



Submission to

Senate Legal and Constitutional Committee

Inquiry into provisions of the *Anti-Terrorism (No. 2) Bill 2005*

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About AMCRAN

The Australian Muslim Civil Rights Advocacy Network (AMCRAN) is dedicated to preventing the erosion of the civil rights of all Australians, and, by drawing on the rich civil rights heritage of the Islamic faith, provides a Muslim perspective in the civil rights arena. It does this through political lobbying, contributions to legislative reform through submissions to government bodies, grassroots community education, and communication with and through the media. It actively collaborates with both Muslim and non-Muslim organisations to achieve its goals.

Since it was established in April 2004, AMCRAN has worked to raise community awareness about the anti-terrorism laws in a number of ways, including the production of a booklet *Terrorism Laws: ASIO, the Police and You*, which explains people's rights and responsibilities under these laws; the delivery of community education sessions; and active encouragement of public participation in the law making and review process.

AMCRAN and its members have participated in a number of parliamentary inquiries with respect to anti-terrorism laws in Australia, including:

- Senate Legal and Constitutional Committee Inquiry into the Provisions of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (including appearance before the Committee), 2002;
- Senate Legal and Constitutional Committee *Inquiry into the Anti-Terrorism Bill (No.2) 2004* (including appearance before the Committee);
- Senate Legal and Constitutional Committee *Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004* and the *National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004*;
- Parliamentary Joint Committee on ASIO, ASIS and DSD *Review of Al Qa'ida, Jemaah Islamiyah, the Abu Sayyaf group, the Armed Islamic Group, the Jamiat ul-Ansar, the Salafist Group for Call and Combat as terrorist organizations under section 102.1A of the Criminal Code*;

- Senate Legal and Constitutional Committee *Inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005* (including appearance before the Committee);
- Parliamentary Joint Committee on ASIO, ASIS and DSD *Review of Division 3 Part III of the ASIO Act 1979 - Questioning and Detention Powers* (including appearance before the Committee).

Introduction

We would like to thank the Senate Legal and Constitutional Committee ('the Committee') for the opportunity to make submissions to the Inquiry into the provisions of the *Anti-Terrorism (No. 2) Bill 2005* ('the Bill'). Unfortunately, due to the shortness of time for this Inquiry and other demands on AMCRAN's resources at this critical time, we have not been able to produce as comprehensive a submission as we would like. However, we would be pleased to appear before the Committee to further elaborate on the details.

We acknowledge and appreciate the contributions and improvements made to existing anti-terror laws by the Committee in past inquiries into anti-terrorism legislation and we hope that, despite the short timeframe allowed for this Inquiry, the Committee will be able to recommend further changes to the proposed legislation to alleviate a number of concerns shared by academics, former judges and civil libertarians alike.

There are a number of concerns in relation to the operation, effectiveness and implications of the Bill. In view of the short period of time allowed for the calling of public submissions, this submission will focus on the potential impact of the laws on the Muslim community, although we note that the laws will also affect members of the wider community. We also note that there are very serious legal concerns with the legislation.

We have had the benefit of reading the draft submissions of Mr Joo-Cheong Tham and Mr Patrick Emerton, the Public Interest Advocacy Centre, the Federation of Community Legal Centres (Victoria), the National Association of Community Legal Centres National Human Rights Network, and the Combined Community Legal Centres Group (NSW) Inc. AMCRAN members also contributed to the *Laws for Insecurity? A Report into the Federal Government's Proposed Counter-Terrorism Measures* (Submission 81 to this Inquiry). We endorse these submissions and support their recommendations to the Committee.

In this submission we make a number of recommendations to the Committee in relation to the Bill. However these recommendations do not imply that AMCRAN accepts that the laws are necessary or proportionate. These recommendations are made with the intention of minimising detrimental and perhaps unintended adverse impacts of the legislation.

General issues

Muslim community reaction

We wish firstly to clarify that media reports of the Muslim community endorsing the anti-terrorism laws are incorrect.

After the London bombings on 7 July 2005, the nature of the threat of terrorism changed from a known terrorist threat from overseas into a relatively unknown “homegrown” one. In view of this, the Prime Minister and members of his Cabinet met with selected members of the Muslim community on 26 August 2005. A Muslim Community Reference Group was subsequently formed that would work “with the Australian Government, and with their respective community groups in creating communication and support networks that will promote understanding between the Muslim community and the wider Australian community.”¹

On 6 October 2005, it was reported that the Muslim Community Reference Group had met with the Attorney-General Philip Ruddock to discuss the proposed anti-terrorism laws. It was reported that at the meeting the Attorney-General sought to reassure the group that there were sufficient “safeguards” to protect members of the Muslim community. It was then widely reported that the group endorsed proposed counter-terrorism laws².

¹ John Cobb, Minister for Citizenship and Multicultural Affairs, Media Release, 15 September 2005.

² See for example, “Government Muslim Reference Group endorses counter-terrorism laws”, the World Today, 6 October 2005. Transcript available online:

<http://www.abc.net.au/worldtoday/content/2005/s1476176.htm>

We wish to stress that it was subsequently revealed that the spokesperson “admitted to misrepresenting the views of other Muslim leaders”.³ We refer the Committee to media reports that other members of the Muslim Community Reference Group clarified that the statement made by the spokesperson “was unauthorised and totally misrepresents our position”.⁴ The spokesperson has himself subsequently publicly stated that the “current laws are working efficiently well”, and that existing laws are adequate.⁵

In spite of the confusion, we wish to emphasise the vast majority of the Muslim community is opposed to the proposed laws.

