Federation of Community Legal Centres (Vic) Inc

11 November 2005

Committee Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600
Email: legcon.sen@aph.gov.au

Dear Secretary

Submission Regarding the Anti-Terrorism Bill (No 2) 2005 (Cth)

We understand that the Senate Legal and Constitutional Legislation Committee is currently conducting an inquiry into the Anti-Terrorism Bill (No 2) 2005 (Cth). We enclose a submission detailing our views on this Bill to assist the Committee's inquiry.

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for forty-nine Community Legal Centres ('CLC's') across Victoria, including both generalist and specialist centres. This submission has been prepared on behalf of the Federation by its Anti-Terrorism Laws Task Group, in consultation with various other members of the Federation.

The Anti-Terrorism Laws Task Group is one of a number of issue-specific working groups within the Federation comprising workers from member centres. This Task Group supports CLC's to provide targeted community legal education programs for communities affected by the State and Commonwealth anti-terrorism laws and supports CLC lawyers to provide up-to-date legal advice to clients affected by the State and Commonwealth anti-terrorism laws. The Task Group also works to monitor the impact of State and Commonwealth anti-terrorism laws on affected communities and individuals.

Should you have any questions regarding our submission, please contact Marika Dias, Convenor, Anti-Terrorism Laws Task Group on (03) 9363 1811 or on 0424 054 314 or via Marika_Dias@fcl.fl.asn.au.

We hope that the Committee will give due consideration to the matters raised in our submission during the course of its inquiry. We would welcome any opportunity to elaborate further on our submission in person should the Committee require additional input.

Yours sincerely

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SUBMISSION OF THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC.) INC

TO THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

ANTI-TERRORISM BILL (NO. 2) 2005 (CTH)

November 2005

This submission was prepared by Marika Dias with Vicki Sentas of the Anti-Terrorism Laws Task Group, on behalf of the Federation of Community Legal Centres (Vic).

About the Federation of Community Legal Centres Victoria

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for forty-nine Community Legal Centres across Victoria, including both generalist and specialist centres. Community Legal Centres ('CLC's') assist in excess of 60,000 people throughout Victoria each year by providing provide free legal advice, information, assistance, representation, and community legal education.

Overwhelmingly, the people who use Community Legal Centres are on low incomes, with most receiving some form of pension or benefit. Community Legal Centres also see a considerable number of people from culturally and linguistically diverse communities.

Introduction

This submission relates to the *Anti-Terrorism Bill (No 2) 2005 (Cth)* ('the Bill') which was publicly released on 3 November 2005.

At the outset we would like to express our dismay at the limits that have been placed on public discussion and proper scrutiny of this proposed legislation. To our knowledge, the final version of the Bill was made publicly available on 3 November 2005 and submissions from the public will only be received up until 11 November 2005. Giving the public only 8 days to peruse and make comment on these significant changes to Australian law does not allow for meaningful debate, especially when the Bill's length and complexity are taken into account. The Government has repeatedly expressed a desire to see passage of this legislation expedited and yet, has failed to provide adequate justification for this purported urgency. Given the extraordinary nature of the proposed laws, this raises the concern that this is an attempt on the part of the Government to rush through

legislation that would attract broader public opposition, were more time given for its consideration.

The Federation is fundamentally opposed to the passage of the Bill due to numerous of serious concerns which are detailed below. We have, however, also included commentary and recommendations on the substance of the Bill, which we hope will assist the Committee in its deliberations, particularly in the event that it is mindful to recommend that the Bill be passed.

General Concerns

Justification for Legislative Change

The Federation is concerned that the Government has failed to provide the public with justification for these legislative amendments. In the wake of the London bombings the Government announced that Australia is in need of further legislation to counter terrorism domestically. The national terrorism threat level has, however, remained at 'medium' since 11 September 2001, notwithstanding such overseas events. This means that a terrorist act 'could' occur in Australia but is neither 'likely' (which would attract a 'high' level assessment) nor 'imminent' (which would attract an 'extreme' level assessment). Given that the national level of terrorist threat, as assessed by our national security agencies, has not increased, it is difficult to comprehend the need for legislative change.

Furthermore, the Bill provides for a number of amendments and new legislative regimes that represent a curtailment of civil liberties and a significant departure from fundamental legal principles (which are discussed below). In light of the extraordinary nature of this proposed legislation, we submit that it is particularly unjustifiable in a context where our national security agencies are only able to indicate that a terrorist act may, or similarly may not, occur.

The Government has also failed to demonstrate how these legislative measures will more effectively deal with the threat of terrorism in Australia. In introducing what some state leaders have admitted is 'draconian' legislation, at a minimum it is imperative that the Government demonstrates that the legislative amendments will be effective for their purpose. Given the complex nature of terrorist operations, it is unclear how the Bill will actually serve to prevent terrorist acts. The Bill certainly arms law enforcement and intelligence agencies and the executive, with an array of new powers. But will measures such as increasing the duration of various Australian Security Intelligence Organisation (ASIO) warrants, allowing for control orders and preventative detention, facilitating the proscription of organisations that praise terrorist acts really have a preventative effect? We submit that the Government has failed to demonstrate that it will or even how it might act preventatively. Furthermore, it is our view that the Government has failed to engage with issues around the root causes of terrorist activity, and in particular the ways its own policies and alliances contribute to making Australia a terrorist target. Instead of resorting to further curtailments of individual rights and liberties we believe that the Government would be better served to address the issue of these roots causes. In the absence of engagement with these broader issues, it would seem that this Bill is simply a 'band-aid' solution for far deeper problems and is therefore unlikely to be an effective preventative measure.

The Government has also failed to demonstrate that our existing anti-terrorism legislation is insufficient to prevent the occurrence of terrorist acts. The Bill significantly extends the powers of the Australian Federal Police (AFP) and ASIO. In public hearings before the Parliamentary Joint Committee on ASIO, ASIS and DSD relating to ASIO's special powers both Dennis Richardson, then head of ASIO, and representatives of the AFP appeared.[1] In response to direct questioning, Dennis Richardson expressly indicated that ASIO were not arguing for increased powers and that he was satisfied that the existing powers equipped

[1] Hansard: Joint Committee on ASIO, ASIS and DSD, Reference: Review of ASIO's Questioning and Detention Powers, Thursday 19 May 2005, Canberra (available at: http://www.aph.gov.au/hansard/joint/committee/J8382.pdf)

them to do their job. The AFP representatives also did not argue for increased powers and did not suggest that their existing powers were insufficient. Only several months later, no evidence has been provided to indicate that these statements no longer apply and it is therefore incomprehensible that ASIO and the AFP require the extended powers afforded by the Bill.

Other Legislative Reviews

Australia already has a raft of counter-terrorism legislation that was introduced after the New York bombings on 11 September 2001. Much of that legislation was recognised to be quite extraordinary at the time of passage and consequently includes sunset clauses. The Parliamentary Joint Committee on ASIO, ASIS and DSD is currently in the process of reviewing the legislation that gives ASIO 'special powers' to question and detain people with respect to terrorism offences. The results of this review are expected to be made public early in 2006. The Attorney General has only just publicly announced the members of the Security Legislation Review Committee, which will now review all other counter-terrorism laws. That Committee is due to report back on the results of its review before July 2006.

We believe that it is particularly imprudent to introduce new counter-terrorism measures before the results of the reviews of our existing legislation have been made public. Firstly, surely it is impossible for the Government to assess whether our existing laws really are insufficient and need to be supplemented without receiving the outcomes of these reviews. Further, the public is in no position to meaningfully determine for itself whether our existing laws are inadequate and whether it agrees with the Government's assertion that we need enhanced counter-terrorism laws. In this way, passing the Bill before the reviews of our current legislation are complete further serves to hamper proper public discussion of the legislation.

We recommend that the Bill not be passed until the outcomes of reviews of existing counter-terrorism legislation are made public, at which time a further enquiry into the Bill should be conducted.

Discriminatory Impact

The Federation is particularly concerned that this proposed legislation will disproportionately impact on the Muslim community.

In the last year the writers of this submission have conducted community legal education sessions on counter-terrorism legislation with Muslim groups. We have also had some significant experiences conducting legal casework in this area. Through these activities it has come to our attention that the Muslim community have been targeted by law enforcement officials and national security agencies as a result of our existing counter-terrorism laws. Disturbingly, the vast majority of Muslim people we have encountered through our work have either known someone or have themselves been contacted for questioning by ASIO. Anecdotally, Muslim people have expressed feeling harassed by ASIO's intelligence-gathering operations and some have even described harassment by law enforcement officials. There is, however, such a level of fear regarding our existing laws, not to mention the secrecy provisions which expressly silence people, that community members have not spoken out widely about these experiences. We are concerned that, if passed, the Bill will only serve to exacerbate this targeting and justify the fears of the Muslim community.

