Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Bill (No 2) 2005

Submission of the Human Rights and Equal Opportunity Commission

11 November 2005

Introduction

1. The Human Rights and Equal Opportunity Commission ('the Commission') is established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act'). It is Australia's national human rights institution.

2. Its functions are set out in section 11(1) of the HREOC Act and include the power to promote an understanding and acceptance, and the public discussion, of human rights in Australia.

3. In this submission, the Commission limits itself to the human rights issues arising from the Anti-Terrorism Bill (No 2) 2005 (the 'Bill').

4. In raising those issues, the Commission asks this Committee to accept that international human rights law is not an 'optional extra' during times of concern about international terrorism. Nor is it an open ended variable to be adjusted according to particular national security needs. Such an approach implies that human rights are somehow antithetical to issues of national security, necessitating a compromise or trade off.

5. This ignores the fact that international human rights law was forged in the wake of devastating periods of global conflict and already strikes a balance between security interests and the rights which are considered fundamental to being human. It allows for protective actions to be taken by states, but demands that those actions remain within carefully crafted limits – most notably proportionality (which is discussed further below).

6. Concerns about the heightened risks of domestic terrorist attacks are plainly legitimate and require innovative measures on the part of all responsible states, including Australia. However, international human rights law was crafted for precisely these times. It provides clearly identifiable landmarks to guide the Australian government in the implementation of such measures in a period characterised by considerable uncertainty.

7. Australia can and should be proud of an excellent human rights record during less difficult times. It should lead the way in staying true to its international obligations in this more challenging era.

8. The Commission's submissions are limited to schedules 4 and 7, where it considers the proposed provisions could give rise to significant breaches of international human rights norms which Australia has undertaken to respect and ensure to all individuals within its territory and subject to its jurisdiction: see article 2 of the *International Covenant on Civil and Political Rights* ("ICCPR"). In considering those obligations, the Commission notes that the Australian government has not sought to use the procedure in article 4 of the ICCPR, which allows derogation from certain provisions of the ICCPR in times of declared emergency.[1] The Commission has therefore assumed that the government intends to remain bound by its human rights obligations and has sought to evaluate the Bill against those standards.

9. The Commission was particularly concerned that the laws proposed in the original 7 October 2005 draft of the Bill could substantially infringe many fundamental human rights by denying realistic access to courts to review the facts on which preventative detention or control orders were based, and to review the necessity and proportionality of those orders against the

[1] Which provides: In time 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.

security risks at the time which were said to justify them. The Bill, as introduced, has removed or amended many of the provisions which caused the Commission concern.

The remaining concerns raised in this submission could be addressed by relatively minor amendments, which the Commission submits would not detract from the objects or essential elements of the Bill.

Recommendations

10. The amendments which this submission proposes are as follows:

Preventative Detention Orders

Recommendation 1: The Bill should be amended to include additional sub-clauses (in s105.4(4) and (6)), which require the issuing authority to be satisfied that the purpose for which the order is made cannot be achieved by a less restrictive means.

Recommendation 2: The Bill should be amended to provide for the lapse of the Preventative Detention Order ('PDO') provisions in 4-5 years (ie a shorter sunset clause).

Recommendation 3: The Bill should provide that a detained person or their lawyer can make an application for revocation of a PDO and can appear in any application for a continuing PDO or for revocation or extension of a PDO.

Recommendation 4: To avoid any concern that a detained person may seek to tie up AFP resources by raising frivolous or vexatious points in an inter-partes application for a continuing PDO or for revocation or extension of a PDO, the Bill be amended such that:

- The issuing authority is given express power to control its own proceedings. This would give it ample power to prevent a detained person or their lawyer seeking to abuse the procedure.
- It is made clear that the issuing authority is not bound by the rules of evidence and may inform itself as it sees fit. This would minimise the taking of technical objections and allow the issuing authority to mould its procedures to take account of, for example, operational constraints on the AFP.

Recommendation 5: At the very least, the Bill should set out the minimum requirements for the content of the 'summary' of the grounds on which a PDO is made. The Commission has in mind an amendment which requires that the summary is sufficient to alert the subject of the order to the factual basis upon which the order is made.

Summaries should also be required in respect of each extension, refused revocation and decision to grant a continuing PDO. Again, they should be required to be sufficient to alert the subject of the order to the factual basis upon which the order or decision is made.

Recommendation 6: That the Committee consider whether the use of Special Advocates or a national Public Interest Monitor could be used to ensure fairness to a detained person where security sensitive information is unable to be disclosed (in full or in part) to them.

Recommendation 7: While the remedies available for contravention of the Protocol under the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) could be improved, the Commission recommends that a similar protocol/complaint handling mechanism be considered in relation to detention under the Bill.

Recommendation 8: That the issue of possible solitary confinement of people detained under PDOs (and other issues relating to the treatment of people detained in state prisons) be addressed in that protocol.

Recommendation 9: Given that the limitations on contact with family members of people detained under PDOs is arguably of little practical utility from a national security perspective, the Commission recommends that more expansive contact rights should be included in the Bill. For example, the contact rights available to people aged under 18 or who are incapable of managing their own affairs could be applied more generally. This would still be subject to the right of the AFP to prevent contact with a particular person through the use of prohibited contact orders.

Recommendation 10: The Bill should be amended to provide that a detained person has a right be informed of a prohibited contact order, save in exceptional circumstances (for example, where disclosure would inevitably compromise intelligence gathering efforts). There should also be provision for a detainee to seek to have such an order revoked.

Recommendation 11: Contact with lawyers should take place within the sight, but not the hearing, of an AFP officer.

Recommendation 12: The disclosure offences and restrictions which apply to contact with lawyers need to be reconsidered and amended so as to avoid imposing unnecessary constraints upon the provision of legitimate legal advice. More specifically, the Bill should allow a lawyer to provide their professional services in connection with any pressing lawful personal or business affairs.

Recommendation 13: The Bill should be amended to require the issuing authority to take into account the best interests of the child when considering a PDO application.

Recommendation 14: The time limit on contact between children and parents/guardians should be removed or relaxed. To avoid possible practical complications, the Bill could confer upon the issuing authority the power to impose some upper limit on contact in the event the AFP demonstrates that there are compelling reasons for doing so.

Recommendation 15: The non-disclosure offence should be amended so as to allow disclosure of the matters specified in s105.41(3)(b)(i)-(iv) between 'family members' (as defined in proposed s105.35(3)). Provision could be made (similar to prohibited contact orders) to allow the AFP to prevent disclosure to a particular family member.

Recommendation 16: The Bill should confer upon a detained person the right to obtain legal aid if they are unable to afford representation.

Control orders

Recommendation 17: The issuing Court should be specifically required to consider whether there are less restrictive means of achieving the relevant purpose (protecting the public from a terrorist act).

Recommendation 18: The Bill should be amended to provide for the lapse of the control order provisions in 4-5 years (ie a shorter sunset clause).

Recommendation 19: The Bill should be amended such that the issuing court for control orders is required to satisfy itself that any ex-parte application is warranted in the particular circumstances. This is the normal practice of a court asked to consider an ex-parte application.

Recommendation 20: In relation to access to information regarding the basis for the making of control orders:

- the Bill should set out the minimum content to be included in the summary to be provided to the subject and specifically require that it include sufficient factual material to alert the subject of the order to the factual basis upon which the order was made; and
- consideration should be given to the use of the Special Advocate procedure and/or a Public Interest Monitor in the case of security sensitive material.

Sedition offences

Recommendation 21: In relation to the defences to the new proposed sedition offences:

- that section 80.3 should be broadened so as to extend to expression which could be characterised as 'attempting to encourage discussion on matters of public interest' if such expression falls within the proposed sections 80.2(7) or (8); and
- that proposed section 80.3 should be broadened to expressly provide a defence in respect of anything said or done in good faith in the performance, exhibition or distribution of an artistic work; the course of any statement, publication or discussion or debate held for any genuine purpose; or, in making or publishing of a fair and accurate report of a particular matter.

Discussion

Preventative Detention Orders

General outline of the scheme

11. It appears from the Bill and the COAG communiqué that there will potentially be three distinct stages of detention under the Preventative Detention Order (PDO) regime:

- In all cases, the first step will be that an AFP officer makes an application for an 'initial' PDO to an 'issuing authority', being at this stage of the process a senior AFP officer[2]. An initial PDO may be made for a period of up to 24 hours, calculated from the time the person is first taken into detention. [3] If the order is first made for a period less than the 24 hour maximum, the senior AFP officer can extend the duration of detention on written application.[4] However, the entire period of detention, as extended, or further extended, cannot exceed a maximum total of 24 hours.[5] The application is made in the absence of the person to be detained.
- The Bill then provides for a period of further detention (beyond 24 hours) which must be authorised by a 'continuing' PDO. A continuing PDO can be granted by an 'issuing authority' – at this stage of the process defined to mean a person who is a Federal Judge or a Magistrate, a State or Territory Supreme Court judges, a retired judge or the President or a Deputy President of the AAT.[6] A continuing PDO cannot be granted unless the person is subject to an initial PDO. Like initial PDOs, a continuing PDO may be extended. However, a continuing PDO, as extended or further extended, must only allow for

[2] Defined to mean the Commissioner, a deputy Commissioner or an AFP officer above the rank of superintendent (see Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 21).
[3] See proposed s 105.8 (5) of the *Criminal Code Act 1995* (Cth) (the 'Criminal Code').
[4] See proposed s105.10 of the Criminal Code.
[5] Proposed clause 105.10(5) provides that: "The period as extended, or further extended, must end no later than 24 hours after the person is first taken into custody under the order."
[6] See proposed clause 105.2 (1) of the Criminal Code.

detention up to a period of 48 hours, after the person is first taken into detention under an initial PDO. The application is made in the absence of the person to be detained.

- According to the COAG communiqué, a period of further detention is then to be available under state and territory legislation. This will allow for detention from the 48 hour mark to a total of 14 days. The detail of that legislation is yet to be revealed.

12. There are two distinct bases for the making of a PDO. The first relates to the prevention of a terrorist act. To utilise that head, the issuing authority must be satisfied that:

    (a) there are reasonable grounds to suspect that the subject:

        (i) will engage in a terrorist act; or

        (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or

        (iii) has done, or will do, an act in preparation for, or planning, a terrorist act; and

    (b) making the order would substantially assist in preventing a terrorist act occurring; and

    (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

13. The 'terrorist act' in question must be 'imminent'. That term is not defined. However, the bill provides that it must at least be one that is expected to occur within 14 days.[7]

14. The second head for the making of a PDO relates to the protection of evidence. To utilise that head, the issuing authority must be satisfied that:

    (a) a terrorist act has occurred within the last 28 days;

    (b) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and

    (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

15. The powers to grant initial and continuing PDOs are subject to a number of safeguards. In particular:

    - the detained person is entitled to contact the Commonwealth Ombudsman or relevant equivalent state authority;[8]
    - the detained person is entitled to contact a lawyer (subject to certain limitations discussed below) to arrange for the lawyer to act for them to seek a remedy relating to the PDO or their treatment whilst detained;
    - there are certain review rights available in the courts and the administrative appeals tribunal.[9] The limitations on those rights are discussed below;
    - the "nominated senior AFP officer", who oversees the exercise of the powers under a PDO,[10] has certain obligations. They include an obligation to 'consider' representations made by the person who is being detained, their lawyer or parent or guardian (in the case of the detention of a person aged between 16 and 18).

16. The person who is detained is required to be given certain information. That includes a copy of the initial PDO and a 'summary of the grounds' upon which it was made.[11] It is specifically

[7] See proposed clause 105.4 (5) (b) of the Criminal Code.
[8] See proposed s105.36 of the Criminal Code.
[9] See proposed s105.51 of the Criminal Code.
[10] See proposed s105.19(5) of the Criminal Code.
[11] See proposed s105.32(1) of the Criminal Code.

provided that information is not to be included in that summary if it is 'likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)).

