functions 74 are being surreptitiously challenged and undermined 75 by the rapid, serial, counter-terrorism law reform 76 and how our conception of the essential characteristics of democracy has been uncritically, but erroneously, assumed to be unaffected 77 and their associated assumptions and functions 74 are being surreptitiously challenged and undermined 75 by the rapid, serial, counter-terrorism law reform 76 and how our conception of the essential characteristics of democracy has been uncritically, but erroneously, assumed to be unaffected

---


72 See ibid, 19 regarding the exercise of these powers being reliant upon good will of those in power not to use such powers politically and represively; Hocking, above n 70, 337 on the issue of personal freedoms and liberties dependent upon the arbitrary will of the State. These personal reliance issues are discussed in the section of the article 'Operational considerations'.

73 See Patrick Emerton, 'Australia's Anti-Terrorism Legislation A Threat To Democracy and the Rule of Law' (2005) 19 Dissent 19, 20-21, referring to 'extraordinary' and 'extreme' discretion to determine the legitimacy of political action.

74 See Hocking, above n 64, 359, 359 citing 'the rule of law; openness and accountability of government; and the maintenance of a bond of trust and confidence between citizens and government that results from an electorate that is informed about public affairs' as core defining principles for liberal democratic governance.

75 See Jenny Hocking, 'National Security and Democratic Rights: Australian Terror Laws' (2004) 89 The Sydney Papers 92-93 for a discussion of similar aspects, including the observation that '[a]l democratic state, underpinned by these fundamental principles, cannot compromise these principles without at the same time also compromising the democratic nature of the state itself'. See also Michael Head, 'Arbitrary Threat to Democratic Rights: ASIO Detentions Cloaked in Secrecy' (2004) 29 Alternative Law Journal 127, 130, discussing trends into long standing democratic principles.

76 For a discussion of another example of this, see Greg Carne, 'Brigitte and The French Connection: Security Carne Blanche Or A La Carte?' (2004) 9 Berlin Law Review 574, 599. Issues associated with the speed with which the practical legislation was passed are discussed in the section of this article 'Debate of the Bill in Parliament'.

77 This matter is apparent in the disjunction between the process of enactment of the legislation and its content, with the official framework of human rights protection in Australia, namely representative and responsible government see the section of the article 'Practical and Pragmatic Human Rights: The Australian Argument of "detailed" Legislation'.

---

Jenny Hocking, 'Protecting Democracy By Preserving Justice: “Even for the Persecuted and The Hated”' (2004) 27 University of New South Wales Law Journal 319, 327, 328. The original intentions of the Commonwealth Government regarding passage of the legislation, confirmatory of this aspect, are discussed in the section of this article 'The Council of Australian Governments'. Scrutiny issues are also canvassed in the section of this article 'Senate Legal and Constitutional Legislation Committee: The Committee Inquiry'.
are increasingly being made more discretionary, contingent, qualified and residual by various legislative accretions of counter-terrorism executive power.

Discussion and illumination of the factors emerging in the debate around the Anti-Terrorism Act No 2 2005 (Cth) will contribute to a more contextual understanding of control orders and preventative detention and what they practically and symbolically represent. This is a transformative shift in assumptions in Australian democracy, with a trend towards formal democratic models and with it, the concentration of executive power. The magnitude of that shift is in turn reflected in distinctive features of the legislative debate, in addition to the drafting of provisions and discretions within the final version of the legislation. Importantly, the process of enactment of the control orders and the preventative detention regime itself expresses changed assumptions about Australian democracy, as much as those legislative measures themselves are likely to a degree to reflect and effect change to the nature of that democracy.

IV THE COUNCIL OF AUSTRALIAN GOVERNMENTS

That process of legislative enactment commenced following the July 2005 London transport bombings, with further details announced as proposals in advance of the Council of Australian Government (COAG) meeting on counter-terrorism held on 27 September 2005.

Legislative enactment necessarily involved COAG, as a COAG agreement on criminal law counter-terrorism legislation established the constitutional and structural framework:

78 Described as a ‘permanent cultural and philosophical shift’: Jon Stanhope, ‘Security? First Secure Human Rights’ (2005) 71 Procedure 4. This shift, amongst other things, reflected in the preferred method of enactment of the legislation: see the sections of the article ‘Council of Australian Governments’ and ‘Senate Legal and Constitutional Legislation Committee: the Committee Inquiry’. See also Carne, above n 76, 579.
79 See Carne, above n 65, 529 and above n 76, 580–81.
80 For example, the differing role and influence of players in the legislative process, covered under the headings ‘Council of Australian Governments’, ‘Attorney-General’s Backbench Committee’ and ‘Senate Legal and Constitutional Legislation Committee: The Committee Inquiry’.
81 For example, a contrast is made with the Commonwealth legislation in the section ‘ACT preventative detention legislation: further comprehending claims about the UK model’.
82 See especially the sections of the article ‘Linkage of the preventative detention powers to questioning and detention powers under pt 3, div 3 of ASIO act 1979 (Cth)’ and ‘operational considerations’.
84 Ibid. The proposals included control orders, preventative detention, notices to produce, access to airline passenger information, stop, search and question powers, search powers at transport hubs and places of mass gathering, changes to the ASIO warrant regime, and strengthening existing offences and creating new offences.
To take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including roll back provisions to ensure that the new Commonwealth Law does not override State law where that is not intended and to come into effect by 31 October 2002. The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those which apply under Corporations arrangements. Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement to be contained in the legislation.\textsuperscript{85}

Subsequently, the referral of powers legislation, the \textit{Criminal Code Amendment (Terrorism) Act} 2003 (Cth) re-enacted a range of terrorism offences, on this occasion with relevant Commonwealth constitutional power, underpinned by references of State legislative power.\textsuperscript{86} Therefore, the operation of the Commonwealth legislation in a referring State is based on:

\begin{enumerate}[(a)]
  \item the legislative powers that the Commonwealth Parliament has under section 51 of the Constitution (other than paragraph 51 (xxxvii)); and
  \item the legislative powers of the Commonwealth Parliament has in respect of matters to which this Part relates because those matters are referred to it by the Parliament of the referring State under paragraph 51 (xxxvii) of the Constitution.\textsuperscript{87}
\end{enumerate}

The \textit{Criminal Code Amendment (Terrorism) Act} 2003 (Cth) also enacted requirements for the amendment of Part 5.3 (Terrorism) of the \textit{Criminal Code}, reflecting the role of the States in the referral of power.\textsuperscript{88} Consequently, proposals for control orders and preventative detention, properly to be located within Part 5.3 of the \textit{Criminal Code}, had to satisfy the majority requirement,\textsuperscript{89} reflected in a Prime Ministerial announcement.\textsuperscript{90} On this issue, the COAG process itself must be seen as highly political in nature and a major component of an executive-

\textsuperscript{86} See the \textit{Criminal Code} (Cth) s 100.3(1): "referred provisions means the provisions of Part 5.3 of this Code as inserted by the \textit{Criminal Code Amendment (Terrorism) Act} 2002, to the extent to which they deal with matters that are included in the legislative powers of the Parliaments of the States".
\textsuperscript{87} See the \textit{Criminal Code} (Cth) s 100.3(1). The note to this section states that "The State reference fully supplements the Commonwealth Parliament’s other powers by referring the matters to the Commonwealth Parliament to the extent to which they are not otherwise included in the legislative powers of the Commonwealth Parliament". See also the \textit{Criminal Code} (Cth) s 100.2(2) for operation in a non-referring State and s 100.3(1) for operation in a territory.
\textsuperscript{88} See the \textit{Criminal Code} (Cth) s 100.8(1): "An express amendment to which this section applies is not to be made unless the amendment is approved by: (a) a majority of the group consisting of the States, The Australian Capital Territory and the Northern Territory; and (b) at least 4 States".
\textsuperscript{90} See Howard, above n 83: "Importantly, control orders will be available to our law enforcement agencies in circumstances where a person might pose a risk to the community but cannot be contained or detained under existing legislation ... I will seek the agreement of State and Territory leaders at our special COAG meeting to introduce a new national regime, similar to that applying in the United Kingdom, allowing for preventative detention in a terrorism situation. Such a scheme would require the States and Territories to enact legislation complementing the work of the Commonwealth ..."
orientated, rather than more broadly democratic, counter-terrorism response. This overtly political and executive orientated flavour is articulated in the Prime Minister’s challenge to State and Territory leaders:

The special COAG meeting will be an opportunity for State and Territory leaders to demonstrate their commitment to working cooperatively with the Commonwealth on national security. I look forward to a continuation of our productive relationship with the States and Territories in co-operatively fighting counter-terrorism.

Other distinctive executive characteristics are also evident from the COAG arrangements. The Legal Working Group attached to the National Counter-Terrorism Committee discussed the Government’s proposed approach the day after the announcement of the COAG summit, based upon the need for State co-operation in legislating “to the full extent of their own powers”. The COAG summit of 27 September 2005 is remarkable in two aspects. The first is that no draft legislation was produced to the meeting, the State and Territory leaders agreeing to quite detailed, far reaching reforms to legal principle, including those going beyond control orders and preventative detention. In fact, drafting instructions for the bill were issued prior to the Prime Ministerial announcement of 8 September 2005, with the “process for preparing this legislation started soon after the London bombing”. The reason for not releasing a draft of the bill to the COAG meeting was the anticipated adverse reaction of the States and Territories.

The second aspect is that the title of ‘summit’ for the meeting is somewhat misleading as it implies an open, deliberative forum for examination and assessment of a public policy issue amongst the Commonwealth, States and Territories, without pre-conceived outcomes. In particular, this is implied in the

---

91 For an appraisal of Federal Government strategy in introducing far reaching legislation, applied to terrorism legislation, see Garth Nettheim, ‘Terror Australia: The “Debate” to Date’ (2005) Human Rights Defender (Special Issue) 6, 7.
92 Howard, above n 83.
94 Ibid.
95 Described by Premier Beattie of Queensland as “draconian laws” and by Prime Minister Howard as “unusual laws for Australia”; Ibid.
98 Ibid.
99 Ibid: “If we had produced a bill on that day, they would have regarded it as the most pre-empive act in the universe. They would have accused us of having tried to pre-empt the whole process ... As it was, when the Prime Minister made his announcement on 8 September — and he made his announcement on that day so that we could meet the next day with the states to talk about the detail — they were complaining for something like two hours that even that was pre-empive.”

28
basis of referred constitutional power\textsuperscript{100} underpinning the relevant sections of the Criminal Code and the process of amendment, requiring the consent of the States,\textsuperscript{101} referred to above. It is also implied in the representative nature of COAG membership, reflected in its membership, comprising, of course, the heads of federal units of representative and responsible government. The outlining of 'proposals' with such detail and specificity,\textsuperscript{102} the day before a meeting of the Legal Working Group attached to the National Counter-Terrorism Committee,\textsuperscript{103} provides two further variations of the identifiers associated with the concentration of executive power — urgency in the pursuit of additional counter-terrorism law reform and the marginalisation of scrutiny and debate.

The drafting processes and material already canvassed above, suggest something other than an open and deliberative forum — indeed the summit was carefully orchestrated, with a security briefing and update from ASIO, the AFP and the Office of National Assessment ('ONA'),\textsuperscript{104} to establish the immediate need for legislative reform. Those briefings appeared as the catalyst\textsuperscript{105} for acceptance of preventative detention and control orders, the detail being sight unseen and agreement only based on a series of principles noted by COAG:\textsuperscript{106}

These briefings put into detailed context the security environment in which we now live and the broad terrorist threats that, not only Australia, but the rest of the western world in particular faces. Following that there was unanimous agreement on the Commonwealth's proposals in relation to both control orders and preventative detention... we have attached to the communiqué — the detailed steps that will be embraced in relation to each of those proposals.\textsuperscript{107}

The somewhat deceptive nomenclature of 'summit' is confirmed by observations about the unprecedented agreement and co-operation at the 27 September COAG meeting.\textsuperscript{108} Significant confirmation of the Government's executive conceived democratic model as the fundamental organising principle of counter-terrorism legislation, is found in the subsequent use and justification of the COAG process

\textsuperscript{100} Criminal Code (Cth) s 100.3(1).
\textsuperscript{101} Criminal Code (Cth) s 100.8(2).
\textsuperscript{102} Howard, above n 83 and Howard, above n 93.
\textsuperscript{103} Howard, above n 93.
\textsuperscript{104} Ibid. See also Howard, above n 96 (Communique): 'COAG was briefed on the current global and domestic security environment by the Directors-General of the Office of National Assessments and the ASIO, and noted that the national counter-terrorism alert remains at medium, as it has since 12 September 2001. A terrorist attack in Australia continues to be feasible and could occur. COAG also discussed the implications of the July 2005 terrorist bombings in London for Australia's security and counter-terrorism arrangements'.
\textsuperscript{105} Indeed, Premier Bunker describing the situation as one where "[t]his is not a choice, there's not a choice to have a security summit and to have a revamp of the laws": Howard, above n 93, (Premier Bunker).
\textsuperscript{106} Howard, above n 96 (attachment): — see the 12 dot points which 'COAG noted' under the heading 'Control Orders' and the 11 dot points which 'COAG noted' under the heading 'Preventative Detention'.
\textsuperscript{107} Howard, above n 93.
\textsuperscript{108} See the comments of the various State premiers and Territory chief ministers in Howard, above n 93.
as demonstrative of consultation prior to legislative reform. That model is further confirmed by the COAG agreed legislation being reviewed not by a legislated independent reviewer, but by COAG itself, the authority found in a remarkably open textured legislative provision.

A draft of the bill was not provided to State premiers until around 7 October 2005. It was anticipated that the bill would not be released into the public domain until such time as it was introduced into Parliament, thereby forestalling public deliberation and debate. However, on 14 October 2005, the Australian Capital Territory Chief Minister, Jon Stanhope, released a version of the bill on his website. Chief Minister Stanhope had earlier obtained written advice of the potential human rights implications of the legislative proposals from the Australian Capital Territory Human Rights and Discrimination Commissioner, which was sent to all State premiers. He had made Australian Capital Territory

---

109 See Philip Ruddock, "Passage Of Anti-Terrorism Bill (No 2) 2005" (Press Release, 7 December 2005) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.asp?pg=Media_Releases_2005_Fourth_Quarter_7_December_2005_PASSAGE_OF_Anti-Terrorism_Bill_No_2_2005> at 8 January 2007 and Commonwealth, Parliamentary Debates, House of Representatives 3 November 2005, 102 (Philip Ruddock): "The special COAG meeting of 27 September provided an opportunity for the Prime Minister to discuss the proposals with premiers and chief ministers who agree that there was a clear case for laws to be strengthened. The COAG agreement was followed by extensive consultation with the states and territories at officer level as well as directly between the Prime Minister and premiers — and the chief ministers. This consultation process of almost two months has been very constructive and has yielded the positive result of an agreed position on the text of the bill introduced today".

In the sense that the terms, composition and procedures of the review and reviewers were not specified in the legislation: see Anti-Terrorism Act (No 2) 2005 (Cth) s 4 Review of anti-terrorism laws (1) The Council Of Australian Governments agreed that the Council would, after 5 years, review the operation of (a) the amendments made by ss 1, 3, 4 and 5; and (b) certain State laws (2) If a copy of the report is to be provided to the Attorney-General, the Attorney-General must cause a copy of the report to be provided to the Attorney-General receives the copy of the report. The report of 17 February 2005 was made by Dr Helen Watchirs of 19 September 2005 to Australian Capital Territory Commissioner, 113

110 In that sense that the terms, composition and procedures of the review and reviewers were not specified in the legislation: see Anti-Terrorism Act (No 2) 2005 (Cth) s 4 Review of anti-terrorism laws (1) The Council Of Australian Governments agreed that the Council would, after 5 years, review the operation of (a) the amendments made by ss 1, 3, 4 and 5; and (b) certain State laws (2) If a copy of the report is to be provided to the Attorney-General, the Attorney-General must cause a copy of the report to be provided to the Attorney-General receives the copy of the report. The report of 17 February 2005 was made by Dr Helen Watchirs of 19 September 2005 to Australian Capital Territory Commissioner, 113

111 McDonald, above n 97, 9. This draft — version 28 of the document — was the draft of the bill subsequently released on the website of the Australian Capital Territory Chief Minister, Jon Stanhope.


114 A Fraser, 'Stanhope Fears New Terrorism Powers' The Canberra Times (Canberra), 26 September 2005.
government approval subject to a range of conditions, particularly in relation to preventative detention, which were apparently met at the COAG summit. However, the draft bill fell considerably short of these promised standards. This point was subsequently confirmed by a range of legal advice obtained by the Australian Capital Territory Chief Minister on compliance of the bill with human rights, constitutional law and further matters. The release of the draft bill and the various advices prompted the type of broadly based public debate and critique

115 See ‘ACT May Scrap Terror Law Human Rights Breach: Stanhope’ The Canberra Times (Canberra), 2 September 2005: ‘The ACT Cabinet met to discuss the issue of anti-terrorism laws yesterday, deciding that to meet ACT Government approval, preventative detention must: include a sunset clause; allow detainees to access a lawyer of their choice and communications with family; and have the right to seek judicial review of their detention’. Stanhope lists a total of eight critical human rights safeguards and legal standards that the ACT would be seeking to achieve today, particularly in relation to preventative detention: see Howard, above n 91 (Chief Minister Stanhope).

116 See the comments of Jon Stanhope, in Howard, above n 91: ‘From the ACT Government’s point of view I did come here with significant concerns around preventative detention and whether or not it was a proportionate response to the issue we faced. The Commonwealth has responded to every issue that the ACT Government put on the table and the ACT Government is supporting willingly this new approach to national counter-terrorism’. See also Jon Stanhope, ‘COAG Agreement A Victory For Human Rights’ (Press Release, 27 September 2005) <http://www.chiefminister.act.gov.au/media.asp?section=24&media> at 8 January 2007: ‘I was therefore extremely pleased that every one of the demands put on the table by the ACT yesterday was fully met by the Prime Minister today and that safeguards protecting these fundamental rights will be part and parcel of the laws introduced by the Commonwealth and the States and Territories ... The guarantees delivered by the Prime Minister today in relation to the most contentious of these laws, the preventative detention orders, mean that those orders will only be used in exceptional circumstances, and that they will meet every one of the human rights demands made by the ACT.’

117 See Stanhope, above n 78, 4: ‘I have never been shown any piece of advice that would entitle the Commonwealth to persist in claiming that the laws it has drafted are consistent with that covenant. What I have seen is compelling evidence, from multiple sources, to the contrary’.

sought to be avoided, and reflective of a broader, participatory democratic model,\textsuperscript{119} then the previously planned circumstances of only releasing the bill upon introduction to Parliament.\textsuperscript{120} In turn, legislation passed in the Australian Capital Territory\textsuperscript{121} instituted higher human rights standards,\textsuperscript{122} attempting to conform as far as possible with the Human Rights Act 2004 (ACT).

