

10 November 2005

Committee Secretary
Senate Legal & Constitutional Committee
Department of Senate
Parliament House
CANBERRA ACT 2600

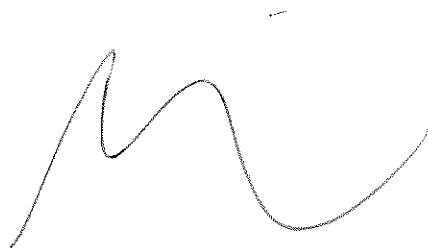
Dear Secretary

INQUIRY INTO THE PROVISION OF THE ANTI-TERRORISM BILL (NO. 2) 2005

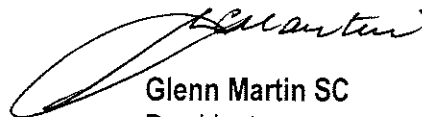
Please find enclosed the Joint Submission of the Queensland Bar Association and the Queensland Law Society to the Senate Legal & Constitutional Committee Inquiry in relation to the Anti-Terrorism Bill (No. 2) 2005.

Both the President of the Queensland Bar Association and the Queensland Law Society would be pleased to attend a hearing of the Committee to make oral submissions and look forward to your advice in that regard.

Yours faithfully



Rob Davis
President
Queensland Law Society



Glenn Martin SC
President
Bar Association of Queensland

**Joint Bar Association of Queensland/
Queensland Law Society**

**Submission to Senate Legal and Constitutional
Legislation Committee**

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

11 November 2005

Joint Bar Association of Queensland/ Queensland Law Society Submission to Senate Legal and Constitutional Legislation Committee

1. Introduction

- 1 The contents of the Anti-Terrorism Bill (No 2) 2005 ('the Bill') are, in general, opposed by the Bar Association of Queensland and the Queensland Law Society. The provisions of the Bill tread too heavily on the fragile and invaluable rights and freedoms which Australians have enjoyed. They go too far. They give great powers to some, without equally great safeguards to protect others against abuse of those powers.
- 2 "The claim that if you want security you must give up liberty has become a mainstay of the revolt against freedom. But nothing is less true. There is, of course, no absolute security in life. But what security can be attained depends on our own watchfulness, enforced by institutions to help us watch – i.e. by *democratic institutions* which are devised to enable the herd to watch, and to *judge the watch dogs*". (Karl Popper, *The Open Society and Its Enemies: Volume One*, Routledge Publishers, London, page 355, ISBN 041523731).
- 3 The preservation freedom does not depend on democracy itself, as a majority can be every bit as oppressive of minorities as the worst tyrant.
- 4 Individual freedom under Australian democracy (which alone in the Western World lacks a Bill of Rights) depends, instead, on respect for institutions which prevent the abuse of power under the guise of majority democratic rule.
- 5 In Australia individual freedom is protected only by strict adherence to the necessary (but not necessarily sufficient) conditions for control of abuse of power by the majority, which include:
 - (a) strict separation of powers;
 - (b) independence of the judiciary;
 - (c) respect for rights of belief, freedom of speech, association, movement, safety and property under a rule of law;
 - (d) equality under the law;

- (e) no detention without arrest (freedom from arbitrary detention);
 - (f) presumption of innocence;
 - (g) procedural fairness for all persons accused of crimes;
 - (h) no conviction without proof beyond a reasonable doubt (which exists to ensure innocent persons are not convicted, and not to ensure that all guilty persons are convicted);
 - (i) open and transparent courts.
- 6 The sole function of these checks and balances is to maintain public confidence in the institutions of society to maximise individual freedom within a society of individuals.
- 7 Where that confidence is diminished, marginalised groups reject the institutions which they no longer trust, causing a break down in the rule of law. That has occurred recently in Australia (Redfern race riots) and in France (riots in the last two weeks by marginalised Arab communities, many of whom are second and third generation French citizens).
- 8 Laws such as those in the Bill infringe many of the necessary institutions Australian society has developed for the preservation of our free and tolerant society. This Bill truly represents a 'crossing the Rubicon' from which it will be difficult to retreat. The Bill, and the arbitrary conduct that it will permit, will further alienate minorities in this country and thereby aggravate the problems of security for all Australians, it will not solve them.
- 9 Our fundamental view is that the Bill should be withdrawn and subjected to substantial public scrutiny and debate.
- 10 We accept without demur that an Australian Government must take every **appropriate** step to protect Australia's citizens, their freedoms, and their future. We recognise that the Government has made its intentions clear about taking this Bill through the Parliament in rapid time. We take the position that, if the Bill is to become law, then it should be in a form which does as little damage as possible.
- 11 To that end we have, while exposing the shortcomings of the Bill, made constructive suggestions as to how particular sections might be changed in order to achieve an appropriate result.

2. Overview

1. The *Anti-Terrorism Bill (No. 2) 2005* ('the Bill') establishes a system of preventative detention by government officials:
 - a. detention is permitted of persons who have not been charged with any offence, and of people who are not even reasonably suspected of committing an offence; where
 - b. justification for detention rests on "intelligence", rather than evidence the adequacy of which can be tested by the judicial process.
2. Involuntary detention of a citizen is typically penal or punitive in character, and under our system of government is part of the exclusively judicial function of adjudging and punishing criminal guilt. This Bill seeks to create a form of detention contrary to our modern system of government. This is contrary to the fundamental legal principle of detention with charge and trial, upon which our entire criminal legal system is based.
3. The Bill removes the standard safeguards for the accused that form part of our justice system. These include:
 - a. the ability of an accused to have an uninhibited communication with their lawyer; and
 - b. the ability to review and challenge evidence upon which detention is based.
4. Detainees are effectively precluded from challenging their detention because the Bill requires their communications with lawyers to be monitored by the investigating authorities. This has the effect of inhibiting communications with lawyers, and making any right to challenge detention illusory.
5. A detainee and a detainee's lawyer have no right to access the "evidence" upon which any order has been made. This renders any provision for review of decisions practically worthless.
6. The absence of safeguards renders the system of detention arbitrary. Arbitrary arrest and detention is contrary to freedoms enshrined in our Constitution and under the common law. It is also contrary to international law.