17. Summaries are not required in relation to continuing PDOs or extensions of initial or continuing PDOs. All that is required to be given is a copy of the order.[12]

18. A person may request that copies of the summary and the orders be forwarded to their lawyer. However, it is made clear that this does not entitle the lawyer to see any other document.[13]

19. Restrictions are also placed upon a detained person's capacity to contact other people. With limited exceptions for family members, lawyers, the Commonwealth Ombudsman and parents/guardians (discussed further below), a person is not entitled to contact another person and may be prevented from doing so.[14] Disclosure outside these exceptions is subject to criminal sanctions.[15]

20. Further, the AFP may seek a 'prohibited contact order' when applying for a PDO or in relation to a PDO which is already in force.[16] Such an order provides that the person detained under a preventative detention order is not to contact certain persons.[17] The AFP is not required to inform the detainee that a prohibited contact order has been made in relation to the person's detention or the name of a person specified in the prohibited contact order.[18]

Issues regarding the right to liberty – the requirement of "proportionality"

21. A number of commentators[19] have suggested that the scheme for granting PDOs violates the rights conferred by article 9(1) of the ICCPR, which provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

22. It is important to understand that article 9(1) **does permit detention for security purposes**.[20] However, such detention must not be 'arbitrary'. The term 'arbitrary' has been interpreted as requiring more than mere compliance with domestic law. In *Van Alphen v Netherlands*,[21] the Human Rights Committee[22] held that the term includes 'inappropriateness, injustice and lack of predictability'.[23] Where, for example, a person has been held on remand, it is not sufficient that the detention be legal in terms of domestic law. Rather, it must be reasonable in all the circumstances.[24] Similar comments were made in Australia by the Full Federal Court in the matter of *MIMIA v Al Masri*:

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[12] See proposed ss105.32(4) and (5) of the Criminal Code.
[13] See proposed ss105.32 (6) and (8) of the Criminal Code.
[14] See proposed s105.34 of the Criminal Code.
[15] See proposed s105. 41 (1) of the Criminal Code.
[16] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.15.
[17] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.15(4).
[18] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.28(3).
[19] See, for example: Dr Penelope Matthews, "Are we crossing the line?: Forum on Nation Security Laws and Human Rights", (Speech delivered at The Anti-Terrorism Bill – Forum at ACT legislature, 31 October 2005). See: http://www.hreoc.gov.au/speeches/other/20051031_national_security_forum.html
[20] Human Rights Committee, *General Comment No 8 Right to liberty and security of persons (Art. 9)*, Para 4 (1982). See also *Mansour Ahani v Canada*, Communication No. 1051/2002, UN Doc: CCPR/C/80/d/1051/2002 (2004).
[21] 305/88.
[22] The Human Rights Committee is the United Nations human rights treaty body created under article 28 of the ICCPR. Amongst other things, the Committee hears complaints submitted by individuals under the Optional Protocol to the ICCPR.
[23] At par 5.8
[24] Ibid.

> …we conclude that the text of Art 9…. requires that arbitrariness is not to be equated with 'against the law' but is to be interpreted more broadly, and so as to include a right not to be detained in circumstances which, in the individual case, are 'unproportional' or unjust.[25]

23. Like the Full Federal Court, the Human Rights Committee has stressed, on a number of occasions, that detention must meet the requirement of 'proportionality'.[26] 'Proportionality' in the context of article 9 requires one to consider the relationship between a purpose (the purpose underlying the person's detention) and the means by which that purpose is achieved (the particular form of detention). Put simply, the means must be 'proportional' to the purpose.

24. If one simply applied that formulation, proportionality could be in the eye of the beholder.[27] However, the Human Rights Committee has developed a clearer 'bright line' proportionality test for the purposes of article 9(1) which essentially involves asking whether the particular detention represents the **least restrictive means** of achieving the relevant purpose.[28] If it does not, then it will be disproportionate and thus arbitrary. That test has been variously expressed by the Human Rights Committee as imposing a requirement that detention not continue 'beyond the period for which a State can provide appropriate justification'[29] or that a person not be detained if it is 'not necessary in all the circumstances of the case'.[30]

Do issues of arbitrary detention arise in relation to PDOs?

25. The Bill requires that the issuing authority be satisfied that detaining the subject for the relevant period is 'reasonably necessary' for the purpose of preventing a terrorist attack or preserving evidence of such an attack. Scrutiny of the necessity of the order does mean that proportionality is being considered to some extent and the Government should be congratulated for adopting that approach. However, the Commission considers that a more stringent proportionality test would appropriately reflect the fact that PDOs are exceptional orders and should only be made in exceptional circumstances. It is also relevant to observe that the other conditions for the making of PDOs may be relatively easily satisfied (particularly those which relate to an imminent terrorist threat, where the powers are only otherwise conditioned upon a 'reasonable suspicion' and satisfaction that the making of an order will 'substantially assist' in the prevention of a terrorist act).

Recommendation 1: The Commission therefore recommends that the Bill include additional sub-clauses (in s105.4(4) and (6)), which require the issuing authority to be satisfied that the purpose for which the order is made cannot be achieved by a less restrictive means.

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[25] (2003) 126 FCR 54 at [152].

[26] See eg *A v Australia* UNHRC 560/93 para 9.2. See also Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary* NP Engel (1993) p 172.

[27] As has been suggested by S Joseph 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' 27(2) *UNSWLJ* (2004) 428 at 443.

[28] See generally regarding proportionality and the tests applied internationally: J Kirk *"Constitutional Guarantees, Characterisation and Proportionality"* (1997) 21 MULR 1.

[29] *A v Australia* (UNHRC Communication No. 560/1993) at paragraph 9.4, *C v Australia* (UNHRC Communication No. 1014/2001) at paragraph 8.2, *Baban v Australia* (UNHRC Communication No. 1014/2001) at paragraph 7.2.

[30] *A v Australia* at paragraph 9.2. This approach to the limits on permissible detention should not be seen as the product of naïve idealism on the part of the United Nations or the Human Rights Committee. In fact, the notion of arbitrariness as a limit on permissible detention was based on an Australian proposal during the drafting of the ICCPR (See Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary*, 1993, p172). In the Commission's view, it reflects the strong tradition of jealously guarding liberty in Anglo-Australian law which, in turn, embodies the notion that deprivation of liberty is a punitive measure which should not be implemented lightly. Indeed, it is arguably precisely that tradition that has generated much of the controversy surrounding the Bill.

26. If that recommendation is not adopted, the Commission would have concerns about whether the Bill sufficiently protects against arbitrary detention. That is because the use of the word 'reasonably' in proposed ss 105.4(4)(c) and (6)(c). In an Australian constitutional context, the use of the word 'reasonably' in relation to proportionality has been viewed as giving the government increased latitude to infringe upon freedoms and as requiring more deference on the part of the courts.[31] This increases the risk that people who have little or no connection with terrorism will be wrongfully detained. For example, if the AFP is given non-specific intelligence to the effect that an imminent terrorist act is planned by a group of young men in a particular suburban street, it may well be within the bounds of 'reasonable necessity' to detain all males between the ages of 16 and 35 from that street. A requirement to consider the least restrictive means of preventing a terrorist attack would focus the mind of the issuing authority upon the need to avoid excessive use of the PDO powers in such a situation.

27. It would also be of assistance to clarify, perhaps in a note to the section or an amended explanatory memorandum, that the test to be applied under the amendments proposed by the Commission to ss105.4(4) and (6) is that under article 9(1) of the ICCPR. There are at least two obvious advantages to this:

- First, the international jurisprudence on arbitrary detention will give issuing authorities clear guidance on what is necessary and what is not.
- Second, such an approach would reinforce Australia's position if concerns are raised (by the Human Rights Committee or other international bodies) regarding PDOs and article 9(1).

Broader proportionality concerns

28. Apart from the specifics of the Bill, there appear to be some overarching questions about the necessity and thus proportionality of the PDO regime. The Commission notes in particular the questions raised by a significant number of security experts, who have suggested that the proposed provisions are unnecessary to meet the threat of a terrorist attack in Australia and will be ineffective.[32] The Commission is not in a position to properly evaluate those concerns in the absence of publicly available material regarding the current threat to Australia of a terrorist attack. However, the Commission notes that such information has apparently been provided to the premiers and chief ministers. Should this Committee be in a position to consider some or all of that material, the Commission respectfully suggests that it should scrutinise it closely with the question of proportionality in mind.

29. In making that assessment, the Committee might also note that Australia already has a range of laws which provide law enforcement authorities with broad powers to address the threat of a terrorist act[33] occurring in Australia. A short overview of the relevant offences and arrest and

[31] *Levy v Victoria* (1997) 189 CLR 579, 598 (Brennan CJ). Relevantly, Brennan CJ stated: "Under our Constitution, the courts do not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose. The courts acknowledge the law-maker's power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose".

[32] ABC Television, "Proposed counter-terrorism laws go to far: survey", *Lateline*, 27 October 2005, < http://www.abc.net.au/lateline/content/2005/s1492436.htm> at 11 November 2005

[33] Section 100.1 of *The Criminal Code* defines terrorist act broadly as an action or threat of action that: causes serious harm that is physical harm to a person; or causes serious damage to property; or causes a person's death; or endangers a person's life, other than the life of the person taking the action; or creates a serious risk to the health or safety of the public or a section of the public; or seriously disrupts, or destroys, an electronic system including, but not limited to: an information system, a telecommunications system, a financial system, a system used for delivery of essential government services, or a system used for, or by, an essential public utility, or a system used for, or by a transport system. The action of threat must also have been made with the intention of advancing a political, religious or ideological cause and with the intention of: coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory, or foreign country; or intimidating the public or a section of the public. Pursuant to s101.1 the penalty for engaging in a terrorist act is life imprisonment.

detention powers is set out in **Annexure A** to this submission. The existence of those provisions may raise questions regarding the necessity for further measures.

30. When approaching the more general question of proportionality, the Committee might also note that nations facing higher threat of terrorist attack have not enacted a preventative detention regime comparable to that proposed in the Bill. For example, the United Kingdom Parliament has conferred power upon police officers to arrest and detain terrorist suspects for up to 14 days. It was recently proposed that that power be extended to a period of 90 days.[34] However, contrary to the suggestions advanced by some in Australia, that power is **not** a preventative detention power analogous to that contemplated under the Bill. Rather, it is a power to detain a suspected terrorist for the purposes of investigation, pending a decision as to whether the detained person should be charged with an offence. Similar powers already exist in Australia (see **Annexure A**).

Sunset clause

31. These broader concerns about the necessity of the new measures raise a further point: the Bill provides for a sunset clause of 10 years.[35]

32. In the Commission's view, a sunset clause providing for a lesser period is highly desirable. It must be recognised that the provisions under consideration represent extreme measures for a particular time and that what may be a proportionate response today may be disproportionate in the future.

Recommendation 2: The Commission recommends that the Bill be amended to provide for the lapse of the PDO provisions in 4-5 years.

Review of preventative detention orders

33. In addition to proscribing arbitrary detention, article 9 of the ICCPR guarantees some fundamental review rights. The most important of these for present purposes appears in paragraph 4, which provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

In *Rameka & Ors v New Zealand*,[36] a majority of the Human Rights Committee held that preventative detention was not in itself a violation of article 9(1) (with a number of Committee members expressing strong dissenting views). However, in so finding, the majority emphasised the importance of review rights for that species of detention:

> detention for preventive purposes, that is, protection of the public, once a punitive term of imprisonment has been served, must be justified by compelling reasons, reviewable by a judicial authority, that are and remain applicable as long as detention for these purposes continues. The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public.[37]

34. "Lawfulness", in the context of article 9(4), does not simply mean lawfulness under Australian domestic law. It requires consideration of whether the detention is within the limits set out in the ICCPR – that is, detention must be limited to what is necessary in all the circumstances of

[34] See Terrorism Bill 2005 (UK).
[35] See proposed 105.53 of the Criminal Code.
[36] UN doc. CCPR/C/79/D/1090/2002.
[37] At para 7.3.

the case and cannot be achieved by lesser means. This was made clear by the Human Rights Committee in considering the review rights available to a person in immigration detention in *A v Australia*. The Committee rejected an argument that there had been no breach of article 9(4) because the author of the complaint had access to the courts and was simply unable to be released by virtue of the effects of the *Migration Act 1958* (Cth).[38] The Committee's more recent decision in *Baban v Australia*[39] similarly emphasised the broader notion of lawfulness and observed that the author and his son had been held in immigration detention:

> … without any chance of **substantive judicial review** of the continued compatibility of their detention with the Covenant. [emphasis added]

35. These obligations to provide review rights for detained people were based upon the Anglo-Australian remedy of habeas corpus. Like that remedy, they are not merely a safeguard against extreme cases involving abuse of power. They recognise the very real possibility (or, perhaps more accurately, inevitability) that decision makers in large bureaucracies will make mistakes. The circumstances of the detention of Cornelia Rau provide a recent example of the necessity for such avenues for redress.

