Malaysian Bar's Memorandum on the Security Offences (Special Measures) Bill 2012, Amendments to the Penal Code, Amendments to the Evidence Act 1950, and Amendments to the Criminal Procedure Code.

PART A: INTRODUCTION

1. We remind ourselves of the statements made on 15 September 2011 by the Honourable Prime Minister on preventive detention laws;

"23. I promised in the maiden speech I made when I took over as the country's Prime Minister on April 3, 2009, that the Internal Security Act (ISA) 1960 will be reviewed comprehensively. As such, I would like to announce on this historic night that the Internal Security Act (ISA) 1960 will be abolished.

24. As a means of preventing subversive activities, organised terrorism and crime to maintain peace and public order, two new pieces of legislation will be formulated under Article 149 of the Federal Constitution. Basically, these laws will be aimed at maintaining peace and wellbeing.

25. Above all, the government will ensure that the rights of those involved will be safeguarded. Legislation formulated will take into consideration fundamental rights and freedom based on the Federal Constitution. The new laws will provide for a substantially shorter duration of police custody and further detention can only be made with a court order, except laws pertaining to terrorism which will remain under the jurisdiction of the minister.

26. On the other hand, the government also gives its commitment that no individual will be arrested merely on the point of political ideology. In general, the power to extend the detention period will shift from the executive to judiciary, except for the laws pertaining to terrorism."

2. Whilst the Malaysian Bar acknowledges the Government's desire to abolish and introduce the replacement legislation on an urgent basis and the hard work of the

Attorney General's Chambers in the drafting of this replacement legislation and related amendments to other laws, we regret that the consultation process was not wide enough (involving more stakeholders such as Suhakam) and insufficient time was given for such consultation.

3. The Honourable Attorney General invited the Bar to provide its comments within 48 hours prior to this legislation being tabled in Parliament. We note that some of our comments were accepted and incorporated, whilst others were not.

4. The Bar in its Memorandum dated 19 July 2010 took the position that there is adequate legislation to deal with the offences prescribed in the Internal Security Act 1960 and where necessary, existing provisions dealing specifically with anti-terrorism could be strengthened alongside improved safeguards and oversight mechanisms.

5. In the Bar's review of the legislation, we are guided by the overarching principle of rule of law and commitment to the values of our Federal Constitution. The Bar is supportive of measures to counter terrorism. But we also have to ensure we preserve our way of life, and particularly the basic freedoms and access to justice that are enshrined in our Federal Constitution.

6. One of the goals of terrorism is to create fear, if not by military might, then by stimulating our fears. We have to be careful as a society that new counter terrorism laws do not frighten citizens into surrendering their civil liberties and therefore ushering in a police state. It also means that the case for departing from accepted civil rights and key elements of our democracy must be fully justified and proportionate to the harm. This is to ensure that public trust and confidence in the state will not be eroded as well.

7. Thus, strong counterterrorism laws are justified where it can be shown that they will help to meet the threat and that they have been drafted in such a way as to have as little impact as possible on fundamental freedoms. Judicial power must not be taken away.[1] There is adequate existing legislation which protects parliamentary democracy. In connection with this, there is no need for reference to Article 149(1) of the Federal Constitution.

8. The Bar believes that this Memorandum can assist the government to strike that balance between our liberties and the threat of terrorism.

9. As a general observation, the legislation should also be drafted using British English spelling and not American English spelling.

HISTORY OF THE LAW

10. The Internal Security Act 1960 ("ISA") was introduced by the then-Deputy Prime Minister, Tun Abdul Razak, on 1st August 1960 for the sole purpose of fighting the communist insurgency in Malaya.

11. Tun Abdul Razak made *"a solemn promise to Parliament and the nation that the ISA would never be used to stifle legitimate opposition and silence lawful dissent.*"

12. ISA is a preventive detention law which empowered the police to detain any person for up to 60 days without trial for any act which allegedly prejudices the security of the nation. After the 60 days, the Minister for Home Affairs can

[1] The Court of Appeal in England in *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279, [2007] 2 WLR 1219 posed two questions on the role of the court and said that *"the task of striking a balance between the demands of the general interests of the community and the requirements of protecting individuals' fundamental rights is shared by the courts and the elected* government."

extend the detention period for up to a period of two years, renewable indefinitely, thus permitting indefinite detention without trial.

13. In order to appreciate how draconian this law is, we must compare it to ordinary criminal law where an arrested person has to be brought before a Magistrate within 24 hours of arrest.

14. When produced before the Magistrate, the Magistrate may allow the person to be detained by the arresting authority pending further investigation pursuant to the Magistrate's powers under **section 117** of the **CPC**[2].

15. **Section 117** of the **CPC** provides that:

(1) If an investigation cannot be completed within 24 hours, the IO must produce the arrested person and a copy of entries in the investigation diary to the Magistrate;

(2) The Magistrate may authorise detention of the arrested person as follows:

(a) If the offence is punishable with imprisonment of less than 14 years, the detention shall not be more than four days on the 1st application and not more than three days on the 2nd application; ***OR***

(b) If the offence is punishable with imprisonment of 14 years and more, the detention shall not be more than seven days on the 1st application and not more than seven days on the 2nd application.

16. In short, there can only be a maximum detention period of 14 days.

[2] There are also other remand provisions in specific Acts, eg section 4(1)(b) of the Drug Dependants and Rehabilitation Act 1983, which allows the remand period to be 14 days. Section 51(5)(b) of the Immigration Act 1959/1963 allows a non-citizen to be detained for 14 days before being produced before a magistrate for further detention. The remand provision which would be applicable would depend on the offence a person is said to have committed.

