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Australian Government
Australian Research Council

CEPS Submission

COAG Review of Counter-Terrorism Legislation

(September 2012)

Prepared by the Australian Research Council Centre of Excellence in Policing and Security (CEPS) in response to an invitation received from The Hon. Anthony Whealy QC, Chair, COAG Review of Counter-Terrorism Legislation.

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Summary of recommendations

Recommendation 1

It is vital that programs of independent research and evaluation, particularly with an empirical focus, continue to be supported through national research priorities and key funding agencies.

Recommendation 2

The issue of measuring the effectiveness of CT Legislation is complex, and has received inadequate attention from Australian academics, policy-makers and government agencies. The COAG Review should explore, drawing expertise from the Australian Institute of Criminology and university research sector, the development of an appropriate model for assessing the effectiveness of CT interventions, including legislation.

Recommendation 3

As there is limited empirical research on intelligence and CT, the COAG Review should develop initiatives with Australian research partners to build an evidence base for legislative reform and counter-terrorism policy.

Recommendation 4

The safeguards against abuse for control orders rest solely on judicial discretion. While judicial oversight has been effective to date in the two cases heard in Australia, consideration should be given to strengthening the formal oversight mechanisms relating to control orders, particularly taking into account the UK experience.

Recommendation 5

COAG should investigate the restoration and resourcing of the normal law reform process for CT Legislation as a matter of priority.

About CEPS

The Australian Research Council (ARC) Centre of Excellence in Policing and Security (CEPS) was established in 2007 to boost policing and security research capacity in Australia in the post 9/11 environment. As the ARC website points out, Centres of Excellence are distinguished as being:

“prestigious foci of expertise through which high-quality researchers maintain and develop Australia's international standing in research areas of national priority.”

CEPS is one of a handful of Centres of Excellence funded outside scientific fields of research in Australia. It was funded through a Special Research Initiative to address the National Research Priority (NRP) area relating to ‘Safeguarding Australia’. The NRP and Associated Goals are accessible online here:

http://www.arc.gov.au/pdf/nrps_and_goals.pdf

CEPS is a multi-university partnership between Griffith University (the administering organisation), the Australian National University, University of Queensland and Charles Sturt University. The research program is led by 12 Professorial Chief Investigators, supported by teams of post-doctoral Research Fellows, Associate Investigators and PhD students.

It is supported by a diverse range of industry partners, including *inter alia* the Australian Federal Police, Queensland Police Service and Victoria Police. A distinctive feature is the embedding of senior policy officers and practitioners in the programs, including a continuous full-time secondment of an Inspector from Queensland Police Service since 2007.

Details of the CEPS research programs, staff profiles, Annual Reports and publications etc, are accessible online here: www.ceps.edu.au.

Acknowledgments

CEPS would like to acknowledge its principal funding source: The Australian Research Council. It would also like to thank those CEPS colleagues who responded to the call for input, but especially Dr Sue Donkin, Dr Russell Brewer, Associate Professor Grant Wardlaw, and Ms Lisa Gilmore for their roles in preparing this submission. CEPS would also like to acknowledge the preliminary advice on how to structure the submission offered by Professor Mark Finnane, Dr Saskia Hufnagel and Ms Kate O'Donnell.

All opinions in this submission are expressed in a personal rather than institutional capacity, and should not be attributed to CEPS industry partners.

Professor Simon Bronitt
Director, CEPS

Research Profile in the field of Counter-Terrorism (CT) Legislation

The Director, Professor Simon Bronitt, has a special and long-standing interest in CT law and policy, and has published widely on this topic. He was the Lead Chief Investigators with colleagues at the Australian National University undertaking an ARC funded study of CT Law, culminating in an edited collection published in 2008.

Since assuming the Directorship of CEPS in 2009, Professor Bronitt leads a team of Research Fellows and PhDs working on specifically on (i) Legal Frameworks and (ii) Vulnerable Infrastructure.

