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Security and counter terrorism legislation review

Submission to the Parliamentary Joint Committee on Intelligence and Security

7 July 2006

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1. Introduction

The Public Interest Advocacy Centre (PIAC) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the 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 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.

2. Terms of reference and scope of submission

Under paragraph 29(1)(ba) of the *Intelligence Services Act 2001*, the Parliamentary Joint Committee on Intelligence and Security (**the Committee**) is required to conduct a review of the operation, effectiveness and implications of the:

(a) *Security Legislation Amendment (Terrorism) Act 2002*;
(b) *Border Security Legislation Amendment Act 2002*;
(c) *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*; and
(d) *Suppression of the Financing of Terrorism Act 2002*.

2.1 Scope of this submission

In January 2006, PIAC prepared a submission to the Security Legislation Review Committee, under the chairmanship of The Hon Simone Sheller AO QC, (**Sheller Committee**) to assess and review the operation, effectiveness and implications of amendments made by the following Acts:

(a) *Security Legislation Amendment (Terrorism) Act 2002;*
(b) *Suppression of the Financing of Terrorism Act 2002,*
(c) *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002;*
(d) *Border Security Legislation Amendment Act 2002;* and
(e) *Telecommunications Interception Legislation Amendment Act 2002.*

Given the limited time available to respond to the Sheller Committee review, PIAC limited its submission to exclude consideration of the following Acts:

- *Suppression of the Financing of Terrorism Act 2002* (Cth);
- *Telecommunications Interception Legislation Amendment Act 2002* (Cth); and

- *Border Security Legislation Amendment Act 2002* (Cth).

PIAC's submission (dated January 2006) to the Sheller Committee is attached for the Committee's information.

In response to the Committee's latest request for submissions, PIAC will draw upon its original submission in respect of the relevant recommendations of the Sheller Committee.

3. Context and unchecked Executive power

3.1 Context of reviews of security legislation

PIAC has repeatedly expressed that reviews of new security legislation cannot be meaningfully undertaken without consideration of the broader context in which security laws operate. Without considering this context it is difficult, if not impossible, to understand the impact of legislative regimes not only in terms of legal rights and obligations but also in terms of social and community values and consequences.

The rationale for the significant range of 'security' legislation at both state and federal level has been that, as a result of the attacks in the USA, Bali and London we are now living in a 'new security environment'. PIAC has, in previous submissions, and continues to challenge this characterisation.[1] However, even if we are to accept that there is a 'new security environment' this does not, in PIAC's view, justify the measures that have been introduced. Any measure introduced by a democratically elected government should be consistent with the Rule of Law, the Australian *Constitution* and Australia's international human rights obligations.

The Australian Government, in its three branches—the executive, the parliament and the judiciary—need to be vigilant to ensure a proper separation in the exercise of powers and to ensure that there remains a clear distinction between the roles of law-enforcement agencies and those of intelligence-gathering agencies.

3.2 Executive-driven regulation not preferable

The growing power vested in the Federal Attorney-General and the executive more broadly needs to be carefully and continuously scrutinised to ensure that those elected to represent and to govern remain properly accountable to the Australian community, not simply once every three or four years through the ballot box, but through the retention of appropriate mechanisms for reviewing the exercise of executive power.

For example, PIAC has noted, with concern, the shift toward the executive limiting the discretion vested in the judiciary to control court proceedings. The *National Security Information Legislation Amendment Act 2005* (Cth) requires the courts to be closed at the behest of the Attorney-General where there is information likely to be disclosed in the proceedings that the Attorney-General determines to be 'likely to prejudice national security'. This exclusions means that the executive controls the flow of information in the legal system and the traditional discretion afforded to the third arm of government—the judiciary—to control proceedings has been limited.[2]

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1 Public Interest Advocacy Centre, *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* (2005) 7-9; Public Interest Advocacy Centre, *Submission to the Senate Legal and Constitutional Legislation Committee on the Anti-Terrorism Bill (No 2) 2005 (Cth)* (2005) 11.

2 Public Interest Advocacy Centre, *Submission to the Senate Legal and Constitutional Committee on the inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005 (Cth)* (2005), 5-8.

4. Recommendations of the Sheller Committee

4.1 Sheller Committee Recommendation 1: Further review

Recommendation 1

The Sheller Committee recommends that the Government establish a legislative-based timetable for continuing review of the security legislation by an independent body, such as the Security Legislation Review Committee, to take place within the next three years.