17. The Malayan Communist Party laid down its arms and gave up its struggle officially after the signing of the Bangkok Accord on 24 December 1989.[3]

18. However, the ISA survived for another 23 years.

19. ISA is not the only preventive detention law, as we also have:
    (a) Emergency (Public Order and Prevention of Crime) Ordinance 1969 (which will no longer be law come 20 June 2012 because of the revocation of the 3 emergency proclamations by the Dewan Rakyat on 24 November 2011 and by the Dewan Negara on 20 December 2011, which would result in all laws formulated under those emergency proclamations ceasing to have any effect within 6 months of 20 December 2011 pursuant to Article 150 of the Federal Constitution);
    (b) Restricted Residence Act 1933 which has been repealed; and
    (c) Dangerous Drugs (Special Preventive Measures) Act 1985, which still remains the law today, and which allows for detention without trial for up to two years at a time, renewable indefinitely.

20. Since August 1960, at least 10,662 people have been detained under various preventive detention laws, with at least 4,139 under ISA and, subject to official correction, none was prosecuted under the legislation. The gross abuses of the ISA are well documented and are not contradicted.

LAW-MAKING PROCESS AND EFFECTIVE CONSULTATION

21. The consultation process started in 2009 after the Honourable Prime Minister announced a comprehensive review of the ISA when he took office in April 2009. Officials from the Ministry of Home Affairs engaged various stakeholders,

[3] Dato' Seri Rais Yatim, Freedom under Executive Power in Malaysia (1995 Edition), p.293.

including the Bar Council, in a series of consultative meetings held in October 2009. After that, nothing further was heard.

22. On 15 September 2011 the Prime Minister announced that the ISA would be abolished and as a means of preventing subversive activities, organised terrorism and crime, and to maintain peace and public order, two new pieces of legislation would be formulated under Article 149 of the Federal Constitution.

23. Further, he stated that the legislation formulated will take into consideration fundamental rights and freedom based on the Federal Constitution and a substantially shorter duration of police custody. He also gave a commitment that no individual will be arrested merely on the basis of political ideology.

24. The Bar Council, within a short period of time, provided preliminary comments on the four Bills drafted by the Attorney General's Chambers:-

(a) (Special Offences (Special Measures) Bill 2012;

(b) Penal Code (Amendment) Bill 2012;

(c) Evidence (Amendment) (No 2) Bill 2012; and

(d) Criminal Procedure Code (Amendment) (No 2) Bill 2012.

25. Ideally, the law-making process should follow the previous substantial amendments to the Penal Code and the CPC where a Parliamentary Select Committee was established to review our criminal laws. This was advocated by the Bar in its Memorandum of 19 July 2010 to the Minister for Home Affairs.

26. Furthermore, the Bar Council recommends that exigencies of terrorist threats be dealt with by applying and adapting existing processes in Malaysia's criminal law to terrorist cases, rather than fundamentally changing the principles of personal liberty in order to accommodate these threats. This approach would be consistent with other international organisations' statements, which recommend the strengthening of a "*rule of law-based criminal justice system"* in the fight against

terrorism, together with promoting the rule of law and respect for human rights.[4] The International Commission of Jurists in their 2009 report recommended adjusting the "*ordinary rules of criminal procedure and evidence to the complexities of terrorist investigation and prosecution"* while still building in a number of safeguards.[5] In light of this, we state a number of our recommendations with reference to existing criminal procedures in Malaysia, such as the CPC, and call for some of these provisions of the Bills to be in line with, or subject to, these existing laws.

27. The Bar Council provides the following comments on the four Bills with the aim of ensuring that the Bills will be an effective tool in counterterrorism efforts, while still subject to the need for justification and proportion in responding to national security threats.

PART B: SECURITY OFFENCES (SPECIAL MEASURES) BILL 2012

OVERALL OBSERVATIONS

28. This is an unnecessary piece of legislation inasmuch as the "*security offences"* under the Bill are already found in Parts VI and VIA of the Penal Code.

[4] As agreed to by member states of the the UN in the United Nations Global Counter-Terrorism Strategy, GA Res 60/288, UN GAOR, 60th sess, UN Doc A/RES/60/288 (2006), and reaffirmed in UN GAOR, 62nd sess, UN Doc A/Res/62/272 (2008). This is from Macken, C, "The counter-terrorism purposes of an Australian preventive detention order" in *Counter-Terrorism and Beyond*, eds McGarrity, Lynch and Williams (2010) Routledge, USA, p 41.

[5] Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, International Commission of Jurists, *Assessing Damage, Urging Action* [2009] 155-6. Also, in 2004, the International Comission of Jurists recommended that in combating terrorism, "*states should apply and where necessary adapt existing criminal laws rather than create new, broadly defined offences or resort to extreme administrative measures, especially those involving a deprivation of liberty*." Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, International Commission of Jurists, *The Berlin Declaration: The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (2004) Principle 3.

29. Further, the broad definition of "*security offences"* would appear to suggest that the reach of the Bill is beyond terrorism offences, contradicting the government's stated rationale for this new legislation.

30. The oppressive nature of many of the provisions of the Bill also violates the equality protection under Article 8 of the Federal Constitution.

PREAMBLE

31. The Preamble to the Bill reproduces the language used in Article 149(1) of the Federal Constitution in an attempt to come within its ambit. This then provides the justification to exclude fundamental liberty provisions in the Federal Constitution (such as Articles 5, 9, 10, and 13), which is permissible under Article 149(1). However, it is noteworthy that a breach of Article 8 is not permitted by a law enacted under Article 149 (1).

32. The resort to the four conditions contained in Article 149 (1) in the preamble is a matter of grave concern. This is because the amended Article 149 was the midwife that gave birth to the ISA. Reciting the four conditions contained in Article 149(1) is therefore an attempt to perpetuate the ISA through the back door.

33. It is also to be noted that Article 149(1) requires Parliament to identify the threat and adopt legislation that is appropriate to deal with that threat. This would be the proper interpretation of the following phrases in Article 149 (1): "*that action has been taken or threatened"* and "*any provision of that law designed to stop and prevent that action"*.[6] However, there is no information provided as to the action that has been taken or threatened as alluded to in the preamble, if any. The recent

[6] This point was argued in the Federal Court case of *Mohamad Ezam bin Mohd. Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449.

revocation of the three emergency proclamations also serves to confirm that the threat no longer exists. Thus, the conditions precedent to a valid invocation and exercise of the power under Article 149(1) have not been met and there is therefore no justification for the Bill to be enacted under Article 149(1). It is our view that the staccato regurgitation of the four conditions contained in Article 149(1), without any basis or justification in order to promulgate the Bill, renders the Bill *ultra vires* the Federal Constitution.

