CHAPTER 2

BACKGROUND AND OVERVIEW

2.1 This Chapter provides a background to and overview of the Bill. It also outlines concerns over the need for the amendments contained in the Bill and constitutional and international law issues raised in respect of those amendments.

Background to the Bill

2.2 The Bill is based on an agreement between the Commonwealth, State and Territory Governments adopted at the Council of Australian Government's (COAG) Terrorism Summit held in Canberra on 27 September 2005.[1] The committee notes that it received a submission from the Tasmanian Government stating that it was satisfied that the provisions of the Bill reflect the terms of the Agreement.[2] The committee was also advised by the Chief Minister of the Australian Capital Territory that his Government had agreed at the COAG Summit to a package of anti-terrorism laws along 'the rough lines of the Bill'. However, the Chief Minister stressed to the committee that advice to his Government is that the Bill is not fully compliant with the International Covenant on Civil and Political Rights (ICCPR).[3]

2.3 Under the COAG Agreement, State Premiers and the Northern Territory and ACT Chief Ministers agreed to introduce complementary legislation for the purpose of introducing preventative detention for a period of up to 14 days and search powers.[4]

2.4 The Bill has many similar features to the Australian Security Intelligence Organisation's (ASIO) compulsory questioning and detention regime. In particular, the Bill envisages that the provisions of Division 105 preventative detention orders will operate in conjunction with ASIO's compulsory questioning and detention powers. The committee notes that the operation and effectiveness of these provisions (that is, Division 3 of Part III of the ASIO Act) is currently the subject of an inquiry by the Parliamentary Joint committee on ASIO, ASIS and DSD (PJCAAD). The report of that inquiry is expected to be tabled in the Parliament before the end of 2005, but it is unlikely the Senate will have the benefit of that report before considering the current Bill.[5]

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1 A copy of the COAG agreement is available at http://www.coag.gov.au/meetings/270905/.

2 The Hon Mr Paul Lennon MHA, Premier, Tasmania, *Submission 208*, p. 1.

3 ACT Government, *Submission 156*, p. 2; see also *Committee Hearing,* 17 November 2005, pp. 89-100.

4 See Terrorism (Community Protection) (Amendment) Bill 2005 (Vic); Terrorism (Preventative Detention) Bill 2005 (SA); Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005 (NSW); Terrorism (Preventative Detention) Bill 2005 (Qld).

5 Section 34Y of the ASIO Act provides that Division 3 of Part III of that Act will cease to have effect 3 years after it commences (22 July 2003); para. 29 (bb) *Intelligence Services Act 2001* requires the review by 22 January 2006.

Key features

2.5 The Bill proposes to amend various federal laws with the stated aim of improving existing offences and powers targeting terrorist acts and terrorist organisations. Key features of the Bill include:

- the expansion of the grounds for the proscription of terrorist organisations to include organisations that 'advocate' terrorism (Schedule 1 of the Bill);
- a new offence of financing terrorism (Schedule 3);
- a new regime to allow for 'control orders' to authorise the overt close monitoring of terrorist suspects (Schedule 4);
- a new police preventative detention regime to allow detention without charge to prevent a terrorist act or to preserve evidence of such an act (schedule 4);
- wider police powers for warrantless search and seizure in Commonwealth places and in 'prescribed security zones' (Schedule 5);
- police powers to compel disclosure of commercial and personal information (Schedule 6);
- updated sedition offences (Schedule 7);
- increased financial transaction reporting obligations on individuals and businesses (Schedule 9); and
- the expansion of information and intelligence gathering powers available to police and ASIO (Schedules 8 and 10).

Rationale for the Bill – A necessary and proportionate response?

2.6 No witnesses questioned the responsibility of the government to evaluate national security information and to make a judgment about the actual level of threat to Australia. However, many questioned whether the obligation to protect the community justifies creating a separate system to deal with 'terrorist suspects' who may otherwise be dealt with by the criminal justice system. As explained elsewhere in this report, submitters and witnesses urged the committee to consider: whether the current Bill is necessary to combat terrorism; whether existing powers and offences are sufficient to deal with acts of terrorism and related activity; and whether the removal of traditional safeguards is a proportionate response.