7. The Bill not only removes standard safeguards but introduces sanctions for the proper conduct of an accused's defence:
 - a. detainees and their lawyers cannot even disclose the fact that a person is being held under a preventive detention order. If they do, they face a penalty of imprisonment of five years; and
 - b. the provisions which make it an offence for a lawyer to disclose any information received by a lawyer in the course of contact with a person being detained under a preventative detention order are so narrowly drafted that they preclude proper consultation and obtaining of advice.
8. Some of the constraints in the Bill go far beyond the protection of sensitive information. For example, – a lawyer should be able to notify a staff member of a Member of Parliament of cruel, inhumane or degrading treatment of a detainee or contact a psychologist for an opinion on the effects of detention. The maximum penalty for disclosing such information is 5 years, the maximum penalty for engaging in cruel, inhumane or degrading treatment is 2 years.
9. Additional safeguards should be put in place The Bill permits preventive detention orders to be granted *ex parte*. There should be provision for the involvement of a Public Interest Monitor (PIM) at the stage when an order is initially sought, and at all other stages.
10. The proposed law has a potential for misuse by zealous officials against individuals who have not committed any crime, and do not intend to commit any crime.
11. The impact of the loss of safeguards is severe:
 - a. people can be detained on the basis of flawed intelligence or false claims by malicious accusers. There are inadequate safeguards to prevent detention orders being made in such cases in the first place, and no realistic scope to challenge them once they have been made; and
 - b. there is a potential for people who have never been charged with an offence to be detained under control orders that are renewed from one year to the next. This is the unhappy experience in other countries, including South Africa during the apartheid era, which abandoned traditional protections under the law in favour of executive detention under anti-terrorism legislation.

12. The Bar Association of Queensland and the Queensland Law Society support the Law Council of Australia's submission regarding amendments to the sedition laws and see that there is no case to be made for any extension.
13. The question must be asked: Is a Bill with so many vices necessary? Current laws, both old and new, create a range of offences against terrorist acts. Law enforcement and security bodies have extensive powers to deal with these activities. As recently as May 2005, ASIO told a Parliamentary Committee that it was satisfied with the existing powers that it had.
14. In summary:
 - a. current laws have not been shown to be inadequate to counter threatened criminal acts; and
 - b. the Bill creates an unprecedented system of executive detention which, due to inadequate safeguards, permits arbitrary detention of individuals.

3. These laws are contrary to freedoms and principles enshrined in our Constitution and the common law

15. The Bill creates a system of detention and control by government officials, based on information that cannot be effectively challenged. It is not a system based on evidence that is tested in judicial proceedings.
16. Preventative detention and control orders may be imposed on persons who are not suspected of committing any crime, who have not been charged with any crime, and who do not intend to commit any crime. Yet, detainees may be jailed in the same places as convicted criminals.
17. A system of detention and control of this kind is punitive in character and contrary to principles and freedoms enshrined in our Constitution and in the common law. Under our system it is part of the exclusively judicial function of adjudging and punishing criminal guilt.¹
18. Freedom from arbitrary detention is part of our common law inheritance² and also enshrined in international law, including conventions to which Australia is a party.³

¹ *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 27-28 Brennan, Deane and Dawson JJ

² *A v Secretary of State* [2004] UKHL 56 at [88]; [2005] 3 All ER 169 at 218

³ Such as the International Covenant on Civil and Political Rights

19. As outlined in this paper, the Bill contains few safeguards of any practical value. Detainees cannot communicate in confidence with lawyers in order to provide proper instructions to challenge orders. Information upon which orders are made, confirmed and renewed is placed beyond effective scrutiny and challenge. Detainees who challenge their detention and their lawyers are not entitled to access the information upon which an order was based. Those against whom control orders are sought face a similar plight.
20. Preventative detention and control by government officials or by courts that do not apply the procedures characteristic of courts is offensive in point of principle.
21. People can be detained on the basis of flawed intelligence or false claims by malicious accusers. There are inadequate safeguards to prevent detention orders being made in such cases in the first place, and no realistic scope to challenge them once they have been made.
22. The proposed law has a potential for misuse by zealous officials against individuals who have not committed any crime, and who do not intend to commit any crime.

2.1 Current Laws that Prevent and Punish Terrorists Acts are Adequate

23. The current laws, both old and new, adequately protect us against terrorist acts. No fewer than thirty-one Commonwealth acts have provisions which provide for the prevention and prosecution of terrorist acts.⁴
24. Before the Parliament “strengthens” the existing laws by removing vital protections for human rights, there should be an assessment of whether the proposed measures are proportionate to the threats that the Government seeks to counter. Two reviews of the existing laws are ongoing and should be completed and considered before changes are made.⁵
25. Reviews and analysis of the existing system should include an explanation of how important is the right affected, how serious is the interference with it and, if it is a right that can be limited, how strong is the justification for the interference, how many people are likely to be affected by it, and how vulnerable they are.⁶

⁴ Listed at:
www.nationalsecurity.gov.au/agd/www/nationalsecurityHome.nsf/headingpagesdisplay/9F291545F46DC7B9CA256E43000565D4?OpenDocument

⁵ One is a statutory requirement of the *Security Legislation Amendment (Terrorism) Act 2002* the other is the parliamentary all-party committee reviewing ASIO’s questioning and detention powers

⁶ UK Joint Committee on Human Rights, *Report of the Joint Committee on Human Rights* (6 May 2004), paragraph 47

26. No major deficiency has been identified by the people exercising the powers which raises the question as to why the powers need to be “strengthened” to the point that basic rights and protections are removed.
27. No statement of senior ASIO or police officials demonstrates the need for increased powers. In particular there is no explanation, given the broadly defined offences contained in the existing legislation, of why standard arrest procedures cannot be applied. Rather, the following has occurred:
- (a) The recent arrests and laying of charges against 17 people with terrorist related offences was achieved under the existing laws by a joint task force of federal and state police with ASIO.
 - (b) It has been suggested that the small change of the indefinite article in the existing anti-terrorist act allowed the Australian Federal Police, the Police in New South Wales and Victoria to work with ASIO to make these arrests. The actions taken under current laws call into question the need for the substantial changes now proposed.
 - (c) The Commissioner of the AFP confirmed on the 7:30 Report that the police already have adequate powers to use firearms in appropriate circumstances.
 - (d) In May 2005, Mr Richardson, former head of the Australian Security Intelligence Organisation, said, before a parliamentary all-party committee reviewing ASIO’s questioning and detention powers:

“I would note [the legislation] has worked very smoothly so far. To be frank, there was a concern [it] would be unduly complex and difficult to administer. [What] was initially introduced into the Parliament, with our support and advice, was much simpler and, of course, tougher. We debated among ourselves whether the compromises [forced on the Government by a hostile Senate] would make it unduly complex. Our concerns were misplaced. We were wrong on worrying about it. The balance has so far been very workable...”⁷

