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

Supplementary Submission of the Human Rights and Equal Opportunity Commission

17 November 2005

1. In this supplementary submission, the Commission has sought to assist the Committee by expressing some views upon the matters arising in the hearing held on 14 November 2005.

Sedition

2. The Commission notes that there has been some discussion regarding the application of recklessness to the elements of the proposed sedition offences, particularly proposed s80.2.[1] Under the *Criminal Code* in order for a person to be found guilty of committing an offence the following must be proved:

   (a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt; and

   (b) in respect of each such physical element for which a fault element is required, one of the 'fault elements' for the physical element.[2]

3. A fault element for a particular physical element may be intention[3], knowledge, recklessness[4] or negligence.[5] If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that for the physical conduct.[6]

4. In response to a question from Senator Brandis, the Department's representatives accepted that the sedition offences in proposed ss80.2(1),(3) and (5) are compromised of a number of different "physical" elements, namely

   (1) urging another person to do something

   (2) being that the other person use force or violence

   (3) understanding the nature of the 'specific target' to which the urging relates (which Senator Brandis has described as the 'purpose element'[7]).

5. The Bill expressly provides that "recklessness" applies to the third element of the offences.[8]

6. The Bill is silent as to the fault elements for the first two physical elements.

7. The fault element for physical element (1), that of urging (which is obviously 'conduct') is intention, in the absence of another specified fault element.

8. However, physical element (2) (that the person use force or violence) might be better characterised as either a 'result of conduct' or a 'circumstance in which conduct, or a result of conduct, occurs'. This is potentially significant because s5.6(2) of the Criminal Code provides:

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[1] Proof Hansard, 14 November 2005, pp 8-9

[2] See s3.2.

[3] The *Criminal Code* defines intention in s5.2 as: (1) A person has intention with respect to conduct if he or she means to engage in that conduct. (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist. (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

[4] The *Criminal Code* defines reckless in s 5.4. Section 5.4 provides: (1) A person is reckless with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. (2) A person is reckless with respect to a result if: (a) he or she is aware of a substantial risk that the result will occur ; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

[5] *Criminal Code*, s5.1 (1)

[6] *Criminal Code*, s5.6(1)

[7] Proof Hansard, 14 November 2005, p20.

[8] See proposed ss80.2(2), (4) and (6).

> If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

9. Similar reasoning would apply to ss80.2(3) and 80.2(5).

10. If section 5.6(2) does operate in the manner suggested above, those who have argued that the Bill does not require a specific intention that the third person use force or violence[9] would be correct, albeit via somewhat different reasoning. As has been observed,[10] this differs from the approach under the existing law of sedition, which requires an intention to cause violence, to create public disorder or public disturbance.

11. It would also follow that the Department's representative was incorrect in suggesting (at Proof Hansard p8) that:

> In fact, recklessness is only applying to the elements of the offence that are about understanding that it is about overthrowing our Constitution and understanding that in fact you are calling for the overthrow of our government and all lawful authority of the government. The intention still remains the fault element for the urging part of it—that is, urging another to overthrow by force or violence. Urging, of course, is conduct under the Criminal Code. Intention is the fault element for that.

At the very least, the matters outlined above indicate that the reach of the proposed offences, as currently drafted, is ambiguous. This is highly undesirable given that the proposed offences encroach upon the right to freedom of expression (see the Commission's primary submission at paras 118-136).

Independent review mechanisms

12. In evidence before the Committee (and in written submissions) a number of witnesses suggested an enhanced supervisory mechanism, similar to the Queensland Public Interest Monitor (see eg the Law Council at proof Hansard p79). The Commission supports such a recommendation and made reference to a similar proposal in annexure 2 to its submission.

13. The Commission would, however, adhere to the view that it would be desirable to:

- create an administrative body in the nature of the Public Interest Monitor with responsibility to ensure the integrity of the process; and
- provide for a **separate** Special Advocate mechanism to represent the interests of those who are detained or subject to control orders where there is security sensitive material which is not able to be disclosed. The Commission has discussed the limitations of that mechanism and the circumstances in which it might operate in annexure 2 to its written submission.

Recognition of the ICCPR in the Bill

14. At proof Hansard p49 the following exchange took place between Senator Brown and Mr Beckett:

> **Senator BOB BROWN**—Just following that through: would you recommend, as a previous witness did, that maybe the ICCPR ought to be incorporated, recognised, in the legislation—that that would at least provide some amelioration to the fears there are about the extent of this legislation in a country which does not have a bill of rights?
> **Mr Beckett**—I would certainly support that incorporation in the sense that the way in which all the various tests that exist throughout the bill, including those applied by the law or by individual officers, should be done with respect to particular human rights, and they could be specified in the legislation merely by

[9] See eg the submission of the Gilbert and Tobin Public Law Centre, p19.
[10] Ibid.

reference to schedule 1 of the Human Rights and Equal Opportunity Commission Act. It could be done simply in that way.