2.7 This inquiry is essentially a review of the provisions of the Bill. However, it is also recognised that the inquiry concerns the proposed introduction into Australian law of a completely new scheme capable of depriving citizens and residents of their liberty and allowing far reaching intrusions into other fundamental civil liberties. The rationale for doing so is the terrorist threat currently facing Australia. As the Director-General of ASIO advised the committee:

> It is a matter of public record that Australian interests are at threat from terrorists. It is also a matter of public record that ASIO has assessed that a terrorist attack in Australia is feasible and could well occur. … the threat

> has not abated and that we need to continue the work of identifying people intent on doing harm, whether they are already in our community, seeking to come here from overseas or seeking to attack Australian interests overseas. I would also point out that the nature of the threat we face is not static. Just as terrorist organisations and groups learn from past experience and adapt to counter the measures that governments implement, so also do we need to continually revise the way we go about the business of countering terrorist threats. Part of that process involves ensuring that the legislative framework under which we operate is commensurate with the threat we face.[6]

2.8 The bombing of the London Underground on 7 July 2005 and the realisation that the nature of the terrorist threat had changed from a known threat from overseas to include a relatively unknown 'home grown' one has been cited as rationale for the Bill.[7] The nature of terrorist attacks elsewhere the world (such as those in Madrid in 2004 and in Indonesia since 2002) were also referred to during the inquiry to illustrate that:

> … terrorist attacks can occur in a number of ways, including single attacks, coordinated attacks on multiple sites within on city or across a number of cities, or as a campaign of attacks over an extended period of time.[8]

2.9 The Australian Federal Police (AFP) argued that the clandestine nature of terrorism activity and its catastrophic consequences mean that police and intelligence agencies must be better equipped to prevent an act of terrorism from occurring:

> Together, the proposals for control orders, preventative detention and stop, search and seizure powers represent additional powers for police to deal with situations that are not covered by the existing legal framework. Since the events of 2001, the AFP and other agencies have been in constant dialogue with the government on the appropriateness of the legal framework for preventing and investigating terrorism as our understanding of the terrorist environment has developed. … The proposals in the bill … address limitations in that framework which have become apparent recently, in particular the need for the AFP to be able to protect the community where there is not enough evidence to arrest and charge suspected terrorists but law enforcement has a reasonable suspicion that terrorist activities may be imminent or where an act has occurred.[9]

2.10 The covert nature of intelligence gathering means that law enforcement agencies may be presented with information crucial to disrupting or preventing a terrorist act, but which is 'unreliable' in that the information, for example, cannot be revealed without jeopardising a source, is insufficient to support a charge or may

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6 Mr Paul O'Sullivan, *Committee Hansard*, 17 November 2005, p. 53.

7 See, for example, The Hon John Howard MP, Prime Minister, Counterterrorism laws strengthened, 8 September 2005, media release. See also AMCRAN, *Submission 157*, p.1.

8 AFP, *Committee Hansard,* 17 November 2005, p.55.

9 AFP, *Committee Hansard*, 17 November 2005, p.54.

inadmissible in a court. On this view, the criminal justice system is incapable of responding appropriately to the threat. Additional measures are therefore needed to protect the community by disrupting terrorist networks and monitoring people suspected of being involved in or likely to be involved in terrorism related activity.

2.11 The additional measures proposed by the Bill are controversial. Reliance on intelligence information for a preventative detention or control order where there is insufficient evidence to bring a criminal charge is a fundamental change to Australia's criminal justice system. As explained elsewhere in this report, civil libertarians argue that a system based on 'intelligence' rather than 'evidence' and which impinges on the right to fair trial, undermines the presumption of innocence, institutionalises the risk of arbitrary deprivation of liberty and is inconsistent with the rule of law.

