CHAPTER 6

LAW ENFORCEMENT AND ASIO POWERS

Introduction

6.1 This chapter will outline the key provisions and issues raised in relation to the following aspects of the Bill:

- the extension of police powers to stop, question and search persons in relation to terrorist acts; and to seize items related to terrorism and other serious offences (Schedule 5);
- the introduction of powers to permit police to directly issue a notice to produce information and documents from persons and organisations for the purposes of investigating terrorism and other serious offences (Schedule 6); and
- the expansion of the scope of ASIO's powers (Schedule 10).

Powers to stop, question and search persons in relation to terrorist acts – outline of key provisions

6.2 Schedule 5 of the Bill amends the Crimes Act to expand the powers of the AFP, and state and territory police forces to stop, question and search persons for the purposes of investigating and preventing terrorism. It also enables police to seize items related to terrorism and other serious offences.[1]

6.3 The Explanatory Memorandum to the Bill states that the provisions will 'dovetail' with equivalent state and territory stop, question and search powers, and will provide a common approach for police operating in a 'Commonwealth place' (which includes airports).[2] The Bill also creates the proposed concept of a 'prescribed security zone': the Minister may declare a Commonwealth place to be a 'prescribed security zone' for 28 days (unless earlier revoked) if the Minister considers that a declaration would assist in either preventing, or responding to, a terrorist act (proposed section 3UJ).

6.4 The declaration of a 'prescribed security zone', and any subsequent revocation, are not legislative instruments (proposed subsection 3UJ(7)). This means that

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1 A 'serious offence' is an offence punishable by imprisonment for 2 years or more (including, for example, theft of property belonging to a Commonwealth entity (section 131 of the Criminal Code), money laundering (section 400 of the Criminal Code), some postal offences (under Division 471 of the Criminal Code), and computer offences (under Division 478 of the Criminal Code)).

2 *Explanatory Memorandum*, p. 74. The states and territories will introduce complementary legislation to cover other major transport hubs.

declarations need not be tabled in Parliament and are not subject to disallowance. There is a requirement to broadcast any declaration by television or radio so as to be capable of being received within the 'prescribed security zone', and published in the *Gazette* and on the Internet. However, there is no requirement that publication occur within a particular timeframe or as soon as practicable. Further, failure to broadcast or publish does not invoke any sanction, nor does it invalidate a declaration (proposed subsections 3UJ(5)-(6)).

6.5 Any person who is in the 'prescribed security zone' during the period of the declaration may be subject to the stop, search, questioning and seizure powers.

6.6 Proposed subsection 3UK sets out the sunset clause for the proposed stop, question, search and seizure powers. The sunset clause does not expressly provide for any of the relevant provisions to cease to have effect after 10 years; rather it appears to allow the proposed police powers to remain in legislation, yet be unable to be exercised.[3]

Stop, question and search powers

6.7 Proposed Subdivision B of Division 3A of the Bill sets out the application and scope of the powers to stop, question and search. Proposed section 3UB provides that the powers may only be exercised where a person is in a Commonwealth place (other than a prescribed security zone) and the police officer 'suspects on reasonable grounds' that the person might be about to commit, be committing, or has just committed, a 'terrorist act';[4] or if a person is in a Commonwealth place in a prescribed security zone.

6.8 Proposed subsection 3UC(1) gives police officers the power to ask a person for the following details:

- name;
- residential address;
- reason for being in the particular Commonwealth place; and
- evidence of identity.

6.9 It is an offence to not comply with such a request, or to give false information (proposed subsection 3UC(2)). The offence carries a maximum fine of $2200; however the more serious offence of obstruction, hindering or intimidating a Commonwealth official in the execution of his/her duties may also apply, which carries a maximum penalty of imprisonment for 2 years.[5] Proposed subsection 3UC(3)

3 Moreover, some provisions will need to remain in force after 10 years to provide for circumstances such as the return of items which were seized prior to the 10-year sunset date.

4 A 'terrorist act' is defined in subsection 100.1(1) of the Criminal Code.

5 See section 149.1 of the Criminal Code.

provides a reasonable excuse defence to the offence created by proposed subsection 3UC(2).

6.10 Proposed subsection 3UD(1) provides a police officer with the power to stop and detain a person for the purpose of searching for a terrorism-related item. Searches that may be conducted include an ordinary search or frisk search (not a strip search), and a search of a vehicle owned or operated by the relevant person.

6.11 A police officer may use reasonable force but must not use more force or create greater indignity than is reasonable or necessary; or detain the person for longer than reasonably necessary to conduct the search (proposed subsections 3UD(2) and (3)).

Seizure of items

6.12 Proposed section 3UE provides for the seizure of terrorism-related or serious offence-related items found in the course of a search conducted under proposed section 3UD. Proposed sections 3UF and 3UG set out how items seized under proposed section 3UE must be dealt with.

6.13 For example, items seized during searches are subject to a notification system, which requires police to serve a seizure notice on the owner within 7 days, identifying the items and informing the owner of their right to request (within 90 days) the return of the item (proposed subsections 3UF(1)-(3)). The police may retain an item where there are reasonable grounds to suspect the item is likely to be used in the commission of a terrorist act or serious offence (proposed subsection 3UF(6)); or is evidence of a terrorist act or serious offence (proposed subsection 3UF(7)).

6.14 When the owner requests return of a seized item, and the relevant police officer does not return it within the time limits, the police officer may apply to a magistrate for orders that:

- the police officer retain the item (proposed subsection 3UG(3) and proposed paragraph 3UG(4)(a));
- the item be forfeited to the Commonwealth (proposed paragraph 3UG(4)(b));
- the item be sold and the proceeds be given to the owner (proposed paragraph 3UG(4)(c)); or
- the item be otherwise sold or disposed of (proposed paragraph 3UG(4)(d)).

6.15 A magistrate may also make an order for the return of the item to its owner (proposed subsection 3UG(5)). In any application to a magistrate under proposed subsection 3UG, the owner of the item must be allowed to appear and be heard by the magistrate (proposed subsection 3UG(2)).

Powers to stop, question and search persons in relation to terrorist acts – key issues

6.16 Some of the key concerns raised in the committee's inquiry in relation to the proposed expansion of police powers to stop, search and question, and seize items, include:

- the necessity of expanding the powers (given the scope and nature of existing police powers);
- the broad and random nature of the powers;
- the possible impact of the proposed powers on specific ethnic, religious or racial groups, and, in particular, the Muslim community;
- the highly discretionary nature of the Minister's power to declare an area a 'prescribed security zone';
- seizure of items related to serious (non-terrorism) offences; and
- the need for independent oversight of the use of the powers.

Need for the new powers

6.17 Many submissions expressed in-principle opposition to the enhanced police powers contained in Schedule 5 of the Bill. Specifically, they questioned the need and justification for the proposed powers, particularly in light of the breadth of existing Commonwealth and state and territory police powers.

6.18 For example, the Federation of Community Legal Centres (Vic) argued that AFP officers are already afforded a wide range of stop, search, question and detain powers under the *Australian Federal Police Act 1979* (AFP Act);[6] and state and territory police are also 'generally able to stop and question a person where it is reasonably suspected that the person is committing or has just committed a criminal offence'.[7] Further, in its view:

> …police powers with respect to terrorism offences are already overly coercive and expansive. Many of the powers provided for in Schedule 5 already exist in some form and are sufficient in themselves. The additional powers sought are in our view an excess of police power.[8]

6.19 PIAC agreed with this assessment:

> In PIAC's view it is unnecessary to extend police powers in this way. State and Federal police already have extensive powers to stop, question, search, detain and arrest people in relation to suspected terrorist offences and other serious offences. The Government has failed to explain why these powers

6 For example, see AFP Act, ss. 141 and 143.

7 *Submission 167*, pp 34-35.

8 *Submission 167*, p. 35.

> are now seen as inadequate, and why a new regime of police powers needs to be introduced into the *Crimes Act.* PIAC notes that the Explanatory Memorandum to the Bill states that the provisions will 'dovetail with equivalent State and Territory stop, question and search powers'. However, in PIAC's view the proposed provisions go beyond what already exists in State and Territory legislation and are likely to result in front-line policing practices that are arbitrary, intrusive and potentially discriminatory.[9]

6.20 In their submission, Mr Joo-Cheong Tham and others also argued that Commonwealth and state and territory police currently 'wield extensive powers to stop, search, detain, question and arrest in relation to 'terrorism' offences' and that, further, the AFP 'are presently empowered by a variety of intersecting laws with broad coercive investigative, preventive and surveillance powers as well as extensive stop, search and question powers'.[10]

6.21 The Australian Political Ministry Network (PolMin) agreed, and emphasised that a far wider range of people would come within the ambit of such broad police powers:

> The proposals also seek to extend "stop, question and search" powers where "there *might* be reasonable grounds that a person *might* have just committed, *might* be committing, or *might* be about to commit a terrorism offence". Both State and Federal police already wield extensive powers to stop, search and question in relation to terrorism offences. The proposals if adopted clearly mean that a much wider range of people may be subject to detention, restrictions on movement and compulsory questioning. Giving the police such free rein to use coercive powers when there is only a *possibility* of an offence, opens the door to mistakes and abuse.[11]

6.22 In evidence, Ms Agnes Chong from AMCRAN told the committee that many of the new powers contained in the Bill, including the random stop and search powers, 'mirror existing powers but with the safeguards removed or weakened'.[12] AMCRAN's submission argued that:

> …the range of powers that are available to both Federal and State Police forces are more than sufficient to combat terrorism, especially in light of desirability of Governments to cooperate. As we saw with the recent raids, they were more than enough to raid, search, detain and arrest persons allegedly to have been involved in terrorism. We further note that they did not even need to resort to the broader NSW police powers to conduct those raids and arrests. In our view, the proposed amendments unnecessarily broaden the powers of the AFP to stop, question and search persons.[13]

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9 *Submission 142*, p. 34.

10 *Submission 81*, p, 19.

11 *Submission 162*, p. 4.

12 *Committee Hansard*, 17 November 2005, p. 19.

13 *Submission 157*, p. 25.

6.23 In their submission, Mr Patrick Emerton and Mr Joo-Cheong Tham expressed concern that little justification has been given by the Federal Government as to why greater discretionary police powers are needed. Their submission contained a useful comparison between, on the one hand, some of the existing powers and inherent safeguards in the Crimes Act and the AFP Act; and, on the other, the Bill's considerable expansion of police powers with few corresponding safeguards.[14]

6.24 For example, Mr Emerton and Mr Tham pointed out that the stop and question powers in the Bill would allow the AFP 'to demand people's reasons for being in a place' and would eliminate 'the connection to a crime that it is believed might have taken place'.[15] By contrast, the current stop and question powers vested in police by the Crimes Act are limited to circumstances in which a police officer believes on reasonable grounds that the person whose name and address is sought 'may be able to assist…in inquiries in relation to an indictable offence that the constable has reason to believe has been or may have been committed'.[16] Further, unlike the Crimes Act, the Bill does not oblige a police officer to identify himself or herself at the request of the person he or she is questioning.[17]

6.25 Mr Emerton and Mr Tham argued further that:

> No explanation has been offered of how the vesting of greater discretionary and coercive powers in the AFP will prevent acts of political or religious violence. Currently, if an AFP member suspects on reasonable grounds that a person is attempting to commit a terrorist act, or is engaged in preparation for or planning of a terrorist act, or has in his or her possession any document or other thing connected to such preparation or planning, then the AFP member can arrest that person. This then triggers a number of powers, as well as accountability and review mechanisms, under the *Crimes Act*.[18]

6.26 The Australian Privacy Foundation (APF) submitted that '(t)he extent to which the provisions not only in Schedule 5 but also in various other schedules to the Bill…are 'new' or differ from existing powers is not clear'.[19] Further:

> If they are different, then this must be better justified. What *is* clear is that the powers will apply to a much wider range of individuals, including those who are not even suspected of criminal offences. There must be more debate about the proportionality of applying these powers to such people.[20]

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14 See *Submission 152*, pp 36-39.

