amnesty international australia

Submission to the

Senate Legal and Constitutional Legislation Committee

regarding the

Anti-Terrorism Bill **(No. 2) 2005**

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The global defender of human rights

1. About Amnesty International Australia

Amnesty International is a worldwide movement of more than 1.8 million people across 150 countries working to promote the observance of all human rights enshrined in the *Universal Declaration of Human Rights* and other international standards. In pursuit of these goals, Amnesty International undertakes research and action focused on prevent grave abuses of human rights including physical and mental integrity, freedom of conscience and expression, and freedom from discrimination. As part of this work Amnesty International monitors the enactment of legislation regarding national security in the context of the 'war on terror' and its impact on human rights.

Amnesty International is impartial and independent of any government, political persuasion or religious belief and is financed largely by subscriptions and donations from its worldwide membership.

2. Executive Summary

General Concerns

This Bill introduces two powers unique to Australia in times other than those of declared war that is, preventative detention and control orders. Each of the powers involve either the imprisonment or a severe restriction on a person's liberty where that person faces no criminal charge**.**

Freedom from arbitrary arrest and detention is a fundamental right contained in Article 9 of the *International Covenant on Civil & Political Rights* (*ICCPR*). It is a requirement of a system founded on the rule of law which includes the burden of proof, the standard of proof and the rules of evidence applicable to the criminal justice system which has been developed over 800 years in order to reduce the risk of innocent individuals being convicted and punished. The abolition of the rules, burden and standard in this new system removes these protections. It renders vulnerable innocent people to imprisonment particularly those people who have been made vulnerable by the climate of fear currently prevalent.

Amnesty International is opposed to any government detaining a person unless that person is charged and prosecuted for a recognisable criminal offence.

Article 14(2) of the *ICCPR* reads:

> "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

Article 2(3)(a) of the *ICCPR* reads:

> "To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

There is no doubt that the purpose of the new provisions for preventative detention and control orders refer only to those who face no criminal charge. It goes without saying that if there was sufficient evidence to charge they would be charged.

It is impossible to reconcile the fundamental notion of persons in our community being presumed innocent with the outcome of the application of either of the provisions relating to preventative detention or control orders.

The Availability of Judicial Review?

Clearly an attempt has been made to address criticisms of the earlier draft of this Bill by inserting Section 104.14 (relating to control orders) and Sections 105.51 and 105.52 (relating to detention orders) which purport to give a capacity for a person subject to either to seek a review of an order in a court.

Amnesty International says that in reality the capacity of such a person to challenge either specie of order is so severely limited, given the restrictions on access to information available to the person or his or her lawyer, as to be meaningless.

Control Order: Section 104.13 allows lawyers to be given a copy of the interim control order and a summary of the grounds on which the order is made. The lawyer cannot obtain access to the material which supports the summary of the grounds for the interim control order. Similarly Section 105.32 allows for similar documentation to be provided where a preventative detention order has been made. True it is that under Section 104.14 a lawyer acting on behalf of a person subject to a control order

may call evidence either by calling witnesses or producing material and presumably also to cross examine any witness called on behalf of the police. It may be under that Section the court will review material which was not made available to either the person the subject of the order and his or her lawyer. This material is not tested; in other words not subject to scrutiny or cross examination by the controlled person's lawyer.

Apart from the proposition that failure to provide the basis for the summary breaches Article 2(3)(a) of the *ICCPR*, it offends what is a fundamental notion namely that a person is entitled to know the evidence led against him or her so as to be able to effectively refute it if that is possible. How can this effectively be done if that information is not to be made available?

Further, the proceedings will be subject to the *National Security Information (Criminal & Civil Proceedings) Act 2004* where the Attorney-General has the capacity to issue a certificate which would effectively prevent evidence being provided to a Court should he consider that disclosure of it would be likely to prejudice national security.

National security is defined in that Act as being amongst other things: "Law enforcement interests".

Law enforcement interests include the protection and safety of informants and of persons associated with informants.

If the basis of information is malicious but cogent it is difficult to see how such evidence could be effectively challenged.

These problems exemplify the essential flaws of this Bill.

Secrecy

One of the truly disconcerting features of this legislation is that both control orders and preventative detention orders are to be clothed in secrecy. This includes the gruesomely ludicrous provisions relating to children.

Amnesty International can see that in some circumstances court proceedings should be held in camera.

In those circumstances an application supported by reasons could be made to a court for an order.

Secrecy ought to be justified not simply assumed.

Balance & Proportionality

Amnesty International, of course, recognises that measures and sanctions modified to meet changing and challenging circumstances – apparent since at least 9/11, Bali and the London bombings- may be needed.

Measures have already been introduced into law by earlier amendments to the Commonwealth Criminal Code, and Amnesty International has expressed its concerns in relation to elements of these provisions in earlier submissions to this Committee. These concerns included: breaches to freedom of association and vague or broad definitions of significant provisions carrying serious criminal sanctions.

