



Anti-Terrorism Bill (No. 2) 2005

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Law and Bills Digest Section

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Anti-Terrorism Bill (No. 2) 2005

Date Introduced: 3 November 2005

House: House of Representatives

Portfolio: Attorney-General

Commencement: Sections 1 to 4, Schedule 2, Schedule 9, items 3, 4, and 7 and Schedule 10, items 1–25, 29–32 commence on the day the Act receives Royal Assent. Schedule 1, item 23, Schedules 3 to 6, and Schedule 10, items 26–28 commence on the day after Royal Assent. Schedules 7 and 8 commence on the 28th day after the Act receives Royal Assent. Schedule 9, items 1–2, 6, 8–9 and 14–15, 18–24 commence on a single date to be fixed by proclamation. If any of the provisions do not commence within 12 months from the day the Act receives Royal Assent, they commence on the first day after the end of that period. Schedule 1, item 22, Schedule 9, item 5, item 10, items 12–13 commence on a single date to be fixed by proclamation. If any of the provisions do not commence within 6 months from the day the Act receives Royal Assent, they commence on the first day after the end of that period.

Purpose

The Bill would introduce the following measures:

- expansion of the grounds for **listing a terrorist organisation** to include organisations that ‘advocate’ terrorism—‘advocate’ includes ‘directly praising’ a terrorist act (**Schedule 1**),
- an expanded offence of financing terrorism (**Schedule 3**)
- preventative detention by the Australian Federal Police (AFP) without questioning or being charged with an offence for a maximum of 48 hours, which will be extended to 14 days under State and Territory legislation. Severe restrictions on who can be contacted, can be questioned by Australian Security Intelligence Organisation (ASIO) and communication can be monitored (**Schedule 4**)
- control orders which will be available for up to 12 months in the case of adults and three months in the case of those aged 16–17. Within these parameters, control orders may be repeated without limit up to 10 years. Control orders may impose severe restrictions on movement (such as a tracking device or house arrest), association, communication, work, and use of telephone and internet (**Schedule 4**)
- new powers for AFP and state/territory police to stop, search and question people, and seize items (**Schedule 5**)
- new powers for the AFP to **obtain information and documents** in relation to terrorism and serious crimes (**Schedule 6**)

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- increased **surveillance on aircraft and in airports**, ASIO/AFP access to passenger list information (**Schedules 8, 6 and 10**)
- revised **sedition** offences which will create seven-year jail terms for those who urge either violence for certain purposes or provide assistance to Australia's enemies (**Schedule 7**)
- new **anti-money laundering** rules (**Schedule 9**), and
- increased **warrant periods** for ASIO and non-return of seized items if in interest of national security (**Schedule 10**).

A **10-year sunset clause** on was agreed to by the Council of Australian Governments (COAG) at its [meeting](#) of 27 September 2005:

Leaders also agreed that COAG would review the new laws after five years and that they would sunset after 10 years.

The Bill applies the sunset clause **only** to preventative detention and control orders, and police stop and search powers (Schedules 4 and 5), not to other parts of the Bill.

The COAG will review **Schedules 1, 3, 4 and 5** after five years, without a Parliamentary inquiry, but the report must be tabled if given to the Attorney-General. There is no requirement that it be given to the Attorney-General.

The Attorney-General makes an annual report to Parliament and the Bill is subject to the usual oversight of the Commonwealth Ombudsman and Inspector-General of Intelligence and Security.

Background

Australia's legislative responses to terrorism since 2001

Before the September 2001 attacks on the World Trade Centre and the Pentagon, the Commonwealth had various legislative provisions related to terrorism, but no anti-terrorism legislation as such. Of the states and territories, only the Northern Territory had an offence of committing a terrorist act.

After 11 September 2001, the government reviewed its current legislation, and in accordance with United Nations Resolution 1373 resolved to introduce specific anti-terrorism legislation. In 2002 a package of five Bills was introduced and, after Senate Committee scrutiny, was passed later that year.¹ Also in 2002, the [Criminal Code Regulations](#) were made, listing proscribed or banned terrorist organisations.

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Since 2002, a number of further amendments have been made to existing legislation, and some major new initiatives have been introduced, such as the *Maritime Transport and Offshore Facilities Security Act 2003*, which established a maritime security regulatory framework.

In November 2003, the *ASIO Legislation Amendment Bill 2003* (which became Act No. 143, 2003) was introduced. It expanded the capacity of ASIO to exercise its powers for questioning and detaining persons who have information important to the gathering of intelligence in relation to a terrorism offence.

A comprehensive chronology of Commonwealth anti-terrorism legislative measures passed since 2001 may be found in the Parliamentary Library's *Criminal Law Internet Resource Guide* at: <http://www.aph.gov.au/library/intguide/law/terrorism.htm>.

For constitutional reasons, the Commonwealth sought and received a referral of power from the state governments in order to ensure comprehensive national coverage of the legislation.² Under that agreement, any amendment to Part 5.3 of the *Criminal Code Act 1995* requires the consent of at least four States (section 100.8). Some state and territory governments since 2001 have also amended their legislation in an attempt to increase police powers of investigation into terrorist offences. A list of current state and territory terrorism-related legislation may be found at <http://www.aph.gov.au/library/intguide/law/crimlaw.htm#terrstate>.

The Parliamentary Library also regularly updates a [Law Internet Resource Guide](#), compiled by Roy Jordan, which features the key existing [terrorism](#) legislation, a chronology and commentary. A list of further reading is featured at the end of this Digest.

The origins and evolution of the Bill

On 8 September 2005, Prime Minister John Howard [announced](#) a number of proposed changes to Australia's counter-terrorism laws with the aim of enabling Australia to 'better deter, prevent, detect and prosecute acts of terrorism'.³ Drawing on overseas experience, particularly the London bombings in July 2005, the Prime Minister declared that the reforms 'will ensure Australia's counter-terrorism legislative regime remains at the forefront of international efforts to counter the global threat of terrorism'.

State and territory leaders unanimously [agreed](#) to the proposed changes at the 27 September COAG meeting, with the detail of the major amendments to be settled through the National Counter-Terrorism Committee by the end of October to enable the implementation of the new measures. At a [press conference](#) following the conclusion of the COAG meeting, the Prime Minister said that 'as a result of the decisions taken today, we are in a stronger and better position to give peace of mind to the Australian community'.

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An early ‘draft-in-confidence’ version of the [Anti-Terrorism Bill 2005](#) (as the Anti-Terrorism Bill (No. 2) 2005 was then called) was released (against the wishes of the Commonwealth) by ACT Chief Minister Jon Stanhope on 14 October. Much of the public and political debate on the Bill dates from this time. The Bill has gone through some significant changes since, particularly relating to the control and preventative detention orders provisions in Schedule 4. For example:

- rules of contact for minors have softened
- access for Queenslanders to the Queensland Public Interest Monitor was reinstated
- more detail regarding legal proceedings was added, and
- changes to the issuing process for control and preventative detention orders have been made.

On 3 November 2005, the Senate referred the provisions of the Anti-Terrorism Bill (No. 2) 2005 to the Senate Legal and Constitutional Legislation Committee for [inquiry](#) and report by 28 November 2005.

The Parliamentary Library has prepared a compilation of references in an [E-brief](#) reflecting the reaction to the proposed counter-terrorism measures and the outcomes of the COAG meeting.

Passage of Anti-Terrorism Bill 2005

On 2 November 2005, a short Anti-Terrorism Bill 2005 was introduced into Parliament. The provisions in that Bill originally formed part of the much larger Anti-Terrorism Bill (No. 2) 2005—the relevant provisions were extracted and formed into a separate piece of legislation after the Prime Minister [announced](#) on 2 November that ‘the immediate passage of [the Anti-Terrorism Bill 2005] would strengthen the capacity of law enforcement agencies to effectively respond to [a specific terrorist] threat’.⁴ The Anti-Terrorism Bill was passed by the House of Representatives on 2 November and by the Senate the following day. For further information on this Bill, see the [Bills Digest](#).⁵

UK anti-terrorism legislation

Prime Minister John Howard stated on 8 September 2005 that some of the proposed measures were based on UK legislation. Further detail on measures such as preventative detention and control orders can be found on the UK [Home Office Terrorism website](#) (includes reviews of terrorism legislation).

A good summary of the evolution of current and proposed UK anti-terrorism legislation is contained in the UK House of Commons Parliamentary Library [paper](#) on the Terrorism Bill 2005-06. That Bill was introduced into the UK Parliament in October 2005, partly

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because ‘concerns were expressed by the police and others about whether current legislation was adequate to deal with the threat facing the UK’.⁶ The full text of the Report by the Independent Reviewer Lord Carlile of Berriew, QC, on Proposals by Her Majesty’s Government for Changes to the Laws Against Terrorism, is available in an article published by [The Times](#) online on 12 October 2005.⁷

At the same time as the Terrorism Bill 2005-06 was introduced, the UK’s Foreign and Commonwealth Office released a [research paper](#) comparing counter-terrorism legislation and practice across ten countries, which included seven European nations, the US, Canada and Australia.⁸

See also the [report](#) by Mr Alvaro Gil-Robles, European Commissioner for Human Rights, on his visit to the United Kingdom, 4–12 November 2004.⁹

Commentary by non-government parties

For general commentary, refer to [E-Brief](#): ‘Proposals to further strengthen Australia’s counter-terrorism laws’—online only, issued 6 October 2005, updated weekly.

Australian Labor Party

In his speech in the second reading debate of the Bill, the ALP spokesperson for Homeland Security, Arch Bevis, foreshadowed a number of proposed amendments to the Bill. They included:¹⁰

- deletion of the revised sedition laws (**Schedule 7**) from the Bill
- increasing the reporting requirement to Parliament regarding use of control orders and preventative detention orders from once a year to quarterly
- reducing the sunset clauses from ten years to five years, with an independent review of the laws after two and a half years
- the creation of a national Public Interest Monitor along similar lines to those applying in Queensland
- a provision that all intelligence-related laws be referred to the Parliamentary intelligence services committee for consideration and report prior to their consideration in the Parliament, and
- increasing available resourcing for the Inspector General of Intelligence and Security.

Australian Democrats

The Australian Democrats have concerns about the proposed new police powers, detention powers, use of control orders, and that people are not informed about why they are being

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detained. They consider the Government already has all the powers required to apprehend, arrest and prosecute terrorists.¹¹

The Australian Democrats are also concerned about media reporting of ASIO's security concerns in relation to 700-800 Muslims in Australia, and that the Government's new laws actively target Muslims. The Democrats label this as follows:

To target Muslims will only increase apprehension and alienation amongst Muslims in Australia and those who support them. It is blatant political and public discrimination. Senator Bartlett said...

Not all attacks on democracy involve violence, but they can still cause enormous damage and can be very hard to repair. Once governments get hold of extra power and freedoms are taken away, they are very hard to regain.¹²

They also have concerns over the suggestions that some parts of the Bill are [inconsistent](#) with fundamental rights and freedoms, particularly rights under the International Covenant on Civil and Political Rights 1966 (ICCPR). They insist that no real case has been made that the new laws are necessary or indeed will be effective in combating terrorism. They contend that there is more of a danger to ordinary Australians by curtailing fundamental rights.¹³

Australian Greens

The Australian Greens are concerned that the Federal Government and all the state and territory governments are cooperating to overturn fundamental human rights in the name of fighting terrorism. They contend that rights relating to a fair trial, the presumption of innocence, the right to silence, and protection from detention without charge, are all under threat: 'National security and the threat of terrorism have been used as a justification for an enormous transfer of power from the people and the parliament to executive government.'¹⁴ The Greens have criticised Labor's (in the Greens' words) 'flip-flop' approach in opposing and then agreeing to the proposals.¹⁵

Main provisions

Review of anti-terrorism laws

Clause 4 refers to a review of the amendments made by **Schedules 1, 3, 4 and 5** after five years.

Subclause 4(1) notes that the COAG agreed on 27 September 2005 to undertake this review. It was also agreed that 'certain State laws' would also be reviewed.

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Subclause 4(2) provides that if a copy of a report of this review is made available to the Attorney-General, he or she must cause a copy of the report to be laid before each House of Parliament within 15 sitting days after the report is received.

This clause ensures that the COAG agreement to a five-year review of these new laws is enshrined in the legislation. It also ensures that any report on the review of these new laws will be made public.¹⁶

Schedule 1—Definition of terrorist organisation etc. Amendment of *Crimes (Foreign Incursions and Recruitment) Act 1978*, *Criminal Code Act 1995* and *Customs Act 1901*

The existing proscription process and the effect of proscription

Section 102.1 of the [Criminal Code Act 1995](#) (the Criminal Code) sets out the process for proscribing a terrorist organisation. The 18 organisations currently proscribed are set out in regulation 4 of the [Criminal Code Regulations 2002](#).

If the Minister is satisfied that an organisation is engaged in terrorist activity, then the Governor-General can make a regulation proscribing that organisation (the regulation is made following a briefing of the Leader of the Opposition). This pathway to proscription was introduced following an amendment to the Criminal Code by the *Criminal Code Amendment (Terrorist Organisations) Act 2004*.

Under subsection 102.1(3) of the Criminal Code, the regulations cease to have effect on their second anniversary but can be renewed.

Subclause 3.4(3) of the *Inter-Governmental Agreement on Counterterrorism Laws* states that the Commonwealth will provide the states and territories with the ‘text of the proposed regulation and will use its best endeavours to give the other parties reasonable time to consider and to comment on the proposed regulation’.

Section 102.1A provides that the Parliamentary Joint Committee on ASIO, ASIS and DSD (the PJCAAD) may review a regulation specifying an organisation as a terrorist organisation for the purposes of paragraph (b) of the definition of terrorist organisation in section 102.1 of the Criminal Code and report the Committee’s comments to each house of the Parliament before the end of the applicable disallowance period. The Committee will review the operation, effectiveness and implications of the listing provisions in section 102.1 of the Criminal Code in 2007.

The PJCAAD noted in its [Annual Report 2004–05](#) that the definition of a terrorist organisation in the Act was very broad, and sought to understand how the Director-General of Security and the Attorney-General decided which organisations should be proscribed.¹⁷

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If an organisation is proscribed in this manner, then the following sections in the Criminal Code make it an offence to

- direct the activities of a terrorist organisation (s. 102.2)—Penalty: Imprisonment for 25 years (intentional) or 15 years (reckless).
- be a member of a terrorist organisation (s. 102.3)—Penalty: Imprisonment for 10 years.
- recruit for a terrorist organisation (s. 102.4)—Penalty: Imprisonment for 25 years (intentional) or 15 years (reckless).
- provide training to a terrorist organisation or receive training from a terrorist organisation (s. 102.5)—Penalty: Imprisonment for 25 years.
- receive funds from, or makes funds available to a terrorist organisation (s. 102.6)—Penalty: Imprisonment for 25 years (intentional) or 15 years (reckless).
- provide support to a terrorist organisation (s. 102.7)—Penalty: Imprisonment for 25 years (intentional) or 15 years (reckless).
- associate with terrorist organisations (s. 102.8)—Penalty: Imprisonment for three years.

Proposed amendments

Item 9 of **Schedule 1** inserts a new definition, ‘advocate’, into subsection 102.1(1) of the Criminal Code:

(1A) In this Division, an organisation *advocates* the doing of a terrorist act if:

- (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act;
or
- (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or
- (c) the organisation directly praises the doing of a terrorist act.

This definition of advocating a terrorist act is important because it will constitute a new ground on which a regulation can be made banning an organisation.

Item 10 repeals Subsection 102.1(2) of the Criminal Code and substitutes:

Terrorist organisation regulations

(2) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of **terrorist organisation** in this section, the Minister must be satisfied on reasonable grounds that the organisation:

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(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).

‘Organisation’ is defined at existing subsection 100.1(1) of the Criminal Code. It mentions a body corporate or an unincorporated body whether or not the body is based outside Australia, consists of persons who are not Australian citizens or is part of a larger organisation. It is not clear from the amendments whether or under what circumstances direct praise by a member of an organisation would be treated as direct praise by the organisation.

In the same subsection, a ‘terrorist act’ is defined as an action or threat of action, such as causing death or serious harm, that is done with the intention of advocating a political, religious or ideological cause, and done with the intention of coercing government or a section of the public. Serious harm can include a disruption to electronic systems as well as harm to people.