⁷ May 19 2005, transcript of proceedings

4. Monitoring of Lawyer's Contact with a Client subject to a Preventative Detention Order

28. Clause 105.38 of the Bill *requires that* communications between a lawyer and a client who is subject to a preventative detention order be monitored by the police.
29. The violation of confidential communications between lawyer and client is unprecedented and intolerable encroachment on basic principles of confidentiality of communications between a lawyer and their client. Law enforcement bodies permit conversations between clients and lawyers to be conducted in confidence and without being monitored. This includes conversations between people who have been charged with offences and their lawyers. Here, conversations between persons who have **not** been charged with any offence are monitored.
30. Lawyers have been professionally obliged to maintain their clients' confidences since Elizabethan times. The rule promotes the public interest by encouraging the client to make full and frank disclosure of all the relevant information to his or her lawyer.⁸
31. Lord Hoffmann has described the client's right to keep communications with his or her lawyer confidential as "a fundamental human right long established in the common law." He explained that it "is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice."⁹
32. There is inadequate protection against the prejudicial use of the contents of monitored conversations. Communications between a lawyer and detained person for one of the allowed purposes relating to (a) obtaining advice/giving instructions regarding challenging the issuing of the preventative detention order or (b) the detained person's treatment while in detention cannot be used as evidence in court proceedings. This suggests that any communications between the detained person and their lawyer beyond the scope of the allowed purposes may be **admissible**.
33. There is no real protection afforded by the prohibition on disclosure by a police monitor (s 105.41(7)). Other persons, including law enforcement officials, are not inhibited from accessing and making whatever use they care to of the contents of the recording (save for the limitation on admitting certain parts of it is evidence (s 105.38(5))).

⁸ *Grant v Downs* (1976) 135 CLR 674 at 685

⁹ *R v Special Commissioner and Another, Ex P Morgan Grenfell & Co Ltd* [2002] UKHL 21 at [7]

34. Information which is not admissible as evidence may be used for investigative purposes.
35. Where monitoring a detained person's communication with their lawyer requires an interpreter, interpreters are only provided where it is "reasonably practicable" to do so (s 105.38(4)). Should an interpreter be unavailable to assist in monitoring, the detained person would not be entitled to take legal advice for some period of time.
36. In summary, the provisions contained in s 105.38 attack both the right of a person to access skilled legal advice and the right to confidentiality of legal advice. It also deprives persons of any real opportunity to give proper instructions to a lawyer to challenge their detention, making any right to challenge their detention practically useless.
37. The provision to monitor contact with a lawyer is an unwarranted and extreme measure and should be removed from the Bill. Otherwise the supposed safeguards in the Bill are severely weakened.

5. Control orders

5.1 Introduction

38. The notion that a person can be deprived of their liberty without trial and conviction for a substantive offence for which the sanction is imposed is dangerous and unwelcome as it is contrary to the fundamental principle of detention only be applied when a person is to be charged and tried. Yet, that is the effect of these provisions.
39. That is not the only objection, however, as concerning as that aspect is.
40. The repugnance of these provisions is compounded by fundamental denials of rights to liberty which have been the cornerstone of our democracy.

5.2 The Scheme of the Provisions

41. Control orders, once made, have the effect of imposing significant and disturbing restrictions on the liberty of the person subject to those orders. These orders restrict the rights of a person subject to the order to engage in a range of activities which are not only ordinarily accepted as the right of the citizen to carry out unrestricted but are, in some cases, necessary activities.

For instance, orders can be made preventing a person from earning an income by restricting the ability to work. Restrictions can be imposed on a person's right to move freely in Australia or overseas, attend certain events or places, possess certain items of property or from using telephones, internet or any other form of technology. The subject may be ordered to wear a tracking device and to remain at their home or some other "specified place". The order also will have an impact on third parties who will not be given a right to be heard as it affects the ability of the subject to associate with others. In addition, the person can be required to undertake "specified counselling or education". Without any need for an arrest, the database that the authorities hold on the subject can be with photographs and fingerprints even though the supplemented person never has to appear before a Court on a criminal matter.

5.3 The Regime

42. A control order is described as "interim" although it can fall into one of four (4) categories:

- (a) interim control order;
- (b) urgent interim electronic order;
- (c) urgent interim in person order; and
- (d) confirmed control order.

43. The need for such an array of orders is not readily apparent or explained.

5.3.1 No case is made out for the need for urgent orders

44. The Second Reading Speech deals briefly with control orders by indicating a two phase process, with no mention of urgent orders. Whilst this is strictly true, it does not present the full picture.

The only explanation for the urgent interim electronic orders is that contained in the Explanatory Memorandum which refers to the provision being "designed to deal with the situation where an AFP member experiences difficulty attending at the location of the issuing Court to seek an interim control order". No explanation is given for an urgent interim in person control order and why that is needed in addition to the preceding provisions dealing with the initiating of an interim control order process and obtaining such an order.

45. The distinguishing features of the urgent interim control orders are that they do not require, as a prerequisite, the obtaining of the Attorney-General's written consent prior to a request being made.
46. No definition is provided of "urgent circumstances" to give a guide to an applicant or to a Court as to what might constitute a circumstance of urgency. Such definition is needed.
47. For urgent orders, the Attorney-General's consent must be obtained within four (4) hours of the request being made. This leads to the potentially cumbersome and embarrassing situation of a Court making an order which is served and the order subsequently being "undone" by the refusal of the Attorney-General to give consent (or the failure to obtain the consent). The person served with the order will then have to be served with an "annotated order" which shows that that order is no longer in force.
48. This is a messy and undesirable situation which causes needless confusion and intimidation to the subject. The urgent order regime should be abandoned.

5.3.2 Notice

49. All applications should be on notice. The ex parte provisions should be removed. It does not assist to suggest that the Court should be encouraged to make its own inquiries through provisions such as Section 104.4(1)(b) which allows the Court to receive and consider "such further information (if any) as the Court requires". This section would not, on a plain reading, appear to provide authority, let alone encouragement, for a Court to refuse to make an order until the Court had heard from the subject. It is noted that the Explanatory Memorandum contains no explanation of the provision and therefore no guidance to the Court.

5.3.3 The Court's decision

50. The tests to which a Court must have regard in deciding if orders are justified, on the balance of probabilities, are that:
 - (a) the order would substantially assist in preventing a terrorist act (104.4(1)(c)(i)); **or**
 - (b) the proposed subject of the order has provided or received training to or from a listed terrorist organisation (104.4(1)(c)(ii)).

51. That is, clause 104.4 allows an order to be made under the training ground (104.4(1)(c)(ii)) even if the order is not necessary to prevent a terrorist act. The position is not clarified but only confused by the requirement (in 104.4(1)(d)) that the Court be satisfied that the obligations, prohibitions and restrictions attached to the order are reasonably necessary, appropriate and adapted for the purpose of protecting the public from a terrorist act. It would seem that, when the training ground is relied upon, the Court can only consider the risk to the public in fashioning the terms of the control order. Otherwise, it must make the control order. Also, the Court can rely on training received many years beforehand.