Since its inception in 2007, CEPS has funded several PhD students to work on CT laws and policing and security related topics. Recent CEPS graduates, Drs Donkin, Brewer and Hufnagel, are now working as CEPS Research Fellows and Associate Investigators. The outputs of this research, much of which is new and in press, is distinguished by its interdisciplinary, comparative and international focus.

Professor Bronitt, along with other CEPS colleagues, is available to participate in the scheduled public hearings.

The expertise profiled in this submission relates to the following:

- (i) the scope, and potential overbreadth, of key terrorism offence-definitions, and selected CT powers; and
- (ii) the methodological and policy challenges of assessing the (actual or likely) effectiveness of CT interventions, which include the impact of CT legislation.

In relation to (i), there is an extensive body of published work available to the COAG Review published by CEPS researchers, and others.

In relation to (ii), the issue of effectiveness has been the focus of more recent work by Dr Donkin and Professor Bronitt, which is profiled below.

The Review should note that CEPS researchers have raised some concerns about the breadth (and unintended impact) of the ‘terrorist act’ definition in relation to specific questions raised by the Independent National Security Monitor in his Annual Report. The CEPS Submission on National Security Legislation addresses inter alia, the issues of proportionality and necessity. CEPS Submission to the INSLM is accessible online here: http://www.ceps.edu.au/CMS/Uploads/file/INSLM_Submission_13Sept.pdf

A selected bibliography is included in the CEPS Submission on National Security Legislation.

CEPS welcomes the opportunity to contribute to a review process that is directed to whether CT laws are effective, and exercised in a way which is evidence-based, intelligence-led and proportionate.

The Importance of Evidence-Based Law Reform

Almost a decade ago, Professor Bronitt called for restraint in relation to the political drive to enact new terrorism laws in the wake of the 9/11 attacks. In an article in the *Public Law Review*, in relation to the 2002/3 reforms, he made a plea that terrorism law reform should be:

*... evidence-based, seeking to minimise counterproductive effects and maximise human rights protections.*¹

The Call for ‘Less Balance, More Evidence’

It is vital that the debate about law reform be reframed. It must move away from the ‘zero-sum’ balancing game (of liberty *versus* security) to one that takes seriously the question of effectiveness, as well as promoting evidence-based public policy and practice and maximizing the protection of human rights.

From the outset the balancing approach to law reform has been the dominant legal policy paradigm. It pervaded parliamentary debates in 2002/3, and subsequently was adopted by the Security Legislation Review Committee [the ‘Sheller Committee’] in its review of the 2002/3 CT laws, The Sheller Committee endorsed the balancing model in the following terms: ‘[s]triking this balance [between liberty and security] is an essential challenge to preserving the cherished traditions of Australian society’.²

It is unnecessary to rehearse the many scholarly critiques of balancing models suffice it to say that the majority consensus among legal scholars is that a balancing model is an unhelpful guide for reform, leading to the trumping and sidelining of both empirical and human rights considerations.³

To call for an ‘evidence-based’ approach to CT law and practice is challenging for several reasons. First, the ‘security blanket’ drawn around the operational issues, noting that most CT laws are infrequently used, hinders or prevents evaluation of their impact and effectiveness. That said, research cooperation with policing and security agencies is not impossible. It is vital that programs of independent research and evaluation continue to be supported through national research priorities and key funding agencies.

Another strategy to assist building the evidence-base around CT interventions is applying relevant research from other related fields (such as investigative psychology and crime prevention) or from comparable jurisdictions. This type of “policy learning” and “policy transfer” has considerable potential. For example, the CEPS submission to the INSLM

¹ S Bronitt, "Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?" (2003) 14 *Public Law Review* 76 at 80.