The new provisions introduced by this Bill are beyond that proportionate response.

In Amnesty International's view these changes attack the freedoms they purportedly seek to defend.

Generally

Amnesty International is of the view that in any event the case has not been made out for these drastic measures which are acknowledged as both draconian and a systematic erosion of civil and political rights.

At least, hasten slowly.

3. General Concerns

Human rights law makes ample provision for strong counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective- by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is more likely to find recruits.

Kofi Annan, UN Secretary-General[1]

Amnesty International acknowledges that governments have a duty to protect the rights and safety of people within their territory. Security and human rights are not alternatives; they go hand in hand. Respect for human rights is the route to security, not an obstacle to it.

Australia has a variety of obligations with regard to the protection of human rights in international law, through both customary law and treaties. Many of these obligations have been adopted and enacted in Australian domestic legislation. Some human rights treaties accept that on some occasions emergencies that 'threaten the life of the nation'[2] may justify limiting or suspending the enjoyment of human rights in order to address the difficulties caused by the emergency, but only for the duration of the emergency. The act of limitation is given the technical term 'derogation'. Australia has not formally derogated from any of its international obligations as a result of anti-'terrorism' laws.

Not all rights under treaties are subject to derogation – a core group of rights are mentioned specifically in some treaties as being non-derogable, and must apply fully at all times. For example, the *ICCPR* states explicitly that the right to life, the right not to be tortured, the right not to be enslaved, the prohibition against retroactive criminal legislation, the right to recognition under the law and the right to freedom of thought, conscience and religion cannot be limited under a state of emergency.

[1] Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, 10 March 2005

[2] *ICCPR* Opened for signature 16 December 1966, 999 UNTS 171, entered into force on 23 March 1976. Australia ratified the *ICCPR* on 13 August 1980 Article 4(1)

Other rights are considered to be non-derogable by virtue of being customary rules of international law (general principals which states accept as being law) or even peremptory rules of international law (a general principle of law which cannot under any circumstances be limited) – for example, the obligation to treat detained persons with humanity, and certain elements of the right to a fair trial, particularly 'arbitrary deprivations of liberty…or the presumption of innocence'.[3]

The Bill undermines human rights. The creation of a system of detention without charge is necessarily inconsistent with the protection of human rights in Australia.

Amnesty recognises the need to balance individual freedoms against anticipated threats in the general community is a difficult process. This Bill breaches the collateral obligation to ensure that any measures taken in the interest of national security preserves the protection of fundamental human rights.

3.1 *Detention without Charge*

The Bill operates to allow detention that would otherwise be unlawful under Australian law. Freedom from arbitrary arrest and detention is a fundamental right contained in Article 9 of the *ICCPR*. It is a requirement of a system founded on the rule of law. The rules of evidence and the burden and standard of proof in the criminal justice system have been developed in order to reduce the risk of innocent individuals being convicted and punished. The abolition of the rules and standards in this new system remove these protections and creates a situation in which innocent people may be subject to lengthy detention without charge or trial.

Amnesty International is opposed to any government detaining a person unless that person is charged with and prosecuted for a recognisable criminal offence without delay.

Additionally, such prolonged detention would violate the right to liberty and freedom from arbitrary detention, given that one of its key constitutive elements, the right to be promptly informed of any charges against oneself, would be disregarded. Detention in police custody for up to 14 days and possible home detention for a renewable period of 12 months would also violate the right to a fair trial by undermining the presumption of innocence.

[3] UN Doc CCPR/C/21Rev.1Add. 11 General Comment No. 29 (24 July 2001), paragraph 11.

3.2 *Lack of Meaningful Review*

The Bill prevents meaningful review of both control orders and preventative detention orders. Information that is likely to prejudice national security is not to be provided to the person subject to the order. In effect this means that the person will be unable to obtain information as to why they are subject to an order. The limited access to such information prevents meaningful review even where provisions are made for such review to occur.

The result of their inability to access the information that forms the basis for the order is that they will be unable to contest the information. The conjunction of this Bill with the *National Security Information (Criminal and Civil Proceedings) Act 2004* is of great concern as the result may be that the person is prevented from ever seeing all the information upon which the order was made. Amnesty International's concerns regarding the *National Security Information (Criminal and Civil Proceedings) Act 2004* were detailed in our submissions to this Committee in July 2004 and April 2005.

3.3 *Discriminatory Effect of the Legislation*

The provisions of the Bill violate the right to be free from discrimination and the right to equality before the law and equal protection of the law without any discrimination. These rights are protected in Articles 2(1) and 26 of the *ICCPR* . The implementation of the provisions in this Bill will give rise to a different regime for the administration of criminal justice with respect to people purportedly suspected of involvement in terrorism which is neither reasonable nor objective nor aimed at achieving a legitimate purpose. This regime provides flimsy safeguards for the person the subject of the order compared to his or her entitlement under ordinary criminal law.

