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**Submission to the Senate Legal and Constitutional Committee
Inquiry into
the Anti-Terrorism Bill (No 2) 2004**

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Introduction

The Public Interest Advocacy Centre (“**PIAC**”) is an independent, non-profit legal and policy centre located in Sydney. Its charter is to undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just and democratic society.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, PIAC was the first, and remains the only, broadly-based public interest legal centre in Australia. Although located in New South Wales, the issues PIAC addresses are often of national interest or importance, or have consequences beyond State boundaries.

PIAC’s work goes beyond the interests and rights of individuals. The Centre's clients and constituencies are primarily those with least access to economic, social and legal resources and opportunities. PIAC provides its services free or at minimal cost.

Terms of Reference

PIAC welcomes the decision of the Senate to refer the Anti-Terrorism Bill (No 2) 2004 (“**the Bill**”) to the Senate Legal and Constitutional Legislation Committee (“**the Committee**”) and is grateful for the opportunity to make a submission to the Committee.

PIAC has previously made submissions and appeared before the Committee regarding the proposed amendments to the Australian Security Intelligence Organisation (“**ASIO**”) legislation in 2002 and the Anti-Terrorism Bill 2004.

This submission does not attempt to address all terms of reference, but addresses those areas of the Bill that most impact on human rights.

We have summarised our concerns below and would be happy to address the Committee if that would be useful to the Committee’s deliberations. The concerns focus on several areas in the Bill that have the potential to have an adverse impact on the human rights of people in Australia. PIAC believes that there are too many areas of significant concern and inadequate protections, and strongly urges the Committee to reject the Bill.

General Comments

Since 11 September 2001, the Government has introduced a raft of legislation in relation to national security and terrorism. Clearly, terrorist attacks are attacks on human rights. At the most basic level terrorism poses a threat to the right to life and to personal security. It is essential that the Government take the necessary precautions and steps to protect everyone within Australia from terrorist attacks.

However, the manner in which Australia responds to the threat of terrorism may also pose a threat to human rights and to the principles of democracy and the rule of law.

As Prime Minister Menzies stated, in introducing the *National Security Act 1939* (Cth), four days after war was declared on Germany in September 1939:

Whatever may be the extent of the power that may be taken to govern, to direct and to control by regulation, there must be as little interference with individual rights as is consistent with concerted national effort ... the greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process.¹

Unlike other industrialised nations, Australia does not have a Bill of Rights to provide a measure or yardstick to assist with assessing and balancing conflicting rights and freedoms. As such, we do not have for example, a measure to guide how to balance rights such as the right to life and security with the rights to privacy and freedom of movement.

Australia is left with little guidance on how to approach such questions as: Given that we do not have the death penalty in Australia and are party to the *Second Optional to the International Covenant on Civil and Political Rights*,² what should Australia's position be in relation to the imposition of the death penalty in Indonesia for the Bali bombers? Do we think that a "torture warrant" to gain information from suspected terrorists, or even people who may have information about a potential terrorist threat, is justified? Is detention without charge justifiable under any or some circumstances? If so, what are those circumstances?

Unfortunately, in the absence of an Australian Bill of Rights the important ethical responsibility of balancing rights and freedoms of everyone in Australia falls first on the legislature and, in recent times, frequently on this Committee.

Provisions to amend the *Passports Act 1938*

General Comments

The Committee will be aware that, following the Senate reference of this Bill to this Committee, the Government introduced the Australian Passports Bill 2004 and the Australian Passports (Transitionals and Consequentials) Bill 2004 ("**the Passports Bills**") into the House of Representatives on 24 June 2004.

While PIAC recognises that these Passports Bills are outside the terms of reference of the current Inquiry, it is worth noting that the Passports Bills are closely related to the proposed amendments to the *Passports Act 1938* contained in the Anti-Terrorism Bill (No 2) 2004. Firstly, in anticipation of the provisions to amend the *Passports Act 1938* in the Anti-Terrorism Bill (No 2) 2004, the Passports Bills rename the *Passports Act 1938* the "*Foreign Passports (Law Enforcement and Security) Act 2004*", thereby distinguishing it from what, if passed, will become the *Australian Passports Act*

¹ Cited in George Williams, *The Case for an Australian Bill of Rights*, University of NSW Press, Sydney, 2004, p. 34.

² This Optional Protocol commits Australia to the abolition of the death penalty.