Timing

We note that there was only a short period of time between the date of the first announcement about the proposed laws and the date the final Bill was introduced into Parliament. In this short period of time, the Government sought to obtain approval from all States and Territories to bypass Constitutional concerns of the proposals, set deadline after deadline and rushed through the drafting process, emphasising the need for the laws to be in place by Christmas.⁶ We submit that this very likely placed illegitimate pressure on government officials to give their consent.

The debate over the Bill only found a voice after the ACT Chief Minister, Mr Stanhope, published an early version of the draft bill on his website. The access to the draft bill and the debate that it generated is indicative of the far ranging consequences of the current bill. The haste with which it is proposed to be enacted does not provide

³ Cameron Stewart, “Muslims deny support for new laws,” *The Australian*, 13 October 2005.

⁴ Cameron Stewart, “Muslims deny support for new laws,” *The Australian*, 13 October 2005.

⁵ ABC AM Program, “Islamic Leader sceptical of need for new terror laws”, 9 November 2005. Transcript available online: <http://www.abc.net.au/am/content/2005/s1500869.htm>

⁶ Marian Wilkinson and David Marr, ‘Rough justice’, *Sydney Morning Herald*, 17 September 2005. Available online at

<http://www.smh.com.au/news/world/rough-justice/2005/09/16/1126750134100.html>.

for the required level of consideration or consultation. Central to good governance is the time necessary for Parliament to debate and scrutinise proposed bills. In 2002 and 2003 when the first set of terrorism laws came before the Federal Parliament, they were debated for months and amended to include or delete those provisions that were problematic to ensure their integrity once passed.⁷

While we are pleased that the Bill has been referred to the Committee, we are surprised at the short length of Inquiry despite the great number of concerns from all sectors of the community, including civil libertarians, academics, politicians, former judges and magistrates, Muslim communities, indigenous communities, NGOs, church leaders, environmental groups, social welfare groups, as well as artists.

The urgency argument is difficult to sustain. It is unclear whether it is politically driven or security driven, particularly in light of the raids this week that saw the searching and arrest of 18 Australians.

We are also concerned that the Security Legislation Review Committee has not had the opportunity to complete its review of a number of existing security and counter-terrorism measures, including the *Security Legislation Amendment (Terrorism) Act 2002 (Cth)*. We submit that no new laws should be introduced unless and until the review has been completed and debate and discussion over the adequacy, effectiveness and necessity of the existing laws have been held.

Recommendation 1: The Bill should not be considered for passage until after the review of the *Security Legislation Amendment (Terrorism) Act 2002 (Cth)* is completed in 2006.

⁷ George Williams, "Essential liberties lost in translation", *Sydney Morning Herald*, 27 Oct 2005.

Use of laws – potential for coercion

We reiterate our concerns to the Parliamentary Joint Committee on ASIO, ASIS and the DSD Review of Division 3 Part III of the *ASIO Act 1979* that there is potential for existing legislation to be abused, or used in a coercive manner. These concerns are also applicable to these proposed powers under the Bill.

In our submission to the aforementioned review⁸ and at the public hearing before the Parliament Joint Committee, we illustrated a general concern in the community about the scope and extent of the anti-terrorism laws. Anecdotally we have heard cases in which ASIO officers explain that they can force cooperation by obtaining a questioning or detention warrant under s34D of the *ASIO Act 1979*, which, combined with the operation of s 34JBA which allows a person's passport to be seized during the period of the warrant, is a potent method of coercing persons to cooperate.

The use of powers to coerce community members to cooperate, whether or not intentionally on the part of the ASIO officer, is likely to create animosity in the very people whose cooperation may be most important for the gathering of intelligence. We submit that a person's cooperation under these circumstances could more closely be identified as cooperation under duress, and that the use of the laws in such a manner should not be allowed.

We are deeply concerned that there is even more potential for some of the proposed powers in the Bill to be used in this way. If the threat of questioning or detention for up to seven days compelled a person to cooperate, the threat of house arrest or the thought of a tracking device would weigh even more heavily in their mind. There is concern that such situations could easily be exploited to coerce or force a person to provide information that may not be reliable but what the person thinks the authorities want to hear, especially in view of the weaker safeguards in place with some of the proposed measures, such as preventative detention under Schedule 4.

⁸ AMCRAN, submission no. 88 Parliamentary Joint Committee on ASIO, ASIS and DSD Review of Division 3 Part III of the *ASIO Act 1979* – Questioning and Detention powers.

Sunset clause

We note that a 10-year sunset clause has been proposed for some of the Schedules but not others. We further note that Cl 4 of the Bill provides for review after five years, but only for Schedules 1, 3, 4 and 5.

We are concerned that the original agreement of the COAG meeting has not been met. It was one of the first safeguards negotiated at the COAG meeting,⁹ and it should be applicable to all of the provisions of this Bill, particularly in light of how the laws are being rushed through Parliament on the basis that they are “urgent”. Given the momentous nature of these amendments, there must be opportunity to review and to assess the application, and effect and operation of each of the proposals after a certain period of time.

Recommendation 2(a): In view of changes that are both serious and have been introduced urgently, a 3-year sunset clause should be applicable to all provisions of the Bill.

Recommendation 2(b): If Recommendation 2(a) is not accepted, the review of the legislation should be brought forward to three years.

⁹ *Council of Australian Governments’ Communiqué: Special Meeting on Counter-Terrorism 27 September 2005*. Available online at <http://www.coag.gov.au/meetings/270905/index.htm>.