Soon after the Prime Minister's initial media release relating the proposals now contained in the Bill, the Police Federation of Australia openly stated that these proposals will inevitably lead to racial profiling with respect to the Muslim community.[2] In his appearance at public hearings before the Parliamentary Joint Committee on ASIO, ASIS and DSD on 18 May 2005, then head of ASIO Dennis Richardson, expressly confirmed that ASIO were targeting the Muslim community

[2] Milovanovic, Selma, ' Suburbs may be "left exposed"', *The Age*, 28 September 2005.

in its intelligence gathering activities.[3] To date, the only organisations to be proscribed by the Government using its proscription powers are Muslim organisations. Despite Governmental assurances that the Bill is not aimed directly at the Muslim community, it is clear that it will overwhelmingly impact on Muslim people in its application, just as our existing counter-terrorism laws have done. While the Bill itself may not specifically refer to Muslim people, they are the community group that will bear the brunt of this legislation. Legislation that has the effect of targeting one particular racial or religious group in this way should be of very grave concern to the whole community. It is also an inadequate response to simply gloss over this issue on that basis that the Bill is not discriminatory in its content. As long as the Muslim community will be directly and disproportionately targeted as a result, this Bill should not be passed.

Sunset Provisions and Review

The Federation does not believe that the proposed 10 year sunset provisions are appropriate given the extraordinary nature of the Bill. We are also particularly concerned that sunset provisions are only applicable to Schedules 4 and 5, and that all other Schedules are of indefinite duration. The Bill provides law enforcement and intelligence agencies with unprecedented powers that will impinge significantly on individual freedoms. We submit that 10 years is far too long to allow these powers to remain part of Australian law. There is a serious risk that after 10 years these powers will have become a permanent part of our legislative landscape despite the fact that they are currently intended as a temporary measure. The longer this legislation remains in place, the less likely it is that it will be allowed to lapse. If this Bill is to be passed, it is our recommendation that sunset provisions apply to the entire Bill and the duration of the Bill be substantially reduced. This will more adequately reflect that this

[3] Hansard: Joint Committee on ASIO, ASIS and DSD, Reference: Review of ASIO's Questioning and Detention Powers, Thursday 19 May 2005, Canberra (available at: http://www.aph.gov.au/hansard/joint/committee/J8382.pdf)

legislation is intended to be temporary only and that it is recognised to be a departure from traditional legal principles and practices.

The Federation is further concerned that the Bill does not expressly provide for review after 5 years, as was agreed upon at the Council of Australian Governments (COAG) meeting on 27 September 2005. In our submission any review should be expressly provided for in the legislation. We also believe that any review of this legislation, if it is passed, should be conducted by an independent specialised review committee after 3 years. This will allow enough time for meaningful review while at the same time ensuring that any problems with the legislation may be detected at the earliest available opportunity. It is important that a specific review committee be used, rather than the COAG, so that the review is conducted by a group that has specialist expertise in this area of law and that does not have the political agendas that state and territory leaders necessarily have.

In addition to the general issues detailed above, the Federation has a number of concerns regarding specific aspects of the Bill.

Schedule 1 – Definition of Terrorist Organisation etc

Amongst other things, this Schedule seeks to amend the definition of 'terrorist organisation' for the purposes of proscription. If passed, an organisation will be able to be proscribed if the Minister is satisfied on reasonable grounds that it:

(a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or

(b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)

The term ‘advocates’ is defined in the Bill to include direct or indirect counselling, urging or providing instruction on the doing of a terrorist act and direct praise of the doing of a terrorist act.

Schedule 1 substantially broadens the criteria for proscription thereby exposing many more organisations to the possibility of proscription. It is also important to note that the proscription power hinges on the definition of ‘terrorist act’ contained in s 100.1 of the *Criminal Code Act 1995 (Cth)* (‘the *Criminal Code*’), which is already very expansive in itself. Broadly, a ‘terrorist act’ is defined as an action or threat intended to advance a political, religious or ideological cause, done with the intention of coercing or intimidating any government or the public, that causes serious physical harm, serious property damage, death, or a serious risk to public health or safety or endangers life or seriously interferes with an electronic system.[4] The expansiveness of this definition coupled with the Minister’s wide discretion to proscribe means that further any extension of this power is of serious concern.

The Federation is in principle opposed to the proscription of organisations by the Executive, particularly with such broad discretion, expansive criteria and limited judicial oversight as result from the legislative regime around proscription. Broadening the proscription power only heightens these concerns.

One of our key concerns regarding this amendment is its capacity to suppress freedom of political expression. The definition of ‘terrorist act’, insofar as it requires political, religious or ideological aims, and its links to various terrorism offences also mean that this amendment has the capacity to unduly limit people’s freedom of religious and political association. In a liberal democracy it is not desirable that the executive be empowered to ban organisations for simply expressing praise for certain acts (however abhorrent those acts may seem to

[4] Section 100.1, *Criminal Code Act 1995 (Cth)*

the broader public). It is the fundamental basis of any open, democratic society that its members be able to freely express their opinions, regardless of the content of those opinions. This amendment seriously jeopardises this fundamental precept. Furthermore, the broad ministerial discretion involved in the exercise of the proscription power and the lack of judicial oversight mean that when this broader criterion is applied there is a very real risk that it may be used by the executive to suppress political opposition and dissent. In our submission, it is perilous to broaden the definition of 'terrorist organisation' in this way, given the scope for misuse of the proscription power by the executive.

This amendment also severs the link between proscription and concrete acts of political violence, particularly insofar as indirect counselling of a terrorist act or mere praise of a terrorist act may trigger proscription. The Bill's 'Explanatory Memorandum' states that 'such communications and conduct are inherently dangerous because it [sic] could inspire a person to cause harm to the community'.[5] In our view, to say that such conduct 'could' inspire a person to commit terrorist acts actually indicates a tenuous link to actual terrorist acts. It does not, therefore, warrant the characterisation of 'inherently dangerous'. In turn, it is not justifiable to ban any organisation that has such tenuous links to actual terrorist activity.

This amendment will have the collateral effect of exposing more people to being charged with terrorism offences under the *Criminal Code*. The Bill's 'Explanatory Memorandum' makes clear that advocacy will not be grounds for proving that an organisation is a terrorist organisation for the purposes of prosecution. It will, however, be grounds for listing an organisation and there are a number of offences that arise once an organisation has been listed, namely: directing the activities of a terrorist organisation, membership of a terrorist organisation, recruiting for a terrorist organisation, training or receiving training from a terrorist

[5] *Anti-Terrorism Bill (No. 2) 2005 (Cth) Explanatory Memorandum*, Schedule 1, Item 9, p 7 (available at http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=156)

organisation, giving or receiving funds from a terrorist organisation, providing support to a terrorist organisation, associating with a terrorist organisation.[6] These offences attract very serious sentences and most of them do not require actual knowledge, mere recklessness is enough. The possibility that people may be charged with such serious offences for simply being reckless in their connections with an organisation that merely praises the doing of a terrorist act is an unjustifiable extension of Australia's counter-terrorism laws.

Judicial Review

As noted above, a broader definition of 'terrorist organisation' for the purposes of proscription means that it is of particular concern that there is no avenue for judicial review of the merits of a decision to proscribe. Although there is provision for procedural review of the Attorney General's decision under the *Administrative Decisions (Judicial Review) Act 1977*, given the broad statutory definitions applying to proscription, a decision is unlikely to be found unlawful. In effect, the executive is immune from judicial review of its exercise of the proscription power. This raises the possibility that this power may be exercised solely for political motives and with relative ease. If the definition of 'terrorist organisation' is to be broadened even further, we recommend that some mechanism for judicial oversight be inserted to prevent misuse of this extraordinary excess of executive power.

Notwithstanding this recommendation, for the reasons detailed above, if this Bill is to be passed we recommend that the extended criteria for proscription be removed.

[6] Sections 102.2 – 102.8 (Sub-Division B), *Criminal Code Act 1995 (Cth)*

Schedule 3 – Financing Terrorism

Schedule 3 amends section 102.6 of the *Criminal Code* so that the offence of 'getting funds to or from a terrorist organisation' will also apply where a person collects funds for or on behalf of a terrorist organisation (whether directly or indirectly).

Schedule 3 also amends section 103.1 of the *Criminal Code* so that the offence of financing terrorism now applies where a person

(i) makes funds available to another person (whether directly or indirectly); or

(ii) collects funds of behalf of another person (whether directly or indirectly); and

the first-mentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.

This broadens the 'financing terrorism' offence to include direct or indirect funding. The term 'make funds available' is also broader in meaning that the term 'provides' funds, which exists in the current legislation.

