PUBLIC
INTEREST
ADVOCACY
CENTRE

Level 9, 299 Elizabeth Street
Sydney NSW 2000
Australia
DX 643 Sydney
Tel: +61 2 8898 6500
Fax: +61 2 8898 6555
E-mail: piac@piac.asn.au
ABN 77 002 773 524

Submission to the Senate Legal and Constitutional Legislation Committee

on the

Anti-Terrorism Bill (No 2) 2005 (Cth)

11 November 2005

Index

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (**PIAC**) is an independent, non-profit legal and policy centre. PIAC provides legal advice and representation, public policy programs and advocacy training to promote the rights of disadvantaged and marginalised people and enhance accountability, fairness and transparency in government decision-making.

PIAC's key goal is to undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just and democratic society and empower citizens, consumers and communities.

PIAC's work extends beyond the interests and rights of individuals; it specialises in working on issues that have systemic impact at both a NSW and National level. PIAC's clients and constituencies are primarily those with least access to economic, social and legal resources and opportunities. PIAC provides its services for free or at minimal cost.

Wherever possible, PIAC works co-operatively with other public interest groups, community and consumer organisations, Community Legal Centres, private law firms, professional associations, academics, experts, industry and unions to achieve its goals.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly-based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1. Summary of Recommendations

Recommendation 9 23

That, consistent with Lord Lloyd of Berwick's recommendations:
(a) as far as possible, the ordinary criminal law should apply to terrorist acts;
(b) any specialised legislation must be strictly proportionate, and strike the right balance between individual freedoms and national security;
(c) additional safeguards should be provided to balance the additional powers;
(d) the laws should comply with Australia's international legal, including human rights, obligations;
(e) all counter-terrorism operations must be according to law;
(f) special powers introduced to deal with a terrorist emergency should be approved by the legislature, and should only be in force for a fixed and limited period.

Recommendation 10 24

That the Bill not be passed until such time as the full ramifications of this Bill, in context, are clear.

Recommendation 11 24

That control or preventive detention orders only be available in respect of persons suspected of the commission of terrorist offences as defined in the Criminal Code Act 1995 (Cth) that require the suspect to have active knowledge of the nature of the activities, rather than recklessness or deemed knowledge.

Recommendation 12 25

That the Committee ensure that the Australian Security Intelligence Organisation and the Australian Federal Police are kept strictly functionally distinct in terms of the law enforcement and intelligence and surveillance functions.

Recommendation 13 25

That the Committee consider the definition of 'national security' to ensure that it does not operate to deny persons subject to control and preventative detention orders any meaningful information about the basis for the order.

Recommendation 14 25

That a person subject to a control order or a preventive detention order and their representatives be entitled to the fullest extent of information possible, as a matter of right. Where information cannot be provided on the basis that it would prejudice national security, it must be provided to an independent authority who is charged with acting in the best interests of the person subject to the order and who must, if a representative is or representatives are appointed, work in conjunction with the person's representative(s).

Recommendation 15 26

That the Committee should be afforded the opportunity to review the related state and territory legislation to ensure the Commonwealth is not seeking, through co-operative arrangements, to circumvent the constitutional limits on Commonwealth power.

Recommendation 16 27

That the retrospective application of Schedule 1 of the Bill be removed as inconsistent with the Rule of Law.

Recommendation 17 28

That Schedule 1 be rejected by the Committee.

In the alternative, that Schedule 1 be amended to:

(a) require that the Minister be satisfied that the proscription of the organisation is necessary in order to protect identified Australian interests within Australia or overseas;
(b) remove paragraph (c) of the definition of 'advocates' at clause 9 of Schedule 1;
(c) clarify whose speech or actions are to be taken as representing those of an organisation;
(d) clarify that the relevant counselling, urging or instruction should be more than a mere whim, careless speech or action of a member who does not represent the views of the organisation;
(e) require the Minister to consider all the circumstances of the alleged advocacy on the part of a member of an organisation.

Recommendation 18 29

That the burden of proof for an issuing court in relation to confirming, varying or extending a control order should not be 'on the balance of probabilities', but 'beyond a reasonable doubt'.

Recommendation 19 30

That a rebuttable presumption in favour of revocation of a control order be included in the Bill.

Recommendation 20 30

That no person should be subject to more than two consecutive control orders, unless the Australian Federal Police can demonstrate to an issuing court, beyond reasonable doubt, that any subsequent control order is necessary.

Recommendation 21 30

If a second, consecutive control order is sought in relation to a person, it must be on the basis of new facts. The strong policy imperative behind the use of control orders ought to be 'charge or let go'.

Recommendation 22 30

That the Committee give consideration to imposing a minimum elapse of time between the cessation of one control order (or two consecutive control orders) and the imposition of another that would apply unless the Australian Federal Police can demonstrate to an issuing court, beyond reasonable doubt, that any subsequent control order is necessary.

Recommendation 23 30

That control orders, in relation to young people, have a maximum life of three months.

Recommendation 24 31

That the principles of human rights proportionality be imported into the Bill.

Recommendation 25 31

That the Bill be amended to explicitly recognise the constitutional protections of freedom of political communication, and to ensure that no one is subjected to conditions that would impair that freedom.

Recommendation 26 32

That the Committee consider amendments to require the Attorney-General to provide to an issuing court all relevant documents in support of a draft request for a control order.

Recommendation 27 32

That the control orders regime should be subject to more effective judicial oversight.

Recommendation 28 33

That the model for granting orders to place a person under preventative detention be amended to ensure judicial officers exercise judicial power appropriately.

Recommendation 29 33

That independent monitoring mechanisms be included to oversight of the operation of preventative detention orders.

Recommendation 30 34

That the Bill be amended to remove proposed section 105.27.

Recommendation 31 36

That the Committee reject Schedule 5.

In the alternative, that Schedule 5 be amended to:

(a) include statutory criteria to regulate and standardise the meaning of 'suspect on reasonable grounds' to assist front-line police officers in the exercise of their powers under the Act and to prevent policing practices based on prejudiced or stereotypical perceptions of particular ethnic, religious or cultural groups;
(b) include statutory criteria for the declaration of an area as a 'prescribed security zone';
(c) to provide that the defendant does not bear the evidential burden of proving 'reasonable excuse' in Clause 3UC(3).

Recommendation 32 37

That the Bill be amended to require:
(a) all police who exercise stop, search and question powers to undergo comprehensive training as to their obligations under federal and state discrimination legislation;
(b) all police to keep records in relation to their use of the stop, search and question powers;
(c) the establishment of a mechanism for independent oversight of the use of police stop, search and question powers (similar to the Stop and Search Action Team in the United Kingdom).

Recommendation 33 38

That the power to obtain documents or information set out in proposed sections 3ZQM, 3ZQN and 3ZQO be subject to the usual requirement that the order be issued by a properly constituted court after consideration of evidence.

Recommendation 34 38

That the privilege against self-incrimination and legal professional privilege be retained in respect of any documents or information sought under the provisions of Schedule 6.

Recommendation 35 38

That all warrants be issued by a properly constituted court.

Recommendation 36 38

That all of the provisions in Schedule 10 that extend the time for warrants not be passed or be limited in operation to ASIO investigations specifically relating to suspected terrorism activities.

2. The Bill and this Inquiry

PIAC welcomes the opportunity to make this submission to the Senate Legal and Constitutional Legislation Committee (**the Committee**) Inquiry into the Anti-Terrorism Bill (No 2) 2005 (Cth) (**the Bill**).

PIAC takes this opportunity to note is serious concerns about the way in which the Government has dealt with the Bill.

2.1 Timing

The Government, with its majority in the House of Representatives and in the Senate, has imposed an unreasonable reporting period on the Committee for this inquiry and in doing so, has demonstrated a lack of commitment to effective, open, considered and public consultation and processes. The Committee will have, at the most, sixteen working days to undertake the review.

More broadly, the public will have had eight days from the tabling of the legislation to the closing date for submissions to review, analyse and understand the impact of the provisions.

Both the Committee's Inquiry and the public review will have been conducted under the shadow of an apparent terrorism crisis. This will not benefit the process and will undermine the opportunities for a properly considered debate.

2.2 Democratic principles

PIAC considers the Government's treatment of this Bill to be a litmus test of the robustness of Australian democracy.

The Prime Minister has publicly conceded that this legislation represents 'unusual laws' for 'unusual times'[1], and it has been labelled by Queensland Premier, Peter Beattie, as 'draconian'.[2]

Consequently, there is a heightened duty incumbent upon the elected representatives to ensure the Bill is subject to measured consideration by Parliament, the public and experts in the Australian community. PIAC strongly urges the Committee to ensure democratic processes are observed by recommending to the Senate that the Bill not be approved until such time as there has been an opportunity for Parliamentarians, and interested members of the public to fully debate the provisions of the Bill, and to realise its full implications and test its necessity.

All members of the Committee, regardless of their party membership, share an interest in ensuring the integrity of democratic processes, which include ensuring meaningful scrutiny of legislative proposals by Parliamentary committees. This inquiry is not adequate and PIAC urges the Committee to demand an opportunity to review the provisions of this Bill thoroughly.

---

1 Brendan Nicholson, *PM orders: search, tag and track* (2005) *The Age* <http://www.theage.com.au/news/war-on-terror/pm-orders-search-tag-and-track-suspects/2005/09/08/1125772640541.html> at 26 October 2005*; States approve new anti-terrorism laws* (2005) ABC Online <http://www.abc.net.au/news/newsitems/200509/s1469394.htm> at 26 October 2005); Adam Shand, *Sunday* (2005) Nine Network <http://sunday.ninemsn.com.au/sunday/political_transcripts/article_1889.asp> at 26 October 2005; Brendan Nicholson, *Should we be afraid of the terror laws?* (2005) *The Age* <http://www.theage.com.au/text/articles/2005/10/17/1129401197536.html> at 26 October 2005.

2 ABC Television, 'Bracks, Beattie on anti-terror laws', *Lateline*, 19 October 2005 <http://www.abc.net.au/lateline/content/2005/s1486208.htm> at 20 October 2005.

Similar inquiries into counter-terrorism laws conducted by Parliamentary prior to 1 July 2005 have enjoyed far more realistic reporting deadlines. For example, the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) (**ASIO Bill**) was considered by the following Committees:

- The Parliamentary Joint Committee on ASIO, ASIS and DSD for an advisory report by the House of Representatives: the ASIO Bill was referred to the Joint Committee on 21 March 2002 for report by 3 May 2005. The Joint Committee tabled an unfinished report on 3 May 2002, together with a request for an extension of time. That extension was granted and the Joint Committee was given until 11 June 2002 to produce a final report. It tabled its final report on 5 June 2002. The Joint Committee noted that an extension was sought due to the intense controversy generated by the provisions of the ASIO Bill.[3]

- The Senate Legal and Constitutional Legislation Committee: the ASIO Bill was referred to the Committee on 21 March 2002, with the report tabled on 18 June 2002.

- The Senate Legal and Constitutional References Committee (**References Committee**): the Bill was referred to the References Committee 21 October 2002 and reported back on 3 December 2002.