Specific issues by schedule

Schedule 1

Advocating terrorism

Schedule 1 of the Bill proposes to add a new proscription criteria for “advocating” terrorism.¹⁰ The proposal to extend the listing criteria to cover organisations that advocate terrorism would only exacerbate the problems that have been persistently identified in relation to the existing proscription regime.

Under the *Criminal Code*, there is already wide power for the Government to proscribe 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 (whether or not the terrorist act has occurred or will occur)’.¹¹ The regime has been criticised for granting too much power to the Executive at the expense of oversight by the Judiciary. It has also been criticised as being overly broad. For example, the phrases ‘indirectly assists in’ or ‘indirectly fosters’ the doing of a terrorist act could apply to a range of acts or behaviours.

Despite the breadth of the listing criteria, it is cold comfort that only eighteen organisations have been proscribed. There are many terrorist organisations that meet the same criteria for proscribed organisations, but are not listed. A *Parliamentary Research Note* highlights what appear to be ‘inconsistencies of the proscription process as it is currently applied’ and lists seven organisations that meet the same criteria but which are not listed.¹²

¹⁰ Sch 1, item 9, inserting cl 102.1(1A) into the *Criminal Code*.

¹¹ *Criminal Code*, s 102.2.

¹² Nigel Brew, *Parliamentary Research Note No 63: The Politics of Proscription* (2004). Available online: <http://www.aph.gov.au/library/pubs/rn/2003-04/04rn63.htm>. These are Mujahideen-e-Khalq (MeK), Liberation Tigers of Tamil Eelam (LTTE), Sendero Luminoso (Shining Path), Euskadi Ta Askatasuna (ETA), Babbar Khalsa International, International Sikh Youth Federation, and (al-)Gama’a al-Islamiyya.

A Parliamentary Joint Committee on ASIO ASIS and DSD (PJCAAD) report¹³ further points to the contradictory listing criteria used by the Attorney General's Department and ASIO. For example, while ASIO considers connections to Australia, the Attorney-General maintains that this was not a necessary condition. In paragraph 2.22 of this report, the Committee bluntly asks - 'The question remains: how and why are some organisations selected for proscription by Australia?'

The proposal to extend the criteria would substantially increase this confusion and lack of transparency. In particular, the adoption of vague concepts such as 'advocating' terrorism would only serve to exacerbate the arbitrary nature of the proscription regime.

A particular concern with any broadening of the existing grounds for the listing of organisations as 'terrorist' would be the severing of any required nexus between proscription, and the organisation's link to acts of political violence. For example, an organisation may become liable to proscription simply on the grounds that it has voiced support for a political struggle somewhere in the world. Currently, all the organisations listed under the *Criminal Code* are based outside Australia. Such an expansion of grounds for proscription would also have the potential to significantly increase the number of Australian organisations liable to be banned, not because of their own participation in political violence, but because of the views they have expressed about political events overseas.

Further, while the proposed amendment would stifle free speech and legitimate debate, no evidence has been put forward to show that it would provide any measure of safety to the Australian people. Specifically, no clear justification has been given as to why the addition of 'advocating terrorism' as a listing criterion is necessary to prevent ideologically or religiously motivated violence or to strengthen security. It is arguable, for example, that the statement 'Australians should not be in Iraq and the Iraqis should fight to be free of occupation' advocates terrorism, and any organisation that supports this view may well become liable to proscription. Far from promoting

¹³ Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the Listing of Six Terrorist Organisations*, March 2005.

the physical safety of Australians, such criminalisation would expose many ordinary Australians to the coercive power of police and security organisations.

We further object to these changes on four grounds. Firstly, the provisions severely limit free speech. For example, consider an organisation that supports resistance to the occupation of Palestinian land, that Palestinians are entitled fight for an independent state, and that non-violent means for achieving a just arrangement have failed. Would this be considered indirectly counselling of a terrorist act? Resistance actions of Palestinians, even against Israeli military targets, would arguably fall within the gamut of the definition of advocating terrorism.

This will have a particular effect on Muslim community groups who may wish to express solidarity with Muslims who are under the thumb of either oppressive regimes or various kinds of occupying forces. This is particularly the case, as the definition of a terrorist act makes no distinction between legitimate liberation and independence movements and terrorism. Examples of such situation would include commentary on Palestinian oppression at the hands of Israeli occupiers; and groups calling, on the basis of things like the torture in Abu Ghraib, that America and its allies be forced out of Iraq by any means necessary. It is our view that the above point of view, while unpalatable to some, should not be limited.

Secondly, there is vagueness as to what is meant for an *organisation* to “advocate” terrorism. Does it mean that the leader of the organisation has made comments on one occasion publicly “advocating terrorism”? Is there a requirement that the comments be made on multiple occasions? Is it sufficient for someone on the forums of a web site to have made statements advocating terrorism? Or is advocacy limited to it being stated as one of the doctrines of the organisation? This is very different from the doing of a terrorist act, which clearly requires logistical support and coordinated acts, rather than the speech of a single individual.

Thirdly, it raises questions of accountability, i.e., that a person should be held accountable for their own actions only and not for actions of others. If a person becomes a member of an organisation, and the leader of that organisation then makes pronouncements that qualify as “advocating terrorism” which results in the

proscription of the organisation, then the person is being punished as a “member of a proscribed organisation” under s 102.1 of the *Criminal Code* 1995 for the statements of the leader. The person may not have been consulted before the leader made those statements, yet he could easily find himself guilty of an offence.