2004.³ Second, the Passports Bills presuppose the passage of amendments in the Bill currently before this Committee. Indeed, the Passports Bills contain provisions that will, if passed, repeal amendments contained in the current Bill and not yet passed by the Senate.⁴ Third, the Passports Bills provide for the Minister to delegate the power to order the surrender of foreign travel documents to an SES (senior executive service) employee.⁵ Finally, and perhaps most significantly, the Passports Bills provide for additional bases for a refusal to issue or a decision to cancel Australian passports in similar circumstances to those which are provided for the seizure of foreign travel documents in the Anti-Terrorism Bill (No 2) 2004.⁶

While these provisions are outside the current Inquiry, it is essential—in addressing potential breaches of human rights—that this not be done in isolation for each new Bill that is introduced into Parliament in respect of increased security measures. To do so will result in “legislation creep”; that is, the slow whittling away of the basic democratic values that are the foundation of Australian society, such as the right to be presumed innocent until found guilty, the right to equality before the law, a fair trial and to freedom of movement.

Specific Comments

The Bill amends the *Passports Act 1938* to grant competent authorities the power to demand, confiscate and seize foreign travel documents from an individual if the authority believes on reasonable grounds that the person is the subject of an arrest warrant in respect of an indictable offence in Australia,⁷ or of a serious offence in a foreign country.⁸ In such circumstances, the competent authority “may request the Minister to make an order under section 16 in relation to the person’s foreign travel documents”.⁹ Section 16 empowers the Minister to “order the surrender of the person’s foreign travel documents”.¹⁰

If there is a warrant for arrest issued in Australia, then the question should be asked why it would be necessary to confiscate someone’s foreign travel documents; as

³ Australian Passports (Transitionals and Consequential) Bill 2004, Schedule 1, clause 9.

⁴ Australian Passports (Transitionals and Consequential) Bill 2004, Schedule 1, clauses 25 and 27.

⁵ Australian Passports (Transitionals and Consequential) Bill 2004, Schedule 1, clause 29.

⁶ Australian Passports Bill 2004, sections 12(1), 13(1), 14(1), and Subdivision D.

⁷ Anti-Terrorism Bill (No 2) 2004, Schedule 1, clause 22, the new section 13.

⁸ Anti-Terrorism Bill (No 2) 2004, Schedule 1, clause 22, the new section 14.

⁹ Anti-Terrorism Bill (No 2) 2004, Schedule 1, clause 22, the new sub-sections 13(1) and 14(1) respectively.

¹⁰ Anti-Terrorism Bill (No 2) 2004, Schedule 1, clause 22, the new section 16(1).

provided under the proposed new section 13. If and when contact is made with such a person, then the first course of action would be to arrest that person under the outstanding warrant. This would have the effect of preventing them from leaving the country and the matter of whether or not the person should be required to surrender up his or her passport could then be determined under existing legislative provisions. It is not clear to PIAC why the additional measures are necessary. Such a measure would perhaps only be *necessary* if in fact there is no existing warrant for arrest.

With regard to arrest warrants issued by a foreign country in respect of a serious foreign offence, it may be appropriate for Australian authorities to be empowered to seize travel documents and make an arrest where there exists an extradition treaty between Australia and that country. In such cases, the effect of arresting someone would be to prevent them from leaving Australia until formal extradition is arranged.

Where there is no extradition treaty between Australian and the foreign country issuing the arrest warrant, there may be a legal question regarding the power to make an arrest or seize the person's foreign travel documents.

Seizure of a person's travel documents—Australian or foreign—before an arrest warrant has been issued effectively imposes a penalty on the person and, as such, presumes the person is guilty before arrested, let alone charged. The presumption must be that the person is innocent until proven guilty by a court; this is not a decision for members of the executive. To presume otherwise would be a serious departure from the principles of natural justice and the separation of powers. While there may be circumstances whereby it is necessary to prevent a person escaping the jurisdiction, the usual and—in PIAC's submission—appropriate measure is to empower a court to issue an order for the arrest of the person and the seizure of that person's passport or travel documents.

PIAC notes that the definition of “competent authority” is slightly different in respect of the proposed new sections 13, 14 and 15 and is concerned about the lack of clarity of the meaning. PIAC submits that the Committee should properly seek clarification as to the intended scope and coverage of the three definitions and consideration be given to amending these definitions to clearly empower specific agencies, for example, the Australian Federal Police.

Given the test set out in the provisions, that is that, if a competent authority *suspects* on reasonable grounds that unless a person is prevented from leaving Australia on foreign travel documents they are likely to engage in conduct that *might* endanger Australian or international security or safety,¹¹ there is also a serious question as to whether this is a matter that is properly decided by the executive government rather than a court. In the view of PIAC, this should be a matter to be determined by a Court.

¹¹ Anti-Terrorism Bill (No 2) 2004, Schedule 1, clause 22, the new section 15(1).

PIAC recommends, if the Bill is to be passed, that these sections be amended to provide that the seizure of foreign travel documents can be ordered by a court on the basis that the court is presented with evidence that there are reasonable grounds to suspect that unless the person is prevented from leaving Australia using those travel documents, that person is likely to engage in conduct that might endanger Australian or international security or safety.