15 *Submission 152*, p. 38.

16 Crimes Act, s. 3V. See further *Submission 152*, p. 38.

17 Crimes Act, subs. 3V(3).

18 *Submission 152*, p. 39.

19 *Submission 165*, p. 5.

20 *Submission 165*, p. 5.

6.27 In a joint submission, the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security pointed out that the proposed 'powers to stop, search and require identification…may cause disagreement or confrontation when exercised, leading to complaints'.[21]

Broad and random nature of the powers

6.28 Many submissions and witnesses criticised the extremely broad nature of the proposed powers in Schedule 5, as well as their likely random application. There were also strong criticisms of the lack of statutory criteria to regulate and standardise the exercise of the powers, and the lack of connection of the power to the alleged 'terrorist act'. Given that the proposed powers allow police to stop, question and search persons where there is only the *possibility* of an offence being committed (or about to be committed), arguably the current threshold for the use of such coercive powers would be lowered considerably.[22]

6.29 PIAC contended that '(t)he proposed powers are exercisable on the basis of unacceptably wide discretions that are a recipe for inconsistent and arbitrary policing practices'.[23] In particular, it noted the breadth of some of Schedule 5's key provisions:

> The repeated use of the word 'might' in clause 3UD(1)(a) is likely to encourage the exercise of the powers on the basis of vague possibilities rather than concrete evidence. The fact that the powers are exercisable by a broad spectrum of policing authorities raises the potential for inconsistent application of the 'reasonable suspicion' test across different police forces.
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> Of even greater concern is clause 3UB(1)(b), which will allow the powers to be triggered simply because a person happens to be in a 'prescribed security zone' in a Commonwealth place. In these circumstances, not even a reasonable suspicion test applies. Anyone can be stopped, searched and questioned, simply because they happen to be in particular area at a particular time. This is an unacceptable interference [with] the right to freedom of movement and the right to privacy and has the potential to lead to inefficient policing practices and to undermine trust and confidence in the police. We note that police in the United Kingdom have been criticised for using similar powers too widely.[24]

6.30 Mr Patrick Emerton and Mr Joo-Cheong Tham were of the view that '(r)ather than increasing the safety of Australians, the vesting of broad discretionary police powers which are not subject to effective review is a recipe for discrimination and racial or ethnic profiling, with all the [related] adverse consequences'.[25]

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21 *Submission 163*, p. 7.

22 For example, see Mr Joo-Cheong Tham and others, *Submission 81*, p. 4.

23 *Submission 142*, p. 34.

24 *Submission 142*, pp 34-35.

25 *Submission 152*, p. 39.

6.31 The NSW Council for Civil Liberties argued that the proposed powers are excessive. It suggested that use of the powers in a 'prescribed security zone' is particularly offensive, given that they are not contingent on a requirement of reasonable suspicion:

> They give police extraordinary powers to search, seize and demand details from *anyone* in a prescribed security zone – without the requirement of reasonable suspicion. So if the Attorney-General were to declare Sydney International airport a prescribed security zone, then everyone in the airport could be searched, have items seized and their personal details recorded. The requirement of reasonable suspicion should not be removed. It is not a crime simply to *be* in a public Commonwealth place.[26]

6.32 The Federation of Community Legal Centres (Vic) expressed their concerns as follows:

> Police would also be offered very broad discretion in that, pursuant to the amended Section 3UB(a) they need only suspect on reasonable grounds that a person '*might* have just committed, be committing or be about to commit such an act. Both the concept of 'reasonable suspicion' and the term 'might' give rise to the extremely broad discretion here. As a result, it is almost certain that these powers will cause far more people to come into contact with police, including a majority who do not pose any threat to the community. This is particularly concerning given the humiliating impact public police searches and questioning may have on people that are subject to this kind of policing. The discretionary nature of these powers is such that there is also the danger that the powers will be misused. The Federation is concerned that these powers will be used for collateral purposes that are not aimed at apprehending criminal offenders, for example to gather intelligence or for harassment or targeting of individuals.[27]

6.33 In a joint submission, the Bar Association of Queensland and the Queensland Law Society noted the lack of safeguards contained in Schedule 5 to counteract the expansion of the powers:

> Safeguards relating to the conduct of the search including a prohibition upon the search taking any longer than is reasonably necessary or that a person is always given the opportunity to open a search item before using force to open it or damage it. No specific consequences are provided for failing to comply with the condition of the search.[28]

Impact on particular groups

6.34 Many submissions and witnesses argued that the measures taken in the Bill in relation to stop, search, question and detain powers will inevitably lead to ethnic,

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26 *Submission 161*, p. 17.

27 *Submission 167*, p. 35.

28 *Submission 222*, p. 34.

religious or racial profiling by exposing minority communities to over-policing and arbitrary interference. In particular, there were serious concerns that the Muslim community would be unfairly targeted.

6.35 For example, Mr Joo-Cheong Tham and others argued that discriminatory application of the powers was highly likely:

> …the extension of AFP powers to provide a pre-emptive authority based on what someone 'might' do, risks the discriminatory and blanket application of stop and search powers. Stop and search powers operate at the level of 'street policing' and have a history of controversial application, exposing particularly vulnerable minority communities to overpolicing and arbitrary interference. Research demonstrates such powers are routinely used for purposes other than 'apprehending criminals', such as gathering intelligence, harassment and punishment along ethnic lines. Heavy-handed forms of policing such as the regular use of stop and search powers, particularly where used in conjunction with racial profiling have proven counter-productive to terrorism investigation through the alienation of communities [citing C Cunneen, *Conflict, Politics and Crime, Aboriginal Communities and the Police* (2001); J White, *Defending the Homeland, Domestic Intelligence, Law Enforcement and Security* (2004)].[29]

6.36 Importantly:

> 'Reasonable suspicion' as a trigger for the exercise of police power represents a powerful discretion to determine levels of action and to interpret law. Coercive powers, together with increased discretionary power, give the police an extended freedom to characterise a situation as giving rise to a 'terrorist offence'. Given the exceptionally broad range of activity, which can fall within a 'terrorism' offence, these extended police powers are likely to increase police interaction with those who are not a threat to security. In such circumstances, the discretionary aspect of increased police power presents a formidable threat to basic freedoms.[30]

6.37 The Federation of Community Legal Centres (Vic) stated that it too was 'worried about the discriminatory use of the powers in prescribed security zones, where no reason for exercising the powers to stop, search and question will be required'.[31] Further:

> There is already a disproportionate focus on the Muslim community by the media, law enforcement agencies, intelligence gathering agencies and the broader community whenever the issue of terrorism is raised. We are concerned that the Muslim community will be subject to further disproportionate and arbitrary police interference as a result of these powers. Police targeting of the Muslim community is clearly an undesirable

29 *Submission 81*, pp 20-21.

30 *Submission 81*, p. 21.

31 *Submission 167*, pp 35-36.

> outcome and may even have a counter-productive effect with respect to criminal investigation, insofar as an alienated community is less likely to be cooperative with police investigations. Most importantly, however, over-policing along racial or religious lines that is facilitated by legislation amounts to officially sanctioned racial and religious discrimination. It also has the danger of perpetuating and even exacerbating racial and religious prejudice in the broader community. This should be something that our society is working to counteract, rather than enacting laws that are inherently prone to discriminatory application such as these.[32]

6.38 In a similar vein, Dr Philip Claxton argued that:

> [The random stop and search powers coupled with the Minister's discretion to declare an area a 'prescribed security zone' mean that] the police…need not even reach the very low threshold of suspecting that a terrorist act "might" be committed: the scope for widespread abuse of those seen as suspect…will be most acutely felt by those seen as terrorists, and the danger of racial and religious stereotyping again raises its ugly head.
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> This in turn will widen the gulf between Muslims and other sections of Australian society as Muslims are forced to become the feared "other": this will inevitably lead to a backlash against ordinary Muslims personally who will be seen as the cause of the current problems Australia is currently touted as suffering from. At particular risk are Muslim women who are visibly Muslim and who will inevitably be subjected to the indignity of a bodily search which requires the headscarf to be removed to be searched in public - there is currently no provision which requires the search to take place in private. Again this will further alienate the Muslim community and serve to marginalise even moderate Muslims.[33]

6.39 Ms Agnes Chong from AMCRAN also highlighted the potential impact of the Bill on the Muslim community, with particular reference to its weakened safeguards:

> The problem with the weak safeguards [in the Bill] is that they increase the chance of innocent people being caught by the bill. And, let us face it, the reality is that these people will be likely to be Muslims. The weaker test allows for the spectre of racial profiling, whether official or unofficial, to arise. Each miscarriage of justice and use against innocent people would cause ripples of fear and disempowerment through the Muslim community. More dangerously, it also undermines the spirit of cooperation that must exist between Muslims and the wider community if terrorism is to be fought.[34]

6.40 Dr Waleed Kadous from AMCRAN commented on the message the Bill may send to the Muslim community at large:

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32 *Submission 167*, p. 36.

33 *Submission 131*, p. 3.

34 *Committee Hansard*, 17 November 2005, p. 19.

> The important thing to realise is that legislation is not just about law; it is about social messages. And the message that these laws send out to the community is that Muslims are to be suspected, whether that is intended or unintended. I had a conversation with a senior member of the AFP recently. I discussed with him the possibility that, under these new laws, racial profiling may happen. He assured me that it is not within his power to guarantee that racial profiling will not happen. Similarly, it is not within my power to guarantee that the introduction of these laws will not lead to people susceptible to radical ideas falling for them as a consequence of what they see as being railroaded, marginalised, by, for example, not being able to say what they really think on a particular issue.[35]

6.41 The Islamic Women's Welfare Council of Victoria expressed concern that the stop and search powers would unfairly target certain members of the Muslim community:

> We are concerned that this will lead to racial profiling and that Muslims are more likely to be searched. Young Muslim men are already vulnerable to racial profiling. Furthermore, it may cause community backlash against Muslims as people would be likely to blame them for any inconvenience they experience because of an area being locked down as a "security zone".[36]

6.42 Further:

> There is also a particular issue for women who wear hijaab (head scarf), niqaab and chador (traditional Islamic dress which also covers part of/or full face) who might be requested to remove their hijab/niqaab/chador as part of a search. There is no requirement that the search be conducted in private and this will be a source of great distress for women. We believe that fear of random stop and search powers; will further isolate women for fear of being searched publicly or being searched by male officers. It also appears that Muslim men are more likely to be stopped in relation to these matters (this has been demonstrated by the fact that all the raids in relation to terrorism have been conducted on Muslims) and therefore, their wives, daughters or other women who might be accompanying them are again vulnerable to the policing measures targeting Muslim men.[37]

6.43 Several other submissions also expressed concern at the particular impact of the stop and search powers on Muslim women, including the lack of privacy safeguards in the Bill and the lack of a requirement that searches be carried out by police officers of the same sex as the person being searched.[38] The National Children's

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35 *Committee Hansard*, 17 November 2005, p. 26.

36 *Submission 150*, p. 3.

37 *Submission 150*, p. 3.