Fourthly, it fails the test of proportionality. Punishments for directing, financing, membership and even association are very severe¹⁴, ranging from 3 years to life imprisonment. This could affect hundreds of individuals. Furthermore, even for the leader who made the “advocating” statements thus making the organisation liable to proscription, he or she may be subject to a severe punishment of 25 years imprisonment for “directing a terrorist organisation” under s 102.2 of the *Criminal Code*. This is highly disproportionate, even compared with the proposed punishment for sedition under this Bill, which is 7 years imprisonment.

Recommendation 3(a): “Advocating terrorism” should be removed as a ground for proscription.

Recommendation 3(b): If Recommendation 3(a) is not accepted, and if “advocating terrorism” must be an offence, it should be made a personal offence and not an offence relating to an organisation. In this way, the impact of a person’s action is limited to just that person. This would be similar to a more narrowly defined version of the sedition offence.

Recommendation 3(c): If Recommendations 3(a) and 3(b) are not accepted, then at the very least the criteria for “advocating” on behalf of an organisation must be clarified. For example, possible criteria may be:

- (i) the statements are made by the acknowledged leader of the organisation; and
- (ii) the statements are made on official material distributed or speeches given by the leader; and
- (iii) the statements are made in public conversation; and
- (iv) the statements are made on more than 5 occasions.

¹⁴ *Criminal Code Act 1995* s 102.

Schedule 3

Financing Terrorism

AMCRAN is not opposed to measures that restrict the financing of terrorism where the person both intentionally and knowingly funds an organisation for which there is overwhelming evidence of involvement in terrorism.

We are concerned that the proposed measures in Schedule 3 could potentially apply to many members of the community. The new amendment in Item 1 of Schedule 3 allows an additional level of indirection, namely that it is now a crime to indirectly and recklessly collect funds for an individual who may then pass on the funds to a terrorist organisation.

The provisions create a great deal of uncertainty, because (a) it is not clear what is meant by “indirectly collecting funds for”; and (b) it is not clear how courts will interpret “recklessness” in this context. This is especially a concern since the penalty for indirectly and recklessly collecting funds for a terrorist organisation is 15 years imprisonment¹⁵.

To give an example of how this may become a problem for the Muslim community, consider two recent natural disasters. The tsunami of 26 December 2004 killed several hundred thousand people, many of them in the Aceh region of Indonesia. Muslims around Australia collected funds to assist the victims of the tsunami, but had to be extremely careful about how to get the money to the victims. Many of the charities that operate in Australia have Christian missionary leanings (and so it is generally considered not preferably to donate through them), and it is very difficult to donate through formal Government channels since corruption is endemic in some Muslim countries. Therefore many Muslims prefer to collect donations for a cause and then pass them through personal connections to trusted people in the affected areas.

¹⁵ Sch 3 Item 1, amending s 102.6 of the *Criminal Code*.

However, there is a very real possibility that the funds could end up in the hands of the Free Aceh movement (GAM), which is an Acehnese liberation movement. Although not currently on the proscribed list of organisations, it could arguably meet the criteria for proscription under s 102.1 of the *Criminal Code*. However, someone unaware of GAM may unintentionally provide the funds to one of their representatives, not realising that a small portion could be used for matters relating to political violence.

This is not a unique situation. A very similar situation occurred with the earthquakes in the subcontinent particularly Kashmir. Several proscribed organisations, such as Lashkar-e-Tayyiba (LeT), operate in Kashmir, so it is quite possible that someone sincerely donating to help their Muslim brethren in Kashmir might inadvertently provide funds to such an organisation. Yet another example is the earthquakes that happened in Bam in Iran.

Hence a person who innocently tries to assist those in need in other parts of the world could find themselves facing fifteen years imprisonment under these new proposals.

Furthermore, laws like these are likely to lead to a decrease in charity within the Muslim community. Anecdotally, since September 11, the Muslim community has become overly fearful about donating – even to legitimate charities – because of the fear that it may incriminate them. Even if it does not lead to charges, they fear that such activities could attract the attention of intelligence or police officers. Several members of the Muslim community have contacted AMCRAN after being visited by ASIO after they made what they believed to be totally legitimate donations.

Recommendation 4 (a): In view of the very real possibility that many innocent people could be affected, and that such laws would reduce charity and support for people in need, Sch 3 Item 1 of the Bill should be removed.

Recommendation 4 (b): If Recommendation 4 (a) is not accepted, the punishment for recklessly collecting funds should be reduced to 5 years imprisonment.



Schedule 4

Control orders

Control orders are built on a significant error: they confuse intelligence measures with punitive measures usually reserved for criminal offences. For example, the ability to monitor a person's phone calls can be seen as an intelligence measure; even though it does limit their privacy, it may be argued as necessary for intelligence purposes. However, if someone were to be put under house arrest, forced to wear a tracking device, stopped from working, stopped from using means of communications, then this would cross the line from an intelligence measure to a punitive measure – it deprives the person of fundamental freedoms in a manner similar to, and in some ways in excess of, incarceration.

While it would no doubt be easier to track people if they were held under house arrest, the deprivation of liberty is too serious a matter to be justified by its convenience to intelligence and police organisations. In the last three years, budgets to security organisations have increased dramatically; they have been given increasing powers to track a person, not to mention improved technology for tracking. Surely all of these factors combined are adequate to remove the need for a criminal punishment to be meted out without the full protections of a criminal trial.

