PUBLIC
INTEREST
ADVOCACY
CENTRE

Level 1, 46-48 York Street
Sydney 2000
Australia
DX 643 Sydney
Tel: (612) 9299 7833
Fax: (612) 9299 7855
Email: piac@piac.asn.au
A.C.N. 002 773 524
A.B.N. 77 002 773 524

Submission to the Senate Legal and Constitutional Committee on the inquiry into the provisions of the *National Security Information Legislation Amendment Bill 2005* (Cth)

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Jane Stratton
Policy Officer

Robin Banks
Chief Executive Officer

Introduction

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 working on issues 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.

Summary of Recommendations

Primarily, PIAC recommends that:

- the Committee rejects the premise of this Bill and refuses to recommend it pass the Senate;
- 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.

Further and in the alternative, PIAC makes the following recommendations:

- That the Committee approaches this legislation with the understanding that Australian constitutionalism, the rule of law and commitment to human rights are non-negotiable and must be protected, especially in any response to threats to national security.
- That the Committee strongly opposes any measures to remove judicial review of a decision by the Attorney-General to grant a certificate under the Bill and ensures that judicial officers' inherent discretion remains unfettered.
- That the Committee rejects the provisions of the Bill that would have the effect of closing to the public courts that are hearing civil matters. Courts already have the power to do so provided the Commonwealth can make a convincing argument.
- That the Committee rejects the provisions of the Bill that would have the effect of requiring any party to civil litigation, including self-represented litigants, to be security cleared in order to participate in their own proceedings.

- That the Committee requires that the Attorney-General substantiate his claim for greater powers under this Bill. If the Attorney-General provides any such justification, PIAC asks the Committee to re-open the submission process to enable the public, including PIAC, to respond.

- That the Committee takes a practical view of the operation of this Act, particularly the key operative term, 'national security information', and the implications for the rule of law principle that the law should be knowable and certain before it applies to anyone, particularly where criminal sanctions may apply.

  PIAC suggests that the Committee, if it does not reject this Bill as we advocate, recommend that its enactment be postponed until further work can be carried out. For instance, PIAC calls on the Attorney-General's Department to work closely with plaintiff lawyers, community legal centres and the legal profession more broadly to create exhaustive guidelines upon which self-represented litigants and the legal profession can rely in preparing for civil proceedings. Any such standards must be easily accessible, well publicised and self-represented litigants must be guided through them.

  PIAC calls on the Committee to require the Attorney-General's Department to fund the development of these resources and the ongoing implementation through publicity, training of court staff and resourcing court registries to assist self represented litigants and lawyers deal with the additional layer of regulation the Attorney-General wishes to impose on civil litigation.

- That the Committee requires that the Attorney-General formulate a more streamlined and efficient model of intervention. The Committee should be informed of the likely impact of this regulation on costs in civil litigation, and how the Attorney-General proposes to justify imposing additional costs and delay on private litigants and finally, how the Attorney-General proposes to ease the impact of additional costs and delay on such parties through a compensation or costs adjustment scheme.

1. Committee's Processes

The *National Security Information Legislation Amendment Bill 2005* (Cth) (**the Bill**) was introduced into the Parliament on 10 March 2005. The Bill was referred to this Committee by the Senate on 16 March 2005.

The Committee has allowed just over two weeks for community organisations to prepare submissions. 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 Joint Committee**), the Senate Legal & Constitutional References Committee (**the Senate References Committee**) and the Senate Legal & Constitutional Legislation Committee (**the Senate Legislation Committee**).[1]

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[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 .

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

The impact of such short timetables is to prevent individuals and community organisations, such as PIAC, from providing comprehensive submissions on all of the relevant issues and from consulting widely with affected communities.

In the circumstances, PIAC calls on the Committee to ensure that its oral hearings invite a broad range of interested parties to address the Committee. PIAC strongly urges the Committee to consider revising its timetable, and to work with the Senate to ensure that deadlines for reporting back to the Senate include sufficient time for meaningful community participation.

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.