The Explanatory Memorandum states that ‘the advocacy would need to be about such an act, not generalised support of a cause’:

The definition of *advocates* is not restricted in terms of the manner in which the advocacy occurs. It covers all types of communications, commentary and conduct. The definition recognises that such communications and conduct are inherently dangerous because it could inspire a person to cause harm to the community. This could be the case where it may not be possible to show that the organisation intended that a particular terrorism offence be committed or even intended to communicate the material to that particular person. Accordingly, the definition is not limited to circumstances where a terrorist act has in fact occurred, but is available whether or not a terrorist act occurs.

An organisation may advocate the doing of a terrorist act without being a terrorist organisation, as this new definition captures statements and conduct in support of previous terrorist acts as well as any prospective terrorist acts.¹⁸

An important point made by the Explanatory Memorandum is that advocacy alone does not create an offence:

Advocacy may only be a ground for listing an organisation. Unlike other grounds upon which it can be proved in court in the context of a prosecution that an organisation is a terrorist organisation, it will not be possible to prove an organisation is a terrorist organisation on the grounds of ‘advocacy’ unless the organisation is listed in the regulations.¹⁹

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However, once an organisation is listed, then the offences in section 102 flow from that listing.

Note that **paragraph 102.1(2)(a)** reflects a change from ‘the’ terrorist act to ‘a’ terrorist act.

Item 11 and **Item 16** correspondingly amend the cessation and de-listing provisions, to add the advocating ground.

Items 3 to 5 repeal the definition of *Hamis organisation*, *Hizballah organisation* and *Lashkar-e-Tayyiba organisation* in subsection 102.1(1). These three organisations are now listed as terrorist organisations under separate Regulations under the Criminal Code Amendment Regulations 2005. **Item 8** similarly repeals paragraphs (c), (d) and (e) from the definition of *terrorist organisation* in subsection 102.1(1). **Item 13** repeals subsections 102.1(7)–(16), which deal with the making of regulations with respect to the Hamas organisation, Hizballah organisation and Lashkar-e-Tayyiba organisation under subsections 102.1(1)(c)–(e).

The Explanatory Memorandum states that **item 6** is an ‘interpretative amendment’ to the existing definition of *terrorist organisation* in section 102.1 of the Criminal Code.²⁰ This item provides that, when determining whether an organisation satisfies the definition of a terrorist organisation, it is not necessary to prove that the organisation is preparing, planning, assisting in or fostering ‘the’ particular terrorist act. It will be sufficient if the prosecution can show the organisation is preparing, planning, assisting in or fostering ‘a’ terrorist act.

Item 21 inserts **clause 106.2** which saves any regulations made before the commencement of the section.

Item 22 inserts a clause **106.3** which provides that the amendments made by Schedule 1 to the *Anti-Terrorism Act 2005* apply to offences committed whether before or after the commencement of this section. The Explanatory Memorandum states:

This is justified because the provision merely clarifies what was originally intended. It is necessary because it will otherwise create an incorrect implication.²¹

It is arguable that the amendment constitutes a substantive expansion of the present offences, not just a clarification. In other words, conduct which was not criminalised before may be now. In this case, legislation which seeks to criminalise conduct in a retrospective manner must do so in clear terms.²²

Schedule 2—Technical amendments to *Criminal Code Act 1995*

Schedule 2 makes amendments to renumber Division 104 of Part 5.4 of the Criminal Code (Harming Australians) as Division 115.

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Schedule 3—Financing terrorism. Amendment of *Criminal Code Act 1995* and *Financial Transaction Reports Act 1988*

The [Explanatory Memorandum](#) makes this statement about the amendments proposed in Schedule 3:

The amendments strengthen the existing terrorist financing offences and confirm Australia's commitment to the principles behind the Financial Action Task Force on Money Laundering's (FATF's) Special Recommendations on Terrorist Financing, the International Convention for the Suppression of the Financing of Terrorism and United Nations Security Council Resolution 1373. In particular, the proposed amendments better implement FATF's Special Recommendation II, which was developed with the objective of ensuring that countries have the legal capacity to prosecute and apply criminal sanctions to a person who finances terrorism.²³

An extensive background to the existing offences of financing terrorist organisations can be found in an earlier [Bills Digest](#).²⁴

Existing subsections 102.6(1) and (2) of the Criminal Code make it an offence to receive funds from, or make funds available to, a terrorist organisation, whether directly or indirectly. 'Terrorist organisation' is defined in section 102.1 of the Criminal Code. 'Funds' are broadly defined in section 100.1 of the Criminal Code, and cover property and assets of every kind.

The difference between the two subsections is in the mental aspect of the offences. Subsection 102.6(1) deals with the situation where the offender knows the organisation is a terrorist organisation. The provision carries the maximum penalty of 25 years imprisonment. Subsection 102.6(2) deals with the situation where the offender is reckless as to whether the organisation is a terrorist organisation, and has a maximum penalty of 15 years imprisonment.

'Knowledge' and 'recklessness' are defined in sections 5.3 and 5.4 respectively of the Criminal Code. Persons have knowledge of a circumstance (in this case that an organisation is a terrorist organisation) if they are aware that the circumstance exists or will exist in the ordinary course of events. Persons are reckless with respect to a circumstance if:

- a) they are aware of a substantial risk that the circumstance exists or will exist, and
- b) having regard to the circumstances known to them, it is unjustifiable to take the risk.

Item 1 of Schedule 3 amends subsections 102.6(1) and (2), creating the additional offence of collecting funds for, or on behalf of, an organisation, whether directly or indirectly. The offence is committed whether the person knows the organisation to be a terrorist organisation (102.6(1)(a)) or is reckless as to whether it is a terrorist organisation

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(102.6(2)(a)). The maximum penalties for the offences under subsections 102.6(1) and (2) will not change.

Existing subsection 103.1(1) of the Criminal Code makes it an offence to provide or collect funds, and be reckless as to whether those funds will be used to facilitate or engage in a terrorist act. The offence is committed even if the terrorist act does not occur (subsection 103.1(2)). The penalty for the offence is life imprisonment.

Item 2 repeals existing subsection 103.1(3) of the Criminal Code. Existing subsection 103.1(3) provides that the offence in subsection 103.1(1) is an offence to which the extended geographical jurisdiction Category D applies (see section 15.4 of the Criminal Code and discussion below).

Item 3 inserts **subclause 103.2**, which deals with conduct similar to the existing subsection 103.1, but explicitly requires that the funds be made available to or collected for, or on behalf of, *another person*. If the person providing or collecting the funds is reckless as to whether that other person will use the funds to facilitate or engage in a terrorist act, the offence will be made out.

With regards to **Item 3**, the [Explanatory Memorandum](#) states:

Recklessness ...is defined in subsection 5.4(2) of the Criminal Code. [Subsection 5.4(2)] provides that a person is reckless with respect to a result if they are aware of a substantial risk that the result will occur, and having regard to the circumstances known to them it is unjustifiable to take that risk. As recklessness is a relatively high standard fault element, the proposed offence will not apply to a person who provides or collects funds believing those funds will be used for an innocuous purpose, irrespective of whether the funds are in fact used for a terrorist act.

This amendment [in subsection 103.2] is intended to better implement FATF's Special Recommendation II. Special Recommendation II in part requires that countries' terrorist financing offences explicitly cover the wilful provision or collection of funds intending or knowing that they will be used by an *individual terrorist*. The other characteristics of Special Recommendation II already exist under Australian law.²⁵

Subclause 103.2(2) ensures consistency between this Bill and the amendments made by the *Anti-Terrorism Act 2005*. The effect of this provision is that as long as the elements of the offence can be proven it does not matter whether:

- a terrorist act actually occurs, or
- that the funds will be used for a different terrorist act to that which the offender thought they might be used for, or
- that the funds will be used to fund a number of terrorist acts, instead of just the one act.

Subclause 103.2(1) carries a maximum penalty of life imprisonment.

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Item 3 also inserts **clause 103.3**, which provides for the application of extended geographical jurisdiction—category D, as set out in section 15.4 of the Criminal Code—to offences under Division 103 (which includes existing subsection 103.1(1) and **subclause 103.2(1)**). Category D extended geographical jurisdiction is unrestricted and means that an offence under one of these provisions is committed whether or not the conduct constituting the alleged offence or the result of that conduct occurs in Australia.

Under subsection 16(1A) of the *Financial Transaction Reports Act 1988* (the FTR Act), a cash dealer (as defined in subsection 3(1) of that Act) must make a report to AUSTRAC about any transaction it is involved in that it has reasonable grounds to suspect is either:

- preparatory to the commission of a financing of terrorism offence, or
- relevant to the investigation or prosecution of a financing of terrorism offence.

Currently, paragraph (a) of the definition of ‘financing of terrorism offence’ in subsection 16(6) of the FTR Act includes an offence under section 103.1 of the Criminal Code. **Item 4** amends the definition to include offences committed under section 102.6 (Getting funds to, for or from a terrorist organisation) or Division 3 (Financing terrorism).

The offence in section 102.6 of the *Criminal Code*, dealing with providing funds to or receiving funds from, for, or on behalf of a terrorist organisation, clearly comes within the ordinary meaning of ‘financing of terrorism offence’. Section 102.6 should have originally been included in this definition and this amendment corrects this oversight.²⁶

The proposed reference to Division 3 of the Criminal Code, rather than just section 103.1, ensures that the new terrorist financing offence added to Division 3 by item 3 of this Schedule falls within the definition of ‘financing of terrorism offence’.

Schedule 4—Control orders and preventative detention orders. Amendment of *Criminal Code Act 1995* and *Administrative Decisions (Judicial Review) Act 1977*

Schedule 4 inserts new Divisions 104 and 105 into the Criminal Code to create control orders and preventative detention orders.

Control orders

Items 1 to 23 insert new definitions into subsection 100.1(1) of the Criminal Code.

Item 24 inserts **new Division 104** into the Criminal Code. The object of the Division is ‘to allow obligations, prohibitions, and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist attack’ (**clause 104.1**).

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Interim control orders

Interim control orders may be requested by senior members of the AFP, with the written consent of the Attorney General (**clause 104.2**).²⁷

The AFP member must:

- (a) consider on reasonable grounds that the control order in the terms to be requested would **substantially assist in preventing a terrorist act**; or
- (b) suspect on reasonable grounds that **the person has provided training to, or received training from, a listed terrorist organisation**.

The AFP can also request an *urgent interim control order* by telephone, fax or email or in person (**new Subdivision C, 104.6 to 104.11**), which has to be consented to by the Attorney-General within four hours, and then must come before the court within 24 hours.

It is an offence for the AFP to include information in relation to a control order throughout this Division that is false or misleading (see sections 137.1 and 137.2 of the Criminal Code, which provide for the offences of false or misleading information (section 137.1) and documents (section 137.2)).

Under **clause 104.3** the AFP must request the issuing court to make an interim control order. The definition of *issuing court* in **subsection 100.1(1)** is:

- (a) the Federal Court of Australia; or
- (b) the Family Court of Australia; or
- (c) the Federal Magistrates Court.

The court must have the AFP request and any further information it requires. The court must then be satisfied on the **balance of probabilities**:

- (i) that making the order would substantially assist in preventing a terrorist act; or
- (ii) that the person has provided training to, or received training from, a listed terrorist organisation.

The court must also be satisfied that the controls sought are reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act (**paragraph 104.4(d)**).

In deciding this, the court must also take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's personal and financial circumstances): **subclause 104.4(2)**.

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The Explanatory Memorandum states:

This allows the issuing court to ensure that each order will be tailored to the particular risk posed by the individual concerned. The more onerous an obligation or stringent a prohibition or requirement, the greater the burden on the AFP member to satisfy the issuing court that the particular obligation, prohibition or restriction sought to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.²⁸

There are several issues that arise from this process.

- The Attorney-General does not have to satisfy him or herself of any grounds to consent to a request being made for a control order. This may impact on a person's ability to seek judicial review.
- The 'balance of probabilities' standard of proof is arguably too low for a substantial deprivation of liberty such as house arrest or a tracking device, which could last for 12 months and be renewed for up to 10 years.
- There is no specific nexus between a person's prospective actions and the test for a control order—the UK legislation only allows a control order on a 'terrorist suspect'. For example, the AFP could receive intelligence that a certain profile of person from a certain place will launch a terrorist attack the next day. If the court agreed on the balance of probabilities it was proportionate, the AFP could gain interim control orders on all the people that met that profile, regardless of any particular suspicion on a particular person. Further, a person may have received training from a listed organisation at some time in the past, perhaps even before it was banned, and it may still be possible for them to be subject to a control order, even if the court is not satisfied that this would substantially assist in preventing a terrorist attack.
- It should be questioned how the court, in the absence of that person, will be able to make a determination with any certainty about how the order will affect a person's personal circumstances. The court has no discretion to allow the person against whom the order is being made, even if there is no real risk that this would jeopardise the order.

If satisfied, the court then **issues** the interim control order which must contain certain information, such as the restrictions placed on the person, and must specify the court date on which the order will be confirmed, voided or revoked (**clause 104.5**). The interim order will also specify a place for the person's lawyer to pick up a copy of the order and a summary of the grounds (**paragraph 104.5(1)(g)**, and **clause 104.13**). The person's lawyer may obtain a copy of the order, but is not explicitly given any right of access to the reasons for the order or to details or the substance of the information on which the order was based.

Clause 104.5(3) provides that a control order can contain the following restrictions:

- (a) a prohibition or restriction on the person being at specified areas or places;

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- (b) a prohibition or restriction on the person leaving Australia;
- (c) a requirement that the person remain at specified premises between specified times each day, or on specified days;
- (d) a requirement that the person wear a tracking device;
- (e) a prohibition or restriction on the person communicating or associating with specified individuals;
- (f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the Internet);
- (g) a prohibition or restriction on the person possessing or using specified articles or substances;
- (h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
- (i) a requirement that the person report to specified persons at specified times and places;
- (j) a requirement that the person allow himself or herself to be photographed (subject to the conditions set out in **clause 104.22** where personal evidence is only to be taken to ensure compliance with the order and must be destroyed after 12 months);
- (k) a requirement that the person allow his or her fingerprints to be taken (subject to **clause 104.22** as above);
- (l) a requirement that the person participate in specified counselling or education (only if the person consents under **subclause 104.5(6)**)

Subclause 104.5(4) states that the exemptions to the ‘associating with a terrorist’ offence contained in subsection 102.8(4) apply to paragraph (e), which places a prohibition or restriction on the person communicating or associating with specified individuals. This exemption covers close family members, public religious worship, humanitarian aid and obtaining certain types of legal advice.

Subclause 104.5(5) provides that a person’s right to contact, communicate or associate with the person’s lawyer is not affected by this section, unless the person’s lawyer is specified as a person with whom the person the subject of the control order is not permitted to associate or communicate, as provided in **paragraph 104.5(3)(e)**. The person can then contact any other lawyer. A limitation on access to a lawyer of choice in relation to Division III of the ASIO Act was the subject of much critical comment from the legal profession.²⁹

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As is the case with organised crime, it is not inconceivable that some lawyers may be directly involved in the organisation of terrorist activity or are capable of passing on information that could be used to organise a terrorist act.³⁰

Counselling can only be by consent, as noted. The Explanatory Memorandum states:

This recognises that the benefit of counselling or education can only be achieved through willing participation. This measure recognises that control orders can last for a long period and that the individual may be able to gain some benefit that take them further away from association with terrorists through appropriate counselling or education. For example, lack of literacy skills could be holding the person back from general employment. Opportunities to participate in education programmes could address this.³¹

Explanation of order

Interim control order proceedings are issued by a court *ex parte* – that is, in the absence of the person. The person subject to the order is not informed of the proceedings until after the order is made and served upon him or her.

Clause 104.12 sets out the service, explanation and notification procedures. **Subclause (1)** states that the order must be served on a person, with a summary of the grounds, as soon as practicable, and at least 48 hours before the court hearing date. The AFP member must inform the person of the effect of the order, the period it is in force and issues relating to access to a lawyer and the court, the use which may be made of photographs and fingerprints, if relevant, and that it is an offence to contravene the order. The AFP member must ensure that the person understands the information, taking into account their personal circumstances (age, mental capacity, language skills etc).

There are significant limitations to this duty to explain the order. The summary of grounds may not do much more than restate the statutory test. The Explanatory Memorandum states, for 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.³²

It is questionable whether 48 hours is sufficient notice to allow the person to obtain legal representation and to prepare for the hearing.

There does not appear to be a time limit set for how long an interim control order can be in force before a confirmation hearing must take place.