If an independent reviewer, as discussed in this report, has been appointed, the review to be commissioned by the Council of Australian Governments (COAG) in late 2010 could be expanded in its scope to include all of Part 5.3 of the Criminal Code. The Sheller Committee also draws attention to other models of review and urges the Government to consider the models discussed in the report.

PIAC expressed concern at the fact that there were significant pieces of legislation related to security that were **not** within the ambit of the Sheller Committee's review. These included the:

- *Anti-Terrorism Act 2004* (Cth), which increased maximum questioning and detention times by police for terrorist offences and created the offence of training with or providing training to a 'terrorist organisation';
- *Anti-Terrorism Act (No 2) 2004* (Cth), which created an offence for associating with terrorist organisations, and provides for the transfer of prisoners on security grounds, by order of the Attorney-General, between states and territories;
- *Anti-Terrorism Act (No 3) 2004* (Cth), which makes a number of changes to security legislation, including the creation of orders by which travel documents can be confiscated and persons prevented from leaving Australia;
- *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), which the Federal Attorney-General can close criminal and civil court rooms and require particular procedures to be followed where 'national security information' might be disclosed;
- *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth), added Division 3, Part III, which provides, among other things, for compulsory questioning and detention warrants.

PIAC also drew attention to the fact that there were numerous pieces of related legislation that had actual or potential to impact on the operation of security legislation, including:

- *Criminal Code Amendment (Anti-Hoax and other measures) Act 2002*;
- *Criminal Code Amendment (Espionage and related matters) Act 2002*;
- *Criminal Code Amendment (Offences against Australians) Act 2002*;
- *Criminal Code Amendment (Terrorist Organisations) Act 2002*;
- *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*;
- *Criminal Code Amendment (Terrorism) Act 2003*;
- *Telecommunications Interception and Other Legislation Amendment Act 2003*;
- *Criminal Code Amendment (Terrorist Organisations) Act 2004*; and
- *Criminal Code Amendment (Suicide-Related Material Offences) Act 2005*.

The fact that these numerous pieces of security-related legislation were excluded from the Sheller Committee review meant that an extremely limited review of security legislation in force in Australia was conducted. Although the Sheller Committee review did include consideration of the foundation stone for the range of terrorist offences by looking at the definition of 'terrorist act' and associated offences, it did not look at the entire criminal edifice that had been erected around that definition. PIAC submits the same point in respect of the Committee's current review.

PIAC noted that the Sheller Committee review was, in effect, a 'one-off' review of a statutory regime that has no sunset clause. While section 4(1) of the *Security Legislation Amendment (Terrorism) Act 2002* requires the establishment of the review committee, and provides a mechanism and procedure for public and independent review, such review is only required to take place 'as soon as practicable after the third

anniversary of the commencement of the amendments'.[3] Currently there is no provision to allow for continued monitoring and review of the impact of the *Security Legislation Amendment (Terrorism) Act 2002* and related legislation in the future. At the same time, more recent legislation does not consistently include any requirement for independent review.

By contrast, PIAC highlighted the model adopted by the United Kingdom, which provided for regular review and monitoring. The *Prevention of Terrorism Act 2005* (UK) contains a 12-month sunset clause[4], as well as comprehensive review mechanisms. Under this Act, the UK Secretary of State must appoint an independent reviewer to review the operation of the Act nine months after the Act comes into force and then every 12 months thereafter.[5]

Given the uncertainty that exists about the nature of terrorist threats in the future, and the potential of the legislation to undermine fundamental human rights and freedoms, PIAC reaffirms its view that all of the legislation that is the subject of this review, and any other security-related legislation be subject to both sunset provisions, and to at least annual independent, public review.

PIAC therefore welcomes and supports the recommendation that the Government establish a legislative-based timetable for continuing review of the security legislation by an independent body, to take place within the next three years.

4.2 Sheller Committee Recommendation 2: Community education

Recommendation 2

The Sheller Committee recommends that greater efforts be made by representatives of all Australian governments to explain the security legislation and communicate with the public, in particular the Muslim and Arab communities, and to understand and address the concerns and fears of members of those communities so that practical and immediate programs can be developed to allay them.