Scenario 1 – Section 104.4(1)(c)(ii)

Jenny was an 18 year old Australian backpacker at the time that she travelled throughout Europe in 1991 and 1992. She had a relationship with a young Macedonian man she befriended while working in a café. She went to Macedonia where she attended Kosovo Liberation Army training with her boyfriend for a short time. The relationship broke up and she returned to Australia in 1993. They remained in contact and still email each other from time to time. Jenny and her family socialise on occasions with Australian Kosovar families she has befriended through her Macedonian friend. Jenny's friend is active in Kosovo politics being a member of the Democratic Party of Kosovo. However, the AFP has been given intelligence which links him with the National Liberation Army which is carrying out terrorist activities against the government of Macedonia (for the purposes of this scenario, the NLA is a listed organisation). Emails between them are passed to the AFP which interprets some of them as indicating Jenny's support for her friend's activities. The AFP also has intelligence that some of Jenny's friends in Australia have links with the NLA. Jenny is unaware of any of this. The AFP, once it learns this information, obtains a control order which is served on Emily at the pre-school where she is dropping off the first of her three children. The control order seeks restrictions on Jenny's use of computers, communication with her friend and her Kosovar acquaintances and that she attend specified counselling or education. The AFP argue that these orders are designed to protect the public from a terrorist attack by deterring Jenny from associating with terrorist suspects.

52. When this is coupled with a system which does not allow the subject of the order or that subject's lawyers to know the full case against the person, the dangers of the provision become obvious.
53. Notably, the first test does not require the Court to consider whether the person the subject of the order is in any way personally involved in a possible terrorist attack. For example, would it be sufficient that a young person fits the profile of someone susceptible to being involved in such activities. Thus, a control order can be made when there is no evidence of any planned attack and on the simple basis that on the balance of probabilities, at some time in the future there will be an attack. It is not necessary to show that the person will even be or is likely to be a participant in the attack. It is possible under this legislation for the Police to mount a case in the following scenarios:

Scenario 2 – Section 104.4(c)(i)

A Muslim youth group operates at a mosque. One of the leaders at the mosque espouses jihad of a kind that is found to be or believed to be of a terrorist nature. The forty or fifty youths who are members of this group are devoted to this particular teacher. No specific threat has been made and there is no evidence of any target. Police intelligence, indicates that thirty of the youths fit the profile of types who are susceptible to be influenced to commit terrorist attacks. The AFP requests an interim control order against the thirty members of the youth group on the basis that they fit the profile of persons who would commit terrorist acts some time in the future.

Scenario 3 – Section 104.4(c)(i)

Approximately 150 people are financial members of a Gaelic athletic association which pursues Gaelic sports. Many members are young professionals. Sectarian violence occurs again in Ireland and British troops move in. The Brisbane Athletic Association marches as a group in St Patrick's Day parade holding banners deploring the British action and supporting Republican viewpoints. Most do it "for a bit of a laugh". The Association sponsors a fundraising event for families of prisoners incarcerated by the troops. The AFP has information that the organisation who is suspected to have formerly financed the purchase of weapons and explosives in the Northern Ireland conflict. The Federal Police want to put a stop to the fundraising and support activities and believe this can be done by having members of the athletic association subject to control orders. It is believed that this will substantially assist in preventing a terrorist attack in Northern Ireland or in Britain by depriving funding for weapons etc. the request is made and approved by the Attorney-General.

54. As to the second test – that a person has provided training to or received training from a listed terrorist organisation – there is no requirement that the training be terrorist training. Section 101.2 of the Code links the training, in creating an offence, to terrorism activity. It is curious that Section 104.4 does not require this. The following scenarios could apply:

Scenario 4 – Section 104.4(1)(c)(ii)

A Brisbane flight school has provides training to persons to obtain their pilot's licence. It markets largely to South East Asia and the Middle East which forms the backbone of its clients. It transpires that two students are members of a listed terrorist organisation. The owner and trainees are unaware of this. The AFP can apply for control orders. The orders sought prevent the school taking any students without the names and contact details being provided first to the AFP.

Scenario 5 – Section 104.4(1)(c)(ii)

Jenny attends a private foreign language school to learn further Indonesian. It transpires that the language school is owned by a listed terrorist organisation. Jenny does not know this as it is kept secret from students. Jenny has received training (in a language) from a terrorist organisation. The AFP has assembled a file on Jenny's travels throughout Indonesia and identifies trips to a number of places of concern. A control order can be made requiring Jenny to wear a tracking device upon her return to Australia.

Scenario 6 – Section 104.1(1)(c)(ii)

Queensland Education Services Pty Ltd runs an English language and computer training college which markets into the Middle East, Thailand, Malaysia and Indonesia. A number of the students attending are found by the AFP to have possible links with listed terrorist organisations. The AFP produces evidence that these students are sent to the college to gain skills which may be useful. This is not known to the company or its Directors. There is no defence that the person was unaware that the persons were being specifically sent for English language and computer training to further the aims of the listed terrorist organisation. The AFP applies for a control order to stop the training of 80 students. Such an order will destroy the business.

5.3.4 The nature of the order

55. The orders are in the nature of injunctive remedies and there is no reason why the tried and tested processes that apply to obtaining injunctions ought not be adopted here.
56. The failure of the law to link orders with any pending or detected criminal act and to effectively have a bail order or what is tantamount to a refusal of bail without any criminal charge being proffered is repugnant.
57. If this regime is to be introduced over our concerns, orders under these provisions must always be made in the context of a pending criminal charge.

58. In that regard, there should be an element akin to the “serious issue to be tried” element in injunction proceedings.
59. Additionally, there should be a balance of convenience test which spells out clearly for the Court the matters to be taken into account not only on the applicant’s side but on the subject’s side. Such matters should include:
- (a) the extent to which restrictions on movement will adversely affect the subject;
 - (b) the undesirability of arbitrary detention;
 - (c) the extent to which the person’s common law right to privacy is impacted;
 - (d) the extent of impact on the subject’s ability to express themselves;
 - (e) the impacts on the ability to engage in peaceful political protest, assembly or association with others;
 - (f) the impacts on the ability to contact elected representatives;
 - (g) whether there is any discriminatory aspect; and
 - (h) the extent to which a fair trial and access to independent legal representation is impeded.
60. There should also be provision for the person to be compensated in the event that an interim order is found to be unjustified and the person has suffered damage as a result. In that regard, the applicant should provide an undertaking to the Court as to damages.
61. This is an important element given the well publicised difficulties of Cornelia Rau and Vivian Solon to achieve any expeditious resolution of what are clearly justifiable claims for compensation in circumstances where each had her liberty infringed in a most fundamental way.
62. A paradox in the drafting of the order is that it could be used for “protective detention” purposes to secure an intended victim of a terrorist attack. This is demonstrated in the following scenarios.