Unlike the equivalent preventative detention provisions, there is no specific reference to an interpreter. The duty to explain the effect of the order or its duration does not apply if the person makes it ‘impracticable’ for the AFP member to comply (**subclause 104.12(3)**). Further, a failure to comply with the obligation to ensure that the person understands the information provided does not make the order ineffective to any extent (**subclause 104.12(4)**).

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Moreover, **subclause 104.12(2)** provides that the summary of grounds does not have to include information which would be likely to prejudice national security, within the meaning of the [National Security Information \(Criminal and Civil Proceedings\) Act 2004](#). 'National security' is defined very widely under section 8 of that Act, which *defines it as* Australia's defence, security, international relations or law enforcement interests. The definition of security is linked to the definition in section 4 of the *ASIO Act 1979*, which states that *security* means:

- (a) the protection of, and 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
 - (vi) 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 subparagraphs of paragraph (a).

The term *international relations* means political, military and economic relations with foreign governments and international organisations (s. 9). The term *law enforcement interests* include interests in 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 and methods 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;
- (d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies. (s. 11)

For more information on this Act, readers are referred to the [Bills Digest](#) for the *National Security Information (Criminal Proceedings) Bill 2004*.³³

If the person is a resident of, or present in, Queensland, the AFP must notify in writing the Queensland Public Interest Monitor (**subclause 104.12(5)**)

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Confirming an interim control order

Clause 104.14 sets out the court procedure for a confirmation hearing on the day specified in the order (paragraph 104.5(1)(e)). The people who can give evidence or make submissions are specified under subclause 1: the AFP member who requested the interim order, plus any other AFP member, the person subject to the order, representatives of that person, and if the person is in or a resident of Queensland, the Public Interest Monitor. Apart from this limitation on people who can be involved, the court has power to control the proceedings.

In relation to the presence of the Queensland Public Interest Monitor, this appears to create a disparity between the rights of residents of different States and Territories, given that the Commonwealth Ombudsman is not given the same right to appear in these proceedings.³⁴

The court can:

- void the order if at the time of making the order there were no grounds to make the order, or
- revoke the order if it is not satisfied that making the order would substantially assist in preventing a terrorist act; or that the person has provided training to, or received training from, a listed terrorist organisation, or
- vary the order if not satisfied that the controls sought are reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act, or
- confirm the order without variation, or
- confirm the order without variation if the person fails to attend and the court is satisfied that the order was properly served on the person (subclause 4).

If confirmed, the control order must state all of the information that was in the interim order, including a date when the lawyer can receive a copy of the confirmed order (**clause 104.16**). The AFP must serve it personally. The order can be in force for **12 months**. A person aged 16-17 can only be issued with an order for **three months (clause 104.28)**. Successive orders can be made in relation to the same person for up to **10 years (subclause 104.16(2)) and clause 104.32**.

Revocation or variation of a control order

While the person subject to the order may apply to the court to have the order revoked or varied at any time, the person bears the onus of proving the grounds for revocation. **Clause 104.18** provides that the person affected must 'give written notice of ... the grounds on which the revocation is sought' to the court, the AFP Commissioner, and the Queensland Public Interest Monitor if applicable. The people allowed to be present at the court hearing are again limited.

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The AFP Commissioner must apply to a court for a revocation if the grounds have ceased to exist, or for a variation if the Commissioner is satisfied the terms should no longer be imposed on that person (**clause 104.19**). The Commissioner can also apply to a court for a restriction to be added if he or she is satisfied that this would substantially assist in preventing a terrorist attack. **Subclause 104.20(3)** notes that the AFP must serve notice of the variation of the order on the person concerned, but without any requirement to explain. The process is the same as confirming a control order.

The court can revoke, vary or dismiss the application in the same manner as the confirmation proceedings, and the lawyer can obtain a copy of any varied order.

Contravening a control order

Contravening a control order is an offence carrying a maximum penalty of **five years imprisonment (clause 104.27)**. The person would have to be at least reckless as set out in section 5.4 of the Criminal Code. Persons are reckless with respect to a circumstance if they are aware of a substantial risk that the circumstance exists or will exist, and having regard to the circumstances known to them, it is unjustifiable to take the risk.

Special rules for young people

There is a requirement for the AFP, when seeking an interim order or a variation of the order from a court, to include information known about the person's age. This is necessary because **an interim control order cannot be requested in relation to a person who is under 16 years of age (see clause 104.28)**.

A control order can only be granted on a person aged 16–17 for **three months**. The Explanatory Memorandum states:

This is designed to recognise the special needs of young people and the additional care that needs to be exercised when dealing with young people in the criminal and security environments.³⁵

However, successive control orders can be sought on that young person for up to 10 years.

Presumably when a court is taking into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's personal and financial circumstances) under **subclause 104.4(2)**, the age of a young person should be a paramount concern, but this is not specified. When the AFP are serving an explanation of an order, the person's age should be taken into account, but a contravention of this section does not render the service ineffective.

The report by the Attorney-General mandated by **clause 124.29** (see below) does not have to specify if any orders were granted on young people in the reporting year.

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Reporting, notification and sunset clause

Clause 104.29 requires the Attorney-General to prepare a report to Parliament on the operation of control orders annually, and table it within 15 days of completion.

Subclause 104.29(2) provides that the report relating to a year must include:

- the number of interim control orders made, specifically identifying the number of urgent control orders made electronically and in person
- the number of control orders confirmed
- the number of control orders declared to be void
- the number of control orders revoked
- the number of control orders varied, and
- particulars of any complaints relating to control orders made or referred to the Commonwealth Ombudsman or the Internal Investigation Division of the Australian Federal Police.

The Attorney-General must be notified in writing by the AFP Commissioner if control orders are declared void, revoked or varied, and a copy of the varied control order must be provided (**clause 104.30**).

Clause 104.31 provides that the functions and powers of the Queensland Public Interest Monitor are not affected.

There is a **10-year sunset clause** on this Division under **clause 104.32**. Unlike most sunset clauses, which state that the Division will cease to have effect after a period of time, this provision merely states that a control order ceases after 10 years, and a control order cannot be requested, made or confirmed after 10 years. The Explanatory Memorandum states:

The sunset provision acknowledges that there are a number of machinery type provisions that must continue in operation despite the intention that the Division providing for control orders should cease to have effect at the end of 10 years. These provisions include, for example, the requirement to destroy identification material.³⁶

The drafting of this clause arguably makes these provisions easier to revive, by keeping them in the legislation but just rendered inoperative. This may have been done because it would be more responsive to an urgent terrorist threat in the future. The government of the day would only need to pass an amendment deleting clause 104.32, rather than having to pass a new amendment introducing the whole Division again.

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Preventative detention

Summary

The Explanatory Memorandum provides the following summary of Division 105:

New Division 105 of the *Criminal Code* provides a regime for detaining persons for up to 48 hours for the purposes of preventing a terrorist act or preventing the destruction of evidence relating to a terrorist act.

Applications for initial preventative detention orders are made by an AFP member to a senior AFP officer. Initial preventative detention orders can have force for up to 24 hours from the time the person was first taken into custody. Applications for continued preventative detention orders are made by AFP members to a judge of a State or Territory Supreme Court, Federal Magistrate, Judge, retired judge or President or Deputy President of the Administrative Appeals Tribunal. Continued preventative detention orders can have force for up to 48 hours from the time the person was first taken into custody.

Although only AFP members can request the issue of preventative detention orders, any police officer, whether an AFP member or a member of the police force of a State or Territory, may detain a person under such an order. This is to ensure that if a State or Territory police officer is aware that a preventative detention order is in force in relation to a person and locates that person, the person may be immediately detained without the need for an AFP member to attend and personally detain the person.

While in preventative detention, the person has an entitlement to contact those who are close to them to let them know that he or she is safe, and to contact a lawyer. These contact rights can be restricted by obtaining a prohibited contact order, which prohibits the person from contacting specified persons where the prohibition of such contact will assist in achieving the objectives of the preventative detention order.³⁷

Clause 105.1 states that the objects of the preventative detention order regime are to enable the AFP to take a person into custody and detain him or her for 48 hours in order to prevent an imminent terrorist attack from occurring; or to preserve evidence of, or relating to, a recent terrorist attack. The object of the detention is not for extended questioning.

Basis for applying for and making preventative detention orders

New Division 105 sets out two types of preventative detention orders ('initial preventative detention orders' and 'continuing preventative detention orders') that may be obtained by members of the AFP.

Initial order

Initial preventative detention orders may be granted by a senior member of the AFP, defined in **item 21** as AFP members at the rank of superintendent and above under **clause 105.8**.

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To request an interim order (**clause 105.4**), the AFP officer must be satisfied that:

- there are reasonable grounds to suspect that the person:
 - will engage in a terrorist act, or
 - possesses something connected with the preparation for, or the engagement of a person in, a terrorist act, or
 - has done or will do an act in preparation for, or in planning a terrorist act, **and**
- making the order would substantially assist in preventing an imminent terrorist act from occurring within the next 14 days, **and**
- detaining the person is reasonably necessary to substantially assist in preventing an attack from occurring.

An order can also be made where a terrorist act has occurred within the last 28 days, the order is necessary to preserve evidence, and detaining the person is reasonably necessary to preserve the evidence.

An application containing information specified in **clause 105.7** is then submitted to a senior AFP officer. For the purposes of initial orders, senior AFP officers are the ‘issuing authorities’. It is an offence for the AFP to include information in relation to a control order that is false or misleading (see sections 137.1 and 137.2 of the Criminal Code, which provide for the offences of false or misleading information (section 137.1) and documents (section 137.2)).

There are restrictions on multiple orders applying to one person in relation to the same terrorist attack and on orders under corresponding State laws (**clause 105.6**). Additionally, there are rules relating to the issuing of a further initial order in relation to a different terrorist act.

The senior AFP member can then issue a written order for up to 24 hours, which takes effect as soon as it is made and lasts for 48 hours if a person has not been taken into custody. **Subclause 105.4(2)** requires that the senior AFP member must meet the requirements of **subclauses 105.4(4) and (6)**, in other words they have to be independently satisfied that the grounds have been made out. The order can be extended, but only until the end of 24 hours after a person was first taken into custody (**clause 105.10**).

Continued preventative detention order

Continued preventative detention orders may be granted by an *issuing authority* with respect to a person who is the subject of an initial preventative detention order under **clause 105.12**.

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Subclause 105.2(1) sets out those persons who may be appointed by the Minister to be an issuing authority for continued preventative detention orders. These are:

- a judge of a state or territory Supreme Court,
- a Federal Magistrate,
- a Judge (Federal or Family Court),
- a former judge who has served at least five years as a judge of one or more superior courts; and
- a President or Deputy President of the Administrative Appeals Tribunal who is enrolled as a legal practitioner of a Federal Court or the Supreme Court of a state or territory and has been so enrolled for at least five years.

Subclause 105.2(2) provides that the Minister may not appoint a person unless the person has, in writing, consented to being appointed, and the person has not revoked that consent. **Clause 105.18** provides that authorities have the same immunities as a Justice of the High Court.

The AFP member must provide all the information in relation to the interim order. The authority must consider the original grounds for detention afresh, plus any information which has become available since the initial order was made.

Representations by detainee not required

A detainee can make representations to the AFP member who oversees the exercise of powers under the order (**subclause 105.19(8)**). However, the provision does not state that the detainee or their legal representative must be allowed to make representations.

While a continuing preventative detention order may be issued by judicial officers, they only sit in a personal capacity rather than as a court (note discussion under ‘Constitutional questions’ below in ‘Concluding comments’). Moreover, this is not required for an initial preventative detention order. In each case, then, there is no court hearing of the issues at the time that the order is issued.

Duration of a preventative detention order

Preventative detention may be ordered for up to 24 hours in the first instance (**subclause 105.8(5)**). The *initial preventative detention order* may then be extended and further extended, although the entire period of detention, as extended, or further extended, is to **total** 24 hours (**subclause 105.10(5)**). A *continued preventative detention order* may then be issued, and this too may be extended and further extended, although the entire period of detention under the initial preventative detention order **and** the continued preventative detention order as extended and further extended, is to **total** 48 hours (**subclause 105.12(3) and subclause 105.12(5)**). The states and territories are then to legislate to permit detention from day 3–14.

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Taking a person into custody

Subclause 105.19(1) provides that, once the preventative detention order has come into force by being made by an issuing authority, the person who is the subject of the order can be taken into custody and detained by any police officer.

Subclause 105.19(2) provides that a police officer has the same powers and obligations as the police officer would have in the situation of arresting the person for an offence or ensuring that the person remained in custody after being arrested for an offence. However, **subclause 105.19(4)** provides that this does not apply to the extent that powers and obligations are provided for in this new subdivision, or new Subdivisions D or E. This would include requirements for the police officer to give their name, the power to enter premises, and the power to conduct frisk and ordinary searches, which are legislated in Subdivision C.

The Explanatory Memorandum states:

The effect of these provisions is to ensure that a police officer may take the same action to ensure that the person is taken into custody and does not escape that custody that he or she is permitted to take to ensure the same result in relation to an arrest warrant ... This is to ensure that each individual police officer is subject to his or her usual rules and procedures in relation to arrests. In the case of the AFP, the relevant powers are conferred by section 3ZC of the *Crimes Act*. State and Territory powers vary. This provision is designed to ensure police are able to use those powers in relation to which they have received training and are experienced and familiar.³⁸

This clause replaces the controversial ‘use of force’ provision in the draft Bill that raised questions about ‘shoot to kill’ policies.

Children over 16 years in adult prisons

The AFP can arrange for the person to be detained at a state or territory prison or remand centre under **clause 105.27**. In light of the strict contact provisions, presumably this detention would be in solitary confinement. No exception or special provision is made for children aged 16 or over, who may also be held in adult prisons or remand centres under this clause.

Under Article 37 of the *Convention on the Rights of the Child*, States Parties are obligated to ensure that:

- no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time
- every child deprived of liberty shall be separated from adults, unless it is considered in the child’s best interest not to do so, and shall have the right to maintain contact with

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his or her family through correspondence and visits, save in exceptional circumstances, and

- every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Service and explanation of order

Under **clause 105.28 and 105.29**, the effect of initial and continued preventative detention orders is to be explained to the person as soon as practicable after he or she is first taken into custody.

Although a failure to comply with this requirement may constitute an offence on the part of the police officer under **clause 105.45**, a failure to comply does not affect the lawfulness of the person's detention (**subclause 105.31(5)**), and the provision does not apply if the person's actions make it impracticable for the AFP to comply with the section (**subclause 105.31(1)**). Unlike the situation with control orders, an interpreter must be used if a person is not fluent in English or has a physical disability that affects their comprehension.

Subclause 105.28(2) sets out the matters the AFP must explain. These include the fact that the order has been made, the period of detention, the restrictions that apply to the people that the person may contact, the fact that an application may be made to continue detaining the person, any rights the person has to make a complaint to the Commonwealth Ombudsman or a state or territory authority, or to seek a remedy from a federal court under clause 105.51, in relation to the order or the person's treatment in connection with the detention under the order, the person's entitlement to contact a lawyer under clause 105.37, and the name and work telephone number of the senior AFP member who has been nominated under subclause 105.19(5) to oversee the exercise of powers under, and the performance of obligations in relation to, the order. However, the detainee does not need to be told if a prohibited contact order has been made in relation to another person or of the identity of that person (for prohibited contact orders, see below).

Paragraph 105.28(2)(a) requires that the detainee be informed about 'the fact that the preventative detention order has been made in relation to the person', but this does not deal with the reasons for which the order was made. Under **subclause 105.32(1)(b)** a summary of the grounds on which the order is made must also be supplied, but it is unclear how far this summary might go beyond the legislative test, for example, that the order was imposed to prevent an imminent attack or to preserve evidence of a past attack. Just as for control orders, **subclause 105.32(2)** provides that paragraph (1)(b) does not require information to be included in the summary if the disclosure of the information is likely to prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

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Restrictions on access to legal representation

Clause 105.37 deals with the person's right to contact a lawyer, and the obligation of the police officer detaining the person to give the person assistance to choose a lawyer.

The quality of the reasons given to a person, and the point at which reasons are given, raise concerns, as stated above in relation to control orders. Restrictions on access to a lawyer, and monitoring of client-lawyer communications, adversely affect the person's ability to seek and obtain advice. In practice, the person's ability to appeal to the Federal Court or lodge a meaningful complaint with the Commonwealth Ombudsman is adversely affected by the lack of reasons for the order or the 'evidence' upon which it is based.