Any departure from ordinary procedures and safeguards recognising and according rights to the suspect in a manner which is practical and effective is unjustified and therefore unlawful.

The implementation of this Bill would inevitably lead to serious human rights violations and to a further alienation of certain sectors of the population, particularly those identified as Muslims. Instead of strengthening security, it will further alienate already vulnerable sections of society.

3.4 *Broad Denial of Rights*

This Bill creates a broad denial of existing rights. In particular, the terms of the control orders breach numerous human rights standards which combination, amount to home detention. The extensive impact that this legislation will have on human rights in Australia is obnoxious.

3.5 *Treatment of Minors*

There is no guidance given to the Minister or the issuing court/ authority as to the relevance, if any, of a person's age. This breaches Article 37 of the *Convention on the Rights of the Child* (*CRoC*). Article 37 provides that no child should be deprived of his or her liberty arbitrarily. Any detention should only be used as a measure of last resort and for the shortest appropriate period of time.

4. Detailed Analysis

This submission deals with the amendments in the order of the sections in the relevant Act and not in the order proposed in the Bill.

4.1 Sections 104.1- 104.32 Control orders

The Bill proposes an entirely new section on control orders to be inserted into the *Criminal Code Act 1995*.

4.1.1 Role of the Attorney-General

The Bill requires the senior AFP member to seek consent from the Attorney-General before requesting the interim control order form the issuing court or within four hours of making an urgent request. The Bill states that the Attorney-General's consent must be obtained.

However the Bill fails to provide any guidance as to what the Attorney-General must consider or to what level he must be satisfied that the order is required. In fact, the Bill does not even require the Attorney-General to be satisfied that the order is required. It merely states that the consent of the Attorney-General is necessary. This lack of clarity means that the role played by the Attorney-General is merely a token check over the process.

4.1.2 Failure to obtain the Attorney-General's Consent after an Urgent Application

The Bill states that if the Attorney-General does not consent after an urgent order has been made, then the order "ceases to be in force".[4] However if the Attorney's consent is a requirement for the creation of an order, failure to obtain consent should result in complete revocation of the order rather than simply ceasing to be in force. This can be contrasted with section 104.15(1) which provides that if an issuing court at a confirmation hearing declares the interim order to be void, then the order is taken never to have been in force.

4.1.3 Imposition of Conditions

The Bill lists the obligations, prohibitions and restrictions that can be imposed in section 104.5(3). These conditions are a prohibition or restriction on the person:[5]

- being at specified areas or places;
- leaving Australia;
- communicating or associating with specified individuals;
- accessing or using specified forms of telecommunication or other technology including the internet;
- possessing or using specified articles or substances; and
- carrying out specified activities.

The person may also be required to: [6]

- remain at specified premises between specified times each day or on specified days;
- wear a tracking device;
- report to specified persons at specified times and places;
- allow him or herself to be photographed;
- allow impressions of his or her fingerprints to be taken; and
- participate in specified counselling or education, with the person's consent.

<u>Human Rights breached by control order regime</u>

Amnesty International believes that these conditions breach a raft of fundamental human rights. Although some of these rights are subject to limitations, the conditions

[4] Section 104.10(2)

[5] Section 104.5(3)

[6] Section 104.5(3)

in the Bill go too far to restrict and remove the rights of individuals who may be subject to the control orders.

Right to liberty and security of the person

The right to liberty and security of the person[7] will be breached by requiring the person to remain at specified premises. As stated by the Human Rights Committee in General Comment 8, the right to liberty and security of the person "is applicable to all deprivation of liberty, whether in criminal cases or other cases".[8] While Article 9 if the *ICCPR* states that '[n]o one shall be deprived of his liberty on such grounds and in accordance with such procedures as are established by law', this does not allow the State to pass any kind of legislation to permit deprivations of liberty. The Human Rights Committee has commented in relation to legislation proposed in Trinidad and Tobago that "a vague formulation of the circumstances" may give "too generous an opportunity to the police to exercise this power".[9]

Any law purporting to restrict liberty must be clear and appropriately circumscribed. It also must not be arbitrary.

Arbitrary detention

The requirement that the person remain at specified premises may constitute arbitrary detention in breach of Article 9(1) of the *ICCPR* in that the person may be detained for up to 12 months, with possible ongoing renewal. In the case of *Van Alphen v The Netherlands*, the Human Rights Committee found that the complainant had been subject to arbitrary detention even though the judicial authorities followed at all times the rules in their criminal code. Arbitrariness does not require that the detention be against the law but rather includes "elements of inappropriateness, injustice and lack of predictability".[10]

[7] Article 9(1) *ICCPR*

[8] Human Rights Committee, General Comment 8 (Article 9), UN Doc. HRI/GEN/1/Rev.3, 15 August 1997 para 1.