38 For example, see Mr Patrick Emerton and Mr Joo-Cheong Tham, *Submission 152*, p. 38; AMCRAN, *Submission 157*, p. 26; Bar Association of Queensland and Queensland Law Society, *Submission 222*, p. 34; Devasia family, *Submission 225*, p. 2.

and Youth Law Centre, and the Hon Alastair Nicholson and others, noted the possible impact of the powers on young people, particularly young people of ethnic background or appearance.[39] PIAC expressed concern that 'the proposed police questioning powers will impact adversely on marginalised and vulnerable social groups', including the homeless, the mentally ill, and those with intellectual disabilities.[40]

6.44 PIAC also pointed out that the use of similar police powers in the UK is subject to independent oversight:

> Unrestricted coercive powers of the type envisaged have the potential to encourage racial profiling and discrimination. There is a danger that decisions by front-line police as to who they will stop, search and question will be affected by commonly held prejudices and stereotypes, eg, that Muslims are terrorists. This may result in particular ethnic, cultural and religious groups being targeted in the exercise of the powers, eg, young men of Arab or Muslim appearance, women wearing the hijab. There is evidence that similar stop and search powers in the United Kingdom have impacted disproportionately on people of colour. The United Kingdom Government has responded to concerns about racially discriminatory application of its anti-terror laws by requiring police to keep records of each stop and search that they carry out and by setting up a Stop-and-Search Action Team, which includes community representatives, to review how the powers are being exercised and to produce a guidance manual for all police forces.[41]

Highly discretionary nature of the power to declare a 'prescribed security zone'

6.45 Some submissions objected to the highly discretionary nature of the Minister's power to declare a 'prescribed security zone' under proposed section 3UJ.

6.46 In this regard, PIAC submitted that:

> There are no guidelines in the Act as to the criteria that have to be satisfied before a place is declared a prescribed security zone, and no requirement that the Minister make his or her decision on the basis of reliable intelligence or information. Although a procedure is set out requiring the Minister to publish the declaration, the declaration remains effective notwithstanding a failure to follow this procedure. Wide, unfettered discretion of this nature is unsatisfactory, given the potential adverse implications that the declaration of an area as a prescribed security zone may have for people who live or work in the area.[42]

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39 *Submission 211*, p. 5; *Submission 237A*, p. 8.

40 *Submission 142*, p. 36.

41 *Submission 142*, p. 35.

42 *Submission 142*, pp 35-36.

6.47 Mr Patrick Emerton and Mr Joo-Cheong Tham expressed a similar view:

> Given the breadth of the definition of 'terrorist act', the broad grounds on which the Minister may make a declaration of a place as a 'prescribed security zone', and the lack of any requirement that the Minister's declaration be based on reasonable grounds, means that the circumstances in which these powers are able to be invoked may be very broad.[43]

6.48 In its joint submission, the Bar Association of Queensland and the Queensland Law Society pointed out that the 'effectiveness of publication [of the Minister's declaration of a 'prescribed security zone' under proposed section 3UJ in the Gazette and on the Internet] seems questionable as a failure to properly publish the declaration has no consequences whatsoever'.[44]

Seizure of items related to 'serious offences'

6.49 The committee received some evidence which was critical of the proposed power to seize items for 'serious offences' (non-terrorism offences), particularly in light of the stated purpose of the Bill to prevent and combat terrorism.

6.50 The Federation of Community Legal Centres (Vic) argued that this part of Schedule 5 reaches beyond the scope of the Bill, effectively amounting to a misuse of anti-terrorism legislation to increase police powers with respect to ordinary crime:

> In our view, the inclusion of 'serious offences' in Schedule 5 is inexplicable and exceeds the scope of this Bill. Schedule 5 provides that, when conducting searches for a terrorism related item, police are permitted to seize and potentially retain any 'serious offence related items' found. A serious offence is specifically not a terrorism offence, rather, this term includes drug offences and those relating to fraud. This would seem to be an attempt to arm police with further powers to assist in policing non-terrorism offences via legislation purportedly aimed only at countering terrorism – an extension of police powers by stealth. We submit that any powers relating to serious offences are clearly misplaced in this Bill. We are concerned that the Government is exploiting public concerns regarding terrorism to extend police powers with respect to ordinary crime. Any increased police powers with respect to serious offences should be removed from the Bill.[45]

6.51 Mr Michael Cordover made a similar argument:

> Search powers may be used in order to obtain evidence to be used in non-terrorism-related trials. This is a misuse of the additional powers being granted in the name of national security.[46]

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43 *Submission 152*, p. 37.

44 *Submission 222*, p. 33.

45 *Submission 167*, pp 36-37.

46 *Submission 134*, p. 24.

6.52 The NSW Council for Civil Liberties agreed:

> The provisions…extend beyond the professed purpose of the Bill (to prevent terrorism) and will apply to all federal indictable offences. There is no justification for extending these extraordinary powers to non-terrorist offences.[47]

6.53 At one of the committee's hearings, Mr Cameron Murphy, from the NSW Council for Civil Liberties, expanded on its concerns with respect to the search and seizure provisions of Schedule 5 (and the notice to produce regime under Schedule 6, discussed in detail later in this chapter):

> It effectively dispenses with any need for a search warrant. That is what this does. It is so broad that you can effectively conduct a search through search and seizure powers or a notice to produce and obtain anything you like. It is not limited in that sense to terrorism offences. It fundamentally changes the protection that the law has provided for people's privacy. It eliminates it. Searches can take place and you will not need a warrant any more. You can simply ask someone to produce anything that you wish in relation to an investigation. I have said in the past that it allows ordinary criminal matters to suddenly morph into terrorism investigations. If you cannot obtain a search warrant in a tax evasion matter or some other criminal matter then suddenly it can become a terrorism investigation and you can obtain the evidence that way. That is the real danger.[48]

Need for independent oversight of the powers

6.54 Some submissions noted that, unlike the situation in the UK where the exercise of similar police powers is subject to independent oversight, the Bill does not contain any accountability mechanisms.

6.55 Liberty Victoria argued that:

> The grant and subsequent exercise of such extraordinary stop and search powers require a system of comprehensive independent auditing of the use of the powers. This is particularly so given there is absence of a Bill of Rights to provide a constitutional or legislative framework against which the grant and exercise of the powers can be judged. However, even where a Bill of Rights is in place the need for regular independent random auditing of the exercise of the powers is necessary to maximize the protection of the public from the abuse of power.[49]

6.56 Similarly, the National Children's and Youth Law Centre argued that, due to the strong possibility of racial profiling:

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47 *Submission 161*, p. 17.

48 *Committee Hansard*, 17 November 2005, p. 42.

49 *Submission 221*, p. 33.

> …the exercise of those policing powers requires special protection and review. Mechanisms for individual and systemic complaint, review and redress are required. Such mechanisms must be public, independent and externally accountable.[50]

Justification of the proposed powers

6.57 The committee heard evidence from the AFP and the Department which provided some background to, and rationale for, the Bill. The committee also took the opportunity to question the AFP and the Department in relation to some of the specific concerns raised by submissions and witnesses about the new police powers in Schedule 5.[51]

6.58 A representative from the AFP told the committee that the Bill addresses limitations in the current counter-terrorism legislative framework which have become apparent recently. This includes:

> …the need for the AFP to be able to protect the community where there is not enough evidence to arrest and charge suspected terrorists but law enforcement has a reasonable suspicion that terrorist activities may be imminent or where an act has occurred. Terrorism is different from other offences that the AFP investigates in that its outcomes are much more unpredictable and potentially catastrophic. The AFP needs appropriate powers to respond to that threat. These powers will be used judiciously and cautiously to protect the community.[52]

6.59 The representative submitted further that:

> What we are confronted with here is a new environment and new terrain where we are being tasked by the community to prevent terrorism from occurring in this country. As part of our operational activity we are seeing things occurring, we are highly disturbed by what we are seeing and we are having to exercise judgments which are at the very upper end of risk management to ensure that we can act before a terrorist act occurs. This is a very onerous responsibility for the security agencies and law enforcement. What we need are the tools to be able to intervene at an earlier period of time without having to wait until all of the evidence may be in place because, as we get towards that particular point, that becomes an inexact science. The risks to the community of something catastrophic happening are very real. This suite of measures is not a grab for power…and it is not something that the AFP does in any way without absolute consideration and great thought. But, from our operational experience, it will allow us to at least have a chance of preventing such activity.[53]

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50 *Submission 211*, p. 5.

51 Answers to relevant questions on notice put by the committee to the AFP and the Department are at Appendix 4 and Appendix 6 respectively.

52 *Committee Hansard*, 17 November 2005, p. 54.

53 *Committee Hansard*, 17 November 2005, pp 67-68.

6.60 The representative provided specific justification for the increased stop, search, question and seize powers as follows:

> …the London and Madrid bombings in particular demonstrate the need for police to have the appropriate powers to ensure that areas of mass gathering and public transport facilities are safe. The proposed extended powers are necessary to increase the AFP's capacity to prevent terrorist attacks and to respond effectively to attacks in a way that is consistent with the police in other jurisdictions. The AFP presently does not have the power to stop a person who may be acting suspiciously and ask basic questions as to their identity and purpose nor can the AFP search any suspicious items that a person may be carrying.[54]

6.61 A representative from the Department provided the committee with an explanation of the reason why seizure of items related to serious offences is included in Schedule 5:

> Where it comes in is that you have to be doing the stopping and questioning and so on in relation to a serious terrorism offence. However, if you find something when you are doing that questioning that relates to a serious offence then there are some provisions that deal with what you may do with that evidence.[55]

Powers to stop, question and search persons in relation to terrorist acts – the committee's view

6.62 The committee notes the concerns raised in submissions and evidence with respect to the proposed powers to stop, question, search and detain persons in relation to terrorist acts; and the power to seize items, including those related to serious offences. The committee shares some of these concerns. However, at the same time, the committee recognises the operational imperatives driving the measures contained in the Bill and is cognisant of the fact that strong police capabilities are essential to respond to, and combat, the threat of terrorism.

6.63 In line with these views, the committee believes that certain safeguards could usefully be included in Schedule 5 to counteract the potentially broad and arbitrary reach of the proposed powers. The inclusion of several statutory safeguards and checks on the use of the powers will serve to better protect civil liberties, such as the right to privacy. In the committee's view, this would provide a more balanced approach without impacting unduly on the exercise of the powers.

6.64 The committee considers also that there is a need for independent oversight of the powers. Therefore, the committee recommends that the Commonwealth Ombudsman be tasked with comprehensive oversight powers of the use of the proposed powers in Schedule 5. The committee emphasises the importance of, and

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54 *Committee Hansard*, 17 November 2005, p. 55.

55 *Committee Hansard*, 18 November 2005, p. 42.

strongly encourages, effective engagement of the Commonwealth Ombudsman in the accountability process.

6.65 The committee also recommends that the sunset clause applicable to Schedule 5 be amended to apply for a period of five years, in light of the stated purpose of the Bill as a specific and exceptional response to the threat of terrorism.

Recommendation 33

6.66 The committee recommends that all police who exercise the new stop, question, detain, search and seizure powers under Schedule 5 of the Bill be required to undergo comprehensive training as to their obligations under Commonwealth and state and territory discrimination legislation.

Recommendation 34

6.67 The committee recommends that proposed section 3UD of Schedule 5 of the Bill be amended to include a requirement that, as far as possible, body searches are to be conducted in private.

Recommendation 35

6.68 The committee recommends that proposed section 3UD of Schedule 5 of the Bill be amended to include a requirement that body searches be carried out by police officers of the same sex as the person being searched.

Recommendation 36

6.69 The committee recommends that Schedule 5 of the Bill be amended to include a requirement that all police forces keep comprehensive records in relation to any exercise of the proposed stop, question, detain, search and seizure powers in Schedule 5.

