Submission No 57

Inquiry into potential reforms of National Security Legislation

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Inquiry into potential reforms of National Security Legislation: Submission to the Parliamentary Joint Committee on Intelligence and Security

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Trade and Investment, Regional Infrastructure and Services NSW for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1. General remarks

PIAC welcomes the opportunity to make this submission to the Committee's Inquiry into potential reforms of national security legislation (the Inquiry).

In general, PIAC endorses the submission by the Gilbert + Tobin Centre of Public Law to this Inquiry. In particular, PIAC endorses the Centre's comments with respect to: the timing of the Inquiry; the lack of detail provided in the Discussion Paper; the importance of the new human rights framework; and the need for a strong accountability framework.

The timing of the Inquiry, and the extended deadline, are commendable because they help foster a more open, considered and public consultation process. Such an approach is far preferable to the consideration of national security law reform under the shadow of an apparent terrorism crisis, which can stifle properly considered debate.

However, PIAC believes there is insufficient detail in the Discussion Paper to allow stakeholders to have a real understanding of some of the reforms currently under consideration. In the absence of such an understanding, it is difficult for stakeholders outside government to undertake a thorough analysis of the likely impact of these reforms. In this context, PIAC supports the Gilbert + Tobin Centre of Public Law's statement that "[c]onsideration of the various proposals by the Committee is not a substitute for further review by the Parliament, relevant parliamentary committees and the public of more detailed legislative proposals as they arise."[1] Therefore, PIAC anticipates that this review will provide impetus for a further round of consultation in respect of any concrete reform proposals arising from the Discussion Paper.

Legislation in the national security area clearly has the capacity to impact significantly on human rights. Especially given the advent of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), it is critical for the executive arm of government to engage openly with the compatibility (or otherwise) of the proposed new legislation. In due course, any proposed Bill would need to be accompanied by a statement of compatibility, but prior to that process being undertaken, PIAC urges the executive to provide a human rights impact analysis of any proposed new legislation. It might also be appropriate for the new Parliamentary Joint Committee on Human Rights to undertake a broad review of proposed and existing national security and terrorism legislation under s 7(b) or s 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

PIAC has consistently argued that national security legislation suffers from a lack of transparency and fails to establish adequate mechanisms of accountability, oversight and review. Many of the specific comments that follow in this submission relate to the need for a strong accountability framework for intelligence and law enforcement agencies. As it stands, the Discussion Paper does not provide any clear, persuasive rationale for the impingement that such reforms would have on fundamental human rights, such as the right to privacy. There is also scant detail on what a revised accountability framework would look like.

[1] Gilbert + Tobin Centre of Public Law, *Inquiry into Potential Reforms of National Security Legislation* (2012), 2.

2. PIAC's work on national security legislation and the present Inquiry

2.1 Lawful access to telecommunications

Paragraphs 1 and 14 of the proposals accompanying this Inquiry's terms of reference deal with the issue of telecommunications interception as authorised by the *Telecommunications (Interception and Access) Act 1979* (TIA). The Discussion Paper proposes that consideration be given to expanding the basis of interception activities by law enforcement and security agencies through an examination of:

- the TIA's privacy objective;
- proportionality tests for issuing of warrants;
- mandatory record-keeping standards; and
- oversight arrangements.

Further proposals in paragraphs 2 and 3 seek to standardise warrant tests and thresholds, reduce the number of agencies eligible to access communications information, and simplify provisions that relate to information sharing within and between agencies.

2.1.1 Interception activities

In PIAC's *Protecting Human Rights in Australia* Community Education Kit, PIAC stated that there should be stronger external monitoring to ensure interception is used in moderation and not abused.[2] This opinion is based on the fact that in 2001, 20 times more telephone calls were intercepted per capita in Australia than in the United States.[3] This does not include telephone interceptions made by ASIO. While PIAC understands that telecommunications interceptions and other surveillance techniques are important in fighting crime, they involve serious invasions of privacy.[4]

2.1.2 Information sharing

PIAC is wary of the Australian Federal Police (AFP) accreting new powers that would transform it into an 'intelligence agency', given its primary role is the investigation of offences and law enforcement. While little detail has been provided on what 'information sharing' would entail, there are real risks in ASIO taking on law-enforcement powers, or the AFP taking on protected intelligence and surveillance functions. In its *Submission to the Senate Legal and Constitutional Legislation Committee on the Anti-Terrorism Bill (No 2) 2005 (Cth)* in 2005, PIAC recommended that ASIO and AFP functions be kept distinct. That means not vesting one body with both law enforcement powers, and intelligence and surveillance functions.

Intelligence and surveillance functions can serve legitimate, and indeed valuable, ends – such as protecting the community against terrorist attack. However, it ought always to be remembered that such functions necessarily impinge directly on rights such as privacy, and indirectly to the extent that they inhibit freedom of association and of expression. For this reason, it is a basic principle of international human rights law that laws vesting government agencies with such

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2 Public Interest Advocacy Centre, Protecting Human Rights in Australia: a community education kit (2004), Fact Sheet 3.