This Bill has generated a similar level of controversy, traverses subject matter that takes Australian law and policing into untested and highly contentious waters with the grant to executive agencies of extensive powers at the expense of individual liberties and legal protections. It merits full, measured and considered scrutiny by the Committee and by the Parliamentary Joint Committee on ASIO, ASIS and DSD. As far as PIAC is able to ascertain, the only distinguishing factor between the Government's approach to the amendments to the *Australian Security Intelligence Organisation Act 1979* (Cth) (**the ASIO Act**) and this Bill is the fact that the Government is now not impeded by a Parliamentary Opposition, having full control of both Houses of Parliament.

Recommendation 1
That the passage of the Bill be slowed to allow for thorough consideration of its provisions by the Senate Legal and Constitutional Legislation Committee and the Parliamentary Joint Committee on ASIO, ASIS and DSD. Any such inquiries should include provision for thorough public consultation.

2.3 Comparative jurisdiction

PIAC notes that in the United Kingdom, where the Terrorism Bill 2005-06 (**UK Bill**) is currently under consideration by the Parliament, a far longer period of debate and consultation as well as a more transparent process has taken place.

The UK Bill's origins lie in the terrorist bombings in London on 7 July 2005. The Home Secretary, Charles Clarke, almost immediately began meetings with the Conservative and Liberal Democrats Parties' home affairs representatives. The correspondence leading up to those meetings, and the comments made by the attendees, are publicly available.[4] Then, on 20 July 2005, the Home Secretary made a statement in the House of Commons outlining the Government's response to the

3 Parliamentary Joint Committee on ASIO, ASIS and DSD, Commonwealth Parliament, *An Advisory Report on the Australian Intelligence Security Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) see particularly Chapter 1, paragraphs 1.1-1.5.

4 See, for example, <http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/223513>.

bombings. He indicated that the issue of control orders, which were at that time the subject of a review, would be considered separately in light of the outcomes of the independent reviewer's report. The Prime Minister, Tony Blair, gave further details in a press conference on 20 August 2005. The Home Secretary entered into further public correspondence with his Opposition colleagues on 15 September 2005[5] and 6 October 2005, and publicly released draft clauses that had proved particularly contentious.[6] The Prime Minister held a further press conference on 11 October 2005.

Two Parliamentary Committees considered the UK Bill and held hearings: the Home Affairs Committee and the Joint Committee on Human Rights.[7]

The UK Bill was introduced to the House of Commons on 12 October 2005 and was, until 9 November 2005, the subject of intense debate in the House of Commons. On 9 November 2005, the UK Bill was passed by the House of Commons with significant amendments that are relevant to the Australian Bill.

This process reflects a commitment to ensuring a democratic and open debate about very significant legislation. There has been open disclosure and negotiation. Yet in Australia, there was no public disclosure by the Government of the detail of the legislation following the COAG Meeting until 3 November 2005 when the Bill was tabled in the House of Representatives. Negotiations between the States, Territories and the Commonwealth have been conducted in secret and the Parliamentary Opposition parties were not provided with the text of the Bill until it was tabled.

In the United Kingdom, the Government has demonstrated a commitment to the conduct of independent reviews by waiting for the report of independent reviewers before legislating further. In Australia, the Government is pushing ahead with its legislative agenda regardless of the outcome of outstanding reviews (**see below Section 3.3**). In the United Kingdom, there is a public perception that the time allowed for Parliamentary debate has been limited; yet in Australia the time allowed is much less.

The comparisons between the two jurisdictions do not reflect well on the current state of Australian democracy.

2.4 Conclusion

In PIAC's submission, the parliamentary process for consideration of the Bill should be regarded as a measure of this Government's commitment to democratic procedures, principles and checks and balances.

The Prime Minister, upon confirmation of the Government's majority in the Senate as a consequence of the 2004 Federal Election, declared that his Government would exercise its powers responsibly and for the benefit of all Australians. On 28 October 2004, the Prime Minister said in relation to the news that the Government would hold the balance of power in the Senate:

> It's a very good outcome. But I want to assure the Australian people that the Government will use its majority in the new Senate very carefully, very wisely and not provocatively. We intend

---

5 See <http://security.homeoffice.gov.uk/news-and-publications1/publications-search/legislation-publications/237936>.

6 See <http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/237979?view=Binary>.

7 For an overview of the lead-up to the UK Parliamentary debates, see Miriam Peck, *The Terrorism Bill 2005-2006*, House of Commons Research Paper 05/66 (2005) 11-17.

> to do the things we've promised the Australian people we would do but we don't intend to allow this unexpected but welcome majority in the Senate to go to our heads.
>
> …
>
> We certainly won't be abusing our newfound position, we'll continue to listen to the people and we'll continue to stay in touch with the public that has invested great trust and confidence in us.[8]

It appears to PIAC that this assurance has proven to be a hollow one.

[8] Doorstop Interview with John Howard, Prime Minister of Australia (Sydney, 28 October 2004) <http://www.pm.gov.au/news/interviews/Interview1137.html> at 3 November 2005.

3. General concerns about the Bill

3.1 The commitments from government

The COAG Communiqué released 27 September 2005 states that the measures enacted by the Bill will be 'evidence-based, intelligence-led and proportionate'.[9]

PIAC commends all governments on giving this commitment to the Australian people.

However, PIAC rejects the claim that the measures in the Bill are proportionate, and expresses serious doubt as to whether the Bill can be said to be based on evidence. PIAC does not offer comments on the extent to which the measures can be said to be led by intelligence, because, by its nature, Australia's intelligence capacity is not open to public scrutiny.

PIAC addresses each of the elements of the Federal, state and territory governments' commitments to measures based on evidence (**see Section 3.2**) and consistent with the principles of proportionality below (**see Section 3.4**).

3.2 Evidence-based

There is no doubt that a terrorist attack is a possibility. This was true before 11 September 2001, and has probably become more likely since that date. That is not the issue for debate.

If this Bill is to be evidence-based, the Government should be in a position to provide evidence to the Committee, the Parliament, and the Australian public as to:

- why the measures *in this form* are necessary;
- against what threats the measures *in this form* are designed to guard;
- why the measures *in this form* are required over and above the existing body of law in the area;
- what legitimate function the measures *in this form* will serve; that is, are they to prevent a terrorist attack, to better equip law enforcement agencies to investigate and prosecute suspected terrorists, etc;
- how the measures *in this form* will effectively serve those functions;
- why the Government is confident of the necessity and effectiveness of the measures *in this form* given that reviews of existing counter-terrorism legislation are not yet completed (see below at **Section 3.3**).

The Government has not yet made public any evidence that answers these questions.

Recommendation 2
That the Parliament should reject the Bill until the Government provides evidence to justify the need for measures in their current form.

3.3 Lack of review

The Parliamentary Joint Committee on ASIO, ASIS and DSD is currently reviewing the efficacy and operation of Division 3, Part III of the ASIO Act that deals with mandatory questioning and detention powers (**Parliamentary review**). Its report is yet to be tabled.

---

[9] Available at <http://www.coag.gov.au/meetings/270905/coag270905.pdf> at 28 September 2005, 3.

Further, according to subsection 4(1) of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), the Federal Attorney-General is required to 'cause a review of the operation, effectiveness and implications' of amendments made to federal legislation by:

- the *Security Legislation Amendment (Terrorism) Act 2002*;
- the *Suppression of the Financing of Terrorism Act 2002*;
- the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*;
- the *Border Security Legislation Amendment Act 2002*;
- the *Telecommunications Interception Legislation Amendment Act 2002*; and
- the *Criminal Code Amendment (Terrorism) Act 2003*.

Subsection 4(2) of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) requires that this statutory review process 'must be undertaken as soon as practicable after the third anniversary of the commencement of the amendments'.

Apart from the *Criminal Code Amendment (Terrorism) Act 2003* (Cth), these laws commenced on 5 July 2002. Consequently, the Federal Attorney-General's obligation under the section is to cause the statutory review to be undertaken as soon as practicable after 5 July 2005.

The Attorney-General announced the statutory review on 12 October 2005.

There is no basis for the Government to claim that new powers are needed before the efficacy and operation of the existing legislation has been assessed.

Recommendation 3
That the Parliament should not be asked to consider any further laws to counter terrorism before the statutory reviews of existing legislation are undertaken, and reports have been properly considered.

3.4 Lack of proportionality

It is not clear how the Federal Government interprets its commitment that the measures be 'proportionate'. PIAC submits proportionality should be understood in light of the *constitutional* and the *human rights* interpretations of the term.

(a) Constitutional proportionality

The constitutional concept of proportionality requires that the measures should be reasonably necessary and 'appropriate and adapted' to achieving a legitimate purpose.[10]

Constitutional proportionality arises in two contexts.

The first is where the validity of a law depends on its being a law that achieves an effect or purpose that is within a relevant head of legislative power under section 51 of the *Constitution*.

The second is where the validity of a law depends on whether or not it infringes an express or implied constitutional limitation. This submission does not address this second context.

Where a law is being questioned as a valid means of achieving a purpose that is within the legislative power of the Commonwealth, the concept of proportionality is used to consider whether

[10] Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (2002) 691; *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (***Nationwide News***).

that law is appropriate and adapted to that purpose or object.[11] This includes the situation where the law is dependent on the incidental power found in placitum 51(xxxix) of the *Constitution*.

In *Nationwide News*, the High Court found that a legislative provision that protected the Industrial Relations Commission against verbal or written criticism was invalid. The reason given by Mason CJ was that the provision did not fall within the incidental scope of placitum 51(xxxv) as it was not reasonably proportionate to the purpose of preserving public confidence in the determinations of the Commission. Mason CJ adopted the principle that:

> [I]n characterising a law as one with respect to a permitted head of power, a reasonable proportionality must exist between the designated object or purpose and the means selected by law for achieving that purpose.[12]

Similarly, Brennan CJ in *Cunliffe* described proportionality as:

> [A] condition of, if not a synonym for, the criterion of appropriate and adapted which is employed to ascertain whether the means adopted by a law achieve a validating purpose or object that is reasonably connected to a head of power.[13]

The test of proportionality may be applied to determine validity of a law in any case where the purpose of a challenged law is relevant to its characterisation. In the case of *Leask v Commonwealth*[14], the High Court held that as the relevant heads of power were non-purposive (placetum 51(ii) or (xii)) the test of proportionality was not relevant to determining whether a law was within power.

An example of a purposive power is the defence power. It authorises the Commonwealth to legislate not on a specified subject matter but for a particular purpose. If a law has as its purpose the defence of the Commonwealth it will fall within this head of power.[15] Any legislative provision that relies for its validity on being characterised as incidental to the defence power must be reasonably proportionate to the overall purpose of the legislation, which it is contained within. Furthermore, the legislation must be a valid law pursuant to the defence head of power.

In respect of the Bill being considered, the objects of the provisions relating to control orders and preventive detention orders in Schedule 4, which inserts new Divisions 104 and 105 in the *Crimes Act 1914* (Cth), respectively are:

> 104.1 Object of this Division [Control orders]
> The object of this Division is to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act.
>
> 105.1 Object [Preventive detention orders]
> The object of this Division is to allow a person to be taken into custody and detained for a short period of time in order to:
> (a) prevent an imminent terrorist act occurring; or
> (b) preserve evidence of, or relating to, a recent terrorist act.

---

11 *Cunliffe v Commonwealth* (1994) 182 CLR 272 (***Cunliffe***), per Mason CJ at 296.

12 *Nationwide News* per Mason CJ at 29.