Recommendation 37

6.70 The committee recommends that the Commonwealth Ombudsman be tasked with comprehensive oversight of the use of the proposed stop, question, detain, search and seizure powers under Schedule 5 of the Bill.

Recommendation 38

6.71 The committee recommends that the sunset clause applicable to Schedule 5 be amended to apply for a period of five years.

Recommendation 39

6.72 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent five year review of the operation of Schedule 5.

Power to obtain information and documents – outline of key provisions

6.73 Schedule 6 amends the Crimes Act to introduce powers to permit authorised AFP officers to directly issue a notice to produce information and documents from operators of aircraft or ships (for example, in relation to persons or things on board), which relate to the doing of a 'terrorist act' (whether or not a 'terrorist act' has occurred or will occur) (proposed section 3ZQM); and to a person or organisation who may have information or documents relevant to the investigation of a 'serious terrorism offence' (proposed section 3ZQN).

6.74 Schedule 6 also allows for a Federal Magistrate, on application by AFP officers, to issue a notice to produce documents which will assist in the investigation of a 'serious offence' (offences punishable by imprisonment of 2 years or more, not including serious terrorism offences) (proposed section 3ZQO). The power to issue such a notice is conferred on a Federal Magistrate in a personal capacity and not as a court or member of a court (proposed section 3ZQQ).

6.75 The provisions allowing for notices to produce to be issued in relation to the investigation of serious terrorism offences and serious offences are aimed at organisations (such as financial institutions, utilities providers and telecommunications carriers) which may have in their possession or control documents such as transaction records, financial accounts and telephone records (proposed section 3ZQP). These might be relevant to determining, for example:

- whether an account is held by a specified person with a specified financial institution, and details relating to the account (proposed subsection 3ZQP(a));
- whether a specified person travelled or will travel between specified dates or specified locations, and details related to the travel (proposed subsection 3ZQP(d)); or
- who holds a specified telephone account and details relating to the account (proposed subsection 3ZQP(h)).

6.76 These provisions significantly widen the current powers of the AFP in relation to seizing documents relating to serious offences without a warrant.

6.77 Proposed section 3ZQR provides that documents requested under a notice given under either proposed section 3ZQN or 3ZQO must be produced. A person is not excused from producing a document on the following grounds (proposed subsection 3ZQR(1)):

- production of the document would contravene another law;
- the document might tend to incriminate the person, or expose them to a penalty or liability;
- production of the document would breach legal professional privilege, or any other duty of confidence (that is, legal professional privilege and other duties of confidence are waived in relation to documents which are the subject of a

notice, but only to the extent that a person is not excused from producing the document); or

- production would otherwise be contrary to the public interest.

6.78 However, proposed subsection 3ZQR(2) provides an immunity to ensure that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly, to gather other evidence against the person. The only exception to this immunity relates to proceedings under sections 137.1 and 137.2 (False and misleading information and documents), and 149.1 (Obstruction of Commonwealth public officials) of the Criminal Code.

6.79 Failure to comply with a notice to produce documents or information under proposed sections 3ZQN or 3ZQO is an offence punishable by a fine of $3300 (proposed subsection 3ZQS).

6.80 Proposed section 3ZQT creates an offence relating to the disclosure of the existence or nature of a notice issued under proposed sections 3ZQN or 3ZQO. The penalty for breach of the non-disclosure provisions is $13200 or 2 years imprisonment or both. There are some exceptions to the non-disclosure provisions, including disclosure to obtain a document required by the notice; disclosure for the purposes of obtaining legal advice or representation in relation to the notice; or disclosure in the course of legal proceedings.

Power to obtain information and documents – key issues

6.81 Key issues raised in the committee's inquiry in relation to the power to obtain information and documents include:

- the broad nature of the power and lack of accountability safeguards;
- the potential impact of the notice to produce regime on the duty of journalists not to reveal their sources; and
- the application of the regime to investigation of serious (non-terrorism) offences.

Broad nature of the power and lack of accountability

6.82 Many submissions and witnesses objected strongly to particular aspects of the proposed notice to produce regime. In particular, many noted the broad nature of the powers conferred on police by the Bill's vague statutory criteria, and the lack of associated oversight and accountability mechanisms.

6.83 For example, Mr David Bernie from the NSW Council for Civil Liberties told the committee that the notice to produce regime:

> …is probably one of the clearest provisions in this whole legislation. The police have the power. There is no problem with the power. They have search warrant power. If they need to they can do it through the existing search warrant powers. All that is happening here is the removing of a safeguard. It is effectively removing the safeguard of having to go and get a

> warrant. That is what is happening here. It is not a case of, 'Oh, gee, police need more powers to fight terrorism.' They have those powers. They can get search warrants. They can get questioning warrants under the ASIO Act. All sorts of warrants are available. What this is doing is removing a safeguard—a safeguard that we have always had in common law countries.[56]

6.84 Mr Cameron Murphy from the NSW Council for Civil Liberties noted further that:

> It is not difficult for the police to obtain a warrant in circumstances where there is some evidence or suspicion of wrongdoing. They can do that quite easily. We are not aware of any instances where the police have had a problem as part of an investigation. There is no real justification for this removal of a check and balance at all.[57]

6.85 The Gilbert and Tobin Centre of Public Law also submitted that the new regime allows the police a wide-ranging power because, unlike a search warrant (and as it applies to terrorism-related activities), there is no independent check on its use:

> [The regime is] plainly designed to circumvent the usual procedures for obtaining evidence under a search warrant, which include the requirements that a magistrate issue the warrant and only when satisfied by information on oath that there are reasonable grounds for suspecting that there is, or soon will be, evidence on the premises (Div 2, *Crimes Act 1914* (Cth)). The Bill does not provide the independent safeguard of an issuing magistrate, nor the additional evidentiary requirement that suspicion be based on information on oath.[58]

6.86 The Gilbert and Tobin Centre of Public Law drew an interesting analogy with the notice to produce powers already conferred on the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission.[59] However:

> The complexity of corporate entities does not apply in the same way to terrorist offences, so the rationale for notices to produce in the corporate context cannot be readily transplanted. While notice to produce powers may be helpful in investigating terrorism, departing from ordinary criminal investigative procedures (and their attendant protections for privacy and liberty) is only justifiable if accompanied by the independent safeguard of an issuing magistrate.[60]

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56 *Committee Hansard*, 17 November 2005, p. 42.

57 *Committee Hansard*, 17 November 2005, p. 42.

58 *Submission 80*, p. 15.

59 See *Australian Securities and Investment Commission Act 2001*, s. 33; *Trade Practices Act 1974*, s. 155.

60 *Submission 80*, p. 15.

6.87 In evidence, Dr Ben Saul from the Gilbert and Tobin Centre of Public Law reiterated the views expressed in its submission, stressing also that the regime has the potential to interfere with various types of confidential relationships. Having said that, however, he acknowledged that the notice to produce regime in the Bill contains some limitations:

> …the Attorney-General has publicly stated that this process is designed purposely to bypass the regular search warrant procedure, and so there must be some kind of intention behind it to make it easier to gather evidence. On the other hand, the notice to produce is relatively restrictive because it only allows you to gather certain kinds of fairly limited information, and so on that basis we are not absolutely against this measure. We do think, however, it should be subject to the protection of an issuing magistrate. The concern is that the notice to produce may interfere in legal professional privilege as well as other kinds of confidential relationships—protection of journalists' sources, for example, and protection of clients in noncriminal or non-civil proceedings—because, although the bill preserves use immunity, it does not preserve legal professional privilege absolutely. Think of refugee cases, for example, where there is no court proceeding on foot; there is simply an administrative process before the department of immigration. You have no use immunity there and therefore refugee lawyers have to effectively dob in their clients.[61]

6.88 PIAC also noted that the regime in Schedule 6 'breaks from the usual legal processes and protections in relation to the obtaining of documents relevant to an investigation'.[62] It observed, with concern, that certain privileges are abrogated under the proposed regime:

> The Schedule also provides that no privileges apply to permit a person to refuse disclosure of a document. As such, documents normally protected under legal professional privilege lose that protection under these provisions. Similarly, it removes the usual evidentiary protection against a person being required to give evidence that may 'tend to prove that the [person] has committed an offence against … an Australian law'.[63]

6.89 Further:

> These processes are a departure from usual criminal procedures with the absence of the requirement that such notices be issued under a court's authority and the absence of any protection against self-incrimination and a limited protection of legal professional privilege.

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61 *Committee Hansard*, 14 November 2005, p. 65.

62 *Submission 142*, p. 37.

63 *Submission 142*, p. 37.

> Where there is a risk of self-incrimination or a claim of legal professional privilege, there ought properly be a process for these matters to be determined by a properly constituted court.[64]

6.90 The APF argued that '(n)o justification has been provided as to why information cannot be obtained by using existing search warrant provisions, subject to judicial oversight'.[65] Indeed, it posed a pertinent question:

> If time is a factor, why not just spend resources on the availability of judges to approve warrants?[66]

6.91 In their submission, Mr Patrick Emerton and Mr Joo-Cheong Tham made similar comments about the broad grounds for use of the proposed powers:

> These powers will be able to be exercised without any need for a warrant being issued, and without the involvement or supervision of any judicial or independent authority. Failure to provide the information or document will be a strict liability offence. There is no express protection of the privilege against self-incrimination, although this might result from defence of 'reasonable excuse'. The burden will be placed on an accused who does not have the information or documents to adduce evidence of this in his or her defence.[67]

6.92 Similarly to the Gilbert and Tobin Centre of Public Law, Mr Emerton and Mr Tham were mindful of the limitations of the regime. However, in their view, these limitations were not enough to temper the power:

> The Bill limits the documents that are subject to a notice to produce to various matters including details of financial accounts, funds transfer, dealings in assets, travel, utility accounts, telephone bills and residence. Nevertheless, this power gives the AFP the capacity to build up extensive dossiers of information on individuals or companies that they are interested in, potentially in secret.[68]

6.93 Mr Emerton and Mr Tham pointed out that such capacity is particularly pertinent in the context of terrorism-related offences:

> This is particularly so in the case of the powers relating to 'terrorism offences', which may be exercised, and subjected to secrecy, without the supervision of any judicial or independent authority. Although the AFP's use of this power is stated to be limited to investigation of terrorism offences, in practice this will be a difficult constraint to enforce, as the party against whom the demand is made will not be in a good position to contest

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64 *Submission 142*, p. 37.

65 *Submission 165*, p. 5.

66 *Submission 165*, p. 5.

67 *Submission 152*, p. 40.

68 *Submission 152*, p. 41.

> the issue simply by virtue of not having the relevant information. Moreover, if the AFP chooses to impose a secrecy requirement, the person who is suspected of engaging in a terrorist offence will have no knowledge that these demands are being made in relation to their personal or business information. Giving the police such free rein opens the door to mistakes and abuse.[69]

6.94 Further, the potential for 'secret police dossiers' raises issues with respect to civil liberties which are exacerbated by the lack of statutory criteria in the Bill for use, handling and storage of the relevant information or documents.[70]

6.95 The Federation of Community Legal Centres (Vic) raised similar issues in the context of application of the regime to passenger information held by aircraft and ship operators. Specifically, they noted the lack of sufficient connection between the information or document sought and 'a terrorist act' under proposed section 3ZQM:

> Given the invasion of privacy involved in the exercise of these powers, we submit that a closer nexus between the information/document sought and a terrorist act should be required. It is conceivable that, as currently framed, the Bill empowers the AFP to request an extraordinarily expansive array of information and documents. As with any intrusive state powers, these powers should be kept to the minimum required for their purpose. In this respect, this Bill does not conform to this principle.[71]

6.96 Notably, in their joint submission, the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security suggested that, in order to lessen the potential for disagreement or confrontation, the Bill should be amended to contain:

> …some specification…which would safeguard against extensive "incidental" collection of information which is contained in documents requested for a specific purpose, particularly where the material may be of a sensitive nature (eg medical information).[72]

6.97 The Australian Privacy Foundation (APF) also argued that proposed section 3ZQT presents 'an unacceptable obstacle to accountability' since it prevents anyone served with a notice to produce from informing any other person (other that those involved in responding to the notice, and the person's own legal advisers).[73]

6.98 The Office of the Privacy Commissioner (OPC) made some pertinent comments about the breadth of the proposed notice to produce regime in the context of the *Privacy Act 1988* (the Privacy Act). Generally, the OPC noted that:

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69 *Submission 152*, pp 41-42.