In its original submission PIAC detailed statements and evidence from various Muslim and Arab communities expressing grave fears about the impact security legislation would have on their communities. In evidence before the Senate Legal and Constitutional Legislation Committee Inquiry into the *Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* and Related Bills, Mr Bilial Cleland, Secretary of the Islamic Council of Victoria stated:

> We are concerned that the definition of terrorism will take on a religious, bigoted tone, and it could mean that the Muslim community here will become unjustified targets of interference and hostility from the state authorities.[6]

Organisations including the Supreme Islamic Council of NSW Inc, Liberty Victoria, Fitzroy legal Service, the Federation of Community Legal Centres (Vic) Inc, the Australian Arabic Council and the Ethnic Communities Council of Victoria have echoed similar sentiments.[7]

PIAC has consistently highlighted the fact that there is an emerging body of evidence suggesting that such concerns are justified. Many Muslim groups have pointed to increased surveillance of their communities, resulting in feelings of disempowerment and a growing reluctance to speak out on political issues.[8]

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3 *Security Legislation Amendment (Terrorism) Act 2002* (Cth), s 4(2)

4 *Prevention of Terrorism Act 2005* (UK), s 13

5 *Prevention of Terrorism Act 2005* (UK), s 14(2), (3).

6 Legal and Constitutional Legislation Committee, *Hansard*, (17 April 2002) 74. This evidence is quoted in the Committee's Report at 28. See also, Submission 138 (Islamic Council of Victoria), 4-6, which discusses the effect on Muslim communities in Australia, the United States of America and elsewhere.

7 *Report of the Senate Legal and Constitutional Committee Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills* (2002) 28.

8 Vicki Sentas, *Rattling the Cage* (2005) <http://spinach7.com/signature/sig-stories.php?id=489> at 5 January 2006.

According to consultations carried out by the Human Rights and Equal Opportunity Commission in 2003 with Arab and Muslim communities throughout Australia, there was a genuine perception that Australian Security Intelligence Organisation (ASIO) and Australian Federal Police officers had unfairly targeted the Muslim community in investigations.[9] Other respondents to the consultations expressed concern about their human rights being at risk of violation under the new anti-terror laws.[10] According to one respondent:

> The changes in the legislation, with the anti-terrorist laws and things like that has made me feel more vulnerable to the whims of the government and what they can potentially do to people, on their whim, not on any factual basis…[11]

PIAC believes that the impact of the discretionary elements within the laws is that, in practice, chiefly Muslim and Arab individuals and communities are racially and religiously profiled. PIAC notes, for example, that all of the organisations proscribed as terrorist organisations under the *Criminal Code* are Muslim groups. At the very least, this raises reasonable concern that the Government, in its 'War on Terror', is targeting Muslims in Australia.

The Australian experience parallels that in the United Kingdom, where evidence suggests that anti-terror laws have impacted disproportionately and adversely on people of colour and on particular racial groups.[12] However, the United Kingdom has responded to concerns about the racially discriminatory application of its anti-terror laws by requiring extensive record-keeping by police, by providing guidance manuals for police officers and by setting up mechanisms to review how laws are being exercised.[13] To date, similar measures have been not taken in Australia.

PIAC therefore welcomes the recommendation of the Sheller Committee and suggests that specific programs to address the issue include requirements for extensive record keeping by police and security personnel, development and delivery of specialised guidance manuals and the creation of an appropriate mechanism to monitor and review how the relevant laws are being exercised.

4.3 Recommendations 3-5: Reform of the process of proscription

Recommendation 3: Reform of the process of proscription

The Sheller Committee recommends that the process of proscription be reformed to meet the requirements of administrative law.

The process should be made more transparent and should provide organisations, and other persons affected, with notification, unless this is impracticable, that it is proposed to proscribe the organisation and with the right to be heard in opposition.

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9 Human Rights and Equal Opportunity Commission, *Isma- Listen! National Consultations on Eliminating Prejudice Against Arab and Muslim Australians* (2004) 67.

10 *Ibid*, 68

11 *Ibid*, 68

12 Home Office figures for England and Wales show that in 2003-2004 black people were 6.4 times more likely to be stopped and searched than white people and that Asian people were twice as likely to be stopped and searched than white people: Home Office, *Statistics on Race and the Criminal Justice System, 2004* (2005) <http://www.homeoffice.gov.uk/rds/index.htm>.

13 *Rise in Police Searches of Asians* (2004) BBC News, World Edition <http://news.bbc.co.uk/2/hi/uk_news/england/london/3859023.stm.> at 5 January 2006; *Stop and Search Action Team: Interim Guidance* (2004) Home Office, Department of Constitutional Affairs <http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/Guidance26July.pdf> at 5 January 2006.

Recommendation 4: Process of proscription

The Sheller Committee recommends that either:

i. the process of proscription continue by way of regulation made by the Governor-General on the advice of the Attorney-General.

