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Our Ref:

The Committee Secretary
Senate Legal and Constitutional Legislation Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

By e-mail: legcon.sen@aph.gov.au

21 November 2005

Dear Committee Secretary

Inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005: Response to Questions on Notice and Transcript for proofing

I refer to the appearance before the Legal and Constitutional Legislation Committee (**the Committee**) Inquiry on 14 November 2005 of PIAC Policy Officer, Jane Stratton, and PIAC Senior Solicitor, Anne Mainsbridge.

PIAC takes this opportunity to thank the Senators for their questions on the Anti-Terrorism Bill (No 2) 2005 (Cth) (**the Bill**).

PIAC took the following questions on notice:

1. Senator Stott Despoja asked PIAC to comment on what appropriate safeguards in preventative detention might look like.

and

2. Senator Brown asked PIAC to detail how PIAC proposed Australia's international human rights obligations should be incorporated into the Bill.

PIAC notes that the question on notice in relation to the *Australian Security Intelligence Organisation Act 1979* (Cth) (**the ASIO Act**) was addressed during the questioning before the Committee because Senator Brandis was able to provide a copy of the Act to PIAC.

PIAC sets out its response below.

PIAC has also had the opportunity to review the Proof Committee Hansard and has no amendments to that proof.

1. Appropriate safeguards in preventative detention

(References in this section are to the proposed sections of the *Criminal Code* set out in clause 24 of Schedule 4 to the Bill.)

PIAC reiterates that the liberty interest at stake in subjecting a person to preventative detention is extremely high and should not be affected in the absence the commission of a criminal wrong. However, PIAC has acknowledged that the preventative detention regime may be introduced over this objection and therefore makes the following suggestions to ensure the preventative detention regime is more proportionate than currently framed.

PIAC notes that the Bill contains certain safeguards in relation to people subject to preventative detention orders. PIAC submits that further safeguards are necessary.

Summary of existing safeguards

The Bill provides the following protections or limitations in relation to preventative detention:

- The objects clause: proposed section 105.1.

- The prohibition against seeking a preventative detention order in relation to a person who is under 16 years of age: proposed sub-section 105.5(1).

- The requirement to release a person, as soon as practicable, where the Australian Federal Police (**AFP**) or a state or territory police officer 'is satisfied on reasonable grounds' that the person is under 16 years of age: proposed sub-sections 105.5(2) and (3).

- The prohibition against issuing multiple preventative detention orders in relation to the same act within a particular period: proposed section 105.6.

- A 48-hour time limit on preventative detention orders issued at the Commonwealth level: proposed sub-section 105.14(6). PIAC notes that it is anticipated that states and territories will legislate to permit detention for up to 14 days. Mr McDonald spoke to the Committee on 14 November 2005 about the constitutional limitations to which the Commonwealth is subject in this regard: Proof Transcript, 14 November 2005, 6.

- Oversight by a 'nominated senior AFP member' of the exercise of powers under, and the performance of obligations in relation to, preventative detention orders: proposed sub-sections 105.19(5)-(7). PIAC makes submissions to strengthen this proposed safeguard below.

- The subject of the order, their lawyer and a parent/guardian or representative of a minor or a person 'incapable of managing their own affairs' is explicitly acknowledged as entitled to 'make representations' to the 'nominated senior AFP member' in relation to certain matters: proposed sub-section 105.19(8).

- A requirement to explain the effect of an initial and a continued preventative detention order: proposed sections 105.28 and 105.29. This includes the existence of the order, its

duration, the restrictions that apply to the person, that it may be extended, the right to complain to the Ombudsman about the application for the order, the right to complain to the Ombudsman, the appropriate police oversight body, and a Federal Court about the person's treatment whilst under the order, the entitlement to contact a lawyer, and the details of the 'nominated senior AFP member'. No similar requirement applies in relation to prohibited contact orders: proposed sub-sections 105.28(3) and 105.29(3).