PIAC's primary concern in regard to the proposed new section 15 is that the purpose of the section does not match the potential effect. In the seizing of foreign travel documents, the purpose of this section is clearly to prevent an individual that may pose a particular threat from escaping Australia's jurisdiction and from travelling outside Australia. However, both the proposed new sub-sections 15(1)(a)(i) and 15(1)(a)(ii) refer to "security of Australia" and the health and physical safety of people "in Australia". The seizure of foreign travel documents, whereby a person is prevented from travel, may do more to protect the security and safety of foreign countries than that of Australia. These aspects of the proposed new section 15 will do little to limit the movement of an individual within Australia.

Further, the proposed new sub-sections 15(1)(a)(iv) and 15(1)(a)(v) provide that if a competent authority suspects that a person *is likely to engage* in conduct that *might* constitute a indictable offence against the *Passports Act 1938* or another law of the Commonwealth, they may request the Minister order the seizure of the foreign travel documents. PIAC is concerned to note the indeterminacy of these provisions hinges on the possibility that potential conduct *might* amount to an indictable offence.

PIAC recommends, if the Bill is to be passed, that these sections be amended to provide clarity. They should read:

- (iv) would constitute an indictable offence against this Act; or
- (v) would constitute an indictable offence against a law of the Commonwealth.

The seizure of foreign travel documents will limit the right to freedom of movement.¹² The question for the Committee and the Parliament is whether the effect achieved by these provisions are a proportionate response to the alleged offence. Further, the seizure of a person's foreign travel documents may have an indirect consequence on other areas of their lives. Generally a non-citizen's visa status is evidenced by a label or imprint on their passport. The passport or travel document is also a primary identity document. The seizure of a person's passport or travel documents may therefore cause undue stress in relation to the person seeking to travel domestically, to look for work or to open a bank account. It may also cause undue inconvenience to employers seeking to employ non-citizens who have work permits.

¹² A possible breach of Article 12(1) of the *International Covenant on Civil and Political Rights*.

Finally, foreign travel documents, like Australian passports, are the property of the issuing country. PIAC recommends that the Committee obtain advice on the legal and diplomatic effects of seizing a passport, which is the property of another sovereign state.

Review process

The Explanatory Memorandum states that, if the order for surrender of foreign travel documents is made based on advice of an adverse ASIO assessment, that person “must be given a copy of the assessment”. Although this refers to section 38 of the *Australian Security Intelligence Organisation Act 1979* (“**the ASIO Act**”) this provision is not stated in the Bill.

This provision in the ASIO Act is an important mechanism for providing adequate scrutiny of administrative process and PIAC recommends that it should be clearly stated in the Bill and should extend to all adverse assessments.

PIAC is concerned that while the proposed new section 23 provides for administrative review by the Administrative Appeals Tribunal (“**AAT**”), the powers of review are seriously limited by the proposed new sub-section 23(4) to the AAT either affirming the Minister’s decision or remitting the decision to the Minister for reconsideration. In PIAC’s view this is not an adequate review mechanism and the AAT should be granted all its usual decision-making powers.¹³

Further, while review provisions are included, they are provided for after the person has had their foreign travel documents seized and freedom of movement restricted. PIAC submits that there are not sufficient safeguards incorporated into the process prior to the order being made.

PIAC recommends that, if passed, the Bill should be amended to include judicial scrutiny prior to the seizure of foreign travel documents to limit the potential for abuse of this power.

PIAC recommends that in the same way that a Court is required to issue a warrant for someone’s arrest, it should be only be a Court that is empowered to make the order for the surrender of a person’s foreign travel documents.

If the Bill is to be adopted, PIAC recommends that it be amended to require the seizure to be authorised in advance by a Court of competent jurisdiction.

¹³

Administrative Appeals Tribunal Act 1975, section 43(1)(c).

Amendments to the *Australian Security Intelligence Organisation Act 1979*

The amendments proposed to the ASIO Act will grant authorities the power to prevent people from leaving Australia even before an ASIO warrant has been issued against them.

Under the proposed amendments,¹⁴ if the Director-General of ASIO seeks the Minister's consent to request that an issuing authority issue a warrant under section 34D, the person must be notified and must provide all travel documents—Australian passports and foreign passports—to an enforcement officer. Failure to do so incurs a penalty of five years' imprisonment. Under section 34AB, an "issuing authority" for a warrant must be a Federal Court Judge or Federal Magistrate appointed by the Minister.