\section*{V \hspace{1em} CHAPTER III CONSTITUTIONAL ISSUES AND DEMOCRATIC GOVERNANCE}

Issues about the constitutionality of control orders and preventative detention reflect similar tensions in the democratic assumptions underpinning enactment of the legislation. In particular, the government's consistent view of the constitutionality of both the control orders and preventative detention regimes\textsuperscript{123} is founded upon an unshakeable political premise of the appropriateness of strong executive measures. It is also founded on the practical reality (and the relative unlikelihood) of the need for a formal constitutional challenge\textsuperscript{114} to force the Commonwealth to provide detailed argument in support of such a claim. It has consistently refused to release such constitutional advice.\textsuperscript{125}

\begin{thebibliography}{99}
\bibitem{119} Such a model was reflected in the fact that even within the limited time granted for the making of submissions to the Committee inquiry, a total of 294 submissions were received by the Senate Legal and Constitutional Legislation Committee inquiry: see Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, Provisions of the Anti-Terrorism Bill (No 2) 2005 (2005) 215-27. The Committee advertised the inquiry on 5 November 2005, inviting submissions by 11 November 2005: see Provisions of the Anti-Terrorism Bill (No 2) 2005, 1.
\bibitem{120} Indeed, the A-G identified developments as "unprecedented parliamentary and public debate": see Ruddock, above n 109, ironically highlighting in a positive manner the consequences of the unauthorised release of the draft bill: "extensive consultation with the States and Territories, discussions with the Government Members' Committee, an inquiry, public hearings and comprehensive report by the Senate Legal and Constitutional Legislation Committee".
\bibitem{121} The higher standards in the ACT legislation include the fact that no person under 18 years may be subject to a Preventive Detention Order and the requirement that a court be satisfied on reasonable grounds that detaining the person would prevent a terrorist act, in place of the requirement elsewhere that detaining the person would substantially assist in preventing a terrorist act.
\bibitem{123} Such a challenge is now proceeding in relation to the control orders provisions of the legislation: see I Munro, "Thomson challenge to control order" The Age (Melbourne), Tuesday 3 October 2006. See also "Curfew order for Jack Thomson" Sydney Morning Herald (Sydney), 28 August 2006. The High Court has commenced hearing of the constitutional challenge: see Thomson v Mowbray and Others [2006] HCA Trans 660 (5 December 2006) and [2006] HCA Trans 661 (6 December 2006).
\end{thebibliography}
The certainty of that advice about constitutionality stands at odds with other information. Reports circulated suggesting that the Chief General Counsel had heavily qualified his advice regarding the bill's constitutionality. Furthermore, State Solicitors General were sufficiently concerned with aspects of constitutionality as to voice doubts and concerns over drafts of the bill, and sought amendment to it after extensive deliberation.

A major consideration in relation to constitutionality of the legislation involves constitutional separation of power and the reservation of judicial power under the Commonwealth Constitution to Chapter III courts, with the constitutional guarantees of judicial independence. This scheme is intended to insulate the judicial function and judicial power from executive and legislative influence and functions. It provides a bulwark of civil liberties and for judicial review of the actions of an officer of the Commonwealth through the constitutional writs under s 75(v) of the Commonwealth Constitution. Judicial power under the Commonwealth Constitution can only be granted to properly constituted Chapter III courts and that subject to limited exceptions, non-judicial power cannot be conferred on Chapter III courts. Within this scheme, Chapter III judges have been constitutionally permitted to exercise administrative

A-G’s Department stated that “[t]he advice that the Department has received from Chief General Counsel is that the detention for 48 hours is not punitive where there is an imminent threat to the community or in the immediate aftermath of an attack and where detention of the person is judged necessary to prevent an attack or further attack. A maximum of 48 hours detention in these cases is not punitive and therefore does not require a judicial exercise of power”. A-G’s Submission 290A (Attachment B) to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005, 12.

126 See Samantha Halden and Denial Shanahan, ‘PM’s bad advice on detention laws’ The Australian (Sydney), 26 October 2005, 10. In that article, the Commonwealth Chief General Counsel, Henry Burnsier QC, is quoted on the preventative detention orders as representing a ‘very untested area of law’; ‘[a] guarantee as to the validity can be given even as to detention for 24 or 48 hours’ and “[t]his is a very untested area of the law. Recent High Court cases do not encourage an expansive approach to the scope for executive detention under Commonwealth law”.


128 See also “Terror Laws rejected by ACT”, The Canberra Times (Canberra), 27 October 2005 citing the advice from Stephen Gigerler SC that the laws in their current form were unconstitutional: see Gigerler, above n 118. See Head, above n 2, 2-3 for a summary of three grounds of constitutional challenge advanced in the Gigerler advice.

129 Commonwealth Constitution s 71.


131 Commonwealth Constitution s 72 involving validity of tenure to a fixed retirement age, no diminution of remuneration during office, with removal only on the address of both Houses of Parliament on the grounds of proved misbehaviour or incapacity.

132 An illuminating summary of Commonwealth judicial power and separation of judicial power under the Commonwealth Constitution is provided by Sarah Joseph and Melissa Curran, Federal Constitutional Law & Contemporary View (2nd ed, 2000) 170-87.

133 See the Commonwealth Constitution ss 71, 77(ii).

134 Such as the exercise by Chapter III courts of powers auxiliary or incidental to the judicial function.
or executive functions in a persona designata capacity, allowing an appointment to perform such functions in a personal capacity of the relevant judge. However, the doctrine of incompatibility has also been developed by the High Court, which may render even such persona designata appointments incompatible with a Chapter III judicial function. As articulated by the joint judgment in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*:

Constitutional incompatibility is derived from the constitutional separation of the functions of the Judiciary from the functions of the Parliament and the Executive. It is a doctrine wider than, and to be distinguished from, the common law doctrine of incompatibility. The constitutional doctrine is to be distinguished in its purpose and probably in its effect. Its purpose is to protect effectively the independence of Ch III judges from the political branches of government as a guarantee of liberty and as a buttress to public confidence in the administration of justice by Ch III courts. The capacity of Ch III judges to perform their judicial duties throughout the terms of their appointment independently of the political branches of government cannot be prejudiced by their appointment to non-judicial office or to perform non-judicial functions. If an appointment to non-judicial office or performance of non-judicial functions prejudices that capacity it is incompatible with the office and function of a Ch III judge. And that is inconsistent with s 72 of the Constitution. Thus constitutional incompatibility limits legislative and executive power.

These principles of judicial power clearly intersect with deprivation of liberty issues inherent in the control orders and preventative detention schemes and form potential Chapter III questions as to both the assigning of functions and in characterising the nature of the powers granted and created under the legislation.

In relation to control orders, the significant issues arise from the untested novelty of the procedure, as well as assigning the issuing function to a Chapter III court. Recognition of potential contests to the constitutionality of control orders was reflected in the revised version of the legislation. That revised version provides for an interim control order, subject to a later, confirmatory process. The inclusion of certain measures where there is an election to confirm a control order — such as the provision of documents to the person subject to the control

---


136 From the previous cases of *Hilton v Wells* (1985) 157 CLR 57 (especially the dissenting judgment of Mason and Deane JJ) and *Grollo v Palmer* (1995) 184 CLR 348.

137 Specifically, Brennan CJ, Dawson, McHugh and Gummow JJ.


139 The High Court subsequently found by a majority of 6 to 1 that the appointment of Justice Matthews to prepare a report under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) was incompatible with Ch III of the Commonwealth Constitution.

140 See the *Criminal Code* (Cth) s 104A.

141 See the *Criminal Code* (Cth) s 104.14.

142 See the *Criminal Code* (Cth) s 104.12A(a) requires that the AFP serve on the person in relation to whom the order is made (i) a copy of the notification; and (ii) a statement of the facts relating to why the order should be made and an explanation as to why each of the obligations, prohibitions and restrictions should be imposed on the person (documents mentioned in s 104.2(3)(b) and (c)) and (iii) any other details required to enable the person to understand and
order, the ability of persons to adduce evidence (including by calling witnesses or producing material), or make submissions to the issuing court in relation to confirmation of the order — and the choices open to the court in relation to an election to confirm a control order — are reforms intended to bolster the claim that the power to issue control orders is judicial in nature and therefore properly invested in the relevant Chapter III courts.

Contrary views exist as to the compatible nature of control orders and Chapter III judicial power. A relevant comparison has been made with the High Court's finding in Fardon v Attorney-General (Qld) ('Fardon') of Chapter III constitutionality of a State based scheme of preventative detention orders of sex offenders through application to the Queensland Supreme Court. However, three distinguishing features emerge. The first is that the control orders scheme, unlike the preventative detention scheme in Fardon, involves no finding of criminal guilt as a precursor to the making of an order. The second matter is that more relaxed requirements exist regarding the incompatibility doctrine for State courts exercising Chapter III judicial power than for federal courts — in the present legislation as issuing authorities — similarly exercising Chapter III judicial power. The third is of course the fact that control orders under Criminal

respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order. Such provision of documents does not include information likely (a) to prejudice national security (b) be protected by public interest immunity (c) put at risk ongoing operations by law enforcement agencies or intelligence agencies or (d) put at risk the safety of the community, law enforcement officers or intelligence officers.

143 See the Criminal Code (Cth) s 104.14.
144 See the Criminal Code (Cth) s 104.5(1)(a)(i)-(iii), 104.14(6), 104.14(7).
145 Issuing courts are the Federal Court, the Family Court and the Federal Magistrates Court: see ‘issuing court’ the Criminal Code (Cth) s 103.1.
147 (2004) 210 ALR 50 ('Fardon').
148 The relevant identifying criteria, instead of reasonable suspicion of criminal activity, are under s 104.4(1)(a) of the Criminal Code (Cth) that ‘the court is satisfied on the balance of probabilities: (i) that making the order would substantially assist in preventing a terrorist act; or (ii) that the person has provided training to, or received training from, a listed terrorist organisation’. The absence of criminal guilt factor is commented upon in both the Gilbert and Tobin Centre submission, Gilbert and Tobin Centre, above n 145 and in the Gageler opinion, above n 118.
149 See Michael McHugh, "Terrorism Legislation and the Constitution" (2006) 28 Australian Bar Review 117, 127. Former High Court Judge Michael McHugh there stated 'the making of such an order against a person without a prior conviction for an offence is not easily justified as an exercise of federal judicial power ... they seem invalid as an attempt to vest federal courts with a power that is non-judicial, contrary to the doctrine of the separation of powers, espoused in the Baudinaires' case'.
150 The tenor of the majority judgments in Fardon v Attorney-General (Qld) (2004) 210 ALR 50 ('Fardon') is to the effect that the Commonwealth Constitution maintains an integrated, but not unitary system of courts: see especially (2004) 210 ALR 30, 36 (Gileson CJ); 37 (McHugh J); 110 (Callinan and Heydon J). Accordingly, the constitutional validity of a State legislated preventative detention scheme was not determinable by the same Chapter III standards regarding incompatibility with judicial power as would apply in the case of Commonwealth legislation, with the legislation in the present case not infringing the incompatibility doctrine: see 37 (Gileson CJ); 65 (McHugh J); 75, 81 (Gummow J); 104 (Hayne J); 110 (Callinan and Heydon J). Gummow J and Kirby J specifically rejected a Commonwealth submission that the
Code are of a potentially diverse nature and subject matter — not familiarly associated with the exercise of judicial power — than the custodial arrangements associated with preventative detention. In other words, the finding of constitutionality of preventative detention legislation in Fardon provides no accurate guidance of the constitutionality of the control orders regime under the Anti-Terrorism Act (No 2) 2005 (Cth). Furthermore, a protective purpose claimed by the objects provision of the legislation may be characterised as non-judicial in nature, and as that protective purpose is neither ancillary nor incidental to the exercise of judicial power, it would support the view that the issue of control orders cannot be vested in a Chapter III court.

Constitutional issues also arise in relation to the preventative detention provisions under the Anti-Terrorism Act (No 2) 2005 (Cth). A clear indicator of possible constitutional difficulties with the characterisation of the issuing of preventative detention orders as a non-judicial, administrative function and the appointment of issuing authorities in a persona designata role are the multiple alternatives for appointment as issuing authorities for a continuing preventative detention order. The inclusion of non-judicial officers — former judges and presidential and deputy presidential members of the Administrative Appeals Tribunal (‘AAT’) — signal concerns about the incompatibility doctrine being invoked regarding the inclusion within the issuing authorities of persons holding Chapter III judicial office. Though described in practical terms of the availability of people to perform the function, the three additional categories over the original bill attempt to bolster constitutionality in the wake of the State Solicitors General doubts and anticipate a judicial severance of the offending categories in the event of a constitutional challenge. Such potentially offending

Commonwealth Parliament itself could validly confer on a Chapter III court the functions in the state based preventative detention legislation: see 71 (Cumminnow J) and 89 (Kirby J). Ulleson CJ found it unnecessary to decide this point: 56. Hayne J reserved his opinion on this point: 163.

151 See Criminal Code (Cth) s 104.2(1) Obligations, prohibitions and restrictions for an interim control order, provide for a diverse range of prohibitions, requirements and restrictions.

152 Criminal Code (Cth) s 104.1: ‘The object of this Division is to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist attack’.

153 See Gilbert and Tobin Centre above n 146, 8.

154 Criminal Code (Cth) s 105.2(1) states that ‘[t]he Minister may, by writing, appoint an issuing authority for continued preventative detention orders: (a) a person who is a judge of a State or Territory Supreme Court; or (b) a person who is a Judge; or (c) a person who is a Federal Magistrate; or (d) a person who (i) has served as a judge in one or more superior courts for a period of 5 years; and (ii) no longer holds a commission as a judge of a superior court; or (e) a person who: (i) holds an appointment to the AAT as President or Deputy President; or (ii) is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory; and (iii) has been enrolled for at least 5 years.’


156 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 14 November 2005, 18 (McDonald).

157 For example, s 105.2 of version 28 of the bill dated 7 October 2005 has only two categories able to be appointed as issuing authorities for continuing preventative detention orders, namely a federal magistrate or a judge.
categories of issuing authorities are those of federal judges\textsuperscript{158} and magistrates,\textsuperscript{159} on the basis that the issuing of continuing orders\textsuperscript{160} after 24 hours of initial detention, upon reasonable grounds of suspicion of \textit{actus reus} elements only of an unspecified terrorism offence\textsuperscript{161} and other conditions\textsuperscript{162} or for evidence preservation purposes\textsuperscript{163} (and without an investigatory and criminal charge procedure with the detention) offend the incompatibility doctrine with Chapter III judicial power.

In a comparable sense, the preventative detention orders are of a greater magnitude and seriousness in their direct impact upon the freedom of the detainee, than the persona designata role of federal judges in issuing telecommunications interception warrants,\textsuperscript{164} sanctioned by the High Court in \textit{Groito v Palmar}.	extsuperscript{165} The third category of judicial appointees for the issuing of preventative detention orders in a persona designata role, State Supreme Court judges, is also potentially open to constitutional challenge. However, the application of the incompatibility doctrine in relation to the activities of State Supreme Courts have significantly reduced the ambit of the principle in \textit{Kable v DPP (NSW)}\textsuperscript{166} as to what is seen as inconsistent with the operation of Chapter III judicial power,\textsuperscript{167} making it less likely that such a challenge would succeed.

\begin{footnotesize}
\begin{enumerate}
\item[158] Criminal Code (Cth) ss 105.2(1)(b).
\item[159] Criminal Code (Cth) s 105.2(1)(e).
\item[160] Criminal Code (Cth) s 105.12(1) takes effect subject to ss 105.4, 105.5, 105.6.
\item[161] Criminal Code (Cth) s 105.4(4) states \{a\} "a person meets the requirements of this subsection if the person is satisfied that \(a\) there are reasonable grounds to suspect that the subject \(i\) will engage in a terrorist act; or \(ii\) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or \(iii\) has done or is about to do any act in preparation for, or planning a terrorist act."
\item[162] Criminal Code (Cth) s 105.4(6) making the order would substantially assist in preventing a terrorist act occurring; and \(e\) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph \(b\).
\item[163] Criminal Code (Cth) s 105.4(6) states \(a\) "a person meets the requirements of this subsection if the person is satisfied that \(a\) a terrorist act has occurred within the last 28 days; and \(b\) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and \(c\) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph \(b\)."
\item[164] For similar views on this point, see Gilbert and Tobin Centre, above n 146, 11.
\item[165] (1995) 184 CLR 348.
\item[166] (1990) 189 CLR 51.
\item[167] See the judgments of (2004) 210 ALR 50, 56-58 (Gleeson CJ); 64-65 (McHugh J); "State legislation that requires state courts to act in ways inconsistent with traditional judicial process will be invalid only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of state courts to administer invested federal jurisdiction impartially according to federal law. That conclusion is likely to be reached only when other provisions of the legislation or surrounding circumstances as well as the departure from the traditional judicial process indicate that the state court might not be an impartial tribunal that is independent of the legislative and executive arms of government. In my opinion, \textit{Kable} does not govern this case. \textit{Kable} is a decision of very limited application"; 78-79 (Gummow J); 104 (Hayne J): "...the principle for which \textit{Kable v DPP (NSW)} stands requires for its application that the Act in question be repugnant to, or incompatible with, that institutional integrity which the executive of federal jurisdiction conferred upon the Supreme Court of Queensland requires"; 108 and 110 (Callinan and Heydon JJ). See also the comments on this point in the Gilbert and Tobin Centre submission: Gilbert and Tobin Centre, above n 146, 11.
\end{enumerate}
\end{footnotesize}
The characterisation of preventative detention orders as administrative, rather than judicial in nature, also raises some additional constitutional issues. Confining the operation of the Commonwealth legislation to 48 hours of preventative detention and then relying upon State legislation for 14 days of preventative detention highlights the fact that the constitutional basis of the Commonwealth component is uncertain. In practical terms, confining the Commonwealth component of detention to 48 hours significantly reduces the opportunities for seeking remedies in the Federal or High Courts, including ventilation of questions of constitutionality. Moreover, the 48 hour Commonwealth limit in its effects of minimising legal challenges should be considered alongside the exclusion of State and Territory courts from review whilst the order is in force, and in denying a capacity for judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth). Judicial review is thereby confined to narrower common law grounds under s 75(v) of the Commonwealth Constitution, as well as denying AAT review of decisions of issuing authorities whilst the preventative detention order is in force.

A second constitutional issue concerning Commonwealth preventative detention is that the legislation assumes that detention for a protective national security purpose falls within a permissible, non-punitive purpose, beyond the reach of Chapter III immunities. That approach relies upon a contraction in interpretation, or rejection of the statement regarding executive detention made by

168 See Terrorism (Po1icy Powers) Amendment (Preventative Detention) Act 2005 (Cth); Terrorism (Preventive Detention) Act 2005 (Qld); Terrorism (Preventive Detention) Act 2005 (SA); Terrorism (Preventive Detention) Act 2005 (Tas); Terrorism (Community Protection) (Amendment) Act 2006 (Vic); Terrorism (Preventive Detention) Act 2005 (WA); Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT); Terrorism (Emergency Powers) Act 2003 (NT). See McConnell, above n 2, 19-20, for an outline of the New South Wales preventative detention provisions and Simon Bronitt, 'The Anti-Terrorism Act (No 2) 2005 (Cth)' (2006) 30 Criminal Law Journal 5, 6 for some observations on the New South Wales preventative detention legislation. Gareth Nethem observes the involvement of the States was necessary 'to escape one of the few fundamental protections offered by the Constitution: that only the courts can punish': Nethem, above n 91, 6, 7.