² Report of the Security Legislation Review Committee (Canberra: Commonwealth of Australia, 2006), p 40

³ For a review of the critical literature on balancing see Bronitt S “Balancing Liberty and Security: Critical Perspectives on Terrorism Law Reform” in Gani M and Mathew P (eds), *Fresh Perspectives on the “War on Terror”* (Canberra: ANU E Press, 2008), Ch 5. Cf Golder B and Williams G, “Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism” (2006) 8(1) *Journal of Comparative Policy Analysis* 43.

drew upon psychological and criminological research to examine whether there was an “optimum” prescribed length of detention under terrorism questioning warrants.

Recommendation 1

It is vital that programs of independent research and evaluation, particularly with an empirical focus, continue to be supported through national research priorities and key funding agencies.

Assessing the Effectiveness of CT Legislation

A major challenge for the COAG Review is that evidence relating to effectiveness of CT legislation is thin both nationally and internationally. It is clear that more research is needed, particularly of a qualitative nature, to examine the effectiveness of key offence provisions and legislative powers. This point was one of the conclusions of the Campbell Systematic Review of CT interventions, discussed below.

This issue has been addressed in a recent contribution to the scholarly literature by Dr Susan Donkin and Professor Simon Bronitt.⁴ Drawing on their knowledge of terrorism law and its practice in Australia and Europe, they seek to move beyond the traditional critique of CT laws, which tends to focus on constitutionality and human rights issues. The authors instead invite legal scholars and policy makers to draw upon the rich, evidence-based research existing in other fields, such as criminology, in particular, crime prevention, to inform the future development of terrorism law.

Donkin and Bronitt acknowledge that determining the effectiveness of CT interventions is not a simple endeavour, not least due to the low frequency of incidents, underlying national security concerns, and differing interpretations of the concept of ‘effectiveness’. However, the importance of relying upon evidence before making decision, a fundamental tenet of criminal justice, is often overlooked in favour of the overwhelming political imperative to be seen to be responsive to threats actual or perceived. This climate, fuelled by media reporting, means that terrorism law reform lags far behind other fields in terms of evidence-based methods and practice, particularly medicine.

Taking lessons from medical and scientific research, criminal justice researchers, however, have sought to redress this lacuna. Since the establishment of the Campbell Collaboration (C2) in 2000, the Crime and Justice Group has published 34 systematic reviews on various topics, including one on the effectiveness of CT measures in 2006. However, according to Cynthia Lum and her colleagues, that systematic review of the literature revealed only seven studies out of a total of over 20,000 met a ‘moderately rigorous’ evaluation criteria.⁵ This underscored clearly the weak, virtually non-existent, evidence-base for CT policy making.

⁴ The research will be published as a chapter in an international edited collection: see Donkin S and Bronitt S ‘Critical Perspectives on the Evaluation of Counter-Terrorism Strategies: Counting the Costs in the ‘War on Terror’ in Australia’ in Masferrer A and Walker C (eds), *Counter-Terrorism, Human Rights and the Rule of Law: Crossing Legal Boundaries in Defence of the State* (Cheltenham: Edward Elgar Publishing Ltd) in press.

⁵ Lum C, Kennedy LW and Sherley AJ, *The Effectiveness of Counter-Terrorism Strategies* (Campbell Systematic Reviews 2006) see www.campbellcollaboration.org

At the organisational level, the commitment to the evaluation of impact and effectiveness in policing agencies responsible for CT law enforcement is under-developed. This has been recently revealed in the Australian National Audit Office Report on the implementation of new policy initiatives within the Australian Federal Police (AFP).⁶ The ANAO report noted that AFP's significant investment in new policy initiatives (including in CT programs) was due to the AFP's expanded role in CT, as well regional peacekeeping and international law enforcement generally. However, the report also noted that the AFP investment was not matched by a similar investment in processes of project management, review and independent evaluation of these new initiatives. As the study by Donkin and Bronitt concluded, policy hyperactivity is problematic where an organization annually is developing more new than recurrent programs.