36. In determining what will exceed the limits of judicial review 'without delay', the Human Rights Committee has emphasised that it is necessary to proceed on 'a case by case basis'.[40] However, the Committee has suggested that relatively short delays (in the order of hours and days) will violate those limits in the circumstances of particular cases.[41]

37. The Committee has also made clear that the procedural right conferred by article 9(4) is simply a specific manifestation of the overarching right to an 'effective remedy' for violations of the ICCPR (which is recognised by article 2(3) of the ICCPR).[42] In the context of the PDO regime under the Bill, a remedy which is 'effective' must be one which provides a means for a person who is wrongfully detained or is being treated inhumanely to obtain redress **before** the wrongful detention or ill-treatment comes to an end.

38. The case of *Keenan v United Kingdom*[43] provides a tragic illustration of why the availability of such a remedy is so important. Mr Keenan was a prisoner, who was subjected to cruel and inhuman punishment and subsequently hanged himself. The cruel and inhuman punishment involved a period of relatively brief (7 days) segregation detention in circumstances where Mr Keenan was suffering from a mental illness and was at risk of harming himself. Mr Keenan killed himself within 24 hours of the commencement of that punishment. The United Kingdom argued that Mr Keenan had available to him a range of remedies, including judicial review, a complaint under the prisons complaints procedure or a complaint to the ombudsman. The Court first observed that the effect of obligation to provide an effective remedy was to:

> …require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention

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[38] *A v Australia.*at paragraph 9.5.
[39] *Baban v Australia* at paragraph 7.
[40] *Torres v Finland* 291/1988.
[41] In *Hammel v Madagascar* (155/83), incommunicado detention for three days was held to violate article 9(4). In its concluding comments on Gabon, the Committee suggested that detention in police custody should 'never' exceed 48 hours so as to avoid violation of the similar protection for those charged with criminal offences in article 9(3). In *Hammel v Madagascar* (155/83), incommunicado detention for three days was held to violate article 9(4).
[42] See eg *Baritussio v Uruguay* 25/1978.
[43] (2001) 33 EHRR 913.

obligations under this provision. The scope of the obligation under [the equivalent of article 2(3) of the ICCPR] varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by [the equivalent of article 2(3) of the ICCPR] must be "effective" in practice as well as in law. In particular, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State…[44]

39. The Court went on to observe that none of the remedies which the United Kingdom relied upon would have produced any result until after the Mr Keenan had completed his separation detention. As such, the United Kingdom had failed to provide an effective remedy:

> Mark Keenan had been punished in circumstances disclosing a breach of [the article proscribing cruel or inhuman treatment] and he had the right, under [the equivalent of article 2(3) of the ICCPR] of the Convention, to a remedy which would have quashed that punishment **before it had either been executed or come to an end**. There has therefore been a breach of [the equivalent of article 2(3) of the ICCPR] in this respect.[45]

40. The Commission is of the view that the Bill leaves people subject to PDOs in a position which is analogous to that of Mr Keenan. This is for the following reasons:

- State and territory courts have no jurisdiction over PDOs while they are in force,[46] except in cases where a person is simultaneously detained under a federal and a state PDO.[47] That leaves judicial review in the Federal Court under s39B of the *Judiciary Act 1903* (Cth) or in the High Court under s75(v) of the *Constitution*. Judicial review is a technical term applied to an arid process of checking for technical legal errors in the steps that lead to the making of the order. It is not a process that allows an investigation of the facts or of the reasonableness and proportionality of the detention.
- While the AAT does have jurisdiction to review the merits of a decision to make a PDO, an application cannot be made to the AAT while the PDO is in force.[48] As such, AAT review is essentially limited to awarding compensation after the fact.[49] The ICCPR requires that such compensation be available to a victim of unlawful arrest or detention.[50] However, the provision of a right to financial compensation does not supersede the (arguably more significant) right to be released from detention which is unlawful or disproportionate.
- The Bill provides for a right to complain to the Commonwealth Ombudsman. However, the ombudsman has no power to make binding recommendations.[51] The Human Rights Committee has indicated that such a non-binding complaint mechanism does not provide an effective remedy for the purposes of the ICCPR.[52]
- The Bill envisages that the ongoing need for a PDO will potentially be reviewed on a number of occasions (each time an extension is sought, when a continuing PDO is sought and in any application for revocation). However, the detained person (or their lawyer) has no right to appear before the issuing authority on those occasions. They are able to make representations to the Nominated AFP Officer – but that person is under no obligation to

[44] Ibid para [123].
[45] Ibid para [127].
[46] See proposed s105.51(2) of the Criminal Code.
[47] See proposed s105.52 of the Criminal Code.
[48] See proposed s105.51(5) of the Criminal Code.
[49] See proposed s105.51(7) of the Criminal Code.
[50] See article 9(5) of the ICCPR.
[51] See *Ombudsman Act 1976* (Cth)
[52] *Baban v Australia* (Communication No. 1014/2001) at paragraph 4.3

> draw those matters to the attention of the issuing authority. The Nominated AFP Officer must merely 'consider' any such representations.[53]

41. The ex-parte nature of the issuing, revocation and extension applications raises a further human rights issue, being the right to a fair and public hearing. The right to a fair and public hearing is provided for in article 14(1) of the ICCPR which states (in part):

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…

42. In the Commission's view, issuing, revocation and extension applications are suits at law.[54]

43. Article 14 does not explicitly confer a right to be present at a civil hearing as an aspect of a fair trial (as compared with criminal defendants, who do have explicit protection under article 14(3)(d) of the ICCPR). However, the Human Rights Committee has stressed the importance of being able to respond to the legal contentions and evidence of the other parties in a civil matter, stating that it is

> a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party. [55]

44. The PDO regime is inconsistent with this guarantee in a number of significant respects.

45. First, it does not allow the detained person to directly contest matters said to require their detention. This places the person in an unequal position as compared to the AFP and violates the 'fundamental duty' to ensure equality between the parties.

46. This is not to say that the application for the initial PDO should be made in the presence of the person to be detained. In the context of anti-terrorism measures, there has been acceptance that ex-parte orders will be necessary in some special circumstances, including where there is a legitimate fear of disappearance or in other circumstances. [56]

47. Given the stated purposes of the PDO regime (preventing imminent terrorist attacks and preserving evidence of a recent terrorist attack) one would assume that special considerations requiring ex-parte orders will generally apply in the case of an **initial PDO**. However, once a person is detained, they have very limited access to the outside world and the grounds for proceeding in an ex-parte fashion are no longer present.

Recommendation 3: The Commission therefore recommends that the Bill should provide that a detained person or their lawyer can make an application for revocation of a PDO and can appear in any application for a continuing PDO or for revocation or extension of a PDO.

Not only would such an amendment avoid violation of the right to a fair hearing, it would also address the concerns expressed above regarding the right to an effective remedy and the related right to review of detention without delay.

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[53] See proposed s105.19(7)(c) of the Criminal Code.

[54] A 'suit at law' need not involve formal legal proceedings before a court and can involve proceedings before administrative tribunals. The Human Rights Committee has looked to the nature of the right in question rather than the characteristics of the relevant forum. Given that the PDO proceedings involve the deprivation of liberty (which is normally a matter reserved to criminal courts) it seems strongly arguable that they are a suit at law, meaning that article 14(1) applies

[55] *Äärelä v Finland* Communication No 779/1997 CCPR/C/73/D/779/1997 at 7.4.

[56] See, for example, the United Kingdom House of Lords Joint Committee on Human Rights observed, in discussing the compatibility if the UK control order regime with the right to a fair trial under the European Convention on Human Rights Prevention of Terrorism Bill, Tenth Report of Session 2004-5, p4, para 5.

48. It may be that the explanation for the omission of those review rights under the current form of the Bill stems from a concern that a detained person may seek to tie up AFP resources by raising frivolous or vexatious points. The Bill already provides for the position of 'nominated senior AFP member', being someone not involved in the making of the application for the PDO. In practical terms, that member would be expected to undertake the bulk of any work involved in responding to a detainee initiated revocation application or a contested application for an extension or continuing PDO. That will limit the effects on AFP officers involved in operational matters connected with an actual or anticipated terrorist act.

49. There are a number of other ways in which such a concern can be adequately addressed while remaining within the limits of Australia's human rights obligations. Some possibilities are addressed in the following recommendation.

Recommendation 4: The Commission recommends that, to avoid any concern that a detained person may seek to tie up AFP resources by raising frivolous or vexatious points in an inter-partes application for a continuing PDO or for revocation or extension of a PDO, the bill be amended such that:

- **The issuing authority is given express power to control its own proceedings. This would give it ample power to prevent a detained person or their lawyer seeking to abuse the procedure.**
- **It is made clear that the issuing authority is not bound by the rules of evidence and may inform itself as it sees fit. This would minimise the taking of technical objections and allow the issuing authority to mould its procedures to take account of, for example, operational constraints on the AFP.**

50. Although not part of the Bill, it will be apparent from the above that the Commission considers it vital that the state and territory provisions dealing with PDOs include enforceable review rights of the nature outlined above. If the Committee feels it is within its power to do so, it would be useful for that matter to be addressed in any recommendations it makes.

Review rights and access to information

51. There is another issue which arises for consideration under articles 9 and 14 of the ICCPR. As noted above, the Bill only requires that the detained person be given a copy of the initial PDO, the continuing PDO and any extensions and a 'summary' of the grounds for the making of the initial PDO. No content is prescribed for the summary. This means that the material could be entirely general in nature.

52. The Bill also provides that the summary need not include any information which is 'likely to prejudice national security' within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). As the Commission has noted in earlier hearings before the Committee,[57] 'national security' has a very broad definition under that Act. It includes matters such as 'political, military and economic relations between Australia, and foreign governments and international organisations'[58] and ensuring that intelligence and law enforcement agencies are not 'discouraged from giving information to a nation's government and government agencies'.[59]

53. It is also notable in this context that the Bill provides that an application cannot be made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). A significant feature of that act

[57] *Official Committee Hansard,* Senate Legal and Constitutional Committee, Parliament of Australia, Canberra, 13 April 2005, 37 (Craig Lenehan).
[58] Sections 8 and 10 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).
[59] Sections 8 and 11(d) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

is the entitlement to request written reasons for a decision.[60] The High Court has held that this is not a requirement at common law,[61] meaning that there is no entitlement to written reasons in relation to PDOs.

54. A detained person may be able to obtain access to a wider range of documentary information through the court's compulsory processes after commencing a judicial review application in a Federal Court. However, there are a number of difficulties with this. First, the Court would only compel production of documents relevant to a matter in issue. As noted above, judicial review is a narrow technical process and this will limit the scope of any documents required to be produced. In addition, the Attorney could potentially invoke the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) and seek to have the Court make non-disclosure orders and orders allowing the use of redacted evidence.[62]

55. Under the ICCPR a person is entitled to be informed of the reasons for their arrest. The notification given must be sufficient to enable the person to take immediate steps to secure her or his release if she or he believes that the reasons given are invalid or unfounded.[63] In discussing those obligations in the context of preventative detention, the Human Rights Committee has observed:

> [I]f so-called preventative detention is used, for reasons of public security, it … must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4)[64]

56. A person who is charged with a criminal offence has a right to even more detailed information as one of the express guarantees designed to ensure a fair hearing.[65] While there is no express equivalent in relation to the situation covered by the Bill (as detainees are not subject to a criminal charge), such an obligation follows from the requirement to treat both parties equally. As noted above, this is fundamental to the right to a fair hearing.