169 See Samantha Maiden and Denis Shutton, "PM's bad advice on detention laws", The Australian (Sydney) 26 October 2005, 1 and 10. In that article, the Commonwealth Chief General Counsel, Henry Burnmaster QC, is quoted on the preventative detention orders as representing a "very untested area of law", that "[e]veryone guarantees as to validity can be given even as to detention for 24 or 48 hours" and "[i]t is a very untested area of law. Recent High Court cases do not encourage an expansive approach to the scope for executive detention under Commonwealth law".

170 This capacity is formally acknowledged in s 105.51(1) of the Criminal Code (Cth): 'Subject to subsections (2) and (4), proceedings may be brought in a court for a remedy in relation to: (a) a preventative detention order; or (b) the treatment of a person in connection with the person's detention under a preventative detention order'.

171 Criminal Code (Cth) s 105.51(2).

172 Criminal Code (Cth) s 105.51(4).

173 Criminal Code (Cth) s 105.51(3). These decisions are (a) a decision by an issuing authority under ss 105.8 or 105.12 to make a preventative detention order; or (b) a decision by an issuing authority in relation to a preventative detention order to extend or further extend the period for which the order is in force in relation to a person.
Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs ("Lim")*.\(^{174}\)

It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power is conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.\(^{175}\)

A contraction or rejection of the *Lim* principle to support constitutionality of the preventative detention powers in the *Anti-Terrorism Act* (No 2) 2005 (Cth) necessarily relies upon the majority decisions in *Al Katab v Godwin* ("Al Katab").\(^{176}\) *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*\(^{177}\) and *Re Woolley Ex parte Applicants M 276/2003* ("Re Woolley").\(^{178}\) In *Re Woolley*, the *Lim* decision was not sought to be re-opened.\(^{179}\) However, that matter principally refers to the correctness of finding of a Commonwealth power to detain aliens preparatory to deportation and expulsion under the s 51(xix) aliens power which the decision endorses, rather than deeper issues from *Lim* about the permissible limits of Commonwealth administrative detention in other areas. There is ample evidence elsewhere of the Commonwealth's efforts in its submissions to have the High Court narrow its methodology of ascertaining purpose and thereby increase the scope of non-punitive executive detention,\(^{180}\) under the s 51(xix) aliens power. Such reasoning would then be adaptable to constitutionally characterise other forms of executive detention as non-punitive in nature.

---

175 (1992) 176 CLR 1, 27. Their Honours subsequently stated that "[t]here are some qualifications which must be made to the general proposition that the power to order that a citizen be involuntarily confined in custody ... is entrusted exclusively to Ch III court", proceeding to list a number of exceptions: (1992) 176 CLR 1, 28.
180 See Carne, above n 65, 559-65. 'C. Attempting to Re-shape the *Lim* Test for Security Reasons: Statutory Purpose and the Disregard of Practical Operation' and 'D. Statutory Purpose and the Disregard of Practical Operation: A Departure from and Inconsistency with the Application of Purpose Elsewhere'. That approach sought to confine a consideration of purpose to statutory purpose, including that the test must whether there was an exercise of judicial power, instead of whether the type of detention is penal or punitive in character: Carne, above n 65, 560. See also Kirby J's observations about Commonwealth submissions in *Vasiljkovic v Commonwealth* (2005) 223 ALR 447, 492, which argued that the broad statements in *Lim* about the exclusive judicial role in imposing involuntary detention in the context of criminal punishment, were not endorsed by a majority of the Court in that case.
In particular, the observations of McHugh J highlight characteristics of judicial approaches of a recent majority of the High Court, \(^{181}\) amenable to present Commonwealth interests in justifying the constitutionality of preventative detention in the *Anti-Terrorism Act (No 2) 2005* (Cth). In *Re Woolley*, \(^{182}\) McHugh J contested the premises of the joint judgment in *Lim*:

[Their Honours drew the conclusion that, apart from some exceptional cases, there exists, for citizens, "at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth".]

With great respect, the reason given by their Honours does not support their premise. If no more appears, a law which authorises the Executive to detain a person should be classified as "penal or punitive in character" and a breach of the separation of powers doctrine. But it is going too far to say that, subject to specified exceptions, detention by the Executive is always penal or punitive and can only be achieved as the result of the exercise of judicial power. Accordingly, their Honours' conclusion that in times of peace, citizens enjoy a constitutional immunity from being imprisoned by Commonwealth authority except under an order by a court in the exercise of the judicial power of the Commonwealth cannot stand. \(^{183}\)

McHugh J then stated that the view of Brennan, Deane and Dawson JJ in *Lim* should not be followed, \(^{184}\) citing the views of Gaudron J in *Lim* and in *Kruger v Commonwealth*, \(^{185}\) which had been referred to with approval by Hayne J in *Al-Kateb v Godwin*. \(^{186}\) His Honour commented that "the most obvious example of a non-punitive law that authorises detention is one enacted solely for a protective purpose" and further observed:

[I]t cannot be said that detention by the Executive in circumstances involving no breach of the criminal law is necessarily penal or punitive in nature, and therefore involves an exercise of judicial power. Nor does it follow that at least in times of peace, citizens enjoy a constitutional immunity from being imprisoned by Commonwealth authority under an order made by a court in the exercise of the judicial power of the Commonwealth. Rather, it is necessary to characterise the law that authorises or requires detention and to consider all the circumstances of the case. In particular, the purpose of a law that authorises or requires the detention of a person is determinative. If the purpose of such a law is purely

---

181 Namely McHugh J, Hayne J, Callinan J and Heydon J. McHugh J sets out his judicial views on the intersection of Chapter III issues with Commonwealth detention and control orders and preventative detention orders in his article: McHugh, above n 149, 121–23, 125–29. Importantly, he asserts that "[t]he conclusion of Brennan, Deane and Dawson JJ that, in times of peace, citizens enjoy a constitutional immunity from being imprisoned by Commonwealth authority except under an order by a court in the exercise of the judicial power of the Commonwealth is open to serious doubt": McHugh, above n 149, 122.  
protective, detention by the Executive under that law will not be regarded as penal or punitive in nature. 197

McHugh J then elaborated upon the question of purpose188 by examining the application of a proportionality test and its role in determining whether a relevant form of detention was for a legitimate non-punitive purpose, observing that '[n]one of the Justices in the majority in that case (Al-Kateb) applied the "reasonably capable of being seen as necessary" test as the determinative test for ascertaining whether the purpose of detention was punitive'. 199

McHugh J's collations of the majority views in Al Kateb regarding purpose extends those views from the specific context of the s 51(xix) aliens power to a general constitutional principle of wherever purpose arises, in other situations involving other constitutional powers. It provides the Commonwealth with a foundation for asserting constitutionality of the preventative detention provisions as not offensive to Chapter III, reliant as they are upon other heads of constitutional power. 189 It is an executive enabling interpretation which facilitates a defining or labelling of what is or is not judicial power, simply through the assertion of protective, rather than punitive purposes. 190 It is a formulation which produces a considerable degree of interpretative latitude. 191

188 McHugh J had previously stated that '[t]he terms of the law, the surrounding circumstances, the mischief at which the law is aimed and sometimes the parliamentary debates preceding its enactment will indicate the purpose or purposes of the law': Re Woolley (2004) 210 ALR 369, 385.
189 Re Woolley (2004) 210 ALR 369, 389. McHugh J went on to identify relevant sections of the judgments of Hayne J, Haydon J and Callinan J in Al-Kateb where their Honours rejected the application of a proportionality test to ascertain whether the law achieves a non punitive end, preferring a simple test of purpose to assess the constitutionality of the detention: see Re Woolley (2004) 210 ALR 369, 389-91, stating '[t]he reasoning in Al-Kateb is therefore inconsistent with the applicants’ argument that the issue of punitive purpose must be determined by reference to whether the law itself is "reasonably necessary" for or "reasonably capable of being seen as necessary" for the achievement of a non-punitive purpose. A law that authorizes detention will not offend the separation of powers doctrine as long as its purpose is non-punitive': Re Woolley (2004) 210 ALR 369, 391.
190 See Carne, supra n 65, 574, this methodology suggesting "a predisposition to look more expansively at other identified constitutional heads of power supporting other detention legislation. Such an approach would readily but improperly lend towards a finding of a constitutional purpose in the other claimed heads of legislative power. The likely heads of legislative power for preventative detention are the defence power and implied police power: see the related matter of a High Court challenge to the imposition of a control order: Thomas v Mooreby and Others (2006) HCA 592 (31 October 2006) (Dr S Dunagh, Counsel for the AFP and the Commonwealth).
191 Kirby J highlights this phenomenon in Fardon (2004) 210 ALR 50, 91-92: 'Normally, a law providing for the deprivation of the liberty of an individual will be classified as punitive. As a safeguard against expansion of forms of administrative detention without court orders, our legal system has been at pains to insist that detention in custody must ordinarily be treated as penal or punitive ... Were it otherwise, it would be a simple matter to provide by law for various forms of administrative detention, to call such detention something other than "punishment" and thereby to avoid the constitutional protection of independent judicial assessment before such deprivation is rendered lawful'.
192 Re Woolley (2004) 210 ALR 369, 385: 'The most obvious example of a non-punitive law that authorizes detention is one enacted solely for a protective purpose ... Protective laws, for example, may also have some deterrent aspect which the legislature intended. However, the law
From the Commonwealth perspective, this is particularly important given the contrary views of Gummow J and Kirby J in the case of [Al-Kateb](http://www.nbc.netnu!/news/newsitems/200511/s1496069.htm) on issues of purpose, similarly reflected in their judgments in [Fardon](http://www.nbc.netnu!/news/newsitems/200511/s1496069.htm). Both judges rejected the Commonwealth’s submissions in that case (as an intervener) that the Commonwealth itself could confer a preventative detention power upon a Chapter III court of the type provided by the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld). More recently, the High Court in an extradition matter [accepted that, subject to qualifications](http://www.nbc.netnu!/news/newsitems/200511/s1496069.htm) that an intended consequence of an otherwise protective law will not make the law punitive in nature unless the deterrent aspect itself is intended to be punitive.

A further constitutional issue in the legislative process and passage of the bill is found through the situation of the territories under the bill. The two territories were subsequently excluded from negotiations on the draft of the bill, a point perhaps explained by the legalities and practicalities of securing an amendment to Part 5.3—Terrorism of the Criminal Code.

---

will not be characterised as punitive in nature unless deterrence is one of the principal objects of the law and the detention can be regarded as punishment to deter others. Deterrence that is an intended consequence of an otherwise protective law will not make the law punitive in nature unless the deterrent aspect itself is intended to be punitive.

194 (2004) 210 ALR 50. 71, 75 (Gummow J); 99 (Kirby J).
195 See [Vasiljkovic v Commonwealth](http://www.nbc.netnu!/news/newsitems/200511/s1496069.htm) (2006) 238 ALR 447, 460 (Gleeson CJ) (citing from [Lim](http://www.nbc.netnu!/news/newsitems/200511/s1496069.htm) (1992) 176 CLR 1 at 28) stating "it may be accepted that, subject to qualifications, "the power to order that a citizen be involuntarily confined in custody is, under the doctrines of the separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts": 474–75 (Gummow and Hayne JJ): "Reference has been made earlier in these reasons to the statement by Brennan, Deane and Dawson JJ in Lim of a principle derived from Ch III enjoining as penal or punitive in character involuntary detention of the state other than as an incident of the adjudging and punishing of criminal guilt. In Fardon (2004) 210 ALR 50 Gummow J expressed a preference for a somewhat differently expressed formulation of the principle. But in each instance, the formulation has been subject to "exceptional cases"." Heydon J agreed with the judgment of Gummow and Hayne JJ: 499. See also Kirby J: 493.

196 Following an unauthorised release of a draft of the bill by the ACT Chief Minister, Jon Stanhope and five adverse legal opinions on the bill’s provisions: see above n 118, for references to those legal opinions. See also "PM “excluding” ACT from anti-terrorism bill talks", [ABC News Online](http://www.abc.net.au/news/newsitems/200511/s1496069.htm) 2 November 2005.<http://www.abc.net.au/news/newsitems/200511/s1496069.htm> at 8 January 2007.

197 Section 100.3(3) refers to the constitutional basis for the operation of Part 5.3 of the Criminal Code (Cth) in the Australian Capital Territory and the Northern Territory as based on "(a) the legislative powers that the Commonwealth Parliament has under s 122 of the Constitution to make laws for the government of that Territory; and (b) the legislative powers that the Commonwealth Parliament has under section 51 of the Constitution (other than para 51 (xxvii))." The process under s 100.8 for approval for changes to pt 5.3 of the Criminal Code (Cth) does, not as such, require the approval of the territories: see s 100.8(3) "An express amendment to which this section applies is not to be made unless the amendment is approved by: (a) a majority of the group consisting of the States, the Australian Capital Territory and the Northern Territory; and (b) at least 4 states."

42
A more comprehensive understanding of the democratic assumptions and practices underpinning the bill can be gleaned from actual parliamentary processes—the circumstances and conduct of both the Attorney-General's Backbench Committee and the Senate Legal and Constitutional Legislation Committee inquiry, and those of the debate of the bill in the Parliament.198

A Attorney-General's Backbench Committee

The Attorney-General's Backbench Committee was considered as having a legitimate function in the review of the bill. It met eight times prior to the inquiry by the Senate Legal and Constitutional Legislation Committee into the bill and was successful in obtaining some concessions both before and after the inquiry,199 even though the safeguards instituted remain inadequate and require significant strengthening given the untested and far reaching nature of the powers. The prominence and persistence of certain backbenchers200 in pursuing changes to the legislation was doubtless a factor in achieving some alteration of the elements of the legislation most offensive to traditional common law and due process rights. The credibility and time afforded to this party based committee reflects distinctive executive-dominated values in scrutiny and modification of the legislation. The function of internal party debate supplanted in practical status and influence formal parliamentary chamber and committee scrutiny.

B Senate Legal and Constitutional Legislation Committee: The Committee Inquiry

The Senate motion of 13 October 2005 that, upon its introduction to the Houses of Representatives, that the Senate refer the bill to the Senate Legal and

198 Again, the A-G presented these developments in a positive light: see Ruddock, above n 109, citing a 'comprehensive report by the Senate Legal and Constitutional Legislation Committee, as well as unprecedented parliamentary and public debate'. In both instances it was originally envisaged that these processes would be speedily completed.

199 See Michelle Grunau, 'A hard slog for backbench rebels as Howard gets his way on key legislation', The Age (Melbourne), 2 December 2005, 7. See also the transcript of an interview with Senator George Brandis, Chair of A-G's Backbench Committee: ABC 'Friday Forum', Lateline, 21 October 2005 <http://www.abc.net.au/lateline/content/2005/s1488_112.htm> at 8 January 2007. The concessions were obtained during the course of eight meetings of the A-G with his Backbench Committee, extending over 16 hours: see comments of Senator Brandis in Commonwealth, Parliamentary Debates, Senate, 5 December 2005, 20 (Senator Brandis). The period of deliberation over a bill of such significance was relatively brief—from the release of the bill into the public domain on 14 October 2005 to its passage on 7 December 2005. The Senate Legal and Constitutional Legislation Committee reported on the bill on 28 November 2005: see Commonwealth, Parliamentary Debates, Senate, 28 November 2005, 66 (Senator Payne).

Constitutional Legislation Committee for report by 8 November 2005, was a highly political gesture, giving the illusion of a public inquiry into the bill’s provisions. At that point, a series of practical circumstances and parliamentary procedures actually prevented a proper inquiry. The practical circumstances were that the Senate would not sit again until the week from 7–10 November 2005, with Senate Estimates Committee hearings occupying senators in the preceding non-sitting week of 31 October 2005 to 3 November 2005. The House of Representatives, where the bill had to be introduced for the terms of the motion of referral to the Senate Committee to become operative, would not sit until 31 October 2005 to 10 November 2005. The effect of the coincidence of these circumstances was that the Senate Committee would have only between one and four days to receive the bills, ‘analyse them, assess them, invite submissions, have an inquiry and write a report’. The parliamentary procedures issue arose because Senator Hill, Leader of the Government in the Senate, introduced the motion after 4:30 pm on a Thursday, meaning under Senate rules there could be no quorums or divisions called — a division could not be called on that day in respect of amending the reporting date in the motion to a later date. The consequences of this measure were stark:

Any delay would mean that effectively we cannot have the matter determined, move forward and have an argument in part in respect of the substantive issue. If that position is adopted, the package of bills will not be referred to the Senate Legal and Constitutional Committee and it will not be available for that committee to start looking at...

The Australian Democrats moved an amendment that the Senate Committee reporting date be changed to ‘the first sitting day of 2006’, subsequently changing that amendment to a reporting date of 28 November 2005. Ultimately, further consideration of the matter was adjourned to the next sitting day, coincidently on the action of Acting Deputy President of the Senate, Senator Brandis, the Chair of the Attorney-General’s Backbench Committee, which had earlier sought amendments to the draft bill. On 3 November 2005, debate on this
motion of 13 October 2005 was resumed and the amendment of the reporting date of the Senate Committee to 28 November 2005 was accepted.207

Although the later reporting date was an important concession, it still created considerable difficulties for thorough review of the bill, participation in public debate and deliberations of the Senate Committee, with the version of the legislation introduced into the House of Representatives some 137 pages in length. The Senate Committee sought submissions on 5 November 2005208 for submission by 11 November 2005. It received some 294 submissions and a number of supplementary submissions.209 It conducted two and a half days of public hearings in Sydney alone.210 A significant proportion of that time was taken up in hearing from Commonwealth government witnesses.211 One consequence of the tight time frame for submissions, and the few days in which the report of the Committee had to be written affected the breadth of the inquiry.212 The Chair of the Committee, Senator Marise Payne, highlighted some of the circumstances of the Committee review and reporting process,213 mentioning the intensity of the work upon the Committee secretariat.214 These matters allude to the demanding circumstances impacting upon the performance of this essential democratic review function and the role of the Senate more broadly.215 The very tight time frame for submissions, and the few days in which the report of the Committee had to be written affected the breadth and quality of the research, compilation and writing involved in both processes. Other senator participants in the review were more critical of some of the democracy-related aspects of the review process.216 Wider criticisms were made about the intense time frame and pressures under which the Committee review was conducted.217

208 Including contacting organisations by an email inviting them to make a submission.
210 This was contrary to the usual Senate Committee practice of also holding hearings in Canberra and Melbourne.
211 Including all of the sitting on Friday 18 November 2005, with representatives from the A-G’s Department.
212 Above n 209, 229-25.
213 ‘As I said earlier, the inquiry took place over a short period of time and the hearings were intensive, with in excess of 10 senators participating in virtually every moment of those hearings. It is an indication of the level of interest that so many submissions were received in such a short period of time’: Commonwealth, Parliamentary Debates, Senate 28 November 2005, 69 (Senator Payne). ‘I acknowledge absolutely that it happened over a relatively short period of time — and very intense days of hearing, but an inquiry which still attracted almost 300 submissions and which nevertheless resulted in the comprehensive ventilation of a range of concerns of both individuals and organisations in the community in relation to the legislation’: Commonwealth, Parliamentary Debates, Senate 5 December 2005, 6 (Senator Payne).
214 Commonwealth, Parliamentary Debates, Senate 5 December 2005, 7 (Senator Payne).
215 Ibid.
216 Commonwealth, Parliamentary Debates, Senate, 28 November 2005, 70 (Senator Crossin) and 71 (Senator Stott Despoja) and Commonwealth, Parliamentary Debates, Senate 5 December 2005, 12 (Senator Stott Despoja), 4–5 (Senator Evans) and 18 (Senator Ludwig).
conducted, the compromising of process producing potentially inferior legislation, attitude arrogance towards the legislative and public participatory process engendered by the Government Senate majority and the overt politicisation of national security matters.