Treatment of detainees

The person is to be treated humanely, which is a standard provision now in Commonwealth legislation relating to law enforcement officers (**clause 105.33**).

The AFP are not permitted to question a person detained under an order (**clause 105.42**)—it is an offence to do so: **clause 104.45**. ASIO may however obtain a questioning warrant. Subclauses **105.25(1)** and **(2)** provide that, if a person is being detained under a preventative detention order, and a warrant under section 34D of the ASIO Act is in force in relation to the person, and the police are given a copy of the relevant warrant, the police officer must take such steps as are necessary in order for the person to be dealt with in accordance with that warrant.

The Explanatory Memorandum states:

The rationale for this process is that detention in itself is a factor that can impact on the reliability of answers to questions. Given the purpose of the preventative detention regime is to prevent a terrorist attack and to preserve evidence, and the police and ASIO questioning time was recently modified to extend questioning for terrorism investigations, it follows that the existing procedures for questioning should be used. Those procedures contain safeguards in relation to the questioning of persons, including persons who are under arrest or are protected suspects.³⁹

Interaction between AFP and ASIO warrants

The Explanatory Memorandum gives an example of the interaction between the AFP and ASIO:

For example, a person could be taken into custody at 9am on Monday under a preventative detention order that authorises detention for 24 hours. The person could be handed over to ASIO at 6pm that day, and dealt with under the ASIO warrant for 20 hours or until 2pm on Tuesday. As the 24 hours authorised by the preventative detention order has elapsed, it is not possible to take the person back into preventative detention unless the AFP member has applied for, and the issuing authority has issued, an extension.⁴⁰

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Given this likely interaction between the two systems, there are several practical issues that are not resolved in the Bill. One issue yet to be clarified is how the service explanation for the preventative detention order will work with the explanation required for an ASIO 34D warrant. The AFP are required to tell the person that they can complain to the Commonwealth Ombudsman. The prescribing authority under section 34E of the ASIO Act must explain to the person that they have a right of complaint to the Ombudsman for any actions by the AFP and to the IGIS for any complaints about ASIO. It is likely to be very confusing to the person which agency is involved and who they have a right to complain to.

Inspector-General of Intelligence and Security

Under items 14 and 22 of the *Intelligence Services Legislation Amendment Bill 2005*, which has just been passed by Parliament, the Inspector-General is empowered, after notifying the Director-General of Security, at any reasonable time, to enter any place where a person is being detained under Division 3 of Part III of the ASIO Act for the purposes of an inspection or an inquiry. The IGIS receives notification 'as soon as practicable' of any such warrant. It may be that the Commonwealth Ombudsman requires the same right of early notification and access to detained persons by the AFP. The two offices will need a high level of coordination.

There is also a protocol required to govern the use of the ASIO Division III powers. The AFP may require a similar protocol for these preventative detention powers, and the two will need to be harmonized.

All contact is restricted while a person is detained by **clause 105.34** except for authorised contact set out in the following clauses. **Clause 105.35** relates to contacting one person from each category of family, work, flatmate and friends to tell them you are safe but not able to be contacted for the time being. **Clause 105.36** allows a complaint to the Ombudsman. **Clause 105.37** allows contact with a lawyer of their choice for limited purposes unless the lawyer is the subject of a prohibited contact order or cannot be contacted. In such cases, the police officer detaining the person must give the detainee reasonable assistance in choosing another lawyer and, in doing so, can give priority to security-cleared lawyers. The use of security-cleared lawyers was the subject of controversy and amendment during the passage of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*, which gives ASIO special powers of *questioning and detention under warrant*.

The Explanatory Memorandum states:

The model for permissible contact under this new regime is less restrictive than that provided by the ASIO Act. Under the ASIO Act there are stricter limitations on contact for a warrant that authorises questioning and detention. Subsection 34F(8) provides that a person who has been taken into custody or detained under Division 3 of the ASIO Act is not permitted to contact, and may be prevented from contacting,

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anyone at any time while in custody or detention. Subsection 34F(9) of the ASIO Act provides that the detained person is only able to contact the IGIS, the Ombudsman, and a person whom the warrant or prescribed authority permits him or her to contact. Subparagraph 34D(2)(b)(ii) of the ASIO Act provides that a detention warrant must permit the subject of the warrant to contact identified persons at specified times when the person is in custody or detention. The person identified in the warrant may be a lawyer of the person's choice, a person with whom the subject of the warrant has a particular familial or legal relationship or other persons (see subsection 34D(4)). A detention warrant must permit the person to contact a single lawyer of the person's choice (see subsection 34C(3B)). However, a prescribed authority may prevent a person detained under a warrant from contacting a lawyer of the person's choice where a prescribed authority is satisfied, on the basis of circumstances relating to a particular lawyer, that if the subject is permitted to contact that lawyer a person involved in a terrorism offence may be alerted that the offence is being investigated or a relevant record or thing may be destroyed, damaged or altered (see section 34TA). If the subject of the warrant is aged between 16 and 18, the warrant must also permit the person to contact a parent or guardian, or another person who can represent the subject's interests (see subsections 34NA(6) and (7)).⁴¹

Role of interpreters

Of particular importance to some Australians is **clause 105.38**. If a person's permitted communication with a family member or lawyer will occur in a language other than English, it can only occur if it can be effectively monitored by an interpreter. It is not the case that a person must be provided with an interpreter. The Bill requires this to be done only if it is reasonably practicable to do so during the detention period.

Disclosure offences

Clause 105.41 sets out the offences if there is any disclosure of information relating to a preventative detention order, carrying a penalty of **five years imprisonment**. These offences relate to unauthorised disclosures made by:

- the person subject to the order
- the person's lawyer
- people (such as parents or guardians) who have special contact with a minor or person incapable of managing their own affairs
- police officers and interpreters assisting in monitoring contact, and
- secondary disclosures of information improperly disclosed.

Prohibited disclosures are disclosures that occur while the person is subject to a preventative detention order and that disclose the fact that a preventative detention order has been made, the fact that the subject is being detained or the period for which the subject is detained. In addition, if the discloser is a parent, guardian, lawyer, interpreter or monitor they are also prohibited from disclosing '**any** information' that they obtain in the

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course of contact—an extremely wide prohibition given the penalty involved. A similar prohibition—any information that a detainee communicates to a person while being detained—also applies to secondary disclosures under **subclause 105.41(6)**. Secondary disclosers could include journalists.

Prohibited contact orders

In connection with a preventative detention order that is either being sought or currently in force, it is possible to apply to the relevant issuing authority for a prohibited contact order under **clause 105.15**, if such an order would assist in achieving the objectives of the preventative detention order. The order provides that the person detained under a preventative detention order is not to contact certain persons, which can include their chosen lawyer.

The Explanatory Memorandum states:

This is designed to ensure that the ‘preventative’ purpose of the order is not defeated by the person in detention being able to contact other persons, including co-conspirators or those who might be in custody of evidence relating to a terrorist act, and, for example, instructing such a person to further the terrorist act in the person’s absence, or destroy evidence of a terrorist act.⁴²

The AFP is not required to inform the detainee that a prohibited contact order has been made in relation to the person’s detention or the name of a person specified in the prohibited contact order (**subclause 105.28(3)**).

Remedies

Although there is provision for a preventative detention order or a prohibited contact order to be revoked by the issuing authority, this procedure can only be initiated by the AFP, and not by the person detained (**clause 105.17**). The AFP must apply to the relevant issuing authority to have an order revoked if the grounds cease to exist.

Subclause 105.51(1) provides that a detainee may apply to a court for a remedy in relation to (a) a preventative detention order; or (b) the treatment of a person in connection with the person’s detention under a preventative detention order

Merits review

Clause 105.51 provides that state and territory courts cannot hear a case while the order is in force. While the detainee can apply for merits review by the Administrative Appeals Tribunal (‘AAT’), application for review cannot be made while the order is in force (**subclause 105.51(5)**). However, the AAT can determine that the decision to issue the preventative detention order is void and that compensation should be paid (**paragraphs 105.51 (7) (a) and (b)**).

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Judicial review

While the operation of the *Administrative Decisions (Judicial Review) Act 1977* is excluded, including decisions by the Attorney-General (**subclause 105.51(4) and item 25**), the Bill is silent on the question of judicial review while the order is in force. The original jurisdiction of the High Court under section 75 of the Constitution cannot be ousted. A person could presumably also apply to the Federal Court under section 39B of the *Judiciary Act 1903* for injunctive relief. The Explanatory Memorandum refers rather obliquely to this option. It is possible therefore that a person could lodge a judicial review action in the Federal Court to gain an injunction, or lodge a prerogative writ in the High Court while the order is in force, then seek merits review, then seek judicial review in a state court. The interaction between these options is difficult to assess in the abstract.

State and territory courts

Clause 105.52 sets out the interaction between legal proceedings in a state or territory court where there is both a Commonwealth and a state preventative detention order. A person can apply to a state or territory court only once the order is finished, where the order was in relation to the same terrorist act, and where the person brings proceedings about the state order. The state court can also give remedies for the Commonwealth detention to promote consistency.

Special rules for young people and those incapable of managing their own affairs

Preventative detention orders may be made in respect of children who are 16 years old or older. There are some allowances made for children and people subject to an ‘incapacity’ to have greater contact with family while in detention under **clause 105.39**, and restrictions on the taking of DNA evidence under **subclause 105.43(4)**. For instance, under **clause 105.39**, such a person can in general have contact with two parents or two or more guardians, but not with step-parents who have not adopted their spouse’s children. They are entitled to disclose that they are subject to preventative detention and the period of their detention and they can be visited.

Parents—disclosure offences

On a strict reading of **clauses 105.39** and **105.41(3)**, the parent of a child in detention can commit an offence if they disclose information about the detention to the other parent, if that parent has not yet had direct contact with the child. This applies even though that parent is eligible to have contact with the child.

Children over 16 in adult prisons

It is not clear where children will be held in detention. **Clause 105.27** suggests that they could be held in adult prisons or remand centres.

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The same special rules apply to persons who are incapable of managing their own affairs.

Unlike in the *Migration Act 1958* (as recently amended), there is no provision in this Division stating that detention of children should be a last resort.

Reporting, notification and sunset clause

Clause 105.47 requires the Attorney-General to prepare a report to Parliament on the operation of control orders annually and table it within 15 days of completion.

Subclause 105.47(2) provides that the report relating to a year must include:

- the number of initial and continued preventative detention orders made,
- whether a person was taken into custody under those orders, and if so the period of the detention,
- the number of prohibited contact orders, and
- particulars of any complaints relating to orders made or referred to the Commonwealth Ombudsman or the Internal Investigation Division of the Australian Federal Police.

Clause 105.49 provides that the functions and powers of the Queensland Public Interest Monitor are not affected.

Clause 105.50 provides that legal professional privilege is not affected by the Division. However, communications with the lawyer are monitored both visually and for content. Section 118 of the *Evidence Act 1995*, which restricts the admission of legal advice into evidence, relates only to **confidential** communications. The effect of the preservation of the privilege under these circumstances is uncertain.

There is a **10-year sunset clause** on this Division under **clause 105.53**. As noted above in relation to the sunset provision on control orders, most sunset clauses state that the Division will cease to have effect after a period of time. This provision states that a preventative detention order ceases after 10 years, and that neither a preventative detention order nor a prohibited contact order can be applied for or made after 10 years. The Explanatory Memorandum states:

The sunset provision acknowledges that there are a number of machinery type provisions that must continue in operation despite the intention that the Division providing for preventative detention should cease to have effect at the end of 10 years. These provisions include, for example, the requirement to destroy identification material and the offence for disclosing information overheard by an AFP member or interpreter while monitoring discussions between the person and their lawyer.⁴³

The drafting of this clause arguably makes these provisions easier to revive, by keeping them in the legislation but just rendered inoperative. This may have been done because it would be more responsive to an urgent terrorist threat in the future. The government of the

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day would only need to pass an amendment deleting clause 104.32 and this clause, rather than having to pass a new amendment introducing the two Divisions again.

Schedule 5—Powers to stop, question and search persons in relation to terrorist acts. Amendment of *Crimes Act 1914*

Items 2 and 3 of Schedule 5 insert two new definitions, ‘**serious offence**’ and ‘**serious terrorism offence**’, into Part IAA of the Crimes Act.

Serious offence means an offence:

- (a) that is punishable by imprisonment for 2 years or more; and
- (b) that is one of the following:
 - (i) a Commonwealth offence;
 - (ii) an offence against a law of a State that has a federal aspect;
 - (iii) an offence against a law of a Territory; and
- (c) that is not a serious terrorism offence.

A ‘Commonwealth offence’ is defined in section 3 of the Crimes Act and, except in Part IC,⁴⁴ means an offence against a law of the Commonwealth.

In Part IAB relating to controlled operations for the purpose of investigating Commonwealth crimes, section 15HB of the Crimes Act creates a definition of the term serious Commonwealth offence as:

an offence against a law of the Commonwealth:

- (a) that involves theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, obtaining financial benefit by vice engaged in by others, extortion, money laundering, perverting the course of justice, bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory, bankruptcy and company violations, harbouring of criminals, forgery including forging of passports, armament dealings, illegal importation or exportation of fauna into or out of Australia, espionage, sabotage or threats to national security, misuse of a computer or electronic communications, people smuggling, slavery, piracy, the organisation, financing or perpetration of sexual servitude or child sex tourism, dealings in child pornography or material depicting child abuse, importation of prohibited imports or exportation of prohibited exports, or that involves matters of the same general nature as one or more of the foregoing or that is of any other prescribed kind; and

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(b) that is punishable on conviction by imprisonment for a period of 3 years or more.

Some examples of ‘serious offence’ in the Criminal Code would include:

- theft of property belonging to a Commonwealth entity (see section 131 of the Criminal Code)
- obtaining property or financial advantage from a Commonwealth entity by deception (see section 134 of the Criminal Code)
- obtaining a gain from a Commonwealth entity or causing a loss to a Commonwealth entity (see section 135 of the Criminal Code)
- money laundering: intentionally or recklessly dealing in money or property over \$1,000 which are the proceeds of crime (see section 400 of the Criminal Code)
- bribing a foreign public official (see section 70 of the Criminal Code), and
- bribing a Commonwealth public official (see section 101 of the Criminal Code).

Offences which would be captured by this new definition (serious offences carrying a penalty of over two years imprisonment) would include:

- offences under Division 471 of the *Criminal Code* relating to postal offences (with the exception of those offences relating to tampering with stamps and postmarks), and
- computer offences under Division 478 of the *Criminal Code*.

Item 10 inserts Division 3A—Powers to stop, question and search person in relation to terrorist acts—into Part IAA.

Subdivision A sets out the ‘Definitions’ for Division 3A, including definitions for the following:

- Commonwealth place
- prescribed security zone
- serious offence related item
- terrorism related item.

Subdivision B sets out the operative provisions of Division 3A—that is, the application and scope of the powers to stop, question and search in relation to terrorism acts.

Clause 3UB provides that the powers may only be exercised where:

- a) a person is in a Commonwealth place (other than a prescribed security zone) and the police officer ‘suspects on reasonable grounds’ that the person might:

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- be about to commit,
 - be committing, or
 - have just committed
- a terrorist act; or

b) a person is in a Commonwealth place in a prescribed security zone.

Police powers

Clause 3UC(1) gives police officers the power in such places to ask a person for the following details:

- name
- residential address
- reason for being in the particular Commonwealth place, and
- evidence of identity.

It is an offence to not comply with such a request (**clause 3UC(2)**), or to give false information (**clause 3UC(3)**). The maximum penalty is 20 penalty units (\$2200).

Stop and search

Clause 3UD(1) provides for the stopping and searching of persons in such places by police officers, including the following searches for terrorism-related items:

- ordinary search or frisk search (i.e. not a strip search)
- search of ‘any thing’ the police officer suspects on reasonable grounds to be under the person’s immediate control
- search of a vehicle which is owned or operated by the person
- search of ‘any thing’ the police officer suspects on reasonable grounds has been brought into the Commonwealth place by the person.

Clauses 3UD(2) and (3) provide that police officers conducting searches under clause 3UD(1) must not:

- use more force, or cause greater indignity to the person, than is reasonable or necessary, or
- detain a person for longer than reasonably necessary to conduct the search.

Seizure

Clause 3UE provides for the seizure of terrorism-related or serious-offence-related items found in the course of a search conducted under clause 3UD. **Clauses 3UF and 3UG** set out how items seized under clause 3UE must be dealt with.