34. We propose that the Preamble should merely refer to the threat of terrorism, sabotage and espionage, as referred to in the Explanatory Statement. We further propose that all references to the conditions in Article 149(1) be removed and all provisions relating to fundamental liberties, where made inapplicable in the Bill, be fully restored.

SECTION 3 - INTERPRETATION

35. Section 3 of the Bill defines *'security offences'* as offences specified in the First Schedule, which refers to offences under Parts VI and VIA of the Penal Code.

36. This interpretation is far too wide. The government has represented the Bill as one to combat the specific threat of terrorism. The definition of *'security offences'* under Section 3 and the First Schedule goes beyond that, thus lending itself to abuse.

37. As this is a specific legislation to deal with terrorism, it would be more appropriate and focused to adopt the definition of an act of terrorism as found in the UN Convention for the Suppression of the Financing of Terrorism:
"Any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a

population, or to compel a government or an international organization to do or abstain from doing an act."

38. The Bar urges the government to amend the definition of "*security offences"*" in line with the definition quoted above.

39. Furthermore, Section 3 states that "*Court*" for the purposes of this Act means the Sessions Court. This should be changed to the High Court particularly in relation to Section 7 (procedures relating to electronic monitoring device) and Section 8 (sensitive information to be used as evidence by the Public Prosecutor). It is to be noted that without amending Section 3, there will be a contradiction in Section 12 which states that "*all security offences shall be tried by the High Court."*

40. It must also be noted that the High Court as appropriate forum was previously mentioned by the Attorney-General Tan Sri Abdul Gani Patail himself. It was reported on April 18, 2012 that he said, *"suspects detained after the [SOSMA] comes into effect will be charged and tried in a special court….the proceedings would be handled by high court judges. We should have experienced people and judges specially assigned for this."*[7]

41. The Bar therefore urges the government to assign the High Court as the designated court for all matters under the Bill.

42. It is to be noted that "*sensitive information"* has been widely defined in Section 3. It purports to cover every government document, information or material, including information falling within one or more of the categories outlined but which has already been declassified. Thus, whistleblowers who intend to disclose public wrong-doing of ministers or civil servants may be caught by the wide definition of "*sensitive information"*.

[7] Bernama, <http://web6.bernama.com/bernama/v3/news_lite.php?id=660162> last accessed May 15, 2012.

43. We propose that the definition of "*sensitive information"* should be limited to information relating to "*security offences",* as set out in the UN definition above of "*an act of terrorism"*.

SECTION 4 - POWER OF ARREST AND DETENTION

44. Now that Parliament has approved the abolition of the ISA, and is seeking to introduce a new regime, the Bar takes the view that the extension of the period of detention beyond the first 24 hours should as limited and sparingly granted, and should be subjected to judicial discretion, approval and oversight. The extension beyond the first 24 hours should not be decided by the police themselves.[8] The role of investigation and the decision to detain should not be made by the same authority, (i.e. the police). There must be a clear separation of powers as between the executive and the judiciary in a serious matter involving the deprivation of individual rights and liberties.

45. Section 4(4) of the Bill should be subjected to or brought in line with the remand procedure under Section 117 of the Criminal Procedure Code ("CPC"). After the expiry of the initial 24 hours, the police must obtain a remand order from Court for further detention under the Bill.

46. The police should also be compelled to maintain a diary of proceedings of investigation similar to Section 119 of the CPC. This diary will then be used to assist the Court to decide on the length of the detention.

[8] In Australia, for example, any extensions made after the initial 24 hour detention without charge order (preventative detention order) must be made by a judge, magistrate or senior member of the Administrative Appeals Tribunal (AAT) acting in a personal capacity. Even for the initial 24 hour order, only a senior member of the Australian Federal Police, superintendent or above, is authorised to make it. In the UK, the judicial authority who can issue a warrant of further detention (after initial period of forty-eight hours) must be satisfied that there are *"reasonable grounds for believing that the further detention is necessary…"* and "*investigation… is being conducted diligently and expeditiously."* (Schedule 8, Part 3)

47. Section 4(10) of the Bill should be removed completely as this Bill should not be regarded as legislation under Article 149(1) of the Federal Constitution.

48. A sunset clause is found in Section 4(11) of the Bill. It requires Parliament to review the 28-day detention period (as found in Section 4(5)) every 5 years. In this regard, it is noted that the Canadian Anti-Terrorism Act 2001 sets a 5-year sunset clause as regards preventive arrest and investigative hearing powers but a 3-year review period for the Act as a whole. The provision of a sunset clause in legislation of this nature is critical. It forces Parliament to review the application of the statute periodically. We welcome the inclusion of the sunset clause but we take the view that the 5-year period of review is too long. We propose that it should be reduced to 3 years, and that the review should cover the entire legislation.

49. In addition, we also propose that a body called the Independent National Security Legislation Committee be appointed to regularly review the application of Section 4(11) of the Bill in the intervening period before the ultimate review of the sunset clause.

50. The Bar welcomes Sections 4(3) and 4(12) of the Bill that carve out "*political belief or political activity"* from the scope of Section 4. However, instead of applying the carve-out just to Section 4, it should be applied throughout the Bill, so that no one can be held liable under this Bill "*solely for his political belief or political activity."*

51. Section 4(12)(a) of the Bill should be amended as the definition of "*political belief*" is limited to "*the expression of an opinion or the pursuit of a course of action made according to the tenets of a political party registered under the Societies Act 1966."* The Bar is fearful that organisations not registered as a political party under the Societies Act 1966 or not registered under the Societies

Act 1966 at all may be subjected to the wide powers of this section. Instead, the subsection should simply read:

"the expression of an opinion or the pursuit of a course of action made according to the tenets of one's personal political beliefs."

