

Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD

Review of Division 3, Part III of the *ASIO Act 1979* (Cth) - Questioning and Detention Powers

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The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent and non-profit legal and policy centre located in Sydney. PIAC provides legal advice and representation, public policy programs and advocacy training to promote the rights of disadvantaged and marginalised people and enhance accountability, fairness and transparency in government decision making.

PIAC specialises in undertaking matters that have systemic impact. The Centre's clients and constituencies are primarily those with least access to economic, social and legal resources and opportunities. PIAC provides its services for free or at minimal cost.

Wherever possible, PIAC works co-operatively with other public interest groups, community and consumer organisations, community legal centres, private law firms, professional associations, academics, experts, industry and unions to achieve our goals. PIAC works on public interest issues at both a NSW and National level.

PIAC was established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with the support of the NSW Legal Aid Commission. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1. Summary of Recommendations

PIAC recommends that:

- the special powers provisions be repealed and not re-legislated into force on the basis that they:
 - are unnecessary;
 - are disproportionate to counter any perceived or actual security threats to Australia;
 - contain inadequate safeguards to protect the fundamental civil liberties of each person in Australia; and
 - are inappropriately vested in ASIO, an inherently secret and unaccountable organisation.
- the Committee ensures that its processes are less accelerated to permit a fuller and more constructive dialogue with the community, including community organisations such as PIAC.
- the definition of terrorism in the *Criminal Code Act 1995* (Cth) is amended to clarify the meaning of ‘advocacy’, ‘protest’, ‘dissent’ and ‘industrial action’. These terms must be defined expansively. If not, legitimate individual and collective political participation and protest risk being policed as a threat to society.
- the criteria for the exercise of the powers under sections 34C 34D by the Attorney-General and under section 34D by an issuing authority include the requirement of reasonable suspicion of an *imminent* ‘terrorism’ offence involving a material risk of serious physical injury or serious property damage.
- the Committee approach claims of a ‘new security environment’ with skepticism, and an awareness of the institutional self-interest of organisations such as Australian Security Intelligence Organisation (and the Australian Federal Police) in claiming that unprecedented circumstances require unprecedented powers.

- the Committee recommend the amendment of sections 34C and 34D of the Act such that only persons who are suspected of the commission of terrorist offences as defined in the *Criminal Code Act 1995* (Cth) that require the active knowledge of the suspect of the nature of the activities, rather than recklessness or deemed knowledge, may be the subject of a questioning or detention warrant.
- the Committee adjusts the period of time in which people subject to special powers warrants may be questioned or detained. Questioning and detention periods should mirror time periods under the *Crimes Act 1914* (Cth) for terrorist offences, renewable upon application to a Federal judicial officer.
- the Committee requires the Commonwealth Government provide non-conditional funding for community education initiatives to give accurate information to all Australians, and particularly Muslim and Arab Australians in appropriate languages, eg, Urdu and Arabic, about the scope of the Government's powers in relation to counter-terrorism, including education about each person's rights in relation to the special powers provisions. PIAC commends the recent publication by the UTS Community Legal Centre, *Be Informed: ASIO and Anti-Terrorism Laws* as an example of the type of community education the Commonwealth should fund.
- a dedicated Race Discrimination Commissioner be appointed immediately to the Human Rights and Equal Opportunity Commission, and that the Race Discrimination Commissioner be legislatively recognised as a person to whom complaints may be made in relation to the operation of the special powers provisions of the ASIO Act. The Race Discrimination Commissioner should have appropriate investigative, recommendatory and compensatory powers.
- the Committee approaches this legislation with the understanding that Australian constitutionalism, rule of law and commitment to human rights are non-negotiable and must be protected, *especially* in any response to threats to national security.
- the Committee approaches the legislation with a commitment to providing the function of Parliamentary oversight to contain excessive powers in the Executive branch of government, consistent with the principles of the rule of law.
- the Act be amended to confer on persons subject to a warrant a clear right of judicial review of the decision to issue a warrant and of any conduct connected to the warrant. This should include the legislative requirement for information to be provided to the person of these rights, assistance in accessing the Court pursuant to those rights and simplified procedures in exercising the right, particularly where no legal representation is available. Common law presumptions in favour of a person's liberty should not be legislatively excluded.
- the Act be amended to provide to any person the subject of a special powers warrant the ability to seek judicial review of the issue and exercise of the warrant, at any stage in the process.
- the right to approach the Inspector-General of Intelligence and Security or the Ombudsman with a complaint be supplemented with a right to approach a Federal Court. Any such right to approach a Federal Court should not be conditional upon the Inspector-General of Intelligence and Security or the Ombudsman having been consulted first.
- this Committee have the capacity to require ASIO to make full disclosure of any matter on which the Committee requires information in order to oversee ASIO's activities under the

Act. The Committee would not be required to make full public disclosure of that material where the material is classified.

- the special powers provisions be removed from ASIO. They are more appropriately vested in a more public and accountable organisation such as the Australian Federal Police, if they are to be retained.
- the Act be amended to create a new offence by persons empowered to seek or execute warrants, such that threats made to persons to induce them to give information that would otherwise be gathered pursuant to a warrant be criminalised as impermissible intimidation and that a good faith requirement in seeking a warrant be required.
- ASIO be required to report publicly at least once a quarter on the matters on which it currently reports annually.
- section 34VAA be repealed as a matter of urgency.
- if section 34VAA is not repealed, its duration in relation to the disclosure of the existence of a warrant and any operational information particular to the execution of that warrant be limited to a maximum of twenty eight days after the expiry of the warrant.
- if section 34VAA is not repealed, the offences that depend on strict liability and ‘recklessness’ be amended to require actual knowledge and intent by the person liable for the offence.
- if section 34VAA is not repealed, lawyers, journalists and Parliamentarians be exempt from any secrecy provisions to the extent necessary to make fair public comment on the effect of the special powers provisions.
- the human rights enumerated in section 10 of this submission be explicitly protected in the Act as human rights obligations and that breaches of those rights be actionable in a Federal court.
- the Act be amended to confer on a person the subject of a warrant a personal cause of action (including the right to seek compensation) for breaches of the Act by officers charged with implementing a warrant, including but not limited to any improper deprivation of liberty, detention and improper treatment in connection with the execution of a warrant.
- persons subject to warrants for questioning and warrants for detention have access to legal representation as a matter of right. Such representation should include private consultations between lawyer and client, and further, permit lawyers to protect their client’s best interests and advocate on their client’s behalf. Lawyers should not be removable at the discretion of the prescribed authority.

2. Terms of reference - PIAC’s position

PIAC thanks the Committee for the opportunity to comment on Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (**the Act**). PIAC addresses the operation, effectiveness and implications of the Division 3 of Part III of the Act (**special powers provisions**) in this submission.

PIAC does not address all of the terms of reference.

PIAC notes that answers to certain questions posed by the Committee cannot be given precisely because of the secrecy provisions of the Act (section 34VAA). For example, PIAC cannot answer in detail any of the following issues raised by the Committee in its background paper:

- How has the legislation has operated since its enactment?
- What persons have been subjected to ASIO's special powers and what was achieved through their questioning?
- What problems, if any, have been encountered in the use of the legislation?
- What aspects of the legislation have not been used?
- What complaints, if any, have been made in relation to this legislation?

Answers to these questions are known exclusively by ASIO and the AFP, persons subject to the warrants and/or their lawyers. None of these persons can disclose the operational effect of the special powers provisions or the existence of a warrant issued under the special powers provisions. Section 34VAA of the Act makes it an offence to disclose the existence of a warrant and any 'operational information' in relation to that warrant. PIAC addresses the secrecy provisions in more detail below at section 9.