If it is to be a punitive measure of the kind usually reserved for criminal offences, then it should have to meet the same criteria required of criminal offences; i.e. “beyond reasonable doubt”. However, we find in the legislation that the test for application is the “balance of probabilities”.

Of particular concern to the Muslim community is that the low test for control orders potentially opens the door for racial or religious profiling to take place, whether it be officially or unofficially. It is our belief that there is the potential for racial and

religious profiling to affect the application in two different areas: grassroots policing and in the courtroom.

In the case of grassroots policing, it is possible that police officers, being human, subconsciously draw conclusions about people based on their appearance or dress. This is not a theoretical possibility and one specific example in practice is the case of Bilal Tayba¹⁶. Bilal Tayba was accompanying another person suspected of involvement of terrorism and parked his car unintentionally behind the AFP offices in Sydney. His steps were dogged by news cameramen. Later that night – after midnight, the AFP raided his home and claimed that he had been recording footage of the AFP offices because he was planning some kind of terrorist activity – which he had not. When the case came before court, the AFP dropped all charges and paid Mr Tayba’s legal costs. While being a specific example, it does illustrate the general problem of how religious and racial profiling can affect the police’s perception of guilt and innocence.

In the courtroom, there is a real possibility that the fact that a person prays at a particular mosque, or that they are devout Muslims, could be used as evidence to support claims of involvement in terrorism. For example, evidence that a person attends a mosque regularly is not likely to meet the standard of “beyond reasonable doubt”. However, we fear that in the context of a “balance of probabilities” test and under pressure to make an urgent decision, circumstantial evidence such as attendance at a particular mosque, or associating with a particular group, could become a “short cut” way of influencing the balance of probabilities.

Recommendation 5: Since the measures available under control orders are punitive and not security-related, the test should be changed from one of “balance of probabilities” to one of “beyond reasonable doubt”.

¹⁶ Hall Greenland, “Operation Terror”, *The Bulletin*, March 2005.

We are also deeply worried by proposed s 104.5(2) which clarifies that there is no limit on the number of successive control orders that can be placed on a person. This is an extraordinary measure and means that people could be held under house arrest year after year. This means, paradoxically, that a person who has been subject of a full judicial process to determine guilt or innocence, could be subject to a lesser punishment than someone who has merely had a short session with a judge based on “the balance of probabilities”.

A 12-month period should be more than adequate to fully investigate as well as stop any links, relationships, or dealings that a person may have that could be related to terrorism. Therefore, there should be no need for successive control orders, unless there is compelling evidence otherwise.

Recommendation 6 (a): That control orders only apply on a single occasion (similar to preventative detention measures), and can not be rolled over unless there is compelling fresh evidence of a different type of threat or further training with a terrorist organisation.

Recommendation 6 (b): If Recommendation 5(b) is not accepted, that control orders be limited to a certain number of re-applications, for example, 3 occasions.

It is also disturbing that proposed s 104.2(2)(b) means that a person could be the subject of a control order merely because he or she trained with a “terrorist organisation” in the past. This is an extremely unusual measure for a number of reasons.

Firstly, there is already an existing offence for “training with a terrorist organisation” either recklessly or intentionally under s101.2(1) and (2) of the *Criminal Code*. Accordingly, there is serious concern that control orders could be used as a means of depriving people of their liberty if there is insufficient evidence to charge a person with the existing offence of training with a terrorist organisation and meet the

“beyond reasonable doubt” test, but have sufficient evidence to meet the “balance of probabilities” test for a control order. Clearly, use of this “back-door” mechanism to meet a lower level of proof is not desirable or appropriate.

Also of concern is that this law is retrospective: it is not a requirement that the training takes place *after* the introduction of these laws. It is also not a requirement that the organisations trained with were proscribed at the time that the training took place. Clearly, it is undesirable that people who engaged in legal activities at the time, but subsequently finding that their past actions subject them to measures similar to those that apply to criminals.

Recommendation 7 (a): That the grounds for having trained with a terrorist organisation be removed as a reason for granting a control order.

Recommendation 7 (b): That the grounds of having trained with a terrorist organisation for seeking a control order not apply retrospectively, but only to people who train with a terrorist organisation after the commencement of the act.

The legislation also simultaneously removes the presumption of innocence and also enforces *ex parte* proceedings as a matter of course rather than as a last resort. The police apply to the court for a control order *ex parte*, the person is then subject to the control order without even having seen a judge; only once subject to the control order can the person apply for it to be removed.

There are a number of problems with this approach.

Firstly, this approach makes it even harder for a person to seek redress if he has been wrongly accused. In practice, it is likely that judges would be reticent to reverse the decisions made earlier. Therefore the scales would be tipped towards the police in this “guilty until proven innocent” arrangement.

Secondly, there is no need for it to be made *ex parte* in all cases. Presumably, the argument is that the subject of a control order could inform others of the existence of the control order. However, this line of argument is lacking. If one examines s 34 of the ASIO Act, a person can be issued with a questioning warrant and told to appear at a particular place and time to answer questions. In such a case, it is an offence for the person to disclose the existence of a questioning warrant. If ASIO feel that a person may disclose the existence or flee, then a detention warrant can be sought, but only if a questioning warrant is deemed insufficient.

A similar regime could be adopted to cover control orders.

Recommendation 8: That in a manner similar to questioning warrants, *ex parte* processes only be used where there are reasonable grounds to believe that the subject of a control order will fail to be present or disclose the existence of the control warrant. In normal circumstances, a person is ordered to appear at a particular place and time but is not subject to the control order until the hearing is complete. If this is not the case, then the police may request *ex parte* proceedings.