70 *Submission 152*, p. 42.

71 *Submission 167*, pp 37-38.

72 *Submission 163*, p. 7.

73 *Submission 165*, p. 5.

> The result of this Bill being enacted would be to permit greater collection of personal information by the AFP including from private sector organisations, without warrant. While such collection and disclosure would comply with the AFP's obligations under the Privacy Act, as it would be authorised by law, careful consideration should be given to the enactment of such powers as they may detract from the intent and spirit of the Privacy Act.[74]

6.99 And further:

> In expanding the powers of law enforcement agencies, this Schedule invests a significant degree of unilateral authority in law enforcement officers going about their required duties with no corresponding guidance as to how this authority should be exercised. Specifically, the test required to request documents is: the authorised AFP officer "believes on reasonable grounds" and the officer must determine what is "relevant to". There is no obvious guidance on how these subjective terms should be interpreted, posing the risk that they may be interpreted broadly. The Office suggests that such powers should be accompanied by guidance as to how they should be executed.[75]

6.100 The OPC also made some comments in relation to particular aspects of the proposed regime. In relation to proposed section 3ZQM (the power to request information or documents about 'terrorist acts' from aircraft or ship operators), the OPC expressed the following concerns:

> …there is the potential for a large quantity of information to be collected from aircraft operators and operators of cruise liners. As a result, the personal information of large numbers of individuals who are not the subject of investigations and about whom there is no cause for suspicion, could be collected. Such an outcome sits uncomfortably with the notion of necessary collection. It would be preferable for there to be greater explanation as to how such routine surveillance would be useful, including whether it is a necessary and proportional response to the need for greater security.[76]

6.101 Proposed section 3ZQM does not address the question of how long personal information, once collected, may be retained. Accordingly:

> …an approach which is consistent with best privacy practice would be to destroy the information once it is no longer necessary for the purpose for which it was collected, particularly in relation to the information of people who may not be the subject of interest to law enforcement authorities.[77]

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74 *Submission 276*, p. 6.

75 *Submission 276*, p. 7.

76 *Submission 276*, p. 7.

77 *Submission 276*, p. 7.

6.102 The OPC also commented on the breadth of proposed section 3ZQN (the power to obtain documents relating to 'serious terrorism offences'):

> This would seem to create a power for the AFP to demand personal information without judicial warrant that is considerably wider than the power which currently exists. This section appears to substitute the use of notices in place of obtaining warrants. It is the Office's understanding that only the latter are subject to judicial oversight. The need for this additional power without judicial oversight is not readily apparent.[78]

Impact on journalists

6.103 In relation to Schedule 6 of the Bill, the Explanatory Memorandum states that:

> Care has been taken to ensure sensitive material can not be obtained under the new notice to produce regime. Sensitive material held by health professionals, lawyers, counsellors and journalists is clearly not caught by the regime. Such sensitive material might be able to be obtained for the purposes of an investigation through a search warrant.[79]

6.104 Notwithstanding this, the committee received a considerable amount of evidence from journalists who raised concerns about the possible impact of proposed sections 3ZQN and 3ZQO on their ability to carry out their functions. In particular, they were concerned that the proposed regime would effectively compel them to reveal the identity of confidential sources.

6.105 For example, in its submission, Fairfax argued that:

> The Bill…in effect mak(es) journalists an investigatory arm of the state, by empowering the AFP to apply for an order requiring any person to produce documents which may help the investigation of a serious non-terrorist offence [3ZQO]. How such a provision came to be included in the Anti-Terrorism Bill 2005 is unclear.[80]

6.106 Fairfax acknowledged the Explanatory Memorandum's reference to sensitive material held by journalists not being caught by the operation of the proposed notice to produce regime. However, in its view, 'the assurances in the E[xplanatory] M[emorandum] are hollow' since the Bill itself does not contain any such assurances.[81] Fairfax expressed grave concerns that, under the Bill, 'a journalist cannot refuse to produce a document which is protected by legal professional privilege or any other duty of confidentiality, including the duty owed to a confidential source'.[82]

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78 *Submission 276*, p. 8.

79 p. 84.

80 *Submission 88*, p. 4.

81 *Submission 88*, p. 4.

82 *Submission 88*, p. 4.

6.107 The Media, Entertainment and Arts Alliance agreed that '(i)t may have been the intention that journalists not be captured in the new notice to produce regime but that intention is not reflected in the Bill itself'.[83] The ABC was also not convinced that the Explanatory Memorandum alone would provide journalists with adequate protection:

> …the Australian Federal Police can…apply for an order to produce documents which may assist the investigation of a serious (non-terrorist) offence. It is difficult to understand why such a provision in relation to non-terrorist offences should be incorporated into anti-terrorism legislation. It is noted that section 3ZQP sets out the type of material that may be subject to a Notice to Produce under section 3ZQN and 3ZQO and that the Explanatory Memorandum to the Bill confidently asserts that material held by journalists would not be caught by these provisions. However, this seems far from certain. It is quite conceivable that a journalist may come into possession of material that relates, for example, to a person's financial transactions, travel or telephone accounts and communications. If so, they would not, apparently, be immune from a Notice to Produce.[84]

6.108 The ABC also noted that, under the Bill, it is a criminal offence, punishable by imprisonment for 2 years, to disclose the fact that the ABC or one of its personnel has been given a notice to produce:

> Again, this seems to be an unreasonable and unnecessary restraint on the media's ability to provide news and information in respect of criminal activities and, specifically, terrorism.[85]

6.109 The Australian Press Council (APC) submitted that:

> The Council notes with concern some elements of the proposed Schedule 6, dealing with the power to obtain information and documents. In particular, the Council raises the question of the inclusion in the Bill of Section 3ZQO that deals with power to obtain documents related to serious offences. Other provisions in this section deal specifically with information and documents related to terrorist acts. Why is a section related to 'serious offences', which might adversely impact on the press when authorities seek the surrender of documents they believe to be in a journalist's possession, in a Bill purportedly dealing with terrorism? If such provisions are thought necessary, they should be introduced separately.[86]

6.110 In relation to the provisions dealing with serious (non-terrorist) offences, the Special Broadcasting Service (SBS) objected strongly to their inclusion in the Bill and argued that they should be removed and dealt with more appropriately in a different context:

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83 *Submission 198*, p. 4.

84 *Submission 196*, p. 3.

85 *Submission 196*, p. 3.

86 *Submission 143*, p. 4.

> The Bill also provides that the AFP can apply to a Federal Magistrate for an order to produce documents that will assist in the investigation of a "serious offence", that is, separate to the provisions relating to a "serious terrorist offence". This provision is also a matter of serious concern: it appears to go beyond the objects of the Bill and, its potential impact on the independence of journalists goes well beyond any justifiable public interest.[87]

6.111 Free TV Australia's submission expressed its view as follows:

> The extension of the AFP's power to obtain documents that may help the investigation of a serious non-terrorist offence is of serious concern to Free TV. Clearly such a provision has no place in Anti-Terrorism legislation. Of similar concern is the AFP's power to require any person to produce documents based on the suspicion that they may assist in the investigation of a terrorist offence.[88]

6.112 Moreover, Free TV Australia argued that:

> Unlike the corresponding provision in the ASIO Act where the power of the Director[-]General of Security to seek a warrant requiring a person to produce records or things which are or may be relevant to intelligence that is important in relation to a terrorism offence is subject to qualification, the proposed Bill does not require the notice to produce documents to be approved by any judicial or other supervising body. Of particular concern is the absence of protection on the basis of legal professional privilege or other duty of confidentiality. Free TV seeks the removal of the AFP's power in relation to non-terrorist offences. In relation to terrorist offences Free TV requests that the Bill be amended to require approval of a notice to produce by a judicial or such body. Further, a carve out for documents protected by legal professional privilege or any other duty of confidentiality should be included.[89]

6.113 In evidence, Professor Kenneth McKinnon from the APC contended that proposed section 3ZQO of the Bill is of particular concern to journalists:

> …clause 3ZQO of the bill…is…very threatening in that it will allow an AFP person to go into any office and seize any document in pursuit of an undefined serious crime. I go around the country and speak to editors every year. I already have examples of state police coming into an editor's room and saying, 'We want that document and we advise you not to publish.' The editors do not know what to do. They usually say, 'If you bring a warrant,' and so on. The threatening tenor, supported by a clause of this kind, would be magnified very considerably.[90]

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87 *Submission 164*, p. 2.

88 *Submission 149*, p. 3.

89 *Submission 149*, p. 3.

90 *Committee Hansard*, 17 November 2005, p. 7.

6.114 Professor McKinnon argued that specific protections should be included in legislation to enable journalists to fulfil their ultimate responsibility of keeping the public properly informed:

> We believe that there ought to be a general set of shield clauses for reporting to the public what is going on, not only about terrorism but also about every other matter, and that in the Evidence Act there ought to be a bar on a judge approving counsel requiring a journalist to divulge sources. These clauses in this legislation add to a general tenor of concern about getting at the intermediaries to the public being informed. We really want to diminish those possibilities as far as possible so that there is the least possible impediment to full reporting to the public. We do not push it as freedom for newspapers or freedom for journalists; we push it as the public's right to know.[91]

6.115 SBS agreed that Schedule 6, as currently drafted, 'does not adequately address matters such as the public interest, legal professional privilege and duty of confidence'. It argued further that:

> Any provision relating to the production of documents in relation to terrorist offences should require judicial approval and an exemption for documents protected by legal professional privilege or any other duty of confidentiality.[92]

6.116 The Media, Entertainment and Arts Alliance also contended that the Bill 'strikes at the basis of news reporting and the principles of freedom of the press'.[93] That is:

> The Alliance can see no demonstrable benefit to be gained by the provisions that will have the effect of stifling freedom of the press and infringing on freedom of political communication.[94]

Application of the regime to non-terrorism offences

6.117 As indicated in the previous section, the committee received a considerable amount of evidence objecting to the application of the notice to produce regime to serious (non-terrorism) offences (proposed section 3ZQO). Some of these concerns are outlined more fully below.

6.118 The Gilbert and Tobin Centre of Public Law argued that inclusion of serious crimes in the regime is inappropriate and unjustified:

> We object to the inclusion of this power in anti-terrorism legislation. The measures in the Bill have been publicly justified as an exceptional response

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91 *Committee Hansard*, 17 November 2005, p. 7.

92 *Submission 164*, p. 2.

93 *Submission 198*, p. 4.

94 *Submission 198*, p. 4.