PIAC advocates the repeal of the special powers provisions. PIAC's view is that the special powers provisions:

- are **unnecessary**;
- are **disproportionate** to counter any perceived or actual security threats to Australia;
- contain **inadequate safeguards** to protect the fundamental civil liberties of each person in Australia; and
- are **inappropriately vested** in ASIO, an inherently secret and unaccountable organisation.

Should the Committee not recommend the repeal of the special powers provisions, PIAC calls on the Committee to recommend the improvement of the special powers provisions by including:

- judicial review of the issue and execution of questioning and detention warrants;
- explicit and enforceable protections of individuals' human rights;
- more frequent and frank public disclosure of the use of the questioning and detention powers by ASIO;
- removal of the secrecy provisions that effectively provide a two year gag on public comment or scrutiny of ASIO's use of the special powers provisions;
- protection of lawyer-client privilege by permitting legal representation as a matter of right and permitting confidential conferences between lawyer and client without supervision by a prescribing authority or the Inspector-General of Intelligence & Security;

PIAC would welcome the opportunity to address the Committee on any of these issues, including PIAC's proposals for a better, more accountable and ultimately, more democratic model of counter-terrorism regulation.

PIAC is a member of the National Association of Community Legal Centre (NACLC) and endorses the submissions made by NACLC and its members, including the Federation of Community Legal Centres (Victoria), Illawarra Community Legal Centre and the University of Technology Sydney Community Law Centre. PIAC also endorses the submissions made by the Australian Muslim Civil Rights Advocacy Network (AMCRAN) and the University of Melbourne Law School.

3. Committee's Processes

PIAC has made a number of submissions in relation to counter-terrorism legislation, including this Act, to both the Parliamentary Joint Committee on ASIO, ASIS and DSD (**the Committee**), the Senate Legal & Constitutional References Committee (**Senate References Committee**) and the Senate Legal & Constitutional Legislation Committee (**Senate Legislation Committee**).¹

PIAC continues to be concerned that, in relation to this Committee (and other Parliamentary Committees), the time periods for submissions and for reporting back to Parliament are shrinking.

The impact of such short timetables is to prevent community organisations such as PIAC from doing their job and from consulting widely with affected communities.

PIAC maintains that Parliamentary Committees serve an important democratic function. Community access to Parliamentary Committees by way of written and oral submissions ought to be strengthened and protected, particularly in light of the impending control of the Senate by the Government. It is important to safeguard all opportunities for community participation in governmental processes.

Recommendation

PIAC recommends that the Committee ensure that its processes are less accelerated to permit a fuller and more constructive dialogue with the community, including community organisations such as PIAC.

4. Terrorism

The special powers provisions of the Act adopt the definition of 'terrorism' in Commonwealth legislation.² Under the special powers provisions, a warrant may be issued for questioning or detention where the Attorney-General and the issuing authority are satisfied, amongst other things, that there are reasonable grounds for believing that the warrant would substantially assist the collection of intelligence that is important in relation to a 'terrorism offence'.³

In PIAC's view this threshold is too ill-defined both because of the underlying definition of 'terrorism' in Commonwealth legislation and because of the wording of the Act itself.

¹ For example: 'Review on the listing of Al Qa'ida, Jemaah Islamiyah, the Abu Sayyaf group, the Armed Islamic Group, the Jamiat ul-Ansar, the Salafist Group for Call and Combat as terrorist organizations under section 102.1A of the *Criminal Code*' (Parliamentary Joint Committee on ASIO, ASIS and DSD (**PJC**)) (25 January 2005); 'Submission to the Inquiry into the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 from the Public Interest Advocacy Centre' (PJC) (7 November 2002); 'Submission to the Inquiry into the Anti-Terrorism Bill 2004 from the Public Interest Advocacy Centre' (Senate Legal & Constitutional Legislation Committee (**Senate Legislation Committee**)); 'Submission to the Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Bills' (Senate Legislation Committee) (April 2002); 'Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Anti-Terrorism Bill (No 2) 2004'.

² *Criminal Code Act 1995* (Cth), Part 5.3 as amended by *Security Legislation Amendment (Terrorism) Act 2002* (Cth).

³ *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**), sections 34C(3)(a) and 34D(1)(b).

Consistent with its prior submissions in relation to counter-terrorism legislation⁴, PIAC remains concerned that the definitions of ‘terrorism’ and ‘terrorist act’ are too broadly cast.

Whilst the definitions try to exclude from terrorist regulation any advocacy, protest, dissent or industrial action that is not intended to cause physical harm, endanger life or to create a serious public health or safety risk, there is no guidance in the Act as to what constitutes ‘advocacy’, ‘protest’, ‘dissent’ or ‘industrial action’. PIAC is concerned that without clarification of these terms, legitimate advocacy, protest, dissent and industrial action remain at risk of being classified as public safety concerns, and policed as terrorism. This would be a significant and unacceptable incursion against democratic free association and the freedom of political communication (as protected by the Commonwealth Constitution).⁵

Recommendation

PIAC recommends that the definition of terrorism in the *Criminal Code Act 1995* (Cth) be amended to clarify the meaning of ‘advocacy’, ‘protest’, ‘dissent’ and ‘industrial action’. These terms must be defined expansively. If not, legitimate individual and collective political participation and protest risk being policed as a threat to society.

Further, PIAC is concerned with the ill-defined and unlimited scope of the threshold for the issuing of a warrant in sections 34C and 34D of the Act. The Attorney-General and an ‘issuing authority’ need only be satisfied

that there are reasonable grounds for believing that issuing the warrant to be requested [or for an issuing authority, for believing that the warrant] will substantially assist the collection of information that is important in relation to a terrorism offence.

PIAC submits that this definition is ambiguous, vague and has a permissive rather than limiting or constraining effect. PIAC supports the University of Melbourne Law School’s submission in calling for a tighter, more disciplined threshold for the issue of any warrant under the special powers provisions of the Act. The exercise of the powers under the Act should be limited to extraordinary circumstances.

Recommendation

PIAC recommends that the criteria for the exercise of the powers under sections 34C 34D by the Attorney-General and under section 34D by an issuing authority include the requirement of reasonable suspicion of an *imminent* ‘terrorism’ offence involving a material risk of serious physical injury or serious property damage.

⁴ See for example, PIAC, *Submission to the Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills*, April 2002. Available at <http://www.piac.asn.au/publications/pubs/antiterr_20020924.html>.

⁵ The High Court has recognised an implied freedom of political communication in the Commonwealth Constitution: see *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Limited v Commonwealth* (1992) 177 CLR 106. A similar implied freedom has been found in relation to State Constitutions: see for example, *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211; *Levy v Victoria* (1997) 189 CLR 579. (protecting symbolic political communication).

5. 'New Security Environment'?

Mr Dennis Richardson, Director-General of ASIO, has made public remarks to the effect that Australia now finds itself in a 'new security landscape'.⁶ This seems to be an increasingly accepted wisdom. Certainly the Howard Government, in creating and passing the special powers provisions of the Act, relied on the logic that the world is a different place post-9/11. This logic has justified the conferral upon ASIO of powers to detain people without trial, charge or suspicion of criminal activity.⁷

In his Second Reading Speech about the Act, the Attorney-General said:

The horrific and tragic events of September 11 marked a fundamental shift in the international security environment.⁸

The Senate References Committee accepted this when it commented:

[I]t cannot be denied that this legislation [the Act] is extraordinary, a fact which the Government does not dispute. But so too are the circumstances that have arisen since September 11 2000.⁹

The Department of Foreign Affairs and Trade (DFAT), in a recent White Paper, further echoed the idea, writing:

Australia's security environment has changed. We are now directly threatened by a new kind of terrorism.¹⁰

PIAC firmly resists the prevailing logic that any such 'fundamental shift' has occurred or that we are living in a 'new security environment'. This is not to say that there is no terrorist threat, but that it does not mark a brave new world that would justify the laws that the Howard Government has passed.