Preventative detention

Preventative detention orders and control orders seem to share a common characteristic: they run parallel with existing legislation, but remove safeguards and introduce new constraints on those people who are subject to the powers.

For example, many of the criteria defined in clause 105.4(4) are already grounds for someone to be arrested and charged under the *Criminal Code*. Accordingly, there is no need for these measures to be introduced. If the police wish to detain someone suspected of a terrorism offence, under existing legislation, police are empowered to hold the person charged with terrorism offences for up to 24 hours (in reality much longer because it does not include “dead time”), unlike people charged with other offences such as murder who can only be held for 12 hours. Furthermore, if they then charge the person, bail would be granted only in exceptional circumstances under the

existing legislation¹⁷, and it is quite possible that the person would likely be detained for even longer than the 14 days under the proposed Bill.

However, the preventative detention regime does not have anywhere near the safeguards that the existing charging powers do have. The safeguards that are missing compared to existing legislative measures are numerous and disturbing. They include:

- A preventative order can be issued by a senior police officer.
- The issuing authority does not act as a member of a court but in an individual capacity.
- There is no potential for appeal of a preventative detention order¹⁸.
- A preventative detention order is shrouded in extreme secrecy. If one parent tells the other that their child is in preventative detention, the penalty is 5 years imprisonment. The subject of the order may only be allowed to contact one person and only to tell them that they are safe but are not “contactable”. A journalist who reports on the existence of a preventative detention order can also be imprisoned for five years.
- Conversations between a lawyer and the subject of the order are monitored; and if the conversations are in a language other than English, an interpreter must be present.
- The person may be subject to a prohibited contact order that can stop him from speaking to any person (e.g. their lawyer, or their parents), or even to a class of people (any family member, or any lawyer whatsoever). The person, however, is not actually told whom he cannot contact until he tries to contact them.

These restrictions are extremely onerous, and likely to lead to deep scarring of someone who – as we mentioned above – may not be suspected of having committed a crime. One that we find particularly onerous is that a lawyer and a person are not allowed to communicate privately, even, for example, to discuss legal strategy in an upcoming case.

¹⁷ *Crimes Act 1914*, s 15AA.

¹⁸ Sch 4, Item 15 of the Bill.

In his second reading speech, the Attorney-General repeatedly stated that there are appropriate safeguards. However, it is extremely disturbing to see that the “preventative detention orders” are, at a pragmatic level, concerned with avoiding the safeguards that would exist if the people were held under existing criminal laws.

Recommendation 9 (a): That the preventative detention regime be removed from the Bill.

Recommendation 9 (b): If recommendation (a) is not accepted, then substantial other safeguards must be present, including:

(i) that a parent can advise another parent about their child’s detention;

(ii) that a detained person is able to speak to his lawyer without monitoring;

and

(iii) in deciding whether to grant a prohibited contact order the judge must consider if it will impede a person’s ability to get access to appropriate legal advice and/or other support services.

A particular concern for the Muslim community is that preventative detention do extend beyond existing legislation in allowing someone who is innocent and not even suspected but may merely possess information in the event of a terrorist attack to be detained for up to 14 days with the cooperation of the States and Territories.¹⁹

The only other situation in which a person not even suspected of an offence can be detained on the basis that they may have evidence is the powers under Section 34D of the ASIO Act with a questioning and/or detention warrant. However, the powers granted here far exceeds the extensive powers given even to ASIO. Firstly, a questioning warrant requires approval from the Director-General of ASIO, and the Attorney-General himself and an issuing authority. A preventative detention warrant requires only the approval of a senior police officer. Secondly, in considering the

¹⁹ Schedule 4, Item 24 104.4(6)

application of a questioning warrant, the issuing authority must be convinced that there is no other mechanism for retrieving the information other than through questioning and/or detention. Thirdly, the maximum period for detention is seven days, not 14 days.

In the tragic event of a terrorist attack, these provisions, requiring the approval only of a senior police officer, could be used to cast a wide net. Muslims would likely – due to racial profiling – be severely affected by this. This is not mere speculation, but a concrete fear having observed the application of the notorious “material witness” measures in the US after the attacks of September 11. Under the material witness laws, individuals who have not committed any crime themselves may nonetheless be detained for extended periods of time²⁰. The preventative detention measures, while not as severe, raise the spectre of the material witness measures in the US.

Two months after the 9/11 attacks, up to 1,100 people, mostly Muslim, were detained under the material witness provisions²¹. The exact number is not known, as there is no requirement that the US report on people detained. Even as late as 2005, it is believed that up to 70 people are still being held as material witnesses²². Many of the people detained had nothing at all to do with terrorism. Similar measures in Australia could clearly be potentially misused and abused, which could lead to massive community tension and be extremely detrimental to the harmony of the community.

Recommendation 10 (a): In view of the risks it carries and the potential for abuse in the aftermath of a terrorist attack, that the capability to detain innocent people not suspected of being involved in a crime be removed from the preventative detention regime.

²⁰ Levenson, L. *Detention, Material Witnesses & The War On Terrorism*, Loyola of Los Angeles Law Review, Vol 35 Jun 2002.

²¹ PBS Newshour, *Locked Up*, 11 November 2001, http://www.pbs.org/newshour/bb/terrorism/july-dec01/detainee2_11-8.html

²² Human Rights Watch

Recommendation 10 (b): If recommendation (a) is not accepted, that additional safeguards be introduced to minimise the risk of innocent people from being detained.