Both of these amendments represent a significant broadening of the financing offences.

The Bill's 'Explanatory Memorandum' states that this amendment is a response to the Financial Action Task Force on Money Laundering (FATF) Special Recommendations on Terrorist Financing.[7] These recommendations require that the wilful collection of funds for terrorist organisations be explicitly covered by terrorist financing offences. In our view, however, the Bill goes much further than the FATF Recommendations suggest. The Bill covers indirect collection which

[7] *Anti-Terrorism Bill (No. 2) 2005 (Cth) Explanatory Memorandum*, Schedule 3, Item 3, p 13 (available at http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=156)

may well occur without criminal intention. Further, as noted above, the Bill expressly contemplates prosecuting people for reckless financing. Changing the term ‘provides funds’ to ‘makes funds available’ also broadens the financing terrorism offence in a way that has not been suggested by the FATF Recommendations. Amending the offences to include wilful collection would be in accordance with the FATF Recommendations. The proposals that are actually contained in the Bill, however, go beyond the FATF Recommendations and this departure has not been justified.

In considering Schedule 3, it is also important to recall that the ‘financing terrorism’ offence attracts a maximum sentence of life imprisonment. The offence funding a terrorist organisation bears a maximum sentence of 25 years imprisonment (or 15 years imprisonment for recklessness). Broadening the offences means that more conduct is likely to fall within the scope of the offences and more people are likely to be charged and prosecuted. Given that these offences give rise to such significant custodial sentences, any broadening of the offences to comply with international standards should be kept to a minimum.

In our submission, these amendments represent excessive broadening of the financing offences and are not required. If, however, this part of the Bill is to be passed, we recommend that the financing offences only be extended to include wilful collection, in line with the FATF Special Recommendations.

Schedule 4 – Control Orders

The Federation is opposed to any regime of control orders as a mechanism for preventing acts of terrorism.

Undue Interference With the Liberty of Non-Suspects

Paragraph 104.5(3) provides for an extensive array of restrictions and prohibitions that may be imposed on a person via a control order. The terms of an order may *prohibit* or *restrict* a person from:

- being at specified areas or places;
- leaving Australia;
- communicating or associating with specified individuals;
- accessing or using specified forms of telecommunications or technology;
- possessing or using specified articles or substances.

The terms of an order may also *require* a person to:

- remain at specified premises between specified times or on specified days;
- wear a tracking device;
- report to specified persons at specified times and places;
- allow himself or herself to be photographed;
- allow impressions of his or her fingerprints to be taken;
- participate in specified counselling or education (providing the person agrees to this).

These intrusive requirements, prohibitions and restrictions may be imposed on people who have committed no offence and are not suspected of committing an offence. Furthermore, the Bill allows for successive control orders and so people may potentially be subject to orders for an infinite period. In our submission, this is a disturbing departure from the principle of innocent until proven guilty. The terms of control orders are likely to have an extremely punitive impact on the subjects of such orders, regardless of whether they are intended as punitive measures or not. In that they sense are more reminiscent of criminal sentencing options than of a civil protective order. In particular, if the terms regarding tracking devices, remaining at specified premises and restrictions on association are combined, a control order will in practical terms replicate home detention. This violates a fundamental principle of liberal democracy, being that people should be free from arbitrary interference by the state in their liberty.

Criteria for Requesting and Granting Control Orders

It is also our view that the criteria relied on by the AFP in seeking a control order and a Court in making a control order are overly broad, especially when the above list of potential restrictions, prohibitions and requirements is taken into consideration. Essentially an order will be able to be sought and imposed where the imposition of it will 'substantially assist in preventing a terrorist act' or where the subject has provided or received training from a terrorist organisation. The former criterion is such that the subject does not have to be actively involved in the future commission of a terrorist act. The subject may merely be a person who is involved in a purely incidental or even coincidental sense. Furthermore, this criterion hinges on the definition of 'terrorist act', which, as we have noted above, potentially includes a wide range of conduct in itself. There is also no requirement that any terrorist act in question be imminent. To take an extreme example by way of illustration, where maps are required by a person planning a terrorist act, restricting the trade activities of a person who supplies maps would substantially assist in preventing a terrorist act. While we recognise that the request for and imposition of an order may be unlikely in these circumstances, nonetheless the Bill technically allows for this to occur. The criteria for making an order does require the issuing Court to determine that the order is 'reasonably appropriate' and to take into account the impact on the subject. This terminology is also broad and vague enough that it is impossible to envisage how it will be applied and it may not function as a significant gatekeeper at all. The danger of this proposed legislation is that its broad criteria and general terms leave the door open to potential abuse or misuse. If this aspect of the Bill is to remain, it is our recommendation that the criteria for seeking and making control orders be amended to prevent orders being imposed unless there is an imminent threat of serious violence and unless the subject is directly connected to any anticipated terrorist act.

The criterion relating to training with a terrorist organisation is also of concern insofar as there are no limits on when this training occurred or what kind of training was engaged in. Essentially this criterion may apply retrospectively. As such, a person who undertook or provided any type of training (whether related to terrorist acts or not) with an organisation at any time in the past, whether the organisation was deemed a terrorist organisation at that time or not, will be exposed to a control order. This is clearly undesirable given the range of intrusive and restrictive conditions that person may be subject to. It is also uncertain that imposing an order on a person who has simply trained with a terrorist organisation will have a preventative effect. A person may have trained with a terrorist organisation at some stage in the distant past and yet they may have had no involvement in terrorist activity of any sort for some time. Nevertheless, on the Bill as it is currently framed they may still be a candidate for a control order.

Standard of Proof

The Federation believes that the standard of proof required for the making of control orders is also inadequate. As noted above, the range of restrictions, prohibitions and requirements that may be applied to a subject strongly resemble criminal sanctions rather than civil orders. That the criteria for making an order be proved 'on the balance of probabilities', as required by the Bill, is therefore insufficient. Simply put, proof on the 'balance of probabilities' requires the criteria to be 'more likely than not', that is, a 51% versus 49% proof in favour of the criteria will be enough. We submit that, with regard to control orders, this is standard is far too low and that the higher, criminal standard of proof is imperative in such cases. Requiring that the criteria be demonstrated 'beyond reasonable doubt' will ensure that control orders are not imposed in inappropriate circumstances. Given the potential terms of an order and their punitive and intrusive impact, it is crucial that all steps be taken to ensure that they are not imposed improperly and unless absolutely necessary.

Successive Control Orders

The Bill also allows for successive control orders to be made with respect to a given subject. This is particularly a concern given that potentially orders may be framed in such a way as to effectively intern people or detain people at home. It is clearly undesirable to legislate for the indefinite detention of non-suspects or people who are not suspected of any offence. If passed, the Bill creates a very real possibility that control orders may be used as an alternative to charging people where police evidence is lacking, particular given that the standard of proof for obtaining an order is much lower than that required in a criminal matter.

Control Orders Relating to Children

The Federation also is deeply concerned that control orders may be made to apply to children aged between 16 and 18 years old. While the period of such orders is limited to 3 months, there is nothing preventing recurrent orders being made and so this limitation on orders relating to young people is relatively inconsequential. As argued above, it is not appropriate that the life of any person be restricted in the ways detailed above when they have not committed any offence and are not a suspect. This is particularly the case where children are concerned. The Federation recommends that control orders not be permitted in relation to people under 18 years old, if the Bill is to be passed.

Summary of Grounds

The Federation is also concerned that people in relation to whom control orders are sought will not have adequate information regarding the grounds and evidence underlying the request for an order. Pursuant to Paragraph 104.12(1)(a)(ii) the subject of an interim order must be served with ‘a summary of the grounds on which the order is made’. Presumably this will also serve as a summary of the grounds on which confirmation of that order will subsequently be sought in a later confirmation hearing. The ‘Explanatory Memorandum’ to the Bill states by way of example that ‘the summary of the grounds could be that the person is alleged to have engaged in training with a specified listed terrorist

organisation'. In our view this kind of summary of grounds would not be sufficient information for a subject intending to contest confirmation of a control order. On the Bill as it stands, the subject will be provided with no indication of the evidential basis for the allegation(s), what kind of evidence the AFP are relying on, who they intend to call as witnesses or what materials they intend to put before the Court. In this regard it will be virtually impossible for a subject to adequately prepare a case in defence of the allegation(s).