PIAC endorses the views of the Honourable Justice Michael Kirby¹¹ and Mr Simon Bronitt¹² both of whom caution, in different ways, against vitiating fundamental principles of the rule of law,

⁶ Dennis Richardson, 'Address to Security in Government Conference', National Convention Centre, Canberra (30 April 2003), p 1. Available at <<http://www.asio.gov.au/Media/comp.htm>>.

⁷ *ASIO Act 1979* (Cth), sections 34C(3) and 34D(1)(b). See also, Dr Greg Carne, 'Detaining Questions or Compromising Constitutionality? The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth)', (2004) 27(2) *University of New South Wales Law Journal* 524, 525.

⁸ *House of Representatives Hansard*, 21 March 2002, p 1930.

⁹ Senate References Committee, *Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (December 2002), p xx.

¹⁰ Department of Foreign Affairs & Trade, White Paper, *Transnational Terrorism: The Threat to Australia* (2004), p vii.

¹¹ Justice of the High Court of Australia. See Michael Kirby, 'National Security: Proportionality, Restraint and Commonsense', paper presented at the Australian Law Reform Commission National Security Law Conference, 12 March 2005 (Federal Court of Australia Conference Room, Sydney). Available at <http://www.highcourt.gov.au/publications_05.html#MichaelKirby>.

¹² Director, National Europe Centre, and Reader in Law, Faculty of Law, Australian National University. See Simon Bronitt, 'Australia's Legal Response to Terrorism: Neither Novel nor Extraordinary?', paper presented at the Castan Centre for Human Rights Law Conference, 'Human

human rights and criminal justice on the basis of a ‘new’ putative threat of ‘transnational terrorism’.¹³ They each seek to challenge the predominant rhetoric that ‘we live in extraordinary times that demand ... extraordinary laws’.¹⁴ It is easy to say that ‘these are new and dangerous times’ but the Australian response to terrorism ought not to be led by fear. The Australian polity should not depart from Australia’s human rights obligations nor centuries-old principles of the rule of law enshrined in our common law system.

Yet the steady stream of counter-terrorism legislation promoted by the Government, and passed by the Parliament,¹⁵ is informed by the logic that extraordinary measures are warranted in these new times of unprecedented threat. PIAC maintains that this Act is disproportionate to the threat Australia now faces.

It is said that the special powers provisions are necessary to prevent a terrorist event in Australia. It remains to be seen, at least in public discourse, on what basis it is alleged these powers are necessary. The following questions remain unanswered, even after two years’ operation of the special powers provisions:

- Against precisely what threat or threats do the special powers guard?
- How is it alleged these powers will prevent a terrorist event, such as the Bali bombings, occurring on Australian soil?
- The special powers have been used three times in the last reporting period. Whilst PIAC says that is three times too many, how can the extension of the special powers be justified when ordinary intelligence gathering powers seem adequate?

Justice Kirby points out that this is not the first time that Australian Governments have reacted disproportionately in the face of a perceived threat. He reminds us of the *Communist Party Dissolution Act 1950* (Cth), which was struck down as unconstitutional by the High Court of Australia. Justice Kirby names this as an example of ‘legislative excess’; a legal response that was ‘completely disproportionate’ to the fear that informed it.¹⁶ He calls on contemporary legislators to heed the lesson of history.

Justice Kirby also dares to name the institutional self-interest of ASIO and law enforcement agencies in seeking extended powers when he said:

Rights 2003: The Year in Review’, 4 December 2003 (CUB Malthouse, Melbourne). Available at <<http://www.law.monash.edu.au/castancentre/events/2003/bronitt-paper.pdf>>.

¹³ The Department of Foreign Affairs and Trade uses the term ‘extreme-Muslim terrorism’ and ‘transnational terrorism’ to denote the ‘new threat’ now faced by Australia: see Department of Foreign Affairs and Trade, White Paper, *Transnational Terrorism: The Threat to Australia* (2004)

¹⁴ Simon Bronitt, ‘Australia’s Legal Response to Terrorism’, p 1.

¹⁵ For example, the *National Security Information (Criminal Proceedings) Act 2004* (Cth) and the *National Security Information Amendment Bill 2005* (Cth) which seek to close court rooms where information that could affect or prejudice ‘national security’ may be disclosed; *Anti-Terrorism Act 2004* (Cth) which amends the *Crimes Act 1914* (Cth) to reverse the presumption in favour of bail for terrorist suspects; *Criminal Code Amendment (Terrorist Organisation) Act 2004* (Cth), which enables the Governor-General to make a regulation identifying an organisation as a ‘terrorist organisation’ following which membership of, direct participation in or support for the organisation or association with its members are punishable by severe criminal penalties.

¹⁶ Michael Kirby, ‘National Security’, p 1.

It is easy to gather a group of experts some of whom may have a view on the importance of their topic [terrorism], and perhaps a professional and institutional commitment to its themes, and to run the risk of losing a sense of proportion and perspective.¹⁷

Simon Bronitt makes the same point when he argues:

I feel that there is almost a new *genus* of law: post 9/11 law. Although 9/11 has become a significant force in justifying these laws, the truth is that there is an element of opportunism (by some law enforcement and state agencies [and ASIO]) behind these claims of necessity for new powers and offences.¹⁸

PIAC calls on the Committee to be wary of claims that this is an entirely new security environment. Australian Governments have framed other perceived threats such as Communism, immigrants, asylum seekers and the proximity of Asian nations, as phenomena that justify discriminatory, unprecedented or extraordinary measures. Legacies such as the proscription of the Communist Party, the White Australia Policy, ongoing mandatory detention and our military commitment to Vietnam are the result. History has judged most of these legacies ill-considered and, in some cases, unconstitutional.¹⁹

PIAC calls on the Committee to learn from the lessons of rash policy and legislative endeavours to counter contemporary threats throughout Australia's history. The most striking example in Australia today of excessive legislative measures is the Howard Government's counter-terrorism legislation, and in particular this Act that grants ASIO extraordinary, and in PIAC's submission, inappropriate, unnecessary, dangerous and disproportionate powers.

Recommendation

PIAC recommends that the Committee approach claims of a 'new security environment' with skepticism, and an awareness of the institutional self-interest of organisations such as Australian Security Intelligence Organisation (and the Australian Federal Police) in claiming that unprecedented circumstances require unprecedented powers.

PIAC calls on the Committee to consider the special powers provisions from the perspective of Australia's human rights obligations and the constraints imposed on the exercise of governmental power by the rule of law, including the separation of powers.

5.1 Human rights

Australia has ratified a range of international human rights instruments that are potentially relevant in connection with the special powers provisions, including the:

- *International Covenant on Civil and Political Rights (ICCPR)*;
- *International Covenant on Economic, Social & Cultural Rights (ICESCR)*;
- *Convention on the Rights of the Child (CROC)*;
- *Convention on the Elimination of All Forms of Racial Discrimination (CERD)*;

¹⁷ Michael Kirby, 'National Security', p 1.

¹⁸ Simon Bronitt, 'Australia's Legal Response to Terrorism', p 1.

¹⁹ *Australian Community Party v Commonwealth* (1951) 83 CLR 1, esp. at 187-188, 193. This case held that the *Communist Party Dissolution Act 1950* (Cth) was beyond the powers of the Federal Parliament and constitutionally invalid.

- *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment (CAT)*.

Australia has undertaken to apply these human rights standards within Australia, including the states and territories, as internationally binding legal obligations. These undertakings are further reinforced by customary international law. Australia owes the obligation to protect, fulfill and promote the human rights of each person in Australia or under its control, whether or not they are Australian citizens.

Rights versus national security?