15. The Commission endorses the incorporation of international human rights norms into domestic law. Indeed, Australia is under an obligation to do so (see article 2(2) of the *International Covenant on Civil and Political Rights*). The method suggested by Mr Beckett would be one means of achieving that end in the context of the current Bill.

16. In its primary submission (at para 29), the Commission has suggested another possible method (in relation to the test for the making of PDOs):

> *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:*
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> - *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).*

17. A similar approach could be taken in relation to the various rights potentially affected by control orders and prohibited contact orders. The advantage of such an approach is that it would assist the issuing court or authority in identifying the relevant international obligations.

Timing of confirmation hearing for control orders

18. A number of submissions to the Committee have suggested that there be a specific clause in the Bill requiring that the confirmation hearing for control orders be heard in a specified time or as soon as practicable. [11]

19. As the Commission understands the Department's evidence, the Department suggests that the absence of such a provision was driven by a desire to avoid fettering the discretion of the Court. However, the use of fettered or guided discretions in procedural provisions relating to terrorism offences and national security has become relatively commonplace.[12] They frequently favour the prosecution/Commonwealth over the defendant/citizen.[13]

20. In those circumstances, the Commission considers that it would be useful (and not objectionable in principle) to provide that a confirmation hearing take place as soon as practicable. However, any such additional clause should make clear that the requirement to hold a hearing as soon as practicable is not to adversely affect the 'controlled' person's right to a fair hearing. This will avoid the possibility that the confirmation hearing takes place before the person has had an opportunity to adequately prepare for the hearing.

Access to information regarding the basis for the making of control orders/PDOs

21. In paras 51-57 and 113-116 of its submission, the Commission expressed its concerns about the lack of information made available to people detained under PDOs and people who are the subject of control orders.

22. To address those matters the Commission made the following recommendations:

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[11] See eg the submission of the Australian Lawyers for Human Rights para 32.
[12] See, for example, the approach taken in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).
[13] See eg sections 31(8) and 38L(8)*National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

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 5)**

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 **(Recommendation 20)**.

23. The Commission notes the following question which Senator Brandis asked the representatives of Amnesty (at proof Hansard p71):

> Would it meet your concerns if that obligation were expanded so that, excepting for the provision of information likely to prejudice national security, there were an obligation to furnish to the person the subject of the control order the material on the basis that it was put before the court to obtain the order?

24. The Commission considers that this would be a useful amendment. However, given that the summary appears to be intended to be a substitute for the statement of reasons for the making of a PDO/control order, the Commission would recommend that the requirement to give a summary (with the minimum legislative content recommended by the Commission) be retained. To avoid any doubt, it would also be useful to specifically provide in the Bill that the summary must be prepared by the issuing court or authority (as opposed to, for example, an AFP officer attending the proceeding, which is a construction which appears open on the face of the current draft).

25. Should such amendments be recommended, it would also be useful to deal with the issue raised by Senator Ludwig at Proof Hansard p72. As noted in the Commission's submission, the bill provides that the obligation to provide a summary does not require the person preparing the summary to include information which is 'likely to prejudice national security' within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act). Senator Brandis appears to have in mind that a similar caveat would apply to an obligation to provide the material put before the issuing authority or court.

26. Under the NSI Act, the fact that disclosure of material is likely to prejudice national security is merely the threshold condition of which the Attorney must be satisfied before invoking the special procedures under that Act. However, satisfaction of that condition **is not determinative of how the security sensitive material is to be treated**. Rather, the relevant Court is required to conduct a hearing and determine whether the material should be disclosed, made the subject of non-disclosure orders or provided in another form (eg with deletions). In considering those orders, the Court is required to weigh any security concerns against various matters, including the right of an accused person to a fair hearing (in a criminal matter) and any adverse effect on the trial (in a civil matter).[14]

[14] See sections 31(7) and 38L(7) of the NSI Act.