2.12 Witnesses and submitters took issue with the claim that the measures proposed by the Bill were an appropriate response to the terrorist threat facing Australia. The committee's attention was drawn to media reports that 15 of 25 security experts interviewed believe the laws are not proportionate to the terrorist threat in Australia and would not deter or prevent terrorism in Australia.[10] Mr Allan Behm, a former senior government advisor on security and counter terrorism, advised the committee that, in his view, the Bill is ill-considered, unnecessary and will almost certainly be ineffectual.[11] In addition to expressing concern over the Bill's implications for the exercise of constitutional, legal and other freedoms, he noted that the government has not offered a detailed assessment of the terrorist threat confronting Australia to justify the law.[12]

2.13 Much was made of the fact that Australia's threat alert has not changed despite recent events in the United Kingdom (UK). As Mr Behm said:

> It is significant that the terrorist alert level in Australia has remained unchanged for four years, notwithstanding substantial increases in the information gathering and analytical capacities of the national intelligence, security and police agencies. At medium, the threat level simply reflects the fact that an attack could or might occur. But the threat is not differentiated any further than that.[13]

2.14 Critics also argued that the Bill reflects assumptions about the nature of global terrorism which do not appear to be based on fact – especially the assumption that terrorist acts are perpetrated by 'terrorist organisations'. Mr Behm advised that:

> The draft Bill also seems to assume that individual terrorists will come to notice through their association with extremist groups, their attendance at sermons by radical cleric, or their participation in overseas terrorist training

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10 Available at http://www.abc.net.au/lateline/content/2005/s1492426.htm.

11 *Submission 193*, p.1.

12 Other submitters and witnesses, such as the New South Wales Council for Civil Liberties, also made this point. See Mr David Murphy, *Committee Hansard*, 17 November 2005, p. 31.

13 *Submission 193*, p.5

> courses…..international experience suggests the greatest danger to the public comes from those who …have not received formal training in terrorist techniques, are not members of identified groups…'cleanskins' who are instructed not to draw attention to themselves and who have not come to the notice of intelligence or law enforcement agencies.
>
> What makes the present day form of terrorism so difficult to deal with is its amorphous nature and the fact that its ideological base is so powerful that individuals are prepared to kill themselves in order to conduct a successful attack.[14]

2.15 Witnesses and submitters also expressed concern that, while the Bill was not intended to single out any particular individuals or communities for special legal attention, an unintended consequence of the Bill has been heightened concern within the Australian Islamic community that it will be subject to discrimination and abuse of power without effective opportunity to obtain redress.[15]

Specific concerns of the Muslim community

2.16 After the London bombings, which highlighted the threat of domestic terrorism, the Prime Minister met with members of the Muslim community on 26 August 2005. A Muslim Community Reference Group (the Reference Group) was subsequently formed that would work 'with the Australian Government, and with their respective community groups in creating communication and support networks that will promote understanding between the Muslim community and the wider Australian community'.[16] The Australian Muslim Civil Rights Advocacy Network (AMCRAN) advised the committee that media reports that members of the Reference Group had endorsed the proposed laws were incorrect and that the majority of the Muslim community was opposed to them.[17]

2.17 The committee was advised that the broad offences and powers proposed in the Bill will create a risk that innocent people will be caught up in the system and that the laws will further alienate and radicalise disaffected people, especially Muslim youth who may be more vulnerable to the extremist ideology of terrorists. [18]

2.18 There was lengthy discussion during the hearings about the impact of anti-terrorist legislation on the community and the difficulty of ensuring that clear, up to date and comprehensive information is available to the Australian Muslim community who feel most effected by the new laws. Representatives from the Muslim community advised the committee that they face considerable difficulties in keeping

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14 *Submission 193*, p.6

15 Mr Allan Behm, *Submission 193*, p.10. Ms Chong, *Committee Hansard*, 17 November 2005, p.20.

16 The Hon John Cobb MP, Minister for Citizenship and Multicultural Affairs, Media Release, 15 September 2005 as reported by AMCRAN in *Submission 157,* p.1

17 *Submission 157*, p.6.

18 Ms Chong, *Committee Hansard*, 17 November 2005, p.20.

their community full informed of developments in anti-terrorism laws, both in terms of the rationale for such laws and their requirements. The committee considers that the Government has a role to play in this regard.