SECTION 5 - NOTIFICATION OF NEXT-OF-KIN AND CONSULTATION WITH LEGAL PRACTITIONER

52. The right to consult with a legal practitioner is a fundamental right guaranteed by Article 5(3) of the Federal Constitution.

53. Under Section 28A of the CPC, the police officer must allow the detained person to consult a lawyer of his choice and has a further positive obligation on the police officer to inform the person that "*he may communicate or attempt to communicate and consult*" a lawyer of his choice. There is no reason why this positive obligation should not be replicated in Section 5 of the Bill. A detained person might know that he has such a right and Section 5(1)(a) of the Bill should therefore be strengthened by a further provision akin to Section 28A(2)(b) of the CPC.

54. Section 5(2) of the Bill provides that the police may authorise a delay of the right to consult a lawyer up to 48 hours. The Bar takes the view that this should be reduced to 24 hours. This would be in line with the practice under the CPC. Also, we have taken the position above that the power to extend detention beyond the first 24 hours be subjected to judicial oversight akin to a remand hearing under Section 117 of the CPC. Allowing a delay of up to 48 hours would mean that the detained person would be unrepresented during the application to extend detention before a judicial officer. (as per our suggestion above).

55. Section 5(3) of the Bill should be removed completely as this Bill should not be made pursuant to Article 149(1) of the Federal Constitution.

SECTION 6 - POWER TO INTERCEPT COMMUNICATIONS

56. Interception of communications by the State is a grave violation of personal liberties, as protected under Article 5(1) of the Federal Constitution. A case may be made for the use of such powers in terrorism-related cases, yet even in such circumstances, these powers must be exercised sparingly and should be as limited as possible to prevent abuse.[9] The Bar therefore urges that the powers under Sections 6(1) and 6(2) of the Bill be made subject to judicial oversight. The authorities must obtain an order from the court to authorise the interception of communications. This is to further ensure that the authorisation should be made by a neutral and detached judge instead of being decided by the officer handling the matter.

57. As for Section 6(3) of the Bill relating to sudden cases requiring immediate action, the power should not be left to the police alone. The police must still obtain authorisation from the Public Prosecutor, either orally or in writing, and it should eventually be made subject to judicial oversight. Under no circumstances should the police be allowed to intercept communications unsupervised.

58. Section 6(6) of the Bill should be removed completely as, again, this Bill should not be made pursuant under Article 149(1) of the Federal Constitution. It is be noted that similar provisions have been proposed in the new Section 116C of the CPC (still pending before Parliament), but they have not excluded the application

[9] The possibility that expansive powers might be abused exist. "For example, in 2002, American judges found that the FBI and the US Justice Department had supplied "false information" in regard to "more than 75 applications for search warrants and wiretaps" for terrorist suspects. Information had also been improperly shared with prosecutors in charge of criminal cases." from Andrew Lynch and George Williams, "*What Price Security?" Taking Stock of Australia's Anti-Terror Laws",* 2006, UNSW Press

of Article 5 of the Federal Constitution, There is no reason why Section 6(6) should be singled out for special treatment.

PART III – SPECIAL PROCEDURES RELATING TO ELECTRONIC MONITORING DEVICES

59. The use of electronic monitoring devices ("EMD") raises a number of ethical, legal and practical issues. EMD is an invasive technology which will place a restriction upon a person's liberties as it is able to track the person's every movement once it is switched on. Research has shown that some of those who have worn it have indicated that it is "*psychologically wearing and more onerous in terms of self-discipline than the world of prison*."[10] Many complex questions as to the scope and practical application also arise if EMD is implemented, such as how long can authorities track the offender's movement outside of curfew hours, and how the information about the offender's movements should be used?[11] If EMD is going to be implemented, the Bar urges that this should be done through judicial determination.[12]

60. Thus, the application under Section 7(1) of the Bill by the Public Prosecutor should not be made *ex parte*. The right to counsel should be accorded. Such an application should be heard before a judge, where the suspect should be given the opportunity to object or resist such an application, either by himself or through legal representation.

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[10] Fox, R.G. 1987, "Dr Schwitzgebel's machine revisited: Electronic monitoring of offenders", Australian and New Zealand Journal of Criminology, vol. 20, no. 3, pp. 131–47.

[11] Australian Institute of Criminology, 2003 <http://www.aic.gov.au/documents/4/6/9/%7B469CBBD4-B204-4F5E-8C73-B9B47C707F05%7Dtandi254.pdf>

[12] In other jurisdictions, i.e. UK and Australia, probation/correction officers write suitability reports to submit to the Court in deciding whether the prisoner should wear EMD or not.

61. Indeed, it should be a basic requirement of the Bill that a person should have the right to retain and instruct counsel at any stage of the proceedings.

PART IV – SPECIAL PROCEDURES RELATING TO SENSITIVE INFORMATION

62. The phrase "*sensitive information"* in Section 8(1) of the Bill is very important. It has been widely defined and we have proposed in our comments to Section 3 of the Bill above a definition which would be appropriate to security offences as set out in the UN definition for "*an act of terrorism*".

63. Moreover, under Section 8(2) of the Bill it would appear that a court is to act as a mere rubber stamp to the dictates of the executive as the provision makes it mandatory for the court to allow the application by the Public Prosecutor. This is a breach of the doctrine of separation of powers as it is axiomatic that the court must always retain the discretion to decide on its own whether or not a piece of information is "*sensitive information"* for the purposes of the Bill. A similar argument may be taken as regards Section 11(4) of the Bill which again requires the court to act according to the dictates of the executive.[13] Thus, Sections 8(2) and 11(4) of the Bill are unconstitutional and can only be saved if there is judicial determination of the matters within the scope of those provisions.

[13] The removal of discretion from the court makes it act as an agent of the executive branch of the government. This was discussed in the Queenland Court of Appeal decision in *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40 in relation to section 30 of the Criminal Proceeds Confiscation Act 2002 (Qld) which required a court to make a preliminary 'restraining order' whichi is made without notice. In the leading judgment, Williams JA said: "*I have come to the conclusion that the direction or command to the judge hearing the application to proceed in the absence of any party affected by the order to be made is such an interference with the exercise of the judicial process as to be repugnant to or incompatible with the exercise of the judicial power of the Commonwealth."* (Appleby, G. and Williams, J., "Anti-terror creep: law and order in the States", in *Counter-Terrorism and Beyond*, op. cit., p. 155).