Under the new provisions, it is the seeking of the Minister's consent for the request for a warrant, not the issue of a warrant, that compels a person to provide all their travel documents. In other words, at the time at which the passport or travel document can be seized no warrant actually exists and the matter has not yet had Ministerial, let alone, judicial scrutiny. There could quite likely be a time-lag between the seeking of the Minister's consent to request a warrant and its issue or refusal. There is no incentive for the Minister to prioritise procedures for requesting the issue of the warrant.

The seizure of travel documents well before the issue of a warrant puts the cart before the horse and presumes the warrant will be issued and imposes a "penalty" in advance of any finding.

The role of ASIO is to gather intelligence, not to have unconstrained powers to prevent a person's freedom of movement, including leaving Australia. If a warrant for arrest exists then it is consistent with the law that that person will be taken into custody for questioning by the Australian Federal Police or ASIO. However, it is not acceptable that the mere *request* to the Minister for approval to seek the issue of a warrant empowers the violation of the right to freedom of movement.

While an adverse security assessment is reviewable by the Administrative Appeals Tribunal,¹⁵ ASIO's operations are not readily open to public scrutiny and therefore the vesting of powers to require the handing in of travel documents without scrutiny of a Judge or Federal Magistrate, is not appropriate. The imposition of a penalty of up to five years' imprisonment simply serves to compound the inappropriateness of this provision. A person will be left with the choice between having their freedom of movement curtailed through having to yield up travel documents and facing a five year prison term for failing to do so.

¹⁴ Anti-Terrorism Bill (No 2) 2004, Schedule 2, clause 1, new section 34JBA.

¹⁵ *Australian Security Intelligence Organisation Act 1979*, section 54.

If the Bill is to be adopted, PIAC recommends that the amendments to the ASIO Act be removed from the Bill.

Amendment to the *Criminal Code Act 1995* in respect of “Associating with terrorist organizations”

Perhaps the most concerning feature of this Bill is the addition of the new section 102.8 to the *Criminal Code Act 1995* (“**the Code**”), which creates the offence of intentionally associating with someone from an organisation that the alleged offender knows is a terrorist organisation.

While there has clearly been an attempt to draft this section to ensure clarity about what qualifies as intentionally associating with a member of a terrorist organisation, it fails in several respects to exclude those who may not be the intended target of these provisions.

The definition of “associate” states: “a person associates with another person if the person *meets or communicates* with the other person” [*emphasis added*].¹⁶ This definition remains too broad and includes “all modern forms of communication”.¹⁷

Clause 2 excludes “close family” members from the definition of “associate”. However, although the section recognises a person’s cultural background is a possible defence, the definition of “close family member” does not include extended family, such as in-laws, aunts, uncles, cousins, and foster siblings. For many people in the Australian community such extended family members are people with whom they have frequent familial contact.

In addition, while close family members are exempted, the Bill does not include exceptions similar to those found in the *Crime (Sentencing Procedure) Act 1999* (NSW), on which the proposed provision is based, dealing with the location or context of the association, such as education, employment and residence.¹⁸

PIAC recommends, if the Bill is to be passed, that it be amended to extent the meaning of “close family” to include extended family members and provide an exemption that deals with the location or context of the association including education, employment and residence.

¹⁶ Anti-Terrorism Bill (No 2) 2004, Schedule 3, clause 1.

¹⁷ Explanatory Memorandum, Item 1.

¹⁸ Explanatory Memorandum.

Of additional and particular concern is the potential combined effect of this provision with the recently introduced presumption against bail and setting of minimum non-parole periods with regard to terrorism offences. These provisions were incorporated into the Anti-Terrorism Bill 2004 by the House of Representatives following the Inquiry by this Committee, and therefore were not subject to public submission before passage of the Bill through the Senate on 30 June 2004.

The combined effect would be that a suspect could be detained without charge for an investigation period of up to 24 hours (which can be suspended or delayed for various reasons), charged with “intentionally associating” with a member of a proscribed terrorist organisation, denied bail, and, if found guilty, subject potentially to a non-parole period of 3/4 of the three-year sentence. Together, such measures seem extreme and excessive.

If the Bill is to be adopted, PIAC recommends that the proposed amendments to the *Criminal Code Act 1995* be removed.

Concluding remarks

There is little evidence to show that the already increased police and ASIO powers with regard to counter-terrorism measures have been necessary or indeed used. Before introducing further powers that potentially breach people’s civil rights, it would be prudent to assess how the previously expanded powers have been used and the need for further powers to infringe on the rights of someone when there is not enough evidence for the issue an arrest warrant. This might amount to “pre-emptive suspicion”.

Finally, it is unclear how any of the proposed amendments to the Bill will substantially improve national security and protect the health and safety of people in Australia. Indeed, any response to terrorism must be measured and proportionate, and must be in keeping with the human rights and fundamental freedoms embodied in the *International Covenant on Civil and Political Rights* rather than at their expense. PIAC therefore recommends that the Bill should not be supported.