In PIAC's view, it is fundamental that any measures to combat terrorism should themselves uphold, rather than circumvent, international human rights standards.²⁰ In discussing measures to combat terrorism, it is not a question of 'striking an appropriate balance' between human rights and the national security interest. Australia's human rights obligations are not negotiable. They are part of the democratic relationship between the Government and people within Australia and are compromised to the deficit of Australian democracy.

The current framing of the Act says to the Australian public that the Executive may target certain people within society for compulsory questioning and/or detention, without regard for their individual rights and freedoms, because subjecting certain individuals to otherwise unacceptable treatment serves to protect the rest of us.

This is to override a number of human rights commitments given by Australia, and expected of modern liberal-democracies. In particular, PIAC is concerned that the special powers provisions of the Act offend against the right of each person in Australia or under its control to be free from arbitrary detention or deprivation of liberty.

Freedom Against Arbitrary Deprivation of Liberty

Both the ICCPR and customary international law²¹ provide an individual right to be free from arbitrary detention or deprivation of liberty at the hands of the State. This right belongs to every person in Australia or under the control of the Australian Government, regardless of their citizenship status.²²

Article 9(1) of the ICCPR clearly sets out the content of the right, stating:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedures as are established by law.

²⁰ See for example, the commitment by the United Nations General Assembly which stated in a Resolution following the events of 11 September 2001, 'that all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, *including human rights standards*'. (emphasis added): Resolution 56/160 (19 December 2001), Preamble. See also operative paragraphs 5 and 6, which (*inter alia*) call on States 'to take all necessary and effective measures, in accordance with relevant provisions of international law, including international human rights standards, to prevent, combat and eliminate terrorism in all its forms and manifestations...' (para 6).

²¹ ICCPR, UN Doc. A/6316 (1966), Article 9(1); see too Human Rights Committee, Human Rights Committee, 'General Comment No. 29' in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 189 [11], UN Doc. HRI/GEN/1/Rev.6 (1994).

²² ICCPR, Article 2(1).

The United Nations Human Rights Committee²³ has made it clear that lawfulness does not exhaustively answer the charge of ‘arbitrary’. An assessment of whether a measure is ‘arbitrary’ will depend on factors such as inappropriateness and injustice. The Human Rights Committee has made it clear that any assessment of whether a measure amounts to arbitrary detention or deprivation of liberty depends on whether it can be said that the detention or deprivation of liberty is ‘necessary in all the circumstances of the case’, including whether it is proportionate to a legitimate end.²⁴ Thus, for instance, even while a law might provide for the indefinite detention of an individual, it may still be held to be arbitrary, and therefore, impermissible detention because of the lack of proportionality of the detention to the end in question.

In PIAC’s submission, the special powers provisions are not proportionate to a legitimate end and are not necessary in all the circumstances. Whilst the Director-General of ASIO contends that ‘useful intelligence’ has been gathered by the use of the special powers provisions²⁵, he does not articulate a cogent or compelling justification as to why the intelligence could not have been collected equally successfully using an alternative method that did not require the deprivation of the person’s liberty.

The detention or deprivation of liberty authorised by the Act could well be considered ‘arbitrary’ on the following bases:

- *It authorises the detention of adult persons of up to seven days, even where they are not a suspect in any terrorist offence, but rather, because they are believed to have information relevant to the investigation of terrorism;*²⁶

PIAC rejects the application of the special powers provisions to non-suspects and calls on the Committee to remove non-suspects from the operation of the Act. PIAC goes further to say that given the extremely broad nature of ‘terrorist acts’ under the *Criminal Code 1995* (Cth), many of which do not require actual knowledge or intent to found a conviction, that only those persons who are suspected of terrorist offences that require an element of actual knowledge and/or intent (rather than recklessness or imputed knowledge and/or intent) be subject to the operation of the special powers provisions.

Further, PIAC recommends that the conditions under which any person who is subject to a compulsory questioning or detention warrant may be held and questioned, more closely follow the criminal law provisions for terrorist offences under the *Crimes Act 1914* (Cth). Currently, ASIO may detain a person for seven days. Police forces may only hold suspect for terrorist offences for a maximum of twenty four hours.²⁷ PIAC submits that it is unjustifiable to permit

²³ The United Nations Human Rights Committee is a body of independent experts created by the ICCPR. It is responsible for providing guidance on the meaning of the ICCPR; considering States’ reports on their performance of obligations under the ICCPR,; and issuing observations on States’ performance under the ICCPR.

²⁴ *A v Australia*, Communication No. 560/1993, 30 April 1997, UN Doc. CCPR/C/59/D/560/1993.

²⁵ Michael Pelly, ‘Terrorist suspects at large – ASIO’, *Sydney Morning Herald*, 24 March 2005. Accessed at <<http://www.smh.com.au>> (24 March 2005).

²⁶ ASIO Act, sections 34C(3)(a) and 34D(1)(b). The exception to this statement is that in the case of children aged between 14 and 18 years of age, there is a requirement that the Minister is convinced that it is likely that the child will commit, is committing or has committed a terrorism offence: section 34NA(4)(a).

²⁷ The *Crimes Act 1914* (Cth) provides a questioning and custody regime for persons suspected of non-terrorist and terrorist offences.

ASIO to compulsorily question and/or detain a person who is not suspected of any wrongdoing for seven days when a person who is suspected of committing a terrorist offence may only be held for twenty four hours.

The regime for terrorist suspects under the *Crimes Act 1914* (Cth) provides an initial four-hour investigation period (or for persons who appear to be Aboriginal and Torres Strait Islanders under 18, two hours).²⁸ The investigation period begins at the time of arrest²⁹, but does not include time in which questioning is suspended, is physically impossible or in which other associated legal procedures are taking place.³⁰

PIAC is concerned about the elasticity of sections 23CA(8)(m)(ii) and 23CB of the *Crimes Act 1914* (Cth) model which allow a police investigator to seek retrospective approval for ‘specified times’ that do not count in the normal investigation period of four hours. This seems to be a blank cheque for questioners and PIAC recommends that any amendment to the special powers provisions avoid creating a similar mechanism. To avoid the situation where a person is held for questioning for an unlimited amount of time, a cap should be set not only on permissible questioning times but further on the total period during which a person can be held in custody. The period in which a person can be continuously questioned in any one session should also be limited.

Under the *Crimes Act 1914* (Cth), an investigation period may be extended upon application to a magistrate or a justice of the peace to a maximum of twenty hours.³¹ PIAC submits that the Commonwealth³² should have to apply to a Federal judicial officer (rather than a magistrate or a justice of the peace) for extensions to compulsory questioning warrants. Extensions should only be granted by a Federal judicial officer on the grounds that the Commonwealth can demonstrate that it has a reasonable suspicion of an imminent ‘terrorism’ offence that involves a material risk of serious physical injury or serious property damage.

- *The provisions enabling detention of persons in the special powers provisions are not limited solely to situations in which detention is necessary in order to prevent terrorism. The issuing authority and prescribed authority are empowered to grant a warrant for detention or continued detention not only in the case where the person may ‘alert a person involved in a terrorism offence that the offence is being investigated’³³ but is also permissible where the person ‘may not continue to appear, or may not appear again, before a prescribed authority’.³⁴*

PIAC submits that the operation of the special powers provisions should be limited purposively, that it, for the purpose of preventing imminent terrorist threats. PIAC follows the University of Melbourne Law School’s recommendation to the Committee that the criteria for the exercise of

²⁸ *Crimes Act 1914* (Cth), sections 23CA(4)(a)-(b).

²⁹ *Crimes Act 1914* (Cth), section 23CA(4).

³⁰ *Crimes Act 1914* (Cth), section 23CA(8).

³¹ *Crimes Act 1914* (Cth), section 23DA.