2. War on terror – general comments

Australia is apparently engaged in a 'war on terror'. The Prime Minister has reiterated the view that 'the events of the 11th of September … changed forever the world in which we live. And it changed the way in which we must … respond.'[2]

PIAC rejects this view. Whilst PIAC does not resile from the plain fact that terrorism exists, it firmly believes that constitutionalism, the rule of law and human rights are non-negotiable in any response Australia, as a democratic nation, takes to counter the threat of terrorism. PIAC rejects the rhetoric that the world changed forever on 11 September 2001, and that this event, and the spectre of terrorism that was supposedly unleashed that day, justifies extensions of State power embodied in this Bill. The Bill would give the Executive, through the Attorney-General or another Minister, the ability to unilaterally close civil court rooms to all except persons security cleared by the Executive.

Recommendation

PIAC urges the Committee to 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.

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2 Prime Minister John Howard, "Closing Address", Speech delivered at the Liberal Party National Convention, Adelaide, 8 June 2003. Available at http://www.pm.gov.au/news/speeches/speech106.html. See Jenny Hocking, "Protecting Democracy by Preserving Justice: 'Even for the Feared and the Hated'" (2004) 27(2) *University of New South Wales Law Journal* 319, 335.

3. Executive direction of judicial discretion

PIAC notes that all courts are vested with a discretion to close their proceedings to the public, whether in their inherent jurisdiction or by virtue of their Rules of Procedure. Courts quite properly do so in limited circumstances. This Bill seeks to guide the hand of judicial discretion in an impermissible way.

PIAC takes the view that it is critical to Australia's separation of powers and therefore to the integrity of Australian democracy that judges retain independence. The Commonwealth is free to seek to intervene and make submissions as to why a Court should take the extraordinary measures of closing the court room for reasons of national security. To do otherwise is to grant to the Attorney-General the power to foreclose the question, in his sole unreviewable discretion.

PIAC is particularly concerned at this model of law making whereby the Executive, through the Legislature, seeks to circumscribe or control the decision making of judicial officers who are properly independent. Further, the Bill seeks to remove as far as possible from judicial review the Attorney-General's decision to issue a certificate.[3]

PIAC regards this Bill is part of a worrying trend observed first in the area of immigration and now in the name of counter-terrorism. This Attorney-General, both as Minister for Immigration, Multicultural and Indigenous Affairs and as Attorney-General, has sought to regulate the judiciary by taking decisions that are properly judicial in nature out of its hands.

Recommendation

PIAC recommends that the Committee rejects the premise of this Bill and refuses to recommend it pass the Senate.

Recommendation

Alternatively, PIAC recommends that the Committee strongly opposes any measures to remove judicial review of a decision by the Attorney-General to grant a certificate under the Bill and ensure that judicial officers' inherent discretion remains unfettered.

4. In camera proceedings

The closed nature of proceedings proposed under the Bill will mean that only people who have passed Government-controlled security clearance will be permitted to participate in such legal proceedings. This makes a mockery of the principle of open and transparent administration of justice that has underpinned Australian democracy to date.

PIAC maintains that one of the strongest bulwarks against threats to our society is the democratic institutions themselves. Open courts are a fundamental part of our democracy and must be defended.

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[3] Item 30 of the Bill would insert a new section 9B into the *Administrative Decisiosn (Judicial Review) Act 1977* (Cth) to limit the jurisdiction of Courts to review the Attorney-General's decision.

Recommendation

PIAC recommends that the Committee rejects the provisions of the Bill that would have the effect of closing court rooms hearing civil matters. Courts already have the power to do so provided the Commonwealth can make a convincing argument.

5. Restricted participation

The possibility that litigants in person or represented litigants may be denied access to hearings that affect their own interests is extraordinary and outrageous. PIAC notes that this extreme measure has already been implemented in relation to criminal proceedings, particularly where terrorist offences are alleged. For the record, PIAC firmly opposes the closure of courts to criminal defendants as it severely compromises the capacity of each individual to defend themselves with full knowledge of what they are stand accused.