- A requirement to arrange for the assistance of an interpreter to explain the effect of the order: proposed sub-section 105.31(3). It is notable that the lawfulness of the detention is not affected by a failure to do so: proposed sub-section 105.31(5).

- A requirement to give the person subject to the preventative detention order, 'as soon as practicable after a person is first taken into custody', a copy of the initial and a continued order and a summary of the grounds on which the order is made: proposed section 105.32. The 'national security' information exclusion applies: proposed sub-section 105.32(2). If requested to do so by the person, the police officer must make arrangements to provide the person's lawyer with the same information. However the lawyer has no entitlement to such documents: proposed sub-sections 105.32(6)-(9).

- A requirement to treat a person being taken into custody, or being detained, under a preventative detention order with humanity and with respect for human dignity and to be free from cruel, inhuman or degrading treatment by anyone exercising authority: proposed section 105.33.

- A limited right to contact a family member, a flatmate, an employer, a business partner or an employee to say that they are 'safe but unable to be contacted for the time being': proposed section 105.35. However, it should be noted that contact must take place in conditions that ensure the communications can be monitored: proposed section 105.38.

- An entitlement to make a complaint to the Commonwealth Ombudsman under the *Complaints (Australian Federal Police) Act 1981* (Cth) or to use a similar complaints mechanism about police in a state or a territory: proposed section 105.36.

- A limited right to contact a lawyer and to take advice under conditions that ensure the communications can be monitored: proposed sections 105.37 and 105.38. PIAC notes that whilst the Bill purports to protect legal professional privilege in the statement that 'this Division does not affect the law relating to legal professional privilege', the privilege cannot operate when communications are not confidential in the first instance: see proposed section 105.50.

- A prohibition against questioning by any police or ASIO officer whilst a person is under a preventative detention order: proposed section 105.42.

- Limitations around the use of identification material and provision for its destruction: proposed section 105.44.

- Offences for police officers for failing to respect the safeguards: proposed section 105.45. However, PIAC notes that the penalty for such an offence is much lighter than

those imposed on persons subject to preventative detention orders and their associates for contravening the provisions of the preventative detention regime.

- The annual reporting requirement imposed on the Federal Attorney-General: proposed section 105.47.

- The retention of the Queensland Public Interest Monitor: proposed section 105.49.

- The retention of judicial oversight in state and territory courts: proposed section 105.52. However, this is subject to the 'national security' information exclusion: proposed sub-section 105.52(4).

Further and improved safeguards

PIAC submits that the following safeguards should be considered by the Committee in addition to, or to improve, the safeguards that are in the Bill as currently drafted:

- The inclusion in the Bill of a requirement to provide 'appropriate facilities' in which to detain people. In recognition of the fact that persons who are subject to preventive detention orders are not in the criminal justice system such facilities should not be ordinary remand or correctional facilities. Detainees should be accommodated comfortably, and with appropriate support. They must be kept away from people who are on remand and who are convicted of an offence. PIAC reiterates its Recommendation 30 and associated submissions. In particular, young people should be accommodated in a place that is suitable for them as minors. A police station, juvenile detention centre or remand facility is *not* suitable. This additional safeguard may require that the Commonwealth create purpose-built facilities. Any arrangements for persons 'incapable of managing their own affairs' should provide appropriate support for persons with special needs, including psychiatric disabilities. Appropriate psychiatric and other medical care should be provided.

- The removal of the power vested in a senior AFP officer to grant an interim preventative detention order for up to 24 hours: see proposed section 105.8. Such powers should vest only in a court. PIAC refers to its Recommendations 8 and 28 and associated submissions on this point.

- Chapter III judicial officers in their judicial capacity should have power to determine any application for a preventive detention order in an *inter partes* hearing, with evidence, as to the factual and legal bases on which a person should be preventively detained. A person in relation to whom a preventive detention order is sought should always have the benefit of legal representation in such a hearing. A hearing must take place before a person enters into preventive detention. PIAC adopts its Recommendation 18 and associated submissions in relation to the appropriate standard of proof that should apply in a preventive detention order regime.