³² PIAC refers to the ‘Commonwealth’ here because it is PIAC’s firm position that it should be an agency other than ASIO who exercises these powers: see below, section 7.

³³ ASIO Act, section 34C(3)(c)(i).

³⁴ ASIO Act, section 34C(3)(c)(ii).

the powers, in addition to present criteria, should include the requirement of reasonable suspicion of an imminent terrorism offence involving material risk of serious physical injury or serious property damage.

- *It authorises keeping a person from contacting any other person whilst in custody or detention.³⁵ This ban on communication extends to contacting an approved lawyer.³⁶*

PIAC submits that all persons subject to a special powers warrant should have the right to a lawyer as a matter of right. PIAC makes further comment on this matter below at section 12.

- *The detention is sought not by the usual law enforcement officials, the police, (who have existing protocols and existing powers) but by a secret intelligence agency (ASIO). Whilst collection of information is a legitimate activity for law enforcement agencies, the detention of persons who are not suspected of having committed (or being likely to be commit) terrorism offences, but who may have information related to anti-terrorist investigations is excessive, and goes beyond any standard of what is reasonably proportionate and necessary.*

PIAC submits that ASIO is an inappropriate body in which to vest the special powers under the Act. PIAC makes detailed submissions below at section 7.

Recommendation

PIAC recommends that the Committee recommend the amendment of sections 34C and 34D of the Act such that only persons who are suspected of the commission of terrorist offences as defined in the *Criminal Code Act 1995* (Cth) that require the active knowledge of the suspect of the nature of the activities, rather than recklessness or deemed knowledge, may be the subject of a questioning or detention warrant.

Recommendation

PIAC recommends that the Committee adjust the period of time in which people subject to special powers warrants may be questioned or detained. Questioning and detention periods should mirror time periods under the *Crimes Act 1914* (Cth) for terrorist offences, renewable upon application to a Federal judicial officer.

Potential for Scheme to Lead to Discrimination and Vilification

Although the legislation is, on its face, non-discriminatory, PIAC has concerns that it may lead to the targeting of persons of particular ethnic, religious and cultural backgrounds, such as Arab or Muslim Australians, such as to constitute impermissible discrimination under the ICCPR, the CERD and the *Racial Discrimination Act 1975* (Cth). In particular, PIAC notes that each of the terrorist organisations proscribed at Australian law is Islamic. Given the connection between terrorism offences and proscribed terrorist organisations,³⁷ PIAC is confident that this Act impacts disproportionately on Muslim and Arab Australians.

³⁵ ASIO Act, section 34F(8).

³⁶ ASIO Act, section 34TA vitiates any right to a lawyer. Where a prescribed authority is satisfied that permitting a person the subject of warrant to contact their lawyer would alert a person involved in a terrorism offence that the offence is being investigated, or cause a record or 'thing' to be destroyed, that the person would otherwise have been required to produce, they may be denied access to a lawyer.

³⁷ For instance, amongst the terrorist offences created in the *Criminal Code Act 1995* (Cth), it is an offence to be a member of a proscribed terrorist organisation; to recruit, raise funds or organise on behalf of such an organisation; to train with a terrorist organisation; support a terrorist organisation;

The secrecy provisions of the Act mean that it is difficult to show that the effect of the Act is discriminatory or disproportionately felt by a particular section of the Australian community.

PIAC refers to the Committee to its comments below at section 9 for additional recommendations about the secrecy aspects of the special powers provisions.

Recommendation

PIAC recommends that the Committee require the Commonwealth Government provide non-conditional funding for community education initiatives to give accurate information to all Australians, and particularly Muslim and Arab Australians in appropriate languages, eg, Urdu and Arabic, about the scope of the Government's powers in relation to counter-terrorism, including education about each person's rights in relation to the special powers provisions. PIAC commends the recent publication by the UTS Community Legal Centre, *Be Informed: ASIO and Anti-Terrorism Laws* as an example of the type of community education the Commonwealth should fund.

Recommendation

PIAC recommends that a dedicated Race Discrimination Commissioner be appointed immediately to the Human Rights and Equal Opportunity Commission, and that the Race Discrimination Commissioner be legislatively recognised as a person to whom complaints may be made in relation to the operation of the special powers provisions of the ASIO Act. The Race Discrimination Commissioner should have appropriate investigative, recommendatory and compensatory powers.

5.2 Rule of law

The rule of law denotes a government that both rules by law and is itself, under law. Relevantly, Dicey formulated the rule of law in a narrow sense to include the following principles:

- individuals should not be subject to the arbitrary and wide discretionary powers of those in Government. No one can be punished or lawfully interfered with by Government authorities except for breaches of law. All government actions must be authorised by law;
- all subject are equal before the law and no one, including the Government, is above the law.³⁸

In a recent United States Supreme Court case in which a terrorist suspect challenged his treatment at the hands of Executive agencies, Justice Stevens eloquently described the role of rule of law principles when he wrote:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unrestrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber ... for if this nation is to remain true to its ideals symbolised by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.³⁹

direct its activities or to associate with members of such an organisation: see *Criminal Code Act 1995* (Cth), sections 102.2-102.8.

³⁸ *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1885).

³⁹ *Padilla v Rumsfeld* 124 SCt 2711 at 2735 (2004), per Stevens J.

In PIAC's submission, the issues of the 'character of the constraints imposed on the Executive by the rule of law', in conjunction with the human rights implications of the special powers provisions, are precisely those that the Committee should articulate and put before the Parliament.

The special powers provisions contrast sharply with the anti-terrorism legislation introduced in comparable jurisdictions such as the United Kingdom, New Zealand and Canada in a key way. Australia is the only jurisdiction, amongst these States, to permit the compulsory questioning and detention of persons who are not suspected of terrorist offences. This vitiates the fundamental tenets of our common law system, by which the deprivation of individuals' liberty at the hands of the State is only justified where an individual has committed or is suspected of committing a criminal offence or is in need of protective custody by the State (foster care, insanity, etc). Dr Greg Carne of the Faculty of Law, University of Tasmania, argues in this regard as follows:

[T]he [ASIO] legislation overturns the significant democratic principle of the right to go freely about one's business in society, save in circumstances of suspected wrongdoing on reasonable grounds. This aspect of the legislation highlights emerging issues of a broader institutional nature in Australia: the qualitative shift towards a more executive-determined and executive-contingent conception of democracy.⁴⁰

PIAC endorses the view of Jenny Hocking when she writes:

[A] democratic state, underpinned by fundamental principles of the rule of law, responsible government and freedom of political association, cannot compromise those principles without at the same time compromising the democratic nature of the state itself. These three requirements are indispensable, the *sine qua non* of democratic states, and it is because of their non-negotiability that the preservation of rights and liberties through steadfast constitutionalism can never undermine security, but will constitute the very means of sustaining it. In this view, democracy 'is not limited by the rule of law but rather is defined by it'.⁴¹

Recommendation

PIAC recommends that the Committee approach this legislation with the understanding that Australian constitutionalism, rule of law and commitment to human rights are non-negotiable and must be protected, *especially* in any response to threats to national security.

Recommendation

PIAC recommends that the Committee approach the legislation with a commitment to providing the function of Parliamentary oversight to contain excessive powers in the Executive branch of government, consistent with the principles of the rule of law.

⁴⁰ Dr Greg Carne, 'Detaining Questions or Compromising Constitutionality?: The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth)' (2004) 27(2) *University of New South Wales Law Journal* 524, at 529.

⁴¹ Jenny Hocking, 'Protecting Democracy', at 336.

6. Separation of powers

6.1 Principles

The separation of powers between the Executive, Legislature and the Judiciary is central to Australian constitutional and legal system. The Constitution affirms the independence and exclusiveness of judicial power vested in Federal Courts.⁴² It vests enumerated legislative powers in the Legislature⁴³ and also describes the nature of Executive power.⁴⁴ This separation of powers itself operates as an important protection for human rights in that it represents a check against the arbitrary use of executive power.