57. In the Commission's view, the current form of the Bill fails to meet those obligations. This has serious practical implications. It might mean, for example, that a detained person simply has no real opportunity to present an innocent explanation for a matter which was central to the issuing of an initial PDO.

Recommendation 5: The Commission recommends, at the very least, the Bill should set out the minimum requirements for the content of a 'summary' of the grounds on which an initial PDO is made. The Commission has in mind an amendment which requires that the summary is sufficient to alert the subject of the order to the factual basis upon which the order is made.

Summaries should also be required in respect of each extension, refused revocation and decision to grant a continuing PDO. Again, they should be required to be sufficient to alert the subject of the order to the factual basis upon which the order or decision is made.

[60] See s13.
[61] *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 662 (Gibbs CJ). Relevantly, Gibbs CJ held that there "is no general rule of the common law, or principles of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons".
[62] See Part 3, Divisions 2 and 3 of the Act.
[63] See article 9(2) and *Caldas v. Uruguay*, Communication No. 43/1979, U.N. Doc. CCPR/C/OP/2 at 80 (1990).
[64] Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 8 (1994).
[65] See article 14(3)(a) of the ICCPR.

58. The Commission accepts that there will be some classes of security sensitive information which will require protection. To the extent possible, the AFP should be required to consider whether the information can be provided in an altered form (which is the approach adopted under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)). However, where, in exceptional cases, non-disclosure is required, consideration might be given to the use of 'Special Advocates', which have been used in similar circumstances in the United Kingdom. There are some similarities between that procedure and the Queensland Public Interest Monitor, although the Public Interest Monitor also has some broader accountability functions and is not subject to a statutory requirement to act in the interests of the person whose rights are in issue. The Commission has set out, in **Annexure B** to this submission, suggestions as to how those procedures might be adapted for use under the Bill.

Recommendation 6: That the Committee consider whether the use of Special Advocates or a National Public Interest Monitor could be used to ensure fairness to a detained person where security sensitive information is involved.

Humane treatment and a detention protocol

59. Section 34C of the ASIO Act made provision for a 'procedural statement' (the 'Protocol') to be issued in relation to detention under that Act.[66] The subsequently issued Protocol deals with matters such as ensuring that detainees are allowed a minimum of 8 hours uninterrupted sleep in every 24 hour period,[67] are provided with three meals per day[68] and are given a separate room or cell in which to sleep.[69] Contraventions of the Protocol may be the subject of a complaint to the ombudsman or the Inspector General of Intelligence Services (IGIS).[70]

Recommendation 7: While the remedies available for contravention of the Protocol under the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) ASIO Act could be improved, the Commission recommends that a similar protocol/complaint handling mechanism be considered in relation to detention under the Bill.

60. This recommendation would better ensure that detainees are treated with humanity and respect for human dignity, particularly having regard to the matter raised in paragraph 63 below.[71]

Contact with family members and other persons

61. The Bill provides that a person who is subject to a PDO has no right to contact other people (and may be prevented from doing so), subject to a number of limited exceptions. Under those exceptions a detained person may contact a lawyer (see further below) and the Commonwealth Ombudsman or state equivalent for the purposes of making a complaint.

62. They may also contact the following people, but solely for the purpose of 'letting the person know that the person being detained is safe but is not able to be contacted':

- one of the detained person's family members;

[66] The Protocol appears as 'Annex 2' to the 2003/2004 Annual Report of the Inspector General of Intelligence Services.
[67] See para 6.3.
[68] See para 6.2.
[69] See para 6.3.
[70] See s34NC of the ASIO Act.
[71] As required by article 10(1) of the ICCPR.

- if the person lives with people other than their family, one of those people;
- if the detained person is an employer, one of their employees;
- if the detained person is an employee, their employer;
- with the permission of the detaining AFP officer, any other person.

63. A concerning practical consequence appears to be that people who are detained in a state or territory prison[72] will need to be held in solitary confinement to prevent contact with other people in the prison population.

Recommendation 8: The Commission recommends that the issue of possible solitary confinement (and other issues relating to the treatment of people detained in state prisons) be addressed in the protocol referred to above.

64. The Bill provides that a person is not entitled to disclose the fact that a PDO has been made, the fact that the person is being detained or the period for which they are being detained.[73] Some surprising consequences arise from that limitation: for example, why should an employer be prevented from giving instructions solely for the running of a legitimate business? Why should an employee be prevented from telling their employer what steps need to be taken on an urgent task? And who bears the financial consequences for any loss arising from these restrictions?

65. The restrictions also raise issues in terms of article 10(1) of the ICCPR, which provides:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

66. Article 10(1) establishes a broad general standard of humaneness in detention. The content of this standard has been developed with the assistance of the Standard Minimum Rules for the Treatment of Prisoners (the 'Standard Minimum Rules') and the Body of Principles for the Protection of all Persons under any form of Detention (the 'Body of Principles').[74]

67. Rule 37 of the Standard Minimum Rules under the heading "*Contact with the outside world*", provides:

> Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

68. Principle 16 of the Body of Principles states:

> Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate

[72] Under proposed s105.27 of the Criminal Code.
[73] See proposed s105.35(2) of the Criminal Code.
[74] The Third Committee of the General Assembly in its 1958 Report on the drafting of the ICCPR stated that the Standard Minimum Rules should be taken into account when interpreting and applying Article 10(l) (United Nations, Official Records of the General Assembly, Thirteenth Session, Third Committee, 16 September to 8 December 1958, pages 160-173 and 227-241). The Human Rights Committee has also indicated that compliance with the Standard Minimum Rules and the Body of Principles is the minimum requirement for compliance with the ICCPR obligation that people in detention are to be treated humanely Human Rights Committee General Comment No. 21 (1992), paragraph 5. See also *Mukong v Cameroon* (1994) HRC Comm No 458/1991, UN Doc CCPR/C/51/458/1991 at para 9.3.

persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

69. These provisions are designed to avoid 'incommunicado detention', which has been found to breach the right to be treated with humanity and dignity.[75]

70. The contact permitted under the Bill falls short of these minimum standards. The Bill does not provide a right to receive visits from family members (rule 37 of the Standard Minimum Rules) – such contact is only guaranteed in the case of people aged between 16 and 18 years of age (see further below). The limits on what may be disclosed also fail to meet the requirements of Principle 16 of the Body of Principles.

71. Some departure from those standards is permissible in exceptional circumstances. For example, the notification required under rule 37 may be delayed for a 'reasonable period' where the 'exceptional needs of the investigation so require'. The Commission doubts that such exceptions justify the approach taken in the Bill: a family member who is involved in a terrorist conspiracy would be likely to be alerted to the fact that the person is being preventatively detained by virtue of the somewhat odd communication envisaged under proposed s105.35(1). An 'innocent' family member is simply likely to be alarmed.

Recommendation 9: Given that the limited contact regime for family members is arguably of little practical utility from a national security perspective, it is the Commission recommends that more expansive contact rights should be included in the Bill. For example, the contact rights available to people aged under 18 or who are incapable of managing their own affairs could be applied more generally. This would still be subject to the right of the AFP to prevent contact with a particular person through the use of prohibited contact orders (discussed in the next section).

72. Amendments should also be made to give greater scope for detained people to address pressing personal or business affairs. This could be facilitated, for example, by expanded rights to make written communications (which could be vetted by the AFP). It could also be achieved by allowing a person to instruct their legal representative to attend to such matters (see discussion below at paragraph 86 and recommendation 12).

Reviewability of Prohibited contact orders

73. The Bill provides for the making of 'prohibited contact orders'.[76] Such an order provides that the person detained under a preventative detention order is not to contact certain persons.[77]

74. The threshold for making such an order is low. The issuing authority must merely be satisfied that the order will 'assist in achieving the purpose for which the [PDO] was made.[78]

75. The AFP is not required to inform the detainee that a prohibited contact order has been made in relation to the person's detention or the name of a person specified in the prohibited contact order.[79] As a practical matter, that will mean that a person may not seek **any** form of redress in respect of such an order – they will not even be able to suggest to the AFP that the order has been made on a mistaken basis.

[75] Which is guaranteed by article 10(1) of the ICCPR. See eg *Gilboa v Uruguay* (147/83).
[76] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.15.
[77] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.15(4).
[78] See proposed ss105.15(4) and 105.16(4).
[79] Anti-Terrorism bill (No. 2) 2005, schedule 4, clause 105.28(3).

76. The making of such orders may affect human rights, including the right of a detained person to be treated humanely and with dignity and the right not to be subjected to arbitrary interference with family life.[80] The approach of allowing the making of such orders to be kept from the detained person therefore potentially violates the right of a person to obtain an effective remedy for breaches of their human rights.

77. No reason is given in the Bill or the explanatory memorandum for that approach.

Recommendation 10: The Commission recommends that the bill be amended to provide a detained person has a right be informed of a prohibited contact order, save in exceptional circumstances (for example, where disclosure would inevitably compromise intelligence gathering efforts). There should also be provision for a detainee to seek to have such an order revoked.

Monitored contact

78. Proposed section 105.38 requires that contact between a detained person and another person (including their lawyer) must be able to be monitored by the AFP. It must also take place in English, unless it can be effectively monitored through the use of an interpreter.

79. In the case of conversations with lawyers, the Bill provides that:

- the communication is not admissible in evidence against the person in any proceedings in a court;[81]
- the monitor cannot disclose the lawyer/client communications permitted under the Bill.[82]

80. As was noted by the majority of the members of this Committee who considered similar provisions in the context of the amendments to the ASIO Act, the monitoring of lawyer/client communications is inconsistent with the *Basic Principles on the Role of Lawyers Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, [83] which provide (at para 8):

> All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in **full confidentiality**. **Such consultations may be within sight, but not within the hearing, of law enforcement officials** (emphasis added).

81. It also appears to raise issues regarding a person's right to privacy guaranteed by article 17 of the ICCPR.[84]

82. Those concerns are somewhat ameliorated by the provisions regarding admissibility and non-disclosure. However, those provisions do not prevent the monitoring police officer making 'derivative use' of privileged information. Matters disclosed during privileged conversations may still be used, by that officer, to uncover other evidence which can be used against the

[80] Article 17(1) of the ICCPR.
[81] See proposed s105.38(5) of the Criminal Code.
[82] See proposed s105.41(7) of the Criminal Code.
[83] Havana, Cuba, 27 August to 7 September 1990.
[84] See the Human Rights Committee's *Concluding Comments on Portugal* (2003) UN doc CCPR/CO/78/PRT for a discussion of article 17 and the professional duties owed by legal advisers.

person in future criminal proceedings.[85] In addition, the amendments do not prevent the admission of otherwise privileged information in a proceeding against a person other than the detained person (say the spouse or child of the detained person).

83. In the context of the ASIO Act amendments, this Committee recommended that monitoring be limited to visual monitoring.[86] The Commission considers that a similar recommendation should be made in relation to the Bill.

Recommendation 11: The Commission recommends that contact with lawyers take place within the sight, but not the hearing, of an AFP officer.

Limitations on the role of lawyers

84. The Bill effectively limits the role of any lawyer whom the detained person contacts by providing that contact can only address the following matters:

(a) obtaining advice from the lawyer about the person's legal rights in relation to the PDO or the treatment of the person in connection with the person's detention under the PDO;

(b) arranging for the lawyer to act for the person in relation to those matters (including in proceedings in a federal court for a relevant remedy);

(c) arranging for the lawyer to act for the person in relation to, and instructing the lawyer in relation to, a complaint to the Commonwealth Ombudsman under the *Complaints (Australian Federal Police) Act 1981* in relation to those matters (or to a state authority where the complaint relates to an officer or authority of a State or Territory); or

(d) arranging for the lawyer to act for the person in relation to an appearance, or hearing, before a court that is to take place while the person is being detained under the order.