The contents of a summary will be further constrained by Paragraph 104.12(2) of the Bill, which states that 'sub-paragraph (1)(a)(ii) does not require any information to be included in the summary if the disclosure of that information is likely to prejudice national security'. It is important to note that the definition of 'national security' relied on is itself extremely broad and encompasses a wide array of information. The definition of 'national security' relied on is that contained in the *National Security Information (Criminal and Civil Proceedings) Act 2004*: 'national security means Australia's defence, security, international relations or law enforcement interests'.[8] In turn 'international relations' is defined to mean 'political, military and economic relations with foreign governments and international organisations'[9] and 'law enforcement interests' includes the following:

(a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;
(b) protecting the technologies used to collect, analyse, secure or otherwise deal with criminal intelligence, foreign intelligence or security intelligence;
(c) the protection and safety of informants and of persons associated with informants;

[8] Section 8, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)*
[9] Section 10, ibid

(d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.[10]

'Security' is defined in the *ASIO Act 1979 (Cth)* (the '*ASIO Act*') to include:

(a) the protection of, of the people of, the Commonwealth and the several States and Territories from;
    (i) espionage;
    (ii) sabotage;
    (iii) politically motivated violence;
    (iv) promotion of communal violence;
    (v) attacks on Australia's defence system; or acts of foreign interference;
    whether directed from, or committed within, Australia or not; and
(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the sub-paragraphs of paragraph (a).[11]

Clearly the definition of 'national security' is such that an extraordinarily wide range of information may be excluded from a summary. Given that the grounds for seeking a control order will necessarily pertain to matters relating to terrorist activity, which are arguably all matters affecting national security, it is highly likely that the vast majority of cases will involve summaries that only include partial information.

It is also unclear how issues of national security will impact on the confirmation hearing. If the *National Security Information (Criminal and Civil Proceedings) Act 2004* is applied, it may be that the subject of an interim control order and his/her lawyer are denied any information regarding the grounds on which the confirmed

[10] Section 11, ibid
[11] Section 4, *ASIO Act 1979 (Cth)*

order is sought. It will therefore become impossible for that person to effectively mount a case contesting the order.

Duration of Interim Orders

In addition, it is worrying that the Bill does not provide any limits on the duration of an interim control order. The interim order is simply required to specify a date on which the subject may attend court for the court to confirm, void or revoke the interim order. As noted above, given the types of restrictions, prohibitions and requirements that may be imposed on a person, a control order can effectively subject a person to internment or home detention. There is, however, no requirement in the Bill that a final hearing of the matter be expedited or occur within a specified period. It is therefore possible that person may be subject to a control order, which has been made ex parte, for a substantial period of time pending a hearing of the matter. If this aspect of the Bill is to be passed we recommend that a limit to the duration of an interim control order be specified, such as 2 days. This will prevent people being subject to the intrusive and punitive impacts of a control order for an exceedingly long time whilst awaiting a hearing. This is also particularly important given that the person has not had an opportunity to contest the allegations against them at this stage of a matter and given that an order may ultimately be declared to be void.

We are aware that interim orders are a mechanism commonly used with respect to intervention orders or apprehended violence orders. We submit, however, that interim orders are not an appropriate measure where control orders are concerned, particularly because of the range of intrusive and punitive restrictions a person may be subject to .

The UK Experience

The Federation is also particularly concerned with the way control orders have operated in the UK since the passage of similar legislation there in March 2005. We believe that it is important to examine this overseas experience in order to

determine whether this kind of legislation is really something that is desirable for Australian society. By way of background, after the events of 11 September 2001, a number of foreign nationals were indefinitely detained pursuant to the UK *Anti-Terrorism Crime and Security Act 2001*, which empowered the Home Secretary to certify a foreign national as a 'suspected international terrorist' (if that person was reasonably believed to be a risk to national security or a terrorist) and to detain that person pending removal from the UK. Seventeen persons were so certified and detained.[12] Two of these people chose to leave the UK, three others were released after their certifications were revoked and two remain in custody. The remaining ten detainees were released after that part of the legislation under which they were detained expired. Nine of these had been detained in maximum security prisons or psychiatric facilities for over 3 years. Immediately upon the legislative introduction of control orders, the Home Secretary made 10 control orders in relation to these same detainees who had recently been released. Subsequently on 11 August 2005, these same detainees were again seized pending deportation.[13] A number were found to have severe mental health problems as a result of their indefinite detention and one was apprehended from a psychiatric institution. Most of these men now face removal to Algeria, which is known to make use of torture.

This demonstrates how control orders may be used as part of a broader scheme to indefinitely subject people to restrictions and/or detention for lengthy periods of time, one legislative mechanism being used after the other in the absence of sufficient evidence to charge and prosecute. In the case of Australia, the Bill allows for successive control orders and preventative detention (discussed below). These may potentially be used in combination with ASIO questioning or detention warrants and ASIO notifications to the Department of Immigration, Indigenous and Multicultural Affairs, which result in people being held in

[12] Ansari, Fahad, *Islamic Human Rights Commission, British Anti-Terrorism: A Modern Day Witch Hunt*, Islamic Human Rights Commission, 2005, 28-29.
[13] *Protect Our Rights, A Briefing Document on the Government's Anti-Terrorism Proposals: A Joint Analysis from UK's Leading Civil Society Organisations*, October 2005 (available at http://www.statewatch.org/news/2005/sep/protectourrightsbriefing.pdf)

immigration detention. The overall result is a legislative regime that allows for the detention of people for lengthy periods without charge, as has occurred in the UK. In our submission Australia should avoid the introduction of any further legislation that supports the detention of people without charge such as control orders.

It is also important to bear in mind that there was a 'control order' regime in the UK prior to the London bombings. This seriously calls into question the capacity of control orders to really have a preventative effect.

In light of all of the above concerns, the Federation strongly recommends that the proposed system of control orders is not suitable to passed as law, even in the event that the remainder of the Bill is passed in some form.

Schedule 4 – Preventative Detention

The Federation is in fundamental opposition to any detention of non-suspects without charge and therefore opposes legislation which establishes a regime of preventative detention.

<u>Detention of non-suspects</u>

Schedule 4 provides for the detention of non-suspects. This is a gross violation of the principle of 'innocent until proven guilty', a fundamental tenet of our criminal justice system. The presumption of innocence requires that a person is presumed to be innocent until found to be guilty by a court after the elements of an offence have been proven. More generally, the presumption of innocence also requires that individuals who have not been found guilty be free from coercive state powers. Our criminal justice system does permit limited departure from this principle insofar as individuals who are suspected on reasonable grounds of

committing a criminal offence may be remanded pending their appearance before a judicial officer. The Schedule 4 proposal for preventative detention, however, goes far beyond this allowing for the detention of non-suspects where no criminal charges have been brought. This is also a departure from the traditional legal principle of habeas corpus, which requires that an imprisoned person be brought before a court to determine the lawfulness of that person's imprisonment.

Insofar as it derogates from these fundamental principles, the Federation is deeply concerned about the proposal for preventative detention and strongly recommends that it be removed from the Bill if the Bill is to be passed.

In addition to this general concern, the Federation has a number of concerns with respect to specific provisions in this part of the Bill:

Grounds for Preventative Detention

The Federation is also concerned that two of the grounds for obtaining a preventative detention order are actually bases for bringing criminal charges. Paragraph 105.4(4) provides that a person meets the requirements for the application and making of an order where there are reasonable grounds to suspect that the person

(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 an act in preparation for, or planning, a terrorist act;

Under our existing law, namely the *Criminal Code*, it is an offence to possess a thing that is connected with preparation for, the engagement of a person, or assistance in a terrorist act.[14] This offence may be committed with actual knowledge or recklessly and carries a maximum penalty of 15 years imprisonment. Under the *Criminal Code*, it is also an offence to do 'any act in

[14] Section 101.4, *Criminal Code Act 1995 (Cth)*

preparation for, or planning, a terrorist act'.[15] This offence carries a maximum penalty of life imprisonment. Sub-paragraphs 105.4(4)(ii) and (iii) raise the possibility that preventative detention may be used by police to detain a person whom they would wish to charge with an offence but against whom they do not have sufficient evidence.

This also calls into question the necessity of such powers, given that police could detain a person by charging them with the relevant criminal offences rather than detaining them without charge. The *Criminal Code* contains a broad range of terrorism offences which allow police to charge persons before the actual commission of a terrorist act, particularly when conspiracy offences are brought into play. Presumably, where a terrorist act is truly imminent (as required in order to obtain a preventative detention order by Paragraph 105.4(5) of the Bill), one or more of the existing terrorism offences under the criminal code will have been committed. For example, where a subject is intending to blow up a bomb at a particular location and this comes to the attention of police as an imminent threat, the subject will have no doubt engaged in planning to blow up the bomb, will in all likelihood possess materials connected with the bombing and will possible even have related documents such as invoices, maps, etc. All of these things would constitute grounds for bringing criminal charges against the person. Where the person has not committed these offences, it is unlikely that the threat could be truly imminent, in which case a preventative detention order would not be able to be obtained anyway.