> to the extraordinary threat of terrorism. Extending special terrorism powers to investigate ordinary crime exploits the anti-terrorism justification for the Bill to significantly undermine regular criminal procedure. Exceptional threats are being manipulated to justify measures which would normally be considered an impermissible intrusion on privacy and liberty.[95]

6.119 In evidence, Dr Ben Saul from the Gilbert and Tobin Centre of Public Law again emphasised this point:

> Our concern with notices to produce is…that, although this bill is publicly justified by the government as a counter-terrorism measure, notices to produce may be available to combat other serious crimes. We think it is inappropriate for that kind of modification of regular criminal investigative procedure to take place on the back of a terrorism bill.[96]

6.120 The APF were extremely critical of the application of the regime to non-terrorism offences:

> Why is the government dealing with this in the context of the rushing-through anti-terrorism legislation instead of in its hopefully considered response to the Privacy Act reviews? This is an example of 'a power grab by stealth' i.e. slipping provisions into legislation that go well beyond the apparent objective of that legislation, to prevent separate debate about those provisions in the proper context. This smacks of rank opportunism –- and should be strongly resisted.[97]

6.121 PIAC agreed:

> Given the urgency with which the Parliament is being required to consider extensive changes to the law to provide, on the Government's rationale, necessary powers to counter the terrorism threat, it is not appropriate to include other amendments to the *Crimes Act 1914* (Cth), which should be properly scrutinised by Parliament for their general affect on the operation of criminal law in Australia and the proper protections to be afforded to individuals in the criminal process.[98]

6.122 The OPC made similar observations:

> Discussion around the Bill has…focused on the extent to which the new powers are necessary and proportional as measures to combat the risks posed by terrorism. The introduction of measures that expand the powers of law enforcement agencies to investigate other offences seems to fall outside

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95 *Submission 80*, pp 15-16.

96 *Committee Hansard*, 14 November 2005, p. 65.

97 *Submission 165*, p. 5. Notices to produce were discussed in the privacy context in the Legal and Constitutional References Committee's recent inquiry into the Privacy Act: Senate Legal and Constitutional References Committee, *The real Big Brother: Inquiry into the Privacy Act 1988*, June 2005, pp 133-134 and p. 161.

98 *Submission 142*, p. 37.

> of the stated purpose of the Bill. Such measures are likely to have policy objectives distinct from those that underpin the main provisions of the Bill relating to terrorist activity and should be able to be separately scrutinised and pursued through stand-alone legislation.[99]

6.123 In a detailed submission on Schedule 6 of the Bill, Mr Kenneth Kuhlmann queried the extension of the proposed notice to produce regime to non-terrorism offences:

> The government policy objectives and the need for this particular extension of police powers is not addressed in the Bill's Explanatory Memorandum (EM). In this area one could read the EM as being disingenuous and less than informative on the effects of this provision…
>
> To my knowledge no Minister of the Government has raised this matter in public discourse and the need to apply these far reaching powers to law enforcement generally has not been the subject of public debate…[100]

6.124 Mr Kuhlmann also made a noteworthy observation:

> It is reasonable to assume that public attention to the detail of this Bill has been directed to the substantial terrorism provisions and that the single section to which I refer has simply passed unnoticed. It is also fair to say that the community generally is completely uninformed about this proposed section and its possible consequences.[101]

6.125 Moreover, Mr Kuhlmann pointed out that a significant feature of the Bill is the power to order production of documents or information kept in electronic form. He argued that the ultimate effect of the notice to produce regime in this context may be 'the establishment of secret systems of monitoring or ongoing surveillance of individuals'.[102] While this might 'be considered necessary to deal with an immediate terrorist threat', it remains to be seen 'whether such powers should be in place for all serious offences'.[103] Arguably this 'is a matter which deserves full disclosure to the Australian community in preparation for serious and measured consideration', particularly in light of the fact that 'there is no sunset provision in relation to these powers; no judicial review; and no mechanism for Parliamentary oversight'.[104]

6.126 The Federation of Community Legal Centres (Vic) expressed concern that the disclosure offences under proposed section 3ZQT apply equally to notices to produce for terrorism-related offences and for notices to produce relevant to the investigation of a serious offence:

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99 *Submission 276*, p. 8.

100 *Submission 238*, p. 1.

101 *Submission 238*, p. 1.

102 *Submission 238*, p. 5.

103 *Submission 238*, p. 5.

104 *Submission 238*, p. 5.

> The justification for secrecy provisions and disclosure offences has consistently been stated to be to protect sensitive information relating to matters of national security. It is therefore unjustifiable that a disclosure offence pertains to a serious offences notice to produce.[105]

6.127 The NSW Council for Civil Liberties concurred with these views, and pointed out that the effect of the extension of the power to serious offences is even more pronounced because the relevant provisions are not subject to a sunset clause:

> These non-terrorism powers will remain in force for more than ten years. If the information and documents [are] sought from the person under suspicion, then any material produced should not be admissible in a court of law. Otherwise, the right to silence would be undermined.[106]

6.128 PIAC pointed out that, since the power to obtain documents relevant to the investigation of a serious offence is to be issued by a Federal Magistrate on the evidence in his or her personal capacity (as opposed to 'as a court or a member of a court'), issues of constitutionality may also be raised.[107]

Justification of the proposed powers

6.129 The Department and the AFP provided the committee with arguments in support of the proposed measures in Schedule 6.[108] A representative from the Department characterised the notice to produce regime in the following way:

> The power to obtain information and documents where they are related to a terrorism offence is properly characterised as an emergency type power because it is about a terrorism offence. However, this second leg, which is about obtaining documents in relation to serious offences, is less of an emergency power. In fact, it has a magistrate authorising the issue of this notice, so it is more of a general criminal justice type aid.[109]

6.130 With respect to the extension of the notice to produce regime to serious offences, he stated that:

> I guess there is a connection in the sense that some of the serious offences in here can be mixed up with some of the terrorism offences. However, to answer the question very honestly, the emergency power component really is about the terrorism offences rather than these offences. These powers are more about enabling the people who have these documents to have some sort of reasonably accessible legal authority to hand the documents over to

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105 *Submission 167*, p. 39.

106 *Submission 161*, p. 18.

107 See further, *Submission 142*, p. 37. See Chapter 2 of this report for a discussion of general constitutional issues raised in the context of the Bill.

108 Answers to relevant questions on notice put by the committee to the AFP and the Department are at Appendix 4 and Appendix 6 respectively.

109 *Committee Hansard*, 18 November 2005, p. 42.

> the police. The documents cannot be used against the person who hands them over, so you could not use these powers effectively to target someone who had the documents. You would have to get a search warrant in that case. There is no way that you would be able to use this for all the sensitive stuff that you would think of—medical records and stuff like that. This is a limited class.[110]

6.131 A representative from the AFP presented its view that the proposed notice to produce regime is a necessary tool to assist in enhancing its operational capacity to combat terrorism:

> With regard to notices to produce, the AFP believes that notices to produce are necessary to facilitate essential and basic inquiries related to the investigation of a terrorist and other serious offences, such as confirming the existence of an account; account holder details, including residential address; account history; and payment details. The British police have such a power, which was invaluable during the response to the London bombings to identify the suspected terrorists and verify their movements and associations at a very early and critical stage. In the past the AFP would have benefited from having these powers, in particular in relation to identifying potential terrorists travelling to Australia. The AFP believes that a notice to produce power is necessary to provide enough certainty to the private sector to assist the AFP in all circumstances.[111]

6.132 The representative continued:

> Some organisations have been reluctant, or have refused, to provide information requested by the AFP under the national privacy principle No. 2. A notice to produce would alleviate these problems. As the existing alternative is seeking search warrants to access information that firms are able to disclose under the NPPs, the national privacy principles, during a terrorist event there could be insufficient evidence on which to ground such a warrant.[112]

6.133 In response to questioning by the committee with respect to extension of the notice to produce regime to serious (non-terrorism) offences, the representative of the AFP provided the following explanation:

> It is an issue for us that has been on the agenda for quite some period of time. We have been in regular discussions with the Attorney-General's Department. But what we are progressively seeing, as I think I indicated in my opening remarks, is that, particularly in the corporate sector, where information is available and able to be released, there are businesses and entities that are unsure of their legal standing. We are finding more and

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110 *Committee Hansard*, 18 November 2005, p. 43.

111 *Committee Hansard*, 17 November 2005, p. 55.

112 *Committee Hansard*, 17 November 2005, p. 55. See also Senate Legal and Constitutional References Committee, *The real Big Brother: Inquiry into the Privacy Act 1988*, June 2005, pp 133-134 and p. 161.

> more reluctance to release information to the AFP, which can be legitimately released in these instances. We are also finding that businesses, companies and corporations are effectively looking for some legal cover, some legal protection, for abiding by the relevant privacy principles. So we are seeing more and more a need for such a notice to produce.[113]

6.134 Further:

> Might I say that notices to produce are not new. The committee may well recall the Proceeds of Crime Act, where there are notices to produce in such activity. And, of course, a range of other agencies, both state and federal, have notices to produce, to facilitate their investigational activity. So, particularly when the issue of notices to produce was being actively put forward as something that was required in the terrorist context, it made absolute sense to the AFP and the department that this particular bill was the appropriate forum in which to move those forward.[114]

6.135 The representatives reminded the committee that, where the notice to produce relates to a serious (non-terrorism) offence, a Federal Magistrate must issue the notice. Moreover, 'the evidence would need to be sworn'.[115]

6.136 The representatives also emphasised that the process of obtaining a search warrant is often not appropriate, nor practicable:

> Often in the early stages of investigation there is physically not enough information to ground a search warrant. Often you find yourself—if I can put it in the colloquial—in a chicken and egg situation. You need to find some base information and look at that information, which then might be the basis on which you could ground further warrants or investigative processes.[116]

6.137 The Commonwealth Ombudsman and the Inspector-General of Intelligence and Security were not entirely satisfied with the AFP's central justification for the application of the notice to produce scheme to serious offences. While maintaining that they were 'not in a position to question the need for notices to produce in relation to terrorism offences', they suggested that 'further consideration be given to allowing this capacity – as currently drafted – to be used in relation to other serious offences as proposed in s 3ZQO'.[117]

6.138 The Commonwealth Ombudsman and the Inspector-General of Intelligence and Security argued that fishing expeditions were still possible under proposed section 3ZQO:

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113 *Committee Hansard*, 17 November 2005, p. 65.

114 *Committee Hansard*, 17 November 2005, p. 65.

115 *Committee Hansard*, 17 November 2005, p. 65.

116 *Committee Hansard*, 17 November 2005, p. 65.

117 *Submission 163A*, p. 5.

> The justification given by the Deputy Commissioner suggests that in many instances it would be sufficient for a notice to seek "information" rather than a "document" or "documents". The latter are likely to contain some extraneous and possibly sensitive information. While the proposed s 3ZQP attempts to narrow the types of documents which can be sought (but in the case of at least proposed (i) and (k), not successfully in our view), there is still the potential to encourage "fishing" or "trawling".[118]

6.139 The Commonwealth Ombudsman and the Inspector-General of Intelligence and Security pointed out that proposed section 3ZQM allows an authorised AFP officer to obtain either 'information' or 'documents' from the operator of an aircraft or ship, but proposed section 3ZQO refers only to 'documents'.[119] They suggested amendments to Schedule 6 in the following terms:

- proposed section 3ZQO (and perhaps proposed section 3ZQN) should include the capacity for a notice to require the production of either information or of documents;
- proposed subsection 3ZQO(2) should specifically require the Federal Magistrate to include in his or her considerations whether:
  - it is appropriate that the notice require the production of 'documents' rather than 'information'; and
  - in cases where documents are sought, whether the source and documents nominated are the most appropriate ones for obtaining the information of relevance to the investigation.[120]

Power to obtain information and documents – the committee's view

6.140 The committee acknowledges the significant level of concern raised throughout the course of its inquiry in respect of Schedule 6 of the Bill. However, again, the committee recognises the operational objectives behind the Bill and expresses strong support for the provision of extraordinary powers to help combat an extraordinary threat. Therefore, after careful consideration, the committee does not consider that the concerns raised warrant rejection or significant amendment to Schedule 6.