85. These restrictions are unnecessarily limited and are inconsistent with paragraph 8 of the *Basic Principles on the Role of Lawyers Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders* (extracted above) which provides that person should be able to 'communicate and consult with a lawyer, without…censorship'.

86. The approach taken in the Bill also gives rise to some odd results. For example, the Bill would prevent a lawyer advising a person about possible criminal charges which may be brought against the detained person. They would prevent the detained person instructing the lawyer to attend to pressing personal or business matters on the detained person's behalf. They would also not permit the person to instruct their lawyer to seek to have a terrorist organisation 'de-listed' under s102.1(17) of the *Criminal Code*. Given that a person's association with a terrorist organisation may form a central part of a decision to issue a PDO for their detention, that constraint on lawyer/client communications could be particularly significant.

87. It is an offence for a lawyer to disclose, during the period of the PDO:

- the fact that a PDO has been made in relation to the person;
- the fact that the person has been detained;
- the period for which the person has been detained; or
- any information which the person gives to the lawyer in the course of contact.

[85] See discussion in Senate Legal and Constitutional References Committee '*Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*' December 2002, at 61-64.
[86] Senate Legal and Constitutional References Committee '*Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*' December 2002, recommendation 9, p142.

88. Exceptions apply in relation to disclosure for a number of purposes, including the taking of proceedings in a federal court. However, as the explanatory memorandum makes clear, those exceptions do not apply to a situation where the lawyer wishes to seek advice from a barrister. This is said to be because 'it should not be necessary to disclose the fact of the particular person's detention to that barrister'. Again this imposes unrealistic constraints upon the role of professional legal advisers. Presumably the drafters had in mind that the barrister's advice could be sought on a hypothetical basis. However, the disclosure offence covers '**any** information which the person gives to the lawyer in the course of contact'. It is difficult to see how a lawyer could avoid transgressing that prohibition if, for example, the barrister's advice was sought on a matter relating to conditions of detention.

89. There may be further anomalies arising from these restrictions on communications made to and by lawyers.

Recommendation 12: In light of the above the Commission recommends that the disclosure offences and restrictions which apply to contact with lawyers need to be reconsidered and amended so as to avoid imposing unnecessary constraints upon the provision of legitimate legal advice. More specifically, the Bill should allow a lawyer to provide their professional services in connection with any pressing lawful personal or business affairs.

Rights of children

90. Unlike the detention provisions in the ASIO Act there is no higher threshold for the detention of a child (as compared to an adult) under the PDO regime.[87]

91. Article 37(b) of the *Convention on the Rights of the Child*[88] (CRC) states that "no child shall be deprived of his or her liberty unlawfully or arbitrarily". That obligation is obviously similar to that in article 9(1) of the ICCPR. However, article 37(b) also includes two additional obligations which have no comparable provision in the ICCPR: detention of children should be a "measure of *last resort*" and should only be for the "*shortest appropriate period* of time". These additional obligations are arguably somewhat similar in substance to the proportionality test applied under article 9(1).[89] However, they appear to require an even stricter approach. Article 3(1) of the CRC requires that in 'all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.[90]

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[87] See s34NA(4)(a) ASIO Act which requires, inter alia, the Attorney to be satisfied on reasonable grounds that it is likely that the child will commit, is committing or has committed a terrorism offence.

[88] Opened for signature 20 November 1989, 1577 United Nations Treaty Series 3; entered into force 2 September 1990; ratified by Australia 17 December 1990; declared an international instrument for the purposes of s 47(1) of HREOC Act on 22 December 1992; gazetted 3 January 1993 (see s 3 HREOC Act).

[89] See S Joseph Australian Counter-Terrorism Legislation and the International Human Rights Framework 27(2) *UNSWLJ* (2004) 428 at 446.

[90] Article 3(1) does not require the best interests of the child to be the sole consideration in all decision-making. In *Minister of State for Immigration and Ethnic Affairs* v *Ah Hin Teoh* (1995) 183 CLR 273, Mason CJ and Deane J noted: The article is careful to avoid putting the best interests of the child as *the* primary consideration; it does no more than give those interests first importance along with other considerations as may, in the circumstances of a given case, require equal, but not paramount, weight (at 289).Later, their Honours stated: 'A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it'. (at 292) This is consistent with the view UNICEF has taken of the article. UNICEF has also stated that the article requires the child's interests to be the subject of active consideration (see *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Children Fund (UNICEF), 2002 at 40).

92. The Bill does not expressly require the AFP or a person issuing a PDO to consider whether subjecting a particular child to detention will be in their best interests. Nor does it specify that such detention should only be used as a measure of last resort. While those matters may be indirectly considered in the application of the 'reasonably necessary' test, the Commission is of the view that they should be expressly required to be considered in the making of a PDO in relation to a child.

Recommendation 13: The Commission recommends that the Bill be amended to require the issuing authority to take into account the best interests of the child when considering a PDO application.

93. The Bill does make some special provision for children, by providing that they may receive visits from their parents or guardians and may also communicate by telephone, fax or email. However, the period of contact is limited to 2 hours per day, unless the AFP officer exercises their discretion to permit additional contact. The reasons for that approach are unclear. Unlike the provisions of the ASIO Act, a PDO is not sought for the purposes of obtaining information from the detainee and so contact with a child's parents is not going to pose operational difficulties.

Recommendation 14: The Commission recommends that the limit on contact be removed or relaxed. To avoid possible practical complications, the Bill could confer upon the issuing authority the power to impose some upper limit on contact in the event the AFP demonstrates there are compelling reasons for doing so.

94. The Bill creates a non-disclosure offence for parents and guardians having contact with their child. That offence will apply where a parent/guardian discloses:

- the fact that a PDO has been made in relation to the person;
- the fact that the person has been detained;
- the period for which the person has been detained; or
- any information which the person gives to the parent/guardian in the course of contact,

to another parent/guardian who **has not** had contact with the child or to any other person. This gives rise to strange consequences. It would, for example, potentially give rise to a criminal sanction where the child is only able to contact one parent because the other parent is interstate on business. Until the interstate parent speaks to her or his detained child directly, the other parent can only tell them 'our child is safe but is unable to be contacted for the time being'.

Recommendation 15: The Commission recommends that the non-disclosure offence be amended so as to allow disclosure of the matters specified in s105.41(3)(b)(i)-(iv) between 'family members' (as defined in proposed s105.35(3)). Provision could be made (similar to prohibited contact orders) to allow the AFP to prevent disclosure to a particular family member.

Provision of legal aid

95. The Bill is silent as to the right of a detained person to legal aid.

96. Article 14(3)(d) of the ICCPR requires the provision of legal aid (subject to certain conditions) where a person has been charged with a criminal offence. People who are the subject of PDOs will generally not be in that position. However, the Human Rights Committee has observed that **anyone who is detained pending charge** should have access to legal aid if they are unable to afford legal representation,[91] regardless of whether they have been charged or not. Some have suggested that the Committee considers such rights to be implied from article 9(1), on the basis that legal representation is important to guard against arbitrary detention.[92] A fuller explanation might be that the Committee considers that legal representation is an essential element in providing an effective remedy for breach of article 9(1).[93]

97. It may be that the Attorney-General's Department is considering amending its legal aid guidelines to cover people subject to PDOs. However, it would be preferable if the right to legal aid was included in the Bill itself.

Recommendation 16: The Commission recommends that the Bill confer upon a detained person the right to obtain legal aid if they are unable to afford representation.

Control Orders

General description

98. The provisions for control orders appear in proposed division 104 of the Criminal Code. The stated purpose is to allow obligations, prohibitions and restrictions to be imposed upon a person for the purpose of protecting the public from a terrorist act.

99. The obligations, prohibitions and restrictions which may be imposed are as follows:

- a prohibition or restriction on the person being at specified areas or places;
- a prohibition or restriction on the person leaving Australia;
- a requirement that the person remain at specified premises between specified times each day, or on specified days;
- a requirement that the person wear a tracking device;
- a prohibition or restriction on the person communicating or associating with specified individuals;
- a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the Internet);
- a prohibition or restriction on the person possessing or using specified articles or substances;
- a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
- a requirement that the person report to specified persons at specified times and places;

[91] See Concluding Comments on Ireland (2000) UN Doc A/55/40, paras 422-451, paras 17-18.
[92] See S Joseph *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* Second Edition OUP (2004) 334.
[93] See discussion of article 2(3) above.

- a requirement that the person allow himself or herself to be photographed;
- a requirement that the person allow impressions of his or her fingerprints to be taken;
- a requirement that the person participate in specified counselling or education.

100. Such restrictions potentially infringe upon a number of human rights, including:

- the right to liberty (article 9(1) of the ICCPR);
- the right to privacy (article 17 of the ICCPR);
- the right to freedom of association (article 22 of the ICCPR);
- the right to freedom of expression (article 19 of the ICCPR);
- the right to freedom of movement (article 12 of the ICCPR); and
- the right to work (article 7 of the *International Covenant on Economic, Social and Cultural Rights*).

101. As noted above, the right to liberty is not absolute – a person may be deprived of that right subject to certain conditions, most notably proportionality. The same may generally be said of the other human rights potentially infringed by the restrictions available under control orders.

102. A control order may only be sought with the permission of the Attorney-General. However, no conditions are placed upon the giving of that consent.[94]

103. If the Attorney consents, the AFP officer may seek an 'interim control order' from the Federal Court, Family Court or Federal Magistrates Court. The Court may make such an order if it is satisfied, on the balance of probabilities that:

- making the order would substantially assist in preventing a terrorist act; or
- the person has provided training to, or received training from, a listed terrorist organisation; and (in either case)
- each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

104. The AFP may also seek an 'urgent interim control order'. The principal difference between those orders and interim control orders is that the application may be made without the prior consent of the Attorney-General.[95]

Proportionality and the test for making control orders

105. Scrutiny of the necessity of the orders involves a consideration of proportionality (similar to that which applies to the making of PDOs). The Bill also provides that, in considering whether that condition is met, 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).[96]

106. However the Commission considers that, as with PDOs, a stricter proportionality test is appropriate.

Recommendation 17: The Commission therefore recommends that the issuing Court should be specifically required to consider whether there are less restrictive means of achieving the relevant purpose (protecting the public from a terrorist act).

[94] See proposed s104.2 of the Criminal Code.
[95] See proposed s104.6(2) of the Criminal Code. The Attorney's consent must be sought within 4 hours of the making of a request for an urgent order (see proposed s104.10).
[96] See proposed s104.4(2) of the Criminal Code.

Broader proportionality concerns

107. Like PDOs, some broader proportionality concerns have been expressed in relation to control orders.

108. Again, the Commission is not in a position to properly evaluate those concerns in the absence of detailed material regarding the current threat to Australia of a terrorist attack. However, it would urge the Committee to consider that question in more depth if the Committee is given access to such material.

109. Again, it would be relevant for the Committee to consider the range of powers that Australian police officers and intelligence services already possess to disrupt terrorist attacks. In addition to the matters referred to in annexure A, those include powers to:

- install and use listening devices;[97]
- inspect and make copies of postal articles;[98]
- hack into computer files and data-bases;[99]
- use tracking devices;[100]
- conduct searches of persons and premises (including covert searches);[101] and
- intercept telecommunications.[102]

Sunset clause

110. As with PDOs, the sunset clause provides that the control order provisions lapse after 10 years.[103] In light of the broader concerns expressed regarding the proportionality of the control order scheme, the Commission suggests a shorter period would be more appropriate.

Recommendation 18: The Commission recommends that the Bill be amended to provide for the lapse of the control order provisions in 4-5 years.

Ex parte nature of interim control order applications

111. Both interim control orders and urgent interim control orders may be made ex-parte. The person to be the subject of those orders has no right to appear before the court. Nor does the Bill impose any requirement upon the AFP or the Court to consider whether the circumstances of the case are such that the person may be given such an opportunity without endangering national security.