It is worth dwelling on the words of Justice Dixon in the case of *Australian Community Party v Commonwealth* where His Honour made the following statement in relation to the limits to and potential dangers that inhere in Executive power and consequently, the importance of ensuring a separation of powers:

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.⁴⁵

PIAC does not make any submissions here as to the constitutionality of the special powers provisions. However, PIAC strongly endorses the submissions before the Committee of the University of Melbourne Law School and on a prior occasion of Professor George Williams of the Gilbert + Tobin Centre for Public Law and Dr Greg Carne of the University of Tasmania Law Faculty.⁴⁶

6.2 Judiciary

Dennis Richardson, Director-General of ASIO, recently commented to an AsiaLaw conference:

Perhaps those concerned that some terrorism laws go too far in the compromise of individual rights, should have more confidence in the capacity of our own democratic system, with its proper separation of powers, to ensure that any legislative excess, however unintended, can, and will, be corrected.⁴⁷

⁴² *Commonwealth of Australia Constitution Act 1900* (Cth), Chapter III. The High Court has struck down legislative schemes which purport to give judicial functions to non-judicial office holders: see *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

⁴³ Constitution, section 51.

⁴⁴ Constitution, section 61.

⁴⁵ (1951) 83 CLR 1 at 188.

⁴⁶ See submissions to the Committee's first inquiry into the Act: Greg Carne, *Submission No. 150* and *Submission No. 155*; George Williams, *Submission No. 148*.

⁴⁷ Dennis Richardson, Director-General's Address, LawAsia Conference 2005, 23 March 2005 (Gold Coast), p 9. Available at <<http://www.asio.gov.au/Media/comp.htm>>.

PIAC echoes Mr Richardson's emphasis on the separation of powers as a democratic safeguard against the abuse of power by the Executive or the Legislature. The role of Australia's Chapter III courts is critical in this regard. Chief Justice Murray Gleeson recently reminded the Commonwealth Government of the importance of Chapter III judicial officers when he said:

The Parliament cannot abrogate or curtail the Court's constitutional function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution.⁴⁸

PIAC notes that, as currently drafted, the special powers provisions do not contain provisions for judicial review of the issue of warrants for compulsory questioning or detention and questioning.⁴⁹

Whilst judicial officers may participate in the process of issuing warrants as 'issuing authorities'⁵⁰, they do so in their personal capacity, rather than as a judicial officer, exercising judicial power. It is therefore a nonsense to say that there is independent judicial oversight of the process of issuing warrants in the Act as currently drafted.

This concerns PIAC greatly. Consistent with its prior submission to the Senate References Committee, PIAC illustrates why the Committee should continue to focus its attention on the special powers provisions in this regard.⁵¹

In particular, PIAC is concerned about the following provisions of the Act:

- Section 34E(3) requires a prescribed authority to tell a person subject to a warrant at least once every 24 hour period that they may approach a federal court to seek a remedy 'relating to the warrant or the treatment of the person in connection with the warrant'.

PIAC's concerns with this section are as follows. The ability to approach a federal court is limited to constitutional writs. This means little in the absence of a guaranteed right to independent legal representation. No ordinary person without training in the law understands the type of relief that may be available to them.

PIAC rejects this minimalist approach for judicial oversight of the special powers which are by the Government's own admission 'extraordinary'.

PIAC notes that the ICCPR, Article 9(4) provides a right to anyone deprived of their liberty or who is in detention to seek a writ of *habeas corpus* – that is, an order as to the lawfulness of the person's detention or deprivation of liberty and whether or not they should be released. Article 9(5) goes on to provide an enforceable right to compensation where a person has been unlawfully detained or denied their liberty. This is not an appropriate manner for anyone but the Courts to be deciding.

⁴⁸ *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2 (4 February 2003), per Gleeson CJ at ¶ 6.

⁴⁹ ASIO Act, sections 34C and 34D.

⁵⁰ ASIO Act, sections 34AB and 34D.

⁵¹ PIAC acknowledges the recommendations made by this Committee in relation to the need to ensure a separation of powers in its report on this Act when it was not yet passed: see *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (May 2002), Recommendations 1 & 4.

Recommendation

PIAC recommends that the Act be amended to confer on persons subject to a warrant a clear right of judicial review of the decision to issue a warrant and of any conduct connected to the warrant. This should include the legislative requirement for information to be provided to the person of these rights, assistance in accessing the Court pursuant to those rights and simplified procedures in exercising the right, particularly where no legal representation is available. Common law presumptions in favour of a person's liberty should not be legislatively excluded.

- The Inspector-General of Intelligence and Security is entrusted with significant powers under the Act. He or she may receive complaints by a person subject to a warrant;⁵² may issue concerns with the effect of suspending questioning of a person;⁵³ and may make inquiries and recommendations to the Director-General of ASIO.⁵⁴ These are not directly enforceable by the Inspector-General of Intelligence and Security.⁵⁵

The Inspector-General of Intelligence and Security is not however, capable of adjudicating criminal matters, ordering personal compensation or compelling ASIO to release a person. Neither is she or he empowered to hear complaints on any subject, only those that

Further, the Inspector-General of Intelligence and Security is likely to be a person drawn from intelligence circles, and therefore, as a member of an Executive agency and a person culturally connected to intelligence activities, cannot properly be called independent.

Recommendation

PIAC recommends that the Act be amended to provide to any person the subject of a special powers warrant the ability to seek judicial review of the issue and exercise of the warrant, at any stage in the process.

Recommendation

PIAC recommends that the right to approach the Inspector-General of Intelligence and Security or the Ombudsman with a complaint be supplemented with a right to approach a Federal Court. Any such right to approach a Federal Court should not be conditional upon the Inspector-General of Intelligence and Security or the Ombudsman having been consulted first.

6.3 Legislature

This Committee is mechanism by which the Federal Parliament oversees the operation of the special powers provisions, and the work of ASIO, the Australian Security Intelligence Service and the Defence Signals Directorate. PIAC is concerned that even this Committee does not have access, as a matter of right, to all the information it needs to provide effective supervision of the otherwise secret activities of ASIO under the special powers provisions.

⁵² ASIO Act, section 34NC.

⁵³ ASIO Act, section 34HA.

⁵⁴ *Inspector General of Intelligence and Security Act 1986* (Cth), section 8.

⁵⁵ *Inspector General of Intelligence and Security Act 1986* (Cth), section 24. The Inspector General for Intelligence and Security may raise unimplemented recommendations with the Minister and the Prime Minister but cannot of his or own accord, enforce the recommendations.

This Committee itself cannot require ASIO to produce material that the Committee judges that it should see. ASIO determines what can be released to the Committee and what it will withhold from independent scrutiny. PIAC notes the terms of a facsimile from the Attorney-General to Ms Agnes Chong, Co-Convenor of the Australian Muslim Civil Rights Advocacy Network dated 18 March 2005 in which the Attorney-General states:

I note that the Committee will be *able to request classified information* in the course of its review. (emphasis added)

There is a vast difference in the quality of independent oversight this Committee can provide where it can access information, whether classified or not as a matter of right, compared to the current situation where it is fed information by ASIO, in its sole discretion.

Recommendation

PIAC recommends that this Committee have the capacity to require ASIO to make full disclosure of any matter on which the Committee requires information in order to oversee ASIO's activities under the Act. The Committee would not be required to make full public disclosure of that material where the material is classified.

7. Nature of ASIO - mandate & powers

ASIO is an intelligence gathering and evaluation service. It is not entrusted with *enforcement* of security,⁵⁶ yet these powers are dangerously close to a security policing role.