Scenario 7 – Section 104.4(c)(i)

Gerald is a Federal independent politician. He has made consistently virulent attacks, under parliamentary privilege, against individuals he labels as Muslim extremists and terrorists. He has repeated those inflammatory attacks on his website and in the media. He has leaked a DVD commencing, “If you are watching this, I have been assassinated”. He goes on to make a number of outrageous attacks on various minorities. The AFP receives credible information that George’s continuing provocative behaviour in Parliament and outside it is motivating a possible terrorist attack (including an attack on Gerald’s electorate office). The AFP, whilst concerned about parliamentary privilege and restricting an elected MP, determines that one way to prevent the attack is to restrict Gerald’s activities. The AFP decides that it would substantially assist in preventing a terrorist attack to have Gerald subject to a control order which prevents him from communicating with the media, using telephones or posting material on his website unless it is approved by the AFP. A request is made.

63. To those who argue that it is not detention in custody, it is important to point to the obligations, prohibitions and restrictions that may be imposed. Under Section 104.5(3) these could include a requirement to report to specified persons at specified times and places and a requirement for the person to participate in specified counselling or education. These provisions can be used separately and jointly to effectively detain a person. There is no requirement as to the reasonableness of the location to which the person is required to report nor the period of time over which the reporting is to occur.

Scenario 8 – Section 104.5(3)

Kevin is 19 years old and has become involved with an ultra right wing skinhead group which espouses the ideological cause of white supremacy. Members of the group have fire-bombed Asian restaurants. He is on the fringes of the group. He lives in Perth. The AFP applies for a control order as a means of breaking the group's organisation. Kevin is named by an informant as being one of those involved in the fire-bombing. This is not true. An ex parte interim control order is obtained on the grounds this would prevent further fire-bombings. Kevin is not given any details beyond the allegations on the grounds that to do so would identify the informant. The AFP and WA Police consider the informant's evidence too unreliable to prefer criminal charges. The AFP have access to a military facility in Queensland where Kevin can be kept under observation and where counselling and education can be provided. The AFP obtain ex parte a prohibition or restriction requiring Kevin to remain in a compound at the military facility for six months and to participate in counselling or education. The Court determines that breaking up the group will substantially assist in preventing further fire-bombings and that the requested restriction is reasonably necessary and appropriate and adapted to preventing a terrorist attack. Kevin is employed as an apprentice mechanic whose boss also has links to the group. The Court determines on the evidence presented by the AFP, in balancing the risk against the impact on Kevin, to impose the restriction.

5.3.5 The form of order

64. Section 104.7(5) which allows the AFP to prepare the form of order obtained by electronic means has a number of curious effects.
- (a) There is no requirement on the AFP to wait until the Court finalises the final terms of the order. By Section 104.7(4) the AFP member is entitled to complete a form of order "in terms substantially corresponding to those given by the issuing Court".
 - (b) It would appear to be the case that the AFP member is permitted to serve the AFP order under Section 104.12 rather than the final form of the order made by the Court.

65. This portrays a singular lack of trust in the Courts to prepare orders in an expeditious manner and leaves open the possibility of an erroneous form of order being prepared and served.
66. The Bill allows police to prepare their own orders which may be inaccurate. As breach of a control order carries with it a maximum term of imprisonment for five (5) years, it is important that the person is served with the correct form of order.
67. It does not seem to be an excuse for breaching a Court made order that the person was following the terms of an order authored by the AFP.
68. There is no provision for compensation for someone who has received an erroneous order and has acted to their detriment as a result.

5.3.6 Secrecy and Legal Representation

69. The secrecy provisions surrounding the request for orders adversely and irreparably affects the right of the subject to adequate legal representation.
 - (a) It defies all standard and accepted rules of fair hearing that the person will not know the case to be met prior to the deprivation of their liberty.
 - (b) The legislation makes unacceptable intrusions into the lawyer/client relationship of trust and confidence.
70. When a Court hears the application, it will have a sworn statement of the facts provided to the Attorney-General, but the facts do not have to be sworn to at the Court hearing of an electronic application. This is a marked anomaly.
71. The Court comes to a conclusion based on facts put before it by the Police. Those facts are not provided to the subject or to the subject's lawyer, instead all that is supplied is a "summary of the grounds on which the order is made".
 - (a) Information may be omitted from the summary of grounds if the disclosure is likely to prejudice national security.
72. The Bill does not require reasons to be given by a Judge for making any of the orders.

73. The Bill is silent but it appears that the Police rather than the Court are responsible for preparation of the summary of the grounds, and the Police decide not only as to what goes into the summary but what information is likely to prejudice national security.
74. A summary of grounds could merely contain a statement that the order was made because it would substantially assist in preventing a terrorist attack or that it is made on the grounds that the person has provided training to or received training from a listed terrorist organisation.
75. The subject may not even be told the identity of the listed terrorist organisation if this is likely to prejudice national security.
76. The Bill also makes unacceptable intrusions into the lawyer/client relationship. The justification for the intrusion is in the Explanatory Memorandum:
- “As is the case with organised crime, it is not inconceivable that some lawyers may be directly involved in the organisation or terrorist activity or are capable of passing on information that could be used to organise a terrorist act.”*
77. The independence of the lawyers role can be compromised through the threat of application of a control order on the lawyer, which may inhibit their willingness to fearlessly represent their client.
78. Once ex parte orders have been obtained, the legal representatives of the subject are seriously hampered in presenting a case.
79. Not only is the defence is not ever privy to any of the material put before the Judge when the order is made but the summary of grounds can be further restricted on public interest immunity grounds (national security).

5.3.7 The Control Order Regime and lack of natural justice.

“Evidence” at the interim control order stage.

80. A Court making an interim control order, should under Clauses 104.3 and 104.4 of the Bill, be provided with a request from the Attorney General, including a “statement of the facts relating to why the orders should be made.”

81. It is unclear whether that statement is required to be sworn to. It ought to be sworn and it ought to be made clear that the “statement of facts” is the same as the “information” which is required to be sworn and to be provided to the Court (Clause 104.3(a)(ii)).
82. The Court can require “any further information” at the interim application stage the Court. It is not clear whether this information need be in any admissible evidentiary form or even be in writing (Clause 104.4(1)(b)). It should be made clear that it must be.
83. The Court should state the bases on which the order is made and to require that the statement of reasons to be provided to the persons affected and their lawyers in due course. Clause 104.5 ought be amended to this effect.

“Evidence” at confirmation or variation stage

84. Subdivision D (Clauses 104.12-104.22) and Subdivision F (Clauses 104.23-104.31) allow for persons who are subject to interim orders to have some involvement in whether orders are “confirmed” or varied.
85. The fundamental principles of natural justice would insist that persons exposed to such orders, (and their lawyers), must be given every reasonable opportunity to demonstrate why an interim order ought not be confirmed or an order varied.
86. As it stands neither lawyer nor client are entitled to see the evidence and documents that were before the Court at the interim stage. There is no reason in principle why they should not. The Bill should say so.
87. Apart from the order itself, a person’s lawyer is presently only entitled to be provided with a copy of the summary of the grounds on which the order is made (Clauses 104.12 and 104.13). Peculiarly, it is not the issuing Court that prepares the summary (although it should be), but a member of the AFP, and then not necessarily the one who made the application. The summary may or may not reflect the true basis for the grant of the interim or confirmed order. For example, the Court may have received further material at the interim hearing stage. In that case, the summary will not reflect the true position.