[9] Human Rights Committee, Concluding Observations on Trinidad and Tobago para 16

[10] Human Rights Committee *Van Alphen v The Netherlands* (305/1988) 23 July 1990, Report of the Human Rights Committee Vol III (A.45.40) 1990 at para 5.8

Right to freedom of movement

The right to freedom of movement[11] will also be breached by requiring the person to remain at specified premises, restricting the person from leaving Australia and restricting the person from being at specified areas of places. The right to freedom of movement may be restricted but any such restriction must be necessary to protect national security, public order, public health or morals and the rights and freedoms of others. Any restrictions "must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognised in the Covenant".[12] Restrictions must be proportional, "appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected".[13]

The conditions under the control orders are not proportional, appropriate or the least intrusive instrument available.

Right to freedom of religion

The conditions may violate freedom of religion.[14] The right to freedom of religion includes the right "to manifest his religion or belief in worship, observance, practice or teaching".[15] The right to freedom to manifest one's religion or belief may be limited by law if such limitations are "necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others".[16] Any limitations must be "directly related and proportionate to the specific need on which they are predicated… Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint".[17] The control order may restrict the person from attending a specified place or may require them to remain at a specified place.

[11] Article 12 *ICCPR*

[12] Human Rights Committee *General Comment 27* para 11.

[13] Human Rights Committee *General Comment27* para 14

[14] Article 18 *ICCPR*

[15] Article 18(1) *ICCPR*

[16] Article 18(3) *ICCPR*

[17] Human Rights Committee *General Comment 22*

Amnesty International believes that such restrictions are not proportionate, nor do the restrictions preserve the individual's right to manifest their religion or belief to the fullest extent compatible with the nature of the control order. If the person is prevented from attending mosque either because they are specifically prevented from attending their mosque or because they are required to remain at a specified premises, this is an unnecessary and disproportionate restriction upon their right to manifest their religion as such complete restriction goes beyond the need to protect the public from terrorism.

Rights to freedom of expression and to freedom of association

The conditions violate the right to freedom of expression[18] in that the person can be broadly restricted from carrying out specified activities which presumably could include speaking in public forums and officiating in religious ceremonies.

The Bill allows for a violation of freedom of association.[19] The orders may prohibit a person from associating with specified individuals, carrying out specified activities or attending a specified place or may require them to remain at a specified place. These conditions would prevent the person from attending meetings of any groups to which the person may belong and would prevent the person from associating with people that the person may normally associate with. Such restrictions breach the right to freedom of association.

4.1.4 The Right to be Presumed Innocent

The Bill removes the presumption of innocence. International law protects the right to be presumed innocent in Article 14 of the *ICCPR* and Article 11 of the *Universal Declaration of Human Rights*. These rights apply in relation to people charged with a criminal offence. The difficulty in this Bill is that the person has not been charged with any offence. They are essentially judged, convicted and sentenced with no real opportunity to contest the basis of the order or the evidence against them. They are not criminally charged and tried but they are subject to a punishment.

Amnesty International believes that this Bill effectively removes the right to be presumed innocent in contravention of international law.

[18] Article 19 *ICCPR*

[19] Article 22 *ICCPR*

4.1.5 Balance of Probabilities

The issuing court is required to consider whether it is satisfied on the balance of probabilities that making the order would substantially assist in preventing a terrorist act or that the person has provided training to, or received training from, a listed terrorist organisation and that each of the obligations, prohibitions and restrictions to be imposed is reasonable necessary, appropriate and adapted for the purpose of protecting the public from a terrorist act.[20]

The conditions are onerous and significant. It is possible that a person could be subject to what amounts to house arrest if required to remain at specified premises with the inability to communicate with people if prohibited from accessing telecommunication.

Given the seriousness of these conditions, it is wrong that the issuing court only be required to be satisfied on the balance of probabilities that these conditions are necessary. Some of the conditions are harsher than those imposed as punishment for breaching the criminal law. Although control orders are supposed to be imposed for the purpose of protecting the public from a terrorist act, the imposition of the conditions, they are a punishment. As such, the issuing court should be required to be satisfied beyond reasonable doubt that the conditions are necessary.

4.1.6 Application for Urgent Orders

While Amnesty International does not support the use of the balance of probabilities as discussed above, it is of further concern that there is no clear reference even to this standard in the application for urgent orders. Section 104.7(2) which provides for the making of an urgent interim control order by electronic means states:

> If the issuing court is satisfied that an order should be made urgently, the court may complete the same form of order that would be made under sections 104.4 and 104.5.

Similarly section 104.9(2) which provides for the making of an urgent interim control order in person states:

[20] Section 104.4

> If the issuing court is satisfied that an order should be made urgently, the court may make the same order that would be made under sections 104.4 and 104.5.