In this case there should be built into that process a method for providing a person, or organisation affected, with notification, if it is practicable, that it is proposed to proscribe the organisation and with the right to be heard in opposition.

An advisory committee, established by statute, should be appointed to advise the Attorney-General on the case that has been submitted for proscription of an organisation. The committee would consist of people who are independent of the process, such as those with expertise or experience in security analysis, public affairs, public administration and legal practice.

The role of the committee should be publicized, and it should be open to the committee to consult publicly and to receive submissions from members of the public.

or

ii. the process of proscription become a judicial process on application by the Attorney-General to the Federal Court with media advertisement, service of the application on affected persons and a hearing in open court.

Recommendation 5: Publicity of proscription of a terrorist organisation

The Sheller Committee recommends that once an organisation has been proscribed, steps be taken to publicise that fact widely with a view, in part, to notifying any person connected to the organisation of their possible exposure to criminal prosecution.

While the Committee will not be reviewing the operation of section 102.1 of the *Criminal Code Act 1995,* which governs the listing of an organisation as a terrorist organisation, PIAC notes that it has, in previous submissions, raised serious concerns about the process and impact of proscription.[14]

These concerns continue and, as more organisations are proscribed, individuals in the Australian community face an increased risk of inadvertently becoming the subject of criminal investigation and prosecution.

PIAC maintains its original position questioning the necessity of the process of proscription. It does, however, welcome the recommendations of the Sheller Committee that the process of proscription becomes more transparent, involves the public and is subject to set criteria.

PIAC would appreciate the opportunity to comment further on the proscription process at the Committee's future review (scheduled for early 2007) under subsection 102.1A(2) of the *Criminal Code Act 1995*.

4.4 Recommendation 6-8: Definition of a 'terrorist act'

Recommendation 6: Definition of terrorist act – 'harm that is physical'

The Sheller Committee recommends that the words 'harm that is physical' be deleted from paragraphs 2(a) and 3(b)(i) in the definition of 'terrorist act' so that the definition of harm in the Dictionary to the Criminal Code applies, and the paragraphs extend to cover serious harm to a person's mental health.

Recommendation 7: Definition of a terrorist act – 'threat of action'

The Sheller Committee recommends that the reference to 'threat of action' and other references to 'threat' be removed from the definition of 'terrorist act' in section 100.1(1).

[14] Public Interest Advocacy Centre, *Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD: Review of 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 at terrorist organisations under section 102.1A of the Criminal Code* (2005); Public Interest Advocacy Centre, *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD: Submission on the relisting of Hizballah External Security Organisation, HAMAS' Izz al-Din al-Qassam Brigades, Lashkar-e-Tayyiba, and the Palestinian Islamic Jihad* (2005).

Recommendation 8: Offence of 'threat of action' or 'threat to commit a terrorist act'

The Sheller Committee recommends that an offence of 'threat of action' or 'threat to commit a terrorist act' be included in Division 101.

The description should extend to cover both the case where the action threatened in fact occurred and the case where it did not occur.

In its original submission, PIAC made submissions outlining its concerns that the scope of the definition of 'terrorist act' was excessively broad and ambiguous. These submissions observed that the use of the term 'serious' throughout the definition rendered it imprecise. The submissions also observed that the fact that the definition is so amorphous necessarily means that it would only be delineated in its practical application by the prosecutorial authorities, a scenario that is troubling.

PIAC also advocated for the Sheller Committee to consider the various laws that have been promulgated since 2002 that rely on the definition of 'terrorist act', for example, to permit action by the Executive against individuals. A particularly stark example was the *Anti-Terrorism Act (No 2)* (2005) (Cth), which include provisions to permit 'preventative' detention in circumstances relating to a 'terrorist act'.[15]

The definition of 'terrorist act' is a pivotal provision as the offences of 'committing a terrorist act'[16] and providing and receiving training[17], possessing things[18] and possessing documents[19] that are connected to a 'terrorist act', all rely on it. There is a further catch-all provision that makes it an offence to be doing 'any act in preparation or planning a terrorist act'.[20] PIAC submitted that these sections are broad and imprecisely defined and that the punishments extremely severe, including sentences of 15 years or life imprisonment.

PIAC notes that unfortunately the Sheller Committee did not agree that these provisions are broad or uncertain. The Sheller Committee relied on the fact that sections 101.2, 101.3 and 101.4 require the prosecution to show beyond reasonable doubt that the defendant either knew, or was reckless as to, the existence of the connection specified in the section. Further, the Sheller Committee notes that sections 101.5 and 101.6 specify the offence of engaging in a terrorist act or acting in preparation for or planning a terrorist act.