Drawing inspiration from the crime prevention literature, the authors advocate transferring a reputable approach to effectiveness to CT law. It is vital in this respect to distinguish between a measure's implementation and its impact.⁷ Doing so helps more accurately identify the strengths and weaknesses, which contributed to the measure's success or failure, thus allowing policy makers and practitioners to adapt their method accordingly. The Australian Institute of Criminology (AIC) has developed a more holistic approach in relation to drug law enforcement effectiveness, drawing on both quantitative and qualitative indicators to measure not only the number of arrests and other traditional indicators, but impact on public health.⁸ Whilst this approach may be more time consuming than traditional measurements, this more comprehensive template could be applied to evaluate the impact and effectiveness of CT measures. It would be appropriate to explore, with the AIC, the feasibility of developing of a similar model for CT interventions.

Recommendation 2

The issue of measuring the effectiveness of CT Legislation is complex, and has received inadequate attention from Australian academics, policy-makers and government agencies. The COAG Review should explore, drawing expertise from the Australian Institute of Criminology and university research sector, the development of an appropriate model for assessing the effectiveness of CT interventions, including legislation.

Intelligence & CT Legislation

CEPS Senior Fellow, Associate Professor Grant Wardlaw, has been undertaking research into intelligence since joining CEPS in 2010. His expertise is informed by his previous senior intelligence role in federal law enforcement.

⁶ Australian National Audit Office (ANAO), *Management of the Implementation of New Policy Initiatives – Australian Federal Police* Audit Report No. 29, 2010-2011 (Auditor General, 2011)

⁷ Ekblom P and Pease K, 'Evaluating Crime Prevention' in Tonry M and Farrington DP (eds), *Crime and Justice - Building a Safer Society: Strategic Approaches to Crime*, vol 19 (The University of Chicago Press 1995)

⁸ Willis K, Anderson J and Homel P, *Measuring the effectiveness of drug law enforcement (Trends and Issues in Crime and Criminal Justice* 2011)

Grant has held senior executive positions in crime intelligence, research and policy organisations, including being National Manager, Intelligence in the Australian Federal Police (AFP), National Director Criminal Intelligence, Australian Crime Commission (ACC), Executive Director of the Australian Bureau of Criminal Intelligence (ABCI), Director of the Commonwealth Government's Office of Strategic Crime Assessments (OSCA) and Acting Director of the Australian Institute of Criminology (AIC).

He is an Associate Investigator on the projects 'Illicit Organisations' and 'Investigative Practices', both headed by Professor Roderic Broadhurst.

Associate Professor Wardlaw offers the following assessment of intelligence research in relation to CT.

Intelligence is at the very heart of counter-terrorism. There would be no instances of either trying to prevent, preparing for or responding to terrorism that do not involve a significant element of intelligence collection and analysis. Intelligence collection on terrorist targets involves a wide range of national security, defence, police and other agencies and analysis is carried out by a number of agencies depending on the purpose, domain or client of the analysis. The question for COAG is the extent to which the system of counter-terrorism intelligence is working effectively and efficiently to direct investigative and other activities mandated by the relevant legislation. To answer this question requires a comprehensive evaluation of the manner in which agencies are collecting information pursuant to the legislation, the extent to which the assessed threat of terrorism to Australia and Australian interests justifies the intelligence collection and sharing powers granted to agencies and the effectiveness of the processes put in place to use the resulting intelligence product to inform decisions about preventive measures and prosecutions. As noted elsewhere in this submission, there is no empirical research on these issues currently available in Australia and we would strongly encourage the Review to consider ways in which such work could be supported to provide an evidence base for legislative reform and counter-terrorism policy.

Preliminary empirical research by CEPS Postdoctoral Fellow Russell Brewer suggests that existing CT policies and legislation are one factor hindering collaboration between state and federal authorities in the Victorian maritime security space.⁹ Concerns voiced by well-placed government officials lament 'disjointed', 'duplicated', and 'overlapping' legislation, suggesting that multiple definitions in federal and state statutes give rise to confusion over the provision of regulatory responsibility and oversight. Elsewhere, officials contend that the complex processes associated with the classification and dissemination of information/intelligence between authorities potentially obstruct communication between one organisation and the next.