64. Next, Section 8(8) of the Bill gives too much power to the court of first instance. Unless the requisite amendments are made to the Courts of Judicature Act 1964, there should be a right of appeal.

65. Section 9 of the Bill is vague as it does not state whether the required notice to be given by the accused person is to be given before trial or after the completion of the prosecution's case. In any event, the requirement to give notice is unacceptable. It gives the prosecution an unfair advantage and further reverses the burden of proof in favour of the prosecution. We therefore recommend that the notice requirement be removed.

66. Given that we have recommended that the requirement for notice should be removed, Sections 10(1) and 10(2) of the Bill should no longer be applicable as well. Upon the court deciding (as in Section 9 of the Bill) that the information is *"sensitive information",* the court should proceed as per Sections 10(3) and 10(4) of the Bill.

67. If the issue of "*sensitive information"* arises at any stage of proceedings, then it is for the court to decide if the information is indeed "*sensitive information",* and if so, then Sections 10(3) and 10(4) of the Bill become applicable.

68. Further, in view of our recommendations above (that there should be no advance notice to the prosecution), Section 9(5) of the Bill is no longer applicable.

69. In order to preserve the principle of equality of arms between the prosecution and the defence, Section 11(4) of the Bill should also be removed.

PART V – TRIAL

70. As previously mentioned, Section 12 of the Bill contradicts Section 3 which defines "Court" as the Sessions Court. We reiterate that all matters under the Bill should be dealt with by the High Court.

71. The following words should be added at the end of Section 12 of the Bill: *"... and the Judge may make any order that is considered appropriate in the circumstances to protect the right of the accused to a fair trial".*

72. Further, Section 13 of the Bill states that *"bail shall not be granted"* hence the offences in the Bill are unbailable, i.e. where no bail will be granted at all.

73. It is suggested that the offences under the Bill should fall under the exceptions in Section 388 of CPC, and regarded as non-bailable, which means the court has the discretion to grant bail. Case law has shown that the act of committal to prison without bail pending trial is an exception and the Bill should not disregard the fact that this is an exceptional practice.[14] Similarly, the court should have discretion to decide whether the person should be given bail where there is an appeal against the acquittal of the person, which was not provided for under the provisions of Section 30 of the Bill (see recommendations below).

74. Under Section 13(2) of the Bill, the exceptions are similar to those found in Section 388(1) of the CPC, except that the age limit has been raised from 16 years to 18 years.

[14] In *Ment & Ors* v. *PP* [1994] 2 CLJ 408, it is stated that, "(a) The provisions of Section 315 also exhibit an intention of the legislature that the grant of bail is the rule and committal to prison without bail is an exception. (b) The discretion in favour of the prosecution is exercised only sparingly and upon being satisfied that there are special circumstances to move the Court. (c) The quantum of bail set should be realistic and should not be such as to have the effect of depriving the person, who stands acquitted of the charge, of his liberty. (d) The mere fact of an admission of appeal to the High Court from the decision of the Magistrate's Court does not by itself constitute special circumstances. (e) It is desirable to also order an early hearing of the appeal itself should the Courts discretion under this section be exercised."

75. Further, Section 13(2) of the Bill places a mandatory condition on the court that should the court decide to grant bail then the person is to be attached with an EMD. This fetters the discretion of the court. The court should always be given the discretion as to whether an EMD device should be attached or not.

PART VI – SPECIAL PROCEDURES RELATING TO PROTECTED WITNESS

76. The reference to Article 5 of the Federal Constitution in Section 14(1) of the Bill should be removed as the constitutional protections found in Part II of the Federal Constitution must be preserved. Likewise the reference to Section 264 of the CPC in Section 14(1) of the Bill should also be removed as the right to a fair trial should be retained.

77. However, if the application of Section 264 of the CPC is to be excluded as proposed by the Bill, then the principle of equality of arms should apply. The rule should apply equally to both the prosecution and the accused person. Thus this protection should be extended to all witnesses of both parties, and not just the prosecution's. This is also the approach in other jurisdictions such as in United Kingdom, Australia and Canada. Moreover, it is also the approach adopted by international tribunals such as the International Criminal Court.

78. Accordingly Section 14(2) of the Bill should be amended to state that either party can apply to court for the protection. The decision as to whether a witness is to have his identity disclosed or not should be decided by the court and not by the witness. The amended Section 14(2) of the Bill may read as follows:

"*Before making an order under subsection (1), the judge shall consider whether it is desirable, in the interests of the proper administration of justice, whether there is a real and substantial risk that any witness would suffer significant harm if*

their identity were disclosed for the court to allow an order under subsection (3)".

79. Sections 14, 15 and 16 of the Bill should not apply to evidence of an accomplice and agent provocateur. We have dealt with the evidence of an accomplice and agent provocateur under Part VII of this paper on Evidence.

PART VII – EVIDENCE

80. We take the position that the Evidence Act 1950 ("EA") should apply in this Bill and therefore Section 17 of the Bill should be deleted. In both Australia and the United Kingdom, the rules of evidence are not changed in relation to terrorism laws.

81. The EA contains principles and rules that ensures fair trial. Thus, only relevant and material evidence would be admissible. Section 2 of the EA makes no exceptions for any particular law.

82. Section 18 of the Bill is contrary to Section 32 of the EA. It is an attempt to circumvent the rule against hearsay evidence. If hearsay evidence is admissible, there will be no room to impeach or discredit the witnesses.

83. Section 19 of the Bill goes against the rule that corroboration is mandatory for unsworn evidence given by a child, which is found in the proviso to Section 133A of the EA.

84. Sections 20 to 23 of the Bill must be rejected in toto. The law as it stands is that issues of relevance, admissibility and weight of evidence are all to be decided by the court.