ASIO is responsible for protecting Australia's security, including from espionage, sabotage, politically motivated violence, the promotion of communal violence, attacks on Australia's defence system and acts of foreign interference.⁵⁷

The use of Australian Federal Police officers to do the physical work of apprehending and detaining persons subject to a warrant is a neat attempt to acknowledge ASIO's limited functions under its Act, but it is not sufficient. The AFP acts as a proxy for ASIO in those situations. It acts at ASIO's direction and according to a warrant obtained by ASIO under its Act, using the special powers provisions.

The special powers provisions, in effect, transform ASIO from an intelligence gathering organisation to a security police force, but with none of the protections that the Australian citizenry expect from its police officers such as a public complaints system; the right to sue at law for compensation; and public visibility, transparency and accountability.

Without such safeguards, ASIO must face inevitable criticism that it is merely the long arm of the Executive branch.⁵⁸

⁵⁶ ASIO Act, section 17(2).

⁵⁷ ASIO Act, sections 17(1) and 4 (definitions of 'security', 'politically motivated violence', 'promotion of communal violence' and 'acts of foreign interference').

⁵⁸ Dr Frank Cain gives a useful historical account of ASIO, including the dangers of entrusting to ASIO the flow of information to the Parliament, in his article, 'Australian Intelligence Organisations and the Law: A Brief History' (2004) 27(2) *University of New South Wales Law Journal* 296, esp. 312-315.

Consistent with its prior submissions to the Senate References Committee, PIAC is concerned to ensure that in a democratic society such as Australia, even under severe threat, no person should be denied their freedom unless they are charged and brought before an independent court at the earliest possible time. Police agencies, not intelligence agencies, are the appropriate authority to investigate crimes, and to make arrests.

National intelligence organisations like ASIO, or any person with information about possible terrorist activity, are able to inform police agencies of their concern. Police have the right to question any person about any crime, but not to detain people unless they are charged, and brought before a court as soon as possible. This should also apply to crimes relating to terrorism.

ASIO and State, Territory and Federal Police already have ready access to warrants to tap telephones, intercept mail and intercept internet activity, in the search for information concerning possible terrorist threats. ASIO has access to warrants to enter premises and search them. The fact that the special powers provisions were used only three times in the last reporting period illustrate that existing intelligence gathering tools are sufficient.

PIAC endorses the argument put before this Committee by the University of Melbourne Law School and in particular, Mr Joo-Cheong Tham who has commented elsewhere that:

... ASIO is *always* to some extent outside the rule of law. Key to understanding this inevitability is the secrecy that cloaks ASIO's operations.⁵⁹

Recommendation

PIAC recommends that the special powers provisions be removed from ASIO. They are more appropriately vested in a more public and accountable organisation such as the Australian Federal Police, if they are to be retained.

8. The shadow of the Act

As already highlighted, it is impossible for PIAC to provide to the Committee precise information about the because of community reluctance to share their experiences caused by confusion over what can be disclosed. This is an example of the extra-legal effects of the Act.

However, PIAC understands from anecdotal evidence shared with PIAC that ASIO officers are taking a line that amounts to a *de facto* if not *de jure* use of the Act. That is, ASIO officers are saying, 'we can do this the hard way, or the easy way'. The implicit threat is that if the person does not voluntarily cooperate, they will be compelled to do so by use of the warrant provisions in Part 3 of Division III of the Act.

Further, by failing to limit the application of compulsory questioning warrants to persons suspected of a terrorism offence, it affects the extent to which people in Australia can freely associate. The special powers provisions of the Act have a chilling effect. Merely knowing someone of interest to ASIO may entitle ASIO to seek to question you. For instance, in the United States, the American Civil Liberties Union has reported that fear of the PATRIOT Act has caused a 'dramatic decline in memberships and donations at mosques'.⁶⁰

⁵⁹ Joo-Cheong Tham, 'ASIO and the rule of law' (2002) 27(5) *Alternative Law Journal* 216, at 217.

⁶⁰ American Civil Liberties Union, Press Release, 'PATRIOT Act Fears Are Stifling Free Speech, ACLU Says in Challenge to Law', November 2 2003. Accessed at <<http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=14307&c=262>>.

PIAC opposes any legislative measure that creates fear, uncertainty, confusion and the potential for religious and ethnic profiling in Australian society, particularly where such measures are in the hands of a secret organisation such as ASIO.

Recommendation

PIAC recommends that the Act be amended to create a new offence by persons empowered to seek or execute warrants, such that threats made to persons to induce them to give information that would otherwise be gathered pursuant to a warrant be criminalised as impermissible intimidation and that a good faith requirement in seeking a warrant be required.

9. Disclosure & Public Reporting

Currently, section 94(1A) of the Act requires ASIO to report publicly on the use of the special powers provisions. This takes place in ASIO's Annual Report. The information recorded there is limited to the number of requests for warrants made; warrants issued for questioning or detention; and the number of hours of compulsory detention and questioning carried out under a warrant; and the number of times each prescribed authority had people appear for questioning before her or him under warrants issued in the reporting year.

PIAC calls on ASIO to be required to report more frequently than once a year in relation to its use of the special powers provisions. Given the extraordinary nature of the powers, public reporting on a quarterly basis is justified.

Section 34VAA prohibits further disclosure by ASIO or by any other person, including lawyers or journalists about the existence of a warrant or how it was executed. The secrecy provisions prohibit the following disclosures:

- while a warrant is in force, disclosure of the existence of the warrant and any fact relating to the content of the warrant or to the questioning or detention of a person under the warrant; and
- while a warrant is in force and during the period of two years after the expiry of the warrant, disclosure of any ASIO 'operational information' acquired as a direct or indirect result of the issue of a warrant, unless the disclosure is a permitted disclosure.⁶¹

This is a highly secretive regime that effectively creates a two-year gag on persons subject to a special powers warrant and any lawyer who assisted them in that process. As Mr Joo-Cheong Tham argues, the secrecy that surrounds ASIO prevents both disclosure of information relating to ASIO and further, prevents people obtaining information about ASIO.⁶² He goes on to argue that this secrecy means that

People affected by ASIO's operations cannot, in practical terms, enforce the law against ASIO...⁶³

The secrecy provisions can be understood insofar as ASIO is concerned: publicity is not good for business. ASIO's operational integrity could be damaged if it was subject to public scrutiny. That

⁶¹ 'Permitted disclosures' are defined at ASIO Act, section 34VAA(5).

⁶² Joo-Cheong Tham, 'ASIO and the rule of law', at 217.

⁶³ Joo-Cheong Tham, 'ASIO and the rule of law' at 217.

may be so, but it is another reason why ASIO is not the appropriate body in which to vest the special powers under the Act.

Even though the Act makes provision for detainees to make complaints to the Inspector General of Intelligence and Security and the Ombudsman, and to be able to access the Federal Court to seek constitutional writs, it is a matter of serious concern that the secrecy which surrounds ASIO operations is likely to impede the ability of individuals to seek redress for abuse of powers.

Recommendation

PIAC recommends that ASIO be required to report publicly at least once a quarter on the matters on which it currently reports annually.

Recommendation

PIAC recommends that section 34VAA be repealed as a matter of urgency.

Recommendation

PIAC recommends that if section 34VAA is not repealed, its duration in relation to the disclosure of the existence of a warrant and any operational information particular to the execution of that warrant be limited to a maximum of twenty eight days after the expiry of the warrant.

Recommendation

PIAC recommends that if section 34VAA is not repealed, the offences that depend on strict liability and 'recklessness' be amended to require actual knowledge and intent by the person liable for the offence.

Recommendation

PIAC recommends that if section 34VAA is not repealed, lawyers, journalists and Parliamentarians be exempt from any secrecy provisions to the extent necessary to make fair public comment on the effect of the special powers provisions.