13 *Cunliffe*, per Brennan CJ at 323-5.

14 (1996) 187 CLR 579.

15 *Stenhouse v Coleman* (1944) 69 CLR 457.

In relying on these objects clauses to ensure constitutional validity, the Government must ensure that the specific measures in the Divisions are reasonable and proportionate having regard to those objects. These matters are considered in detail in respect of the particular measures below.

(b) Human rights proportionality

The principle of proportionality in human rights law is well developed through consideration by the European Court of Human Rights, the United Nations treaty bodies, and the United Kingdom courts and its (Parliamentary) Joint Committee on Human Rights. Before turning to what proportionality means in the context of human rights law, PIAC provides a brief analysis of the significance of human rights to counter-terrorism regulation.

Terrorism has been the subject of United Nations General Assembly and Security Council Resolutions since at least 1995. *The Declaration on Measures to Eliminate International Terrorism*[16], together with a General Assembly Declaration to support it[17], and Security Council Resolutions 1373[18], 1390[19], and 1455[20], have called on States to eliminate international terrorism in various ways.

The United Nations has clearly observed that States, when implementing General Assembly and Security Council resolutions in relation to terrorism, should:

> … comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law.[21]

Australia's international human rights obligations are therefore relevant to the way that the Government crafts its responses to terrorism threats. Australia's obligations to protect, respect and fulfill human rights do not cease to operate when national security is at stake. The rights under the *International Covenant on Civil and Political Rights* (**ICCPR**) are clearly relevant to consideration of the Bill. The ICCPR guarantees certain rights to all persons within Australia or under the jurisdiction of the Australian Government, regardless of their citizenship status. The following rights and freedoms are particularly relevant to the current Bill:

- Freedom from torture and cruel, inhuman or degrading treatment or punishment: Article 7.

- The right to liberty and security of the person, including the freedom from arbitrary arrest or detention and to be deprived of liberty only on grounds that are established by law. This right requires that a person who is deprived of their liberty be entitled to take proceedings before a court for the court to decide on the lawfulness of their detention. It also requires that any person

---

16 GA Res 49/60, UN Doc A/RES/49/60 (1995) Annex.

17 *Declaration to supplement the 1994 Declaration on Measures to Eliminate International Terrorism*, GA Res 51/210, UN Doc A/RES/51/210 (1997), Annex.

18 *Threats to international peace and security caused by terrorist acts*, Security Council Resolution 1373, UN Doc S/RES/1373 (2001).

19 *The situation in Afghanistan*, Security Council Resolution 1390, UN Doc S/RES/1390 (2002).

20 *Threats to international peace and security caused by terrorist acts*, Security Council Resolution 1455, UN Doc S/RES/1455 (2003).

21 Security Council Resolution 1456, UN Doc. S/RES/1456 (2003) paragraph 6.

who has been subject to unlawful arrest or detention should have an enforceable right to compensation: Article 9(1), (4) and (5).

- The right to be treated with humanity and with respect for the inherent dignity of the human person when deprived of liberty: Article 10(1).

- The right to equality before courts and tribunals and to a fair and public hearing by a competent, independent tribunal established by law: Article 14(1).

- The prohibition against retrospective criminal liability: Article 15(1).

- The right to recognition as a person before the law: Article 16.

- Freedom from and protection by the law against arbitrary or unlawful interference in a person's privacy, family, home or correspondence: Article 17(1) and (2).

- Freedom of thought, conscience and religion, including the right to manifest one's beliefs, conscience and religion: Article 18(1).

- Freedom to hold opinions without interference and freedom of expression. The right to freedom of expression includes the right to receive and to impart information and ideas subject only to lawful restrictions that are necessary for the protection of national security: Article 19(1), (2) and (3).

- The right to peaceful assembly subject only to lawful restrictions that are necessary in a democratic society in the interests of national security, public safety, public order or the protection of the rights and freedoms of others: Article 21.

- Freedom for members of ethnic, religious or linguistic minorities, in community with other members of the minority, to enjoy their own culture, to profess and practice their own religion, or to use their own language: Article 27.

The Bill has the potential to infringe each of these rights and freedoms.

The principle of proportionality as understood in human rights discourse, requires Governmental decision-makers, when contemplating an interference with a right, to balance the severity of the interference with the intensity of the need for action. Proportionality has a number of elements. The United Kingdom Joint Committee on Human Rights[22], in a review of criminal laws, said that the following factors are relevant in considering whether a measure is proportionate:

- an interference in rights must not take away the very essence of a right;
- there must be a sufficient factual basis for believing that there was a real danger to the interest which the State claims there was a pressing social need to protect;
- the State's measure or act must interfere with the right in question no more than is reasonably necessary in order to achieve the legitimate aim;
- measures are likely to be regarded as disproportionate if they impose heavy burdens on one individual or group, apparently arbitrarily, in order to achieve a social benefit, or if they impose burdens that appear to be excessive in relation to the circumstances to which they relate;

[22] The United Kingdom Joint Committee on Human Rights is a Parliamentary Committee established to consider 'matters relating to human rights in the United Kingdom' and to consider remedial orders to be made under the United Kingdom's *Human Rights Act 1998*.

- the effectiveness of any legal controls over the measures in question, and the adequacy of compensation or legal remedies for those affected by the measures, will be relevant to the proportionality of any interference.[23]

The United Kingdom Joint Committee on Human Rights has restated its test more generally as follows:

> [H]ow important is the right affected, how serious is the interference with it and, if it is a right that can be limited, how strong is the justification for the interference, how many people are likely to be affected by it, and how vulnerable they are.[24]

(c) Proportionality applied

The constitutional approach to proportionality has considerable overlap with the human rights approach to proportionality. Both are concerned with ensuring that there is a legitimate purpose, and that the means used to achieve that purpose are appropriate, narrowly tailored, and reasonably adapted.

PIAC submits that any analysis of what is proportionate in the Australian context should import Australia's human rights obligations, with the consequence that the extent to which an individual's human rights are limited is a relevant consideration in determining whether the Government's proposed measures are proportionate. In this way, the Committee ought to be concerned with ensuring the Bill has the lightest footprint possible in relation to restriction of individuals' human rights. PIAC contends that the Bill remains highly (and unnecessarily) invasive those human rights.

Key measures that PIAC submits the Committee should consider to ameliorate the Bill's lack of proportionality include:

- that control or preventive detention orders only be applicable to persons suspected of the commission of those terrorist offences as defined in the *Criminal Code Act 1995* (Cth) that require the suspect to have active knowledge of the nature of the activities, rather than recklessness or deemed knowledge;

- removing offences that rely on recklessness and considering whether a more direct nexus between a person's conduct and a terrorist act should be required in order for offences to be proven;

- reformulating the disclosure offences and prohibited contact orders available in relation to preventive detention orders to take better account of the individual right to freedom of expression;

- reconsideration of the adequacy of judicial review mechanisms said to exist in the current Bill (**see Section 3.5**);

- reconsideration of the adequacy of independent review and reporting mechanisms in the Bill;[25]

---

23 As defined by the Joint Committee on Human Rights, United Kingdom, First Report of the Joint Committee on Human Rights, Annex 2, Session 2000-01, Criminal Justice and Police Bill UK, 26 April 2001.

24 Joint Committee on Human Rights, United Kingdom, *Nineteenth Report of the Joint Committee on Human Rights* (2004) paragraph 47.

25 PIAC submits that there should be quarterly Parliamentary reporting obligations in relation to the use by the Government and its agencies of the powers in Schedule 4, as in the United Kingdom under the *Prevention of Terrorism Act 2005* in relation to control orders. The Bill currently provides for an

- inclusion of a more limited sunset clause, such as one year.

By way of further guidance in principle, PIAC refers to the recommendations of Lord Lloyd of Berwick set out below at **Section 3.5**.

Recommendation 4
That, in assessing the potential impact and operation of the Bill, the Committee adopt an interpretation of proportionality that is consistent both with the interpretation in constitutional and human rights law.

(d) Derogation

The Prime Minister has commented in relation to the Bill that we live in 'different times' and that while these laws might be 'distasteful', they are necessary.[26] This implies that certain standards, such as human rights standards many of which are fundamental principles of our common law and Rule of Law traditions, lack contemporary relevance.

It is not open to the Prime Minister to dismiss human rights standards in the context of national security. The dictates of national security and public order are a part of human rights principles, rather than a foreign or disqualifying concept.

Article 4(1) of the ICCPR provides:

> In times of public emergency which *threatens the life of the nation* and the existence of which is *officially proclaimed*, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant *to the extent strictly required by the exigencies of the situation*, *provided that such measures are not inconsistent with their other obligations under international law* and *do not involve discrimination* solely on the ground of race, colour, sex, language, religion or social origin. (*Emphasis added*.)

There are clear criteria and processes that Australia must apply should it wish to temporarily limit its international human rights obligations. In order to do so, it must officially proclaim a public emergency, setting out the basis for the proclamation and for the derogating measures it seeks to implement.[27] Those measures must be limited strictly by the exigencies of the situation at hand in terms of their duration, their geographical limitation, and the material scope of the state of emergency.[28] This reflects the principle of proportionality.[29]

---

annual report by the Attorney-General (cl 24: proposed s 104.29). There should be provision for a review of the operation and efficacy of the Bill, once passed into law, including its impact on individuals by an independent Parliamentary or other review committee that should commence within nine months and no later than twelve months after the commencement of the Bill as law. COAG is *not* an appropriate or sufficiently independent body. Any such report must be tabled in Parliament and require a response from each Government exercising powers under or related to the Act, that is, every Australian government.

26 Interview with the Prime Minister John Howard (Radio 2UE, 3 November 2005).

27 United Nations Human Rights Committee, *General Comment No 29 on States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev 1/Add 11 (2001) paragraph 17.

28 *Ibid*, paragraph 4.

29 *Ibid*.

Australia has not proclaimed any official emergency, and it is highly unlikely that it could validly do so in the current circumstances. Therefore, Australia's human rights obligations remain in full effect.[30] Some rights allow for lawful restrictions to the extent necessary for national security or public order. However that is not an escape clause: any such restrictions must be proportionate (see **Section 3.4(a), (b) and (c)**).

Recommendation 5

That the Committee explicitly:

(a) acknowledge that Australia's international human rights obligations are engaged and potentially violated by this Bill; and

(b) ensure that the Bill is proportionate.

3.5 Constitutionality

It is PIAC's view that the Bill, as currently drafted to provide for preventive detention and control orders, is a constitutional gamble. The very drafting of the Bill takes that into account. The Government has created a 'Plan B' options in the event of a successful constitutional challenge. For instance, an 'issuing authority' in relation to preventive detention orders is now said to include an Administrative Appeals Tribunal (**AAT**) member in addition to Chapter III judges, each acting in their personal capacities.[31]

There is considerable uncertainty over the constitutional validity of the provisions in relation to the making of control and preventive detention orders. This uncertainty arises from the legislative scheme that enables a citizen accused of a terrorist act to be deprived of their liberty in circumstances where they:

- are not accused of a crime;
- have not been found guilty of a crime;
- are not fully aware of the case against them;
- cannot challenge the evidence against them; and
- cannot lead evidence to support their case.

The separation of executive and judicial power in the *Constitution* requires detention of a person to be determined exclusively by a Chapter III court after the exercise of judicial power in an appropriate manner, with limited exceptions.