85. Removing the power of the court to decide on relevance and admissibility of evidence would be prejudicial to the accused and in breach of the right to a fair trial.

86. These provisions are of grave concern as they deny the accused the right to challenge the legality of all evidence adduced and produced against him which ought only to be determined by the courts, which is the competent authority to do so.

87. Section 24 of the Bill has been dealt with in our comments to Part II Section 6 of the Bill. We reiterate that if information obtained through interception of communications becomes admissible without the investigative agency having to disclose the source or how it was obtained, such information is open to abuse and fabrication.

88. Section 25 of the Bill ignores Section 90A of the EA and leaves open the risk of abuse and fabrication. There are no good reasons why Section 90A of the EA should not apply, in respect of the offences under the Bill.

89. Section 26(1)(a) of the Bill enables an accomplice to taint and fabricate evidence and to entrap an individual who may be innocent. It should be deleted. Other common law jurisdictions abhor the practice of have always declared abhorrence entrapment. The English Courts have taken the view that prosecution which is founded on entrapment is an abuse of process.[15] A state-induced crime is improper, unacceptable and deplorable.

90. Notwithstanding that the provisions in Section 26(1)(b) & (2) of the Bill are found in other statues (such as the Dangerous Drugs Act 1952 ("DDA") and Malaysian Anti-Corruption Commission Act 2009), the evidence of an *agent provocateur* is

[15] See R v Looseley [2001] 4 ALL ER 897, *per* Lord Hoffman.

often frowned upon because he is a *particeps criminis*. The common law has recognised the dangers of accepting as truth the evidence of an *agent provocateur*. Giving room to an *agent provocateur* for his evidence to be accepted without being corroborated gives rise to the dangers of fabrication. It violates the concept of fairness and would bring the administration of justice into disrepute.[16]

PART VIII – MISCELLANEOUS

91. Section 115 of the CPC was deleted in 2007 because of grave concerns that confessions were procured as a result of torture, abuse, inducement, threat or promise. There is no basis to believe that a confession under Section 27 of the Bill would be exempt from these concerns. As such, Section 27 of the Bill should be deleted.

92. Although in Section 27(3) of the Bill there is a provision that provides a safeguard against this possibility, we are of the view that it is insufficient as an accused may still fear the threat of reprisals if he does not confess.

93. As regards Section 28 of the Bill, the provisions therein are identical to Section 40 of the DDA. However the DDA has a safeguard in Section 40(3) against the informer who may wilfully make a complaint which he knew or believed to be false. This gives room to the court to have a full inquiry into whether the informer wilfully made the complaint or otherwise and require full disclosure concerning the informer. Such a safeguard is absent from Section 28 of the Bill. We suggest that this safeguard under Section 40(3) of the DDA should be included in Section 28 of the Bill.

[16] The European Courts of Human Rights in *Teixeira de Castro v Portugal* [1998] 28 EHRR 101, voiced its concern on the use of undercover agents (in this case AP) and urged for safeguards, *"the use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against dangerous drugs trafficking".*

94. Section 30(1) of the Bill should be removed as the constitutional protections found in the Federal Constitution are to be preserved. Moreover, Sections 30(1) to (4) of the Bill introduce the unprecedented power for the court to order the detention of a person who has been acquitted and discharged, pending the decision of the prosecution whether or not to appeal. This offends the fundamental right to life guaranteed under Article 5 and the freedom of movement under Article 9 of the Federal Constitution. Under similar provisions in other legislation, where there is appeal against acquittal, the court retains the discretion to decide if the accused should be remanded to prison pending the disposal of the appeal or to admit him to bail (see Sections 56A and 88 of the Court of Judicature Act 1964 and Section 315 of the CPC). As reiterated above, the Bar urges for the commitment to the principle that *"the grant of bail is the rule and committal to prison without bail is an exception*."[17]

95. Further, Sections 30(2) and (4) of the Bill require the court to act without exercising its discretion and do not give the accused person a right to oppose or to be heard.

96. Our recommendations above also apply to Sections 30(5) and (6) of the Bill.

97. Accordingly Section 30(7) of the Bill should be deleted as once a person is acquitted there should be no reason to further detain him. There must be finality after a trial, particularly so when a person has been acquitted.

FURTHER RECOMMENDATIONS

100. The Bar calls for an establishment of a body called the Independent National Security Legislation Committee ("INSLC") to review terrorist legislations from time to time. The members of the INSLC should consist of the Attorney General's

[17] See *Ment & Ors* v. *PP* [1994] 2 CLJ 408 (see note 8).

Chambers, Bar Council, the Police, SUHAKAM, and members of Parliament (cross-party representation).

101. The Bar states that there is a need for a formal and specific provision for the study, report and review on the implementation, operation and effect of the provisions of the Bill, which is to be periodically placed before Parliament for full debate. In order to justify a more precautionary counter-terrorism law, its expanded preventive capacity should also be accompanied by more effective, and comprehensive, mechanisms for review of these laws.

102. The INSLC must be given full access to all information relating to cases under the Bill and all documentation thereto (including audio and video recordings of interviews of suspects and detainees). Powers of the INSLC should further include questioning of all persons involved and the INSLC should be able to apply to the court to obtain orders to compel the cooperation of all such persons and production of information.

103. The INSLC must present its report and proposals for review to Parliament, where it would be debated by Parliament not later than 3 years from the Bill coming into force. Furthermore, the INSLC should be responsible for the regular review of the sunset clause (Section 4(11) of the Bill) before the ultimate review under the Bill (every 5 years as in the Bill, every 3 years as suggested by the Bar).

104. It is to be noted that provisions for study, review and reporting are essential features of any law which has an impact on the liberty of a country's citizens. These features are prominent in the laws of Canada, United Kingdom and Australia.

105. The setting up of the INSLC should be immediate upon the Bill coming into force.

106. We recommend the following wording to be adopted into an amendment to the Bill, following the model of the Canadian provision:

"Review and Report
(1) Within three years after this Act coming into force, a comprehensive review of the provisions and operation of this Act shall be undertaken by a body called the Independent National Security Legislation Committee.
(2) The committee referred to in subsection (1) shall, within a year after a review is undertaken pursuant to that subsection or within such further time as may be required, to submit a report on the review to Parliament, including a statement of any changes that the committee recommends."