The evidence suggests that existing frameworks contribute to a security environment where the myriad of federal and state agencies/departments involved in law enforcement and regulation, have a tendency to operate within their own legislative mandates. In doing so, they delineate their own specific responsibilities and obligations without full consideration to other organisations. As a result, these factors contribute to limited information exchange and collaboration.

⁹ Brewer, R (under review), 'Enhancing crime control partnerships across government: Examining the role of trust and social capital on American and Australian waterfronts', Submission to *Police Quarterly*. Copy can be provided to COAG upon request.

These findings speak to the need, as noted by Wardlaw above, for future empirical research testing these issues across the transport sector (and in other contexts). This work would serve as an important first step in developing an evidence base for legislative reform, and/or examine counter-terrorism policy.

Recommendation 3

As there is limited empirical research on intelligence and CT, the COAG Review should develop initiatives with Australian research partners to build an evidence base for legislative reform and counter-terrorism policy.

In the time available, it is not possible to address every CT law identified by the COAG Review. Commentary on preventative detention and related police powers have been addressed in the CEPS Submission on National Security Legislation (September 2012) submitted to the INSLM. We refer to our previous recommendations therein.

In the next section, we examine the control order regime, drawing upon the expertise of Dr Donkin, who undertook as part of her doctoral research, a comparative study of control orders in Australia and the UK.¹⁰

The following is a *précis* of some of this research.

Control Orders: A Necessary and Proportionate Response?

Since the Australian federal control order scheme was introduced under the *Anti-Terrorism Act (No. 2)* in 2005, only two orders have been issued, the last one of these being in 2007. Both ‘controlees’, Jack Thomas and David Hicks, had allegedly participated in training with proscribed organisations prior to 9/11. However, these groups were proscribed only after the alleged training had taken place, leaving the government with no legal recourse to prosecute retrospectively. Containing both a pre-emptive and reactive condition for issuance, both control orders were justified on the basis that Thomas and Hicks had trained with proscribed organisations. The reactive element makes up one of the two conditions for issuing a control order, and in both cases, this condition has been relied upon to justify the first, and thus as grounds to issue the control order. While it is true to state that the control order aims to prevent future behaviour in a bid to protect the public, its issuance was based on past conduct.

The subsequent introduction of legislation criminalising association with listed organisations in Subdivision B of Division 102 of the *Criminal Code 1995 (Cth)* appears to make any future issuance of a control order on this basis unnecessary and disproportionate, since conduct falling within the scope of the orders can now be prosecuted independently. Equally, the practice of imposing a control order immediately upon the return of a not guilty verdict in terrorism cases is controversial, signalling inappropriately a lack of the confidence in the judiciary. In light of the multitude of preparatory offences introduced into the Criminal Code, Donkin’s research suggests that control orders are no longer necessary in practice. Whether or not the legislative

¹⁰ Donkin S, ‘The Evolution of Pre-emption in Anti-Terrorism Law: A Cross-Jurisdictional Examination’ (PhD Thesis, Griffith University 2011).

provision is kept on the books beyond its sunset provision in 2015 depends on the symbolic value this provision represents in the government's eyes.

In terms of proportionality, the David Hicks case illustrates several important issues. Hicks returned from Guantanamo Bay in May 2007, where he served the remainder of his sentence imposed by the US Military Commission in Yatala Prison, Adelaide. Having served the full sentence, he was released from prison and was issued with a control order. The issuing of a control order upon his release therefore can not be considered as a condition for early release or parole of any kind. Indeed, Federal Magistrate Donald said as much when declaring it a prospective protection of the public. Used in these circumstances, the use of a control order would appear disproportionate.