- Minor should not be subject to preventive detention orders unless, consistent with the *ASIO Act*, there are reasonable grounds for an 'issuing authority', which as PIAC contends should be a court, to be satisfied that it is likely that the person 'will commit, is committing or has committed' a terrorist act: see the *ASIO Act*, sub-section 34NA(4).

Note that the *ASIO Act* refers to a 'terrorism offence', however, consistent with PIAC's submissions on the *ASIO Act*, PIAC would limit the operation of both the ASIO questioning regime and the proposed preventive detention regime to 'an imminent terrorist act'.

- A minor or a person who is 'incapable of managing their own affairs' should be continually accompanied or have access to a 'special friend' appointed to guard their best interests while in preventive detention and to provide general support when close family, guardians or other approved visitors cannot be present.

- That the Parliament's commitment to the principle that a 'minor shall only be detained as a measure of last resort' be included in the Bill. This would be consistent with section 4AA of the *Migration Act 1958* (Cth) and should be explicitly noted in the context of preventative detention.

- PIAC adopts its Recommendations 24, 25 and 27 and associated submissions in relation to control orders and asks the Committee to apply those submissions to preventive detention orders. Those recommendations deal with proportionality, appropriate judicial oversight, the implied constitutional freedom of political communication; all of which are equally relevant to preventive detention orders.

- PIAC reiterates its Recommendations 39 and 40 and associated submissions in relation to disclosure offences.

- Further to PIAC's Recommendation 29, at proposed sub-sections 105.19(5)-(7) the 'nominated senior AFP officer' should be replaced by a 'prescribed authority'. Further, that the Committee consider the establishment of a policing equivalent of the Inspector-General of Intelligence and Security as a further officer to exercise independent monitoring functions.

  A 'prescribed authority' already exists in the definitions section of the Bill (see Schedule 4, Part 1, item 17). It refers to the *ASIO Act* definition, which is:

Section 34B Prescribed authorities

(1) The Minister may, by writing, appoint as a prescribed authority a person who has served **as a judge in one or more superior courts for a period of 5 years and no longer holds a commission as a judge of a superior court**. [Emphasis added.]

(2) If the Minister is of the view that there is an insufficient number of people to act as a prescribed authority under subsection (1), the Minister may, by writing, appoint as a prescribed authority a person who is currently serving as a judge in a State or Territory Supreme Court or District Court (or an equivalent) and has done so for a period of at least 5 years.

(3) If the Minister is of the view that there are insufficient persons available under subsections (1) and (2), the Minister may, by writing, appoint as a prescribed authority a person who holds an appointment to the Administrative Appeals Tribunal as President or Deputy President and who is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory and has been enrolled for at least 5 years.

(4) The Minister must not appoint a person under subsection (1), (2) or (3) unless:
 (a) the person has by writing consented to being appointed; and
 (b) the consent is in force.

PIAC's submission to the Committee supports a view that a prescribed authority should be drawn from the ranks of Federal Courts or state or territory Supreme Courts. PIAC does not support the use of former District Court (or equivalent) judges.

Under the *ASIO Act*, whenever a person is first brought into custody under a questioning or a detention warrant, the prescribed authority ensures that the person understands the terms of the warrant, that an interpreter is available, that the person is made aware of the rights of review or appeal, rights to complain to the Inspector-General of Intelligence and Security and the Ombudsman, and of the time limitations for questioning. The prescribed authority oversees the operation of the questioning, enforces time limits and respect for safeguards. For example, the prescribed authority is empowered to make directions, including that release of the person subject to a warrant under the *ASIO Act*, in certain circumstances: see *ASIO Act* sections 34F and 34HA.

Furthermore, under the *ASIO Act*, the Inspector-General of Intelligence and Security has the power to be present when anyone is apprehended under a warrant and to attend all questioning under a warrant and may raise concerns that must be considered by a prescribed authority: see *ASIO Act* sections 34HAB and 34HA(3).