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Within seven days of seizing an item under clause 3UE, the police officer responsible for the seized item must serve a 'seizure notice' on the owner of the thing, or the person from whom the item was seized if the owner can not be found (**clause 3UF(1)**). The seizure notice must contain the following details (**clause 3UF(3)**):

- information identifying the item seized
- the date of seizure
- the ground(s) for the seizure, and
- notification to the person that if they do not request return of the seized item within 90 days of the date of the seizure notice, then the item is forfeited to the Commonwealth.

Where an owner of a seized item requests the item be returned (**clause 3UF(4)**), then the police officer responsible must return the item to the owner (**clause 3UF(5)**), unless:

- the police officer suspects, on reasonable grounds, that if returned to the owner, the item is likely to be used (either by the owner or another person) in the commission of a terrorist act or serious offence (**clause 3UF(6)**), or
- the item is evidence of a terrorist act or serious offence (**clause 3UF(7)**).

Where the owner requests return of a seized item, and the police officer responsible does not return a seized item within the time limits provided in the legislation, then the police officer may apply to a magistrate for orders that:

- the police officer retain the item (**clause 3UG(3)** and **clause 3UG(4)(a)**),
- the item be forfeited to the Commonwealth (**clause 3UG(4)(b)**),
- the item be sold and the proceeds given to the owner (**clause 3UG(4)(c)**),
- the item be otherwise sold or disposed of (**clause 3UG(4)(d)**).

The magistrate can also make orders that the item be returned to the owner (**clause 3UG(5)**).

In any application to a magistrate under clause 3UG, the owner of the item must be allowed to appear and be heard by the magistrate (**clause 3UG(2)**).

Clause 3UH expressly states that the powers set out in Subdivision B do not derogate from powers conferred by other laws of the Commonwealth, states or territories.

Declaring 'prescribed security zones'

Subdivision C provides for the declaration of a 'Prescribed security zone'. On application by a police officer (**clause 3UI**), the Minister may declare a Commonwealth place to be a prescribed security zone if the Minister considers that declaration would assist in either preventing, or responding to, a terrorist act (**clause 3UJ(1)**).

A declaration under clause 3UJ(1) ceases to have effect 28 days after being made, unless earlier revoked by the Minister (**clause 3UJ(3)**). **Subclauses 3UJ (4) and (5)** deal with

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the reasons for revocation of a declaration, and the manner in which the revocation must be notified.

The declaration of the prescribed security zone, and any subsequent revocation, are not legislative instruments (**clause 3UJ(7)**). As a result, declarations need not be tabled in Parliament and are not subject to disallowance. Where there are requirements to publish declarations (over TV or radio, in the Gazette and on the Internet), there is no requirement that publication occur within a particular time frame or as soon as practicable, and failure to publish does not invalidate a declaration (**clause 3UJ(5)-(6)**).

Clause 3UK sets out the sunset clause for the proposed Division 3A. The sunset clause does not expressly provide for any provision in Division 3A to cease to have effect after 10 years. Rather, clause 3UK provides:

- police must not exercise powers or duties under Division 3A after the end of 10 years of the Division commencing (with the exception of powers and duties under clauses 3UF and 3UG relating to dealing with seized items),
- a declaration made under clause 3UJ (a declaration that a Commonwealth place is a prescribed security zone), which is still in force at the end of 10 years of Division 3A commencing, will cease to be in force at that time, and
- police officers can not apply for, and the Minister can not make, declarations under clause 3UJ after the end of 10 years of the Division commencing.

Some provisions will need to remain in force after 10 years, to provide for issues such as the return of items which were seized prior to the 10-year sunset date. However, the overall effect of clause 3UK seems to allow for the anomalous situation where police powers and duties remain in legislation, but are unable to be exercised.

Schedule 6—Power to obtain information and documents. Amendment of *Crimes Act 1914*

Schedule 6 provides that AFP officers can directly issue a notice to produce documents on ship and aircraft operators who may have information or documents which relate to the doing of a terrorist act.

AFP officers can also issue a notice to produce documents or information to a person who may have information or documents relevant to the investigation of a serious terrorism offence.

The provisions in **Schedule 6** also allow for a Federal Magistrate, on application by AFP officers, to issue a notice to produce documents directed at organisations which may have in their possession or control documents which will assist in the investigation of a ‘serious offence’ (see discussion above in relation to **item 2** of **Schedule 5**, and below in relation to increased powers for the AFP). The provisions allowing for notices to produce to be issued

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in relation to the investigation of serious terrorism offences and serious offences are aimed at organisations such as financial institutions, utilities providers and telecommunications carriers, requiring them to produce documents such as transaction records, financial accounts and telephone accounts and call records.

On 18 October 2005, the *Australian Financial Review* made the following comments on the ‘notice to produce’ powers contained in **Schedule 6** of a draft of the Bill:

Industry would also feel the effects of the measures as the draft bill amends the Commonwealth Crimes Act to give the AFP and the Australian Security Intelligence Organisation more scope to require businesses in critical sectors such as transport, financial services and communications to provide information and records for investigations into terrorist offences.

Under these provisions, AFP and ASIO officers would be able to issue notices directly to aircraft and shipping operators requiring production of information about their planes and ships, cargo, crew and passengers.

The AFP would be able to apply to a federal magistrate for notices requiring financial institutions, travel and transport companies, electricity, gas and water utilities and telecommunications carriers to produce information on a suspect’s accounts, transactions and activities.

Businesses would be guilty of an offence if they refused to produce the information, with fines of up to \$6600, but they would also be shielded from legal action for breaching privacy rules, contracts or legal privilege by handing over confidential details to police.

A spokesman for Attorney-General Philip Ruddock said the “notice to produce” would be an alternative to a search warrant, which would make it easier for police to investigate terrorism, and businesses would not face the negative connotations of being served with a warrant.⁴⁵

The provisions in Schedule 6 waive legal professional privilege in relation to documents which are the subject of a notice, but only to the extent that a person is not excused from producing the document. The right not to incriminate oneself is also abrogated.

Item 1 inserts a new Division 4B (Power to obtain information and documents) into the *Crimes Act 1914*.

Clause 3ZQL inserts definitions for ‘authorised AFP officer’ and ‘Federal Magistrate’ into the Crimes Act. Authorised AFP officers are:

- the Commissioner,
- the Deputy Commissioner, or

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- a senior executive AFP employee who is a member of the AFP and is expressly authorised by the Commissioner.

Clause 3ZQM contains the provisions giving authorised AFP officers the power to request information or documents about terrorist acts from aircraft or ship operators. **Subclause 3ZQM(1)** sets out that **clause 3ZQM** applies where an authorised AFP officer believes on reasonable grounds that an aircraft or ship operator has information or documents relevant to a matter relating to the doing of a terrorist act.

Subclause 3ZQM(2) provides that an authorised AFP officer may, where subclause 3ZQ(1) applies:

- ask the operator questions relating to the ship or aircraft (including questions about people or things on board) that are relevant to the matter, or
- request the operator to produce documents in their possession or control about the ship or aircraft (including questions about people or things on board) that are relevant to the matter.

Failure to comply with **subclause 3ZQM(2)** is an offence punishable by a fine of \$6600 (**subclause 3ZQM(4)**). **Subclause 3ZQM(6)** provides a defence of reasonable excuse to the offence in **subclause 3ZQM(4)**.

Clause 3ZQN contains provisions giving authorised AFP officers the power to obtain documents relating to serious terrorism offences.

Clause 3ZQN will apply where an authorised AFP officer considers on reasonable grounds that a person has documents that will assist in the investigation of a serious terrorism offence (**subclause 3ZQN(1)**). In those circumstances, **subclause 3ZQN(2)** provides that the authorised AFP officer may give the person a notice requiring them to produce documents that are within the possession or control of the person and relate to one or more of the matters set out in section 3ZQP (discussed below). The content of the notice must comply with the provisions in **subclause 3ZQN(3)**.

Clause 3ZQO provides for an authorised AFP officer to apply to a Federal Magistrate for a notice requiring a person to produce documents relating to serious offences, rather than serious terrorism offences. That provision may widen what the AFP can currently do in relation to seizing documents in relation to serious offences for two reasons.

First, **item 2 of Schedule 5** creates a definition of ‘serious offence’ which relates to offences punishable by imprisonment of two years or more (see discussion above). This is different to the only existing definition of ‘serious Commonwealth offence’ in section 15HB (which only applies to Part 1AB—Controlled Operations) which lists specific crimes and applies to offences punishable by imprisonment for three years or more.

Second, under the current search warrant provisions there is scope for the AFP to seize documents under warrant issued by a magistrate or Justice of the Peace. The provisions in **clause 3ZQO** create a separate mechanism with a seemingly lower test and different limitations.

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The test for a notice to produce documents in relation to serious offences in Schedule 6 under **clause 3ZQO** requires that the Magistrate be satisfied on the **balance of probabilities**, by information on oath or by affirmation that a person has **documents that are relevant to, and will assist, the investigation of a serious offence**.

The provisions in sections 3E and 3F of the Crimes Act do allow for search warrants to be issued to search premises if an issuing officer (defined as a magistrate or Justice of the Peace) **is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material at the premises**.

The information which must be stated in the warrant issued under section 3E of the Crimes Act includes:

- (a) the offence to which the warrant relates; and
- (b) a description of the premises to which the warrant relates or the name or description of the person to whom it relates; and
- (c) the kinds of evidential material that are to be searched for under the warrant; and
- (d) the name of the constable who, unless he or she inserts the name of another constable in the warrant, is to be responsible for executing the warrant; and
- (e) the time at which the warrant expires (see subsection (5A)); and
- (f) whether the warrant may be executed at any time or only during particular hours.

The warrant must specify what exactly the warrant authorises in respect of the premises (section 3E(6)), and particularly that the warrant may authorise the seizure of:

- evidential material in relation to an offence to which the warrant relates, or
- a thing relevant to another offence that is an indictable offence, or
- evidential material (within the meaning of the *Proceeds of Crime Act 2002*) or tainted property (within the meaning of that Act),

if officers believe on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence.

The notice must be for the production of documents which (**subclause 3ZQO(2)**):

- relate to one or more matters set out in section 3ZQP (discussed below), and
- are in the possession or control of the person.

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Clause 3ZQP sets out 11 matters to which documents subject to a notice to produce under **clauses 3ZQN** and **3ZQO** relate, including:

- determining whether an account is held by a specified person with a specified financial institution, and details relating to the account,
- determining whether a specified person travelled or will travel between specified dates or specified locations, and details relating to the travel,
- determining who holds a specified telephone account and details relating to the account.

Personal capacity

Clause 3ZQQ expressly provides that the powers in clause 3ZQO are conferred on the Federal Magistrate in a personal capacity, and not as a court or member of a court. The Federal Magistrate does not have to accept the powers conferred under clause 3ZQO (**subclause 3ZQQ(2)**). When exercising the powers conferred under clause 3ZQO, the Federal Magistrate has the same protections and immunities as if exercising the power as the court, or member of the court, to which the Magistrate belongs (**subclause 3ZQQ(3)**).

Clause 3ZQR addresses some of the practical issues about when a person must produce a document under a notice, and what use may be made of documents produced pursuant to a notice. Notably, a person is not excused from producing a document on the grounds (**subclause 3ZQR(1)**) that:

- production of the document would contravene another law,
- the document might tend to incriminate the person, or expose them to a penalty or liability,
- production of the document would breach legal professional privilege, or any other duty of confidence, or
- production would otherwise be contrary to the public interest.

The production of documents and the information contained in those documents is not admissible as evidence in proceedings, other than for the purposes of proceedings under sections 137.1 and 137.2 (False and misleading information and documents), and 149.1 (Obstruction of Commonwealth public officials) of the *Criminal Code*.

Failure to comply with a clause 3ZQN or clause 3ZQO notice to produce documents is an offence punishable by a fine of \$3300 (**clause 3ZQS**).

Clause 3ZQT creates an offence relating to the disclosure of the existence or nature of a notice issued under clauses 3ZQN or 3ZQO. The penalty for breach of the non-disclosure provisions is \$13,200 or two years imprisonment or both. **Subclause 3ZQT(2)** sets out exceptions to the non-disclosure provisions, including disclosure:

- in order to obtain a document required by the notice,
- for the purposes of obtaining legal advice or representation in relation to the notice, or

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- in the course of legal proceedings.

Schedule 7—Sedition. Amendment of *Crimes Act 1914*, *Criminal Code Act 1995*, *Migration Act 1958* and *Surveillance Devices Act 2004*

Australia has an existing regime of ‘seditious’ offences contained in the *Crimes Act 1914*. The prohibited conduct under the existing provisions is engaging in ‘seditious enterprises’ or uttering ‘seditious words’.⁴⁶ These two concepts are tied to another one: ‘seditious intention’. A seditious intention, under existing legislation, is an intention:

- to bring the Sovereign into hatred or contempt
- to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth
- to excite Her Majesty’s subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth, or
- to promote feelings of ill-will and hostility between different classes of Her Majesty’s subjects so as to endanger the peace, order or good government of the Commonwealth.

A ‘seditious enterprise’ is an enterprise carried out in order to give effect to a seditious intention. ‘Seditious words’ are words expressive of a seditious intention.

In addition, under the current laws, to commit the offences noted above, the accused must act with the intention of causing violence or creating public disorder or a public disturbance. The existing penalty for both offences is a maximum of three years imprisonment.

Item 2 of Schedule 7 repeals the existing provisions on sedition (sections 24A to 24E of the Crimes Act). In their place, **item 12** inserts (into the *Criminal Code*, rather than the Crimes Act, in accordance with Government policy to put major new offences into the latter) a new regime for sedition offences.

The new offences

The Bill contains **clause 80.2** of the *Criminal Code* dealing with the offence of ‘sedition’. This offence is committed by:

- Urging another person to overthrow by force or violence:
 - the Constitution;
 - the Government of the Commonwealth, a state or a territory; or
 - the lawful authority of the government of the Commonwealth

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- urging another person to interfere by force or violence with lawful processes for an election of a member or members of a House of Parliament
- urging a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups, where that use of force or violence would threaten the peace, order and good government of the Commonwealth
- urging another person to engage in conduct intended to assist, by any means whatever, an organisation or country that is at war with the Commonwealth (whether declared or undeclared) or proclaimed to be so at war
- urging another person to engage in conduct intended to assist, by any means whatever, an organisation or country that is engaged in armed hostilities with the Australian Defence Force.

‘Recklessness’ is declared to apply to many elements of these offences. The effect of this is, taking subsection (1) as an example, that a person would commit the offence if they were aware that there was a substantial risk that what the person says will have the effect of urging another person to overthrow the Government by force or violence, and that having regard to circumstances known to them, that it was unjustifiable to take that risk.⁴⁷ This will involve some degree of widening of the scope of those offences to which recklessness applies, because the existing offences require an intention to be proved.

Defences

There are currently defences to the existing sedition offences in the Crimes Act. New defences for the new regime in the Criminal Code are contained in the Bill. Both groups of defences centre around the concept of acts done ‘in good faith’. The defences to the new provisions are similar to those to the old offences, but they differ in at least one substantial respect. There is, in the new provisions, more discretion given to courts to determine whether something is done ‘in good faith’. Whereas the existing provision deems acts done with certain intentions (to be prejudicial to the safety or defence of the Commonwealth, to assist an enemy, to cause violence or public disorder) not to be done in good faith, the new provisions provide that the existence or otherwise of such intentions is merely something that can be taken into account when considering the application of the defences.⁴⁸

The defences are:

- trying in good faith to show that the Queen; the Governor-General; the Governor of a state; the Administrator of a territory; any of their advisers; or a person responsible for governing another country, is mistaken in their counsels, policies or actions
- pointing out in good faith errors or defects, with a view to reforming same, in:
 - the Governments of the Commonwealth, states or territories

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- the Constitution
- legislation of the Commonwealth or states or territories or other countries
- the administration of justice of or in the Commonwealth, states or territories or other countries.
- urging in good faith another person to lawfully procure a change to any matter established by law, policy or practice in the Commonwealth, states or territories
- pointing out in good faith matters producing or having tendency to produce feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters
- doing anything in good faith in connection with an industrial dispute.

A question arises as to why any ‘good faith’ requirement needs to be included in these defences. That is: why, if a person attempts to show that the Governor-General or the Sovereign is mistaken in policy or action, is it further necessary to show that this is in ‘good faith’? It can be argued that it should be enough that a person who can demonstrate that they are simply accusing the sovereign or the Government of error or defect should be able to claim the protection afforded by the defences without complicating the issue by requiring that person to also show ‘good faith’.