These concerns can be seen to be significantly substantiated. They yield further insights into the democratic assumptions and practices underpinning the bill and ultimately, the effectiveness of protection of democratic institutions by the legislation. The importance of the Senate Committee Report's process and findings means that a high investment is made in the relevance and integrity of democratic process and its adoption and implementation of the recommendations, as identified by the Committee Chair:

As I mentioned when tabling the committee report on Monday of last week, the committee made 52 recommendations, and many of these in fact were procedural recommendations. They were aimed at improving the operation of the processes of preventative detention orders and control orders ... Given the intent of the bill and given the provisions that were incorporated in the bill, what the committee in the majority chose to do was to suggest amendments to procedures for the development and handling of the preventative detention orders and control orders, and the individuals who would be subject to those, to better, in our view, protect their position, their civil liberties, their capacity to go about their daily lives as far as possible. We had to acknowledge in that process that any government invoking this sort of legislation is obviously saying to the community that what we face is a very significant threat to the way in which we live our lives. I have said this before: we have to take very serious steps to address the threat.217

The claim, however, that the overwhelming majority of the recommendations were taken up218 is open to dispute, at least in relation to preventative detention and control orders. One factor is the brevity of time elapsed between the handing down of the Committee report on 28 November 2005 and the passage of the legislation in the Senate on 6 December 2005. Another consideration is the indirect influence of the reality of a Committee process of inquiry and forecast recommendations219 upon the activities of the Attorney-General's Backbench Committee, given the degree of influence that this Committee apparently brought to bear.220 The major

---

217 Above n 214, 7.
218 Ibid.
219 In the sense that there was some commonality of membership of Government senators of the Senate Legal and Constitutional Legislation Committee (as Participating Members) and of the A-G's Backbench Committee. Whilst the Government had only three of the six elected members of the Senate Legal and Constitutional Committee — Senators Payne, Mason and Scullion — it was significant that the report was described 'as a consensus report — that is to say that the elected members of the committee are agreed on the substance of the report'. Commonwealth, Parliamentary Debates, Senate, 28 November 2005, 67 (Senator Payne).
220 See for example the comments of Senator Brandis, Chair of the Committee: "I also want to pay tribute to members of my committee, the government Attorney-General's Committee, who participated in this debate behind closed doors, as is the way of government committees, during the course of eight long meetings with the Attorney-General, stretching over some 16 hours ... Mr Ruddock could not have been more helpful in seeking to find the right answer to attempt to engage with us on the common task of balancing the two imperatives of protecting the community from the real threat of terrorist violence while at the same time making as few
point, however, is in the number of Committee recommendations in relation to preventative detention and control orders that finally appeared in the legislation — of a total of 25 recommendations dealing with control orders and preventative detention, most were rejected and only a few minor changes were made.221

Many of the most significant recommendations were rejected outright — these included the removal of restrictions on lawyer-client communications and the right to consult a lawyer privately, 222 modifications to the ability of an AFP officer to monitor lawyer-client communications, 223 requirements that the Attorney-General report to the Parliament on preventative detention orders and control orders every six months, 224 a requirement for a public and independent five year review of preventative detention orders and control orders, 225 a five year sunset clause, 226 and a requirement that the AFP officer, the Attorney-General and the issuing Court each be satisfied that the particular control order sought is the least restrictive means of achieving the purpose of the order. 227

Other recommendations appear to be only partly implemented or implemented in a more restrictive, indirect or minimal manner — an express right, with legal representation, to present information to the issuing authority for a continued preventative detention order, 228 contact with family members, 229 that reasons be provided for decisions for preventative detention and control orders, including materials on which the order is based, subject to redaction or omission on national security grounds, 230 the elaboration of grounds for a prohibited contact order, 231 the involvement of Human Rights and Equal Opportunity Commission ("HREOC") (with the Ombudsman and Inspector General of Intelligence and Security ("IGIS")) in developing a Protocol governing minimum conditions of detention and standards of treatment of persons subject to a preventative detention order 232 and the videotaping of any questioning that takes place during the period of preventative detention. 233

*compromises of traditional liberties as possible*; Commonwealth, Parliamentary Debates, Senate, 5 December 2005, 30 (Senator Brandis).

221 See "Howard's Way The Fourth Term Agenda 'Terror', The Age (Melbourne), 2 December 2005, 7.
222 Above n 209, xi (Recommendation 13).
223 Ibid.
224 Ibid (Recommendation 16 — preventative detention orders) and xii (Recommendation 24 — control orders).
225 Ibid (Recommendation 17 — preventative detention orders) and xii (Recommendation 25 — control orders).
226 Ibid (Recommendation 18 — preventative detention orders) and xii (Recommendation 26 — control orders).
227 Ibid xii (Recommendation 19).
228 Ibid ix (Recommendation 2).
229 Ibid (Recommendation 6).
230 Ibid x (Recommendation 7) and xii (Recommendation 23).
231 Ibid (Recommendation 8).
232 Ibid (Recommendation 10).
233 Ibid xi (Recommendation 12).
Only a handful of recommendations appear to have been accepted in their entirety — the ability of detainees to make representations to the nominated senior AFP member concerning revocation of the preventative detention order, oversight of the preventative detention regime by the Ombudsman, and the prohibition on hearsay evidence in a proceeding for a grant of a continued control order.

The extent of the failure to adopt as legislative amendments the Committee's recommendations provides some important indications. The Senate Committee process, whilst reinforcing democratic values of critique and analysis, was nonetheless located within an executive context with primary considerations in speed in the passage of legislation and a concern to be seen as tough on terrorism. This was as much to enhance political capital and advantage as to insulate against political repercussions in the aftermath of a terrorist attack that more could, and should, have been done. The intense Committee timetable itself was only arrived at, in place of a token one day hearing, in a fluid political situation where public concern and debate had been increased by the release of a version of the bill on the Australian Capital Territory Chief Minister's website. Consequently, Government responses towards the Committee's findings may be properly viewed as concessional, expedient political responses. Given the controversy surrounding control orders and preventative detention proposals, there was a political advantage in defending the legislation, by factually asserting that it had been fully reviewed by a parliamentary committee and the committee recommendations had been responded to. The failure to amend the bill to incorporate most of the safeguards suggested by the Senate Legal and Constitutional Legislation Committee Report and the adverse reaction to the

234 Ibid iv (Recommendation 5).
235 Ibid x (Recommendation 9).
236 Ibid xi (Recommendation 15).
238 See Ruddock, above n 109.
human rights orientated public release and analysis of the bill pursued by the Australian Capital Territory Chief Minister, and subsequently reflected in the Australian Capital Territory legislation, ought properly to be seen in the broader context of the government's criticisms of the United Nations Treaty Committee system. Many of the suggested safeguards for the bill draw upon principles analogous to or derived from such instruments as the International Covenant on Civil and Political Rights.

C Debate of the Bill in Parliament

Such practical political realities are corroborated elsewhere. The gag and guillotine were used in debate about the bill, in contrast to the considerable time expended in the same parliamentary session after passage of the bill, involving a filibustering process on relatively minor and unimportant legislation, whilst negotiations were being conducted to secure support on the voluntary student unionism legislation.

The Anti-Terrorism Bill (No 2) 2005 (Cth) was declared an urgent bill by Government motion in the Senate on 5 December 2005, with an allotment of time of only an additional four and a half hours of debate, including all the remaining second reading and committee stages. The second reading debate of the bill resumed immediately after the successful declaration. This prompted concerns to be voiced about the ability of the Senate to scrutinise the legislation and as a

242 Higher Education Legislation Amendment (2005 Measures No 4) BILL 2005 (Cth); Education Services For Overseas Students Amendment Bill 2005 (Cth) and European Bank for Reconstruction and Development Amendment Bill 2005 (Cth).
243 Higher Education Support Amendment (Abolition of Compulsory Upfront Union Fees) Act 2005 (Cth).
244 See Commonwealth, Parliamentary Debates, Senate, 5 December 2005, 81, 85-86.
245 Ibid 81 (Senator Evans): ‘I want to make the point that I do not want to delay the business of Senate in debating the legislation before us by suspensions et cetera that unduly delay the Senate. But we have hit a new low. The Senate ought to be allowed proper time to debate the terrorism legislation. I understand that the urgency declaration will limit that debate quite considerably’.
serious diminution of democratic practice. The mere fact that the bill received only a total of 6 hours and 24 minutes of parliamentary debate, with its profound civil liberties ramifications, indicates a formal, functionalist approach to its passage, rather than providing adequate time to digest the recommendations of the Senate Committee and to properly consider amendments based on them.

The issue of inadequate time being allocated to debate provisions of the bill is highlighted by use of Senate time on the last parliamentary sitting day in December 2005. Government senators filibustered on their own bills, ensuring that the Senate sitting was prolonged so that sufficient time existed for negotiations from the Prime Minister's office to obtain the casting vote of Family First Senator, Steven Fielding, on the voluntary student unionism legislation, after National Party Senator Barnaby Joyce had indicated that he would cross the floor on the same legislation. The Senate was thus deprived, through political contrivance, from additional time in Committee stage for consideration of the control orders and preventative detention legislation.

The matters considered so far are a means of gaining information and insight into how the legislative provisions relating to control orders and preventative detention have eventually manifested. Common manifestations include the speed demanded of the legislative process, inadequate consideration of and redress of constitutional issues, efforts to maintain secrecy of the draft versions of the bill so as to curtail informed public debate and differing degrees of credibility, legitimacy and acceptance of the respective views of COAG, the Attorney-General's Backbench Committee and the Senate Legal and Constitutional Legislation Committee. There is also a high degree of selectivity in and rejection of the Committee's recommendations. Such factors also reflect a discretionary and executive-contingent nature of many of the safeguards eventually included in the legislation.

Beyond the legislative process itself, several other background considerations shed light upon the final legislative form of the preventative detention and control orders and attitudes towards the accretion of executive power.

246 For example, above n 244, 84 (Senator Bartlett): 'We are not serious players in this debate, according to the government's own words. We disagree with the government; therefore we cannot possibly have a serious view. That is contemptuous of democracy in the Senate ... So people who disagree with the government clearly are on a different plane and clearly do not need to be taken seriously or treated with any respect'.


248 Higher Education Support Amendment (Abolition of Compulsory Upfront Union Fees) Act 2005 (Cth).

249 For a summary of these activities, see Glenn Milne, 'PM drunk on political power', The Australian (Sydney), 12 December 2005, 8.
VII BEYOND THE PARLIAMENTARY PROCESS

A. False Comparisons: Claimed Derivation from the United Kingdom Model

The example of existing United Kingdom legislation in the form of the Terrorism Act 2000 (UK) and the Prevention of Terrorism Act 2005 (UK), linked to the tragic experience of the London terrorist bombings of 7 July 2005, figured prominently in reasons for introducing the control orders and preventative detention provisions into Australian law. Comments by the Prime Minister and at the Senate Legal and Constitutional Legislation Committee inquiry into the bill confirm that incident provided the impetus for the seeking of similar legislation in Australia, including the experience of Australian officials in London. Moreover, serial counter-terrorism law reform in Australia has frequently followed a significant external terrorist incident, and is best

250 As modified in the capacity to arrest and hold suspected terrorists (see ss 40 and 41 of the Act) for a period of 14 days, as part of a criminal law investigative process. This 14 day period (increased from seven days in 2003 by the Criminal Justice Act 2003 (c44) UK, pt 13, s 305(4)) was further increased to a maximum of 28 days by the Terrorism Act 2006 (UK). See Terrorism Act 2006 (UK) s 237.

251 The legislation instituting a system of control orders, following the decision of the House of Lords in A and others v Secretary of State for the Home Department [2005] 2 WLR 87, which found that indeterminate detention of foreign nationals under the Anti-Terrorism, Crime and Security Act 2001 (UK) was incompatible with the Human Rights Act 1998 (UK).

252 See Howard, above n 90: ‘Following the terrorist attacks on the London transport system in July, law enforcement and security agencies were asked to examine whether further legislative reforms could be made that would enable Australia to better respond to the threat of terrorism’: Howard, above n 93: ‘We have looked very carefully at what happened in the UK. We've had the benefit of briefing from the Federal Police team that went to Britain in wake of the attack on 7th of July’.

253 ‘The process for preparing this legislation started soon after the London bombing. I think I said in my opening that the London bombing was a big influence around the starting of this process. We were working basically flat out from then right up until that time when we finalised those drafting instructions’: McDonald, above n 97, 9.

254 This is further explicitly revealed by the comment, ‘[t]he terrorist attacks on the London transport system in July have raised new issues for Australia and highlighted the need for further amendments to our laws. The Government has comprehensively reviewed our existing laws and will move quickly to implement the following new regimes 1. Control orders ... 2. Preventative Detention ... ’ Howard, above n 90. Other comparative references to the UK experience exist throughout the Prime Minister's comments: Howard, above n 93.

255 Howard, above n 90: ‘Some of those amendments ... draw directly from the experience and observations of the AFP, state police and the officials from the Department of Transport and Regional Services who travelled to London after the bombing’.

appreciated as located within an executive operating framework of rapid legislative reform.257

Drawing upon the July 2005 London incident, several comments by the Prime Minister positioned the seeking of the new powers within a comparable framework of what was already available in the United Kingdom.258 Similarly, the United Kingdom example was used as a reassurance that the powers sought were not suggestive of a police state,259 — so that whilst on one level such powers could be identified as exceptional and extraordinary, those powers are similarly available to the authorities of a comparable common law country. A preventative and interventionist purpose was also strongly advanced by the Attorney-General’s Department at the hearings of the Senate Legal and Constitutional References Committee into the bill.260

The difficulty with this approach is that it identifies few, if any of some important differentiating factors261 in the formulation, drafting and operation of the control orders and preventative detention matters between Australia and the United Kingdom. Instead, it rhetorically assumes that a formalised human rights framework in the United Kingdom262 will not have any substantive bearing upon derivation of the laws, nor upon real comparability between the two jurisdictions. That attitude itself and its failure to acknowledge differences are strong indicators of executive precedence and endorsement of executive discretion in the implementation of profound legislative reform. It is also an illustration of selective internationalism — that is, a selective usage of an international and comparative example to extend the reach of Commonwealth executive power whilst declining from that same example further restraints upon power which implement international human rights principles. Accordingly, the different bases, and justifications for the Australian legislation are distorted. This is particularly the case in relation to the uses of the preventative detention power.

257 The predictability and pattern of terrorism law reform has been identified by Joo Chong Tham as a five step technique: the technique is quoted by Senator Nettle in Commonwealth Parliamentary Debates, Senate, 12 August 2004, 36081 (Senator Nettle).

258 See Howard, above n 90, ‘If it is the case in the UK, the focus of preventative detention is primarily about stopping further attacks and the destruction of evidence ... States and Territories will be asked to provide for longer detention periods, similar to those available in the UK which allow for up to 14 days detention’. See also Howard, above n 93, ‘If it is the case in the United Kingdom, the focus of preventative detention is primarily about stopping further attacks and the destruction of evidence ... we have in mind a period of up to 14 days which is similar to the period which obtains in the United Kingdom.’

259 See comments of Philip Ruddock. Howard, above n 93: ‘Can I just say in relation to control orders, when I hear comments that suggest that this is somewhat akin to what you might expect in a police state that it’s modelled upon the provisions in the United Kingdom. So you know, you’re looking at countries that observe the rule of law of democratic institutions and were certainly not accused of being a police state when those laws were enacted there.’

260 McDonald, above n 156, 2–3.


262 In the form of the Human Rights Act 1998 (UK) and in the United Kingdom’s international obligations under the European Convention on Human Rights.
At first glance, the preventative detention provisions in the United Kingdom and Australia seem quite similar. Section 41(1) of the Terrorism Act 2000 (UK) states that 'a constable may arrest without warrant a person whom he reasonably suspects to be a terrorist'. A 'terrorist' means a person who (a) has committed an offence under any of ss 11, 12, 15-18, 54 and 56-63 or (b) is or has been concerned in the commission, preparation or instigation of acts of terrorism. In turn, 'terrorism' is broadly defined by s 1 of the Criminal Code. Section 105.4(4) of the Anti-Terrorism Act (No 2) 2003 (Cth) similarly states the grounds for applying for preventative detention orders in a manner offering a range of circumstances permitting early intervention in relation to persons quite removed or tentatively connected to a prospective terrorist act, also without confining that intervention to specifically identified and constituted criminal offences. Likewise, 'terrorist act' is broadly defined in s 100.1 of the Criminal Code. These changes mirror the Anti-Terrorism Act (No 1) 2003 (Cth), which amended the terrorism offences in div 101 and 102 of the Criminal Code, replacing 'the' with an 'a', assuring that the

---

263 Terrorism Act 2000 (UK) s 40.

264 Section 1 of the Terrorism Act 2000 (UK) states "terrorism" means the use or threat of action where (a) the action falls within subsection (2)(b) the use or threat is directed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause. (2) Action falls within the subsection if it (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system. The inclusion of "international governmental organisation" was made by a 34 of the Terrorism Act 2006 (UK).

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

266 "Terrorist act" means an action or threat of action where (a) the action falls within subsection (2) and does not fall within subsection (3); and (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and (c) the action is done or the threat is made with the intention of (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or part of a State, Territory or foreign country; or (ii) intimidating the public or a section of the public. (2) Action falls within this subsection if it: (a) causes serious harm that is physical harm to a person; or (b) causes serious damage to property; or (c) causes a person's death; or (d) endangers a person's life, other than the life of the person taking the action; or (e) creates a serious risk to the health or safety of the public or a section of the public; or (f) seriously interferes with, or disrupts or destroys, an electronic system including, but not limited to: (i) a financial system; or (ii) a telecommunications system; or (iii) a financial system; or (iv) a system used for the delivery of essential government services; or (v) a system used for, or by, an essential public service; or (vi) a system used for, or by, a transport system. (3) Action falls within this subsection if it: (a) is advocacy, protest, dissent or industrial action; and (b) is not intended: (i) to cause serious harm that is physical harm to a person; or (ii) to cause a person's death; or (iii) to endanger the life of a person, other than the person taking the action; or (iv) to create a serious risk to the health or safety of the public or a section of the public.
prosecution would not need to prove a specific, identified terrorist act. It would be enough that the prosecution prove that conduct was related to a terrorist act.267

A major and unarticulated difference between the two pieces of legislation is that the United Kingdom provisions are intrinsically part of a criminal law investigatory process, complete with a range of detailed procedures and safeguards contained in ch 11, sch 8 of the Terrorism Act 2000 (UK). As the major commentary268 on the legislation advises about the Part V counter-terrorism powers:

The leading purpose is to interrogate suspects so as to uncover admissible evidence sufficient to put before a court, and perhaps more common in the light of the low charging rate, to gather background intelligence information, aided by the extraordinary lengthy period of detention following an arrest and aided by the fact that no detailed reasons for arrest on suspicion of terrorism need be offered at the point of arrest. This purpose is allied to the idea that the threat of terrorism demands an early police intervention at the preparatory stages whether to interrogate or simply to disrupt. A second growing reason for the special arrest and detention powers is to facilitate the carrying out of searches. The third reason for s 41, very particular to Britain, is to deal with the special problems posed by international terrorism. The s 41 formulation differs from normal arrest powers in that there is no need for there to be any specific offence in the mind of the arresting officer. Nor does the definition of terrorism itself refer to a schedule of offences. The result is to allow the police wider discretion in conducting investigations — they are not bound by the need to state on arrest or subsequently the offences which may be in mind.269

In contrast, the counter-terrorism criminal law investigatory powers and safeguards in Australia are located in pt IAA and pt IC of Crimes Act 1914 (Cth), with particular reference to ss 23CA, 23CB, 23DA and 105.42 of the Anti-Terrorism Act (No 2) (2005) imposes substantial restrictions upon the questioning of persons detained under a preventative detention order, clearly restricting that questioning to non-investigatory and non-intelligence gathering purposes,270 that is, for procedural issues associated with the fact of detention


269 Ibid 119-21 (emphasis added). The ‘background intelligence information’ must necessarily encompass criminal intelligence information, as at the point of arrest information supporting prosecution for a specific, identifiable criminal charge is not a pre-requisite for that arrest.