PIAC has made clear its concerns about the compulsory questioning and detention powers granted to ASIO in its various submissions to this Committee and the Parliamentary Joint Committee on ASIO, ASIS and DSD. Nonetheless, that system of a prescribed authority, together with the involvement of the Inspector-General of Intelligence and Security, provides more independent and multi-layered oversight of the operation of the warrants under that Act than anything proposed in the current Bill. That type of system can easily be imported into this Bill and is preferable to a 'nominated senior AFP officer'. Notably, PIAC does *not* support granting to prescribed authorities the ability to remove lawyers, such as exists in the *ASIO Act*.

- The protection of legal professional privilege through an entitlement for those subject to preventive detention orders to private consultations with their legal representative.

- The inclusion of measures to enable effective representation including that there should, as a matter of right, be an entitlement that the legal representative of any person subject to a preventive detention order be provided with a summary of the basis of the preventive detention order. PIAC further repeats its Recommendations 13 and 14 (and associated submissions) in relation to narrowing and clarifying the scope of 'national security information'.

- The protection against self-incrimination and subsequent use of any information disclosed during a period of preventive detention. Although questioning is not permitted during a period of preventive detention, it is plausible that a person subject to a

preventive detention order may make a disclosure that could incriminate them. They should enjoy appropriate protections from self-incrimination;

- A clear right of judicial review of the decision to issue a preventive detention order and of any conduct connected to the order. This should include the legislative requirement for information to be provided to the person of these rights, assistance in accessing the court pursuant to those rights and simplified procedures in exercising the right (particularly if legal representation is not to be available as a matter of right).

  Any person the subject of a preventive detention order should have the ability to seek judicial review of the issue and exercise of the order, at any stage in the process. Currently, the Bill precludes any judicial review of a decision made under proposed Division 105: see Schedule 4, Part 2, item 25.

- That the right to approach a Police Integrity Commission or equivalent body and/or the Commonwealth Ombudsman with a complaint be supplemented with a right to approach a Federal Court *or* a Supreme Court of a state or territory. PIAC notes that no such right is explicitly recognised in relation to preventive detention orders through recourse to Chapter III Courts. Whilst the original jurisdiction of the High Court cannot be excluded, the Bill seems to assume that challenges to preventive detention orders will take place in state or territory Supreme Courts with a right to approach the Administrative Appeals Tribunal (**AAT**) for compensation *ex poste facto*. PIAC submits that a right to approach a Federal Court, whilst the preventative detention order is still on foot, should be explicitly recognised. Persons subject to a preventive detention order must be able to seek a writ of *habeas corpus* as a minimum safeguard.

- The creation of a maximum period during which a person may be subject to subsequent preventive detention orders, regardless of whether they are made on new factual bases or in relation to new terrorist acts. PIAC adopts its Recommendations 19 to 23 and associated submissions, made in relation to control orders and invites the Committee to apply those concerns in the context of preventative detention orders. Preventative detention should be a limited tool. The overriding imperative should be to charge or release.

- That the Federal Attorney-General and his/her state and territory counterparts be required to report on the use of the preventive detention orders to their respective parliaments every three months, rather than annually: see section 105.47). The report should include (see sub-section 105.47(2)):

  - the number of initial preventive detention orders issued by the AFP;
  - the duration of each initial preventive detention order issued by the AFP;
  - the number of initial and continued preventive detention orders issued by issuing authorities;
  - the duration of each initial and continued preventive detention order issued by an issuing authority;
  - a statement of the basis of each initial and continued preventive detention order with reference to the criteria for making those orders: see sub-section 105.4(4) and (6);