---

30 Notably, there are certain rights from which no derogation is permitted. Relevantly, Article 4(2) of the ICCPR articulates non-derogable rights to include:
- the prohibition against torture, or other cruel, inhuman or degrading treatment or punishment: Article 7;
- the prohibition against retrospective criminal liability: Article 15(1);
- the recognition of everyone as a person before the law: Article 16; and
- freedom of thought, conscience and religion: Article 18.

The United Nations Human Rights Committee has held that other procedural and fair trial rights are similarly non-derogable, and that the obligation to provide effective remedies against rights violations cannot be excluded: see United Nations Human Rights Committee, *General Comment No 29 on States of Emergency*, above n 27, paragraphs 13(a), 14, 15 and 16.

31 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, Part 1, cl 10.

In *Chu Kheng Lim v the Minister for Immigration, Local Government and Ethnic Affairs*[32], Brennan, Dawson and Deane JJ stated:

> In exclusively entrusting to the courts designated by Chapter III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form. It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. Every citizen is 'ruled by the law, and by the law alone' and 'may with us be punished for a breach of law, but he can be punished for nothing else'.[33]

The provisions of the Bill that provide for preventive detention and control orders are constitutionally questionable because they envisage the making of decisions by Chapter III Courts (to deprive persons of their liberty and freedom of movement) that do not involve the exercise of judicial power. They also involve the punitive detention of persons at the order of 'designated persons' not exercising judicial power.

The appropriate use of judicial power involves a full hearing of the facts with full disclosure and representation for the parties. The Bill does not embody this type of judicial power. Rather, the Government hopes to use courts to confirm, vary, revoke and extend control orders, none of which require the finding of criminal guilt after a full hearing of the facts. The Government also intends to use judges and AAT members, *in their personal capacity*, to issue and renew preventive detention orders.

(a) Control orders

In relation to the making of control orders, in PIAC's view and consistent with *Kable v The Director of Public Prosecutions for New South Wales*[34], courts making decisions regarding detention of citizens without a full trial of fact will not be acting in a manner that is compatible with their judicial status. Chapter III Courts can only exercise powers that do not comprise their institutional integrity or public confidence in their independence.

This decision was reaffirmed by the High Court in *Fardon v Attorney-General for the State of Queensland*.[35] In that case, Justices Callinan and Heydon referred to whether a court is required 'to undertake a genuine adjudicative process'.[36] There are a number of indicators a court must demonstrate to ensure that it is validly exercising this power. In *Fardon*, the legislation under review had a number of safeguards that ensured that the courts were validly exercising judicial power. These included:

- the allegations and evidence were fully disclosed to the defendant;
- the defendant had the right to cross examine;

---

32 (1992) 176 CLR 1.

33 (1992) 176 CLR 1 at 27.

34 [1996] HCA 24.

35 [2004] HCA 4 (***Fardon***).

36 [2004] HCA 4 at [219].

- the normal rules of evidence applied to the hearing;
- there was a hearing;
- the court had to consider a range of factors in making its decision, so that there was a real exercise of discretion; and
- normal rights of appeal applied.

The Bill does not allow for any of these procedures in the issuing of a control order. It is arguable then that the issuing of control orders does not involve the exercise of a judicial function. Further, the section seeking to explain the objects of the part dealing with control orders confirms that the power is non-judicial in nature.[37] The Government is seeking to involve the Federal Court, the Federal Magistrates Court and the Family Court as 'issuing courts' in the context of control orders.[38] This may be unconstitutional as it envisages Chapter III Courts exercising non-judicial power.

In the event that a control order is made against a person, their liberty is unavoidably curtailed. PIAC maintains that control orders (and preventive detention orders) are functionally equivalent to criminal sanctions. A person subject to a control order can appeal the control order only by seeking revocation or variation of the order by the same issuing court that made or confirmed the order. This is a seriously limited form of review. In PIAC's submission, this regime is inconsistent with the appropriate and constitutional exercise of judicial power.

(b) Preventive Detention Orders

In the case of preventive detention orders, the Government has sought to circumvent constitutional problems by giving power to issue preventive detention orders to 'designated persons', acting in a personal capacity. The designated persons could be current or past judges of Chapter III Courts or members of the AAT.

By designating individuals as issuing authorities for the purpose of making preventive detention orders, the Government is again risking constitutional challenge as it is conferring a function on judicial officers that may be incompatible with a judge's role. The majority of the High Court held in *Wilson and Ors v the Minister for Aboriginal and Torres Strait Islander Affairs and Anor* (1996) 189 CLR 1 (***Wilson***):

> The capacity of Chapter III judges to perform their judicial duties throughout the terms of their appointment independently of the political branches of government cannot be prejudiced by their appointment to non-judicial office or to perform non-judicial functions. If an appointment to non-judicial office or performance of non-judicial functions prejudices that capacity it is incompatible with the office and function of a Ch III judge. And that is inconsistent with s 72 of the *Constitution*.[39]

In determining whether the function is incompatible, the majority in *Wilson* stated:

> [I]t will often be relevant to note whether the function to be performed must be performed judicially, that is, without bias and by a procedure that gives each interested person an opportunity to be heard and to deal with any case presented by those with opposing interests. An obligation to observe the requirements of procedural fairness is not necessarily indicative of compatibility with the holding of judicial office under Chapter III, for many persons at various

---

37 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, Part 1, cl 24.

38 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, Part 1, cl 11.

39 *Wilson and Ors v the Minister for Aboriginal and Torres Strait Islander Affairs and Anor* (1996) 189 CLR 1, 16.

> levels in the executive branch of government are obliged to observe those requirements. But, conversely, if a judicial manner of performance is not required, it is unlikely that the performance of the function will be performed free of political influence or without the prospect of exercising a political discretion.[40]

Clearly, in the case of preventive detention orders, a person who is the subject of an order does not have an opportunity to be heard or to deal with the Crown's case. It would appear to follow that the designated person would be exercising the power to issue a preventive detention order in a non-judicial manner and that if that person were a judge, such exercise of power would be incompatible with their status as a judge.

The same would not necessarily apply to Supreme Court judges. Complex issues arise including whether Australia has an integrated legal system whereby a Supreme Court judge who is a designated person is in the same position as a Chapter III judge.

However the central issue would be whether the designated person who is a judge could validly exercise the power to detain a person.

In the event that a preventive detention order is made against a person at the Commonwealth level, there is no appeal to a Chapter III Court with the exception of an appeal in the original jurisdiction of the High Court. Appeals against preventive detention orders made at the Commonwealth level are restricted to applications to the AAT after the order is no longer in force. The AAT may quash the order (retrospectively) and may award compensation.

PIAC strongly rejects this regime. Detaining people in the absence of a criminal conviction is inconsistent with the high value placed on personal liberty in Australian law.

Recommendation 6

That the constitutional uncertainty of the Bill be addressed in more detail prior to its passage through Parliament. This requires the Bill to be redrafted to ensure that the role of Chapter III Courts is consistent with the exercise of judicial power and does not require Chapter III judicial officers to exercise functions that are incompatible with their role as judicial officers or in a manner that is incompatible with that role.

Recommendation 7

That no Federal Magistrate, Member of the Administrative Appeals Tribunal, or current or former District Court judge be included as an issuing authority in the Bill in relation to preventive detention.

3.6 Appropriateness of using comparative models – Charter of Rights

The Prime Minister has acknowledged that the United Kingdom's counter-terrorism model has been a source of inspiration for the measures reflected in the Bill.[41]

There is a danger in using comparative models without transposing the entire framework within which those models operate.

In this instance, it is imperative to realise the impact of the United Kingdom's *Human Rights Act* 1998 (**HRA**). The HRA imports into domestic law, some of the United Kingdom's obligations

40 *Ibid,* 17.

41 The Hon John Howard, Prime Minister, 'Counter-Terrorism Laws Strengthened' (Media Release, 8 September 2005).

under the *European Convention on Human Rights*. It means that any act or omission by a public authority must be consistent with the rights recognised by the HRA. Remedies may be granted for violations of recognised rights by public authorities. The HRA further requires that new and existing laws be interpreted, to the extent possible, in a manner that is consistent with the recognised rights. Where it is not possible to do so, a United Kingdom judge may issue a Declaration of Incompatibility, which requires the relevant Minister and/or the Parliament to review the offending legislation and to ensure its conformity with the recognised rights. Further, people subjected to rights violations by public authorities in the United Kingdom may have recourse, after seeking domestic remedies, to the European Court of Human Rights.

Australia is notable for the complete absence of enforceable, comprehensive human rights protection. In the absence of such fundamental protections, it is not only disingenuous and misleading, but dangerous, to suggest that the United Kingdom legislation provides an appropriate model for Australia. This is especially so given that existing safeguards and accountability mechanisms in the United Kingdom legislation, such as a reporting requirement by the Secretary of State every three months on the use of control orders[42], and an independent reviewer, have also been weakened in Australia's adoption of the model. For instance, under the Bill, the Federal Attorney-General would only be required to report on the use of control orders once a year[43], rather than once a quarter as is required in the United Kingdom. Further, under the Bill there is be no independent reviewer of the provisions of the Bill similar to review required of the United Kingdom's terrorism regulation through Lord Carlile of Berriew QC.[44]

PIAC urges the Committee to look to the United Kingdom's long experience with terrorism and its comparatively measured response and more extensive rights protections. PIAC refers the Committee to the important comments of Lord Lloyd of Berwick, a member of the House of Lords in the United Kingdom. Lord Lloyd conducted the *Inquiry into Legislation Against Terrorism* in 1996. His report has influenced the development of subsequent United Kingdom legislation, and should be instructive in the Australian context. He observed that:

> It is an illusion to believe that the fanaticism and determination of well established terrorist organisations can be defeated by laws alone, even of the most severe and punitive kind… [T]here is no legislative 'fix' or panacea against terrorism.[45]

Further, Lord Lloyd made these recommendations about Government responses to terrorism, emphasising proportionality:

i. legislation should approximate as closely as possible to the ordinary criminal law and procedure;

ii additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual;

---

42 *Prevention of Terrorism Act 2005* (UK) s 14.

43 Anti-Terrorism Bill (No 2) 2005 (Cth).

44 Lord Carlile of Berriew QC was appointed pursuant to s 14 of *the Prevention of Terrorism Act 2005* (UK) to prepare an independent review of the UK Act. His report can be found at <http://www.homeoffice.gov.uk>.

45 Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism* (1996) volume 1, 58, cited in Commonwealth, *Terrorism and the Law in Australia: Legislation, Commentary and Constraints*, Parliament of Australia Library Research Paper No 12 (2002) <http://www.aph.gov.au/library/pubs/rp/2001-02/02rp12.htm> at 10 November 2005.

iii the need for additional safeguards should be considered alongside any additional powers; and

iv the law should comply with [the State's] obligations in international law.[46]

Lord Lloyd also put forward three principles regarding the administration of these laws:

i. all aspects of the anti-terrorist policy and its implementation should be under the overall control of the civil authorities and, hence, democratically accountable;

ii the government and security forces must conduct all antiterrorist operations within the law;

iii special powers, which may become necessary to deal with a terrorist emergency, should be approved by the legislature only for a fixed and limited period.[47]

PIAC endorses Lord Lloyd's approach and commends it to this Committee.