It is possible to envisage a situation where a person is suspected of committing one of the above offences preparatory to a terrorist act and where the police have not yet gathered sufficient evidence to charge that person and so cannot yet bring that person into custody. Such a situation is still no justification for the introduction of preventative detention, as we already have laws that allow police significant leeway to detain people in such cases. Section 23CA of the *Crimes*

[15] Section 101.6(1), ibid

Act 1914 (Cth) provides that where a person is arrested for a terrorism offence, that person may be detained for the purpose of investigating whether that person has committed that or another terrorism offence. While the 'investigation period' is generally 4 hours[16], Section 23DA allows for repeated extension of the 'investigation period' up to a total of 20 hours. Furthermore, Section 23CA(8) provides for a range of events that will be disregarded for the purposes of calculating the investigation period. These include (amongst other things):

- any time used to transport the person;
- any time during which questioning is suspended or delayed while the subject is contacting friends or relatives;
- any time during which questioning is suspended to allow a friend, relative or lawyer to arrive;
- any time during which questioning is suspended or delated for medical treatment of the subject;
- any time questioning is suspended or delayed because the subject is intoxicated;
- any time questioning is suspended or delayed to allow the person to rest and recuperate.[17]

There is also a 'catch-all' provision that allows any reasonable time that is a time during which questioning of the person is reasonably suspended or delayed to be disregarded, although this requires approval of a magistrate.[18] In combination, all of the time periods to be disregarded (and the legislation does, in actual fact contain a more extensive list than we have provided above) may result in a period of detention that far exceeds the 24 hours allowed by an initial preventative detention order.

Clearly, our existing legislation already has built into it sufficient preventative mechanisms by virtue of the fact that conduct preparatory to terrorist acts has

[16] Section 23CA(4)(b), *Crimes Act 1914 (Cth)*
[17] Section 23CA, ibid
[18] Sections 23CA(8)(m) and 23CB, ibid

been criminalised and due to the detention periods allowed for the investigation of terrorism offences. We therefore submit that the regime of preventative detention proposed in Schedule 4 is a superfluous and unjustified amendment to our laws.

Preserving Evidence

Paragraph 105.4(6) of the Bill also permits preventative detention of a person where a terrorist act has already occurred and the detention is necessary to preserve evidence of or relating to that terrorist act. This would seem to be contrary to notion of a 'preventative' purpose. Clearly this aspect of the Bill is more about the preservation of evidence to facilitate subsequent criminal prosecution than it is about preventing an imminent terrorist act. It is therefore beyond the scope of what should be permitted under a regime purporting to be aimed at preventing an imminent terrorist act.

Recurrent Preventative Detention Orders

The note relating to Paragraph 105.6(1) makes it clear that it will be possible to obtain a subsequent initial preventative detention order for the purpose of preserving evidence. This proposal contemplates the situation where a person is detained under a preventative detention order for the purpose of preventing an imminent terrorist act and a terrorist act nonetheless occurs. That person may then be subject to a further, new preventative detention order for the purpose of preserving evidence. The Federation is concerned that this will be used to extend the detention of a person where a terrorist act occurs and yet there is insufficient evidence to link the person to the terrorist act and therefore charge him or her. In this regard, preventative detention orders may be used by police as means of circumventing traditional criminal justice procedures with respect to the prosecution of criminal offences. Worryingly, the impact of this will be that a person who is innocent of any criminal offence may be imprisoned without charge.

Furthermore, Paragraph 105.6(2) seems to allow for successive initial preventative detention orders to be made where they are made based on new information. This creates the possibility that, where the AFP are continually uncovering new information as often occurs, a person may be repeatedly and successively subject to new initial preventative detention orders. That is, a person may be detained for an overall period much longer than 48 hours, which is the supposed maximum period of preventative detention. Again, this is of grave concern considering that the subject being detained has not been charged with any criminal offence.

Informing the Subject

If a person is to be imprisoned, it is only humane that the person be informed of the reasons for their imprisonment. The Bill, however, does not require the AFP to inform the subject of the grounds for making the preventative detention order. This will give rise to the situation where people may be imprisoned without charge, they will know that they are subject to a preventative detention order but they may have no understanding of why this has happened to them.

Paragraph 105.28(2) details a number of matters that the police officer effecting detention must inform the subject of. These include the following

(a) the fact that a preventative detention order has been made;

(b) the period of detention;

(c) any restrictions on contact with other people during detention;

(d) the possibility that extended or continued detention may be sought;

(e) the person's right to complain to the ombudsman and regarding what;

(f) the right to complain to the relevant state or territory police authorities;

(g) the right to seek federal court remedies;

(h) the entitlement to contact a lawyer; and

(i) the name and work telephone number of the AFP officer overseeing the detention.

These requirements also apply once again whenever a continued detention order is made.

Paragraph 105.31 states, however, that any requirement to provide the above information does not apply where the subject's actions make this impractical. It is unclear what would satisfy this exemption. If the subject is belligerent will that be a reasonable excuse for not advising them that they are in preventative detention? If a subject suffers from mental illness or a cognitive disability with that be sufficient grounds for failing to advise them of their rights? If the subject is asleep when a continued detention order is made, will that be sufficient grounds for failing to advised them that they will be subject to a further preventative detention order?

Paragraph 105.31(2) provides that the obligation to inform is discharged even if the explanation of the matters detailed above is not precise. Furthermore, Paragraph 105.31(3) where a subject is of non-English speaking background, it is the police officer effecting detention who makes the assessment as to whether the subject requires an interpreter or not. The subject is not able to determine this for themselves. This may create difficulties for subjects who have sufficient command of the English language to engage in basic conversation but are unable to comprehend legal terminology and complex instructions.

It is our concern that these provisions will result in people being detained without any or adequate knowledge of why they are so detained.

Judicial Oversight

This Bill represents a significant extension of executive power and therefore requires commensurate mechanisms of judicial review. This was recognised in the COAG Meeting and also repeatedly affirmed by a number of state and

territory leaders in statements to the press after the Meeting. [19] A significant concern with respect to the preventative detention regime relates to this issue of judicial oversight.

Paragraph 105.8 provides that a senior AFP officer may make an initial preventative detention order on application by an AFP member. In fact, for the purposes of the Bill a senior AFP officer falls within the definition of an issuing authority with respect to initial preventative detention orders. This is worrying insofar as there is a complete absence of judicial supervision of the exercise of this power. There is nothing to ensure that AFP officers act within the limits of the legislation nor is there anything to ensure that these powers really are only used in extreme circumstances. Given that these proposals relate to the detention of non-suspects, this is exceedingly worrying.

We are also concerned that the issuing authority in such cases will merely act to provide a 'rubber stamp'. As the issuing authority will only receive material from the AFP member seeking the order there will be no means for that authority to test that material, particularly insofar as it will generally relate to matters of national security. In all likelihood, an issuing authority will simply have to take the word of the AFP officer as to the particulars of the matter. This opens the door to potential abuse of this system and the improper detention of non-suspects. Furthermore, it is our view that this dangerously provides the semblance of effective judicial oversight where actually the role of the judicial officer is quite limited. This would act as a barrier to true transparency and accountability. Where it is assumed that there is judicial oversight, it is unlikely that the use of this regime will be carefully scrutinised. As a result, abuses of the system and improper imprisonment may go unchecked.

[19] *Council of Australian Governments' Communiqué: Special Meeting on Counter Terrorism*, 27 September 2005 (available at http://www.coag.gov.au/meetings/270905/index.htm); COAG Joint Press Conference, Parliament House, Canberra, 27 September 2005 (available at http://www.pm.gov.au/new/interview/Interview1588.htm)

It is also worrying that the judicial issuing authority in such cases will not be acting in a judicial capacity, but rather, will be acting in a personal capacity. Again we submit that this type of judicial involvement will merely provide a semblance of appropriate judicial safeguards. As the Honourable Alistair Nicholson pointed out in a recent address:

> *The problem about this is that if a judge is not sitting in a judicial capacity then he/she is not sitting as a judge at all and the proposal for so-called judicial review is illusory.*[20]

It is our view that effective judicial oversight has not been provided for with respect to the preventative detention regime proposed in the Bill. It is clear that where the decision to make an order for preventative detention is a decision of the executive, there will always be inadequate judicial oversight. Yet it would appear that, due to the need to maintain the separation of powers, it is constitutionally impossible to envisage any other mechanisms for issue of preventative detention orders. As it seems that it will not be possible to ensure effective judicial oversight, it is our recommendation that this aspect of the Bill is not suitable to be passed as law.