270 Dealing with the period of arrest if arrested for terrorism offences.

271 Specifying the terms during which suspension or delay of questioning may be disregarded for the purpose of investigating whether the person committed a terrorism offence.

272 Specifying the extension of the investigation period if arrested for a terrorism offence.

273 Criminal Code (Cth) s 105.42 states that ‘(1) A police officer must not question a person while the person is being detained under a preventative detention order except for the purposes of (a) determining whether the person is the person specified in the order, or (b) ensuring the safety and well being of the person being detained; or (c) allowing the police officer to comply with a requirement of this Division in relation to the person’s detention under the order. (2) An officer or employee of the ASIO must not question a person while the person is being detained under a preventative detention order (3) An AFP member or an officer or employee of the Australia Security Intelligence Organisation, must not question a person while the person is being detained
itself. Accordingly, the major focus of the United Kingdom legislation is clearly that of criminal investigation, and several of the procedures are extended and more flexible versions of the relevant criminal procedure for non-terrorism offences.\textsuperscript{274} This point of differentiation is not clearly made in the present circumstances. In a persistent and ultimately successful effort to obtain for an intelligence agency in a Western democracy detention and interrogation powers, the distinction of the United Kingdom legislation as having a criminal law focus was inconsistently pursued in an earlier forum, namely the Senate Legal and Constitutional References Committee examination of the then proposed ASIO detention and questioning powers:

The major cornerstones of consideration were the obvious culprits — the United Kingdom, the United States, Canada and New Zealand. The legislation from those jurisdictions was in fact considered in the drafting of this legislation, but there were two very distinct differences in some of that legislation. One was that most of that legislation is law enforcement based ... we took the view that this was about intelligence collection and not law enforcement, before the event rather than after the event, we went outside the parameters or looked outside the square to see how ASIO as an agency might deal with those matters ... In terms of discrepancies I think it is fair to say ... that in the United Kingdom, for example, yes, it is a law enforcement technique that they have there ... Again I go back to the comment I made earlier, that those laws were drafted in the context of law enforcement agencies investigating an offence.\textsuperscript{275}

This earlier Commonwealth appraisal of the United Kingdom legislation is now omitted to justify why Australia needs a third form of counter-terrorism detention, alongside that of the ASIO Act 1979 (Cth) detention and questioning powers and Crimes Act 1914 (Cth) detention powers.\textsuperscript{276} A plausible explanation is that this is another example of executive choice to advance arguments most supportive of the present Commonwealth legislative agenda. Both of the 2002 appraisals — in the Blackstone extract above\textsuperscript{277} and through the evidence of the Attorney-General’s Department before the Senate Legal and Constitutional References Committee\textsuperscript{278} — remain relevant, as the original arrest and detention provisions of the Terrorism Act 2000 (UK) are extant, save for changes in the available duration of the detention.\textsuperscript{279} The foundational structure of the arrest and custodial provisions in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{274} See, for example, the comparisons made between the relevant terrorism-related provisions of sch 8 of the Terrorism Act 2000 and those applying to non-terrorism offences under the Police and Criminal evidence Legislation, as highlighted by Walker, above n 268, 127–34.
\item \textsuperscript{275} Evidence to Senate Legal and Constitutional References Committee Parliament of Australia, Canberra 12 November 2002, 3–4 (Mr Holland, A-G’s Department).
\item \textsuperscript{276} See, for example, Submission to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Inquiry Into the Provisions of the Anti-Terrorism Bill (No 2) 2005 Submission 290A Attachment B, 20–21 (A-G’s Department).
\item \textsuperscript{277} Above n 268.
\item \textsuperscript{278} Above n 275.
\item \textsuperscript{279} Above n 276.
\end{itemize}
\end{footnotesize}
the United Kingdom has not changed in the intervening period. The major reason for this is that at its enactment in 2000, prior to the events in New York and Washington of September 11 2001, the legislation was seen as extensive and far reaching, replacing earlier 'temporary provisions' measures, was crafted out of the protracted contemporary experience of IRA terrorism and sought to comply as far as possible with the European Convention on Human Rights.

In Australia, with the considerable latitude of what constitutes the foundation 'terrorism offence' in the Commonwealth Criminal Code, as well as ancillary and inchoate offences associated with terrorism offences, applied with full geographical reach, the two alternatives of the respective detention powers under the ASIO Act 1979 (Cth) and the Crimes Act 1914 (Cth) are readily

---

280 The Anti-Terrorism, Crime and Security Act 2001 (UK) was passed in response to the events of September 11, 2001 and whilst including numerous new powers and new offences, left intact the framework of the arrest and custodial provisions of ss 40 and 41 of the Terrorism Act 2000 (UK).


283 Section 4 defines 'terrorism offence' as an offence against div 72 or pt 5.3 of the Criminal Code (Cth). Division 101 of the Criminal Code (Cth) provides a range of terrorism offences: s 101.1 Engaging in a terrorist act; s 101.2 Providing or receiving training connected with terrorist acts; s 101.4 Possessing things connected with terrorist acts; s 101.5 Collecting or making documents likely to facilitate terrorist acts; and s 101.6 Doing acts done in preparation for, or planning, terrorist act. Subdivision B of div 102 of the Criminal Code (Cth) provides a further range of terrorism offences: s 102.3 Directing the activities of a terrorist organisation; s 102.4 Membership of a terrorist organisation; s 102.4 Recruiting for a terrorist organisation; s 102.5 Training a terrorist organisation or receiving training from a terrorist organisation; s 102.6 Getting funds to, from or for a terrorist organisation; s 102.7 Providing support to a terrorist organisation; and s 102.8 Associating with terrorist organisations.

284 See Criminal Code (Cth) as 11.1 (Attempt); 11.2 (Complicity and common purpose); 11.3 (Innocent agency); 11.4 (Incitement); 11.5 (Conspiracy. Importantly, Section 11.6(1) of the Criminal Code (Cth) states that "[a] reference in a law of the Commonwealth to an offence against a law of the Commonwealth (including this Code) includes a reference to an offence against as 11.1 (attempt), 11.4 (incitement), or 11.5 (conspiracy) of this Code that relates to such an offence. Likewise, under s 11.2(1) of the Criminal Code (Cth) "[a] person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly".

285 Extended geographical jurisdiction — Category D under the Criminal Code applies to div 101 and div 102 offences. Section 15.4 of the Criminal Code (Cth) defines Extended geographical jurisdiction — category D as "(if a law of the Commonwealth provides that this section applies to a particular offence, the offence applies: (a) whether or not the conduct constituting the alleged offence occurs in Australia; and (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia".

286 Section 34F(1)(a) of the ASIO Act 1979 (Cth) states that "[t]he Minister may, by writing, consent to the making of the request, but only if the Minister is satisfied "that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence". Section 34G(1) of the ASIO Act 1979 (Cth) states that "[t]he issuing authority may issue a warrant under this section relating to a person, but only if (b) the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence". Section 4 defines 'terrorism offence' as an offence against div 72 or pt 5.3 of the Criminal Code (Cth).

287 Section 23A of the Crimes Act 1914 (Cth) contains provisions applicable if a person is arrested for a terrorism offence. The power of arrest for Commonwealth offences is located in s 3W of the Crimes Act 1914 (Cth).

56
available to be invoked for preventative purposes in emergency circumstances of an anticipated terrorist attack.

Furthermore, the structure of the preventative detention legislation can be seen to facilitate availability of persons detained, at much lower legal thresholds, for questioning under those two alternative regimes. The preventative detention legislation also clearly contemplates the shifting of persons between different forms of detention, potentially extending the length of actual detention, however described, quite substantially.288

Other factors from the United Kingdom legislative experience explain why the Australian legislation has taken on a particular form, making direct comparisons with the United Kingdom legislation misguided. The distinctive Australian methodology in counter-terrorism legislation of attempting to write in additional legislative protections following the introduction of a government bill, prompted by unanticipated political pressure from different sources, is by definition, an ex post facto, more reactive human rights response. The extent to which human rights protections are included in such counter-terrorism legislation becomes an ad hoc process, subject to a range of variables such as senate and committee control, the currency and distractions of a range of competing political issues, as well as the prominence given in the media to particular sections of a bill, rather than comprehensive legal analysis.

That process is open to far greater executive manipulation in the framing of a political response than is available in jurisdictions with a charter of rights. In such jurisdictions, the formal presence of statutory or entrenched rights, forms a background culture and language within which counter-terrorism legislation is scrutinised and justified. This does not mean that beneficial human rights outcomes are impossible in situations like Australia's serial counter-terrorism legislative enactments, but merely that they are more difficult to achieve.

In the example of the present legislation, the initial Government strategy was to severely constrict the circumstances that would produce informed public debate. Such an objective is quite the opposite to the realities of the interaction of the Human Rights Act 1998 (UK) in the public sphere,289 particularly in response to its

288 This point is developed more fully, including an exposition of how the different pieces of legislation interact, in a later section 'Demonstrating Increased Executive discretion: Linkage to ASIO questioning and detention powers under pt 3, div 3 of ASIO Act 1979 (Cth).'

289 Importing principles such as proportionality, necessity, and legitimacy into an assessment of the legislative counter-terrorism response, then prompting, that 'whenever there is a big judgment in the UK with the courts saying, "No, I'm sorry, we think that this doesn't comply with the Human Rights Act", then a lot of publicity ensues. Community groups are able to contribute to the debate, and both the House of Commons and the House of Lords become exercised in the problem. And so a process — a democratic process, if you like, ensues': ABC, 'UK Counter-Terrorism Laws Subject to Greater Scrutiny than Australia's' Lateline, 24 October 2005 <http://www.abc.net.au/lateline/content/2005/05/1495692.htm> at 8 January 2007 (Angela Ward). Counter-terrorism legislation has been found by UK courts to be incompatible with the Human Rights Act 1998 (UK): see A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department [2005] 2 WLR 87, the House of Lords finding that the detention of non-nationals under s 23 of the Anti-Terrorism, Crime and Security Act 2001 (UK) (if the Home Secretary believed that their presence in the United Kingdom was a
judicial application to the review of legislation. Similarily, the release of the draft bill by Chief Minister Stanhope and his obtaining of several legal opinions as to its consistency with international and other human rights principles, coincidentally prompted debate and dialogue of a kind similar to that arising through a declaration of incompatibility under the Human Rights Act 1998 (UK).

A further illustration of the influence of a human rights document is in the setting of boundaries as to what activity is curtailed — the Australian preventative detention legislation has a range of disclosure offences, of a kind absent in the comparable United Kingdom legislation.

The other distinguishing characteristic of the United Kingdom legislation is that the greater number of its safeguards — review under the Human Rights Act 1998 (UK), ultimate appeal to the European Court of Human Rights in Strasbourg, a much shorter sunset clause, a three monthly requirement of reporting to Parliament on the use of control orders, a formal derogation process in relation to those control orders which infringe the right to liberty of the person risk to national security and that the Home Secretary suspected that they were terrorists who, for the time being, could not be deported because of fears for their safety) incompatible with the Human Rights Act 1998 (UK) on the basis of it being a disproportionate response (Art 15 of the ECHR), discriminatory against foreign nationals (Art 14 of the ECHR) and infringing on the right to liberty and security of person (Art 5 of ECHR). In addition, the control orders legislation has been found incompatible as breaching a fair procedure and in severity amounting to a deprivation of liberty under Article 5 of the ECHR; see David Pannick, ‘Crisis, what crisis? It’s just political posturing’ Times Online, July 11 2006 <http://www.timesonline.co.uk/article/0,18010,2260732,00.html> at 8 January 2007.

290 See Ward, above n 289, referring to the then Australian prohibition of a family member informing anyone that another family member is subject to detention and the capacity to review: ‘An Australian judge, in comparison, will be disempowered. Australian judges don’t have the authority to issue declarations of incompatibility for serious breach of human rights and breach of the principle of proportionality. Australian judges don’t have the power to directly review legislation against Australia’s international human rights obligations’.

291 See Watchirs, ‘Re: Commonwealth Anti-Terrorism Bill 2005’, above n 118; Byrnes, Charlesworth and McKinnon, above n 118; Lassy and Eastman, above n 118.

292 See Angela Ward, ‘Checks balances’ Precedent May/June 2005, 12; Ward, above n 289 and Lynch, above n 261, 8, 10.

293 See capacities at 2, 3 and 4 of the Human Rights Act 1998 (UK). In Secretary of State for the Home Department v J & J (1 August 2006), the Court of Appeal heard an appeal by the Secretary of State of an order made by Sullivan J of the Queen’s Bench Division issuing a declaration of incompatibility on 12 April 2006 under s 4(2) of the Human Rights Act 1998 (UK) that the s 3 procedures in the Prevention of Terrorism Act 2003 (UK) of the court’s supervision of non-derogating control orders were incompatible with a right to a fair hearing under Art 6(1) of the European Convention on Human Rights. The Court of Appeal, in allowing the Secretary of State’s appeal, found that Sullivan J was in error in holding that the provisions for review by a court did not comply with the requirements of Art 6 of the European Convention on Human Rights. See also Secretary of State for the Home Department v JJ and others [2006] EWCA Civ 1141 (1 August 2006, Court of Appeal).


296 Prevention of Terrorism Act 2005 (UK) s 14.
in s 5(3) of the European Convention on Human Rights and the appointment of an independent reviewer to review on an annual basis the operation of terrorism laws — all reflective of more substantive rights charter culture. In fact, several of the Senate Legal and Constitutional Legislation Committee’s recommendations which were rejected by the Government are obviously derived from similar provisions in the United Kingdom legislation.

B Australian Capital Territory Preventative Detention Legislation: Further Comprehending Claims About the United Kingdom Legislation

The selective nature of the government’s usage of the United Kingdom legislation to justify enactment of the Anti-Terrorism Act (No 2) 2005 (Cth) and the discounting within the Australian enactment of the human rights principles intrinsic to the United Kingdom process is further corroborated by the content of, and Commonwealth reaction to, legislation enacted in the Australian Capital Territory under the COAG agreement, the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT).

The Australian Capital Territory legislation represents an attempt to adopt ‘counter-terrorism measures that are consistent with international human rights obligations’, to protect our community against terrorist activity ... and promote the values reflected in, and the rights and freedoms guaranteed by, the International Covenant on Civil and Political Rights. It was considered ‘that it is critical that Australia’s fundamental legal principles (such as the rule of law, respect for the legal process, the separation of powers, and respect for human rights) be preserved.’ In attempting to adhere to the International Convention on Civil and Political Rights (‘ICCPR’) articles reflected in the Human Rights Act 2004 (ACT), the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) includes a range of procedures and standards significantly reinforcing human rights simply absent in the Anti-Terrorism (No 2) Act 2005 (Cth). Byrnes and McKinnon identified these key differences: confining the making of

297 See ss 2 and 3 of the Prevention of Terrorism Act 2005 (UK). Article 5(3) of the European Convention on Human Rights states that ‘everyone arrested or detained in accordance with the provisions of paragraph 1c of this article 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 pending trial’.

298 See s 14 of the Prevention of Terrorism Act 2005 (UK) and s 36(1) of the Terrorism Bill 2005 (UK): ‘The Secretary of State must appoint a person to review the operation of the provisions of the Terrorism Act 2000 and of Part 1 of this Act’.

299 See the discussion above.

300 Paragraph 7 of the Preamble to the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT).

301 Ibid para 8.

302 Ibid para 9.

preventative detention orders to the Supreme Court;\textsuperscript{304} the requirement to provide a statement of reasons for the making of the preventative detention order to the person affected;\textsuperscript{305} confining the making of preventative detention order to circumstances where they are the least restrictive means to prevent a terrorist act or the only effective way to preserve evidence;\textsuperscript{306} only persons 18 years or older to be the subject of preventative detention orders;\textsuperscript{307} and the Public Interest Monitor to have a role at preventative detention hearings.\textsuperscript{311}

These provisions demonstrate that more rigorous human rights standards could have been incorporated into the Anti-Terrorism Act (No 2) 2005 (Cth) in implementing a system of preventative detention. The fact that reference was made to the United Kingdom legislation for the sole, specific purpose of creating legitimacy and credibility about the claimed need for new powers is also circumstantially confirmed by subsequent criticism of the Australian Capital Territory legislation by the Commonwealth Attorney-General.\textsuperscript{312} The Commonwealth has hinted it may move to legislatively intervene\textsuperscript{313} to override the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) through use of the s 122 Territories power in the Commonwealth Constitution on the grounds that the legislation is not as strong\textsuperscript{314} as the comparable Commonwealth and State legislation enacted after the September 2005 COAG agreement.

\begin{itemize}
\item Challenges and State Responses in a Free Society', National Enmore Centre, ANU, 20–21 April 2006 16.
\item Byrne and McKinnon, above n 303, 10 and Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 18.
\item Ibid s 18(9).
\item Ibid; and ibid as HR(4)(a) and 18(6)(e).
\item Ibid; and ibid s 11.
\item Ibid 11; and Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 55.
\item Ibid; and ibid s 50(3).
\item Ibid; and ibid as S(1), 5(3).
\item Ibid; and ibid as 14(3), 14(4).
\item Described by the Commonwealth Attorney-General to us as "the weak link and that weakness is capable of being exploited ... the Commonwealth cannot accept a regime which leaves the ACT the odd man out.
\end{itemize}
C Practical and Pragmatic Human Rights: The Australian Argument of 'Detailed' Legislation

The format and content of the legislation can also be more readily comprehended from the perspective of expressed government preferences in methods of human rights protection. Indeed, the degree of conformity or otherwise with the claims of those methods will provide a strong test of their bona fides or in the alternative, a strong indication of the application of executive power and discretion in relation to control orders and preventative detention.

The government’s preferred human rights model was set out in a comprehensive document released in December 2004 and intended to be submitted as part of Australia’s reporting to the United Nations committee system, Australia’s National Framework For Human Rights National Action Plan. It reflects a continuing official position that there is no need for a statutory or constitutional charter of rights in Australia. As there is a deliberate and positive comparison made between the United Kingdom system of control orders and preventative detention, measures evolved in a jurisdiction where legislation must answer to the European Convention of Human Rights based Human Rights Act 1998 (UK), this alternative Australian approach is of interest in assessing how effectively the control orders and preventative detention legislation conforms with the Commonwealth Government’s preferred methodology of human rights protection and realises the protections advocated therein.