However, PIAC reaffirms its original position and highlights the fact that these sections create absolute liability. Reckless indifference to the connection between a defendant's actions and a terrorist act is merely a mitigating factor in relation to sections 101.2-5 and only results in the penalty being reduced.

These provisions give the executive, and the prosecutorial authorities in particular, extraordinarily wide powers. In addition, as the powers are so broad, the executive will have considerable discretion as to how and when the powers are used. The only safeguard preventing unnecessary and disproportionate charges is the executive itself. However, the executive's own decision-making process is not open and transparent. PIAC is concerned that reliance on the executive to do the right thing is not sufficient and that there is likely to be abuse of these provisions.

The temptation will be greatest if a terrorist attack occurs in Australia. As was evident after the attacks on targets in the United States of America in 2001, the temptation to arrest or detain large numbers of people

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15 See, for further comment, Public Interest Advocacy Centre, *Submission to the Senate Legal and Constitutional Legislation Committee on the Anti-Terrorism Bill (No 2) 2005 (Cth)* (2005) .

16 *Criminal Code 1995* (Cth) s 101.1.

17 *Criminal Code 1995* (Cth) s 101.2.

18 *Criminal Code 1995* (Cth) s 101.4.

19 *Criminal Code 1995* (Cth) s 101.5.

20 *Criminal Code 1995* (Cth) s 101.6.

who may have evidence that relates to a terrorist attack, let alone suspects, is difficult for the executive to resist.[21]

5. Rationale for the laws

PIAC has continuously maintained that the laws are essentially unnecessary. This issue has previously been addressed at length by the Law Council of Australia in its submission to the Senate Legal and Constitutional Legislation Committee (**Senate Committee**), *Consideration of Legislation Referred to the Committee Security Legislation Amendment (Terrorism) Bill 2002 [No 2]*, *Suppression of the Financing of Terrorism Bill 2002*, *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002*, *Border Security Legislation Amendment Bill 2002 and Telecommunications Interception Legislation Amendment Bill 2002*.

The Senate Committee quoted the Law Council's submission on this point at page 20 of its report of May 2002:

> Existing Commonwealth and State and Territory legislation covers offences of murder, conspiracy, aiding and abetting, kidnapping, conduct likely to involve serious risk of life, personal injury, damage to property, all involving heavy penalties, as well as dealing with proscribed organisations, intelligence, investigation and enforcement. At the Commonwealth level alone, legislation includes:
>
> - laws dealing with investigation and enforcement: *Australian Federal Police Act 1979*; *National Crime Authority Act 1984*; *Telecommunications Act 1977*; *Australian Security Intelligence Organisation Act 1979*; *Measures to Combat Serious and Organised Crime Act 2001*;
> - laws dealing with criminal procedure and international co-operation: *Extradition Act 1988*; *Mutual Assistance in Criminal Matters Act 1987*; *International Transfer of Prisoners Act 1977*;
> - laws creating specific offences: *Crimes Act 1914* (including treason, treachery, sabotage, sedition, unlawful drilling, espionage, official secrets, being in a prohibited place, harbouring spies, taking unlawful soundings, computer related acts, postal and telecommunications offences); *Air Navigation Act 1921*; *Public Order (Protection of Persons and Property) Act 1971*; *Crimes (Biological Weapons) Act 1976*; *Crimes (Foreign Incursions and Recruitment) Act 1978*; *Nuclear Non-Proliferation (Safeguards) Act 1984*; *Crimes (Hostages) Act 1989*; *Crimes (Aviation) Act 1991*; *Crimes (Ships and Fixed Platforms Act) Act 1992*; *Chemical Weapons (Prohibition) Act 1994*; *Weapons of Mass Destruction (prevention of Proliferation) Act 1994*;
> - laws dealing with the proscribing of organisation: *Crimes Act 1914* (Part 11A concerning unlawful associations); *Charter of the United Nations Act 1945*;
> - laws regulating the entry and deportation of aliens: *Migration Act 1958*;
> - laws concerning intelligence services agencies: *Intelligence Services Act 2001*; *Australian Security Intelligence Organisation Act 1979*; and
> - laws concerning suspect transactions: *Proceeds of Crime Act 1987*; *Financial Transaction Reports Act 1988; Charter of the United Nations Act 1945*.

PIAC reaffirms its endorsement of these views.

[21] Human Rights Watch, Witness to Abuse Human Rights Abuses under the Material Witness Law since September 11 (2005) 17(2G) *Human Rights Watch*.