Revocation

While the Bill provides for revocation of a preventative detention order by the police, it does not provide subjects with any specific mechanism for seeking revocation. This renders it more difficult for subjects who feel they have been wrongly detained to challenge their imprisonment.

If this aspect of the Bill is to be passed, we submit that it is imperative that some mechanisms for revocation of the orders be expressly provided for in the legislation.

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[20] Nicholson, Alistair, *The Role of the Constitution, Justice, the Law, the Courts and the Legislature in the context of Crime, Terrorism, Human Rights and Civil Liberties*, An address to the Post-Graduate Student Conference: Transgressions – Intersections of Culture, Crime and Social Control, 4 November 2005 (available at http://www.mpso.unimelb.edu.au/mpso/media/transcripts)

Restrictions on Legal Advice

The Bill imposes a number of restrictions on the provision of legal advice to subjects which we believe will act to their detriment.

The Bill provides that a subject's lawyer must be given a copy of the preventative detention order. There is, however, no requirement that the lawyer be advised of the grounds upon which that order was made. As a result if will be virtually impossible for a lawyer to provide a subject with meaningful legal advice regarding the detention and its lawfulness.

All communications between subject and lawyer will be monitored. It has been long-recognised in our legal system that the capacity for lawyers to truly advise and fully represent the interests of their clients hinges on legal advice being provided in a confidential environment. The departure from this understanding will impede a lawyer's ability to receive full instructions and provide comprehensive legal advice.

Other restrictions include that subjects may be prevented from contacting the lawyer of their choice where that lawyer is specified in a prohibited contact order and that generally all communications between subject and lawyer must be confined to matters directly related to the preventative detention order.

If this aspect of the Bill is to be passed and a regime for the detention of non-suspects established, it is our recommendation that any person detained under such a regime be given unfettered access to confidential, legal advice.

Restrictions on contact

The Bill also proposes that, once preventatively detained, a subject will be severely limited with respect to contacting other persons. Paragraph 105.35 provides that a subject is entitled to contact on family member or a housemate

and one work colleague. The subject will only be able to tell those people that he or she is safe and cannot contact them further for the time being. Paragraph 105.35(2) expressly prohibits the subject from advising those people that a preventative detention order has been made or even that the subject has been detained, nor is the subject permitted to indicate how long the detention is expected to last. Effectively subjects will be able to provide two people with just enough information to make them curious and worried, and then nothing further. These limitations on contact are not only somewhat farcical (it is difficult for anyone to imagine that any family member would be satisfied with that kind of explanation for one's absence) but they also act to prevent any discussion on a subject's detention while it is occurring. This in turn prevents broader scrutiny of police conduct and transparency of processes.

Orders relating to children

The Federation is deeply concerned about the proposal that preventative detention orders be applicable to children aged between 16 and 18 years old. As noted above, the Federation is fundamentally opposed to the detention of non-suspects. That the persons being detained may be children only serves to heighten our concerns. In addition, the Bill does not make it clear where it is contemplated that children might be detained and under what circumstances. We are concerned that this lack of specificity will lead to situation were children are detained alongside adult prisoners.

If this section of the Bill is to proceed, it is our recommendation that preventative detention orders only apply to subjects aged 18 years old and above.

Disclosure Offences

Paragraph 105.41 of the Bill renders it an offence for subjects of preventative detention and the people they contact to convey any information about an order, or even about the mere existence of an order, to any other person. It is difficult to envisage what might be gained by this prohibition on disclosure except that it will

allow people to be detained largely in secret, without the fact of their detention being able to be publicly disclosed. This kind of secretive detention of individuals is certainly inappropriate in an open, democratic society. Further, it may act as a hindrance to transparency of police activities and close monitoring of police conduct with respect to these extraordinary powers.

For all of the reasons detailed above, the Federation strongly recommends that measures for preventative detention are not passed as part of this Bill.

Schedule 5 – Powers to Stop, Question and Search Persons in Relation to Terrorist Acts

Schedule 5 amends the *Crimes Act 1914 (Cth)* to provide all police officers with powers to stop, question and search people with respect to terrorist acts. Firstly, these powers are invoked in relation to people who are present in a Commonwealth place, that is, a place where the Commonwealth has the power to make laws. In order to exercise the powers with respect to a person in this environment, a police officer must suspect on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act. The powers may also be exercised *carte blanche* in a 'prescribed security zone'. That is, no reasonable suspicion regarding the commission of a terrorist act is required.

Where the above circumstances apply, police will have the power to ask a person for his or her name, address and proof of identity. Police may also require the person to explain why they are in that particular place. Police will further have the power to stop and detain person for the purpose of conducting a search for a terrorism related item, as well as powers to seize items found.

Prescribed Security Zones

We note with concern that the Bill does not provide for public grounds to be given when declaring a particular area a prescribed security zone. Instead there is broad ministerial discretion to declare an area a prescribed security zone where the Minister considers that such a declaration will assist in preventing a terrorist act or in responding to a terrorist act that has occurred. The Bill does not expand on exactly how a Minister is to make such a determination, what the Minister might be required to consider or what matters the Minister might be expected to inform him or herself of before making a declaration. We believe that this represents an excess of unchecked executive power. This is particularly worrying given that a declaration may apply to a particular zone for up to 28 days and given the increased police powers that the declaration triggers.

Necessity

The Federation is of the view that this extension of police powers is unnecessary. Currently, the *Crimes Act 1914 (Cth)* provides AFP members with broad search and questioning powers. Pursuant to the *Australian Federal Police Act 1979 (Cth)* AFP officers may stop and search a person in a range of listed circumstances, including where there is a reasonable belief that the person has something that he or she will use to cause damage or harm to a place or person 'in circumstances that would be likely to involve the commission of a protective services offence'.[21] Furthermore, AFP officers are permitted to demand a person's name and proof of identification where there are reasonable grounds to believe that a person might have just committed, might be committing or might be about to commit a protective service offence.[22] The definition of a 'protective service offence' encompasses the various terrorism offences that exist under the *Criminal Code*. We have also detailed above (in relation to preventative detention) the extensive powers of AFP officers to detain persons suspected of committing a terrorism offence for extended periods of investigative questioning.

[21] Section 143(1), *Australian Federal Police Act 1979 (Cth)*
[22] Section 141, ibid

State police are also generally able to stop and question a person where it is reasonably suspected that that the person is committing or has just committed a criminal offence. In our opinion police powers with respect to terrorism offences are already overly coercive and expansive. Many of the powers provided for in Schedule 5 already exist in some form and are sufficient in themselves. The additional powers sought are in our view an excess of police power.

Broad Discretion

As discussed above, the definition of 'terrorist act' is quite expansive. Police would also be offered very broad discretion in that, pursuant to the amended Section 3UB(a) they need only suspect on reasonable grounds that a person '*might* have just committed, be committing or be about to commit such an act. Both the concept of 'reasonable suspicion' and the term 'might' give rise to the extremely broad discretion here. As a result, it is almost certain that these powers will cause far more people to come into contact with police, including a majority who do not pose any threat to the community. This is particularly concerning given the humiliating impact public police searches and questioning may have on people that are subject to this kind of policing. The discretionary nature of these powers is such that there is also the danger that the powers will be misused. The Federation is concerned that these powers will be used for collateral purposes that are not aimed at apprehending criminal offenders, for example to gather intelligence or for harassment or targeting of individuals.

Racial Profiling

As noted above, in response to the proposals now contained in the Bill, the Police Federation of Australia has commented that there will be inevitable racial profiling of the Muslim community.[23] The Federation is concerned that the stop, search and question powers will be particularly prone to racist or discriminatory exercise. We are particularly worried about discriminatory use of the powers in

[23] Milovanovic, op cit

prescribed security zones, where no reason for exercising the powers to stop, search and question will be require.

There is already a disproportionate focus on the Muslim community by the media, law enforcement agencies, intelligence gathering agencies and the broader community whenever the issue of terrorism is raise. We are concerned that the Muslim community will be subject to further disproportionate and arbitrary police interference as a result of these powers. Police targeting of the Muslim community is clearly an undesirable outcome and may even have a counter-productive effect with respect to criminal investigation, insofar as an alienated community is less likely to be cooperative with police investigations. Most importantly, however, over-policing along racial or religious lines that is facilitated by legislation amount to officially sanctioned racial and religious discrimination. It also has the danger of perpetuating and even exacerbating racial and religious prejudice in the broader community. This should be something that our society is working to counteract, rather than enacting laws that are inherently prone to discriminatory application such as these.