112. As noted above, ex-parte hearings pose issues in terms of the right to a fair and public hearing. They should only be undertaken when, for example, there is a flight risk or a risk that the person will destroy evidence. Such risks seem less likely to arise in the context of the making of control orders as compared to the making of PDOs. In relation to the control order scheme in the United Kingdom, the House of Lords Human Rights Committee observed that in the

[97] See s26(3) of the ASIO Act
[98] See ss27(2) and (3) of the ASIO Act.
[99] See s25A(4) of the ASIO Act.
[100] See ss26B(1) and 26C(1) of the ASIO Act.
[101] See s25 ASIO Act.
[102] See s9(1) *Telecommunications (Interception) Act 1979* (Cth).
[103] See proposed s105.53 of the Criminal Code.

absence of such concerns there should be a normal inter-partes hearing so as to avoid violating the right to a fair hearing.[104]

Recommendation 19: The Commission recommends that the Bill should be amended such that the issuing court is required to satisfy itself that any ex-parte application is warranted in the particular circumstances. This is the normal practice of a court asked to consider an ex-parte application.

Confirmation/revocation proceedings

113. The Bill does provide for an inter partes hearing after the order has been served. It specifically states that the subject of the control order and their legal representative may make submissions and adduce evidence at that hearing. After considering the material before it, the court is empowered to:

- confirm the order (with or without variation) if it is satisfied that the conditions referred to above are met;
- revoke the order if the court is not so satisfied; or
- declare the order void, if the court is satisfied that, at the time of making the order, there were no grounds on which to make it.[105]

114. The Bill also allows the subject of a control order to bring an application for revocation or variation of the order, provided they have given written notice of the application and the grounds upon which revocation is sought to the Commissioner of the AFP.[106]

115. A difficulty with both of these avenues for redress is that of access to information. The Bill adopts a similar approach to that discussed above in relation to PDOs – that is a person must be served with a copy of the control order and a 'summary' of the grounds upon which it was made.[107] Again, the Bill does not set out any minimum requirements for the summary and the AFP need not include any information considered likely to prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

116. A number of consequences follow from this:

- A person subject to a control order may find it difficult or impossible to comply with the requirement that a revocation or variation application be preceded by written notice to the AFP Commissioner of the grounds upon which revocation or variation is sought.
- The issuing court would presumably be able to rely upon the usual range of compulsory powers to require the AFP to produce relevant documentary material at a confirmation, revocation or variation hearing. However, this will inevitably result in delays, during which time a person may be effectively subject to a form of detention (if the order includes a requirement that the person remain at specified premises between specified times each day, or on specified days). The current approach in the Bill therefore increases the likelihood that a person may be subject to arbitrary detention or violation of one of the other human rights referred to above for a longer period of time.

[104] See *Prevention of Terrorism Bill*, Tenth Report of Session 2004-5, p4, para 5.
[105] See proposed s104.14(6)-(8) of the Criminal Code.
[106] See proposed s104.18 of the Criminal Code.
[107] See proposed s104.12 of the Criminal Code.

- Even if a Court does compel production of relevant material, the Attorney-General could invoke the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). As noted above, the use of that procedure may result in information being withheld (through orders for redaction or non-disclosure). It will also delay any determination as to whether the control order should be revoked or varied. Again, this raises the possibility of delay in correcting mistaken exercises of power and longer lasting and more intense violations of the human rights of people who should not be subjected to control orders.

Recommendation 20: As with the PDO regime, the Commission recommends that:

- **the Bill should set out the minimum content to be included in the summary of grounds on which a control order is made and specifically require that it include sufficient factual material to alert the subject of the order to the factual basis upon which the order was made; and**
- **consideration should be given to the use of the Special Advocate procedure and/or a Public Interest Monitor in the case of security sensitive material.**

Sedition provisions

117. The Commission has two principal concerns about the sedition provisions:

- the breadth of sections 80.2(7) and (8); and
- whether the defences in section 80.3 should be broadened.

Freedom of Expression under international human rights law

118. Freedom of expression is constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress.[108]

119. Freedom of expression is protected by article 19 of the ICCPR. Relevantly, article 19(2) provides:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.

120. Article 19(2) protects 'information and ideas of all kinds'; it not only applies to information or ideas that are favourable received, or regarded as inoffensive or as a matter of indifference, but also those that offend, shock and disturb.[109] Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.[110]

121. Article 19(2) is subject to article 19(3), which recognises specific instances in which it is permissible for states parties to restrict freedom of expression. It provides:

[108] See *Erdogdu v Turkey* (2002) 34 EHRR 50, [52].
[109] See *Fressoz and Roire v France* (2001) 31 EHRR 2, [45].
[110] See *Erdogdu v Turkey* (2002) 34 EHRR 50, [52].

The exercise of rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are **necessary**:

a) For the respect of the rights or reputations of others;
b) For the protection of national security or of public order (*ordre public*), or of public health or morals. (emphasis added)

122. The sedition provisions will therefore only constitute a permissible restriction on freedom of expression to the extent that they can be said to be necessary for the purposes of protecting public order or national security. The word 'necessary' imports the principle of proportionality, which requires that any restriction must be proportionate to the legitimate ends sought to be achieved.[111] As already noted above, the restriction must represent the least restrictive means of achieving the relevant purpose.[112] This is to ensure that the restriction does not jeopardise the right itself.[113]

123. Under the ECHR, States are also required to establish that there is a 'pressing social need' for the restriction to establish 'necessity'. Whilst States are given a margin of appreciation in relation to whether there is a pressing social need for the restriction, the European Court of Human Rights has consistently held that laws which restrict expression other than expression which incites to violence or public disorder will not constitute a permissible restriction on the freedom of expression.[114]

124. The Court has also held that the comparable provision to article 19(3) in the ECHR, article 10(2), provides 'little scope … for restrictions on political speech or matters of public interest'.[115] This is in recognition of the fundamental importance of freedom of expression to democratic society.[116]

125. It is in light of these principles that the Commission comments on the sedition provisions.

Sections 80.2(7) and (8)

126. Unlike sections 80.2(1)-(6), sections 80.2(7) and (8) do not require proof of an intention to urge another to violence or public disorder to overthrow or undermine constituted authority,

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[111] See *Faurisson v France*, HRC Communication No. 550/93, [8]. This is also the approach adopted by the European Court of Human Rights in relation to the comparable provision of the ECHR, article 10(2): see *Fressoz and Roire v France* (2001) 31 EHRR 2. See also, *R v Shayla* [2003] 1 AC 247.

[112] See generally regarding proportionality and the tests applied internationally: J Kirk *"Constitutional Guarantees, Characterisation and Proportionality"* (1997) 21 MULR 1.

[113] Human Rights Committee, *General Comment No.10: Freedom of Expression (Art 19): 29/6/83, CCPR General Comment No.10 (General Comments)*, available at http://www.unhchr.ch/tbs/doc.nsf

[114] See *Erdogdu v Turkey* (2002) 34 EHRR 50; *Baskaya and Okçuoglu v Turkey* (2001) 31 EHRR 10. See also, *R (Rusbridger and Another) v Attorney-General* [2004] 1 AC 357.

[115] (2002) 34 EHRR 50, [62]. This was also the position taken by the Privy Council in *Hector v Attorney-General of Antigua and Barbuda* [1990] 2 AC 312, in which Lord Bridge of Harwich stated that: 'In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind … In light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion'. Those comments were adopted by the House of Lords in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 548. See also, *R v Shayla* [2003] 1 AC 247; *R (Rusbridger and Another) v Attorney-General* [2004] 1 AC 357.

[116] See *Erdogdu v Turkey* (2002) 34 EHRR 50.

which is the essence of seditious conduct.[117] Those sections merely require proof that a person urged another to commit conduct that is intended to assist, by any means whatever (except by humanitarian aid), any organisation or country that is at war with the Commonwealth or engaged in armed hostilities with the Australian Defence Forces (ADF). Sections 80.2(7) and (8) therefore considerably expand existing sedition laws.

127. The term 'assist' is not defined in the Bill. The Macquarie Dictionary (Third Edition) defines 'assist' as meaning, 'to give support, help or aid'. The intended breadth of that term is underscored by the phrase 'by any means whatever'. These provisions will therefore apply regardless of the degree to which the conduct urged by the person would 'assist' the organisation or country, or of the type of 'assistance' that the conduct would provide. Of course, whether conduct is ultimately caught by sections 80.2(7) or (8) will depend on whether one of the defences in section 80.3 applies.

128. The Commission is concerned that the breadth of sections 80.1(7) and (8) restricts freedom of expression beyond that which is permissible under article 19(3) of the ICCPR for the protection of public order or national security.[118] As noted above, the European Court of Human Rights has consistently held that the comparable article of the ECHR, article 10(2), will not apply to conduct that falls short of inciting violence or public disorder.[119] The Court has held that this is required by the importance in democratic society of robust discussion about issues of public interest, irrespective of how unpalatable some of that discussion might be to government.[120]

129. For example, an Australian peace activist sends letters to ADF personnel and their families containing photographs of Iraqi children alleged to have been maimed by Coalition forces and urging them to not to be deployed in Iraq. Such action could be said to 'urge another to engage in conduct' (not to be deployed) that will 'assist' (by compromising ADF capability in Iraq, or at least lowering morale) insurgent 'organisations' currently 'engaged in hostilities' with the ADF in Iraq.

130. Whether such conduct would ultimately be caught by section 80.2 will depend on whether a defence is available under section 80.3. However, in the Commission's view, it is unlikely that any of the proposed defences in section 80.3 would apply in this situation.

131. The Commission is concerned that the restriction of such conduct is likely to be impermissible under article 19(3) of the ICCPR, and not the sort of conduct which should be unlawful in a democratic society.[121] The Commission considers that this could be remedied by the adoption of a broader defence provision.

Defences: section 80.3

132. The Commission considers that the good faith defences proposed in section 80.3 of the Bill are not sufficiently broad in two respects, in that they:

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[117] See *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury* [1991] 1 OB 429, 453.
[118] See *R v Attorney-General* [2004] 1 AC 357; *Erdogdu v Turkey* (2002) 34 EHRR 50.
[119] See *Erdogdu v Turkey* (2002) 34 EHRR 50.
[120] See *Erdogdu v Turkey* (2002) 34 EHRR 50, [71]. See also, *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 548. See also, *R v Shayla* [2003] 1 AC 247; *R (Rusbridger and Another) v Attorney-General* [2004] 1 AC 357.
[121] The Privy Council has held that the courts should be slow to uphold the criminalising of speech which can be characterised as criticising government and even aimed at 'undermining public confidence in government': see *Hector v Attorney-General of Antigua and Barbuda* [1990] 2 AC 312. See also, *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 548; *R v Shayla* [2003] 1 AC 247; *R (Rusbridger and Another) v Attorney-General* [2004] 1 AC 357.

- do not appear to extend to expression which could be characterised as 'attempting to encourage discussion on matters of public interest' if such expression falls within the proposed sections 80.2(7) or (8); and

- may not extend to all manner of expression.

133. Section 80.3 sets out the 'good faith' defences available to a person charged with sedition offences under sections 80.1 or 80.2. Sections 80.1 or 80.2 will not apply to expression which, in good faith:

- tries to show that government is 'mistaken' in its view;

- seeks to 'point out' errors or defects, with a view to reforming those errors or defects;

- 'urges another person' to 'lawfully procure a change to any matter established by law or policy or practice in the Commonwealth';

- 'points out' any matters that are producing or have a tendency to produce feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; or

- is done in connection with an industrial dispute or an industrial matter.

134. As illustrated by the example set out above, the Commission is concerned that the defence provisions are not broad enough to apply to conduct that could be characterised as attempting to encourage discussion on matters of public interest, where that expression would be caught by the proposed sections 80.2(7) or (8). As noted above, the Commission considers that this is an impermissible restriction under article 19(3) of the ICCPR.