  - the number of prohibited contact orders made, the duration of those orders and the age of those subject to them;
  - details about whether any application to continue an initial preventive detention orders was denied and on what basis;
  - details about the outcome of any application to vary or revoke any preventive detention order;
  - the age of the persons subject to initial and continued preventive detention orders;
  - the nationality, national origin and religion of persons subject to initial and continued preventive detention orders;
  - where each person subject to an initial or continued preventive detention order was detained;
  - whether any complaints were made to a police complaints body, an Ombudsman or any other complaints mechanism provided for in the final Act, and the outcome of those complaints;
  - whether any applications were made to Federal or state or territory courts, the basis of such applications and their outcome;
  - the amount of money paid by the Commonwealth by way of compensation to any person the subject of a preventive detention order;
  - an analysis of the effectiveness of the preventive detention regime including what, if any, terrorist events the Federal Attorney-General reasonably believes were prevented as a result of the use of preventive detention orders and on what basis; and
  - the certification of the destruction of identification material: see sub-section 105.44(3).

- The establishment of a new office of 'Independent Reviewer' in the model of the United Kingdom, funded by the Commonwealth. Lord Carlile of Berriew QC performs this function in the United Kingdom, with broad terms of reference that permit him to survey the operation of the laws related to terrorism, whether they are effective and whether they have been fairly used. Lord Carlile reports annually and, in performing his functions, consults widely with all stakeholders involved in counter-terrorism work, including those who are the subject of policing and surveillance efforts. His reports are provided to the Secretary of State and are tabled in Parliament. They are publicly available at the Home Office's website and inform public and Parliamentary debate in the United Kingdom. The Independent Reviewer in the United Kingdom has, and should have in Australia, access to restricted and security information;

- Increasing penalties for police officers and other officials who contravene safeguards. Currently the penalty for contravention of safeguards by police officers and officials is set at two years (see proposed section 105.45), whereas persons who are subject to preventive detention orders and their associates risk imprisonment for five years for contravening prohibited contact orders for example. There should be parity of sentencing for persons subject to preventative detention orders and for those administering them.

- The introduction of a one-year sunset clause, consistent with PIAC's Recommendation 41 and associated submissions.

2. Incorporation of Australia's human rights obligations

PIAC refers to its Recommendation 8 and associated submissions.

As is the case in the United Kingdom, Australia's human rights obligations ought to apply to all decision-making, implementation of decisions, and review of any such decisions, in relation to the following matters:

- **Proscription of a terrorist organisation**: Consideration of the right to freedom of thought, conscience and religion, including the right to manifest one's beliefs, conscience and religion, the right to freedom to hold opinions without interference, the right to freedom of expression and the right to peaceful assembly are at stake. The right to be free from retrospective application of criminal liability is also invoked because of the retrospective application of Schedule 1. Notably, the rights to freedom of expression and peaceful assembly are amenable to lawful restrictions that are necessary in a democratic society in the interests of national security. This invites a proportionality analysis: see PIAC's Submission, 15-16.

- **Control orders**.

- **Preventative detention orders** and **prohibited contact orders**.

In PIAC's submission, the ideal way of incorporating Australia's human rights obligations into the administration of the Bill is to:

- insert a new section at Schedule 1 to create a proportionality requirement by the Minister when proscribing organisations, reviewable by Parliament; and

- expand on the already existing language in Schedule 4, Division 104 of the Bill of necessity, appropriateness and adapted, in relation to control orders, preventative detention orders and prohibited contact orders.

Proscription

PIAC suggests a new section be inserted in Schedule 1 in relation to proscription.

Proposed subsection 102.1(2): Proscription

(1) The Minister must, when considering whether an organisation should be listed as a 'terrorist organisation', consider the effect of any such proscription upon the following rights of individuals who are, have been, or may become, ordinary or other members of the organisation:

  (a) freedom of opinion, conscience, belief and/or religion;
  (b) freedom to manifest or practice their opinion, conscience, belief and/or religion;
  (c) freedom of expression;
  (d) freedom to associate with others.