Recommendation 8

That, if this Bill is to be passed by Parliament, it be accompanied by a corresponding set of safeguards that fully protect human rights at a domestic level. This can be achieved within the Bill, by incorporating Australia's obligations under the ICCPR and the *Convention Against All Forms of Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment* explicitly into the Bill, and requiring all issuing courts, issuing authorities, the Attorney-General, Australian Federal Police officers and Australian Security Intelligence Organisation officers to abide by those standards in exercising powers granted under the Bill.

Recommendation 9

That, consistent with Lord Lloyd of Berwick's recommendations:

(a) as far as possible, the ordinary criminal law should apply to terrorist acts;
(b) any specialised legislation must be strictly proportionate, and strike the right balance between individual freedoms and national security;
(c) additional safeguards should be provided to balance the additional powers;
(d) the laws should comply with Australia's international legal, including human rights, obligations;
(e) all counter-terrorism operations must be according to law;
(f) special powers introduced to deal with a terrorist emergency should be approved by the legislature, and should only be in force for a fixed and limited period.

3.7 Cumulative effect – the Bill in context

The Bill is designed to dovetail with existing counter-terrorism measures, including the *ASIO Act 1979* (Cth), the *National Security Information Legislation Amendment Act 2005* (Cth), and the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

It is therefore critical to consider the effect of the Bill, once passed, in context. It will have an effect beyond its terms and this should be considered. PIAC has not had sufficient time to fully consider or document how the Bill will interact with existing legislation.

---

46 Lord Lloyd of Berwick, above n 45, 9.

47 Lord Lloyd of Berwick, above n 45, 60.

Recommendation 10
That the Bill not be passed until such time as the full ramifications of this Bill, in context, are clear.

3.8 Change of culture

This Bill follows a recent shift in legal and political culture, with a drift by Government towards treating people who are not suspected of any criminal act in a manner that is more consistent with the treatment of those who have been convicted of criminal offences.

Under recent legislative amendments, there is no requirement that a person be suspected of committing a terrorist act before they are subject to intrusive and coercive powers, such as mandatory questioning and/or detention by the Australian Security Intelligence Organisation (**ASIO**). This is shift is manifested in the Bill in the creation of preventive detention and control orders. These provisions significantly weaken the long-held safeguard of the presumption of innocence and a definite shift to applying criminal sanctions and coercive powers to people who are not criminal suspects.

This is a marked difference from comparable jurisdictions, some of which have experienced actual terrorist attacks on their home soil. The United Kingdom, for instance, requires that a person be suspected of a terrorist offence before they are liable to be subject to a control order.[48] No such requirement exists in the Bill. Rather, it is sufficient that a combination of a senior Australian Federal Police (**AFP**) officer, the Federal Attorney-General and an issuing court, are satisfied on reasonable grounds that:

- the order 'would substantially assist in preventing a terrorist act' (a criterion that has no necessary relationship to the actual conduct of the person in question); or
- the person has provided training to or received training from a proscribed terrorist organisation; and
- for the issuing court, that it is necessary, on the balance of probabilities, to impose the terms of the order on the person for the purpose of protecting the public from a terrorist act.[49]

Recommendation 11
That control or preventive detention orders only be available in respect of persons suspected of the commission of terrorist offences as defined in the *Criminal Code Act 1995* (Cth) that require the suspect to have active knowledge of the nature of the activities, rather than recklessness or deemed knowledge.

3.9 Separation of intelligence and law-enforcement powers

PIAC 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.

---

48 *Prevention of Terrorism Act 2005*(UK), sub-ss 2(1)(a) and (b) provides that the Secretary of State may make a control order against an individual 'if he has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity' and 'considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations upon that individual'.

49 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, cl 24: proposed section 104.4. See also cl 24: proposed s 104.2.

Recommendation 12
That the Committee ensure that the Australian Security Intelligence Organisation and the Australian Federal Police are kept strictly functionally distinct in terms of the law enforcement and intelligence and surveillance functions.

3.10 National security information

There has been a trend towards more and more information being caught within the scope of 'national security' information. This worrying trend is continued by the Bill.

As more and more information is classified as 'national security' information, the Federal Attorney-General will have greater basis for issuing certificates closing court rooms to the public and the media under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

The broadened scope also has the potential to deny persons subject to preventive detention or control orders access to information that they need to effectively challenge the order using the limited judicial review mechanisms available to them. There is an explicit caveat on the type of information that can be provided by the authorities to a person subject to an order that means that 'information … likely to prejudice national security' need not be included in the summary of information to be provided to the person.[50]

PIAC reiterates its concerns from previous submissions about the inherently elastic notion of 'national security'. It is not a certain term, and relies on a patchwork of definitions to give it meaning. That means that the exclusion of 'national security' information is open to differing and contrary interpretations.

Recommendation 13
That the Committee consider the definition of 'national security' to ensure that it does not operate to deny persons subject to control and preventive detention orders any meaningful information about the basis for the order.

Recommendation 14
That a person subject to a control order or a preventive detention order and their representatives be entitled to the fullest extent of information possible, as a matter of right. Where information cannot be provided on the basis that it would prejudice national security, it must be provided to an independent authority who is charged with acting in the best interests of the person subject to the order and who must, if a representative is or representatives are appointed, work in conjunction with the person's representative(s).

3.11 Lack of clarity and certainty

This Bill contains terms that lack concise definition, such as 'terrorist act' and 'national security', and tests that are overly broad. This would not be of such concern were it not for the fact that the Bill, if passed, will impose heavy penal sanctions including life imprisonment.[51]

---

50 See for example, Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, cl 24: proposed s 104.12(2).

51 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 3, cl 3: proposed s 103.2). This amendment would mean that making funds available to or collecting funds for another person, with the intent that or with recklessness as to whether, the funds would be used in relation to a terrorist act is punishable by life imprisonment.

Fundamental to the Rule of law is the principle that laws should be certain. People in the community should be capable of understanding the legal consequences of their actions before they undertake them.

This Bill fails that test.

It creates offences that are too easily committed; they are committed regardless of whether a terrorist act occurs and regardless of any causal connection between the alleged conduct of a particular person and any terrorist act. Further, for many offences created by the Bill, recklessness will suffice to found the offence. There is no requirement of knowledge or a more positive intent. PIAC submits that this places the bar for criminal liability, and imprisonment, too low.[52]

PIAC is concerned that the net of criminality is being cast too wide. It is more appropriate to be guided by the ordinary criminal law, and to frame terrorist offences as offences that require actual conduct with a requisite intent.

3.12 State and territory legislation

The Bill relies on state and territory legislation to achieve its ends. PIAC submits that in order to properly assess this Bill, the Committee should have available to it the state and territory legislation.

The Committee should, in PIAC's submission, review the state and territory legislation with an eye to ensuring that the Commonwealth has not sought to use the states and territories to do what it could otherwise not do, thereby circumventing rather than respecting the constitutional safeguards on its power.

Recommendation 15
That the Committee should be afforded the opportunity to review the related state and territory legislation to ensure the Commonwealth is not seeking, through co-operative arrangements, to circumvent the constitutional limits on Commonwealth power.

[52] For example, Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 3, cl 3: proposed s 103.2). This clause creates a new offence of financing terrorism. A person may be guilty of this offence even if they lack the intent that the funds be used for terrorism, but merely if they are reckless concerning the use of the funds. Similarly with the new sedition offences found at Anti-Terrorism Bill 2005 (Cth), cl 12: proposed s 80.2, there is no requirement that a person have an intention to promote ill-will and hostility. It is enough to act recklessly. The financing offence attracts life imprisonment.

4. Specific Comments

4.1 Proscription of terrorist organisations: Schedule 1

Together, clauses 2, 9, 10, 11 and 16 of Schedule 1 of the Bill introduce a new basis for proscribing an organisation as a 'terrorist organisation' for 'advocacy' of terrorist acts. The Minister will have the power to proscribe by regulation an organisation if the Minister is satisfied, on reasonable grounds, that the organisation is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act'.

A 'terrorist act' is already defined at section 100.1 of the *Criminal Code Act 1995* (Cth) to mean an action or a threat of action that causes serious harm to a person or to property, causes a person's death, endangers a person's life, creates a serious risk to the health and safety of the public or a section of the public, or seriously interferes with, disrupts or destroys an electronic system. Such an act or threat to act must be made with an intent to coerce or intimidate a government, whether in Australia or not, or to intimidate a member of the public or a section of the public.[53]

The Explanatory Memorandum states that the intent is to capture:

> … direct or indirect advocacy by an organisation, in the form of counseling, urging and providing instruction on the doing of a terrorist act. It also covers direct praise of a terrorist act… The definition [in clause 9 of Schedule 1] recognises that such communications and conduct are inherently dangerous because it could inspire a person to cause harm to the community.

(a) Retrospectivity

The proscription regime based on advocacy has retrospective effect.[54] Whilst proscription does not of itself amount to an offence, it attracts the application of a range of criminal offences under the *Criminal Code*. Retrospective application of criminal liability is generally not considered to be consistent with the Rule of Law. The Explanatory Memorandum to the Bill states that 'the provision merely clarifies what was originally intended' and that the retrospective application is necessary 'because it will otherwise create an incorrect implication'.[55]

Recommendation 16
That the retrospective application of Schedule 1 of the Bill be removed as inconsistent with the Rule of Law.

(b) Excessive application of criminal law

The effect of being proscribed as a terrorist organisation is that persons connected, directly or indirectly, with the organisation become liable for criminal offences including membership of a terrorist organisation (10 years' imprisonment)[56], and association with a terrorist organisation (three years' imprisonment).[57]

---

53 *Criminal Code Act 1995* (Cth), s 100.1, definition of 'terrorist act'.

54 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 1, cl 22.

55 Anti-Terrorism Bill (No 2) 2005 (Cth), *Explanatory Memorandum*, 9.

56 *Criminal Code Act 1995* (Cth), Criminal Code, s 102.3.

57 *Criminal Code Act 1995* (Cth), Criminal Code, s 102.8.

An organisation risks being proscribed on the basis that a member, who is not necessarily representative of the organisation, advocates the doing of a terrorist act or praises the commission of such an act. This then has a flow on effect to other members of the organisation through the fact that membership of a proscribed organisation is, in itself, a criminal offence.

PIAC submits that the approach of proscription on expanding bases is not an effective approach. It over-criminalises ordinary acts, including critical or dissenting speech, and criminalises, by association, others who may not be aware of or share the views expressed.

Further, it is problematic to criminalise speech. Such law cannot operate consistently with the Rule of Law or freedom of speech. Rather, law should deal with actions that cause harm.

The extension of the proscription regime in this way is both dangerous public policy and unnecessary.

(c) Lack of connection to Australian interests

Schedule 1 does not require a connection to Australian interests in order for an organisation to be proscribed as a terrorist organisation.

PIAC reiterates its submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD that the Federal Attorney-General's powers to proscribe organisations should include consideration of whether the proscription is connected to Australian interests domestically or overseas. PIAC submitted that the Federal Attorney-General should be required to explicitly state why proscription is a desirable outcome for Australia and its interests.[58]

(d) Definitional uncertainty

The Bill defines 'advocates' to include 'directly praises the doing of a terrorist act'. PIAC submits that this basis for proscription should be removed for lack of certainty. Must the advocacy be a public act? Or could the Minister proscribe an entire organisation on the basis of comments made by a member of the organisation in his or her living room that is known to the Minister as a result of surveillance? People often express ideas in the privacy of their own homes that would not be appropriate in public. Is this space to be policed?