10. Explicit Protection of Human Rights

Mr Dennis Richardson recently addressed a LawAsia Conference on the Gold Coast.⁶⁴ He lamented the 'reluctance of countries to introduce laws specifically targeting terrorism'. As part of his justifications or reassurances about the introduction of counter-terrorism laws, such as the Act, he commented:

Certainly, the European Court of Human Rights has been required to address some very difficult matters of proportion and balance arising from some of the more complex terrorism cases in the United Kingdom, Ireland and Spain.⁶⁵

PIAC acknowledges the valuable role played by an institution such as the European Court of Human Rights, but rejects Mr Richardson's justification resting in any such institution in an Australian context. With no Bill of Rights, and a notable absence of human rights protections in the

⁶⁴ Dennis Richardson, Director-General's Address, LawAsia Conference 2005, 23 March 2005 (Gold Coast). Available at <<http://www.asio.gov.au/Media/comp.htm>>.

⁶⁵ Dennis Richardson, Director-General's Address, LawAsia Conference 2005, 23 March 2005 (Gold Coast), p 9. Available at <<http://www.asio.gov.au/Media/comp.htm>>.

Act, coupled with a determined effort to limit judicial review to the minimum required under the Constitution, it is difficult to see how the argument holds in Australia. Rather, it highlights the lack of human rights protections or other institutional means of ensuring that ‘proportion and balance’ can be achieved.

The only explicitly protective provision in the relevant part of the Act is section 34J(2) that relevantly provides:

The person must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, by anyone exercising authority under the warrant or implementing or enforcing the direction.

The Act provides criminal sanction for officers who breach section 34J(2),⁶⁶ however there is no redress available for a victim of any such abuse such as compensation. The remedy accrues to the State rather than the victim.

In PIAC’s view, the absence of any explicit or enforceable human rights protections in the special powers provisions lies in the absence of a Bill of Rights in Australia. The celebrated American jurist, Justice Robert Jackson held as follows, in the height of World War II when the United States was facing grave threats to its national security:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.⁶⁷

In light of the potential for grave abuses of human rights standards in the exercise of the special powers under the Act, PIAC calls on the Committee to recommend that further protections of individuals subject to warrants be made explicit in the Act. These protections should be recognised in the Act as human rights obligations of Australia and at a minimum should include the following rights reflected in the ICCPR:

- right to be free from torture and cruel, inhuman or degrading treatment or punishment and to compensation and rehabilitation for any such treatment;
- right to be free from arbitrary detention or arbitrary deprivation of liberty;
- right to challenge one’s detention or deprivation of liberty in a Court of law;
- right to compensation for any improper detention or deprivation of liberty;
- right to be treated with humanity and respect for the inherent dignity of the human person;
- right to legal representation;
- right to communicate with family members subject to lawful and proportionate constraints;
- right against self-incrimination;
- right to an interpreter; and
- right to be treated equally before the law and to the equal protection of the law, without discrimination on the grounds of race, sex, language, religion, politics or other opinion, national or social origin, birth or other status.

The Act should ensure that these rights are not merely guidelines but that they are enforceable rights.

⁶⁶ ASIO Act, section 34NB(4).

⁶⁷ *West Virginia State Board of Education v Barnette*, 319 US 624, 638 (1943).

Recommendation

PIAC recommends that the human rights enumerated in section 10 be explicitly protected in the Act as human rights obligations and that breaches of those rights be actionable in a Federal court.

11. Remedies

There are a number of concerns PIAC wishes to raise in connection with the lack of remedies under the special powers provisions of the Act.

As discussed above in section 10, section 34J(2) of the Act provides a limited protection from cruel, inhuman or degrading treatment.

Whilst a person commits an offence for breaching section 34J(2), there is no clear mechanism for enforcing the obligation. There is no explicit cause of action and right to damages for breach of the duty that accrues to the person who has suffered the abuse or maltreatment.⁶⁸ In contrast to the extensive criminal provisions provided for a person's failure to co-operate in the questioning, it is remarkable that no requirement for accountability to the victim for what would amount to serious abuse of powers has been established. PIAC notes that section 34NB(4) provides that it is an offence to engage in conduct that contravenes section 34J(2) provided the 'person knows of the contravention'. This is an extreme double standard; officers responsible for policing 'terrorism' must have actual knowledge that their conduct is illegal, whilst persons the subject of 'counter-terrorism' regulation are required to have no such knowledge before they trip the wires of the extensive offences under the *Criminal Code Act 1995* (Cth).⁶⁹

PIAC notes that the CAT, at Article 14, requires that any victim of torture be provided with an 'enforceable right' to 'fair and adequate compensation', including the means for as full rehabilitation as possible. PIAC contends that at customary international law, the prohibition against cruel, inhuman or degrading treatment accompanies the prohibition against torture and that the dual prohibition as a non-derogable or *jus cogens* norm. PIAC therefore submits that it is strongly arguable that the right to seek compensation applies equally to victims of cruel, inhuman or degrading treatment or punishment.

Recommendation

PIAC recommends that the Act be amended to confer on a person the subject of a warrant a personal cause of action (including the right to seek compensation) for breaches of the Act by officers charged with implementing a warrant, including but not limited to any improper deprivation of liberty, detention and improper treatment in connection with the execution of a warrant.

⁶⁸ PIAC acknowledges section 34NB(4) of the Act but notes that this does not provide a remedy to the victim but rather penalises the officer responsible for the abuse.

⁶⁹ For example, it is sufficient to commit the offence of directing a terrorist organisation that a person is 'reckless' as to whether the organisation was in fact a terrorist organisation, with a penalty of 15 years' imprisonment: section 103.2(2).

12. Legal Representation & Protection of Privilege

The Act frames lawyers as passive actors in the processes it creates and explicitly removes any right to legal representation for a person subject to a warrant. The Act provides that a person may be questioned in the absence of a lawyer of the person's choice;⁷⁰ that a person may be denied contact with a lawyer in certain circumstances;⁷¹ and a lawyer may be removed from questioning at the discretion of a prescribed authority for being 'unduly disruptive'.⁷² In the framing of a warrant for questioning or detention and in its exercise, there is no requirement that a lawyer be amongst those persons whom a person is able to contact.⁷³ In other words, there is no guaranteed right to access legal representation.

Further, there is no right to unmonitored, private conversations.⁷⁴ This strikes at the heart of the basis of the relationship between client and lawyer, on which legal privilege is predicated, and by which a lawyer may give frank and fearless advice to their client based on the full information. PIAC notes that this is inconsistent with section 34WA that provides that 'this Division does not affect the law relating to legal professional privilege'. No such privilege arises if the communications between the lawyer and the client are not confidential in the first place.

Lawyers may not advocate to protect their clients or to serve their clients' best interests.⁷⁵ This makes the inclusion of lawyers an empty gesture.

Recommendation

PIAC recommends that persons subject to warrants for questioning and warrants for detention have access to legal representation as a matter of right. Such representation should include private consultations between lawyer and client, and further, permit lawyers to protect their client's best interests and advocate on their client's behalf. Lawyers should not be removable at the discretion of the prescribed authority.

⁷⁰ ASIO Act, section 34TB(1).

⁷¹ ASIO Act, section 34TA. Whilst a person may contact another lawyer, there is no process by which a lawyer must be secured before questioning can begin.

⁷² ASIO Act, section 34U(5). PIAC notes that an alternative must be sought in this case. In the case of children, their parent or guardian can also be removed in similar circumstances, with provision for the appointment of an alternative representative: ASIO Act, section 34V(2) – (3).

⁷³ ASIO Act, sections 34D(2)(b)(ii) and 34D(4), 34F(1)(d).

⁷⁴ ASIO Act, section 34U(2).

⁷⁵ ASIO Act, section 34U(4).