Hicks' personal account provides valuable, albeit subjective insight into how the control order affected his life.¹¹ His ability to communicate was restricted by the control order, limiting his access to one device approved by the AFP. However, the AFP were unable to provide him with or approve access to a computer, essentially turning a restriction into a deprivation. It would appear that the control order lived up to its name, exerting complete control over his actions and his life. Despite the relatively short curfew requirement, in combination with the other obligations, Hicks felt he was still in custody. In this sense, control orders, although purportedly non-punitive, appear to evoke a sense of punishment and detention in those subject to them. It is important to highlight that these orders are, from a formal legal perspective, civil orders and not criminal sanctions. The Australian control order regime is not equipped with the same legal safeguards as the United Kingdom; lacking both a federal human rights Act, which may be used to challenge the regime, as well as having fewer avenues for independent oversight.¹² In both Australian cases, that oversight is entirely entrusted to the courts, namely, to the judicial discretion of federal magistrates to temper the scope of the orders, supported by the ultimate right to appeal to the High Court. Clearly, there is a need for a system that incorporates both Executive and Parliamentary oversight.

Recommendation 4

The safeguards against abuse for control orders rest solely on judicial discretion. While judicial oversight has been effective to date in the two cases heard in Australia, consideration should be given to strengthening the formal oversight mechanisms relating to control orders, particularly taking into account the UK experience.

Normalising CT Law Reform

It should be apparent that the publicly funded research sector has a significant role to play in CT law reform at both the national and state level in Australia. It is a role that should be coordinated with government agencies which conventionally have the responsibility for law reform, namely, the Australian Law Reform Commission (ALRC) and, in relation to the reform of criminal law and procedure, the Model Criminal Law Officers' Committee (MCLOC). Regrettably the past decade has witnessed the sidelining of these two institutions in relation to CT law reform.

¹¹ Hicks D, *Guantanamo: My Journey* (Ranom House Publishing 2010)

¹² Jagers B, *Anti-terrorism Control Orders in Australia and the United Kingdom: A Comparison* (Canberra: Parliamentary Library, Department of Parliamentary Services 2008).

Since the 1990s, MCLOC has functioned on a slim ‘shoestring’ budget relative to the critical role that criminal law and the promotion of uniformity *should* play in the Australian federation. With the breadth of legal expertise and policy experience available to MCLOC, it ought to be fully integrated into any future CT law reform process involving criminal law and procedure matters. MCLOC is distinguished by its productive relationship with leading criminal law scholars, judges and practitioners.

A similar concern can be raised in relation to the diminishing role of the ALRC in CT law reform. With the notable exception of the retrospective review of the Law of Sedition, the ALRC has been not used to assist the development of CT law reform. Even in relation to sedition, the then Attorney General took the extraordinary step of requesting the ALRC to undertake a review of their new sedition laws *after* enactment.¹³ Its recommendations were however ignored by the then Government. The serious budget cuts imposed on the ALRC in the following years have significantly diminished its capacity to play any role in future CT law reform. This loss of capability has been identified in a recent Senate Inquiry into the ALRC.¹⁴

The importance of ‘normalizing’ law reform should not be under-estimated to improving the effectiveness and legitimacy of CT Legislation and its operation.¹⁵

Recommendation 5

COAG should investigate the restoration and resourcing of the normal law reform process for CT Legislation as a matter of priority.

¹³ The ALRC followed, albeit in a short time frame, the normal process of consultation: see ALRC IP 30, *Review of Sedition Laws*, Issues Paper (2006); ALRC DP 71 *Review of Sedition Laws*, Discussion Paper (2006); ALRC 104, *Fighting Words: A Review of Sedition Laws in Australia*, (2006).

¹⁴ The Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Law Reform Commission* (April 2011). The Report and Submissions may be downloaded at the following URL: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees.htm.

¹⁵ Further reflections on the damage to the legitimacy of CT legislation by doing law reform ‘on the cheap’ has been addressed in Bronitt S, “Balancing Liberty and Security: Critical Perspectives on Terrorism Law Reform” in Gani M and Mathew P (eds), *Fresh Perspectives on the “War on Terror”* (Canberra: ANU E Press, 2008).