Recommendation 17

That Schedule 1 be rejected by the Committee.

In the alternative, that Schedule 1 be amended to:

(a) require that the Minister be satisfied that the proscription of the organisation is necessary in order to protect identified Australian interests within Australia or overseas;
(b) remove paragraph (c) of the definition of 'advocates' at clause 9 of Schedule 1;
(c) clarify whose speech or actions are to be taken as representing those of an organisation;
(d) clarify that the relevant counselling, urging or instruction should be more than a mere whim, careless speech or action of a member who does not represent the views of the organisation;

---

[58] Joint Parliamentary Committee on ASIO, ASIS and DSD, Report, *Review of the listing of four terrorist organisations* (5 September 2005), paragraph 2.25 <http://www.aph.gov.au/house/committee/pjcaad/terrorist_listingsc/chapter2.htm> at 10 November 2005.

(e) require the Minister to consider all the circumstances of the alleged advocacy on the part of a member of an organisation.

4.2 Control orders: Schedule 4

PIAC's concerns about the constitutionality of these provisions are dealt with above (**see Section 3.5**). PIAC outlines its other concerns here.

PIAC questions the necessity and the utility of Schedule 4, Part 1of the Bill in relation to control orders. PIAC refers to its comments above at **Section 3.2**. It is not clear why control orders are a necessary part of the Government's response to the threat of terrorism. This is a question for Government to answer, with well-reasoned, well-evidenced and legally sound justifications.

Should this Division of the Bill remain, PIAC makes the following submissions in relation to the detail of the drafting.

(a) Balance of probabilities test

It has been suggested that control orders are functionally equivalent to Apprehended Violence Orders in domestic violence situations. This is not, in PIAC's view, a correct characterisation. They are functionally equivalent to the imposition of a criminal punishment without evidence of any real or substantive criminal conduct, or even evidence of a real threat of such conduct.

Therefore, PIAC submits that the issuing court should be required to be satisfied of the matters listed at clause 104.4(1) (and other places) on a higher threshold than balance of probabilities. A balance of probabilities test is appropriate for civil matters. However, a control order could last for up to twelve months and is renewable for the duration of the Bill's life in law (currently up to ten years).

A control order has the potential to severely restrict personal liberty as it can amount to house arrest, involve restrictions on movement, compel a person to wear a tracking device, prohibit certain associations, prohibit the use of a mobile phone or the internet, and restrict the lawful activities of a person, including their working activities. A person who is subject to a control order can be compelled to allow photographs of themselves to be taken as well as their fingerprints. It can also strongly encourage 'education' or 'counselling'.[59] Such restrictions are strongly analogous to criminal sanctions such as imprisonment, parole conditions or home detention.

Given the high value accorded to personal liberty in the common law, particularly where it is not alleged that a person has committed any crime, stronger safeguards are required at the threshold of confirming, extending and varying control orders.

As a corollary, there should be a rebuttable presumption in favour of a person who is the subject of a control order when they make an application for revocation.

Recommendation 18

That the burden of proof for an issuing court in relation to confirming, varying or extending a control order should not be 'on the balance of probabilities', but 'beyond a reasonable doubt'.

[59] Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, cl 24: proposed sub-ss 104.5(3) and 104.5(6).

Recommendation 19
That a rebuttable presumption in favour of revocation of a control order be included in the Bill.

(b) Maximum period

As currently drafted, there is no cap on the length of time a person may be subject to a control order. Minors and adults alike could potentially be under a control order for the life of the Bill as law, that is, ten years.[60]

PIAC submits that this is not an acceptable outcome.

PIAC has particular concerns in relation to young people. The Explanatory Memorandum acknowledges on the one hand the 'special needs of young people and the additional care that needs to be exercised when dealing with young people in the criminal and security environments'.[61] Yet the Explanatory Memorandum goes on to state that it is clear that nothing in the Bill 'prevents the making of successive control orders in relation to the same person.'[62] This is inconsistent.

Recommendation 20
That no person should be subject to more than two consecutive control orders, unless the Australian Federal Police can demonstrate to an issuing court, beyond reasonable doubt, that any subsequent control order is necessary.

Recommendation 21
If a second, consecutive control order is sought in relation to a person, it must be on the basis of new facts. The strong policy imperative behind the use of control orders ought to be 'charge or let go'.

Recommendation 22
That the Committee give consideration to imposing a minimum elapse of time between the cessation of one control order (or two consecutive control orders) and the imposition of another that would apply unless the Australian Federal Police can demonstrate to an issuing court, beyond reasonable doubt, that any subsequent control order is necessary.

Recommendation 23
That control orders, in relation to young people, have a maximum life of three months.

(c) The appropriate test of proportionality

Clause 104.4(2) (and similar provisions) require that the issuing court be satisfied 'on the balance of probabilities' (see above at **(a)**) that each of the restrictions or obligations to be imposed on a person 'is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act'.

---

60 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, cl 24: proposed sub-ss 104.5(2) and 104.16(2).

61 Anti-Terrorism Bill (No 2) 2005 (Cth), *Explanatory Memorandum*, 35.

62 Anti-Terrorism Bill (No 2) 2005 (Cth), *Explanatory Memorandum*, 35.

PIAC submits that consistent with its submissions above in relation to proportionality (**see above Section 3.4, in particular at (c)**), that it is appropriate to import human rights proportionality analysis in making that determination.

This would have the effect, amongst other things, of ensuring that a person's individual circumstances, including their family responsibilities, working and community commitments would be taken into account in making a determination about whether a restriction is reasonably necessary and appropriate and adapted for the purpose. It would also have the effect of minimising the impact of the control order on the person's life and their rights and freedoms, such as freedom of expression and to receive and impart information, which is a part of that right. It may also mean that issuing courts will require further evidence in order to be satisfied that the imposition of a certain obligation or restriction is justifiable.

PIAC notes that a Part 3, Division III of the *ASIO Act 1979* (Cth) includes an express recognition of the constitutional protection of freedom of political communication.

Recommendation 24
That the principles of human rights proportionality be imported into the Bill.

Recommendation 25
That the Bill be amended to explicitly recognise the constitutional protections of freedom of political communication, and to ensure that no one is subjected to conditions that would impair that freedom.

(d) Provision of information

PIAC is concerned to ensure the Bill contains the protections in relation to the provision of information.

In order to make a properly considered determination, the issuing court should have the benefit of all the relevant information, as provided by the AFP to the Federal Attorney-General. There is an ambiguity in the drafting of the Bill (see for example, clause 24: proposed section 104.3(a)(i)) by which the Federal Attorney-General can amend the draft request. It is conceivable that the Attorney-General could amend the draft request, effectively emptying it of all but the most basic information. That should not be permitted if the Government is to have the benefit of claiming that there is effective judicial oversight in this regime.

In order to ensure fairness in the process, the person subject to a control order and their representatives should be guaranteed equal access to the information upon which the control order is based. Without it, the person cannot properly be in a position to effectively challenge the control order in court. As noted above at **Section 3.8**, there is an explicit caveat on the type of information that can be provided by the authorities to a person subject to an order that means that 'information … likely to prejudice national security' need not be included in the summary of information to be provided to the person.[63]

Once again, PIAC reiterates its concerns about the inherently elastic notion of 'national security'. It is not a certain term, and relies on a patchwork of definitions to give it meaning. That means that the exclusion of 'national security' information is open to differing and contrary interpretations.

[63] See, for example, Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, cl 14: proposed s 104.12(2).

Recommendation 26
That the Committee consider amendments to require the Attorney-General to provide to an issuing court all relevant documents in support of a draft request for a control order.

(e) Judicial oversight

PIAC submits that the in order to be effective, judicial oversight should be undertaken by a judicial officer of a superior court of record. PIAC's view is that the appropriate judicial officers are officers of the Federal Court, the Family Court or State and Territory Supreme Courts. This ensures an appropriate degree of expertise and independence.

Further, the court should be involved before the grant or exercise of the powers. This is practically possible, even in urgent situations. As the Bill recognises, courts can be convened by telephone and using electronic communications in emergency sittings, if required, provided that appropriate systems are put into place with court registries.

Effective judicial oversight also requires that the court be empowered to undertake a factual and legal determination of whether the powers should be granted, on the basis of evidence put before it; have the opportunity to hear from both parties; have the opportunity to hear from both parties before determining the matter; and any judicial decision should be subject to a right of appeal to a competent court sitting in review of the first judicial decision. This implies that the appellate court is required to review the merits as well as the legality of the first decision.[64]

Recommendation 27
That the control orders regime should be subject to more effective judicial oversight.

Two aspects of the Bill raise serious challenges to the effectiveness of judicial oversight.

The first of these is the limited scope of the judicial determination. An issuing court is asked to sit as a secondary decision-maker rather than as a court. The more appropriate arrangement would be for the court to be required to make the determination as to whether a control order is necessary in all the circumstances, rather than approving or varying a decision made by the AFP with the Attorney-General.

The second is the fact that the issuing court appears to have authority to sit in review of its own decision, upon an application to revoke or vary by the person under the order. That is not a proper appeal mechanism.

4.3 Preventive detention: Schedule 4

(a) Efficacy

PIAC refers to its submissions above at **Section 3.2** in relation to concerns that the Bill needs to be evidence-based. PIAC asks the Committee to consider what evidence is there that preventive detention orders work or are the appropriate response to an identified problem.

---

64 Joo Cheong-Tham, 'Provisions of the Anti-Terrorism Bill 2005 (Cth) dealing with control and preventive detention orders: The failure to provide effective judicial oversight' (2005) <http://www.piac.asn.au/publications/pubs/judicial_20051024.html> Note this document was completed before the current draft was available.

(b) Constitutionality

PIAC refers to its submissions above at **Section 3.5** in relation to constitutionality.

(c) Issuing authorities

Schedule 4, Part 1, clause 10, together with clause 105.2 of the *Criminal Code* to be inserted by the Bill, define an 'issuing authority' in relation to preventive detention to mean:

- a Judge of a Supreme Court of a State or Territory;
- a Chapter III Judge, a Federal Magistrate;
- a retired Judge of any of the High, Federal, Family Courts, a Supreme Court or a District Court; or
- the President or Deputy President of the AAT (who has been enrolled as a legal practitioner for at least five years).

PIAC refers to its submissions in relation to effective judicial oversight in relation to control orders and adopts those submissions in relation to preventive detention orders (**see above, section 4.2(e)**).

In the context of preventive detention, PIAC's concerns are more acute. Preventive detention orders deprive a person of their liberty for up to fourteen days in circumstances where the person has not been convicted of any criminal offence. Such a 'penalty' ought not be imposed upon a person in the absence of a full hearing by a Chapter III Court.

Issuing an authorisation for law enforcement officers to detain someone for fourteen days cannot be compared to issuing a search or surveillance warrant. This is an excessive intrusion into personal liberties, is disproportionate and unjustified.

Recommendation 28
That the model for granting orders to place a person under preventive detention be amended to ensure judicial officers exercise judicial power appropriately.

(d) Lack of independent monitoring

PIAC is concerned about the lack of independent monitoring mechanisms, such as the Inspector-General of Intelligence and Security who oversees all detention and questioning under the *ASIO Act 1979* (Cth).