PART C: AMENDMENTS TO THE PENAL CODE

107. The Malaysian Bar is concerned over the amendments to the Penal Code as contained in Sections 6, 7, 8 and 9 of the proposed Penal Code (Amendment) Bill 2012 ("PC Bill").

108. Contrary to the stated intention of the Prime Minister that he would abolish the ISA, the PC Bill seeks to retain and extend six offences which were previously contained in the ISA. These are the proposed Sections 124D, 124E, 124F, 124G, 124I and 124J of the PC Bill.

109. Section 124D of the PC Bill corresponds with Section 24 of ISA; Section 124E of the PC Bill with Section 25 of ISA; Section 124F of the PC Bill with Section 26 of ISA; Section 124G of the PC Bill with Section 27 of ISA; Section 124I of the PC Bill with Section 28 of ISA; and Section 124J of the PC Bill with Section 29 of ISA.

110. Thus, rather than abolish the ISA, the Prime Minister has maintained certain provisions of the ISA but in a different guise.

111. It should also be noted that the use of the term "*subversive document*" in Section 29 of ISA has been replaced with the phrase "*document or publication detrimental to parliamentary democracy*". This is now the phrase used to refer to documents or publications which would have contravened an order under Section 22 of ISA. The definition of "*document or publication detrimental to parliamentary democracy"* that now appears in Section 130A(b) of the PC Bill adopts word-for-word the definition of "*subversive document"* as found in Section 29 of ISA. Again, there is no real change in the new legislation as compared with the old.

112. Further, the use of the term "*detrimental to parliamentary democracy*" is troubling because this phrase is used more to demarcate the functions of a state's security services rather than to define a new range of criminal activity. Our research has disclosed that this phrase is used in the UK's Security Service Act 1989 to define the functions of the UK's security service. It has not been used to categorise a range of criminalised activity.

113. Thus, the creation of new offences relating to *"activity detrimental to parliamentary democracy"* in Sections 124B and 124C of the PC Bill, and the manner in which *"activity detrimental to parliamentary democracy"* is defined in Section 130A(a) of the PC Bill, seem designed to curtail and criminalise legitimate democratic activity alongside the activity of overthrowing or attempting to overthrow parliamentary democracy by violent means. The definition of *"activity detrimental to parliamentary democracy*" has too broad a scope; it should only criminalise violent conduct.

114. Next, Sections 124G and 124H of the PC Bill have used the phrase "*counsels*" or "*counselling" "**violent** disobedience to the law or to any lawful order*". However in the definition of *"document or publication detrimental to parliamentary democracy*", in Sections 130A(b)(b) and (c) of the PC Bill, a different phrase of "*counsel*" or "*counselling*" "*disobedience to the law thereof or any lawful order therein"* is used. It is our understanding the Attorney General had agreed to insert the word "*violent"* in front of this phrase wherever it occurred in the PC Bill. However this is not reflected in the wording in Sections 130A(b)(b) and (c) of the PC Bill, thus lowering the threshold for liability under these provisions.

115. It is to be noted that mandatory jail terms are prescribed for all offences under Sections 124B to 124J of the PC Bill. There is no provision for a fine. This is extreme, especially in the case where there has only been a minor infringement of the law.

116. In defining "*serious offence*" for the purpose of the offence of being a member of or assisting an "*organized criminal group*" (Chapter VIB) the PC Bill has used the maximum possible sentence for the offence, instead of specifying the nature of the criminal offence. It would have been more consistent, especially as we already have predicate offences defined in the Anti-Money Laundering and Anti-Terrorism Financing Act 2001, to use the committing of those predicate offences to define "*organized criminal group"* rather than the maximum penalty for any offence in the Penal Code or elsewhere. This has the disadvantage of categorising those who have been convicted of non-serious crimes as nonetheless being members of a serious organized group, and subjecting them to additional jail terms.

117. In this respect, the Bar calls for the adoption of the definition of "*organized criminal group"* to be "*organised criminals that work together for the duration of a particular criminal activity or activities for substantial profit, whether based in*

Malaysia or elsewhere". The commission of "*serious offences*" by itself is too broad, and we recommend that the Government define organised crime in terms of specific threats, as seen in the approach to understand and tackling such crime by the UK Home Office.[18]

118. The definition of *"sabotage"* in the amended Section 130A of the PC Bill is too wide. The words "*to cause harm"* should be replaced with the Australian equivalent of the words *"to cause destruction, damage or impairment"* (Section 24AB Crimes Act 1914).

119. The Bar calls for change of definition of "*imprisonment of life*" under Chapter V of the Penal Code. It should be in line with Section 57 of the Penal Code, i.e. "*equivalent to imprisonment for thirty years."*

120. It is to be noted that "*sensitive information"* has been widely defined in Section 130A(i) of the PC Bill. It purports to cover every government document, information or material. Thus, whistleblowers who intend to disclose public wrong-doing of ministers or civil servants may be caught by the wide definition of "*sensitive information"*. Accordingly, "*sensitive information"* should be properly classified and there must be provision for "*declassification"* similar to Section 2C of the Official Secrets Act 1972.

121. Section 130KA of the PC Bill criminalises membership of a terrorist group. While this appears straightforward enough, it is also quite vague as to when someone is considered a *"member"*.[19] Furthermore, there is no statutory defence available,

[18] See the United Kingdom Threat Assessment of Organised Crime 2009-2010. Some of these defined threats are fraud, drugs, money-laundering, human trafficking, firearms, etc. <http://www.soca.gov.uk/threats>

[19] The UK definition of a member is "*if he belongs or professes to belong to a proscribed organisation"* (Section 11(1) Terrorism Act 2000). The Australian Criminal Code Act 1995 Section 102.3 (1) states, "*A person commits an offence if (a) the person intentionally is a member of a [terrorist] organisation…(c) the person knows the organisation is a terrorist organisation."*

unlike in other jurisdictions.[20] The Bar suggests for the inclusion of such a defence. These considerations apply as well to Chapter VIB – Organized Crime (Section 130U to Section 130W of the PC Bill: Interpretation of "organized criminal group", Member of an organized criminal group, assisting an organized criminal group).