3 Attorney General's Department, Annual Report on the Telecommunications (Interception) Act 2000/01; Administrative Office of the United States Courts, Annual Wiretap Report 2001 (2001).

4 Daryl Melham MP, Shadow Minister for Justice and Customs, More Telephone Taps in Australia than the United States (press release), 15 September 2002.

powers should intrude to the minimum extent necessary to achieve a legitimate, lawful end.

The covert character of ASIO's intelligence functions means that these functions are not subject to the checks that usually apply to the functions exercised by other public institutions. Having (or being seen to have) both intelligence gathering and coercive powers vested in one body weakens the institutional bulwarks that protect against corruption and abuses of power. Consequently, there would need to be a clear, public justification for such reform.

2.2 Operational capacity of Australian intelligence community agencies

Paragraph 5(b) of the proposals accompanying this Inquiry's terms of reference proposes streamlining the warrant provision process under the *Australian Security Intelligence Organisation Act 1979* by enabling warrants to be varied by the Attorney-General, simplifying the renewal of the warrants process, and extending the duration of search warrants from 90 days to 6 months.

Paragraph 11(e) proposes establishing classes of personnel able to execute warrants, as distinct from specific named persons as required under the *Australian Security Intelligence Organisation Act 1979*. This is intended to be implemented by authorising officers at a certain 'level' to execute a warrant as opposed to a specific list of named persons.

Paragraph 17 canvasses proposals to expand ASIO's warrant provisions under the *Australian Security Intelligence Organisation Act 1979*. The Discussion Paper proposes that consideration be given to:

- authorising the use of third party computers and communications to execute a computer access warrant;
- authorising access to third party premises to execute a warrant under the incidental power within the search warrant provision;
- clarifying that reasonable force may be used at any time during the execution of a warrant, not just on entry; and
- introducing an evidentiary certificate regime.

2.2.1 Duration of search warrants

As pointed out in the Gilbert + Tobin Centre for Public Law's submission, search warrants operate for a maximum of only 90 days on the basis that they are far more intrusive than other ASIO warrants which may operate for a maximum of six months.[5] PIAC agrees that reconsideration of the necessity of a search warrant every 90 days does not impose on the executive government "a disproportionate administrative burden given the significant inroads that searches make into the individual's right to privacy".[6]

In its *Submission to the Senate Legal and Constitutional Legislation Committee on the Anti-Terrorism Bill (No 2) 2005 (Cth)* in 2005, PIAC expressed similar concerns regarding the proposal to extend the time permitted for execution of a search warrant by ASIO from 28 days to 90 days. PIAC reiterates its concern expressed at that time that the government has not provided a rational justification for such an extension, noting that limited time for the operation of warrants is an important safeguard against abuse of the warrant power and protects against a warrant being

5 Gilbert + Tobin Centre of Public Law, *Inquiry into Potential Reforms of National Security Legislation* (2012), 12.
6 Ibid.

used as the basis of a fishing expedition where a lack of clear and relevant evidence has been obtained through targeted enquiries.

PIAC continues to believe that a more appropriate approach is to maintain reasonable time limits throughout, thereby requiring ASIO to seek a further warrant based on its further information-gathering activities. None of the relevant provisions is limited in operation to ASIO activities specific to a terrorism threat. Rather, the power extends generally and so could be applied to any ASIO investigation.

PIAC urges the Committee to reconsider all of the provisions that have extended the time for warrants, and that they either be repealed or limited in operation to ASIO investigations specifically relating to suspected terrorism activities.

2.2.2 Identity of persons able to execute warrants

PIAC's previous comments on the identity of persons able to execute warrants only relate to law enforcement officers. In its 2005 *Submission to the NSW Attorney General on Terrorism (Police Powers) Act 2002* (NSW), PIAC recommended that the Act should be strictly limited in its operation to identifiable police officers or other duly authorised law enforcement officers whose actions remain accountable and whose conduct can, at the very least, be referred to the Police Integrity Commission.

PIAC believes the same principles of accountability should apply to ASIO officers. There is a risk that warrants approving a designated 'level' of officer to carry out the warrant, while simplifying warrant execution, could promote a culture of reduced personal accountability among ASIO officers. While more detail is required to understand the impact of the proposal, PIAC is concerned this measure might eliminate opportunities to identify and subsequently rectify misconduct by a given ASIO officer.

2.2.3 Incursions on third party property

PIAC and other organisations (the International Commission of Jurists, Combined Community Legal Centres Group NSW, Australian Lawyers for Human Rights, Sydney Centre for International Law and the NSW Council for Civil Liberties) raised concerns about incursions on third party property in an open letter to the NSW Government in March 2009 in response to covert search warrant provisions under the *Terrorism (Police Powers) Act 2002 (NSW)*.

PIAC reiterates its view that legislation with this effect is unnecessary and poses a threat to the right to privacy. Extension of these powers to people not suspected of any crime who, for example, happen to live in property adjoining that of a suspect, is disproportionate to the purpose that covert search warrants are intended to achieve and is an unjustifiable incursion of the right to privacy.