6.141 Nevertheless, the committee notes the evidence it received with respect to Schedule 6's abrogation of legal professional privilege and other duties of confidence, including the duty of journalists not to reveal confidential sources. The committee agrees that legal professional privilege and other duties of confidence should be preserved absolutely in respect of any documents or information sought under the notice to produce regime in Schedule 6. This aligns with the committee's view in

118 *Submission 163A*, p. 5.

119 *Submission 163A*, p. 6.

120 *Submission 163A*, p. 6.

relation to legal professional privilege in the context of the preventative detention regime.[121]

6.142 The committee also agrees with the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security's suggested amendments to proposed section 3ZQO which would limit the scope of the notice to produce regime for serious (non-terrorism) offences in order to protect the capture of extraneous and possibly sensitive information.

6.143 Further, the committee acknowledges, and agrees with, comments and suggestions by the OPC in relation to the expansion of the powers of law enforcement agencies to collect and use personal information under Schedule 6. The committee notes that similar arguments could also apply to Schedule 5 and Schedule 8 (enabling the Minister to determine a code regulating and authorising the use of optical surveillance devices at airports and on board aircraft by aviation industry participants) of the Bill. Specifically, the committee is mindful that these powers provide a significant degree of unilateral authority in law enforcement officers (and others), with no corresponding statutory guidance as to how such authority should be exercised. The committee agrees that such broad powers should be accompanied by some guidance as to how they should be executed and recommends that best practice procedures be developed in this regard.

6.144 The committee is also of the view that the Bill be amended to include a sunset clause of five years applicable to Schedule 6, in light of the stated purpose of the Bill as a specific and exceptional response to the threat of terrorism.

Recommendation 40

6.145 The committee recommends that proposed section 3ZQR of Schedule 6 of the Bill be amended to preserve absolutely legal professional privilege and other duties of confidence, including the duty of journalists not to reveal their sources, in respect of any documents or information sought under the notice to produce regime in Schedule 6.

Recommendation 41

6.146 The committee recommends that proposed section 3ZQO of Schedule 6 of the Bill be amended to better protect the capture of extraneous and possibly sensitive information from the scope of the notice to produce regime for serious (non-terrorism) offences. That is:

- **proposed section 3ZQO be amended to include the capacity for a notice to require the production of either 'information' or of 'documents';**
- **proposed subsection 3ZQO(2) be amended to specifically require Federal Magistrates to consider also whether:**

121 See Chapter 3 of this report.

- **it is appropriate that the notice require the production of 'documents' rather than 'information'; and**
- **in cases where documents are sought, whether the source and documents nominated are the most appropriate ones for obtaining the information of relevance to the investigation.**

Recommendation 42

6.147 The committee recommends that a set of best practice procedures and guidelines be developed in consultation with the Office of the Privacy Commissioner to govern the collection, use, handling, retention and disposal of personal information acquired under the powers in Schedules 5, 6 and 8 of the Bill.

Recommendation 43

6.148 The committee recommends that the Bill be amended to include a sunset clause of five years applicable to Schedule 6.

Recommendation 44

6.149 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent five year review of the operation of Schedule 6.

ASIO powers - outline of key provisions

6.150 Schedule 10 of the Bill amends the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), the *Customs Act 1901* (Customs Act), the *Customs Administration Act 1985* (Customs Administration Act), and the *Migration Act 1958* (Migration Act).

6.151 Schedule 10 amends the ASIO Act to:

- expand the scope of ASIO's special powers warrant regime by:
  - clarifying the scope of computer access warrants to include a 'data storage device' (such as a compact disc) to allow ASIO to conduct lawful operations in the face of changing technologies, and to resolve any possible ambiguities in relation to what constitutes electronic equipment (Item 1);
  - extending the time period for the validity of search warrants (from 28 days to 90 days) (Item 12) and inspection of postal and delivery service warrants (from 90 days to 6 months) (Items 16 and 17), and extending the maximum time periods for foreign intelligence gathering warrants so that these periods are consistent with the general warrant time periods (Items 18-20);

  - allowing for the removal and retention of material found during the execution of a search warrant for 'such time as is reasonable' unless its return would be 'prejudicial to security' (Items 23 and 24); and
  - extending computer access warrants to allow entry onto premises without the need for a separate (search) warrant to authorise such entry (Item 13);
- provide ASIO with the power to request assistance from operators of aircraft and vessels, and impose obligations on such operators to answer questions and produce information and documents (in relation to the aircraft or vessel, or its cargo, crew, passengers, stores or voyage) that are in the possession or under the control of the operator (Item 2);
- align the offence of providing false or misleading information during questioning under a warrant issued under Division 3 of Part III of the ASIO Act (to covertly collect intelligence information that 'is important in relation to national security') with the formulation used in similar offences in the Criminal Code (Items 21 and 22); and
- make it clear that obligations, prohibitions and restrictions imposed by control orders under proposed Division 104 of the Criminal Code will not be a 'prescribed administrative action' for the purposes of Part IV of the ASIO Act (Items 26-28).

6.152 Schedule 10 also amends the Customs Act and the Customs Administration Act to broaden the powers of Customs officers to copy documents in relation to 'security or intelligence' matters (where the documents are relevant to specific functions of ASIO); and to allow Customs officers to lawfully disclose information relevant to 'security or intelligence' to relevant agencies (Items 29 and 30). It also amends the Migration Act to clarify the power to deport non-citizens on security grounds so that the definition of 'security' is the same as the definition in the ASIO Act (Items 31 and 32).

ASIO powers – key issues

6.153 The key concerns raised in submissions in relation to Schedule 10 of the Bill include:

- the necessity of the new ASIO powers;
- the proposed extension of time periods for validity of ASIO search warrants.; and
- the proposed ASIO power to confiscate seized items.

Need for the new powers

6.154 Most submissions commenting on Schedule 10 questioned the need and justification for the new powers, given the existence of ASIO's already extensive powers (most of which, to date, have not been utilised). Some submissions also

queried the inclusion of expanded ASIO powers in the Bill before the completion of various reviews of Australia's current anti-terrorism laws (which, it was contended, may effectively render these reviews meaningless).[122]

6.155 For example, the Federation of Community Legal Centres (Vic) submitted that:

> …we reiterate our concern relating to the necessity of extending ASIO's powers…ASIO have expressly stated in public hearings that they do not require an extension of their powers and no circumstances have been elucidated to justify this proposed extension of their powers. Furthermore, the review of ASIO's existing 'special powers' with respect to terrorism offences is incomplete. Again, we submit that it is imprudent to be affording ASIO an extension of their powers while the review of their existing powers remains incomplete.[123]

6.156 The Australian Privacy Foundation (APF) raised similar concerns:

> The changes to ASIO powers contained in Schedule 10 are not adequately justified (other than some technical changes which seem unobjectionable). We understand that the former Director-General of ASIO – Mr Richardson – stated publicly earlier this year that he considered ASIO's powers to be adequate and that he was not seeking further powers. The government has produced no explanation for why this assessment is no longer valid.[124]

6.157 In particular, the APF noted concerns relating to changes to the warrant regime and noted that '(t)he last round of amendments to the ASIO warrant regime benefited greatly from a lengthy period of Senate Committee scrutiny'.[125] The APF also submitted that the extension of the power of ASIO to require information from operators of aircraft and ships is not adequately justified:

> …there is inadequate explanation of the extent of the changes, and the justification for them, to allow for us to make a judgement as to their proportionality. But clearly any extension of compulsory information gathering powers outside of a judicial warrant regime are a matter of concern and need to be examined carefully.[126]

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122 See, for example, Mr Joo-Cheong Tham and others, *Submission 81*, pp 13-14; Federation of Community Legal Centres (Vic), *Submission 167*, p. 48; Mr Alan Behm, *Submission 193*, p. 8; AMCRAN, *Submission 157*, p. 30; Ms Catharine Errey, *Submission 257*, p. 1. Current reviews of anti-terrorism laws, as referred to elsewhere in this report, include the review by the Parliamentary Joint Committee on ASIO, ASIS and DSD; and the review being undertaken by the independent Security Legislation Review Committee, announced by the Attorney-General in October 2005.

123 *Submission 167*, p. 44.

124 *Submission 165*, p. 7.

125 *Submission 165*, p. 7.

126 *Submission 165*, p. 7.

6.158 The Federation of Community Legal Centres (Vic) also warned that any expansion of ASIO's powers should be considered against the non-transparent nature of its operations:

> The Federation is generally concerned with any extension to ASIO's powers. Being the agency responsible for intelligence gathering, ASIO necessarily operates covertly and is therefore not subject to the same public scrutiny as other agencies. Given that ASIO does not operate transparently (by necessity) it is not as easily made accountable. Any extension of its powers must therefore be approached with extreme caution. We submit that in the absence of compelling justifications for these extensions, the powers of ASIO should remain at the minimum required for them to properly fulfil their role. In this instance, no justifications have been provided for these extensions. It is therefore our submission that, even if other parts of the Bill are passed, this particular Schedule should not proceed.[127]

6.159 The OPC made some general observations about the proposed new ASIO powers. While noting that the activities of ASIO do not fall within the jurisdiction of the Privacy Act, the OPC still recommended that 'any expansion in its powers in relation to the collection, use and handling of personal information should be accompanied by strong guidance in relation to best practice in the handling and disposal of that information'.[128]

6.160 Specifically, the OPC highlighted Item 2 of Schedule 10 which grants ASIO additional powers to collect personal information from the operators of ships and aircraft and introduces an offence for not producing such documents:

> In many cases, the exercise of this power could result in the collection of personal information about individuals who are not the subject of inquiry and about whom there is no cause for suspicion.
>
> The O[PC] notes that there is no guidance on the grounds on which the Director-General, or senior officer authorised in writing, may authorise an ASIO officer to exercise this power (see, new section 23(6) [of the ASIO Act]).[129]

6.161 The OPC suggested that guidance from the Inspector-General of Intelligence and Security would be beneficial 'in relation to the collection, use and disposal of records by ASIO, particularly those relating to individuals not the subject of interest to ASIO'.[130]

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127 *Submission 167*, p. 46.

128 *Submission 276*, p. 13.

129 *Submission 276*, p. 13.

130 *Submission 276*, p. 13.

Extension of time periods for search warrants

6.162 Some submissions argued that there is no apparent justification for the proposed extension of time periods for ASIO search warrants.

6.163 For example, in their submission, Mr Joo-Cheong Tham and others argued that:

> At present, it is possible for ASIO to seek the issue of a further warrant if there continue to be grounds for the issuing of a warrant. The proposed amendment is therefore unnecessary for ASIO to be able to carry out its operations. Rather, it would simply reduce the degree of oversight to which ASIO is subject. In particular, if the time period for which a warrant remains in force is doubled, ASIO is in effect invited to take an ever less strict view of what counts as an individual's likelihood to engage in activities prejudicial to security. With a lengthened period of surveillance, the threshold requirement that interference under the warrant would be likely to assist in obtaining intelligence is also diluted.[131]

6.164 Arguably, by extending the time periods in such a way, 'one of the key factors balancing the interests of privacy against the interests of security' is diminished significantly.[132]

6.165 PIAC commented that the current time periods for warrants provide important safeguards:

> There is no apparent or rational justification provided for such an extension. Limited time for the operation of warrants is an important safeguard against abuse of the warrant power and protects against a warrant being used as the basis of a fishing expedition where a lack of clear and relevant evidence has been obtained through targeted enquiries.[133]

6.166 PIAC also argued that it is appropriate 'to maintain the current time limits throughout, thereby requiring ASIO to seek a further warrant based on its further information gathering activities'.[134]

6.167 The Gilbert and Tobin Centre of Public Law submitted along similar lines:

> Tripling the length of ASIO search warrants from 28 days to three months (cl 27A(3)(a)), and both mail and delivery service warrants from 90 days to 6 months (cl 27(4) and 27 AA(9)) cannot be justified. Reasonably short time limits on warrants are designed to ensure that warrants are not abused

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131 *Submission 81*, p. 23; see also Mr Patrick Emerton and Mr Joo-Cheong Tham, *Submission 152*, p. 44.