135. The Commission is also concerned that the present defences do not adequately extend to all manner of artistic expression. In the Commission's view, artistic expression such as a painting, cartoon or mime act may not in some circumstances fall within the proposed section 80.3. In the Commission's view, this might be best addressed by extending the defences to cover the grounds set out in s18D of the *Race Discrimination Act 1975* (Cth).

136. As some have pointed out, the uncertainty created by this could have a subtle 'chilling effect' on artistic expression.

Recommendation 21: The Commission considers that these issues could be remedied by:

(a) broadening section 80.3 so as to extend to expression which could be characterised as 'attempting to encourage discussion on matters of public interest' if such expression falls within the proposed sections 80.2(7) or (8); and

(b) broadening the proposed section 80.3 to expressly provide a defence in respect of anything said or done in good faith in the performance, exhibition or distribution of an artistic work; the course of any statement, publication or discussion or debate held for any genuine purpose; or, in making or publishing of a fair and accurate report of a particular matter.

137. The Commission considers that broadening the defences in section 80.3 in this way will be more likely to ensure that the sedition provisions do not breach Australia's obligations under article 19 of the ICCPR.

Other comments

138. The Commission notes that it has been suggested that the proposed section 80.2(5) strays into the area of discrimination and vilification law.

139. The Commission has previously called for the introduction of comprehensive religious discrimination and vilification laws at the federal level,[122] consistent with Australia's international human rights obligations under article 20(2) of the ICCPR[123] and article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*.[124] The Commission considers the enactment of such legislation to address discrimination and vilification against Arab and Muslim Australians is crucial to combating terrorism. However, rather than attempt to do this under the umbrella of sedition laws, Parliament should address the topic in separate legislation so as to allow for a proper consideration of the interests and issues involved.

Conclusion

140. In her address to the Biennial Conference of the International Commission of Jurists in Berlin on 27 August 2004,[125] Ms Louise Arbour the High Commissioner for Human Rights (and former Justice of the Canadian Supreme Court) observed:

> I firmly believe that terrorism must be confronted in a manner that respects human rights law. Insisting on a human rights-based approach and a rule of law approach to countering terrorism is imperative. It is particularly critical, in time of crisis, when clarity of vision may be lacking and when institutions may appear to be failing, that all branches of governance be called upon to play their proper role and that none abdicate to the superior claim of another…For even though it may be painted as an obstacle to efficient law enforcement, support for human rights and the rule of law actually works to improve human security. Societies that respect the rule of law do not provide the executive a blanket authority even in dealing with exceptional situations. They embrace the vital roles of the judiciary and the legislature in ensuring that governments take a balanced and lawful approach to complex issues of national interest. A well-honed system of checks and balances provides the orderly expression of conflicting views within a country and increases confidence that the government is responsive to the interest of the public rather than to the whim of the executive.

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[122] See, for instance, HREOC reports, *Article 18: Freedom of religion and belief* (July 1998), available at http://www.humanrights.gov.au/human_rights/religion/index.html#Article; *Isma–(Listen): National Consultations on eliminating prejudice* (June 2004), available at http://www.humanrights.gov.au/racial_discrimination/isma/report/index.html

[123] Article 20(2) of the ICCPR provides that:

> 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

[124] Article 4 of CERD provides that:

> 'States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention'.

[125] Available at http://www.unhchr.ch/huricane/huricane.nsf/NewsRoom?OpenFrameSet

> Ultimately, respect for the rule of law lessens the likelihood of social upheaval, creating greater stability both for a given society and its neighbours.

141. This is the challenge that Australia currently faces. Australia has an international legal obligation to protect its citizens from the risks of terrorist attacks. Such attacks threaten the right to life, one of the most fundamental rights protected by the ICCPR.[126] However, the steps Australia takes in fulfilling that obligation must not in themselves threaten the values and principles embodied in instruments like the ICCPR, which provides a 'road map' to guide legislators in the steps that may be taken to combat terrorism in free and democratic societies. The principles those instruments embody are not oddities of international law - they are, in many cases, drawn directly from our own legal traditions and should not be abandoned at the first sign of trouble.

142. The recommendations made by the Commission in this submission are intended to assist in meeting that challenge. In the Commission's view, they are practical and reasonable suggestions which would provide better protections for human rights, whilst not detracting from the intention or workability of the scheme.

[126] See article 6. See also Security Council resolution 1373 (2001).

Annexure A – Existing powers to prevent acts of terrorism (see submission, paras 29 and 30 and 109)

The definition of 'terrorist act' in the Criminal Code is broad – it includes 'threats of actions' as well as actions. The terrorism offences also include a variety of preliminary or preparatory acts, such as:[127]

- providing or receive training connected with terrorist acts;[128]
- possessing a thing connected with the preparation for, engagement in or assistance in a 'terrorist act';[129]
- collecting or making documents likely to facilitate terrorist acts;[130]
- other acts done in preparation for, or planning, terrorist acts.[131]

The Criminal Code also contains a number of offences relating to Terrorist organisations[132] and an offence of financing terrorism.[133]

The authorities already possess power to detain people in connection with the investigation of those offences. Under the *Crimes Act 1914 (Cth)* ('Crimes Act'), the Australian Federal Police have broad search and questioning powers without warrant as well as the power of arrest, where there is reasonable suspicion of the commission of an offence. Section 23CA of the Crimes Act provides the Australian Federal Police have the power to detain persons reasonably suspected of committing a terrorism offence for a period of four hours. If the Australian Federal Police wish to extend this period, the investigating official may apply to a magistrate for an extension of the investigation period. The investigation period may be extended any number of times, for a total period of up to twenty hours.[134] In practice, a person will most likely be detained much longer as time ceases to run during, for example, periods when questioning is suspended.[135]

As noted in the body of this submission, the enlivening conditions for the granting of PDOs to prevent imminent terrorist attacks include a reasonable suspicion that will engage in a terrorist act,

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[127] All of the following provisions were recently amended by the *Anti-Terrorism Act* 2005.

[128] Criminal Code, s 101.2 Section 101.2 (3) states an offence of *Providing or receiving training connected with terrorist acts* will be committed even if: a terrorist does act does not occur; or the training is not connected with the preparation for, the engagement of a person in, or assistance in a specific terrorist act; or the training is connected with preparation for, the engagement in, or assistance in more that one terrorist act.

[129] Criminal Code, s 101.4. Relevantly s 101.4(3) provides that an offence will be committed under this provision even if a terrorist act does not occur; or the prohibited action is not connected with a specific terrorist act; or the prohibited action is connected with more than one terrorist act.

[130] Criminal Code, s101.5. Relevantly s 101.5(3) provides that an offence will be committed under even if a terrorist act does not occur; or the prohibited action is not connected with a specific terrorist act; or the prohibited action is connected with more than one terrorist act.

[131] Criminal Code, s101.6. Relevantly s 101. 6(3) provides that an offence will be committed even if a terrorist act does not occur; or the prohibited action is not connected with a specific terrorist act; or the prohibited action is connected with more than one terrorist act.

[132] See, for example: directing the activities of a terrorist organisation (s 102.2); membership of a terrorist organisation (s102.3); recruiting for a terrorist organisation (s102.4); training or receiving training from a terrorist organisation (s102.5); getting funds to or from a terrorist organisation (s102.6); providing support to a terrorist organisation; associating with a Terrorist organisation.

[133] Criminal Code, s103.1. Under this section an offence will be committed if a person provides or collects funds and is reckless as to whether the funds will be used to facilitate or engage in a terrorist act. A person will commit an offence even if a terrorist act does not occur or the funds will not be used to facilitate or engage in a specific terrorist act; or the funds will be used to facilitate or engage in more than one terrorist act. Section 103.1(3) was recently amended by the *Anti-Terrorism Act* 2005.

[134] Crimes Act, s 23DA(7). It is noted that section s23 D(5) which provides for the 'Extension of an investigation period if arrested for a non-terrorism offence' only permits the investigation period to be extended for a maximum of eight hours and does not permit the period to be extended more than once.

[135] Section 23CA(8) provides in ascertaining the period of time a person was detained for under s23CA(4) or(6) a potentially significant amount of time is disregarded, including circumstances in which the questioning is suspended or delayed and the time in which the person is transported from the place of arrest to the place where questioning will occur. For a full list of circumstances in which time will be disregarded see s23CA(8).

possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act or has done, or will do, an act in preparation for, or planning, a terrorist act. If that condition is met then, given the breadth of the offences available under the criminal code, the person could be arrested, detained under the Crimes Act and ultimately charged with an offence. Detention would then generally continue as s 15AA of the Crimes Act provides that, in cases involving terrorism offences, there is a presumption against bail, except in exceptional circumstances. [136]

ASIO also has broad powers[137]to investigating matters relating to 'terrorism offences', which may overlap with the PDO provisions. Under the ASIO Act, the Minister may grant a request for a warrant to compulsorily question and detain persons subject to certain conditions. These include that there are reasonable grounds to suspect that the subject of the warrant will alert a person involved in a 'terrorism' offence that the offence is being investigated.[138]

[136] Section 15AA does not apply to persons charged under s102.8 of the Criminal Code.
[137] It is noted that when Dennis Richardson, previous Director –General of ASIO appeared before the Parliamentary Joint Committee on ASIO, ASIS and DSD he was asked whether he was "satisfied that the existing powers equip you to do the job you need to do?". Mr Richardson replied 'Yes'. See Commonwealth, *Parliamentary Debates,* Parliamentary Joint Committee on ASIO, ASIS, and DSD, transcript of public hearings, Canberra, 19 May 2005, 8
[138] s 34C (3) (c) (i) of the *Australian Security Intelligence Organisation Act* 1979

Annexure B (see submission para 58)

The role of the Special Advocate

1. The Special Advocate is a specially appointed security cleared lawyer who acts in the interests of a party to proceedings when that party, and his or her legal representative, have been excluded, on security grounds, from attended closed hearings or from accessing material. In a speech titled *Terrorism: The International Response of the Courts,* Justice Kirby stated:

> The aim of the office of "special advocate" is to make the attainment of justice more achievable in a case where certain information cannot be disclosed to the accused or the accused's lawyers because of the suggested interests of national security.[139]

2. A Special Advocate's relationship with the relevant party is different from the relationship between the ordinary lawyer and his or her client. The Special Advocate is not responsible to the relevant party.

3. The role of the Special Advocate has been utilised in the United Kingdom and Canada[140] in proceedings where a party to proceedings (and their legal representative, if they have one) have been excluded from attending hearings or viewing material relevant to proceedings. In the United Kingdom, the Special Advocate is able to access excluded materials and make submissions in the party's interest but can not communicate with the relevant party about the material.

Special Advocate Procedure in the United Kingdom

***Special Immigration Appeals Commission Act* 1997 (UK)**

4. In the United Kingdom the use of Special Advocates was first introduced under the *Special Immigration Appeals Commission Act* 1997 (UK) which established the Special Immigration Appeals Commission (SIAC).[141]

5. The *Special Immigration Appeals Commission Act* 1997 was passed in response to the decision of the European Court of Human Rights in *Chahal v United Kingdom* [1996] ECHR (15 November 1996) where the Court stated:

> The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved […] there are techniques which can be employed which accommodate legitimate security concerns about the nature

[139] Justice Michael Kirby, "Terrorism and the Democratic Response: A Tribute to the European Court of Human Rights", (Speech delivered at the Robert Schuman Lecture, Australian National University, Canberra The Australian National University, 11 November 2004).
[140] See, for example, the discussion in *Chahal v The United Kingdom* [1996] ECHR 54 (15 November 1996) [at 144].
[141] Prior to 1997 there was no mechanism in England or Wales for information that was withheld from an applicant or an appellant to be considered or challenged. Following a number of European Court of Human Rights Cases, notably *Chahal v United Kingdom* [1996] ECHR 54 which questioned the compatibly of the existing Home Office Panel System with Article 6 of the European Convention on Human Rights, the *Special Immigration Appeals Commission Act 1997* (UK) was introduced. This Act followed enabled the Special Immigration Appeals Commission (SIAC) to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him or her, having regard in particular to the 'need to secure that information is not disclosed contrary to the public interest.' The role of the Special Advocate was introduced in this Act. The role of the Special Advocate under this Act is to act in the appellant's interest in relation to any material which an appellant to SIAC or a controlled person is prevented from seeing because of national security concerns. The Special Advocate is not responsible to the person whose interests they are appointed to represent. The operation of the SIAC was the subject of amendments under the *Anti-terrorism, Crime and Security Act 2001.*

and sources of intelligence and yet accord the individual with a substantial measure of procedural justice.