These measures may include:

(i) Requiring approval from the Commissioner of Police and Attorney-General for a Section 104.4(6) preventative detention warrant.

(ii) The issuing authority must be satisfied that all other means to protecting the evidence have been explored and are not achievable.

(iii) Detention in such periods should last until the particular evidence required has been adduced or seven days at most, whichever comes first.

Schedule 5

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

The Explanatory Memorandum states that Schedule 5 of the Bill amends the *Crimes Act* “to introduce a regime of police stop, question and search powers for the purposes of investigating and preventing terrorism and other serious offences.”²³

We submit that it is disingenuous to suggest that the stop, question and search powers for the purpose of investigating and preventing terrorism and other serious offences will be *introduced* by this, when similar Federal and State powers already exist.

Under the *Crimes Act*, the AFP has the power to search and question persons without warrant where there is reasonable suspicion of the commission of an offence.²⁴

The AFP, in the course of performing protective services functions, may also stop and search a person in other circumstances, for example, where there is a reasonable belief that they have something that they will use to cause damage or harm to a place or

²³ Explanatory Memorandum, *Anti-Terrorism (No. 2) Bill 2005*, p. 74.

²⁴ *Crimes Act*, Part 1C.

person ‘in circumstances that would be likely to involve the commission of a protective service offence’.²⁵ ‘Protective service offences’ include the ‘terrorism’ offences under the *Criminal Code*.²⁶

Further, AFP officers also have the power to demand name and identification, where there are reasonable grounds ‘that a person might have just committed, might be committing, or might be about to commit a protective service offence’.²⁷

At the State level, the NSW Police also have extensive powers for stopping and searching a person and/or vehicle without a warrant and detain that person and vehicle for as long as is reasonably necessary to conduct that search²⁸, where the police officer suspects on reasonable grounds that the person or vehicle is the target of an authorisation or in an area that is the target of an authorisation. They also have the power to ask the person to disclose their name and address and provide proof of identity.²⁹

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

It should not be necessary for Australian citizens to be faced with losses of civil liberties on two fronts: increased intelligence and tougher police powers. Either one of these should be adequate to combat the scourge of terrorism. Recent raids have

²⁵ *Australian Federal Police Act 1979* (Cth) s 14J(1).

²⁶ *Australian Federal Police Act 1979* (Cth) s 4(1).

²⁷ *Australian Federal Police Act 1979* (Cth) s 14I.

²⁸ *Terrorism (Police Powers) Act 2002*(NSW), ss 17, 18.

²⁹ *Terrorism (Police Powers) Act 2002* (NSW), s 16.

proved that intelligence obtained from surveillance or phone tapping was sufficient for them to raid, search and arrest people suspected of being involved in terrorism. According to reports, these were still very early stages of an alleged terrorist attack, but the powers were still sufficient. If we are asked to place our trust in intelligence, there is no need to also increase “street policing powers”. We contend that such powers are likely to be misused, indeed, history shows that these powers are prone to controversial application.

From the Muslim community perspective, greater street policing powers also increase the risk of discriminatory application, exposing vulnerable and visible communities to arbitrary interference.³⁰ Personal biases and prejudices are likely to weigh on the mind of the police officer. Indeed, Police Federation of Australia Chief Executive Mark Burgess confirmed this when he suggested that the police should have legal protection against being sued for unlawful discrimination when using the stop, question and search powers. This will only be counter-productive to terrorism investigation through the alienation of communities.³¹

Furthermore, it may cause community backlash against Muslims as people blame Muslims for being subject to these measures. There is also a particular issue for women who wear hijab or niqaab who might be requested to remove their hijab as part of a search. There is no requirement that the search be conducted in private.

Recommendation 11: In view of existing powers available to Federal and State police, Sch 5 of the Bill should be removed.

The ability of the Minister to declare that a Commonwealth place a “prescribed security zone” for a period of 28 days under cl 3UJ is also of particular concern.

Firstly, there is no legislative limit on the size of the “prescribed security zone”. Within the “prescribed security zone”, the police would be allowed to search a person

³⁰ For example, in Australia, see C Cunneen, *Conflict, Politics and Crime, Aboriginal Communities and the Police* (2001).

³¹ J White, *Defending the Homeland, Domestic Intelligence, Law Enforcement and Security* (2004).

without even the very primitive protection of suspicion, or even the very low bar of “might be”³². Police would also have the power to seize property. This is extremely likely, for sheer practical reasons, to involve racial profiling in its application.

Recommendation 12: That a limit be placed on the size of an area declared as a “prescribed security zone”.

Schedule 7

Sedition

The Bill seeks to amend the *Crimes Act* to repeal existing sedition offences, and to replace them with a number of new offences, including urging overthrow of Constitution or Government, urging interference in Parliamentary elections, urging violence in the community, urging a person to assist the enemy, and urging person to assist those engaged in armed hostilities against the Australian Defence Force.³³ We note that s 30A of the *Crimes Act* which addresses unlawful associations is retained.

AMCRAN submits there are a number of problems with this Schedule. Far be it for us to reiterate all of these concerns, which are in all probability much better articulated and argued by other legal minds, we briefly discuss some of these before moving on to examine the likely impact of the sedition offences on the Muslim community.