There is no need to restrict participation in civil proceedings to persons with security clearances. Should the Commonwealth ever manage to convince a Court that it is necessary to do so, then appropriate orders can be contested between the parties, made by an independent judicial officer, and appealed by the parties (including the intervener) to a higher Court if necessary.

Recommendation

PIAC recommends that the Committee rejects the provisions of the Bill that would have the effect of requiring any party to civil litigation, including self-represented litigants, to be security cleared in order to participate in their own action.

6. Lack of necessity

It is incumbent upon the Attorney-General and the Government to demonstrate a pressing need for this type of regulation.

It is not sufficient to claim that 'national security' demands that the Attorney-General have the powers under the Bill. It ought not to be the role of PIAC and other concerned groups and citizens to convince this Committee that this Bill is unnecessary or disproportionate, but rather for the Attorney-General to present a clear, cogent, and compelling case for such extraordinary powers to be granted to him. In a functioning democracy, it is difficult to imagine why any such powers should be granted.

Recommendation

PIAC recommends that the Committee requires that the Attorney-General substantiate his claim for greater powers under this Bill. If the Attorney-General provides any such justification, PIAC asks the Committee to re-open the submission process to enable the public, including PIAC, to respond to those arguments.

7. Information that affects 'national security'

The elastic notion of 'national security' is also a cause of concern to PIAC. Given that the Bill revolves around the control of disclosure of 'national security' information, and further, creates criminal sanctions in relation to 'national security' information, it is worrying that the definition of

this term is confusing. 'National security' is defined at section 8 of the existing *National Security Information (Criminal Proceedings) Act 2004* (Cth). It is a composite definition, including terms that are themselves defined in other Acts and in the Act.[4] This creates a confusing definitional puzzle that the Commonwealth expects lawyers, litigants in person and other parties to proceedings to navigate correctly or face the very real risk of committing an offence.

The Bill creates offences that might apply to lawyers, litigants in person, witnesses, court officers, court reporters and judges.

PIAC is concerned that this type of regulation offends the rule of law as people cannot ever be certain of whether information at issue in a civil proceeding might be regarded by the Attorney-General as 'national security' information. For instance, a lawyer in a civil proceeding may fail to notify the Attorney-General that such information may arise at hearing simply because the Attorney-General and the lawyer share a different idea of what constitutes 'national security' information.

Recommendation

PIAC recommends that the Committee takes a practical view of the operation of this Act and the implications for the rule of law principle that the law should be knowable and certain before it applies to anyone, particularly where criminal sanctions may apply.

PIAC suggests that the Committee, if it does not reject this Bill as we advocate, works closely with plaintiff lawyers, community legal centres and the legal profession more broadly to create exhaustive guidelines upon which the self represented litigants and the legal profession can rely in preparing for civil proceedings. Any such standards must be easily accessible, well publicised and self-represented litigants must be guided through them.

PIAC calls on the Committee to require the Attorney-General's Department to fund the development of these resources and the ongoing implementation through publicity, training of court staff and resourcing court registries to assist self represented litigants and lawyers deal with the additional layer of regulation the Attorney-General wishes to impose on civil litigation.

8. Costs and convenience

The Attorney-General is, through exercise of the intervention power, likely to create significant delays in civil proceedings. Witnesses will be prevented from giving oral answers and court rooms will have to be closed. Hearings are likely to take longer if subject to a certificate under this Bill. There is, however, no indication that the Commonwealth intends to compensate parties for the additional time and cost they will incur as a result of the Attorney-General's intervention in the civil proceedings.

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4 Section 8. Note that 'security' (section 9), 'international relations' (section 10) and 'law enforcement interests' (section 11) are each separately defined.

Recommendation

PIAC recommends that the Committee requires that the Attorney-General formulate a more stream-lined and efficient model of intervention. The Committee should be informed of the likely impact of this regulation on costs in civil litigation, and how the Attorney-General proposes to justify imposing additional costs and delay on private litigants and finally, how the Attorney-General proposes to ease the impact of additional costs and delay on such parties through a compensation or costs adjustment scheme.