PART D: AMENDMENTS TO THE EVIDENCE ACT 1950

Section 114A - Presumption of fact in publication

122. This provision contains certain new presumptions, which are applicable to both civil and criminal proceedings. This would have the effect of reversing the burden of proof. In criminal proceedings, it is a significant departure from the accepted notion that the prosecutor is required to prove all the central elements of an offence before a person has to mount a defence.

123. This section is open to abuse by investigators and creates a serious risk of wrongful prosecution and injustice as it does not take into account the nature of cyberspace. For example, the owner of a computer can be made responsible for whatever information contained in his computer, notwithstanding that the information could have been entered by a third party be it through hacking or manipulation. Likewise, another person could easily get access to one's WiFi account and upload a controversial document, or similarly, one could publish information using someone else's name or online alias. The owners of the computer, WiFi account or alias/name in the above examples would then have the

[20] Section 11 (2) in UK Terrorism Act 2000 states: "*It is a defence for a person charged with an offence under subsection (1) to prove— (a)that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and (b) that he has not taken part in the activities of the organisation at any time while it was proscribed*."

Section 102.3 (2) of the Australian Criminal Code Act 1995 states that, "*Subsection (1) does not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation".*

evidential burden to prove their innocence. This in itself is problematic as the average person would not have the technical knowledge to prove third-party manipulation and access on their computers, which will be a more difficult task if the investigators seize the computers during the investigation.

124. Under this amendment, investigators and prosecutors will therefore find it easier to bring a charge for the alleged wrongdoer, removing the burden of proving first the actual perpetrator's identity on the Internet. This would be disastrous also for children and teenage users who are forced to prove their innocence. This amendment will also consequently impact our society's freedom of expression and media freedom as well, causing fear and self-censorship among Internet users of what they say and do. In light of all of the above, the Bar calls for the withdrawal of the entire section on the basis of its immediate and long-term negative consequences on our society.

125. Nevertheless, if this is recommendation is not accepted, the Bar proposes a safeguard to protect alleged wrongdoers against the disproportionate burden of proof placed upon them. It is noted that presumptions of this nature are found in counter-terrorism legislations, such as the UK Terrorism Act 2000 (for example, Section 58A(1)- *Eliciting, publishing or communicating information about members of armed forces*) but are not widely used. Indeed, even where it is used in the said UK Act, it does not take much for the presumption to shift back to the party who bears the burden of proving (the prosecution in criminal proceedings and the plaintiff in civil proceedings). In this regard, see for example, Section 58(2) of the UK Terrorism Act 2000, where the defence is that the person charged "*…had a reasonable excuse for their action."*

126. Therefore, if this amendment is to be kept, the Bar advocates that the same applies where a more specific defence should be provided for the person charged

so that he is aware of what is needed in order to shift the burden of proof back to the prosecutor or plaintiff.

PART E: AMENDMENTS TO THE CRIMINAL PROCEDURE CODE

127. The present Section 116 of the CPC is wide enough and there is no necessity for the new Section 116A. Further, Section 116A will allow the police to conduct a search and seizure without obtaining a search warrant and on "*reasonable cause to suspect"*. It is a provision that can be easily abused. Unlike Section 116 of the CPC, the new Section 116A is not subject to the safeguards contained in Section 51 of the CPC.[21]

128. It is to be noted that the new Section 116A is confined to "*security offence"* and "*organised crime"*. However, the new Sections 116B and 116C are applicable to all offences and it is objectionable. Further, the new Section 116C is identical to Section 6(1) of the SOSMA Bill, which has been dealt with above in our comments, as well as in our comments to Sections 20-23 of the Bill above.

129. The proposed Section 153 of the CPC removes the burden on the prosecution to prove the time, date and place of publication. The publication is at the place where it is read. We disagree with the use of such presumptions in framing a charge.

130. The proposed Section 388A of the CPC should not include Section 387 which deals with bailable offences. Bail under Section 387 of the CPC is as of right and there is no discretion to impose any further conditions.

[21] Section 116 clearly states that the investigative authority must have "reason to believe" (a higher threshold) that the person to whom the order or summons under Section 51 will not produce the document or any other thing as directed in the summons or order. Only then, the officer may search or cause to search the said place. Furthermore, search and seizures without warrant are inherently problematic because they deprive the occupier of premises the opportunity to challenge the decision of the police officer to search, as well as to challenge the seizure of evidence by investigating officials. It is therefore all the more important to place safeguards as a check on potential abuses of power by the police force.

131. The proposed Sections 445(1)(a) and 445(2)(a) of the CPC give the accused person an option to apply for bail pending appeal or in lieu, to apply for the EMD. The proposed Sections 445(1)(b) and 445(2)(b) of the CPC should be removed as the constitutional protections found in Article 9 of the Federal Constitution should be preserved.

132. Moreover, these Sections introduce the unprecedented power for the court to order the attachment of the EMD on the accused person when released on bail. The Bar urges that there should be guidelines for the court as to when someone should be attached with EMD.[22]

PART F: CONCLUSION

133. We trust that the Honourable Attorney General would entertain a supplementary Memorandum in the event that upon further reflection, the Malaysian Bar has other contributions towards the new legislation.

134. Although the legislation have now been passed by Parliament, we urgently request that the Honourable Attorney General undertake an immediate review of the legislation in light of the Malaysian Bar's Memorandum, with a view to amending the legislation before the new laws are brought into force.

135. We offer our full cooperation to the Honourable Attorney General in incorporating and implementing the proposals set out in the Malaysian Bar's Memorandum.

Prepared by
Bar Council Malaysia
Dated this 29 Aug 2013

[22] In other jurisdictions, i.e. UK and Australia, probation/correction officers write suitability reports to submit to the Court in deciding whether the prisoner should wear EMD or not.