88. Non-disclosure of the summary is presently allowed at the discretion of the AFP where it is contended that the information is likely to prejudice national security (Clause 104.12(2)). There ought be no basis to refuse to supply it unless a Court so orders. For all intents and purposes those representing the persons subject to such orders, and the persons themselves have no practical capacity to resist confirmation of the order without it.
89. Clause 104.14(2) and the existing provisions of the *National Security Information (Criminal & Civil Proceedings) Act 2004* could easily operate to allow the Court to prevent disclosure of material.
90. It is extraordinary that Clause 104.14 does not ensure a right to be heard, a hearing based on admissible evidence, and the application of principles of natural justice for such hearing, without exception. The procedural provisions of Clause 104.14 which concern the process of confirmation of interim control orders does not guarantee, and there ought to be a guarantee, that:
- (a) parties and their lawyers be entitled to be present throughout the hearing;
 - (b) the rules of evidence apply to any material relied upon and an opportunity is given to test that evidence;
 - (c) there otherwise be a hearing applying the principles of natural justice;
 - (d) the Court determine the case on the merits, and comprehensively state its reasons and the evidence upon which any decision to make an order is based; and
 - (e) the decision of the Court ought be the subject of a right of appeal to a competent court and the Appeal Court entitled to review the decision both on the merits and as to the legality of the decision.
91. It may be implicit (because one is entitled to produce evidence or make submissions), however Clause 104.14 does not presently specifically require that evidence be adduced in the presence of the subject or his lawyer. It should do so.

5.3.8 Confirmation of the Interim Order

92. In relation to confirmation of the interim control order, the Court is required to consider the original request as well as any evidence adduced and submissions made at the confirmation hearing.

93. The problem for the citizen is that the person does not know what evidence to adduce because there is no requirement for the disclosure to the defence of the request information presented to the Court on the earlier occasion. Whilst the Court can control its proceedings, the information may be quarantined from the defence on the basis of a public interest immunity claim.
94. Further, there are risks for a person who does not understand the order in having an order made in their absence. While the Police are required to ensure the person understands the information provided there is no sanction if the Police fail to comply with this requirement.
95. It is uncertain whether the Court has any latitude to grant an adjournment beyond the “specified day” for the confirmation hearing. Section 104.14 prescribes what the Court can do on a specified day which, where the person attends or is represented, is limited to declaring the order void, revoking the order, confirming the order, or varying the order. There may be a discretion to adjourn because of the use of the word “may” and the peculiar situation that would arise in the event of a person not turning up. It should be made clear that the defence is entitled to adjournments to gather evidence and prepare a case.
96. A declaration that a control order is void is a declaration that the order was of no force and effect and, presumably, should not have been made in the first place. Is the person entitled to be compensated for the effects of a void order?
97. Whilst control orders operate for a period of 12 months, they can be continually rolled over by further applications. This means that they can amount to an “indefinite sentence” subject to the 10 year sunset period. No further control orders should be available after the first order. The time should have come by that stage for criminal charges to be preferred, if any otherwise the person should be released from further control.
98. In relation to persons aged between 16 and 18, the power to seek successive control orders means that persons in that age group, too, can be subject to an “indefinite sentence”. The traumatising effects on a youth of multiple Court appearances on successive applications is obvious. This provision may have the unintended effect of traumatising young people rather than in fact being sensitive to their special circumstances.

5.3.9 Non-Appearance – Restriction on Court’s Discretion

99. The Court’s power to confirm an interim control order, under s104.14, restricts the court from revoking or varying the interim order in circumstances where the subject of the order does not appear at the hearing.
100. Section 104.14(4) states that the court may confirm the interim order where a party or his/her representative does not appear. The power to declare void, to revoke or to vary the interim order on the other hand appears to be provided for only in s104.14(6) and (7).
101. The concern arises because s104.14(5) provides that the court may take the action in subs (6) or (7) “if the person... or a representative” attends the hearing. That is, if the person or their representative attends the hearing, the court has the power to declare void, revoke or vary the order, but no provision is made for the court to do any of those things if there is no appearance for the subject. That construction of the section gains weight, from subs(4), which specifically states that the court may **confirm** the order in the event of no appearance by the subject.
102. Accordingly, if that is the correct construction, it leads to the absurd result that the court, in circumstances where there is no appearance by the subject, is constrained to either confirming the interim order, or making no order (effectively allowing the interim order to continue). That would be so even where the court was convinced, for whatever reason, that the basis for the interim order was unsustainable, or that it had been improperly made.

5.3.10 The Queensland Public Interest Monitor

103. The Queensland Public Interest Monitor will have little effective role either in Commonwealth applications or State applications.
104. The PIM has no functions in relation to powers exercised under the Commonwealth legislation by the AFP other than those functions conferred directly by the Commonwealth (see Explanatory Memorandum for Section 104.31). Under the Commonwealth legislation, in AFP applications, the PIM:
- (a) has no right to be present or notified of the request to the Court;
 - (b) can be present at the confirmation hearing (unless already a representative of the subject);

- (c) is entitled to receive notice of an application for revocation or variation by the AFP or the subject and to present evidence and make submissions on the application; and
 - (d) is entitled to be given notice of an application by the AFP to add obligations, prohibitions or restrictions to the order and adduce additional evidence and make additional submissions on the application.
105. If the Queensland legislation mirrors the Federal legislation in identical terms, the PIM will have no meaningful function such as that exercised presently under Queensland law. The role of the PIM is well accepted in Queensland having originally been proposed and installed as an institution by a National Party government and opposed by the Labor Opposition. It has now been accepted by the Labor Party in government. The role is vital and important to ensure the public interest is effectively represented but can only be meaningful if the PIM is notified of the application and is present from the very first hearing.

6. Preventative detention orders

6.1 Both an initial preventative detention order and a continued preventative detention order should only be made on the order of a current member of a higher Court.

106. The presently proposed system, under which an initial preventative detention order is made by a senior member of the AFP and a continued preventative detention order is made by a person selected by the Commonwealth Attorney-General from a very wide class of “judicial” persons, is unacceptable because:
- (a) a person can be detained without charge for a period of up to 24 hours on the application by one AFP member to another AFP member;
 - (b) a person could be detained without charge for a period of up to 48 hours on application to a retired member of the judiciary, who is nothing more, nor less, than a private citizen;
 - (c) a person could be detained without charge for a period of up to 48 hours on application to a person, such as a senior member of the AAT, who does not possess the qualifications of a judge of a superior court, such as a judge of the Federal or Supreme Courts;

- (d) the power to order the detention of a person without charge is invested not in a particular court, but in certain members of courts who are selected by the Attorney-General; and
- (e) the system, as proposed, in terms of the identity of an issuing authority, does not provide, either in actuality or as a matter of perception, a sufficient level of judicial oversight for such serious provisions. It proposes a regime that can only bring the process into disrepute in the community from which the person detained has been drawn or quite probably the wider Australian community.