Recommendation 1

2.19 The committee recommends that the Government continue to fund its terrorism related information campaign directed at the Australian community and, further, that the Government also develop and fund a specific information campaign – in conjunction with leaders of the Australian Muslim community – which is directed at informing that community of the rationale for and requirements of Australia's terrorism legislation.

Adequacy of existing criminal law

2.20 Submitters and witnesses also argued that Australia's current criminal laws were adequate to deal with the terrorist threat. They pointed to the breadth of existing Australian criminal law, which already provides offences for conduct antecedent to the doing of a terrorist act.[19] The Criminal Code already criminalises the following conduct:

- providing or receiving training connected with terrorist acts (section.101.2);
- possessing things connected with terrorist acts (section.101.4);
- collecting or making documents likely to facilitate terrorist acts (section.101.5); and
- any act in preparation for, or planning, a terrorist act (section.101.6).

2.21 These offence provisions were amended by the Anti-Terrorism Bill 2005 passed on 3 November 2005. That Bill amended the Criminal Code to clarify that conduct antecedent to doing a terrorist act is an offence even: if a terrorist act does not occur; or if the training, the thing, the document or act is not connected to a specific terrorist act, or is connected to one or more terrorist acts.

2.22 The Criminal Code also currently criminalises conduct which involves a connection to a terrorist organisation, whether or not it is directly linked to the preparation or doing a terrorist act or whether a terrorist occurs. The proscribed conduct includes:

- directing the activities of a terrorist organisations (section 102.2);
- membership of a terrorist organisation (section102.3);
- recruiting for a terrorist organisation (section 102.4);
- training or receiving training from a terrorist organisation (section 102.5);
- getting funds to or from a terrorist organisation (section 102.6);

19 See, for example, Mr Emerton and Mr Tham, *Submission 152,* p.24.

- providing support to a terrorist organisation (section 102.7); and
- associating with terrorist organisations (section 102.8).

2.23 The Criminal Code also includes ancillary offences such as attempt, complicity (aid, abet, counsel or procure a criminal offence) incitement and conspiracy. All these ancillary offences apply to terrorism and related offences.[20]

2.24 In light of the above, some submitters argued that it is difficult to envisage a situation in which the grounds for a preventative detention order would be satisfied, but there would not be a sufficient basis to arrest the person in question for an offence already established by the Criminal Code.[21]

International law issues

2.25 As noted above, the Chief Minister of the Australian Capital Territory informed the committee that advice to his Government was that the Bill is not fully compliant with Australia's obligations under international law.[22]

2.26 International law permits restrictions on fundamental rights, over and above those normally accepted in democratic societies in peace time, in relation to many (but not all) human rights where there exists a 'threat to the life of the nation'.[23] The state of emergency exception permitted under article 4 of ICCPR allows for derogation from certain provisions of that Covenant, including article 9 (deprivation of liberty), 10 (humane treatment) and 14 (fair trial). However, for such a derogation to occur, strict conditions must be met. In states of emergency the requirement for 'proportionality' continues to operate to ensure that limitations or derogations of rights do not exceed those strictly necessary to achieve a legitimate objective. As was explained to the committee:

> 'Governments enjoy a margin of appreciation in evaluating the necessity of restricting or suspending rights, though they must precisely specify the nature of the threat and the reasons for restrictions.'[24]

2.27 Extraordinary laws may be justifiable but they must also be temporary in nature. Sunset provisions ensure that such laws expire on a certain date. This mechanism ensures that extraordinary executive powers legislated during times of emergency are not integrated as the norm and that the case for continued use of extraordinary executive powers is publicly made out by the Government of the day. Witnesses noted that clause 4 of the Bill provides for a review of the Bill at the end of

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20 *Criminal Code Act 1995*, Division 11, Part 2.4.