Serious Offences

In our view, the inclusion of 'serious offences' in Schedule 5 is inexplicable and exceeds the scope of this Bill. Schedule 5 provides that, when conducting searches for a terrorism related item, police are permitted to seize and potentially retain any 'serious offence related items' found. A serious offence is specifically not a terrorism offence, rather, this term includes drug offences and those relating to fraud. This would seem to be an attempt to arm police with further powers to assist in policing non-terrorism offences via legislation purportedly aimed only at countering terrorism – an extension of police powers by stealth. We submit that any powers relating to serious offences are clearly misplaced in this Bill. We are concerned that the Government is exploiting public concerns regarding terrorism to extend police powers with respect to ordinary crime. Any

increased police powers with respect to serious offences should be removed from the Bill.

In light of the above concerns, it is our view that this section of the Bill should not be passed.

Schedule 6 – Power to Obtain Information and Documents

Schedule 6 provides the AFP with the power to obtain information and documents that are relevant to the commission of a terrorist act. The AFP may compel the operators of aircraft and ships to provide information and documents. Furthermore, the AFP may issue a 'notice to produce' to compel to any person to produce documents that are relevant to and will assist in the investigation of a serious terrorism offence. It is proposed that such a 'notice to produce' may be issued in relation to serious offences (that is, non-terrorism offences), however, this will be issued by a Magistrate who is acting in his or her personal capacity (upon an AFP application). In the case of serious offences, there is a broad range of documents that may be sought, including financial account documents, travel documents, utilities and telephone bills and documents and documents relating to who resides at a particular place.

Criteria for Requesting Passenger Information

With respect to the power to passenger information, we are concerned that the Bill does not require a sufficient connection between the information or document sought and a terrorist act. The Bill allows the AFP to request information or documents that are 'relevant to a matter that relates to the doing of a terrorist act'. Given the invasion of privacy involved in the exercise of these powers, we submit that a closer nexus between the information/document sought and a terrorist act should be required. It is conceivable that, as currently framed, the Bill empowers the AFP to request an extraordinarily expansive array of information

and documents. As with any intrusive state powers, these powers should be kept to the minimum required for their purpose. In this respect, this Bill does not conform to this principle.

Oversight and Accountability

We are also concerned that both the request for passenger information and notices to produces with respect to terrorism offences are not subject to any form of judicial supervision or oversight. In this regard, there is the concern that these mechanisms may be overly used or even used as 'fishing expeditions'. The Bill does not propose any accountability mechanisms to ensure that this does not occur.

Failure to Comply

Under Schedule 6 it will be an offence to fail to provide information or documents as requested. This in an offence of strict liability however the Bill provides that where a person has a 'reasonable excuse' for the failure to provide, this may be a defence. The onus of proof however lies with the defendant in such cases. If a person genuinely does not have a document or information sought by police that person will be forced to lead evidence to demonstrate that that was the case. On the face of it, to demonstrate that one did not have a document or information would seem to be an inordinately difficult task. We imagine that the only evidence that a person could usefully lead would be the person's own testimony. That being the case, the person would be compelled to testify in his or her own defence and would thereby have to abrogate the right to silence.

It will also be an offence to fail to comply with a 'notice to produce'. Providing a person has been given a notice to produce and the person fails to comply with that notice, the person will have committed an offence. There is no defence specified in the Bill to this offence. It appears, therefore, that it is no defence of not having access the document requested. Naturally, it would be grossly unfair to prosecute a person with such an offence if it was not within their power to

produce the document requested and yet this is what Schedule 6 permits. It is quite possible that the issuing AFP officer or Magistrate may be mistaken as to the person's access to the document sought, however, this possibility is not contemplated in the Bill.

Serious Offences

Schedule 6 also empowers the AFP to obtain information relating to 'serious offences'. The concerns raised above with respect to Schedule 5 and 'serious offences' apply equally here. Additional powers in relation to 'serious offences' are outside the ambit of counter-terrorism legislation and in our view their inclusion in this Bill represents an attempt to extend police powers more generally under the guise of preventing terrorism.

We are also concerned that the disclosure offences apply equally to notices to produce that relate to the investigation of a serious offence. The justification for secrecy provisions and disclosure offences has consistently been stated to be to protect sensitive information relating to matters of national security. It is therefore unjustifiable that a disclosure offence pertain to a serious offences notice to produce'.

Due to the above concerns, the Federation is opposed to the passage of this section of the Bill.

Schedule 7 – Sedition

The Federation strongly opposes the activation and extension of archaic sedition offences for prosecuting political or religious opinion, as a counter terrorism measure. Criminalising people for what they say rather than what they do is a dangerous, anti-democratic trend apparent in the laws.

Critically, it is already an offence, punishable by life imprisonment, to threaten politically motivated violence with the intention of intimidating a section of the public.[24] In addition there are existing provisions against incitement to commit a crime[25]. Further, laws making racial or religious vilification an offence, also already exist in some jurisdictions.

The Government has relied on the Gibbs Review as justification for these changes to sedition laws. However, the Review expressly recommended limiting the scope of sedition offences, arguing that the laws are out of step with contemporary democratic freedoms.[26] As such its recommendation on limiting sedition to incitement to overthrow government, interference in parliamentary elections and inter communal violence, has been taken out of context and adapted and extended as counter terrorism measures that in actual fact do not reflect the real findings of the Review.

The Bill repeals existing sedition offences in the *Crimes Act 1914 (Cth)* and introduces five new sedition offences into the *Criminal Code* punishable by up to 7 years imprisonment.

The new offences are considered in turn:

<u>Urging the overthrow of the Constitution or Government and Urging interference in Parliamentary elections</u>

Contrary to the Attorney General's stated intention to modernise sedition offences, these provisions deploy archaic provisions for counter terrorism purposes. A range of legitimate political opinions and actions such as civil disobedience could be criminalized. Again, a number of available laws already

[24] Section 100.1, *Criminal Code Act 1995 (Cth)*
[25] Section 101.4, ibid
[26] Attorney-General's Department, *Review of Commonwealth Criminal Law, Fifth interim report: Arrest and Matters Ancillary Thereto, Sentencing and Penalties, Forgery, Offences Relating to the Security and Defence of the Commonwealth and Part VII of the Crimes Act 1914 (1991)*, Paragraphs 32.13, 32.14, 32.16, 33.13.

criminalise violent acts that threaten overthrow of government rendering these proposals superfluous.[27]

Urging violence within the community

The new offence requires urging a group (whether distinguished by nationality, race or religion) to use force or violence against another group, anywhere in the world, where this would threaten the peace, order and good government of Australia. The offence does not require an intention that force or violence be committed, or evidence of an actual act of force or violence. The Federation believes that this provision will operate to construct inter-communal violence as necessarily terrorist. While reform to a federal offence of incitement against religious vilification is worthy of debate, the proposed offence has no place as a counter-terrorism measure.

Urging a person to assist the enemy and Urging a person to assist those engaged in armed hostilities

It will be an offence to urge someone to 'engage in conduct' by any means whatever, which would assist an organisation or country engaged in armed hostilities against Australia's defence forces, or if the organisation is an 'enemy' of Australia. That neither the urging of violence nor an intention that violence be committed are required, indicate a serious infringement on freedom of speech and political association. The absence of any connection between an 'incitement' and a specific terrorist act will allow for the prosecution of generalised comments in support of violent acts. Counter terrorism measures should be based on specific evidence of intention to commit a crime not on criminalising speech.

The provisions are likely to criminalise the advocacy of resistance against occupying forces in Iraq, a war recognised as unlawful in international law.

[27] This includes incitement to commit an offence - s 11.4, *Criminal Code Act 1995 (Cth)*; treachery -s 24AA, *Crimes Act 1914 (Cth)*; disrupting elections - s 327, *Commonwealth Electoral Act 1918*.

Political opinion expressed by journalist John Pilger on ABC's 'Lateline' last year, included the view that Coalition troops in Iraq are legitimate targets, and that it is desirable for peace and stability in the region that America be militarily defeated. These statements were considered by recent legal advice to arguably breach the proposed sedition offences.[28]

While political views such as Pilger's may be considered 'offensive' by some sections of the public, including Foreign Minister, Alexander Downer,[29] many Australians would endorsed this view and a large section of the population have opposed Australia's involvement in the war in Iraq. Indeed, the right to take up arms against foreign occupation and tyranny is a belief historically shared across societies and religions as well as being recognized in International Law. It is a nuanced matter of subjective interpretation, as to whether some representations of this political opinion would be strongly worded or passionately held to the degree that it could be constituted as 'urging'.

We are concerned that these proposals are simply a tool of political suppression that has no place in a modern democracy. Simply because an individual resides in Australia does not mean that they should be compelled to offer their unmitigated support for the activities and policies of the current Government. At times those activities and policies may be deeply offensive or concerning to Australian residents and such people should not be restricted from voicing their concerns or dissent. In any event, these proposals are arguably already covered by our current offences of treason and treachery as we have noted above.