Issues

The sedition provisions in the Bill have provoked considerable controversy. It has been argued that the new offences ‘widen the existing law of sedition in troubling ways’⁴⁹ and that the Bill is liable to stifle the expression of dissenting views (see below). These views are based on the idea that the new sedition provisions contained in the Bill effectively broaden the circumstances under which a person can be guilty of sedition. This had led to concern that the introduction of the provisions may have a negative impact on the freedom of the media. The ABC’s *Media Watch* raised as an example comments by journalist John Pilger during an interview with Tony Jones on *Lateline*. The exchange referred to was this:

John Pilger: ... we’ve always depended on resistances to get rid of occupiers, to get rid of invaders.

And what we have in Iraq now is I suppose the equivalent of a kind of Vichy Government being set up. And a resistance is always atrocious, it’s always bloody. It always involves terrorism.

You can imagine if Australia was occupied by the Japanese during the Second World War the kind of resistance there would have been, and so on. We’ve seen that all over the world.

Now, I think the situation in Iraq is so dire that unless the United States is defeated there that we’re likely to see an attack on Iran, we’re likely to see an attack on North

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Korea and all the way down the road it could be even an attack on China within a decade, so I think what happens in Iraq now is incredibly important.

Tony Jones: You mean defeated militarily?

John Pilger: Yes.

Tony Jones: Can you approve in that context the killing of American, British or Australian troops who are in the occupying forces?

John Pilger: Well yes, they're legitimate targets. They're illegally occupying a country. And I would have thought from an Iraqi's point of view they are legitimate targets. They have to be, sure.⁵⁰

Media Watch sought the advice of barristers Bret Walker SC and Peter Roney, as to whether Pilger's comments could constitute offences under the sedition provisions of the Bill, or whether Tony Jones and the ABC could be culpable for their reporting of them. The response is a fairly guarded one: that 'it would be open to construe Pilger's words as urging or inviting any person to engage in the conduct of the forceful elimination of Australian troops and their defeat in Iraq' and that 'there would certainly be an arguable case sufficient to place the evidence and surrounding circumstances before a jury'.⁵¹ Walker and Roney conclude that the 'inevitable consequence of the Bill will be to stifle the making of those statements, or even the reporting or repetition of them by others legitimately involved in public debate on such issues'.⁵²

Walker and Roney acknowledge that inciting terrorism is unlawful under existing law. They take the view, however, that the Bill must be intended to extend to covering 'indirect urging as well as condoning, justifying or glorifying acts of terrorism or conduct associated with it, or even abstract opinions about that conduct'.⁵³ This view seems primarily based on **subclauses 80.2(7)-(8)**. Those provisions outlaw the urging to engage in conduct that is intended to assist, by any means whatever, an organisation or country at war with Australia, or engaged in armed hostilities with the Australian Defence Force. As Walker and Roney point out, 'assistance need only be minimal, it need not ... involve inciting or urging violence'.⁵⁴

There is, however, already an offence of assisting, by any means whatever, proclaimed enemies or specified persons engaged in hostilities with Australian forces.⁵⁵ That has the result that it is also currently an offence to incite a person to commit such an offence.⁵⁶ That offence requires an intention on the part of the urger that the offence—the assisting of the enemy—be committed, but so too do the new offences in **subclauses (7)-(8)**. On that view the only difference between the old and the new offences in this respect is that the **subclause (8)** does not require an organisation or country engaged in hostilities against the Commonwealth to be specified by proclamation, as does the current provision (paragraph 24AA(2)(b) of the Crimes Act).

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Pilger might, then, as a result of his comments, have been prosecuted for assisting or inciting persons to assist a proscribed enemy in any way under the existing provisions of the Crimes Act and *Criminal Code*.⁵⁷ On one view, therefore, the Bill is unlikely to have the consequence attributed to it by Walker and Roney, of expanding the circumstances under which a person can be guilty of urging assistance to an enemy. On that view, if statements in the nature of that made by Pilger are discouraged, it is more a result of the continued existence of the law of sedition, than of the particular provisions of this Bill.

Also, it is by no means certain that a conviction would ensue if Pilger was to have been charged under the sedition provisions in this Bill. For a conviction to result, it would have to be shown, firstly, that Pilger intended the conduct to assist an organisation or country engaged in hostilities against the ADF, and secondly, that Pilger's comments were not covered by one of the good-faith exceptions. The statement that the invasion of Iraq was illegal is hardly a marginal or radical one. It is a view shared by Kofi Annan, and by several respected international lawyers.⁵⁸ It could be argued on Pilger's behalf that the additional statement to the effect that coalition troops are, from an Iraqi point of view, legitimate targets, amounts to no more than an affirmation of the internationally accepted right of self-defence, as recognised in article 51 of the United Nations Charter. If that were accepted, Pilger's comments might well come within one of the good-faith exceptions provided for in the Bill.

The need for sedition laws

The inclusion of these provisions on sedition in this Bill has triggered discussion on whether sedition offences are warranted at all in Australian law. The law of sedition is open to abuse by those wanting to silence opinions inconsistent with mainstream political views. One Australian commentator claims that 'archival and other evidence amply demonstrates that sedition is invariably used in an oppressive manner' and that 'in twentieth century Australia the history of the law of sedition is a history of repeated injustice meted out to left wing radicals'.⁵⁹ In support of this proposition, the case of *Burns v Ransley*⁶⁰ is cited. Burns was convicted of uttering seditious words at a public meeting in Brisbane. The conviction arose out of this exchange:

Questioner: We all know that we could become embroiled in a third world war in the immediate future between Soviet Russia and the Western Powers. In the event of such a war what would be the attitude and actions of the Communist Party of Australia?

Burns: If Australia was involved in such a war, it would be between Soviet Russia and American and British Imperialism. It would be a counter-revolutionary war. We would oppose that war. It would be a reactionary war.

Questioner: Mr. Chairman, I want a direct answer.

Burns: We would oppose that war. We would fight on the side of Soviet Russia. That is a direct answer.

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Burns was convicted and sentenced to six months imprisonment. He appealed to the High Court which split 2:2 on the question of whether the conviction should be allowed to stand. Because Chief Justice Latham was in favour of affirming the conviction, the deadlock was so resolved. The acting Commonwealth Attorney-General, Senator Nicholas McKenna, whose consent was necessary in order to launch a prosecution, granted consent despite receiving advice that Burns had not committed the offence charged. This decision, it has been suggested, was intended to secure a political advantage for the Commonwealth Government:

By making an example of Burns the Chifley Government was able to send a clear message to the opposition, to the public, and to the CPA [Communist Party of Australia], that communist “extremism” would not be tolerated.⁶¹

Another commentator, referring specifically to this Bill (or at least an earlier version of it) asserts that ‘it is preferable to remove sedition offences altogether from Australian criminal law’.⁶²

Unlawful associations

Item 4 amends the Crimes Act by inserting a new definition of ‘seditious intention’ into section 30A. This is necessary because the current subparagraph 30A(1)(b) refers to the definition of ‘seditious intention’ in section 24A, and that definition is to be removed by this Bill. The definition will not now have any bearing on the offences of sedition described above but will only be relevant for subparagraph 30A(1)(b) which declares unlawful:

any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages the doing of any act having or purporting to have as an object the carrying out of a seditious intention.

An interesting question arises as to the application or otherwise of the good-faith defences in section 24F of the Crimes Act. As it stands, it is at least arguable that those defences apply to subparagraph 30A(1)(b) because that subsection refers to section 24A, which in turn must be read subject to section 24F. Section 24F begins with the words ‘nothing in the preceding provisions [i.e. including section 24A] of this Part makes it unlawful for a person.’ The use of the term ‘person’ would include associations by virtue of section 22 of the *Acts Interpretation Act 1901*. The effect is that an organisation whose propaganda ‘urges disaffection against the Commonwealth’, for instance, would not, under this view of the current provisions, be an unlawful association if it was merely pointing out, in good faith, what it saw as errors in the Government.

The argument that the defences in section 24F apply to unlawful associations would not be available under the provisions as they appear in this Bill. That is because the definition of ‘seditious intention’ will no longer be a provision ‘preceding’ section 24F. The effect of this could be significant. Subparagraph 30A(1)(b) automatically declares any organisation

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to which it applies unlawful. Hence any organisation that simply urges ‘disaffection’ against the Government, or ridicules the Sovereign, for instance, could be considered an unlawful organisation, and its members and officers could be liable to imprisonment for one year, and persons who donated money to it could be liable to imprisonment for six months. If this is to be remedied, the provisions of section 24F need to be expressed to apply to subsection 30A(1)(b).

For an argument that the unlawful associations provisions should be repealed, see Roger Douglas, ‘Keeping the revolution at bay: The unlawful associations provisions of the Commonwealth Crimes Act’, *Adelaide Law Review*, vol. 22, no. 2, 2001, p. 259.

Schedule 8—Optical surveillance devices at airports and on board aircraft. Amendment of *Aviation Transport Security Act 2004*

Existing Part 4 of the *Aviation Transport Security Act 2004* deals with various security matters relevant to airports and aircraft, such as baggage and passenger screening, security identification requirements and the like. **Item 5** inserts new **Division 10—Optical surveillance devices (clauses 74J and K)** into Part 4. Under the *Surveillance Devices Act 2004*, optical surveillance devices include equipment that is used only for observational purposes (like binoculars) as well as recording equipment (like cameras and video recorders).

Clause 74J sets out the purposes of **new Division 10**. As well as preventing and detecting any offences under Commonwealth law at airports or on board aircraft, a stated purpose of Division 10 is ‘safeguarding Commonwealth interests’. This is obviously very broad in scope and would, in combination with **clause 74K**, allow for any information gained from, say, airport surveillance cameras to be used for non-aviation security purposes.

Clause 74K effectively allows ‘aviation industry participants’⁶³ to use optical surveillance devices free of regulation by state or territory law. The use of devices *may* be controlled by a code, yet to be developed. The code would allow the devices to be used:

- (a) at a security controlled airport⁶⁴, or
- (b) on board an aircraft that either is at a security controlled airport or is a prescribed aircraft⁶⁵; or
- (c) in a vehicle that is either on board an aircraft covered by paragraph (b) or is at a security controlled airport.

The code may also regulate and authorise the use or disclosure of a ‘signal, image or other information’ obtained by the use of an optical surveillance device, and provide penalties (maximum 50 penalty units) for offences against the code.

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Any such code will be disallowable by either House of Parliament in the usual way under the *Legislative Instruments Act 2003*.

Schedule 9—Financial transaction reporting. Amendment of *Financial Transaction Reports Act 1988*, *Proceeds of Crime Act 2002*, and *Surveillance Devices Act 2004*

The [Financial Action Task Force](#) (FATF) is an international organisation chiefly concerned with strengthening anti-money laundering (AML) provisions in the global financial system, including through individual countries implementing appropriate legislative and enforcement measures. To this end it developed a series of [40 AML recommendations](#) in 1990, which have been revised twice since. In the aftermath of the 11 September 2001 attacks, it also adopted [nine special recommendations](#) on combating the financing of terrorism (CFT).

Australia's principal anti-money laundering legislation—the *Financial Transaction Reports Act 1988* (the FTR Act)—was last updated in a significant way through the *Proceeds of Crime Act 2002* and, in relation to terrorism, through the *Suppression of the Financing of Terrorism Act 2002*. However, following the revision of the FATF AML/CFT recommendations in 2003/04, the Australian Government [committed](#) itself to a further overhaul of the FTR Act and associated legislation.⁶⁶ The consultative process has been a lengthy and difficult one, with industry groups raising concerns such as compliance costs and competitive neutrality between different sectors.⁶⁷ The Government now appears to have decided to split the implementation of the overhaul into a number of different initiatives:

- the amendments contained in Schedule 9 of this Bill, which address three of the FATF CFT special recommendations (SRs): SRVI (remittance services), SRVII (wire transfer funds services), and SRIX (cash couriers).
- an exposure draft anti-money laundering Bill, to be released later in November 2005, that will cover a broad range of FATF AML recommendations, and possibly some CFT as well; and
- consultation with the States and Territories about the enactment of laws to address a fourth FATF CFT special recommendation, that of preventing the use of non-profit or charitable organisations for the financing of terrorism.

The Commonwealth agency with operational responsibility for anti-money laundering matters is the Australian Transaction Reports and Analysis Centre, or [AUSTRAC](#). Australia's progress in meeting the various FATF AML/CFT recommendations was reported in an FATF [country evaluation](#) published on 14 October 2005. Of the three FATF CFT special recommendations the subject of Schedule 9, Australia was rated as 'partially compliant' for SRs VI and IX, and 'non-compliant' with SR VII. Australia achieved a rating of 'largely compliant' for most of the other special recommendations.

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Item 11 inserts **new Part IIIB—Register of Providers of Remittance Services**—into the FTR Act. **Clause 24E** provides that cash dealers⁶⁸ (other than financial institutions and real estate agents) who provide remittance services must provide certain information to the AUSTRAC Director. A failure to provide this carries a maximum penalty of up to 2 year imprisonment, or in the case of a corporation, a fine of approximately \$50,000. The details of the information the cash dealer must provide to AUSTRAC are to be contained in regulations, although the Explanatory Memorandum suggests this will include the Australian Business Number and various contact details.⁶⁹ The information provided will be placed on a Register maintained by the Director: **clause 24F**. It is not clear whether the required information will also include all agents used by the cash dealer—something that would assist in fully complying with SRVI.⁷⁰

Item 10 inserts **new Division 3A—Customer information to be included in international funds transfer instructions** to strengthen the various existing reporting and recording-keeping obligations contained in existing Part II of the FTR Act. In particular, **clause 17FA** provides that when a cash dealer is given an instruction for a transfer of funds out of Australia, the dealer must ensure the instruction includes information about the customer. A failure to do so carries a maximum penalty of up to two years imprisonment, or in the case of corporations, a fine of approximately \$50,000. In relation to funds transfers coming into Australia, **clause 17FB** in certain situations allows the AUSTRAC Director to direct a cash dealer to request the ordering customer to include customer information in all future incoming transfers.

In the October country evaluation report, FATF commented that:

Australia has a comprehensive system for reporting cross-border movements of currency above AUD 10,000 to AUSTRAC; however, there is no corresponding system for declaration/disclosure of bearer negotiable instruments.⁷¹

As defined in **item 1**, ‘bearer negotiable instruments’ include bills of exchange, cheques, promissory notes—essentially any type of instrument that the holder, or some other person, can exchange for cash or a deposit of equivalent value in a bank account.

Item 18 inserts **clause 33AA** into existing Part V of the FTR Act. It provides that a person who is leaving or arriving in Australia must, *if requested by an officer*,⁷² declare any bearer negotiable instruments he or she has with them and the amount payable under each instrument. They must also produce each instrument to the officer. If a person fails to declare or produce a bearer negotiable instrument in their possession as required, they commit an offence with a maximum penalty of imprisonment for one year. If an officer has asked a person to declare any bearer negotiable instrument, and the officer has ‘reasonable grounds to suspect that the person has made a false or misleading declaration’ in response, they may search their baggage or person.⁷³

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Under **clause 9**, if a bearer negotiable instrument is produced in a voluntary declaration by the person, or found through search, an officer may ask the person to prepare a report on the instrument. The report must include the very detailed information required in **item 21**.

Schedule 10—ASIO powers etc. Amendment of *Australian Security Intelligence Organisation Act 1979*, *Customs Act 1901*, *Customs Administration Act 1985*, and *Migration Act 1958*.

Item 1 inserts a new definition for ‘data storage device’ into section 4 of the ASIO Act. **Items 7–11** make consequential amendments to the ASIO Act to take account of this new definition.

Item 2 inserts a new section 23 into the ASIO Act. That proposed new section provides (**clause 23(1)**) that authorised officers or employees of ASIO may (for the purposes of carrying out ASIO’s functions):

- ask operators of aircraft or vessels questions regarding cargo or persons on board the aircraft or vessel, and
- request documentation from the operators relating to the cargo or persons on board the aircraft or vessel.

Non-compliance with the provisions in clause 23(1) is an offence (**clause 23(3)**).

Item 4 inserts a new provision into section 25 (Search warrants) of the ASIO Act. The new provision (**clause 25(4C)**) provides that records removed in the course of executing search warrants are to be retained only for such time as is reasonable, unless the return of the records would prejudice security.

Item 12 increases the period that search warrants under section 25 can remain in force from 28 days to 90 days.