The proposed sedition offences differ from the existing ones in a number of ways, including the removal of the requirement of intention, or any connection to a terrorist act or organisation. An extended geographical jurisdiction would apply to these offences. This means that they apply whether or not the conduct occurs in Australia

³² Sch 5, item 10, cl 3UB(b) of the Bill

³³ *Anti Terrorism Bill* (No. 2) 2005 (Cth) sch 7, item 12 inserting s 80.2 into the *Criminal Code*.

and whether or not a result of the conduct constituting the alleged offence occurs in Australia.³⁴

There are serious concerns that the proposed offences will have a significant impact on freedom of speech in Australia. While the Government has been at pains to reassure the community that it is not seeking to limit free speech,³⁵ and Attorney-General Philip Ruddock has said that ‘there is no prospect of people being found guilty of offences in relation to participating in robust debate on political issues,’³⁶ it is certain that the proposed legislation will have a much broader application and effect. Counsel opinion obtained by ABC’s Media Watch states that:

it is reasonable to conclude that the Bill is intended to operate so that it will now extend to covering indirect urging as well as condoning, justifying or glorifying acts of terrorism or conduct associated with it, or even abstract opinions about that conduct. These examples of indirect urging might include offensive or emotional opinion about the significance of the events at 9-11, whether the terrorists involved had any justification for their acts, opinion about the validity of what terrorist leaders might be seeking to achieve, the desirability at an international level of victory against the American forces in Iraq (as expressed by John Pilger and dealt with later in this advice), or the inevitability of further terrorist acts, for example, in Bali, and as to whether Australian citizens should expect more of the same should they continue to be involved in the Iraqi war.³⁷

The difficulty in drawing the line between ‘robust debate’ and ‘seditious commentary’ is what makes these laws so potentially damaging. The history of such laws is that individuals and organisations err on the side of caution, and impose on themselves a

³⁴ See *Criminal Code Act 1995* (Cth) s 15.8.

³⁵ Samantha Maiden, ‘Rivals Unite to Lobby on Sedition’, *The Australian* (Sydney), 27 October 2005, 16.

³⁶ Michelle Grattan, ‘Deflating Terror’s Bubble’, *The Age* (Melbourne), 16 October 2005, <<http://www.theage.com.au/news/michelle-grattan/deflating-terrors-bubble/2005/10/15/1128796745073.html?oneclick=true>> at 7 November 2005.

³⁷ Advice from Bret Walker SC and Peter Roney to *Media Watch*, ABC Television, 24 October 2004, 13, <<http://abc.net.au/mediawatch/img/2005/ep34/advice.pdf>> at 7 November 2005.

form of self-censorship. This is not conducive to healthy and open discourse, an essential element of a democratic society.

There are many in the Muslim community who feel that the sedition offences are designed to limit their freedom to speak out against injustice. While we accept that any speech inciting violence is indefensible, we note that laws already exist that make it an offence to incite violence; indeed, it is already a terrorism-related offence, punishable by life imprisonment, to threaten politically motivated violence with the intention of intimidating a section of the public.³⁸ Further, existing provisions also prohibit incitement to commit a crime³⁹, and racial or religious vilification offences already exist in different jurisdictions that prohibit the incitement of violence or hatred against different groups of people.

The sedition offence would have a significant impact on the ability of the Muslim community as well as the wider community to express its views. Some of the views that were canvassed in the section on “advocating terrorism” would also be covered by the sedition offences. An example of this view is that “Iraqis have the right – indeed the duty – to resist the occupation of their country by Western forces.” While unpalatable, this view is part of a healthy debate on Australia’s involvement in Iraq.

In the section on conditions for advocating terrorism, we expressed the view that it was simpler and cleaner for “advocating terrorism” to not be an organisational offence and to be made a personal offence.

We would therefore recommend that the sedition offences need to be rewritten. We also note that certain members of the government have extracted a commitment from the Attorney-General for a review of the sedition offences in the new year, and we concur with this view. However, it is absurd to insert a law for six months, only to remove it once again. As a group that conducts community legal education sessions about the anti-terror laws, this would make our lives complex and lead to confusion in the community.

³⁸ Section 100.1, *Criminal Code Act 1995 (Cth)*

³⁹ Section 101.4, *ibid*

Recommendation 13: Given that the sedition laws have been roundly condemned by many groups, and that it is likely to be amended shortly, the sedition offences should be removed from the Act. An amended version which includes “advocating terrorism” but with tighter definitions could be added as a separate act once the new offences are introduced.

Schedule 10

ASIO Powers

Several measures in Schedule 10 extend the duration of warrants (s12 extends search warrants from 28 days to 90 days; postal service warrants are extended from 90 days to 6 months in s16; delivery search warrants are extended from 90 days to 6 months in s17).

This does not give ASIO additional powers; however, it weakens existing safeguards. Safeguards on surveillance warrants are already very weak and warrants of this kind are easy to obtain. Statistics on search, postal and delivery warrants are not. However a recent enquiry into phone taps found that 99 per cent of phone tap applications succeeded in 2003-2004 (31 out of 3059 were not accepted)⁴⁰. Nonetheless, the monthly or quarterly review of surveillance warrants is an important part of the review process and other than a slight inconvenience for ASIO, there is no reason that an intelligence organisation’s surveillance warrants should not be subject to regular review.

This is especially important, as because of the level of secrecy around ASIO’s activities the public scrutiny that would hold an enforcement agency, such as the AFP, accountable, does not exist.

⁴⁰ Joseph Kerr, *Judges all ears when it comes to hearing requests for phone taps*, 2 April 2005, SMH.

Recommendation 14: That the measures in Schedule 10 that weaken existing safeguards by extending the duration of warrants be excised from the Bill.