Neither of these sections specifically require the issuing court to be satisfied on the balance of probabilities as required by section 104.4(1)(c). Stating that the court 'may complete the same form of order' or 'may make the same order that would be made' does not specifically require the issuing court to be satisfied on the balance of probabilities. The phrase 'the same form of order' appears to refer to the way in which the order is manifested rather than the process by which the order is made.

This is to be contrasted with section 104.14 which deals with confirming an interim order. Subsection (7) provides that the court may revoke, confirm and vary the order or confirm the order without variation by reference to section 104.4(1)(c) which requires the issuing court to be satisfied on the balance of probabilities.

It must be made clear that the standard for determining whether to grant an urgent order is the same as that for an interim order.

4.1.7 Retrospectivity

The Bill provides for the imposition of a control order if the person has provided training to, or received training from, a listed terrorist organisation. Thus if the person has provided training to the organisation ten years ago and the organisation has only been listed in 2005, the person may still be subject to a control order despite the organisation not being listed at the time that the training was provided. Article 15 of the *ICCPR* provides that

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

Again under the control order regime, a person is not being held having been found guilty of a criminal offence. However, the effect of the regime is that the person is essentially being convicted and punished without any right to a fair and public trial.

Specifically, the person is being punished for an act that had no such consequences at the time it was committed. This breaches Article 15 of the *ICCPR*.

4.1.8 Time period for the Interim Control Order

The Bill fails to specify a time limit for the interim order. The Bill provides that the interim control order must specify a date on which the person may attend the court for the confirmation hearing.[21] The Bill also provides that the interim control order must specify the period during which the confirmed control order is to be in force and makes clear that the confirmed control order must not extend most than 12 months after the day on which the interim control order is made.[22]

However the Bill does not specify how long the interim control order can be in place. There is nothing to prevent the interim control order from stating that the confirmation hearing will occur on a date several years in the future. It is correct that any confirmed control order could not extend past 12months from when the interim order is made however this only means that at the confirmation hearing, the issuing court could confirm the order and acknowledge that the time period has passed so that the order is no longer in force.

In essence, this allows for the indefinite imposition of the obligations, prohibitions and restrictions under the interim control order with no limitation on the length of time that the interim order may remain in force. This uncertainty is unacceptable.

Even if the interim order cannot extend past 12 months, there is no period specified within which the confirmation hearing must be held. Thus the interim order could extend for 11 months and 29 days, with the confirmation hearing being held on the 30th day. This makes the role of the confirmation hearing purely tokenistic.

4.1.9 Service of the Order

The interim order does not have to be served on the person until at least 48 hours before the day specified for the confirmation hearing, although the Bill does require that an AFP member must serve the interim order personally on the person as soon

[21] Section 104.5(1)(e)

[22] Section 104.5(1)(f)

as practicable.[23] In any event, the interim order does not come into force until it is served on the person.[24]

The decision of the confirmation hearing must also be served on the person personally as soon as practicable after the decision.[25] However there is no provision that states that the order is not in force until it is served. There is no time period within which the outcome of the confirmation hearing must be served personally on the person. The outcome of the confirmation hearing may be that the conditions in the interim order are revoked or varied. The lack of a time period within which the outcome must be served on the person may be overly harsh on the person the subject of the order. If the conditions have been varied or revoked, they will not be aware of this until served with the revocation or order and accordingly would reasonably believe that they were still required to comply with the interim order.

4.1.10 Arbitrary Detention

There are at least two ways in which the application of this Bill could result in arbitrary detention.

Firstly, as discussed above, the interim order could extend indefinitely. Secondly, the Bill provides that successive control order can be made.[26] It is noted that the Bill provides in section 104.32(1) that a control order that is in force at the end of ten years after the date on which the Division commences ceases to be in force. This acknowledges that the control order may continue for up to ten years.

If the person is subject to an order that requires them to remain in a specified place, this amounts to home detention. If this condition is extended year after year, this amounts to arbitrary detention and is in clear breach of Article 9 of the *ICCPR* which prohibits arbitrary detention. This is of overwhelming concern to Amnesty International.

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[23] Section 104.12(1)

[24] Section 104.5(1)(d)

[25] Section 104.17

[26] Section 104.5(2)

4.1.11 Restricted contact with specified persons

The Bill provides that one of the prohibitions or restrictions that may be imposed on the person is a prohibition on communicating with specified individuals. This will impose a broad restriction, such as a condition restricting the person from contacting anyone from their mosque, or anyone from their place of employment.

Further, Amnesty International notes that the Bill states that section 102.8(4) applies to the prohibition on communicating or associating with specified individuals. Section 102.8(4) specifies exceptions to the association offence contained in section 102.8. Amnesty International expressed concern about the limited nature of these exceptions in our submission to this Committee in 2004.