6.2 The system should require reasonable steps to be taken before an extension of an order is made or a continued preventative detention order is granted.

- 107. Another difficulty with the proposed Bill is that it does not require an explanation for why the purpose was not fulfilled during the initial period of detention. In other words, before an extension of an initial preventative detention order is made, or a continued preventative detention order is granted, or an extension of a continued preventative detention order is made, it should be necessary for the applicant for such an order to demonstrate that during the initial period of detention and any subsequent extensions that have already past, that all reasonable steps were taken to fulfil the purpose for which the initial order was originally made.
- 108. For example, in the case of an initial preventative detention order granted for the purpose of securing certain evidence of a terrorist act, it should be necessary for an applicant for any extension of the initial order to demonstrate that all reasonable steps were taken during the initial period in order to secure the particular evidence.

6.3 A lawyer should be entitled to view all relevant documents.

- 109. The Bill specifically provides that a lawyer is not entitled to see or be given a copy of any document other than the preventative detention order, the summary of the grounds on which the order was made, or the extension or further extension of the order. The consequence of that restriction is that it is impossible for a lawyer to adequately advise a client as to the validity of an order other than in purely technical ways apparent on the face of the order.

6.4 A lawyer needs to be able to consult with other lawyers.

110. The Bill makes it an offence for a lawyer to disclose any information received by a lawyer in the course of contact with a person being detained under a preventative detention order other than for certain limited purposes, including for the purposes of proceedings in the Federal Court or making representations to an AFP officer. The problem with these provisions is that they seemingly prevent the briefing of counsel by a solicitor, consultation of a lawyer with another lawyer or investigation by a lawyer of the facts and circumstances surrounding the detention.

The Explanatory Memorandum states at page 64:

“There is no provision for the person’s lawyer to disclose information he or she lawfully obtains from the person under new section 105.37 because if the lawyer wishes to seek advice from a barrister, for example, it should not be necessary to disclose the fact of the particular person’s detention to that barrister.”

111. It is not clear that the offence contained within the Bill is limited to circumstances where the subject of a preventative detention order is identified, as opposed to a situation in which information communicated in the course of discussion with the subject of a preventative detention order is disclosed. Offences in the Bill must be clearly defined.

6.5 Cruel, inhumane and degrading treatment should be appropriately punished.

112. The Bill makes it an offence for the subject of a preventative detention order to be treated in a manner that is cruel, inhumane or degrading. It also makes it an offence for a lawyer and many other persons to disclose information received in the course of contact with the subject of a preventative detention order. Extraordinarily, the maximum penalty for disclosing information is 5 years, while the maximum penalty for engaging in cruel, inhumane or degrading treatment is only 2 years.
113. That contrast in penalties does not in actuality or as a matter of perception suggest that there is an adequate attempt to protect the right of those subject to preventative detention orders. The disparity suggests that disclosure of facts by a lawyer is more damaging than cruel, inhumane or degrading treatment.

6.6 Disclosure Offences

114. The Bill makes it an offence for communications with a person subject to a preventative detention order to be disclosed in a number of circumstances. Liability for disclosures may arise for detainees, their lawyers, their parents or guardians, interpreters who assist in the monitoring and possibly even police officers who communicate regarding the detainee.
115. According to proposed sections 105.34, 105.45 105.41(3) a detainee's communications to a family member is restricted to informing that person that the detainee is "safe but is not able to be contacted for the time being". In the real world, such a statement, without more, would be unlikely to indicate that someone was in fact safe. On the contrary, without information about where the person was and why they could not be contacted, a family member would suspect the worst.
116. What provision is made, for example, for a detainee who suffers from a medical condition that requires ongoing treatment from a doctor?
117. There is no provision in the Bill for the detainee's doctor to be contacted by or communicate with and treat a detainee.
118. There is no provision in the Bill for the Doctor to be contacted by a family member or lawyer. Presumably medical treatment for the detainee is left to the direction of the AFP.
119. According to section 105.41(2) there appears to be no scope under the Bill for an interpreter to be utilised *other* than for monitoring a detainee. If a detainee cannot communicate in English and their lawyer cannot communicate in their native tongue, how can proper instructions and advice be communicated? How could they even communicate at first instance? In view of the explanatory memorandum and its construction on 105.37 it would be an offence for a lawyer to, through an interpreter, repeat in the form of advice any information that the detainee gives the lawyer in the course of the contact. It would also be an offence for the interpreter to translate that information and disclose it to the detainee.¹⁰

¹⁰ section 105.41(6)

120. There is ambiguity between the explanatory memorandum and s105.41(2). Section 105.41(2)(d)(i) appear to extend to any disclosure for the purposes of proceedings in a Federal Court yet the explanatory memorandum seems to restrict the capacity of a lawyer to disclose information lawfully obtained from a detainee for the purposes of, for example, seeking advice from a barrister because “it should not be necessary to disclose the fact of the particular person’s detention to that barrister.”¹¹ How could any meaningful advice be obtained in these circumstances?
121. Section 105.41(3) makes it an offence for a parent/guardian to contact a lawyer to act on behalf of a detainee in relation to proceedings in a federal court for a remedy relating to the preventative detention order or the treatment of the detainee circumstances where the detainee is under 18 years of age or incapable of managing their own affairs and has not themselves contacted a lawyer. Contrast this with what a detainee can themselves do under section 105.37. That is you have less rights if you are the guardian of a vulnerable person who is a detainee then if you are a detainee;
122. It would be an offence for a parent or guardian to communicate the fact of detention to another parent or guardian unless that person has also been contacted by the detainee. A parent or guardian is restricted from communicating to other persons anything other than that the detainee is “safe but not able to be communicated for the time being”.

Scenario 9 – Section 105.41(3)

Randy a 16 year old is detained under a preventative detention order. Jim, Randy’s father, visits him in detention. As soon as he gets home Jim tells his wife (Randy’s Mother) what has happened to Randy. Jim is guilty of an offence against s105.41(3).

123. Section 105.41(5) makes it an offence for an interpreter to tell a monitoring police officer what is being communicated between the detainee and, for example, a lawyer. The utility of having an interpreter to monitor in these circumstances is questionable.

¹¹ Explanatory Memorandum

Scenario 10 – Section 105.41(5)

Imran is bought in by the AFP to interpret so that Sergeant Jones can monitor the conversation between Abdul and his lawyer Singh. Abdul says something to Singh in Afghani. Sergeant Jones asks Imran what was said. Imran tells him. Imran is guilty of an offence under s105.41(5).