Recommendation 29
That independent monitoring mechanisms be included to oversight of the operation of preventive detention orders.

(e) Lack of judicial review

PIAC refers to the submissions above at **Section 3.5** and **4.2(e)**.

(f) Balance of probability

PIAC adopts its submissions above in relation to the threshold of proof for control orders at **Section 4.2(a)**. The need for a higher threshold is more acute for preventive detention orders because of the undeniable liberty interest at stake.

(g) Remand and corrections facilities

PIAC rejects the requirement that a person subject to a preventive detention order should be kept in a corrections facility. This is in clear breach of Australia's human rights obligations in the ICCPR whereby convicted and non-convicted persons should be kept separately. It is not appropriate for a person who has not been convicted of an offence to be placed in a gaol.

Recommendation 30
That the Bill be amended to remove proposed section 105.27.

4.4 Powers to stop, question and search persons in relation to terrorist acts: Schedule 5

Schedule 5 to the Bill introduces a number of new powers for police officers to stop, question and search persons in relation to terrorist acts. These powers may be exercised by a police officer in relation to a person who is in a Commonwealth place, if the officer suspects on reasonable grounds that the person might have just committed, might be committing, or might be about to commit a terrorist act or where the person is in a prescribed security zone.[65]

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.[66] The Government has failed to explain why these powers 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'.[67] 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.

The proposed powers are exercisable on the basis of unacceptably wide discretions that are a recipe for inconsistent and arbitrary policing practices. In the current climate of heightened fear and anxiety regarding possible terrorist attacks, the fact that a person is carrying a large backpack or even a cricket bat[68] may be deemed to be sufficiently 'suspicious' to be stopped, questioned, searched, detained and/or arrested. 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

---

65 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 5, cl 10: proposed s 3UB.

66 See ,for example, s 14J(1) of the *Australian Federal Police Act 1979* (Cth), which enables police officers and protective services officers to stop and search a person where there is reasonable belief that a person has something they will use to cause damage or harm to a person in circumstances that are likely to involve the commission of a 'protective service offence' (defined in s 4(1) of that Act as including 'terrorism offences' under the *Criminal Code*). See also ss 16, 17 and 20 of the *Terrorism (Police Powers) Act 2002* (NSW), which enable NSW police to obtain disclosure of identity, to search persons and to seize and detain things where such powers have been authorised by a police officer who is satisfied that there are reasonable grounds for believing that there is the threat of a terrorist act in the near future and that the exercise of the powers will substantially assist in preventing the terrorist attack.

67 Anti-Terrorism Bill (No 2) 2005, *Explanatory Memorandum,* 74

68 In July 2005, a cricketer on his way to a match was stopped at Kings Cross Station in London pursuant to s 44 of the *Terrorism Act 2000* (UK) and questioned over his possession of a bat: P Johnston, 'The police must end their abuse of anti-terror legislation', *Daily Telegraph* (UK) 3 October 2005 <http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2005/10/03/do0304.xml opinion.telegraph>.

authorities[69] raises the potential for inconsistent application of the 'reasonable suspicion' test across different police forces.

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 the right to freedom of movement[70] and the right to privacy[71] 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.[72]

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.[73] 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.[74]

The power to declare an area a 'prescribed security zone' is highly discretionary. This power is exercisable by the Minister, on application by a police officer, and simply requires that the Minister be satisfied that the 'declaration would assist in preventing a terrorist act occurring or in responding to a terrorist that has occurred'.[75] 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

---

69 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 5, cl 10: proposed s 3UA: 'police officer' as meaning a member of the Australian Federal Police, a 'special member of the Australian Federal Police' and a member of a police force of a State or Territory.

70 ICCPR, Article 20.

71 ICCPR, Article 17.

72 *Police Stop and Search 'rising'* (2005) BBC News OnLine <http://news.bbc.co.uk/1/hi/uk/4368524.stm> at 10 November 2005.

73 Home Office figures for England and Wales show that in 2003-04 black people were 6.4 times more likely to be stopped and searched than white people and Asian people were twice as likely to be stopped and searched than white people: *Statistics on Race and the Criminal Justice System, 2004* (2005) vii.

74 *Rise in Police Searches of Asians* (2004) BBC News, World Edition <http://news.bbc.co.uk/2/hi/uk_news/england/london/3859023.stm.> at 10 November 2005; *Stop and Search Action Team: Interim Guidance* (2004) Home Office, Department of Constitutional Affairs <http:www.privacyinternational.org/issues/terrorism/library/ukstopsearchguidance2004.pdf> at 11 November 2005.

75 Anti-Terrorism Bill (No 2) 2005, Sch 5, cl 10: proposed s 3UJ(1).

is set out requiring the Minister to publish the declaration[76], the declaration remains effective notwithstanding a failure to follow this procedure.[77] 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.

PIAC is concerned that the proposed police questioning powers will impact adversely on marginalised and vulnerable social groups. Clause 3UC will make it an offence for a person to fail to comply with a request by a police officer to provide their name, their address, their reason for being in a 'Commonwealth place' and evidence of their identity (provided the police have advised them of their authority to make the request).[78] This offence will carry a maximum fine of 20 penalty units, which currently amounts to $2,200.[79] There are many circumstances where people may not be able to comply with requests for this type of information. People who are homeless may not be able to provide a fixed address. People who are mentally ill or who have intellectual disability may not understand the nature of the request or may be reluctant to comply with it because of fear, distrust, or psychosis. As the provisions are currently drafted, these people would have to prove beyond a reasonable doubt in criminal proceedings in the Local Court that they had a 'reasonable excuse' not to comply with the request. [80] This is inappropriate and unfair, given the limited access that these groups typically have to legal advice and representation.

Recommendation 31

That the Committee reject Schedule 5.

In the alternative, that Schedule 5 be amended to:

(a) include statutory criteria to regulate and standardise the meaning of 'suspect on reasonable grounds' to assist front-line police officers in the exercise of their powers under the Act and to prevent policing practices based on prejudiced or stereotypical perceptions of particular ethnic, religious or cultural groups;
(b) include statutory criteria for the declaration of an area as a 'prescribed security zone';
(c) to provide that the defendant does not bear the evidential burden of proving 'reasonable excuse' in Clause 3UC(3).

---

76 Anti-Terrorism Bill (No 2) 2005, Sch 5, cl 10, proposed s 3UJ(5).

77 Anti-Terrorism Bill (No 2) 2005, Sch 5, cl 10, proposed s 3UJ(6).

78 Anti-Terrorism Bill (No 2) 2005, Sch 5, cl 10, proposed s 3UC(2).

79 A note to sub-s 3UC(2) indicates that the more serious offence of obstruction, hindering or intimidating a Commonwealth official, including a designated person, in the execution of his or her functions (found in s 149.1 of the *Criminal Code* and which carries a maximum penalty of two years' imprisonment) may also apply.

80 Anti-Terrorism Bill (No 2) 2005, Sch 5, cl 10: proposed s 3UC(3).

Recommendation 32

That the Bill be amended to require:

(a) all police who exercise stop, search and question powers to undergo comprehensive training as to their obligations under federal and state discrimination legislation;

(b) all police to keep records in relation to their use of the stop, search and question powers;

(c) the establishment of a mechanism for independent oversight of the use of police stop, search and question powers (similar to the Stop and Search Action Team in the United Kingdom).

4.5 Power to obtain information and documents and ASIO powers: Schedules 6 and 10

Schedule 6 breaks from the usual legal processes and protections in relation to the obtaining of documents relevant to an investigation. It empowers the investigating body, being the Australian Federal Police, to require another person or entity to answer questions and/or produce documents that:

- are 'relevant to a matter that relates to the doing of a terrorist act': proposed section 3ZQM of the Crimes Act 1914 (Cth);
- are 'relevant to, and will assist, the investigation of a serious terrorism offences': proposed section 3ZQN of the Crimes Act 1914 (Cth);

It also provides a more fettered power to obtain documents 'relevant to … the investigation of a serious offence'. In that circumstance, the notice to produce is to be issued by a Federal Magistrate on evidence. However, this power is conferred on a Magistrate in his or her personal capacity and 'not as a court or a member of a court'. This raises the same concerns as to constitutionality as are identified above in the sections dealing with constitutionality generally and preventive detention orders.

It also extends the reach of the Bill beyond terrorism and terrorism related offences to serious offences more generally. 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.

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'.[81]

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.

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.

---

[81] See, for example, *Evidence Act 1995* (Cth), ss 128 and 134.

Recommendation 33
That the power to obtain documents or information set out in proposed sections 3ZQM, 3ZQN and 3ZQO be subject to the usual requirement that the order be issued by a properly constituted court after consideration of evidence.

Recommendation 34
That the privilege against self-incrimination and legal professional privilege be retained in respect of any documents or information sought under the provisions of Schedule 6.

Schedule 10 provides ASIO with the power to require the production of documents and the answering of questions by aircraft or vessel operators. This must be authorised by the Director-General of ASIO or a senior officer as defined.

This is effectively a warrant provision with no allowance for independent oversight, judicial or otherwise.

Recommendation 35
That all warrants be issued by a properly constituted court.

Schedule 10 also provides a significant extension to the time permitted for the operation of a search warrant to be executed by ASIO. The current law permits a warrant to continue in effect for 28 days. The amended provision provides for such warrants to operate for 90 days (effectively three months).

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.

A much more appropriate approach is to maintain the current time limits throughout, thereby requiring ASIO to seek a further warrant based on its further information gathering activities.

None of these provisions is limited in operation to ASIO activities 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.

Recommendation 36
That all of the provisions in Schedule 10 that extend the time for warrants not be passed or be limited in operation to ASIO investigations specifically relating to suspected terrorism activities.

4.6 Sedition offences: Schedule 7

On 8 September 2005, the Prime Minister announced that the existing federal offence of sedition would be replaced by an offence of:

> … inciting violence against the community … to address problems with those who communicate inciting messages directed against other groups within our community, including against Australia's forces overseas and in support of Australia's enemies.[82]

[82] The Hon John Howard, Prime Minister, 'Counter-Terrorism Laws Strengthened' (Media Release, 8 September 2005).

In making this proposal, the Prime Minister claimed to be implementing the recommendations of former Chief Justice of the High Court, Sir Harry Gibbs' review of federal criminal law (**Gibbs Committee**).[83]

The Gibbs Committee recommended the amendment of provisions dealing with treason and sabotage, and sedition. Amongst other things, the Gibbs Committee recommended that it should be an offence for an Australian citizen or resident

> … to help a State or any armed force against which any part of the Australian Defence Force is engaged in armed hostilities, the existence of which is established by proclamation.[84]

Importantly, the Gibbs Committee also recommended that:

> [T]he right to express dissent from the Government's decision to so commit the Defence Force should be preserved.[85]

The Gibbs Committee further recommended that provisions in the *Crimes Act 1914* (Cth) dealing with sedition be repealed and replaced with an offence of inciting the overthrow of the Constitution or Government, violently interfering with Parliamentary elections or using violence against racial, ethnic or national groups in the community.[86]

The Government, whilst claiming to be relying on the Gibbs Committee's recommendations, has departed from them significantly.