The framework document gives considerable emphasis to the role of representative and responsible government and parliamentary institutions as the most effective mechanisms for the protection of human rights. Some relevant examples from the document are:

Australia’s robust system of human rights protection — The central features of our constitutional system are the doctrines of ‘responsible government’ under which the Executive is accountable to the Parliament and the Parliament to the people ... In addition, a network of parliamentary committees exists, with specific responsibilities to review various spheres of government activity and legislation.

316 A matter recognised in the A-G’s Department evidence as found in McDonald, above n 97, 8: ‘We all know that the government is being quite clear about their being no need for a Bill of rights in Australia’. This follows earlier comments from the then A-G, Hon D Williams, that ‘I am not about to reignite an old debate about a Bill of Rights ... In Australia [how it implements its international obligations] we do so through a combination of our strong democratic institutions, the common law and an extensive array of statutes and programs at the Commonwealth, State and Territory level. This fits our circumstances and is highly effective’: D Williams, ‘UN Human Rights Committee’ (Press Release 29 July 2000) <http://www.ag.gov.au/_dfw/WWW/Attorney_general/home.nsf/Page/Media_Releases_2000_July_ UN_Human_Rights_Committee> at 8 January 2007.
317 A-G’s Department, above n 315.
318 Ibid 5–6.
Promoting a strong free democracy — Australia has one of the most effective representative democracies in the world. The Government considers that Australia's federal structure, independent judiciary and robust representative parliamentary institutions play an integral role in protecting human rights and provide a bulwark against abuses of power and denials of fundamental freedoms. 319

Representative government — Members of the Australian community can also play an active role in representative democracy by making submissions to Australian, State and Territory parliamentary committees, which examine issues of public concern or proposed legislation. 320

Enhancing the effectiveness of national security — Efforts to achieve national security must not jeopardise basic human rights ... Australia's democratic traditions and processes are its greatest ally and greatest strength in the war on terror. These traditions and processes are the tools that will help combat terrorism and protect and preserve our human rights. 321

Such reliance upon classic parliamentary doctrines and institutions is, in the context of legislated national security control orders and preventative detention measures, highly problematic, given the level of secrecy and restricted access to information, deference of institutions to the expertise of intelligence agencies as expressed through the executive, manipulation of public debate through selective and timed release of information and the use of the concept of 'operational matters' as a mechanism for curtailing scrutiny and denying debate. Such classic parliamentary approaches to legislated rights are also susceptible in national security circumstances to 'balancing' formulae, 322 which assume that the trading off of rights in counter-terrorism measures will ensure enhanced physical security.

The translation of a preferred human rights model in Australia into control orders and preventative detention legislation is similarly reflected in the terminology of practical and pragmatic human rights, 323 as well as in the chain of 'detail' of the legislation. These characteristics were an integral part of the defence

319 Ibid 8.
320 Ibid 71.

323 An approach first articulated by the former A.G. D Williams: see 'Future Directions For Human Rights' (Press Release, 8 December 2000) <http://www.ag.gov.au/AGD/Pages/Media_Releases_2000_December_Future_directions_for_Human_Rights.aspx> at 8 January 2006: 'Debate about human rights issues in Australia is in danger of becoming too theoretical and academic rather than focusing on practical ways to ensure that everyone gets a fair go ... It is important that we don't treat human rights in an abstract or esoteric way. We must never forget that how we deal with human rights has a real and direct impact on people's lives and the world in which we live'.

62
of the bill before the Senate Legal and Constitutional Legislation Committee, displaying an Australianised differentiation: 122

In this country we give people practical access to human rights. We focus on making sure our statutes do that instead of leaving it to become a lawyers' picnic in the Supreme Court by using a human rights charter. The aim of our legislation is to give people accessible and clear rights... Human rights are about practical mechanisms that people can access. That is what we have been attempting to provide through this bill. 123

Our piece of legislation is 160 pages long. Compare that to Canada, to the United Kingdom — You will find that there is no country more meticulous about this aspect of our law-making. 124

These views are advanced as a preferable alternative for reconciling human rights and counter-terrorism measures, instead of a charter of rights based approach. The linking of the language of pragmatism and practicality to claimed effective human rights outcomes is likely, however, to distract from the fact that the content of such legislated rights is determined on an executive basis, with judicial review conceived within a more restricted framework of statutory and constitutional principles, instead of such review further animated by international human rights principles domestically incorporated and referenced to international human rights jurisprudence.

Furthermore, the executive-determined character of the rights conferred is confirmed by the fact that additional detail (apparent through the differences between the 103 pages of the draft bill (version 28) released by Australian Capital Territory Chief Minister on 14 October 2005 and the final version of bill, passed on 7 December 2005, 125 comprising 147 pages) was included in the legislation, only following COAG concerns 126 and the efforts of members of the Attorney-General's Backbench Committee. 127 These concessions followed release of a draft version of the bill by the Australian Capital Territory Chief Minister and

324 McDonald, above n 97, 28: 'Not everything from overseas is better than what we can produce. We can do better'.
325 Ibid 11.
326 McDonald, above n 156, 17.
329 See the comments of Senator Brandis: Commonwealth, Parliamentary Debates, Senate, 5 December 2005, 20 describing 'the government Attorney-General’s Committee. Who participated in this debate behind closed doors ... during the course of eight long meetings with the Attorney-General, stretching over some 16 hours'.

63
with the background of the Senate Committee inquiry and report. These realities reflect little, if anything, of a guiding influence over counter-terrorism legislative process of the ‘preferred’ human rights protective characteristics espoused in Australia’s National Framework For Human Rights.

The arguments about pragmatism, practicality and detail also fall when account is taken of the very real impact that a rights charter has in creating a rights orientated culture which is proactive, rather than reactive, one that is more receptive to the inclusion of a range of safeguards, through the need to comply with, or derogate from, a clear set of principles. The very fact that a range of comparable safeguards to the United Kingdom legislation have been omitted in the Australian legislation, as well as the fact that the majority of the Senate Legal and Constitutional Legislation Committee’s recommendations for detailed amendments were not taken up, renders the Commonwealth arguments equating detail with rights unsustainable. Much more detail could have been included in the legislation, drawn from the Senate Committee recommendations and the several expert submissions made to the Committee. Of course, with greater detail, there may well be a corresponding reining in of executive detention.

An important contextual matter relating to the ‘detail’ argument should also be articulated. In the absence of a bill of rights, the Australian legislation must necessarily be more detailed if safeguards are to be incorporated. Other than what can be derived from an examination of constitutional powers and immunities, there is no external rights document with its resultant jurisprudence against which the drafting, enactment and operation of the provisions can be tested. Instead, the detail argument suggests, in the absence of a bill of rights, an ad hoc, concessional process of amendment engrafting safeguards is necessary, instead of the bill from its inception being drafted in conformity with the international human rights standards increasingly referred to in comparable democracies such as the United Kingdom, Canada, New Zealand, South Africa and Ireland.

331 Such as those included in the relevant UK and ACT legislation discussed above under the heading ‘False Comparisons: Claimed Derivation from the United Kingdom Model’.
333 Charter of Rights and Freedoms 1982 (Canada).
334 New Zealand Bill of Rights Act 1990 (New Zealand).
336 Human Rights Act 2003 (Eire).
VIII DEMONSTRATING INCREASED EXECUTIVE DISCRETION

A Linkage of the Preventative Detention Powers to Questioning and Detention Powers under Part 3, Division 3 of ASIO Act 1979 (Cth)

The content of the legislation can also be understood by the fact that the preventative detention provisions deliberately integrate with the controversial ASIO questioning and detention warrant powers contained in separate legislation, pt 3, div 3 of the ASIO Act 1979 (Cth). This is made apparent by relevant sections of the Anti-Terrorism Act (No 2) 2005 (Cth), which deal with a co-existent ASIO warrant. In such circumstances, s 105.25 affords clear priority to the ASIO warrant:

(2) The police officer must take such steps as are necessary to ensure that the person may be dealt with in accordance with the warrant.

(3) Without limiting subsection (2), the police officer may, under section 105.26, release the person from detention under the preventative detention order so that the person may be dealt with in accordance with the warrant.

However, s 105.26(7)(b) confirms that a person so released may be brought back under the preventative detention order:

a person released under subsection (1) from detention under a preventative detention order may again be taken into custody and detained under the order at any time while the order remains in force in relation to the person.

Accordingly, this suggests that it would be legally feasible to take into preventative detention a person on the lower thresholds of the Anti-Terrorism Act (No 2) 2005 (Cth), applied initially by an AFP issuing officer and subsequently, by an appointed issuing authority for a continuing preventative detention order. During that 48 hour preventative detention, a detainee could be questioned for up to 24 hours under s 34D of the ASIO Act 1979 (Cth) questioning only warrant.

---

337 See Criminal Code (Cth) s 105.25. The section applying if (a) a person is being detained under a preventative detention order; and (b) a warrant under s 34D of the ASIO Act 1979 is in force in relation to the person; and (c) a copy of the warrant is given to the police officer who is detaining the person under the preventative detention order.

338 Criminal Code (Cth) s 102.2(2).

339 Criminal Code (Cth) s 105.28(3).

340 See Criminal Code (Cth) ss 105.4(6), (6).


342 See the combined operation of s 34HB of the ASIO Act 1979 (Cth) and the Protocol. The requirements for an ASIO questioning only warrant under s 34C(3) of the ASIO Act 1979 (Cth) are met if (a) 'there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and (b) relying on other methods of collecting that intelligence would be ineffective'.
Similar arrangements can also be affected under the authority of the 14 day State and Territory preventative detention legislation. In doing so, the requirement of having to satisfy the higher threshold test for an ASIO detention warrant can be avoided. In practical terms, the same result can be achieved, particularly as the complementary State and Territory preventative detention legislation permits detention for up to 14 days, whereas the ASIO Act 1979 (Cth) limits detention to 168 hours.

Several observations can be made about this integrated working of the two acts. The Commonwealth Attorney-General had previously complained about restrictions on the ability to use the ASIO detention and questioning powers in relation to the Brigitte incident. Indeed, the Attorney-General described the

---

343 See Terrorism (Preventative Detention) Act 2005 (Qld) s 44, 45; Terrorism (Emergency Powers) Act 2003 (NT) s 21(2); Terrorism (Preventative Detention) Act 2003 (SA) ss 26, 27; Terrorism (Community Protection) (Amendment) Act 2005 (Vic) s 13U, 13V; Terrorism (Preventative Detention) Act 2003 (Tas) ss 23, 31; Terrorism (Preventative Detention) Act 2006 (WA) ss 31, 32. The NSW legislation, the Terrorism (Police Powers) Act 2002 (NSW), does not make explicit provision for an ASIO Act 1979 (Cth) s 34 warrant, but the same effect as the other State and Territory legislation could arguably be achieved under s 26W(2)(b) of the Terrorism (Police Powers) Act 2002 (NSW). Section 42(3) of the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) states that "[i]f a person is released from detention under a preventative order (a) the order lapses; and (b) the person must not again be taken into custody, or detained, under the order (unless the order is reinstated under division 2.5). Section 27(1) of the legislation, which provides the reinstatement of a preventative detention order by an application to the ACT Supreme Court, contemplates the laying of a preventative detention order where the person was detained under..."; (b) the Australian Security Intelligence Organisation Act 1979 (Cth) part 3, division 3 (Special powers relating to terrorism offences).

344 See ASIO Act 1979 (Cth) s 34P(9)(d): "that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person: (i) may alert a person involved in a terrorism offence that the offence is being investigated; or (ii) may appear before the prescribed authority; or (iii) may destroy, damage or alter a record or thing the person may be required in accordance with the warrant to produce".

345 Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005 (NSW); Terrorism (Preventative Detention) Act 2005 (Qld); Terrorism (Preventative Detention) Act 2003 (SA); Terrorism (Preventative Detention) Act 2003 (Tas); Terrorism (Community Protection) (Amendment) Act 2006 (Vic); Terrorism (Preventative Detention) Act 2006 (WA); Terrorism (Extraordinary Temporary Powers) Act 2005 (ACT); Terrorism (Emergency Powers) Act 2003 (NT).

346 Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005 (NSW) s 26K; Terrorism (Preventative Detention) Act 2003 (Qld) s 25(10); Terrorism (Preventative Detention) Act 2005 (SA) s 16(3)(b); Terrorism (Preventative Detention) Act 2003 (Tas) s 9(2); Terrorism (Community Protection) (Amendment) Act 2006 (Vic) s 13Q(1); Terrorism (Preventative Detention) Act 2005 (WA) s 13(3); Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 21(3)(b); Terrorism (Emergency Powers) Act 2003 (NT) s 21(1)(f). The 14 day limit is under review by the Commonwealth A-G’s Department for prospective extension.

347 ASIO Act 1979 (Cth) s 24G(e).

ASIO legislation as 'too checked' and 'where possibly we have an outcome that is third or fourth best.' Liberalisation of the questioning and detention warrant criteria was then mooted, but not explicitly implemented, with an undisclosed departmental review conducted of the legislation. Ironically, the s 34E and s 34F ASIO Act 1979 (Cth) warrant standards were a clause drafted by the government included in the original bill introduced in March 2002.

At the November 2005 Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Bill (No 2) 2005 (Cth), evidence from the Attorney-General's Department confirmed the potential usage of transferring a preventative detainee onto an ASIO questioning warrant. Accordingly, de facto legislative reform has been obtained of the threshold standards for ASIO questioning, not subject to an ASIO detention warrant, with that questioning only intelligence gathering mechanism buttressed both before and after with preventative detention derived from a different legislative source. The dimension of this reform is demonstrated by the fact that there is no prohibition on the one person acting as both the prescribed authority for an ASIO questioning warrant and as the issuing authority in relation to a continuing preventative detention

---


351 Ibid.

352 Formerly located in ASIO Act 1979 (Cth) s 34D and now divided between questioning only warrants (s 34E) and detention and questioning warrants (s 34F).


354 A-G’s Department, above n 276, 13–14.

355 ASIO Act 1979 (Cth) s 34E.

356 ASIO Act 1979 (Cth) s 34F allows the appointment of prescribed authorities to oversee the operation of the questioning and detention provisions, such authorities being (1) 'a person who has served as a judge in one or more superior courts for a period of 5 years and no longer holds a commission as a judge of a superior court', (2) 'a person who is currently serving as a judge in a State or Territory Supreme Court or District Court (or an equivalent) and has done so for a period of at least 5 years', and (3) 'a person who holds an appointment to the Administrative Appeals Tribunal or President or Deputy President and who is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory and has been enrolled for at least 5 years'.

67
order. In fact there is an overlap between three categories of appointees — creating a clear potential for a conflict of interest, more likely to emerge in the smaller Australian jurisdictions with a limited pool of persons from whom the appointees may be drawn.

The preventative detention provisions act in tandem with the existing ASIO detention powers to enlarge the ambit of the ASIO powers, responding in a different, but nevertheless, expansionary manner sought both in the original bill and subsequently suggested by the Attorney-General. This legislative contemplation of transfer of a preventative detainee onto an ASIO questioning warrant also suggests a subsequent expansionary effect over the original claim of the ASIO warrants as measures of 'last resort'. The preventative detention order requires no contemplation of the exhaustion or ineffectuality of alternative means as a criterion for the granting of the order. Likewise, notification is not required to the issuing authority for the preventative detention order that an existing s 34D ASIO Act 1979 (Cth) detention and questioning warrant has been requested or is in force.

---

357 Anti-Terrorism Act (No 2) 2003 (Cth) s 105.2 makes appointable, amongst others, an issuing authority for continued preventative detention orders: (b) a person who is a judge of a State or Territory Supreme Court ... ; (d) a person who (i) has served as a judge in one or more superior courts for a period of 3 years and (ii) no longer holds a commission as a judge of a superior court ... ; (e) a person who: (i) holds an appointment to the AAT as president or deputy president; and (ii) is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory; and (ii) has been enrolled for at least 5 years.

358 Those categories being retired judges, present State or Territory judges and presidential or deputy presidential members of the Administrative Appeals Tribunal.

359 For a discussion of some of the more extreme provisions of the original bill, see Jenny Hocking, Terror Laws, ASIO Counter-Terrorism and The Threat to Democracy (2004) 215-47 and Carne, above n 76, 393-92.

360 See ABC 'Intelligence delay has Reddock asking questions', Lateline, 27 October 2003 <http://www.abc.net.au/lateline/content/2003/376417.htm> at 8 January 2007; Reddock, Sunday, above n 348 and Reddock, ABC News Online, above n 348.

361 See Commonwealth, Parliamentary Debates, House of Representatives, 20 March 2002, 13172 (D Williams) and D Williams, 'ASIO Legislation Amendment Bill Introduced' (Press Release, 21 March 2002). The 'last resort' characterisation was also made of the ASIO questioning and detention regimes elsewhere: A-G's Department, above n 276, 8.

362 Instead, the relevant criteria are 'making the order would substantially assist in preventing a terrorist act occurring;' and 'detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b)' (Anti-Terrorism Act (No 2) 2003 (Cth) s 105.4(6)(b)-(c)) or, in the alternative, the s 105.4(6)(b)-(c) criteria are 'a terrorist act has occurred within the last 28 days; it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act and detaining the subject for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b)'.

363 In contrast, the Terrorism (Extraordinary Temporary Powers) Act 2005 (ACT) s 17(3)(v) requires that an application to the Supreme Court for a preventative detention order set out the 'particulars of all periods for which the person has been detained under the Australian Security Intelligence Organisation Act 1979 (Cth), pt 3, div 3 (Special powers relating to terrorism offences) within the last 3 months'. The inclusion of this provision has been objected to by the Commonwealth A-G; see Philip Ruddock: 'Commonwealth Standing Firm in its View of Terrorism Laws', The Canberra Times (Canberra), 26 July 2006.
Furthermore, the capacity of the two pieces of legislation to work jointly makes contestable the attempt in the Attorney-General's Department submissions to the Senate Committee Inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005 (Cth) to maintain clear dividing lines between, and singularity of purpose of, the different forms of counter-terrorism detention available to the authorities. This was a matter argued in some detail. This approach by Attorney-General's Department introduced a level of abstraction and artificiality into the examination and defence of the preventative detention provisions, unlikely to apply in reality, and without sufficiently articulating the interrelationship between the provisions in different pieces of legislation. Moreover, the characterisation of the ASIO questioning and detention provisions as strictly for intelligence gathering purposes is historically not accurate. Accordingly, it is contestable that a bright line can be drawn between intelligence gathering and prevention, given the interlocking Commonwealth legislative scheme, more so because until intelligence is obtained and analysed, one cannot know of its preventative potential.

An alternative perspective, consistent with executive discretion as a foundational principle in Australian counter-terrorism law, is that the legislation contemplates a high degree of flexibility in selecting and shifting persons between various forms of detention. That flexibility is admitted as offering 'alternative measures which may be more suited to achieving national security objectives in the particular circumstances of individual cases.' Issues of management and allocation of counter-terrorism resources, priorities and competition and hierarchy between the various agencies are also likely to be relevant considerations in incorporating that flexibility. That appraisal is consistent with an overall analysis of counter-terrorism legislation characteristically enhancing executive discretion and choice.