Under subsection 25A(4) of the ASIO Act, the Minister may authorise certain things to be done under a computer access warrant, for example, using computers or telecommunications facilities for the purpose of obtaining access to data relevant to security matters. **Item 13** inserts a new provision into subsection 25A(4) allowing the Minister to authorise the entry into specified premises for the purposes of doing the things mentioned in subsection 25A(4).

Item 15 contains **subclause 25A(5A)**, which provides that computer access warrants must:

- authorise the use of any force necessary and reasonable to do the things specified in the warrant, and
- state when the entry is authorised (for example at any time during the day or night, or at specified hours of the day or night).

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Section 27 of the ASIO Act provides for the inspection of postal articles. Section 27(4) provides that a warrant for the purposes of the section shall specify the period that it remains in force. Currently, the period that a warrant under section 27 remains in force should not exceed 90 days. **Item 16** amends section 27, increasing the time a warrant can remain in force from 90 days to six months. **Item 17** makes a similar amendment to section 27AA(9) which deals with warrants for delivery service articles.

Section 17(1)(e) provides that one of ASIO's functions is to obtain, and communicate, foreign intelligence within Australia. Section 27A deals with warrants for the performance of functions under section 17(1)(e).

Item 18 increases the time period that some warrants authorised under section 27A (as detailed in section 27A(3)(a)) can remain in force from 28 days to 90 days. The amendments in **items 19 and 20** increase the period of time that certain warrants (as detailed in section 27A(3)(c)) can remain in force from 90 days to six months.

Section 34G provides for the giving of information (either pursuant to a warrant or direction) to a prescribed authority. Section 34G(5) makes it an offence to make false statements to the prescribed authority. **Item 22** inserts a new subsection 34G(5A) creating an exemption to the offence in section 34G(5).

Section 34N sets out, in addition to actions authorised under a warrant, the powers of ASIO to remove, retain and copy material. **Item 23** inserts a new subsection 34N(3) providing that items retained under the section may only be retained for such time as is reasonable, unless the return of the item would be prejudicial to security.

Item 25 sets out the timing for applying the changes to search warrants and statements put in place by Schedule 10.

Part IV of the ASIO Act makes provision for security assessments. Section 35 sets out the definition provisions for the purposes of Part IV. **Item 28** adds a new subsection 35(2) explicitly stating that an obligation, prohibition or restriction imposed by a control order under Division 104 of the *Criminal Code* is not a prescribed administrative action (which is defined in section 35(1)).

Amendments to the Customs Act 1901, Customs Administration Act 1985 and the Migration Act 1958

Section 186A of the Customs Act authorises the copying and taking of extracts of documents which are examined under the provisions in section 186 (General powers of examination of goods subject to Customs control). **Item 29** inserts three subparagraphs into paragraph 186A(1)(b), expanding the circumstances in which Customs officers can take copies or extracts of a document to include situations where the documents are relevant to specific functions of ASIO.

Section 16 of the Customs Administration Act puts in place a prohibition of disclosure of certain information. Subsections 16(7), (8) and (9) deal with permissible disclosure of personal information. **Item 30** expands the scope of permissible disclosure permitted

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under subsection 16(9) to include disclosure for the purpose of the administration or enforcement of a law of the Commonwealth, of a territory or of another country that relates to specific functions of ASIO.

Item 32 amends the Migration Act to include a definition of ‘security’ which is the same as the definition in the ASIO Act.

Concluding comments

Provisions of concern

Parliament may wish to note that issues or concerns about specific provisions are dealt with in detail under the relevant Schedule headings above.

Constitutional questions

The Commonwealth has no express head of power in the Constitution to deal with terrorism or criminal law. In the absence of an express or conferred power to deal with terrorism *per se*, it is thought that the Commonwealth may derive the power to legislate with respect to terrorism on the basis of a bundle of constitutional powers.

This bundle of powers is currently thought to be comprised of the defence power (section 51(v)), external affairs power (section 51(xxix)), express incidental power (section 51(xxxix)), the executive power (section 61) and the territories power (section 122). A further source of power may be Commonwealth’s power to legislate with respect to Commonwealth places within the meaning of section 52 of the Constitution, and possibly and the so-called ‘implied nationhood’ power.⁷⁴

However, the likelihood that even this bundle of constitutional powers is not sufficient to create a full coverage of legislative powers for the Commonwealth is at the heart of the COAG Communiqué of 27 September. The cooperation between the Commonwealth and the states aims at closing a possible legislative gap which arguably exists at the cross-section of state and Commonwealth legislative powers.

The Bill still raises various constitutional issues, some of which have already been flagged in the media. Of particular concern to significant sectors of Australia’s legal profession have been the preventative detention and control order regime in Schedule 4.⁷⁵

Overall, it seems almost inevitable that parts of the Bill as it is currently drafted will be challenged.

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Preventative detention orders—Division 105

As indicated above, the proposed law states that the object of the preventative detention order regime is to enable the AFP to take a person into custody and detain him or her for 48 hours in order to prevent an imminent terrorist attack occurring; or to preserve evidence of, or relating to, a recent terrorist attack. The object of the detention is not for extended questioning by police.

The initial question is whether a 48-hour detention by the AFP can be characterised as punitive in nature. If so, the basic principle that only Chapter III courts can authorise such detention on the basis of the proper adjudication of criminal guilt would arguably apply. This basic principle has been stated by the High Court in the case of *Chu Kheng Lim v Minister for Immigration* (1992) [176 CLR 1](#).⁷⁶

If not, that is, if detention is preventative and can be ordered by the executive,⁷⁷ it would raise the issue of whether conferring the power to issue a preventative detention order upon a Federal or state judicial officer in their personal capacity, would be requiring a member of the judiciary to exercise powers which are likely to be incompatible with his or her judicial function.⁷⁸

A different issue is whether the states and territories will be able to legislate detention powers for the preventative detention of a person for up to 14 days. The separation between executive and judicial power which is found in the Commonwealth Constitution does not occur at state level. For this reason, the Commonwealth requested that state laws should be passed to enable preventative detention for up to 14 days. On the information so far available, there is no general constitutional impediment on the states and territories to pass this type of legislation.

Control orders—Division 104

Control orders are issued by Chapter III courts. The question in relation to these orders is whether the restrictions on movement imposed by an order, such as house arrest or tracking devices, could amount to detention. There seems to be an argument that at a particular point in time, house arrest could equate to detention. Again, this raises a characterisation exercise as to whether this detention is punitive or not.

Constitutional issues may arise because the Bill may make a court act in a way that is incompatible with the essential nature of a court and the exercise of judicial power.⁷⁹ Questions that might occur in this context in relation to interim control orders might include the fact that orders which may result in detention via house arrest or severe restrictions on liberty through a combination of other restrictions are made *ex parte*, require the court to take account of matters it is likely to have no knowledge of (e.g. the person's financial and personal circumstances) and merely be satisfied on the balance of probabilities before making orders that may have severe impacts on rights and liberties. Similar arguments could be made about confirmed control orders. While the person and

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their lawyer (who may not be the lawyer of their choice) can be present, they have little real opportunity for a ‘hearing’ in any real sense—they need only be given a summary of the grounds on which the order is made, information likely to prejudice national security can be omitted from the summary, the person need only be given 48 hours notice of the hearing (not much time to prepare a case), and the court is only required to apply a balance of probabilities test. If the High Court invalidated interim control orders, that may by itself cause the rest of the control order regime to fail.

Human rights issues

Commentators have also objected to the Bill on the basis that it does not conform with Australia’s international human rights obligations.⁸⁰

Rights issues were considered in some depth by the [Senate Legal and Constitutional Committee inquiry and report into the ASIO \(Terrorism\) Bill 2002](#) in the context of special ASIO powers to question and detain under Division III of the *ASIO Act 1979*:

The proposed detention provisions provoked the most critical comment. In particular, the concept that a person who is not suspected of having committed an offence may be detained incommunicado for questioning and held without charge for up to a week is seen by almost all as incompatible with the rights and freedoms enjoyed in this country.

...Both of the major parties acknowledge the need for greater powers for the intelligence services to combat the terrorism threat. But to what extent is it necessary to sacrifice individual rights and liberties in order combat this threat? This is the fundamental question faced by this Committee and which must be faced by the Parliament in concluding the debate on this Bill.⁸¹

The President of the Human Rights and Equal Opportunity Commission, John von Doussa, has noted that Australia’s recent experience of executive detention without full review by the courts has been troubled:

We have recently seen the consequences of mistakes in the exercise of detention powers (as in the Cornelia Rau case). We are now contemplating a situation where a person who is detained by mistake will not have any real opportunity to contest their detention on the basis that the authorities got it wrong.⁸²

Australian National University academic Dr Penelope Mathew makes a similar point in relation to Australia’s record at the UN level in relation to detention issues:

Australia has been found by the Human Rights Committee to have violated both Articles 9(1) and (4) of the ICCPR repeatedly. ...It seems that Australia has not learned all its lessons when it comes to arbitrary detention. Lurching from one extreme to another, we have locked people up indefinitely in immigration detention and want to know at what point this became arbitrary; in some cases we have contemplated permanent detention simply because the detainees could not go

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anywhere else; and now apparently we think that if we only lock up people for a very short period of time for possibly vague security reasons it will be off the radar. What's important are **the reasons** for detention, and whether they withstand objective scrutiny as necessary and proportionate in the particular case to meet a rational and legitimate objective. It may be difficult, even in relation to the new version of the bill, for Australia to argue that there is adequate court control of preventative detention. While the bill shows an awareness of the jurisprudence relating to Article 9 of the ICCPR, it may be that it is a far too mechanistic and minimalist take on Australia's obligations.⁸³

In response to criticisms from former Family Court Chief Justice Alastair Nicholson,⁸⁴ the Attorney-General Philip Ruddock stated:

Let me just make it very clear. We have examined each and every one of these measures against our international obligations, and they do not breach our international obligations. There are some people who have a wish list in relation to international obligations, as to what they would like them to include, and the point I make in relation to international obligations that we are a party to, is that they have to be seen as a whole package.

One of the first and primary international obligations that we are a party to, is to the protection of the right to life, safety and security. Other rights in international instruments are not absolute. I make the point, and I have made it time and time again, in relation to freedom of movement that freedom of movement is restricted in order to preserve peoples' right to life. You have no right to choose on which side of the road you will drive on, and you know and you understand that. You accept it, but it constrains your freedom of movement. Equally, in relation to the sedition laws, freedom of speech, people say we can say anything. Well, you're journalists, you know that what you can say is constrained by defamation laws. Nobody is arguing out there that they are in breach of our fundamental human rights obligations.

You have to, in relation to each of these matters, recognise that in the international instruments that we have signed, there is provision for issues relating to safety and security to be taken into account in getting that balance right. These measures do and they do not breach our international obligations.⁸⁵

Is the language of the Bill sufficiently certain?

Part of the rule of law necessitates that when legislation seeks to create a criminal offence or impose a penalty, the language of the provision should be sufficiently certain and precise. The Parliament may wish to satisfy itself about the precise operation and meaning of many of the tests in the Bill. Essentially, precision is important because the Bill is dealing with preventing or deterring potential acts. In other words, many of the acts penalised in this Bill are one step removed from committing a substantive offence. They deal with pre-crimes or future acts, past actions, or urging or financing others to commit

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crimes. Amendments to Schedule 1 may operate to retrospectively criminalise past actions, even if a terrorist act does not occur.

For example, the test for a court to issue a control order in [Schedule 4](#) is essentially speculative as to future conduct, or based on past conduct that may have been legal at the time.

The test for proscription in [Schedule 1](#) has widened to include ‘advocating’ a terrorist act, which includes direct ‘praise’ for a terrorist act. This may prove difficult to adjudicate, particularly combined with current section 102.8, which makes it an offence carrying a three year penalty to ‘associate’ with a terrorist organisation defined in wide terms. There has not as yet been an assessment of these laws in courts.

Likewise, the Bill updates sedition offences in [Schedule 7](#). An issue that has arisen is that the good-faith defences to the new sedition offences are directed towards protecting political speech. By comparison, good-faith defences commonly found in state and federal anti-vilification legislation typically protect statements made in good faith for an academic, artistic, scientific, religious, journalistic or other public-interest purpose.⁸⁶

Finally, there is the question of whether a student or church group raising money for an overseas group could be caught by the new financing terrorism offence in [Schedule 3](#). The offence is made out if anyone intentionally makes funds available to, or collects funds directly or indirectly on behalf of, another group/person and is reckless as to whether the other group/person will use the funds to facilitate a terrorist act. This offence carries a maximum penalty of life imprisonment, even if the terrorist act does not occur or the funds were not used to facilitate a specific terrorist act.

How will the Bill interact with other major legislative changes passed since 2001?

The Commonwealth [National Security website](#) lists all terrorism-related legislation. There have been nearly 30 substantive pieces of legislation passed since 2001 which have changed the criminal laws of the Commonwealth, the powers of the intelligence and police agencies, the way terrorism trials are run, and the way telecommunications are intercepted. The powers given to ASIO to question and detain are currently under review. Several terrorism proceedings are currently under way, including the trial of Mr Izhar Ul-Haque, the trial of Mr Fadheem Lodhi (scheduled for February 2006), and the committal hearings for suspects arrested in Sydney and Melbourne in November 2005.

Parliament may benefit from a full picture of how this Bill would fit within the full legislative framework.

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How will the new powers affect the Australian Federal Police?

Australians expect certain things from our criminal justice system: that a person can only be arrested if reasonably suspected of committing an offence, or preparing to commit one, and that an arrested person will be informed of the charge and the grounds for it, and be able to fight those grounds in front of a court at the earliest opportunity. These are rights that have arisen from a long legal tradition.

In contrast, this Bill reflects an intelligence-led response to ‘home grown’ terrorism. The purpose of preventative detention is to prevent an act of terrorism and to preserve evidence, *not criminal prosecution* per se.

The use of intelligence for control orders where there is insufficient evidence to bring a criminal charge or as an alternative to prosecution is a fundamental change to Australia’s criminal justice system.

As Hugh White, former Director of the Australian Strategic Policy Institute, puts it:

...the laws as drafted have much wider reach. They appear to allow the Government to detain people who are not and have never been - so far as anyone knows - involved in terrorist planning or training, on the grounds that police or ASIO believe that they might become terrorists in the future.

But how could they tell that? How far would they cast this new net? And why can't adequate powers to fight terrorism be provided more simply and safely by the normal processes of criminal justice?⁸⁷

Although there has been strong reporting of criticisms of the procedure and content of the Bill from a legal and democratic perspective, there has not been sustained analysis of the operational implications arising from the Commonwealth’s approach to counter-terrorism contained in the Bill.

The Bill facilitates an increase in intelligence-gathering and access to personal and commercial information by ASIO and AFP through access to passenger lists in **Schedule 6** and **10**, the new stop, question and search powers in **Schedule 5**, the ‘notice to produce’ provisions in **Schedule 6**, and increased warrant periods for ASIO in **Schedule 10**.

The use of intelligence information in forming a reasonable suspicion that the police can then act upon has not yet received in-depth analysis. The UK Head of MI5⁸⁸, Dame Eliza Manningham-Buller was reported as stating recently:

“We are judged by what we do not know and did not prevent,” she said.

She said difficult decisions often needed to be made on the basis of intelligence that was “fragmentary and difficult to interpret”.

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“Some is gold, some dross and all of it requires validation, analysis and assessment. When it is gold it shines and illuminates, saves lives, protects nations and informs policy,” she said.

“When identified as dross it needs to be rejected: that may take some confidence.”

The central dilemma, said Dame Eliza—director general of MI5—was how to protect citizens within the rule of law when “fragile” intelligence did not amount to clear cut evidence.⁸⁹

Defence lawyer Phillip Boulten, SC, has questioned the linkage between AFP and ASIO powers:

My concern is that the questioning regime is being used by ASIO to gather information to add to its broader base of intelligence. The powers are not strictly used to obtain information that might be relevant to a specific, identifiable terrorism offence. They are not being used for their stated and intended purpose.

The ASIO questioning is in reality a de facto police interrogation. These powers are as wide as they are and more powerful than police questioning powers because they are designed for use in support of national security issues—i.e. to ward off the threat of imminent terrorist attacks.

They should not be used for ordinary police work.⁹⁰

It is important to note that the laws will be interpreted in an atmosphere of heightened tension, as has happened in the US and the UK.⁹¹ This puts pressure on law enforcement agencies, and increases the stakes for both inaction and error.