The exceptions contained in section 102.8(4) are extremely limited in their application. The first exception is for an association with a "close family member". "Close family member" is defined in the *Criminal Code Act 1995*. However the definition does not include uncles, aunts, cousins, nieces, nephews, parents-in law or children over whom the person is a guardian. The second exception is for an association in a place being used for public religious worship which takes place in the course of practising a religion. This may not include social meetings before or after religious worship or meeting associated with programs that the religious group may run such as education or counselling services. The third exception is for an association for the purpose of providing aid of a humanitarian nature. This does not appear to extend to people meeting to discuss welfare needs of a community or to discuss how to source humanitarian aid. The Explanatory Memorandum for the *Anti-Terrorism Bill (No 2) 2004* stated that the exception "is intended to apply to persons undertaking humanitarian aid".[27] The final exception is an association for the purpose of providing legal advice or representation in connection with certain legal proceedings. This does not cover an association for the purpose of fundraising to pay for legal representation. It also does not cover legal representation in connection with all types of proceedings. Amnesty International is of the view that these exceptions are far too limited.

[27] *Anti-Terrorism Bill [No 2] 2004 Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, House of Representatives p. 33

4.4.10 Opportunity for review of the decision

An AFP member is required to serve personally on the person a summary of the grounds on which the order is made.[28] However the summary is not required to include any information that is likely to prejudice national security, as defined in the *National Security Information (Criminal and Civil Proceedings) Act 2004*. Given that the Bill is meant to apply to terrorism related activities, it is highly likely that the relevant information will be information that will fall foul of the definition of national security. In effect this means that the person will be unable to obtain information as to why they are subject to a control order.

The result of the inability to access the information that forms the basis for the control order is that people subject to such orders will be unable to contest that information.

Although the confirmation hearing ostensibly provides an opportunity to adduce evidence or make submissions in relation to the order, in reality these proceedings will be limited as the person subject to the order will not be able to see the information that forms the basis of the order before the hearing and, in any event, the proceedings will almost certainly be subject to the *National Security Information (Criminal and Civil Proceedings) Act 2004*. This may have the effect of preventing the person from ever seeing all the information. Amnesty International's concerns regarding the *National Security Information (Criminal and Civil Proceedings) Act 2004* were detailed in our submissions to this Committee in July 2004 and April 2005.

The result of the application of the *National Security Information (Criminal and Civil Proceedings) Act 2004* and the restrictions regarding national security in the Bill is that the person has no real opportunity to contest the order or to challenge the evidence presented. This is in breach of the right to a fair trial under Article 14 of the *ICCPR*. This Article provides that "[i]n the determination of … his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

The person subject to the order is denied a fair hearing as they will not have access to the evidence or grounds beforehand and they are denied a public hearing if the hearing is subject to the *National Security Information (Criminal and Civil*

[28] Section 104.12(1)(a)(ii)

Proceedings) Act 2004. In addition, even if the person is able to receive a summary of the grounds upon which the order is made, sections 104.14(1) and 104.14(3) suggest that new evidence may be adduced by the AFP. The person subject to the order is thus unable to fully prepare to contest the order.

An essential component of the right to a fair hearing is the principle of "equality of arms".[29] This principle firmly establishes the need for equality between the parties and is an overarching right that must be observed throughout the process. It means that both parties must be treated in a manner ensuring that they have a procedurally equal position during the course of the hearing and are in an equal position to make their case.[30] This principle would be violated if a party was not given access to information necessary for the preparation of their case. The 'inequality of arms' in the Bill is unacceptable.

The inability to access information also renders the right of the person to apply for a revocation or variation of a control order nugatory. The 'inequality of arms' also plays an important role here in that if the person is not able to fully access the information that forms the basis of the order against them, then they are unable to satisfactorily demonstrate to the court why the order should be revoked or varied.

4.1.12 Attendance of the person at the Confirmation Hearing

The Bill fails to specifically ensure that the person must be permitted to attend their confirmation hearing. It must be explicitly provided within the Bill as, if the person is subject to an interim control order requiring them to remain at specified premises, then the person may not leave those premises without breaching the order. Given the different consequences which flow from the attendance or non-attendance of the person (see below), it is essential that the person be able to attend the confirmation hearing.

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[29] Also discussed in the ALRC Report 98 *Keeping Secrets: The Protection of Classified and Security Sensitive Information* 7.67- 7.69. The European Court of Human Rights has discussed this notion in a number of decisions (*Delcourt v Belgium European Court of Human Rights* 17 January 1970 A-11, EHRR 355)

[30] See European Court judgments in the cases of *Ofrer* and *Hopfinger*, Nos 524/ 59 and 627/59 Dec. 19.12.60, yearbook 6, p. 680 and 696.

4.1.13 Confirmation Hearing

The Bill provides that, if the person or their representative fails to attend the confirmation hearing then the issuing court may confirm the order without variation.[31] However if the person or their representative does attend then the court may declare the order to be void, revoke, confirm and vary or confirm the order without variation.[32]

It is unclear why the Bill does not state that the court may declare the order to be void, revoke, confirm and vary or confirm the order without variation regardless of the presence of the person subject to the order. There does not appear to be a link between the presence of the person and the ability of the court to determine, on the balance of probabilities, whether the court is satisfied that the making of the order would substantially assist in preventing a terrorist act, or that the person has provided training to, or received training from, a listed terrorist organisation.