The ECHR in *Chahal* pointed to the example of Canada, where:

> Under the Canadian Immigration Act 1976 (as amended by the Immigration Act 1988), a Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.[142]

***Prevention of Terrorism Act* 2005 (UK)**

6. Under the *Prevention of Terrorism Act 2005* the use of Special Advocate procedures is transferred to the High Court for cases involving control orders.

7. Section 7 of the *Prevention of Terrorism Act 2005* (UK) provides for special representation in control order proceedings. Section 7 provides for the appointment of a person by the Attorney General[143] to represent the interests of a relevant party to relevant proceedings in any relevant proceedings from which that party and his legal representative (if he has one) are excluded. [144]

8. Part 76 of the Civil Procedure Rules, "Proceedings Under the Prevention of Terrorism Act 2005" provide for the appointment of a Special Advocate (Rule 76.23). Under Rule 76.24 the functions of the Special Advocate are:

    a) making submissions to the court at any hearings from which the relevant party and his legal representatives are excluded;

    b) cross-examining witnesses at any such hearings; and

    c) making written submissions to the court.

9. Under rule 76.25 the Special Advocate may communicate with the relevant party or his legal representative at any time before the Secretary of State serves closed material on him. When the secretary serves closed material on the Special Advocate, the Special Advocate cannot communicate with any person about any matter connected with the proceedings unless it is necessary for administrative purposes not connected with the substance of proceedings or the Special Advocate requests and receives a direction from the court authorising the Special Advocate to communicate with the relevant party, his legal representative or the with any other person.

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[142] *Chahal v United Kingdom* [1996] ECHR (15 November 1996), 144

[143] The Attorney General will make the appointment for special representation in relation to proceedings in the England and Wales. In relation to proceedings in Northern Ireland or Scotland the appointments will be made by the Advocate General for Northern Ireland and the Advocate General for Scotland respectively.

[144] Under s7(2) of *The Prevention of Terrorism Act 2005* 'relevant proceedings' means control order proceedings or proceedings on appeal or further appeal relating to control order proceedings. A person may be appointed under s7 of the *Prevention of Terrorism Act 2005* only if he has the appropriate legal qualifications stipulated in the Act (s7(3))

10. The role of the Special Advocate has been considered in a number of recent cases.[145] In *The Secretary of State for the Home Department v M* [2004] EWCA Civ 324. The Court of Appeal upheld a judgment of SIAC that the appellant, 'M', had been detained under the *Anti-Terrorism, Crime and Security Act 2001* on evidence that was unreliable and should not have been used to justify detention. The Court of Appeal refused the Home Secretary leave to appeal. In its judgment, the Lord Chief Justice outlined the benefits of having a Special Advocate:

> The involvement of a special advocate is intended to reduce (it cannot wholly eliminate) the unfairness which follows from the fact that an appellant will be unaware at least as to part of the case against him. Unlike the appellant's own lawyers, the special advocate is under no duty to inform the appellant of secret information. That is why he can be provided with closed material and attend closed hearings. As this appeal illustrates, a special advocate can play an important role in protecting an appellant's interests before SIAC. He can seek further information. He can ensure that evidence before SIAC is tested on behalf of the appellant. He can object to evidence and other information being unnecessarily kept from the appellant. He can make submissions to SIAC as to why the statutory requirements have not been complied with. In other words, he can look after the interests of the appellant, insofar as it is possible for this to be done without informing the appellant of the case against him and without taking direct instructions from the appellant. [146]

'M' took no part in the appeal as he did not consider that the procedure could afford him justice. However, the Court noted that the Special Advocates performed their role in a 'commendable way'..[147] The Court also made the following observations:

> We feel the case has additional importance because it does clearly demonstrate that, while the procedures which SIAC have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to undervalue the SIAC appeal process… While the need for society to protect itself against acts of terrorism today is self-evident, it remains of the greatest importance that, in a society which upholds the rule of law, if a person is detained as M was detained, the individual should have access to an independent tribunal or court which can adjudicate upon the question of whether the detention is lawful or not. If it is not lawful, then he has to be released. [148]

Disadvantages of the Special Advocate Procedure

11. There are reservations about the use of Special Advocate procedure. The Preliminary Report of the House of Lords, House of Commons Joint Committee on Human Rights Preliminary on the Prevention of Terrorism Bill observed in relation to the Special Advocate procedure to be used in control order proceedings:

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[145] In *A, X and Y v Secretary of State for the Home Department* [2002] EWCA Civ 1502 a member of the English Court of Appeal commented [at 89] "the special advocate procedure is a better way of dealing with this than any procedure devised in this country in the past"; see also *Secretary of State for the Home Department v Rehman* [2001] 3WLR at 877. See *Roberts (FC) v Parole Board* [2005] UKHL 45

[146] [2004] EWCA Civ 324, [at 13]

[147] Ibid, [at 17]

[148] Ibid, [at 34]

> It seems to us to be unlikely that the use of a special advocate procedure, in which the individual does not get to see the material on the basis of which the order against him is made, would be compatible with the right to a fair trial in Article 6(1) ECHR. [149]

12. The Constitutional Affairs Select Committee was critical of the Special Advocate system, recommending that "it should only be operated under the most exceptional circumstances". The Committee criticised the claim by United Kingdom Attorney General that the Special Advocate procedure "is a procedure which was actually promoted by the European Court of Human Rights", stating:

> In fact, the European Court of Human rights has not given a ringing endorsement to the use of Special Advocates at all, but has indicated that their use is a lesser evil than some other systems, but still a potentially impermissible one. [150]

13. The Committee noted that in *Al Nashif v Bulgaria,* the Court was non committal on the use of Special Advocates, stating:

> Without expressing in the present context an opinion on the conformity of the above system [i.e the use of Special Advocates] with the Convention, the Court notes that, as in the case of *Chahal* cited above, there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice.[151]

14. The Committee observed that the most important disadvantages faced by Special Advocates are:

    i. once they have had sight of the closed material they can not take instructions (subject to narrow exceptions) from the persons they are representing or their ordinary legal representatives;

    ii. they lack the resources of an ordinary legal team for the purposes of conducting a full defence in secret (for instance, for inquiries or research); and,

    iii. they have no power to call witnesses.[152]

15. The Committee observed that under the *SIAC* Act and the *Prevention of Terrorism Act 2005* once closed material had been shown to the Special Advocate they could no longer have contact with the person they were representing. The Committee recommended that:

> Steps be taken to make it easier for Special Advocates to communicate with appellants and their legal advisers after they have seen closed material, on a basis which does not compromise national security.[153]

16. The Committee also recommended that sufficient professional support is provided to the Special Advocates, stating:

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[149] House of Lords House of Commons Joint Committee on Human Rights "Prevention of Terrorism Bill: Preliminary Report" *Ninth Report of Session 2004–05*, 23 February 2005.
[150] House of Commons Constitutional Affairs Committee, "The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates", *Seventh Report of Session 2004-05,* 3 April 2005
[151] As cited in Ibid, 21
[152] Ibid, 22
[153] The Committee made this recommendation for two reasons: "first, to ensure that the Special Advocate is in a position to establish whether the charges or evidence can be challenged by evidence not available to the appellant and second, so that the Special Advocate is able to form a coherent legal strategy with the appellant's legal team. See Ibid, 41.

The support provided should include security cleared staff to assist in research and assessment of controlled material. These arrangements should be formalised into an "Office of the Special Advocate" to allow appropriate staffing and resources to be dedicated to ensuring suspects obtain a fairer hearing. [154]

Queensland public interest monitor

17. Queensland legislation provides for a Public Interest Monitor (an independent official[155] appointed by the Governor in Council) to be present at applications for surveillance warrants and search warrants and to make submissions on the appropriateness of the application, examine or cross examine any witness, gather statistics for its annual report, and monitor police compliance with the act.[156] The person subject to the warrant or anyone who may alert that person cannot attend the application but the Public Interest Monitor, or a lawyer representing the Public Interest Monitor, may be present.[157]

18. Unlike the role of the Special Advocate in the United Kingdom, the Public Interest Monitor is not subject to any specific statutory requirement to act in the interests of the appellant/applicant.[158] However, there are some similarities between the functions of the Public Interest Monitor and the Special Advocate: for example, both roles provide the relevant officer with the power to cross-examine witnesses at a court hearing from which the applicant/appellant is excluded, as well as make submissions to the Court.[159]

19. Queensland's use of a Public Interest monitor was noted in the COAG communiqué of which stated: "Queensland would continue to use the Public Interest Monitor for control orders and preventative detention". [160] Relevantly, the Bill provides that if a person in relation to whom an interim control order is made is a resident of Queensland, the AFP must give notice to the Queensland Public Interest Monitor of the fact that an interim control order has been made.[161] The Queensland Public Interest only becomes involved after the interim control order has been made. The Public Interest Monitor may adduce evidence or make submissions to the court in relation to the confirmation of the control order[162] or in relation to an application for a revocation or variation of a control order.[163]

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[154] Ibid

[155] *Police Powers and Responsibilities Act 2000* (Qld) S157 provides a monitor must not be a person who is, or who is a member of, or who is employed in or by or to help any of the following: the director of public prosecutions; the office of the director of public prosecutions; CMC; the police service; the Commissioner for Children and Young People and Child Guardian.

[156] *Police Powers and Responsibilities Act 2000* (Qld) s159. The Monitor can also present questions for the applicant to answer: see s159 (2) (i).

[157] *Police Powers and Responsibilities Act 2000* (Qld) s149

[158] See *The Prevention of Terrorism Act 2005*, s 7; *Civil Procedure Rules* (UK,), Part 76, rule 76.24; see also *Police Powers and Responsibilities Act 2000* (Qld), s 159.

[159] See Ibid.

[160] http://www.coag.gov.au/meetings/270905/

[161] See proposed s 104.12 (5) of the Criminal Code.

[162] See proposed s 104.14 (1) (e) of the Criminal Code. It is noted that the Public Interest Monitor can not make submissions to the Court under s 104.14(1) (e) if the Monitor "is already a representative of the person [subject to the interim control order]". One or more representatives of the person make submissions in relation to the confirmation of the control order under s104.14(1)(d).

[163] See proposed s 104.18(4)(e) of the Criminal Code. It is noted that the Public Interest Monitor can not make submissions to the Court in relation to revoking or varying a control order under s 104.18(4)(e) if the Monitor is "a representative of the person [subject to the interim control order]". One or more representatives of the person make submissions in relation to the confirmation of the control order under s 104.18(4)(d).

The possible role of the Special Advocate or Public Interest Monitor in the context of the Bill

20. The Commission considers that the use of a Special Advocate procedure would provide better protection for the rights of the detained person (as compared to the public interest monitor), given that the Special Advocate would be required to act in the interests of the detained person. While the Special Advocate procedures are not ideal, they may provide a substantial measure of procedural justice not otherwise available in circumstances where a party to proceedings is prevented from viewing relevant material – either under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) or in proceedings before in issuing authority in the case of PDOs.

21. The Committee may also wish to consider recommending a combination of the Special Advocate and Public Interest Monitor mechanisms. Under such a scheme, the Public Interest Monitor might be given functions to monitor and ensure the integrity of the overall process and the Special Advocate would focussed upon the rights of the detained person.

22. The Commission considers that if a Special Advocate procedure was adopted in Australia, the integrity of the process would be best ensured by allowing the defence to choose a Special Advocate from a pool of lawyers who had obtained security clearance. Ideally, the members of that pool would be nominated by a professional organisation like the Law Council of Australia or Bar Associations.