27. During this Committee's inquiry into the National Security Information Legislation Amendment Bill 2005 (which extended the reach of the NSI Act to civil proceedings), the Department observed:

> The Government considers that it is essential to provide a regime to enable parties to use security sensitive information in civil cases without jeopardising Australia's national security…The existing rules of evidence and procedure do not provide adequate, consistent and predictable protection for information that may affect national security and that may be adduced or otherwise disclosed during the course of proceedings. …while the court can make an order in relation to only part of a document, there is no clear authority for redaction (editing or revising a document) or substitution of the information with a summary or stipulation of the facts…The Bill enables courts to balance national security considerations against **the ability to use the greatest amount of information possible to be admitted**. (emphasis added)

28. That is not the approach adopted under the Bill. The information may be withheld at what is the first hurdle under the NSI Act.

29. The Commission would therefore recommend that the disclosure of security sensitive material which is:

- contained within the summary; or
- provided as part of the material placed before the issuing authority/court (should Senator Brandis' suggestion be pursued)

should be determined having regard to the considerations similar to those a court is required to have regard to under the NSI Act (see particularly sections 31(7) and 38L(7)). The relevant provisions should expressly refer to the use of deletions etc to facilitate the provision of the 'greatest amount of information possible' without compromising security.

Conditions for revocation

30. There appears to be a drafting error in proposed sections 104.14(7)(a) and 104.20(1)(a) (which, respectively, allow the court to revoke an interim control order at a confirmation hearing or to revoke a confirmed control order on application of the subject or the AFP).

31. To **issue** an interim control order the court must be satisfied, on the balance of probabilities, that:

- making the order would substantially assist in preventing a terrorist act (**condition 1**); or
- the person has provided training to, or received training from, a listed terrorist organisation (**condition 2**); **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 (**condition 3**).

32. A Court may **revoke** an order if neither condition 1 nor condition 2 applies at the time of considering revocation.

33. However, failure to satisfy condition 3 is not grounds for revocation. If a Court finds condition 3 is not satisfied it may only 'vary' the order, implying that some form of restriction will remain (indeed, in the case of the confirmation hearing, it is expressly provided that the order will be 'confirmed').[15]

34. Condition 3 is important in that it involves considerations of proportionality, which is a significant feature of the human rights issues raised by the Commission and others. While

[15] See proposed sections 104.14(7)(b) and 104.20(1)(b)

proportionality considerations may well lead to the conclusion that less onerous restrictions should be imposed (variation), they may also require the conclusion that the person should simply be subject to no control order (in which case revocation would be the appropriate order).

35. Of course, the Commission has suggested, in recommendation 17, an additional condition which picks up the approach of the Human Rights Committee to proportionality (requiring the Court to consider whether there are less restrictive means of achieving the relevant purpose).

Separate detention of children

36. At proof Hansard p 5, the following exchange took place between Senator Crossin and the Department's representative:

> **Senator CROSSIN**—There is no requirement, though, that minors would be held in a separate situation to adults?
> **Mr McDonald**—The strict answer to that there is nothing specific about them being held anywhere separate or different, although from a practical point of view the police cells generally keep the person separate.

37. The Commission is gravely concerned by that response. Article 37(c), of the *Convention on the Rights of the Child* provides:

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.

38. Australia has entered a reservation to that obligation, which is in the following terms:

> Australia accepts the general principles of this Article. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia.

39. This is plainly not an unconditional rejection of the obligation in article 37(c) and Australia remains under an obligation to comply with the terms of that article as modified by its reservation. Given that PDOs are only to be used in exceptional circumstances, it seems reasonable to assume that it will be 'feasible' (with the resources of the Commonwealth) to separate children from adults on all occasions. The Commission therefore recommends that the Bill include a specific provision proscribing the detention of children with adults.

Use of PDOs in relation to journalists

40. At proof Hansard p 18, the Department's representative responded to a question from Senator Nettle regarding the possible use of PDOs for the detention of journalists and suggested:

> I cannot see how preventative detention would be relevant unless the journalist was someone who was going to destroy the evidence.

41. It will be apparent from the Commission's submission that the Commission is concerned that the Bill does not give adequate protection (by way of effective review rights) to a journalist who is **mistakenly** considered likely to destroy evidence.

42. The Department's representative later suggested (in considering the possibility that a PDO could be made under proposed s105.4(4) for possession by a journalist of a 'thing'):

> What I am getting at is that if the person possesses that thing and making this order would substantially assist in preventing the terrorist act occurring and it was reasonably necessary for those purposes—all those grounds—you would be able to get an order. **However, if it was evidence in relation to a terrorist act, I think there would be more ways of getting it from a mere journalist.**

43. This suggests that the Department considers that other less invasive means of securing required material from journalists will **always** be employed prior to a PDO. However, as the Commission has observed in its submission, this is not the test currently in the legislation. It is for that reason that the Commission has recommended 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 (**Recommendation 1**).