132 *Submission 81*, p. 23; see also Mr Patrick Emerton and Mr Joo-Cheong Tham, *Submission 152*, p. 43.

133 *Submission 142*, p. 38.

134 *Submission 142*, p. 38.

> by the authorities to conduct fishing expeditions over extended periods, where there is insufficient evidence of specific criminal conduct. Where suspicion of criminal activity continues over a protracted period of time, a new warrant should be made on the basis of any current and accurate information which justifies the continuing need for the warrant.[135]

6.168 Importantly, and on a more general note, PIAC also pointed out that none of the provisions relating to ASIO in Schedule 10 is limited in operation to ASIO activities that are specific to a terrorism threat:

> Rather, the power extends generally and so could be applied to any ASIO investigation, where in the past the Parliament has felt that the existing time limits were an appropriate balance.[136]

Power to confiscate items

6.169 Some submissions also commented on Items 23 and 24 of Schedule 10 which propose to amend section 34N of the ASIO Act to allow ASIO to retain seized items for 'such time as is reasonable' unless its return would be 'prejudicial to security'. The term 'security' is defined very broadly in the ASIO Act to include, for example, the protection of the people of the Commonwealth and the states and territories from espionage, sabotage, and politically motivated violence.[137]

6.170 Mr Patrick Emerton and Mr Joo-Cheong Tham contended that '(t)he single most concerning part of the Bill in relation to ASIO special powers warrants…is the power it would give to ASIO to confiscate property'.[138] ASIO does not currently possess a power of confiscation. Mr Emerton and Mr Tham pointed out that '(t)he risk of abuse [of the power of confiscation] is all the greater because ASIO is able to execute its search warrants, and the power of confiscation that it would be granted, in secret'.[139]

6.171 The Federation of Community Legal Centres (Vic) argued that 'the expansive definition of 'security'…effectively allows ASIO to confiscate items in an incredibly broad range of circumstances'.[140] Since ASIO is 'inherently a covert organisation that is not subject to the same mechanisms for oversight as law enforcement agencies', it is undesirable that it be given such broad powers to confiscate personal property.[141]

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135 *Submission 80*, p. 23.

136 *Submission 142*, p. 38.

137 See ASIO Act, s. 4.

138 *Submission 152*, p. 45. This may also raise an issue of constitutionality under section 51(xxxi) of the Constitution which requires the Commonwealth to acquire property only on 'just terms': see further *Submission 152*, pp 46-47.

139 *Submission 152*, p. 46.

140 *Submission 167*, p. 45.

141 *Submission 167*, p. 45.

6.172 Importantly, it was suggested that granting ASIO the power to confiscate property may also serve to compromise its role as an intelligence agency (as opposed to a law enforcement agency).[142] PIAC also made a general comment about the importance of the separation of intelligence and law enforcement powers which is relevant in this regard: namely that it is 'wary of any developments that would see the AFP transformed into an intelligence agency, or vice-versa, that is, ASIO taking on law-enforcement powers'.[143]

Justification of the proposed powers

6.173 The committee heard that ASIO supports the Bill 'as part of an evolving legislative framework directed at strengthening Australia's counter-terrorism capabilities'.[144] The Director-General of ASIO told the committee that:

> …it is essential that intelligence and law enforcement agencies have the capacity to effectively investigate potential threats and, where necessary, to intervene at an early enough stage to prevent a terrorist act from occurring.[145]

6.174 The Director-General advised the committee that, from ASIO's perspective, the proposed measures in the Bill would give ASIO 'a greater capacity to make better judgments about whether or not a threat is imminent'.[146] While '(t)he threat will not be abolished by the passage of these laws', the capabilities of the security intelligence and law enforcement agencies would be significantly enhanced.[147]

6.175 In evidence, representatives from ASIO justified the proposed extension of time limits for search warrants. The Director-General stated that:

> We have had evidence in recent times that operational considerations and operational flexibility would be considerably enhanced by having that greater period to operate in…(T)he extension of that period does not actually change the powers that ASIO has, but having a longer time frame within which to operate would be of use to us.[148]

6.176 A representative from ASIO clarified that current conditions and safeguards attaching to ASIO warrants would remain, despite the extension of time limits for their validity:

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142 Mr Joo-Cheong Tham and others, *Submission 81*, p. 25.

143 *Submission 142*, p. 24.

144 *Committee Hansard*, 17 November 2005, p. 53. Answers to questions on notice put to ASIO by the committee are at Appendix 5.

145 *Committee Hansard*, 17 November 2005, p. 53.

146 *Committee Hansard*, 17 November 2005, p. 60.

147 *Committee Hansard*, 17 November 2005, p. 60.

148 *Committee Hansard*, 17 November 2005, p. 60.

> I will just add to that that a search warrant can be executed only once, and it would still have to be the case that the grounds on which the warrant was issued—that is, that access to particular premises would yield items relevant to security—continue to exist. If during the longer period the (D)irector-(G)eneral is satisfied that the grounds no longer exist, there is a statutory obligation to take action to have the warrant discontinued. This just simply allows the situation where, for various reasons, it might not have been practical to execute the warrant within 28 days but at the end of that 28 days the grounds upon which the warrant was sought continue to apply.[149]

6.177 With respect to the new power to obtain information or documents from aircraft or vessel operators, the representatives from ASIO told the committee that currently ASIO would require the cooperation of such operators to provide the information or documents on a voluntary basis, or a search warrant. The Director-General stated that:

> At the moment, if my understanding is correct, there is no strict legal requirement for airlines to supply information of that kind to an organisation such as ASIO, although there has been cooperation with some of the airlines some of the time in obtaining information. If we have a situation where we know a person of interest is travelling, say, from Sydney to Lebanon or Afghanistan, sometimes it is possible, but it is not predictable that we will be able to obtain that information.
>
> …
>
> We would probably request the information from the airlines. We could use a search warrant.[150]

6.178 The other representative added that:

> We could theoretically request a search warrant, but we might be at a lower stage in the inquiry where the test for a search warrant might not be met or there might be a number of airlines that may have relevant information.[151]

6.179 The representatives from ASIO also provided comments on the proposed amendments to section 34N (Items 23 and 24 of Schedule 10) of the ASIO Act to allow ASIO to retain seized items for 'such time as is reasonable' unless their return would be 'prejudicial to security'. The representatives told the committee that it is not the intent of this proposed amendment to connote a position where the items are never returned:

> That is not the intent and that is not how we read it, because it is still subject to the requirement that it be returned in such time as is reasonable…unless an earlier return might be [prejudicial to security]…[152]

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149 *Committee Hansard*, 17 November 2005, p. 60.

150 *Committee Hansard*, 17 November 2005, p. 64.

151 *Committee Hansard*, 17 November 2005, p. 64.

6.180 When the committee pointed out that the Bill does not expressly contain the word 'earlier', the representative reiterated that it was the intention that it do so:

> The intention is that the items can only be withheld for a longer period than the time needed to inspect and examine if there is a security reason for holding onto them.[153]

6.181 The representative assured the committee that clarification of this part of the Bill would be pursued with the Department.[154]

6.182 In response to questioning by the committee in relation to the impact of increased ASIO powers on civil liberties, the Director-General informed the committee that ASIO is involved in a broader process that the Federal Government considers when developing legislation:

> Ultimately, that is not a judgment that we alone make. We are part of a much broader process that the federal government considers. It has people specifically mandated to give it advice on those issues. I think you had testimony from the Chairman of the Human Rights and Equal Opportunities Commission, for instance. So there are a variety of mechanisms where the government gets input into its considerations about how particular proposals might affect civil liberties. We have quite a number of in-house lawyers who advise on that issue, but there are many other people in, say, the Attorney-General's Department who advise the government on it. It has a wide range of views from outside the formal bureaucratic structures and so on.[155]

ASIO powers – the committee's view

6.183 The committee acknowledges the significant level of concern raised in submissions and evidence with respect to the Bill's proposed changes to ASIO powers. In particular, the committee notes the broad nature of the provisions extending the time periods for validity of search warrants, and their potential application to *any* ASIO investigation. The committee is of the view that the Bill should limit the extension of time periods for search warrants to ASIO investigations specifically relating to suspected terrorist activities and offences. This is particularly pertinent in light of the stated rationale of the Bill – a response to the threat of terrorism in Australia.

6.184 The committee is also mindful of apprehension expressed by some witnesses in relation to the proposed ASIO power to confiscate items, which could serve to compromise its role as an intelligence agency. In stating this, however, the committee accepts assurances from representatives of ASIO and the Department that the intent of

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152 *Committee Hansard*, 17 November 2005, p. 64.

153 *Committee Hansard*, 17 November 2005, p. 64.

154 *Committee Hansard*, 17 November 2005, p. 64.

155 *Committee Hansard*, 17 November 2005, p. 61.

the proposed amendments to section 34N of the ASIO Act (Items 23 and 24 of Schedule 10) is not to connote a position where the items are never returned, but rather to allow ASIO to retain relevant items for a longer period than currently permitted if there is a 'security' reason for doing so.[156] The committee recommends that the Bill be amended to clarify this position beyond doubt.

6.185 Further, the committee notes, and agrees with, the recommendation by the OPC that any expansion of ASIO's powers in relation to the collection, use and handling of personal information should be accompanied by strong guidance about best practice in the handling and disposal of that information. The committee agrees that guidance from the Inspector-General of Intelligence and Security would be beneficial with respect to the collection, use and disposal of records by ASIO. This is particularly pertinent in relation to information about individuals who are not the subject of interest or investigation.

6.186 The committee is also of the view that the Bill should include a sunset clause of five years which is applicable to Schedule 10, in light of the stated purpose of the Bill as a specific and exceptional response to the threat of terrorism.

Recommendation 45

6.187 The committee recommends that Items 12 and 16-20 of Schedule 10 of the Bill be amended to limit the provisions extending the time periods for validity of search warrants to ASIO investigations specifically relating to suspected terrorist activities and terrorism offences only.

Recommendation 46

6.188 The committee recommends that Items 23 and 24 of Schedule 10 of the Bill be amended to clarify that the power allowing for the removal and retention of material found during the execution of an ASIO search warrant, for 'such time as is reasonable' unless its return would be 'prejudicial to security', does not encompass a power to confiscate the material absolutely.

Recommendation 47

6.189 The committee recommends that ASIO, in consultation with the Inspector-General of Intelligence and Security, develop a set of best practice procedures and guidelines to govern the collection, use, handling, retention and disposal of personal information acquired under its expanded powers in Schedule 10 of the Bill.

Recommendation 48

6.190 The committee recommends that the Bill be amended to include a sunset clause of five years applicable to Schedule 10.

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156 See also answers to questions on notice at Appendix 5.

Recommendation 49

6.191 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent five year review of the operation of Schedule 10.