(2) The Minister must include with any regulation that proscribes an organisation as a 'terrorist organisation', a Human Rights Impact Statement that includes:

(a) the extent to which the human rights listed in sub-section (1) are likely to be limited and the classes of individuals or groups are likely to be affected by the proscription;
(b) the purpose or purposes of any proposed limit on the human rights listed in sub-section (1);
(c) a statement of why any proposed limit on the human rights listed in sub-section (1) is, in the Minister's opinion, necessary - the statement should include what alternative measures were considered and why such measures were rejected by the Minister;
(d) a summary of any information, evidence and other material upon which the Minister relies in forming the opinion that the proposed limit is necessary;
(e) a summary of the Minister's reasoning as to why the form of the proposed limit is appropriate, the least intrusive and best adapted to achieve the purpose of the proposed limit.

(3) No regulation made by the Governor-General in relation to proscription under this Division can take effect until the Parliament has considered and approved by a process to be established by the Parliament, the Human Rights Impact Statement attached to the regulation that would proscribe an organisation as a 'terrorist organisation'.

Control orders, preventative detention orders and prohibited contact orders

PIAC submits that a new definition of 'scheduled international instruments' is inserted with application to proposed Divisions 104 and 105 of the Criminal Code as follows:

> **Definition**
> ***'scheduled international instruments'*** means the treaties signed and ratified by Australia at Schedule [**X**] of the Criminal Code, namely, the *International Covenant on Civil and Political Rights*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *Convention on the Rights of the Child*.

Further, PIAC submits that the language in proposed sub-section 104.4(2) that reads:

> in determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances) …

should be applied more broadly to the exercise of discretion, to decision-making, to review of decisions, and to the implementation of decisions to issue a control, preventative detention or prohibited contact order under proposed Division 104 and 105 of the Bill.

This formulation should be included, with appropriate amendments in relation to the person acting, eg, officer, issuing authority, issuing court, person, etc, and the appropriate action, eg, when confirming, when apprehending, when varying, etc, in relation to:

- control orders, at proposed sections 104.2, 104.3, 104.6, 104.7, 104.8, 104.9, 104.10, 104.14, 104.18, 104.19, 104.20. 104.23, 104.24 and 104.28; and

- preventative detention orders, at proposed sections105.4, 105.7, 105.8, 105.10, 105.11, 195.12, 105.14, 105.19, 105.22, 105.23, 105.24, 105.26, 105.27, 105.33, 105.41, 105.43, 105.44, 105.51 and 105.52; and

- prohibited contact orders at proposed sections 105.15, 105.16, 105.34, 105.38 and 105.39.

PIAC further proposes that the language of proposed sub-section 104.4(2) be expanded with a new proposed sub-section that imports human rights proportionality principles as follows:

> (3) When determining what is reasonably necessary, and reasonably appropriate and adapted, any person, police officer, issuing court or issuing authority exercising powers under this Division must, when making, reviewing, confirming, implementing or otherwise acting consistent with powers in this Division, have regard to the human rights standards contained in the **scheduled international instruments**. In particular, the person, police officer, issuing court or issuing authority must consider, and may require evidence to be provided as to:
> (a) the extent to which the human rights contained in the scheduled international instruments are likely to be limited and what classes of individuals or groups, if any, are likely to be affected;
> (b) the purpose or purposes for which any limitation is proposed to be made;
> (c) whether such a limitation of the human rights contained in the scheduled international instruments is necessary to achieve the purpose or purposes, including what alternative measures were considered and whether they were properly rejected;
> (d) whether the form of the limitation of human rights proposed to be made has the least severe impact on the human rights contained in the scheduled international instruments of affected classes of individuals or groups.

Conclusion

PIAC would be pleased to provide the Committee with further information or submissions. PIAC notes the reported evidence of officers of the Federal Attorney-General's Department who appeared before the Committee on Friday, 18 November 2005. PIAC has not had sufficient time to fully consider that evidence and may have further and supplementary comments to offer the Committee in light of the evidence of those officers and would welcome the opportunity to make any such submissions to the Committee.

Any questions in relation to these responses should be directed to PIAC Policy Officer Jane Stratton on 02 8898 6522 or by e-mail to jstratton@piac.asn.au.

Yours sincerely

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