Derivative use of privileged material

44. At proof Hansard p 25, the Department's representatives were asked by Senator Ludwig about whether the Bill provided protection for 'derivative use' of monitored conversations between a detained person and their lawyer.

45. The Department's representatives referred to proposed ss 105.38(5), 105.41(7) and 105.45. The Commission has explained in its submission (see paras 78-83) why these provisions do not prevent derivative use of privileged material. In addition, the bill does not address the question of admissibility of such material in proceedings against a person other than the detained person (which could include their spouse or child).

46. If the Committee were minded to make a recommendation to address these issues it could recommend amending s 105.38(5):
    - such that the communication is not admissible in evidence against **any** person in any proceedings in a court, unless there is consent for that use by the person who had the communication with the lawyer;
    - to expressly prohibit derivative use. Such a provision could be modelled on s83.28(10) of the Canadian *Anti-Terrorism Act 2002*.[16]

Counterfactual posed by Senator Brandis

47. At proof Hansard p 31, Senator Brandis asked the following question of Ms Stratton of PIAC:

> **Senator BRANDIS**—Let me give you a counterfactual proposition. Let us say that ASIO, in the exercise of its electronic surveillance function, picked up a conversation from a person of interest over the telephone in which that person of interest said to, say, a close relative or a close friend—but only in the privacy of the conversation—'I have decided that I am going to commit a terrorist act,' and he made that confession with specificity, particularity and apparent seriousness. A declaration of intent to do something made unilaterally without more does not seem to me to be a criminal offence. It is not a conspiracy, it is not an attempt, it is not an incitement; it is merely a private declaration of intent to a non-participating party made privately. It seems to me, if that is right, that the police or the law enforcement authorities would have no basis at all on which to arrest that person merely on the strength of the declaration of intent alone. Yet, if it were a serious, particular and credible threat, surely that person should be taken off the streets. Would you accept that, in those circumstances, preventive detention or control orders—probably a preventive detention order in the case I have given you—would be justified?
> **Senator LUDWIG**—I have found the word 'imminent'.

[16] Which provides: 'no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person…[other than an offence connected with perjury]'

Senator BRANDIS—Yes, and imminent. Let us say a man rings his mother and says: 'Mother, this is the last time we will ever speak. I have decided to do this, and I am going to do it tomorrow.'

48. Ms Stratton referred to the possible use of the detention provisions under the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act). The conditions for the exercise of that power are as follows:

First: The Director-General of ASIO must ask the Attorney-General to grant written consent to a request to issue a warrant. To do so, she or he must be satisfied:

- that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence;
- that relying on other methods of collecting that intelligence would be ineffective; and
- in the case of warrants providing for detention (rather than questioning alone) that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:

  (a) may alert a person involved in a terrorism offence that the offence is being investigated;
  (b) may not appear before the prescribed authority; or
  (c) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.[17]

Then: Having obtained the Attorney's consent, the Director-General may seek a warrant from an issuing authority. The issuing authority must be satisfied that the Director-General has followed the relevant procedural requirements in requesting the warrant and that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence.[18]

49. In the Commission's view, the facts outlined by Senator Brandis would at least support a warrant for questioning. There are plainly reasonable grounds to believe that the compulsory powers to question a subject under the ASIO Act would 'substantially assist' in the collection of evidence that is important in relation to a future terrorism offence. Other methods of collecting intelligence appear likely to be ineffective, particularly given the person appears to be acting alone and intending to execute their plan the following day.

50. The hypothetical facts also appear likely to support a warrant for detention (on the basis that a person prepared to undertake a suicide attack is unlikely to appear before a prescribed authority).

51. In the Commission's view, those facts would also allow the AFP to arrest the person under section 23CA of the *Crimes Act 1914 (Cth)* ('Crimes Act') on 'reasonable suspicion' that they may:

- possess a thing connected with the preparation for, engagement in or assistance in a 'terrorist act';[19]
- have collected or made documents likely to facilitate terrorist acts;[20] or

[17] See s 34C(3) ASIO Act.
[18] See s34D(1) ASIO Act.
[19] 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.

- have undertaken other acts done in preparation for, or planning, terrorist acts.[21]

52. Of course, it may be that the person has taken no steps towards their declared intention, in which case there would be no basis for a criminal charge and they would be released. However, it is important to recognise that this is also the outcome of detention under a PDO. The primary difference is that use of the ASIO Act or Crimes Act provisions will allow questioning of the subject, which may prove a more effective means of preventing a terrorist act.[22]

[20] 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.

[21] 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.

[22] Compare proposed s 105.42 of the Bill.