Use of intelligence information has other ramifications. Significant restrictions on access to a lawyer and monitoring of client–lawyer communications may adversely affect a person’s ability to seek and obtain advice. In practice, a person’s ability to appeal to the Federal Court or lodge a meaningful complaint with the Commonwealth Ombudsman is adversely affected by the lack of reasons for the order or the ‘evidence’ upon which it is based.

Evidence may be intelligence from sources in third countries which may have been obtained by ill treatment or torture. There is no express prohibition in the Bill on the use of intelligence from third countries where the information may be unreliable, obtained under duress, or motivated by promises of leniency. The admissibility of evidence obtained by torture is currently a prominent issue in the UK, and a judgment of the House of Lords on the point is expected shortly.

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In deterring terrorist acts, is there a risk of discriminating against groups?

The Prime Minister's stated aim for the new laws on 8 September was to 'deter' acts of 'home-grown' terrorism. Issues of racial profiling may become important in this context. Australian National University academic Professor Simon Bronnitt has suggested Australian criminal law was:

reverting to the ideology of 'status crimes', in which the laws tended to criminalise a person's status as a member of a group, rather than punishing them for what that person had done or intended to do.⁹²

As the Human Rights and Equal Opportunity Commission has noted in a 2004 report, Arab and Muslim Australians are experiencing heightened levels of prejudice and discrimination since 2001.⁹³ Being detained in secret or being the subject of a control order will affect not just an individual and family but could well intimidate sizable sections of the relevant community. The Prime Minister has striven to reassure the Muslim community at a recent summit of leaders.

Whilst the Bill is not designed to dissuade people from volunteering information to police, the wide scope of its provisions may prove counter-productive to people coming forward.

Parliament may wish to consider, for example, whether strict secrecy obligations in relation to preventative detention orders are necessary. These orders prevent the family or their lawyer from disclosing the whereabouts of a family member held in detention or reasons for his or her absence. The penalty is up to five years imprisonment. The secrecy provision may be criticized as disproportionate and potentially stifling public debate and public scrutiny of the operation of the laws.

Conclusion

Patrick Walters, national security editor for *The Australian*, has argued that the concern of the legal community over this Bill is misplaced, and trust should be placed in Parliament:

... our historical experience of security laws suggests that civil liberty alarmists could have more confidence in the good sense of the Australian body politic.⁹⁴

In the same context of the dilemmas of a democratic state facing security threats, Sir Anthony Mason recently cited President Aharon Barak of the Supreme Court of Israel speaking of a case in which his Court held that violent interrogation of a suspected terrorist was not lawful even if it might save human life:

We are aware that this decision does not make it easier to deal with the reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of

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law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.⁹⁵

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Further reading: legal commentary

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Brian G. Martin, '[International Terrorism: Recent Developments and Implications for Australia](#)', *Current Issues Brief*, 1985.

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[Anti-Terror Bill: Judiciary Compromised](#), media release, 25 October 2005.

[Law Council's Outrage at One Week Review for Anti-Terror Laws](#), media release, 14 October 2005.

[International Legal Concern Grows re Anti-terror Laws](#), media release, 12 October 2005.

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[Government Abuses Power Over Anti-Terrorism Laws](#), media release, 14 October 2005.

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Professor Mirko Bagaric (Deakin University), '[Your rights or your life? It's no contest](#)', *Herald Sun*, 4 October 2005, p. 21.

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Christopher Michaelson (ANU), '[Democracy wilts easily when conducted behind close doors](#)', *Canberra Times*, 18 October 2005.

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Professor George Williams (UNSW). '[Jumping the gun on terror](#)', *The Age*, 27 October 2005, p. 15.

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Justice John Von Doussa, '[Human rights chief says anti-terrorism laws could make courts unfair](#)', *Canberra Times*, 15 October 2005.

Hon. Terrence Higgins (Chief Justice ACT Supreme Court), '[Address to the Isaacs Law Society Ball](#)', Canberra, 13 October 2005.

Hon. Alastair Nicholson QC, '[Contemplating Justice: The Law as a Tool of Justice and Human Rights](#)', address to the Annual General Meeting of ReprieveAustralia, Melbourne, 12 October 2005.

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Endnotes

- 1 *Security Legislation Amendment (Terrorism) Act 2002; Suppression of the Financing of Terrorism Act 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002; Border Security Legislation Amendment Act 2002 and the Telecommunications Interception Legislation Amendment Act 2002.*
- 2 The *Criminal Code Amendment (Terrorism) Act 2003* applies terrorism offences to all of Australia.
- 3 Hon. J. Howard (Prime Minister), [Counter-Terrorism Laws Strengthened](#), media release, Canberra, 8 September 2005.
- 4 Hon. J. Howard (Prime Minister), [Anti-Terrorism Bill](#), media release, Canberra, 2 November 2005. See further Patrick Walters, 'Radical youths in fear of arrest as law passed', *The Australian*, 4 November 2005.
- 5 Sue Harris Rimmer, 'Anti-Terrorism Bill 2005', [Bills Digest, no. 62](#), Parliamentary Library, 2005–06.
- 6 UK House of Commons Parliamentary Library paper on the Terrorism Bill 2005-06, p. 3.
- 7 '[In full: Lord Carlile report on Terrorism Bill: Proposals by Her Majesty's Government for Changes to the Laws Against Terrorism: Report by the Independent Reviewer Lord Carlile of Berriew Q.C.](#)', *Times Online*, 12 October 2005.
- 8 'Counter-Terrorism Legislation and Practice: A Survey of Selected Countries', October 2005, <http://www.fco.gov.uk/Files/kfile/QS%20Draft%2010%20FINAL1.pdf>, accessed on 17 November 2005.
- 9 'Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to the United Kingdom', Strasbourg, 8 June 2005, [http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/CommDH\(2005\)6_E.doc](http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/CommDH(2005)6_E.doc), accessed on 17 November 2005.
- 10 House of Representatives, *Debates*, 10 November 2005, pp. 47–50.
- 11 Sen. L. Allison, '[PM Pedantic on Semantics](#)', media release, 3 November 2005.
- 12 Sen. A. Bartlett, '[Media Reports Cites \[sic\] Muslims as a Security Threat](#)', media release, 2 November 2005.
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- 14 Sen. Kerry Nettle, '[Trampling Human Rights](#)', media release, [27 October 2005].
- 15 Sen. B. Brown, '[Labor's Terror Flip-Flop](#)', media release, 4 November 2005.
- 16 Explanatory Memorandum, p. 5.
- 17 Parliamentary Joint Committee on ASIO, ASIS and DAD, *Annual Report of Committee Activities 2004-05*, May 2005, pp. 8–9. Available at: http://www.aph.gov.au/house/committee/pjcaad/annualreport04_05/report/fullreport.pdf
- 18 Explanatory Memorandum, p. 7.

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- 19 *ibid.*, p. 8.
- 20 *ibid.*, p. 6.
- 21 *ibid.*, p. 9.
- 22 Media reports state that several individuals were arrested in Sydney and charged with offences relating to planning a terrorist act. AFP Commissioner Mick Keelty stated that the arrests ‘could not have been made’ without the *Anti-Terrorism Act 2005* amendments. See Marian Wilkinson and Matthew Moore, ‘[We’ll charge more suspects](#)’, *Sydney Morning Herald*, 9 November 2005.
- 23 Explanatory Memorandum, p. 12.
- 24 M. Tapley, ‘Suppression of the Financing of Terrorism Bill 2002’, [Bills Digest, no. 127](#), Department of the Parliamentary Library, Canberra, 2001–02.
- 25 Explanatory Memorandum, p. 13.
- 26 *ibid.*, p. 14.
- 27 Item 21 inserts into the definitions section 100.1(1) of the Criminal Code that **senior AFP member** means (a) the Commissioner of the Australian Federal Police; or (b) a Deputy Commissioner of the Australian Federal Police; or (c) an AFP member of, or above, the rank of Superintendent.
- 28 Explanatory Memorandum, p. 21.
- 29 Senate Legal and Constitutional Committee, [Report into the ASIO \(Terrorism\) Bill 2002 and other matters](#), December 2002, Chapter 6.
- 30 Explanatory Memorandum, p. 23.
- 31 *ibid.*
- 32 *ibid.*, p. 27.
- 33 Jacob Varghese, ‘National Security Information (Criminal Proceedings) Bill 2004’, [Bills Digest, no. 59](#), Parliamentary Library, Canberra, 2004–05.
- 34 The ALP has suggested that a national Public Interest Monitor be established along the same lines as the Queensland monitor. See Arch Bevis, ‘Second reading speech: Anti-Terrorism Bill (No. 2) 2005’, House of Representatives, *Debates*, 10 November 2005, pp. 48.
- 35 Explanatory Memorandum, p. 35.
- 36 *ibid.*, p. 36.
- 37 *ibid.*, p. 37.
- 38 *ibid.*, p. 50.
- 39 *ibid.*, p. 66.
- 40 *ibid.*, pp. 53–4.
- 41 *ibid.*, pp. 59–60.

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- 42 *ibid.*, p. 47.
- 43 *ibid.*, p. 73.
- 44 Investigation of Commonwealth Offences.
- 45 Mark Davis, 'Terror laws end customer privacy rights', *Australian Financial Review*, 18 October 2005, p. 1.
- 46 Crimes Act, sections 24C and 24D.
- 47 Section 5.4 of the Criminal Code defines 'recklessness'.
- 48 Subsection 80.3(2).
- 49 Ben Saul, 'Briefing on sedition offences in the Anti-Terrorism Bill 2005', 1 November 2005.
- 50 '[Pilger on the US and Terrorism](#)', *Lateline*, ABC TV, 10 March 2004.
- 51 Bret Walker SC and Peter Roney, [Memorandum of advice](#), 24 October 2005, p. 15.
- 52 *ibid.*
- 53 *ibid.*, p. 13.
- 54 *ibid.*, p. 12.
- 55 Crimes Act, section 24AA.
- 56 Criminal Code, section 11.4.
- 57 Crimes Act, section 24AA and Criminal Code, section 11.4.
- 58 'Iraq war illegal, says Annan', [BBC News](#), 16 September 2004.
- 59 Laurence W. Maher, 'The use and abuse of sedition', *Sydney Law Review*, Vol. 14, 1992, p. 295.
- 60 (1949) 79 CLR 101.
- 61 Maher, *op. cit.*, p. 300.
- 62 Saul, *op. cit.*, note 4, p. 3.
- 63 These include Airservices Australia, airlines, airport operators, businesses operating on airport sites, persons appointed by the DOTARS Secretary, and contractors providing security and similar services to these entities.
- 64 There are approximately 168 security controlled airports in Australia.
- 65 Prescribed aircraft are generally those that provide regular passenger services, or are jet aircraft, or have take-off weights in excess of certain thresholds.
- 66 Hon. Chris Ellison, *Australia endorses global anti-money laundering standards*, media release, 8 December 2003.
- 67 '[Business holds up anti-laundering law](#)', *The Australian*, 17 May 2005, p. 31.
- 68 Cash dealers are defined section 3 of the FTR Act, and include a very wide range of entities and persons.

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- 69 Explanatory Memorandum, p. 104.
- 70 See FATF [country evaluation](#), p. 18; FATF [interpretative note](#), paragraph 8.
- 71 FATF country evaluation, p. 18.
- 72 That is, a Federal, state or territory police officer, or a customs officer.
- 73 A search of the person must be done by a member of the same sex.
- 74 The latter power is highly controversial and exists currently only as obiter statements by some High Court Justices. It has never been properly explored and tested.
- 75 Please see Legal Commentators under 'Further Reading' below.
- 76 There, the High Court held, except in certain circumstances: '...the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. The key question in relation to the power to detain persons under the Act is whether it is punitive. If so, it is clearly not pursuant to the adjudgment and punishment of criminal guilt and hence, its conferral will be unconstitutional.' The High Court has had occasion in recent years to consider this statement, with a range of views being expressed as to the degree to which it may be said that a firm principle exists in the face of numerous exceptions, and also as to the significance of a punitive character to the relevance of any prohibition implied from Chapter III.
- 77 Detention can be characterised in various ways, including, for example, detaining persons to punish them for having committed a crime, to deter potential future offenders from committing crimes or to protect the community from persons who have committed crimes. Some forms of detention have been held to be non-punitive in nature. In *Chu Kheng Lim*, the High Court noted several exceptions including, for example, the detention of persons for quarantine and mental health purposes or for awaiting trial. Since then, the High Court has accepted further exceptions, including the detention of persons for the purpose of protecting others in the community (*Fardon*) and the segregation of immigrants for the purposes of processing visa applications (*Al-Kateb*). (For more information: Peter Prince, '[The High Court and Indefinite Detention: Towards a national bill of rights?](#)', *Research Brief*, No. 1, and '[The Detention of Cornelia Rau: legal issues](#)', *Research Brief*, No. 14, Parliamentary Library, Canberra, 2004–05).
- 78 The High Court discussed how incompatibility issues might prevent a judge from exercising non-judicial functions even when that function was conferred *persona designata* and by consent in *Grollo v. Palmer*. The incompatibility condition stipulates that... 'no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power'. In relation to State judicial officers, see further the decision of *Kable v DPP (NSW)* (1996) 189 CLR 51.
- 79 Note discussion of McHugh J in *Al Kateb* of cases where war-time detention was upheld as using non-judicial power by the Executive: *Lloyd v Wallach* (1915) 20 CLR 299; *Ex Parte Walsh* [1942] ALR 359.

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- 80 See further Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, '[Human rights implications of the Anti-Terrorism Bill 2005](#)', 18 October 2005 (report prepared at the request of Jon Stanhope, MLA, Chief Minister of the ACT).
- 81 Senate Legal and Constitutional Committee. *Report into the ASIO (Terrorism) Bill 2002 and other matters*, December 2002, at p. xix.
- 82 Hon. John von Doussa, QC, '[HREOC President says anti-terrorism bill needs debate on practical considerations before it is too late](#)', media release, 27 October 2005.
- 83 P. Mathew, '[The Anti-Terrorism Bill 2005: Are We Crossing The Line?](#)', HREOC Forum on National Security Laws and Human Rights, ACT Legislative Assembly, 31 October 2005.
- 84 Hon. Alastair Nicholson, '[The Role of the Constitution, justice, the law, the courts and the legislature in the context of crime, terrorism, human rights and civil liberties](#)', speech to the Post-Graduate Student Conference, University of Melbourne, 4 November 2005.
- 85 Hon. Philip Ruddock MP (Attorney-General), '[Press Conference following meeting of the Standing Committee of Attorneys General](#)', transcript, 4 November 2005.
- 86 Ben Saul, '[Watching what you say](#)', *The Age*, 19 October 2005. See further David McLennan, '[Terrifying new laws](#)', *Canberra Times*, 22 October 2005; Brian Toohey, '[Read with care, seditious material](#)', *Australian Financial Review*, 22 October 2005; Media Watch, '[Seditious opinion? Lock 'em up](#)', *ABC TV*, 24 October 2005; and Andrew Jaspan, '[Anti-terrorism laws threaten media freedom](#)', *The Age*, 25 October 2005.
- 87 Hugh White, '[Tell us the how, not just the why of new laws](#)', *Sydney Morning Herald*, 31 October 2005.
- 88 The UK equivalent of ASIO.
- 89 '[MI5 head warns on civil liberties](#)', BBC News, 10 September 2005.
- 90 Phillip Boulten, SC, '[Australia's Terror Laws: The Second Wave](#)', *Australian Prospect*, Winter 2005 (online only).
- 91 UK terrorism laws have featured in incidents involving [interrupting a meeting](#) ('Anti-terror barrister offers to act over treatment of heckler', *The Times*, 1 October 2005), [riding a bike](#) ('Two wheels: good. Two legs: terrorist suspect', *The Times*, 17 October 2005) and [taking photographs](#) ('MP's 'Big Brother' fears over police use of terror laws', *Daily Echo* (Southampton), 20 October 2005).
92. Andrew Fraser, '[Top judge hits out at terror law](#)', *Canberra Times*, 14 October 2005.
93. See further Human Rights and Equal Opportunity Commission, [Ismaξ—Listen: National consultations on eliminating prejudice against Arab and Muslim Australians](#), June 2004.
- 94 Patrick Walters, '[Don't Panic: Threat response is measured](#)', *Weekend Australian*, 22 October 2005.
- 95 Sir Anthony Mason, '[Democracy and the law](#)', 2005 Law and Justice Address, Law & Justice Foundation of New South Wales, Parliament House, Sydney, 6 October 2005.

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