(a) Proposed new sedition laws

The proposed section 80.2 of the *Criminal Code* repeals the existing sedition offences, and creates a range of offences, punishable by a maximum of seven years' gaol.

As well as reformulating the existing offences of incitement to treachery, incitement to treason, and interfering with political liberty the Bill introduces new offences of:

- urging a group or groups, whether distinguished by race, religion, nationality or political opinion, to use violence against another such group or groups (within or outside Australia) that would threaten the peace, order and good government of the Commonwealth;[87]
- urging a person to assist an enemy country or organisation, by 'any means whatever';[88] and
- urging a person to assist an organisation or country engaged in armed hostilities against the Australian Defence Force, by 'any means whatever'.

The existing offences of urging the overthrow of the Constitution or the Government by force or violence[89], and of urging another person to interfere by force or violence with lawful electoral processes[90] are maintained with the changes noted below.

---

83 *Review of Commonwealth Criminal Law*, *Fifth Interim Report* (1991).

84 *Ibid*, 298. See also, Parliament of Australia Library, above n 45, fn 134.

85 *Ibid*. See also, Parliament of Australia Library, above n 45, fn 134.

86 *Ibid*, 307. See also, Parliament of Australia Library, above n 45, fn 135.

87 Anti-Terrorism Bill 2005 (Cth), cl 80.2(5)-(6).

88 Anti-Terrorism Bill 2005 (Cth), cl 80.2(7)-(8).

There are a number of key differences between the existing law and the new offences. Firstly, there is no requirement under the proposed offences that a person have an intention to promote ill-will and hostility. It is enough to act recklessly.

Further, the requirement that there be incitement that is connected to actual violence or resistance or a disturbance of some kind is no longer required. It will be enough that a person urges 'another person' to do any of the acts that are proscribed, regardless of whether or not the other person acts on those words.

Finally, the Bill makes an ambit claim by inserting into the offences the concept of 'by any means whatever'. This expands the potential operation of the sedition offences impermissibly, and given the narrow range of the defences, will criminalise most dissenting speech that resists Government.

A slightly more narrow defence of 'good faith' will be available, with the defendant bearing the onus of proof.

Finally, non-nationals convicted of sedition will face deportation.[91]

(b) Comparative law on sedition and incitement to terrorism

In comparable jurisdictions, such as the United Kingdom, Canada and New Zealand, sedition has not been used in the counter-terrorism context.

In the United Kingdom, specific laws, balanced in light of the guarantees for freedom of expression in Article 10 of the European Convention on Human Rights, currently are under consideration by the House of Commons. Those laws would limit expression that supports or glorifies terrorism. These proposals have been the subject of lengthy negotiations, Parliamentary scrutiny and compromise by the Blair Government.[92] They are amongst the most controversial amendments to be introduced by the Terrorism Bill 2005-06 (UK).

The United Kingdom Law Commission recommended that the crime of sedition is an unnecessary tool in light of the fact that the conduct that might be caught by the offence of sedition is already captured by the ordinary offence of incitement to crime.[93]

Recent reviews of the criminal law in Canada and New Zealand have recommended the repeal of sedition offences in their entirety.[94]

(c) Concerns

In his Second Reading Speech to the Bill, the Federal Attorney-General said that he would, with his Departmental officers, consider the sedition offences again. It has since been disclosed that the Attorney-General is considering an internal review in a year's time of the sedition offences.

---

89 Anti-Terrorism Bill 2005 (Cth), cl 80.2(1)-(2).

90 Anti-Terrorism Bill 2005 (Cth), cl 80.2(3)-(4).

91 *Migration Act 1958* (Cth), s 203(1)(c).

92 Peck, above n 7, 18-21.

93 *Review of Commonwealth Criminal Law*, above n 92, 304-5

93 *Ibid*.

It is completely unacceptable that a Government should propose to pass into law provisions that it knows, before their passage into law, warrant a review. The sedition offences should be excised from this Bill and considered separately at a later stage. A broad consensus is emerging that sedition is the incorrect model to address the problems at hand. The United Kingdom model is better tailored to the task.

The sedition model that the Government favours protects the wrong interests. The harm of terrorism is ultimately borne by the community, rather than the Commonwealth or its symbols. The appropriate model in Australia is to be found in already existing vilification legislation.

The Bill talks about 'protecting the public from a terrorist act' as its object in Schedule 4. It appears to PIAC that this is the Government's ultimate rationale for the Bill. It is therefore somewhat curious that the Government should seek to protect its own authority rather than to protect the community from any violent actions resulting from hateful, inciting or violent speech.

Article 20(2) of the ICCPR prohibits advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and obliges States Parties, such as Australia, to prohibit such things by law. The Commonwealth is yet to legislate to bring into domestic affect this obligation.

Recommendation 37
That Schedule 7 be rejected.

Recommendation 38
That, consistent with its international human rights obligations, the Government legislate to protect community members from hatred, contempt, ridicule or violence on the basis of their nationality, birth, social origin and religion. Further, the Government should ensure that the defences available in existing vilification laws be available in this extended vilification legislative regime.

4.7 Disclosure offences: Schedule 4

PIAC is concerned by the restrictions that Schedule 4, Subdivision E, place on persons subject to preventive detention in relation to contacting another person to inform them about the circumstances of their detention.

The Bill provides that a person detained is not entitled to contact another person[95], and that a person may be prohibited from contacting certain persons, including lawyers and family members who are subjected to prohibited contact orders.[96] If contact is permitted, the Bill provides that the person detained is only able to contact a family member, work or a housemate to let that person know that they are safe, but not able to be contacted for the time being.[97] Minors may contact two parents or guardians and disclose that they are the subject of a preventive detention order and its duration.[98]

It is an offence under the Bill, punishable by up to five years' imprisonment, for the detainee or any person contacted by the detainee, to disclose that the detainee is being detained under a detention

95 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, cl 24: proposed section 105.34.

96 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, cl 24: proposed section 105.40.

97 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, cl 24: proposed section 105.35.

98 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, cl 24: proposed section 105.39(3).

order.[99] It is also an offence for a parent, lawyer or an interpreter contacted by the detainee to disclose any other information provided to them by the detainee in the course of their contact with the detainee.[100]

(a) The disclosure offences limit human rights

PIAC submits that these provisions are inconsistent with the right to freedom of expression contained in Article 19(2) of the ICCPR, to which Australia is a party.

The provisions may also be inconsistent with the right to be free from arbitrary interference in one's privacy, family, home or correspondence in Article 17(1) of the ICCPR, and be inconsistent with the Standard Minimum Rules for the Treatment of Prisoners (**the Standard Rules**), adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The Standard Rules provide that prisoners shall be able to communicate with family and friends at regular intervals and also with consular representatives if they are foreign nationals.[101]

Given the potential of this section of the Bill to limit human rights, the measures introduced must comply with the principle of proportionality, as discussed at **Section 3.4** of this submission. PIAC is concerned for the reasons that follow that the disclosure offences do not comply with the principle of proportionality.

(b) Criminalising the disclosure of information unrelated to a terrorism offence

PIAC assumes that the rationale behind the disclosure offences is to stop terrorist offences from occurring or to prevent a person from evading prosecution. However, PIAC is concerned that the current disclosure provisions criminalise acts that are not related to terrorist offences.

Recommendation 39

That the disclosure offences be redrafted to reflect a tighter filtering of the types of disclosure that are subject to criminal sanctions to better reflect the purpose of preventing the commission of terrorism offences or evading prosecution.

(c) The unintentional transmission of information

The current provisions fail to contain a requisite intention for the commission of the offence. Accordingly, people can be penalised for unintentional disclosure.

(d) Penalty is disproportionate to the disclosure offence

PIAC submits that the penalty of imprisonment for five years is not proportional to the severity of the disclosure offence in its current form, when one considers that an offence can be committed unintentionally and by disclosing information not related to the commission of a terrorism offence. PIAC notes that other offences attracting such imprisonment penalties include offences containing

---

99 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, cl 24: proposed section 105.41.

100 Anti-Terrorism Bill (No 2) 2005 (Cth), Sch 4, cl 24: proposed section 105.41.

101 The Congress was held in Geneva in 1955 and was approved by the Economic and Social Council by its resolutions 663 C (XXIV) of July 1957 and 2076 (LXII) of 13 May 1977.

elements of violence, for example, indecent assault[102], malicious poisoning of a water supply[103], and possessing an explosive in a public place.[104]

Recommendation 40
That the disclosure offences contained in the proposed section 105.41 be limited to disclosure with the knowledge that the disclosure could reasonably assist the commission of a terrorist act, or could reasonably enable a third person to evade police.

4.8 Sunset and Review clauses

(a) Sunset Clauses

PIAC is concerned that the Bill provides a sunset clause that applies to only two out of ten of its schedules, namely Schedule 4 relating to control and preventive detention orders, and the stop, search and question powers contained in Schedule 5. In particular, PIAC is concerned that the schedules relating to the banning of organisations for advocating for terrorism (Schedule 1), the power of the AFP to compel the production of documents and the answering of questions (Schedule 6), the new sedition offences (Schedule 7) and warrant powers (Schedule 10), have no sunset.

Furthermore, PIAC is concerned that the provisions in Schedule 4 and 5 are not sunset provisions in the true sense of the term. The schedules do not cease to have effect. Rather, the Bill provides for a moratorium on certain provisions in the schedules, namely the use of declarations, control orders and preventive detention orders. PIAC is concerned that when the provisions expire, the schedules relating to the orders will remain so that the Government can resurrect the provisions rather than be forced to re-enter into a debate over the legitimacy of the entire schedule.

Given the extreme nature of measures proposed and the uncertainty around the nature of terrorist threats in the future, a ten-year sunset clause is too long a period of time. PIAC notes that the piece of legislation on which the Bill is based, the *Prevention of Terrorism Act 2005* (UK), contains a 12-month sunset clause.[105]

Recommendation 41
That the Bill be amended so that Schedules 1, 4, 5, 6, 7 cease to have effect one year from the date on which they come into effect.

(b) Review

Clause 4 of the Bill provides that the Council of Australian Government (**COAG**) will review the operation of the amendments by Schedules 1, 2, 4, and 5, as well as certain state laws within five years. The report in relation to the review must be tabled in Parliament after the review has been completed.

PIAC is concerned that the review is to be carried out by the very body that agreed to the proposed multi-jurisdictional legislative scheme: COAG. PIAC is further concerned that the review provisions only apply to limited provisions of the Bill and that five years is too long a period of time, given the extreme nature of the measures proposed.

---

102 *Crimes Act 1900* (NSW), s 61C.

103 *Crimes Act 1900* (NSW), s 41A.

104 *Crimes Act 1900* (NSW), s 93FA.

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

PIAC notes that the *Prevention of Terrorism Act 2005* (UK) contains comprehensive review mechanisms. Under this Act, the UK Secretary of State must table a report every three months in Parliament regarding the exercise of control order powers.[106] The Secretary of State must also appoint an independent reviewer to review the operation of the Act nine months after the Act comes into force, and then every 12 months thereafter.[107]

Recommendation 42

That the provisions introduced by the Bill should be reviewed in their entirety by an independent reviewer on an annual basis. The independent reviewer should be required to consult with the community when drafting her/his report and to provide the report for tabling in Parliament. The Government should be required to table a response within three months of that tabling.

106 *Prevention of Terrorism Act 2005* (UK), s 14 (1).

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