124. Section 105.41(6) is worded so broadly it could potentially apply to communication between police officers regarding a detainee.

Scenario 11 – Section 105.41(6)

Detective Jones brings Jack in to the Roma Street Watch house and tells Sergeant Smith that Jack is on a preventative detention order. Sergeant Smith records this information in the Watch house log book. Sergeant Smith is guilty of an offence under s105.41(6).

Scenario 12 – Sections 105.41(1) & 105.41(6)

Omar, an Iranian Australian, is subject to a preventative detention order. He does not speak English well. He wishes to have an interpreter present to interpret for him to his lawyer (the Bill makes no provision for such an interpreter). Omar asks the interpreter to tell his lawyer that Omar has been subject to a preventative detention order for 2 weeks (Omar is guilty of an offence under s105.41(1)). Lin, the interpreter, does as Omar asks. In translating this to the lawyer Lin commits an offence under s105.41(6).

Scenario 13 – Sections 105.41(1), (2) & (6)

Jane is detained under a preventive detention order. She calls her lawyer Sarah but Sarah is with a client. She leaves a message with Sarah's secretary Ann, for Sarah to contact her urgently because she has been detained under a preventive detention order. Jane is guilty of an offence under s105.41(1). Ann sends Sarah an e-mail repeating what Jane said. Sarah is guilty of an offence under s105.41(6). Sarah rings the Watch house in order to speak to Jane. The Sergeant who answers does not know who Jane is so Sarah says "she was the one brought in on the preventative detention order". Sarah is guilty of an offence under s105.41(2).

125. With respect to sections 105.35 and 105.41(4), the exempted disclosure provisions: – as was pointed out by Walker SC and Roney in their advice what is the utility of an exemption from a detainee telling a person they are "safe but not able to be contacted for the time being". This in effect will become a by-word for the fact that a preventative detention order has been made.

7. Public interest monitor

126. There is a vital role to be played by a Public Interest Monitor (PIM) in all aspects of the operation of any law that provides for control orders and preventative detention orders.
127. The PIM should be involved at **all stages** of the processes by which these orders are obtained and reviewed. The PIM also should monitor their enforcement.
128. The need for a PIM, with access to all material upon which an application for such orders is based, is acute. This is particularly so if orders are to be granted in the absence of the persons who are to be subject to them, or those persons and their lawyers are denied access to all of the material upon which an order is sought.

129. A PIM would not inhibit the operation of the proposed law. It would enhance it. This has been the experience in Queensland, where a PIM plays a beneficial and helpful role.¹²
130. The concept of a PIM has operated very successfully in Queensland since that time, under both Coalition and Labor governments.¹³
131. The PIM has described his task as requiring a balance to be struck between two competing expectations:
- “The first is the community expectation that modern investigative agencies will have appropriate powers and technology available to them in combating contemporary crime. “The second expectation is that the erosion of fundamental rights of the individual that the granting of such powers necessarily involves will be minimised to the greatest extent possible by ensuring that the process of approving and using those powers is done strictly in accordance with the restrictions expressed by the Parliament.”*
132. The Bill would be considerably improved by imposing a requirement for a similar balance to be struck with respect to applications for control orders and preventative detention orders.

¹² The Public Interest Monitor (PIM) is a statutory officer in Queensland essentially established to counterbalance invasive law enforcement powers introduced in 1997 allowing warrants to be obtained from a Supreme Court judge or magistrate permitting:

- 1 the use of surveillance devices (listening, visual, and tracking devices installed in a private place, or in a public place, on a person’s clothing or on a moveable object), and
- 2 covert or undercover operations

Broadly, under the Queensland model, the role and responsibilities of the PIM are to:

- appear in the Supreme Court or Magistrates Court at the hearing of an application for a surveillance warrant or covert search warrant to test the validity of the application by:
 - i. presenting questions to the applicant police officer
 - ii. examination or cross-examination of any witness, and
 - iii. making submissions on the appropriateness of granting the application.
- monitor compliance by law enforcement officers regarding applications for the warrants (both before and after the issue of a warrant),
- gather statistical data about the use and effectiveness of surveillance warrants and covert search warrants,
- report, whenever appropriate, to the police commissioner or Crime and Misconduct Commission on non-compliance with the Act, and
- report to Parliament annually on the use of surveillance and covert search warrants.

¹³ The then National Party Police Minister, Russell Cooper, MLA introduced the Public Interest Monitor onto the statute book in the *Police Powers and Responsibilities Act 1997*. Since that time, the provisions have not been substantially amended and changes that have been made by the subsequent Labor government have strengthened the role of the PIM.

8. Stop and search powers

133. The Bill includes proposed amendments to the *Crimes Act 1914* and the powers of Police Officers to stop, question and search persons.
134. Importantly the proposed powers can only be exercised in a “Commonwealth Place” as defined in the *Commonwealth Places (Applications of Laws) Act 1970* which is defined as a place to which the Parliament has, subject to the Constitution, exclusive power to make laws.
135. The powers created provide that if a person is in a Commonwealth place and a Police Officer (which includes both Federal and State Police) suspects on reasonable grounds that the person might just have committed, might be committing, or about to commit a terrorist act then the Police Officer may request the person to give the following details:
- (a) their name;
 - (b) their residential address;
 - (c) their reason for being in that particular Commonwealth place; and
 - (d) evidence of their identity;
136. If a person fails to comply with the request or gives a name or address that is false in a material particular, they commit an offence punishable by 20 penalty units. The Police Officer must first explain that they have the authority to make the request and that it may be an offence if the person fails to comply for the offence to be complete. A specific defence is provided if the person has a reasonable excuse for not providing those particulars.
137. Additionally, a Police Officer may request the Minister to declare any Commonwealth place to become a security zone. Publication of this declaration is to take the form of a broadcast by a television or a radio station so as to be capable of being received within the place as well as being published in the Gazette and on the Internet. The effectiveness of publication seems questionable as a failure to properly publish the declaration has no consequences whatsoever.
138. If in a Commonwealth place a Police Officer suspects that a person has committed or is about to commit a terrorist act, or if a person is in a declared security zone, the Police Officer is empowered to stop and detain the person for the purpose of:

- (a) a frisk search;
 - (b) a search of anything that the Officer suspects is under the control of the person;
 - (c) any vehicle that is operated or occupied by the person; and
 - (d) any other thing that the Officer suspects on reasonable grounds that the person may have brought onto the Commonwealth place.
139. Safeguards relating to the conduct of the search including a prohibition upon the search taking any longer than is reasonably necessary or that a person is always given the opportunity to open a search item before using force to open it or damage it. No specific consequences are provided for failing to comply with the condition of the search.
140. The safeguards do not go as far as other similar legislation relating to the conduct of searches, for example, that the officer conducting the frisk search be a member of the same sex as the person (eg ASIO Act 1979 (Commonwealth) s25AA).