We are also concerned that the current climate of institutionalised Islamaphobia, may lead to the criminalisation of political statements made by Muslims as 'incitement' where there may otherwise be no evidence of the impending

[28] Walker, B, SC, Roney, P, *Memorandum of Advice*, 24 October 2005 (available at: http://www.abc.net.au/mediawatch/img/2005/ep34/advice.pdf at 2 November 2005)
[29] The Hon.Alexander Downer, MP, Minister for Foreign Affairs, *'Pilger Should Say Sorry'*, 11 March 2004.

commission of violent acts which threaten the safety of the public. Indeed, as has been pointed out by the UK Islamic Human Rights Commission, '(c)ertain statements made by Muslims will be regarded as "glorification" due to the Muslim audience. Similar comments made by members of other communities will not be held to the same standard of accountability'.[30] There is an imminent danger that the vague and politicised concept of 'extremism' will be deployed to target the political beliefs of Muslims and unduly read these as 'terrorist'. Indeed, it is well established that Australian counter terrorism intelligence agencies have historically operated on a continuum approach informed by the military philosophy of counter-insurgency. That is, that 'subversive' views are a short step from politically motivated violence.[31]

Defences

The 'good faith defences' are very limited and narrowly construed and apply only to pointing out errors of government policy and lawful reform activity.

These limited defences, together with the expansive reach of the offences, will repress public debate on critical issues of war, violence and state crime. In particular, it is concerning that there are no defences for artistic pursuits, journalism (fair comment), or statements made for academic, scientific or religious purposes. This is quite distinct from most state and federal anti-vilification legislation, which typically protects freedom of speech by including these kinds of 'good faith' defences.

If passed, the Bill will have the likely impact of severely restricting the range of what is considered legitimate political activity and opinion. Further, this will suppress criticism, advocacy and dissent against the government. We

[30] Ansari, Fahad, op cit at p 3
[31] Hocking, J, *Beyond Terrorism, the Development of the Security State*, Allen & Unwin, St Leonards, 1993, pp18-22

recommend that Schedule 7 in its entirety be removed and that a review of the relevance of the existing sedition laws to a liberal democracy be conducted.

Schedule 10 – ASIO Powers etc

With respect to this Schedule, we reiterate our concern relating to the necessity of extending ASIO's powers. As detailed above ASIO have expressly stated in public hearings that they do not require an extension of their powers[32] and no circumstances have been elucidated to justify this proposed extension of their powers. Furthermore, the review of ASIO's existing 'special powers' with respect to terrorism offences is incomplete. Again, we submit that it is imprudent to be affording ASIO an extension of their powers while the review of their existing powers remains incomplete.

Confiscation of Seized Items

The Bill proposes to amend Section 34N of the *ASIO Act* to allow ASIO to retain seized items for longer than is reasonably necessary where returning the item would be prejudicial to 'security'. As noted above, 'security' is defined very broadly in the *ASIO Act* to include:

(j) the protection of, of the people of, the Commonwealth and the several States and Territories from;
  (i) espionage;
  (ii) sabotage;
  (iii) politically motivated violence;
  (iv) promotion of communal violence;
  (v) attacks on Australia's defence system; or acts of foreign interference;

whether directed from, or committed within, Australia or not; and

[32] Hansard: Joint Committee on ASIO, ASIS and DSD, Reference: Review of ASIO's Questioning and Detention Powers, Thursday 19 May 2005, Canberra (available at: http://www.aph.gov.au/hansard/joint/committee/J8382.pdf)

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the sub-paragraphs of paragraph (a).[33]

Given the expansive definition of 'security' this amendment effectively allows ASIO to confiscate items in an incredibly broad range of circumstances. This is particularly a concern given that ASIO is inherently a covert organisation that is not subject to the same mechanisms for oversight as law enforcement agencies, for example. It is therefore undesirable that they be given such broad powers to confiscate people's personal property.

Providing False or Misleading Information

The Federation is particularly concerned about the proposed amendment to the offence of giving false or misleading information under an ASIO questioning warrant. Under Section 34G(5) of the *ASIO Act*, it is an offence for a person to make a statement that is 'to the person's knowledge, false or misleading in a material particular'. This offence is punishable by 5 years imprisonment. The Bill proposed to amend this offence so as to remove the term 'material particular' from the definition of the offence. The offence will still, however, only apply where the statement is false or misleading in a material particular. The practical impact of these amendments will be as follows: where previously the onus was on the prosecution to prove that the offence was false and misleading in a material particular, if this amendment is passed, the prosecution will only have to prove that the statement was false and misleading. If the prosecution succeeds in this task, the onus will then be on the defendant to show that, although the evidence was false and misleading, it was not false and misleading in a material particular.

Firstly, no definition of 'material particular' is provided in the *ASIO Act*, nor is a definition provided in the Bill. Furthermore, given that this offence will pertain to matters of national security which generally remain secret, it will be extremely

[33] Section 4, *ASIO Act 1979 (Cth)*

difficult for any defendant to determine what exactly is materially particular to ASIO in their given case. This amendment will make the task of defendant virtually impossible and thereby render the criminal justice process a farce in such cases.

General Concerns

The Bill also proposes to extend the duration of ASIO warrants with respect to searches and inspection of postage and delivery service articles. The Bill also proposes to give ASIO powers to question aircraft and vessel operators, to compel the production of documents, and to enter premises for the purpose of executing computer access warrants. The Federation is generally concerned with any extension to ASIO's powers. Being the agency responsible for intelligence gathering, ASIO necessarily operates covertly and is therefore not subject to the same public scrutiny as other agencies. Given that ASIO does not operate transparently (by necessity) it is not as easily made accountable. Any extension of its powers must therefore be approached with extreme caution. We submit that in the absence of compelling justifications for these extensions, the powers of ASIO should remain at the minimum required for them to properly fulfil their role. In this instance, no justifications have been provided for these extensions. It is therefore our submission that, even if other parts of the Bill are passed, this particular Schedule should not proceed.

Conclusion

In summary, the Federation's concerns and recommendations regarding the Bill are as follows:

- No circumstances have arisen which justify or call for legislative changes to increase police, ASIO and executive powers.
- The Bill represents an excessive curtailment of civil liberties and departs substantially from key democratic and legal principles.

- There should be no consideration of further counter-terrorism legislation until the reviews of our extensive existing counter-terrorism legislation are complete and the results publicly available.
- The Bill is liable to be applied in a discriminatory manner and, due to the way it is framed, will make racial profiling a common police practice in its application.
- The sunset provisions in the Bill do not apply to all Schedules and, in any event, 10 years duration is far too long for such extraordinary legislation.
- The Bill should expressly provide for review by an independent, specialised review committee.
- Amending the definition of 'terrorist organisation' to include organisations that advocate the doing of a terrorist act is an undue extension of the executive power to proscribe that will suppress political expression and that has no place in an open, democratic society.
- The paragraphs relating to 'financing terrorism' excessively broaden the financing offences and are not required, particularly insofar as they far exceed what is recommended in the FATF Special Recommendations.
- The proposed control orders regime represents undue interference with the liberty of non-suspects and hinges on overly broad and vague criteria for the making of orders and on an inadequate standard of proof. The proposed regime also seriously impedes a subject's ability to fairly contest a control order.
- The proposed preventative detention regime is a fundamental departure from the key legal principle of the presumption of innocence. The proposed regime is also characterised by a lack of judicial oversight, undue restrictions on the subject's access to legal advice and contact with other people, and a failure to guarantee that a subject will be furnished with all pertinent information relating to the detention. It is also clear that preventative detention is largely superfluous given the extensive powers currently held by federal police to arrest for the purposes of investigation.

- It is deeply concerning that control orders and preventative detention orders may be made in relation to children aged between 16 and 18 years old.
- The proposed extension of police powers to stop, search and question people is not only unnecessary, but also afford police such broad discretion that the powers may be abused or used in a discriminatory manner.
- The powers provided in Schedule 5 and 6 with 'respect to serious offences' amount to a misuse of this anti-terrorism legislation to increase police powers with respect to ordinary crime.
- The powers to obtain information and documents are based on overly vague criteria and are not subject to sufficient judicial supervision. In addition, the proposed legislation does not adequately protect subjects from prosecution for a failure to comply where compliance was in fact impossible.
- The proposed extensions of ASIO's powers are not justified, particularly as the review of ASIO's existing 'special powers' is incomplete, and any extension of ASIO's powers must be viewed with extreme caution given the non-transparent nature of ASIO's operations.

In light of the above concerns, we strongly urge the Committee to recommend that this Bill should not be passed. Alternatively, should the Committee be mindful to recommend passage of the Bill, we submit that it should be substantially amended to address the many issues we have raised above.