The court must be able to fully exercise its decision making power without the restrictions those sections 104.14(4) and 104.14(5) appear to impose on the court.

4.1.14 Sunset clause

Amnesty International notes that the Bill provides for review of the anti-terrorism laws contained in Schedules 1, 2, 4 and 5 of the Bill by the Council of Australian Governments (COAG) after five years.[33] However it is unclear exactly what form this review will take and whether it will allow for public consultation.

The Bill further provides that a control order cannot be requested, made or confirmed after the end of ten years after the day on which the Division commences.[34] The imposition of such a long sunset clause is unacceptable, even with the inclusion of the COAG review after five years.

If the Bill is enacted, it must be subject to regular and frequent review because of the significant inroads that it makes to human rights.

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[31] Section 104.14(4)

[32] Sections 104.14(6) and 104.14(7)

[33] Clause 4

[34] Section 104.32(2)

4.1.15 Application to children

It is of continuing concern to Amnesty International that legislation such as this Bill applies to children 16 and above. Amnesty International is concerned that the Bill may breach Article 37 of the CRoC. Article 37 provides that no child should be deprived of his or her liberty arbitrarily. Any detention should only be used as a measure of last resort and for the shortest appropriate period of time. The Bill fails to provide any guidance to the Minister or the issuing court as to the relevance, if any, of a person's age.

Amnesty International is further concerned that the control order provisions in the Bill breach Article 40 of the CRoC in their application to children. Article 40 provides that a child is to be presumed innocent until proven guilty.

4.2 Sections 105.1- 105.53 Preventative detention orders

The Bill proposes an entirely new section on preventative detention orders (PDO) to be inserted into the *Criminal Code Act 1995*.

4.2.1 Arbitrary Detention

The regime as proposed in Division 105 of the Bill allows for detention to prevent an imminent terrorist act or to preserve evidence. It currently provides for detention of 48 hours although it is understood that the States are to pass legislation permitting preventative detention for 14 days. It is the position of Amnesty International that this regime breaches the right to be free from arbitrary detention as discussed above.

The purpose of the PDO is to detain a person who has not yet engaged in a terrorist act but who it is suspected will do so or who is suspected to possess a thing connected with the preparation for or engagement of a person in a terrorist act or has done an act in preparation for or planning a terrorist act. The purpose is not to punish someone who has broken the law.

Accordingly the detention regime is arbitrary in that it is uncertain exactly who will be detained under this regime and provides for detention without charge or trial. Additionally, the time period of 14 days could be said to be arbitrary and thus in breach of Article 9 of the ICCPR.

4.2.2 Constitutional Concerns

Amnesty International is aware of the constitutional concerns that have been expressed about the proposed legislation. While Amnesty International does not purport to have expertise in constitutional law, the organisation supports the concerns expressed by various commentators regarding the appropriateness of the individuals designated as issuing authorities and the question as to whether the States can provide for detention for 14 days in lieu of the Commonwealth being able to pass such laws.

4.2.3 Lack of Scrutiny

Amnesty International questions the process of obtaining an initial PDO. A member of the AFP applies to a senior member of the AFP who has the power to grant the initial PDO. This process is entirely without transparency. There is no external check on the process. The internal nature of the entire process prevents any knowledge of how the power is being exercised, whether it is being used appropriately and whether the member of the AFP and the senior member of the AFP are sufficiently satisfied of the matters required in section 105.4(4).

Amnesty International is also concerned about the disclosure offences contained in section 105.41. The section provides that it is an offence for a person being detained under a PDO to disclose that a PDO has been made in respect of them; that they are being detained; or the period for which they are being detained. The person is allowed to contact a family member, a housemate, their employer/ employees/ business partner and any other person that the police officer detaining the person permits the person to contact.

However the person is only allowed to let these people know that 'the person being detained is safe but is not able to be contacted for the time being'.[35] It is foreseeable that the use of this phrase will come to have its own meaning. If a fax is received stating 'I am safe but unable to be contacted for the time being', it will be clear that the person is held subject to a PDO. Accordingly this provision is farcical.

Amnesty International is concerned by the provision that prevents disclosure of the detention or the time period. Such secrecy provisions have no place in an open

[35] Section 105.35(1)

transparent democratic system. These provisions essentially create a system of secret police detention.

In addition, the monitoring of communications between a person detained and their lawyer undermines an essential component of a person's right to a proper defence – that is, full and frank confidential discussion with a lawyer.