---

364 'Just as the ASIO regime is not about preventative detention but about intelligence gathering, so the questioning regime associated with the police arrest powers is focused on investigation purposes not on preventative detention': A-G's Department, above n 276, 10. See also Evidence to Senate Legal and Constitutional References Committee, Parliament of Australia, Sydney, 17 November 2005, 76 (P Sullivan).
365 A-G's Department, above n 276, 8–10.
366 Ibid.
368 A-G's Department, above n 276, 10.
Reference has already been made to s 105.25 of the Anti-Terrorism Act (No 2) 2005 (Cth) and the obligations upon a police officer detaining a person under the preventative detention order when a s 34D ASIO Act 1979 (Cth) warrant is in force. Equally, s 105.26(4) obviates the need for a police officer to give a detainee a written statement that the person is being released from preventative detention to be dealt with (a) in accordance with a warrant under s 34D of the Australian Security Intelligence Organisation Act 1979; or (b) under the provisions of div 4 of pt IAA, and pt IC, of the Crimes Act 1914. A person released under a preventative detention order 'may again be taken into custody and detained under the order at any time while the order remains in force in relation to the person'.

The lower thresholds for making an initial or continued preventative detention order, in comparison to making an arrest under pt IAA of the Crimes Act 1914 (Cth), alert us to the fact that the three alternative criteria for preventative detention orders in fact constitute the actus reus elements of an offence — will engage in a terrorist act, possessing a thing that is connected with the preparation for, or the engagement of a person in a terrorist act or has done an act in preparation for, or planning a terrorist act. The difference is in the focus of preventative detention provisions upon these terrorist acts, drawing upon the definition set out in s 106.1 of the Criminal Code. That section makes no reference to the mental state elements of knowledge and recklessness contained in the possession offence, contracting the scope of the reasonable grounds of suspicion as the criterion for the preventative detention order. A plausible hypothesis therefore could be that a person could be preventatively detained in relation to any one of the nominated activities where insufficient information as to intention

---

269 Criminal Code 1995 (Cth) s 105.25 (7)(b).
270 See Criminal Code 1995 (Cth) s 105.4 — the test being that the there are reasonable grounds to suspect that the subject (i) will engage in a terrorist act or (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or (iii) has done an act in preparation for, or planning a terrorist act, and (b) making the order would substantially assist in preventing a terrorist act occurring; and (a) detaining the subject for a period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).
271 See Crimes Act 1914 (Cth) s 3W(1): 'A constable may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds that: (a) the person has committed or is committing the offence; and (b) proceedings by summons against the person would not achieve one or more of the following purposes: (i) ensuring the appearance of the person before a court in respect of the offence; (ii) preventing a repetition or continuation of the offence or the commission of another offence; (iii) preventing the concealment, loss or destruction of evidence relating to the offence; (iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence; (v) preventing the fabrication of evidence in respect of the offence; (vi) preserving the safety or welfare of the person.'
274 See Criminal Code (Cth) s 101.6, 'Other Acts Done in Preparation for, or Planning, Terrorist Acts' and contrast with s 105.4(4)(b)(ii).
275 Criminal Code (Cth) s 5.3.
276 Criminal Code (Cth) s 5.4.
277 Criminal Code (Cth) s 101.4(1) (knowledge), 101.4(2) (recklessness).
exists, but may be progressively acquired through further investigatory processes, including a s 34D ASIO Act 1979 (Cth) questioning warrant, and then be subject to Crimes Act 1914 (Cth) arrest powers for a relevant s 101.1, 101.4 or 101.6 Criminal Code offence. The potential indirect applications of the preventative detention power are more clearly understood through this focus upon reasonable grounds to suspect that physical actions have occurred. These physical actions are simply identifiable as the possession of a thing connected for, or the engagement of a person in a terrorist act, or the doing of an act in preparation for, or planning a terrorist act.

Significant also in this interrelationship is the fact that the AFP or State and Territory police are responsible for custodial and protective arrangements during an ASIO questioning or detention warrant, a police presence envisaged during that questioning before the prescribed authority.

**B Operational Considerations**

The above discussion of flexibility in the relationship between the ASIO questioning and detention powers and the preventative detention and control orders legislation touched upon some operational considerations. The claim of broader operational considerations partly explains the drafting of the preventative detention provisions, especially in the omission of more stringent safeguards and contemporaneous review mechanisms. This principle of operational considerations is again reflected in the breadth of executive discretion in the preventative detention provisions.

The context contemplated for operation of the legislation provides some explanation for the significant restrictions imposed both upon the capacity to

---

378 Including 14 day detention under State and Territory based legislation.
379 Sections 34D (a)-(b) of the ASIO Act 1979 (Cth) provide direct use, but not derivative use, immunity for information or things obtained under the warrant questioning regime.
380 See the evidence of the AFP Deputy Commissioner: Evidence to Senate Legal and Constitutional Legislation Committee, Senate, Sydney, 17 November 2003, 78 (Deputy Commissioner Lawler): 'To be able to prevent or investigate such attacks the Australian Federal Police believes the proposed preventative detention powers would enhance its ability to prevent and investigate Commonwealth terrorist offences by enabling police to detain suspected terrorists in order to protect the community while either ruling the detainees out of the investigation or forming the reasonable belief that the detainees can be released from detention, arrested and questioned under part I C of the Crimes Act 1914'. See also Lynch, above n 261, 11: "The purpose behind preventative detention orders might perhaps be to cover those circumstances where the authorities are not in possession of sufficient evidence to support laying a charge of that sort and having the matter dealt with by a court".
381 Criminal Code (Cth) s 105.4(4)(b).
382 Criminal Code (Cth) s 105.4(4)(c).
383 See s 34DA of the ASIO Act 1979 (Cth) and Australian Security Intelligence Organisation Protocol, part 5.1.
384 In the sense that there is no direct right of a detainee or a detainee's lawyer to make representations regarding the continuation of the detention before the issuing authority.
make representations to the issuing authority for continuing preventative detention orders, as well as restrictions upon contemporaneous legal proceedings relating to preventative detention orders. Evidence before the Senate Committee inquiry presented the situation as one of an emergency and of intervention in such circumstances in the preservation of public safety, differentiated from a criminal law process. It was admitted that the legislation was deliberately drafted to minimise the need for key officers to be involved in responding to litigious challenges.

A range of restrictions, incremental upon those applying in the making of representations to issuing authorities, exists upon contemporaneous legal proceedings seeking redress for the imposition of a preventative detention order. A detainee seeking judicial review is reliant upon original common law

---

385 However, see A-G’s Department above n 276, 5 which observes that the “bill does not preclude the issuing authority from seeking representations from the detained person or their representative”.

386 Section 105.12 of the Criminal Code (Cth) “requires the issuing authority (for a continued preventative detention order) to consider afresh the merits of making the order and to be satisfied, after taking into account relevant information (including any information that has become available since the initial preventative detention order was made) of the matters referred to in subsection 105.14(5) or (6) before making the order.” As there is no direct right of a detainee or a detainee’s lawyer to make representations regarding the continuation of the detention before the issuing authority, a circuitous method is employed, one that relies upon, in a manner full of contradictions of the interests advanced, that the Australian Federal Police member applying for a continuing preventative detention order to place all relevant information before the issuing authority, including that information communicated to the separate, nominated senior AFP member by the detainee or detainee’s lawyer under s 105.19(8). This process is described in A-G’s Department, above n 276, 5: “In meeting the nominated senior Australian Federal Police member’s obligations under subsection 105.19(8) to oversee the exercise of powers under, and the performance of obligations in relation to, the preventative detention order and ensure that the provisions of section 105.17 (which deals with revocation of preventative detention orders and prohibited contact orders) are complied with in relation to the preventative detention order, that nominated member would be required to ensure that any matters relevant to the extension or continuation of a preventative detention order were communicated (by the appropriate AFP member) to the issuing authority.” Furthermore, it is not at all clear whether the nominated senior AFP member’s obligations actually extend beyond an existing preventative detention order, to also include the prospective continuing preventative detention order.

387 See McDonald, above n 156, 2–3 and McDonald, above n 97, 10–12.

388 See McDonald, above n 156, 3 and McDonald, above n 97, 12.

389 See McDonald, above n 97, 10–11 and A-G’s Department, above n 276, 4. Interestingly, the rationalisation for this measure, that “Terrorist organisations are quite interested in litigation. They will naturally be using that” echoes the statement of the United States Defense Department identifying national security threats with the use of the curial and judicial processes: “Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes and terrorism”, United States, The National Defense Strategy of The United States of America (2005) United States Department of Defense <http://www.defenselink.mil/releases/2005/nr20050318-2245.html> on 8 January 2007.

390 See the above preceding discussion.

391 Section 105.21 imposes this range of restrictions on legal proceedings in relation to preventative detention orders.

392 As expressed in s 105.51(1) a remedy in relation to (a) preventative detention order or (b) the treatment of a person in connection with the person’s detention under a preventative detention order.
jurisdiction of the Federal Court and High Court,279 with application of the Administrative Decisions (Judicial Review) Act 1977 excluded.280 Such judicial review is restricted to Federal Courts281 while the preventative detention order is in force — ss 105.51(2)(a) and (b) make it clear that a State or Territory court does not have jurisdiction in such circumstances.282 As the making of preventative detention orders has been characterised as an administrative act exercised in a personal capacity,283 applications to the AAT for review of relevant administrative decisions relating to the preventative detention order:284 have been excluded while the preventative detention order is in force.

Instead, a form of ex post facto merits review of the administrative decision concerned with the preventative detention is permitted. That review must be conducted by the Security Appeals Division of the AAT, and a putative declaration power to set the decision aside285 and a power to determine that the Commonwealth should compensate the person286 are provided. Where the AAT makes a determination of compensation, "the Commonwealth is liable to pay the compensation determined by the Tribunal".287

These severely truncated review mechanisms afford a premium to executive authority and discretion. They challenge accepted rule of law accountability mechanisms in an admitted context where the response is anticipatory and preventative,288 with insufficient evidence to criminally charge and prosecute, and where investigation of the detainee’s circumstances with a view to prosecution is not the stated purpose of the legislation.289 The ex post facto and compensatory

---

279 See the comments in A-G’s Department, above n 276, 12.
280 Application of the Administrative Decisions (Judicial Review) Act 1977 (Cth) to a decision made under div I05 — preventative detention orders would have enabled the detainee to remove the decision, potentially providing a more substantive basis for challenge. See para (d) to sch I to the Administrative Decisions (Judicial Review) Act 1977 (Cth).
281 Reflecting the minimum constitutional requirements of s 75(v) of the Commonwealth Constitution, as articulated by the High Court in Plaintiff v Commonwealth (2003) 211 CLR 476.
282 Thereby declining to invest State courts with jurisdiction under s 77(iii) of the Commonwealth Constitution and Territory courts under s 122 of the Commonwealth Constitution.
283 According to the advice received by the A-G’s Department from Chief General Counsel and the Commonwealth Solicitor General: McDonald, above n 156, 18.
284 Such decisions being under the Criminal Code (Cth) s 105.51(5)(a) "a decision by an issuing authority under section 105.8 or 105.12 to make a preventative detention order or under s 105.51(5)(b) 'a decision by an issuing authority in relation to a preventative detention order to extend or further extend the period for which the order is in force in relation to a person'.
285 The Criminal Code (Cth) s 105.51(7)(a) allows the AAT to 'declare a decision referred to in subsection (5) in relation to a preventative detention order in relation to a person to be void if the Tribunal would have set the decision aside if an application for review of the decision had been able to be made to the Tribunal while the order was in force.'
286 The Criminal Code (Cth) s 105.51(7)(b) allows the AAT to 'determine that the Commonwealth should compensate the person in relation to the person’s detention under the order if the Tribunal declares the decision to be void under paragraph (a)'.
287 Criminal Code (Cth) s 105.51(b).
288 See McDonald, above n 156, 13 and McDonald, above n 97, 13.
289 Described as a 'simpler sort of process' desired by the police at one point: McDonald, above n 97, 27.
determination mechanisms impinge significantly upon the conception of rights to liberty and freedom of movement. They will not act as a contemporaneous check or deterrent on excesses of the preventative detention regime, but instead merely formally acknowledge error and order payment as redress.404

Similarly reflective of executive precedence and discretion in the control orders and preventative detention regime is the personalised re-assurance in the integrity and capacity of key office bearers operating the legislation and in institutional culture.405 Broad discretions exercised by such office bearers over the exercise of substantive powers, rather than a hindrance to rule of law values, are inverted to be presented as a safeguard.

In one sense, the giving such re-assurances merely confirms the scope of the discretions conferred, by assuaging fears concerning the likelihood of improper application. On the other hand, such measures are essentially meaningless because office bearers, or their interpretation and use of their discretion, can change. Importantly, the constant accretion amendment of and addition to Commonwealth counter-terrorism legislation offers no stable foundation for the change. Importantly, the constant accretion amendment of and addition to discretion conferred, by assuaging fears concerning the likelihood of improper exercise of substantive powers, rather than a hindrance to rule of law values, are inverted to be presented as a safeguard.

In one sense, the giving such re-assurances merely confirms the scope of the discretions conferred, by assuaging fears concerning the likelihood of improper application. On the other hand, such measures are essentially meaningless because office bearers, or their interpretation and use of their discretion, can change. Importantly, the constant accretion amendment of and addition to Commonwealth counter-terrorism legislation offers no stable foundation for the change. Importantly, the constant accretion amendment of and addition to discretion conferred, by assuaging fears concerning the likelihood of improper exercise of substantive powers, rather than a hindrance to rule of law values, are inverted to be presented as a safeguard.

In one sense, the giving such re-assurances merely confirms the scope of the discretions conferred, by assuaging fears concerning the likelihood of improper application. On the other hand, such measures are essentially meaningless because office bearers, or their interpretation and use of their discretion, can change. Importantly, the constant accretion amendment of and addition to discretion conferred, by assuaging fears concerning the likelihood of improper exercise of substantive powers, rather than a hindrance to rule of law values, are inverted to be presented as a safeguard.

In one sense, the giving such re-assurances merely confirms the scope of the discretions conferred, by assuaging fears concerning the likelihood of improper application. On the other hand, such measures are essentially meaningless because office bearers, or their interpretation and use of their discretion, can change. Importantly, the constant accretion amendment of and addition to discretion conferred, by assuaging fears concerning the likelihood of improper exercise of substantive powers, rather than a hindrance to rule of law values, are inverted to be presented as a safeguard.

In one sense, the giving such re-assurances merely confirms the scope of the discretions conferred, by assuaging fears concerning the likelihood of improper application. On the other hand, such measures are essentially meaningless because office bearers, or their interpretation and use of their discretion, can change. Importantly, the constant accretion amendment of and addition to discretion conferred, by assuaging fears concerning the likelihood of improper exercise of substantive powers, rather than a hindrance to rule of law values, are inverted to be presented as a safeguard.

In one sense, the giving such re-assurances merely confirms the scope of the discretions conferred, by assuaging fears concerning the likelihood of improper application. On the other hand, such measures are essentially meaningless because office bearers, or their interpretation and use of their discretion, can change. Importantly, the constant accretion amendment of and addition to discretion conferred, by assuaging fears concerning the likelihood of improper exercise of substantive powers, rather than a hindrance to rule of law values, are inverted to be presented as a safeguard.

In one sense, the giving such re-assurances merely confirms the scope of the discretions conferred, by assuaging fears concerning the likelihood of improper application. On the other hand, such measures are essentially meaningless because office bearers, or their interpretation and use of their discretion, can change. Importantly, the constant accretion amendment of and addition to discretion conferred, by assuaging fears concerning the likelihood of improper exercise of substantive powers, rather than a hindrance to rule of law values, are inverted to be presented as a safeguard.
IX CONCLUSION

On the one hand, it is difficult and premature to make a comprehensive appraisal of the broader consequences of the introduction of preventative detention and control orders for the nature of the democratic Australian polity. On the other hand, an easy and lazy response would simply reserve judgment about the operation of the legislation until practices under it are more fully implemented. It has been shown in this article, however, that much of the underlying practices and attitudes of the control orders and preventative detention legislation can be explored. Two initial observations may be made. The first is that insufficient consideration has been given to the consequences of the measures on liberty based assumptions and norms underpinning democratic institutions and practices — the growing familiarity and expectation of exceptional measures have distracted analysis of the likely incremental damage to those institutions and practices. In turn, the irony of counter-terrorism protective measures actually eroding the institutions and practices legislatively protected from terrorism has largely escaped attention, including the use of international and comparative examples.

Muslim and Arab communities, to understand and address the concerns and fears of members of those communities so that practical and immediate programs can be developed to allay them.


At the time of writing, the High Court of Australia is hearing a challenge to the constitutionality of the control order regime: see Thomas v Mowbray and Others [2006] HCA Trans 660 (5 December 2006) and [2006] HCA Trans 661 (6 December 2006).

One obvious impact being the lateral impact, as demonstrated in the Thomas case, of the significance and status of a quashing of conviction on appeal, as the freedom consequent upon the quashing of conviction is now subject to the grant of a control order on a balance of probabilities test, or alternatively, a preventative detention order.

See Carne, above n 65, 578.

This will of course be affected by and be contingent upon the exercise of discretion in seeking control orders and preventative detention, and in particular, the frequency of use of these powers. In that respect, the comparative experience of the issuing of ‘last resort’ ASIO questioning warrants as against the equivalent Canadian investigative hearing procedure may be instructive: see Greg Carne, ‘Gathered Intelligence Or Antipodean Exceptionalism?: Securing The Development of ASIO’s Detention and Questioning Regime’ (2009) 25 Adelaide Law Review 1, 36–38. Statistics indicate a greater willingness of Australian authorities to invoke the special...
to justify such measures.\textsuperscript{412} Such democratic institutions and practices are increasingly qualified and made contingent upon the exercise of executive restraint, tolerance or discretion.

The second point is that the processes of the legislative enactment of these measures have taken on an increasingly executive dominated and executive determined disposition. Such characteristics have been justified through claims of urgency and necessity. Parliamentary and consultative processes are often treated as mere formalities within which the executive must guide its preferred legislation with minimum amendments and within the fastest possible time frame. That process of amendment extends to re-visiting legislation to reinstate powers that were deleted in the original passage of the legislation. In the changed circumstances where the government has a Senate majority, that attitude has now shifted to one of rapid passage of legislation, with amendments, if any, to follow after possible review. However, the findings of a formal process of review after legislative passage provide no guarantee of any significant adoption of review recommendations.\textsuperscript{411} The promise of referral to review is as much a political device to neutralise criticisms that legislative passage is hasty or ill conceived, as it is an indication of the bona fides in the claimed necessity for the legislation.


\textsuperscript{412} On this point see Cams, above n 411, 2-3.

counter-terrorism legislation is further, predictable legislative reform prompted by the latest terrorist incident, even in situations where recently revised powers have neither been invoked nor tested.

Consistent with such executive-inspired approaches is the fact that the control orders and preventative detention legislation was orchestrated within the framework of COAG. On one level, this development can be explained through the formalities of referred State powers underpinning relevant sections of the Criminal Code. More importantly, however, the COAG arrangements align neatly with the prominence of law and order issues in State politics. That highly charged environment provided a powerful political imperative for use by the Commonwealth to commit the States and Territories to the passage of then unsighted legislation, an act of good faith in carrying out COAG obligations and in characterising the dissent of the Australian Capital Territory Chief Minister as inappropriate. In turn, a foundation has been provided for a suggested revision or override of the Australian Capital Territory legislation through use of the Commonwealth Constitution’s 122 Territories Power.

The predominance of a range of executive characteristics impacting on democratic content and processes means that the pressing question of the efficacy and desirability of the control order and preventative detention reforms has received inadequate analysis and commentary. The novel nature of those powers means that great trust has been placed in how discretion within the powers will be exercised and internal management over when and how they are used.414 There is an insufficiently comprehended risk that the powers improperly used will create such alienation, victimisation and disaffection to actually promote terrorist ideologies, sympathies and actions, particularly amongst Muslim youth. The low threshold for invocation of the powers, based on belief of suspected actions of a potential range of peripheral terrorism offences,415 located, for the purposes of extended 14 day detention, within a context of State based law and order debates, is a volatile environment conducive to realising such an outcome. Indeed, the probability of that outcome is enhanced by the absence of any provisions for regular, structured review of the operation and implications of the provisions by an independent body or reviewer or parliamentary committee. That reality again reflects the executive-centric nature of the provisions, likely to be compounded over time.

The effects upon democratic institutions and practices of the control orders and preventative detention legislation may be more broadly hypothesised by the

---


415 The conditional phrases indicating possession, preparation and planning relating to indefinite terrorist acts in the preventative detention s 105.4(4)(a)(ii)-(iii) of the Criminal Code 1995 (Cth) derive from actual offences of possessing things connected with terrorist acts (s 101.4 of the Criminal Code 1995 (Cth)), and acts done in preparation for, or planning of, a terrorist act (s 101.6 of the Criminal Code (Cth)).
idea that counter-terrorism legislation is a constant work in progress or an unfinished canvas. Such an approach reveals the intensely partisan and longitudinal nature of counter-terrorism law reform, where it is considered advantageous to match or outbid one’s political opponents in severity of legislative response. Analysis and review of the efficacy of such legislative responses seemingly becomes a secondary consideration.

Heightened fear and manipulation of terrorism is a superb animator of constant legislative revision and a persuasive rationale that the only limits upon the practical erosion of common law rights should be political, rather than legal or constitutional in nature. Accordingly, with no outer parameters or limits of reform acknowledged, and with charters of rights considered as hindering effective counter-terrorism responses, inevitably a broadening of the control orders and preventative detention provisions will be sought and implemented.

Additional reforms could take the form of further terrorism related offences or removal of the ideological basis of the definition of terrorism, creating a broadened base of the referent terrorism offence; incremental extensions in the length of preventative detention with each successive overseas or domestic terrorist incident, even if such an incident is interdicted and frustrated; the seeking of questioning powers to apply within preventative detention; and, overriding, through use of the s 122 Commonwealth Constitution, the Australian Capital Territory legislation which imposes more rigorous human rights protections, so as to conform as far as possible with international human rights standards under the Human Rights Act 2004 (ACT). The regularity of counter-terrorism law reform is completely predictable, but the formalities of serially exercising a legislative process to further concentrate executive power will produce unchartered results in re-constituting the nature of Australian democracy.

416 This is the import of the Commonwealth A-G’s opposition to a bill of rights: see Malcolm Farr, ‘States Rights Push Wrong – Ruddock Stems Campaign’, Daily Telegraph (Sydney), 7 April 2006, stating ‘Mr Ruddock said that the effect of a bill of rights on countries with common law systems like Australia could be seen with the European Convention on Human Rights where applications of the convention varied according to a country’s individual legal system. He said the European Convention had caused difficulties for Britain in the areas of immigration and anti-terrorism measures’.

417 See the Sheller Committee, above nn 407, 53-57.

418 This matter was raised by certain members of the A-G’s Backbench Committee during debate around the bill and is likely to be referred to a future COAG meeting. See Commonwealth, Parliamentary Debates, House of Representatives 3 November 2005, 103, noting that ‘[t]he number of members of the government have suggested that questioning of a person in preventative detention should be permitted — subject to normal safeguards’ (Hon P Ruddock).


420 See especially para 7 and 8 of the Preamble to the legislation: ‘The Legislative Assembly is committed to fully implementing United Nations resolutions relating to terrorism by adopting counter-terrorism measures that are consistent with international human rights obligations’; ‘[i]n particular, the Legislative Assembly is committed to taking measures to protect our community against terrorist activity that respect and promote the values reflected in, and the rights and freedoms guaranteed by, the International Covenant on Civil and Political Rights’.
That such a re-constitution is being mediated through counter-terrorism legislative reform is suggested in the tone of other comments. That re-constitution has been the identification and articulation of safety and security, under an appropriated, Australianised label of 'human security', as re-configuring an understanding of human rights and aligning perceptions of necessary and desirable counter-terrorism legislative change closely with the enhancement of executive power.

That re-constitution is also corroborated by a series of other legislative measures and increasing Commonwealth intervention in the daily lives of citizens, particularly in proposals to intervene in and assume areas of traditional State responsibility. These elements are indeed complemented by other High Court decisions, articulating strong elements of a more formalist democracy model through curtailing, marginalising or making conditional avenues for democratic public participation, whilst constraining redress of improperly applied executive power. A full appreciation of the significance of control orders and preventative detention longitudinally for Australian democracy will only be revealed over time. That appreciation will be assisted by a more thorough awareness of a larger executive agenda, partly propelled through the medium of counter-terrorism law reform.


423 See, for example, the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth); the Higher Education Support Amendment (Abolition of Compulsory Upfront Fees) Act 2005 (Cth); the Workplace Relations (Work Choices) Act 2005 (Cth); changes to media cross ownership laws to permit a media proprietor to own multiple media types in the one capital city in the Broadcasting Services Amendment (Media Ownership) Act 2006 (Cth); and the proposal for four year terms for the House of Representatives and eight year terms for the Senate (with no fixed terms, preserving Executive discretion about election timing and extending the period for which a Government winning control of the Senate can maintain that control). Other examples, particularly concerning taxing and funding measures to influence and control NGO participation in political advocacy and criticism, are cited in P Manning, 'Keeping Democracy in its Place' in M Kingston (ed), Not Happy John (2004), 265-87.

424 Especially in the areas of education and health. See also Greg Craven, 'Tearing Up the Constitution', The Age (Melbourne), 9 May 2006. The decision of the High Court in New South Wales v Commonwealth (2006) 231 ALR 1, regarding a wide ambit of the s 31(cxx) Corporations power against a range of areas for federal control; see the considerable range of activities identified by Kirby J in New South Wales v Commonwealth (2006) 231 ALR 1, 146.

The Senate

Legal and Constitutional Legislation Committee

Provisions of the Anti-Terrorism Bill
(No. 2) 2005

November 2005
RECOMMENDATIONS

Recommendation 1

2.19 The committee recommends that the Government continue to fund its terrorism related information campaign directed at the Australian community and, further, that the Government also develop and fund a specific information campaign – in conjunction with leaders of the Australian Muslim community – which is directed at informing that community of the rationale for and requirements of Australia's terrorism legislation.

Recommendation 2

3.152 The committee recommends that proposed section 105.12 be amended, or a new provision inserted into the Bill, to provide a detainee with an express statutory right to present information to the independent issuing authority for a continued preventative detention order, to be legally represented and to obtain the published reasons for the issuing authority's decision.

Recommendation 3

3.153 The committee recommends that:

(i) the Bill be amended to expressly require that young people between the ages of 16 and 18 years of age must not be detained with adults while in police custody;

(ii) proposed section 105.27 be amended to require the segregation of minors from adults in State and Territory facilities; and

(iii) proposed section 105.33 be amended to expressly require that minors must be treated in a manner that is consistent with their status as minors who are not arrested on a criminal charge.

Recommendation 4

3.154 The committee recommends that proposed section 105.28 be amended to place an obligation on police officers to ensure access to a detainee by a lawyer and an interpreter, as necessary, in cases where there are reasonable grounds to believe that the detainee is unable to understand fully the effect of the preventative detention order because of inadequate knowledge of the English language or a mental or physical disability.

Recommendation 5

3.155 The committee recommends that proposed sections 105.28 and 105.29 be amended to expressly require that detainees be advised that they can make representations to the nominated senior AFP member concerning revocation of the preventative detention order.

Recommendation 6

3.156 The committee recommends that proposed section 105.28 be amended to expressly require that the detainee be advised that he or she can contact the family members referred to in proposed section 105.35.
Recommendation 7

3.157 The committee recommends that proposed section 105.32 be amended to provide that the detainee shall be provided with a copy of the order and the reasons for the decision, including the materials on which the order is based, subject to any redactions or omissions made by the issuing authority on the basis that disclosure of the information concerned is 'likely to prejudice on national security' (as defined in the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)).

Recommendation 8

3.158 The committee recommends that proposed sections 105.15 and 105.16 be amended to elaborate the grounds for a prohibited contact order. The committee also recommends that these grounds be equivalent to those provided in the UK terrorism legislation, namely:

(i) interference with or harm to evidence of a terrorism related offence;
(ii) interference with or physical injury to any person;
(iii) alerting of persons suspected of a terrorism related offence who have not been arrested;
(iv) hindering recovery of property obtained as a result of a terrorism related offence;
(v) interference with gathering information about the commission, preparation or instigation of acts of terrorism; and
(vi) alerting a person and thereby making it more difficult to prevent an act of terrorism.

Recommendation 9

3.159 The committee recommends that the Bill be amended to:

(i) authorise oversight by the Commonwealth Ombudsman of the preventative detention regime, including conferral of a statutory right for the Ombudsman to enter any place used for detention under a preventative detention order; and

(ii) require the nominated senior AFP officer - in circumstances when a legal adviser is not available to the detainee - to notify the Ombudsman when a preventative detention order and a prohibited contact order is made and to provide the Ombudsman with a copy of any such order and reasons for those orders.

Recommendation 10

3.160 The committee recommends that the Bill be amended to require the Minister - in consultation with HREOC, the Ombudsman and the Inspector-General for Intelligence and Security - to develop a Protocol governing the minimum conditions of detention and standards of treatment applicable to any person who is the subject of a preventative detention order.
Recommendation 11
3.161 The committee recommends that proposed paragraph 105.41(3)(c) be amended to refer to the persons whom the detainee has a right to contact instead of persons with whom the detainee has had contact.

Recommendation 12
3.162 The committee recommends that proposed subsection 105.42(1) be amended to require that any questioning which takes place during the period of the preventative detention order be videotaped and generally occur in the presence of the detainee's lawyer.

Recommendation 13
3.163 The committee recommends that the Bill be amended to remove the restrictions on lawyer/client communications and to allow a legal representative to advise his/her client on any matter. The committee also recommends that proposed section 105.37 be amended to affirm the right of a detainee, subject to a prohibited contact order, to contact their lawyer of choice and to consult their lawyer at any time and in privately.

Recommendation 14
3.164 The committee recommends that proposed section 105.38 be amended to permit monitoring of detainees' consultation with their lawyers only where the nominated AFP officer has reasonable grounds to believe that the consultation will interfere with the purpose of the order.

Recommendation 15
3.165 The committee recommends that the Bill be amended to prohibit reliance on hearsay evidence in proceedings for the issue of a continued preventative detention order.

Recommendation 16
3.166 The committee recommends that proposed section 105.47 be amended to require the Attorney General to report on Commonwealth preventative detention orders on a six monthly basis and that, in addition to the matters currently set out in that provision, the information should include the number of orders voided or set aside by the AAT.

Recommendation 17
3.167 The committee recommends that the Bill be amended to include an express requirement for a public and independent five year review of the operation of Division 105 adopting the same mechanism and similar terms as that provided by section 4 of the Security Legislation Amendment (Terrorism) Act 2002 (Cth), which established the Sheller Committee.

Recommendation 18
3.168 The committee recommends that proposed section 105.53 be amended to include a sunset clause of five years applicable to Schedule 4.
Recommendation 19

4.56 The committee recommends that proposed sections 104.2, 104.4, 104.7-9 and 104.14 be amended to include a requirement that the AFP officer, the Attorney General and the issuing Court each be satisfied that the application and making of the control order and the terms in which it is sought and issued is the least restrictive means of achieving the purpose of the order.

Recommendation 20

4.57 The committee recommends that proposed section 104.5 be amended to require that the day of the hearing to confirm, vary or revoke the order must be set as soon as is reasonably practicable after the making of the order.

Recommendation 21

4.58 The committee recommends that proposed section 104.12 be amended to require police officers to arrange access to a detainee by a lawyer and an interpreter, as necessary, in cases where there are reasonable grounds to believe that the detainee is unable to understand fully the effect of control order because of an inadequate knowledge of the English language or a mental or physical disability.

Recommendation 22

4.59 The committee recommends that the Bill be amended to prohibit reliance on hearsay evidence in a proceeding for the grant of continued control order.

Recommendation 23

4.60 The committee recommends that proposed section 104.12 be amended to provide that the detainee shall be provided with a copy of the order and the reasons for the decision, including the materials on which the order is based, subject to any redactions or omissions made by the issuing authority on the basis that disclosure of the information concerned is 'likely to prejudice on national security' (as defined in the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth))

Recommendation 24

4.61 The committee recommends that proposed section 104.29 be amended to require the Attorney-General to report to the Parliament on control orders on a six monthly basis.

Recommendation 25

4.62 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent 5 year review of the operation of Division 104, adopting the same mechanism and similar terms to that provided by section 4 of the Security Legislation Amendment (Terrorism) Act 2002 (Cth), which established the Sheller Committee.

Recommendation 26

4.63 The committee recommends that proposed section 104.32 be amended to provide a sunset period of five years.
Recommendation 27

5.173 The committee recommends that Schedule 7 be removed from the Bill in its entirety.

Recommendation 28

5.174 The committee recommends that the Australian Law Reform Commission conduct a public inquiry into the appropriate legislative vehicle for addressing the issue of incitement to terrorism. This review should examine, among other matters, the need for seditious provisions such as those contained in Schedule 7, as well as the existing offences against the government and Constitution in Part II and Part IIA of the *Crimes Act 1914*.

Recommendation 29

5.176 If the above recommendation to remove Schedule 7 from the Bill is not accepted, the committee recommends that:

- proposed subsections 80.2(7) and 80.2(8) in Schedule 7 be amended to require a link to force or violence and to remove the phrase 'by any means whatever';
- all offences in proposed section 80.2 in Schedule 7 be amended to expressly require intentional urging; and
- proposed section 80.3 (the defence for acts done 'in good faith') in Schedule 7 be amended to remove the words 'in good faith' and extend the defence to include statements for journalistic, educational, artistic, scientific, religious or public interest purposes (along the lines of the defence in section 18D of the *Racial Discrimination Act 1975*).

Recommendation 30

5.233 The committee recommends that the amendments in Schedule 1 of the Bill, relating to advocacy of terrorism, be included in the proposed review by the Australian Law Reform Commission as recommended above in relation to Schedule 7.

Recommendation 31

5.236 The committee recommends that proposed paragraph (e) of the definition of 'advocates' in Item 9 of Schedule 1 be amended to require that the praise be made with the intention, or in circumstances where it is likely to have the effect, of creating a substantial risk of a terrorist act occurring.

Recommendation 32

5.239 The committee recommends that the proposed definition of 'advocates' in Item 9 of Schedule 1 be amended to include criteria to clarify the circumstances to be taken into account in determining whether an 'organisation' may be considered to 'advocate terrorism'. This criteria could include, for example, that the statements advocating terrorism are made by the acknowledged leader of the organisation; are made on official material distributed or speeches given by the leader or organisation; and the statements are made on multiple occasions.
Recommendation 33

6.66 The committee recommends that all police who exercise the new stop, question, detain, search and seizure powers under Schedule 5 of the Bill be required to undergo comprehensive training as to their obligations under Commonwealth and state and territory discrimination legislation.

Recommendation 34

6.67 The committee recommends that proposed section 3UD of Schedule 5 of the Bill be amended to include a requirement that, as far as possible, body searches are to be conducted in private.

Recommendation 35

6.68 The committee recommends that proposed section 3UD of Schedule 5 of the Bill be amended to include a requirement that body searches be carried out by police officers of the same sex as the person being searched.

Recommendation 36

6.69 The committee recommends that Schedule 5 of the Bill be amended to include a requirement that all police forces keep comprehensive records in relation to any exercise of the proposed stop, question, detain, search and seizure powers in Schedule 5.

Recommendation 37

6.70 The committee recommends that the Commonwealth Ombudsman be tasked with comprehensive oversight of the use of the proposed stop, question, detain, search and seizure powers under Schedule 5 of the Bill.

Recommendation 38

6.71 The committee recommends that the sunset clause applicable to Schedule 5 be amended to apply for a period of five years.

Recommendation 39

6.72 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent five year review of the operation of Schedule 5.

Recommendation 40

6.145 The committee recommends that proposed section 3ZQR of Schedule 6 of the Bill be amended to preserve absolutely legal professional privilege and other duties of confidence, including the duty of journalists not to reveal their sources, in respect of any documents or information sought under the notice to produce regime in Schedule 6.
Recommendation 41

6.146 The committee recommends that proposed section 3ZQO of Schedule 6 of the Bill be amended to better protect the capture of extraneous and possibly sensitive information from the scope of the notice to produce regime for serious (non-terrorism) offences. That is:

- proposed section 3ZQO be amended to include the capacity for a notice to require the production of either 'information' or of 'documents';
- proposed subsection 3ZQO(2) be amended to specifically require Federal Magistrates to consider also whether:
  - it is appropriate that the notice require the production of 'documents' rather than 'information'; and
  - in cases where documents are sought, whether the source and documents nominated are the most appropriate ones for obtaining the information of relevance to the investigation.

Recommendation 42

6.147 The committee recommends that a set of best practice procedures and guidelines be developed in consultation with the Office of the Privacy Commissioner to govern the collection, use, handling, retention and disposal of personal information acquired under the powers in Schedules 5, 6 and 8 of the Bill.

Recommendation 43

6.148 The committee recommends that the Bill be amended to include a sunset clause of five years applicable to Schedule 6.

Recommendation 44

6.149 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent five year review of the operation of Schedule 6.

Recommendation 45

6.187 The committee recommends that Items 12 and 16-20 of Schedule 10 of the Bill be amended to limit the provisions extending the time periods for validity of search warrants to ASIO investigations specifically relating to suspected terrorist activities and terrorism offences only.

Recommendation 46

6.188 The committee recommends that Items 23 and 24 of Schedule 10 of the Bill be amended to clarify that the power allowing for the removal and retention of material found during the execution of an ASIO search warrant, for 'such time as is reasonable' unless its return would be 'prejudicial to security', does not encompass a power to confiscate the material absolutely.
Recommendation 47

6.189 The committee recommends that ASIO, in consultation with the Inspector-General of Intelligence and Security, develop a set of best practice procedures and guidelines to govern the collection, use, handling, retention and disposal of personal information acquired under its expanded powers in Schedule 10 of the Bill.

Recommendation 48

6.190 The committee recommends that the Bill be amended to include a sunset clause of five years applicable to Schedule 10.

Recommendation 49

6.191 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent five year review of the operation of Schedule 10.

Recommendation 50

7.45 The committee recommends that clause 2 of the Bill be amended to provide that Schedule 9 of the Bill shall commence on 'a date to be proclaimed'.

Recommendation 51

7.73 The committee recommends that the Bill be amended to provide that Schedule 3 of the Bill shall be subject to a public and independent five year review.

Recommendation 52

7.74 Subject to the above recommendations, the committee recommends that the Senate pass the Bill.