4.2.4 Standard of Proof

The issuing authority must be "satisfied" that there are reasonable ground to suspect that the person will engage in a terrorist act; or possesses a thing connected with the preparation for, or the engagement of a person in, a terrorist act; or has done an act in preparation for or planning a terrorist act.

Amnesty International is concerned that the mere requirement that the issuing authority be 'satisfied' is an unacceptably low standard to apply to a regime that provides for detention of a person without charge or trial.

4.2.5 Opportunity for Review of the Decision

The PDO provisions operate in a similar way to the control orders for the provision of information to the person the subject of the order. A police officer is required to serve personally on the person a summary of the grounds on which the order is made.[36] However the summary is not required to include any information that is likely to prejudice national security, as defined in the *National Security Information (Criminal and Civil Proceedings) Act 2004,*which legislation is assumed to apply to these orders.

The submissions above in relation to control orders regarding the inability to access information limiting the ability to contest the order applies equally here. The Bill purports to provide the ability to seek a remedy from a federal court relating to the PDO or the treatment of the person in connection with the person's detention under the PDO.[37]

However if the person is unable to access the information that forms the basis for their detention, then the person cannot question or disprove the information. In any event, any such federal court proceedings will almost certainly be subject to the *National Security Information (Criminal and Civil Proceedings) Act 2004*. This may

[36] Section 105.32(1)(b)

[37] Section 105.28(2)(g)

have the effect of preventing the person from ever seeing all of the information and will result in a breach of the right to a fair trial under Article 14 of the *ICCPR*.

In addition, it is unclear whether the person is able to attend the hearing for the continued PDO. Amnesty International is concerned that such orders are firstly made completely within the AFP and then confirmed through a process that the person subject to the order will not be permitted to attend. This compounds concerns about a lack of transparency and accountability in the process, as well as undermining the effectiveness of any judicial oversight of the application of such orders

Further Amnesty International notes that, while section 105.51 provides for application to the Administrate Appeals Tribunal (the 'AAT') for review of a decision to make a PDO or in relation to a PDO, the application cannot be made while the order is in force. Amnesty International is unclear as to why this limitation is placed upon the availability of review. It is the understanding of Amnesty International that such review by the ATT would amount to merits review. Accordingly such review must be available at all times.

4.2.6 Breach of Legal Professional Privilege

Amnesty International notes that the Bill purports to protect legal professional privilege in section 105.50. However in substance there is no such protection as the Bill provides that contact that a detained person has with another person 'may take place only if it is conducted in such as way that the contact, and the content and meaning of the communication that takes place during the contact can be effectively monitored by a police officer'.[38] Under international human rights law, communications between the accused and their counsel are and must be confidential.[39]

[38] Section 105.38(1)
[39] Principle 22 of the *Basic Principles on the Role of Lawyers* Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

4.2.7 Application to Children

The PDO provisions apply to children aged 16 and above.[40] Amnesty International reiterates its concerns discussed above in relation to children and control orders.

4.2.8 Place of Detention Unclear

Amnesty International is concerned that the Bill does not clearly establish where the person is to be detained. Section 105.27 states that '[a] senior AFP member may arrange for a person who is being detained … to be detained under the order as a prison or remand centre'. This provisions still provides some leeway as to where the person is held and fails to specify whether children will be held separately from adult detainees or whether the detainees will be held separately to the convicted prisoners.

All detained people have the right to be held only in an officially recognized place of detention, located if possible near their place of residence, under a valid order committing them to detention to ensure that detainees have access to the outside world and as a safeguard against human rights violations such as "disappearance" and torture,.[41] International human rights require that convicted and non-convicted persons be held separately[42] and that detained children must be segregated from adults, except where this would not be in the best interests of the child.[43]

4.2.9 Sunset Clause

As discussed above, the ten year sunset clause in section 105.53 is unacceptable, even with the five year COAG review.

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[40] Section 105.5

[41] Principles 11(2) and 20 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* adopted by consensus by the UN General Assembly resolution 43/173 of 9 December 1988 1988; Rule 7(2) of the *Standard Minimum Rules for the Treatment of Prisoners* Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

[42] Article 10(2)(a) *ICCPR*

[43] Article 10(2)(b) of the *ICCPR*, Article 37(c) of the *Convention on the Rights of the Child*, Rule 29 of the *UN Rules for the Protection of Juveniles Deprived of their Liberty* G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

4.2.10 Future Extension of the Bill

The Bill prevents the person from being questioned while they are detained. However Amnesty International notes that in the second reading speech, Attorney-General indicated that the possibility of questioning of a person while in detention would be examined before the next COAG meeting. This is of particular concern.

Amnesty International has found that prolonged periods of pre-charge detention provide a context for abusive practices which can result in detainees making involuntary statements, such as confessions. The organisation considers that the likelihood of suspects making self-incriminatory statements under duress or other types of admissions or confessions increases with the length of time that people are held for interviewing or otherwise in police custody. Thus any provisions for questioning of detainees would be of significant concern.