21 Mr Emerton and Mr Tham, *Submission 152,* p.24.

22 ACT Government, *Submission 156*, p. 2; see also *Committee Hearing,* 17 November 2005, pp. 89-100.

23 Article 4 of the ICCPR.

24 Professor Williams, Dr Lynch, Dr Saul, Gilbert and Tobin Centre of Public Law, University of New South Wales, *Submission 80*, p.4.

five year period. They argued, however, that the Bill's provision for a sun-set at the expiry of 10 years is grossly disproportionate to any 'emergency' that Australia may be facing:

> Expiry clauses of ten years' duration do not qualify as genuine sunset clauses. The nature and extent of the terrorist threat cannot possibly be predicted over the forthcoming ten year period, and the government has not presented evidence to suggest that the threat to Australia will be remain constant or will increase over that period. The uncertainty and speculation involved in such predictions point to the need for sunset clauses of reasonably short periods.[25]

2.28 This committee has taken the position in previous inquiries into proposed terrorism laws that:

> A sunset clause in legislation can be used as a guarantee of parliamentary scrutiny and opportunity to review. It can help to ensure that the survival of the legislation is made to depend on upon a continuing demonstrated threat of terrorism.[26]

2.29 The committee also notes that it is unaware of any other legislation imposing a 10 year sunset period.

2.30 Submitters noted that there is nothing in the Bill, as currently drafted, which links the operation of the proposed laws to a proclaimed state of emergency consistent with the terms of article 4 of the ICCPR.[27]

2.31 A number of witnesses took issue with the lack of any formal derogation from Australian human rights obligations under the ICCPR.[28] It has been pointed out that the Commonwealth government is not claiming to be at war or dealing with a public emergency that threatens the life of the nation or circumstances that may justify formal derogation under article 4 of the ICCPR from certain fundamental civil rights.[29] It is argued that this absence of formal derogation affects the degree of comparison between the Bill and the anti-terrorism legislation in the UK on which it is

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25 Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 24. Proposed sections 104.32 and 105.53, for example, provide that certain proposed provisions in the Bill shall lapse after 10 years.

26 Senate Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment Bill 2002 and related matters*, December 2002, paragraphs 9.9.

27 Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 4. See also footnote 27 below.

28 See for example, Professor Donald Rothwell, Challis Professor of International Law, Sydney Centre for International and Global Law, The University of Sydney, *Submission 188*, p.8

29 For example, Professor Rothwell points out that there is no proclaimed state of emergency and the Attorney General made no mention of a threat to the life of the nation in his Second Reading Speech of 3 November 2005 and no reference is made to any threats to the nation in the Explanatory Memorandum accompanying the Bill, *Submission 188*, p.8.

reportedly modelled. Only the UK has derogated from the right to liberty under article 9 of the ICCPR and article 5 of the European Convention of Human Rights.

Bill of Rights

2.32 Many witnesses also noted that, unlike other western democratic common law countries, the Bill's operation will not be tempered by a Bill of Rights.[30] That is, the absence of a constitutional or statutory bill of rights in Australia means that Australian judges do not have a coherent statement of minimum human rights standards against which to interpret law that *prima facie* infringe civil rights and fundamental freedoms. In contrast, the UK *Human Rights Act 1998* (HRA), sets out a range of such standards and requires judges to interpret UK law consistently with these, so far as it is possible to do so. This allows laws to be read down to ensure consistency wherever possible.

2.33 The HRA provides that legislative provisions, which cannot be interpreted consistently with that Act, may be declared incompatible. A declaration of incompatibility does not invalidate the law, but signals to the legislature that amendments are necessary. The UK Government is not compelled to alter the law and the Parliament remains the final decision maker. This reflects the fact that the HRA is based on a 'dialogue' model and is intended to foster wider and better informed debate on fundamental human rights issues.[31]

2.34 The HRA also requires that public authorities must act consistently with the HRA and provides grounds for review of executive action and remedies, including damages if appropriate.

Constitutional Issues

Reference of power

2.35 The Constitution does not grant the Commonwealth express power over 'criminal activity'. However, there is no doubt that the Parliament can validly make laws which create criminal offences and provide for their investigation, prosecution and punishment, provided that the offences fall within, or are incidental to the exercise of a constitutional head of power'.[32] In other words, Commonwealth criminal law is

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30 See, for example, Professor Charlesworth, Professor Byrne, Ms Mackinnon, *Submission 206*, p.5; Dr Angela Ward, ABC *Lateline, 24* October 2005 available at http://search.abc.net.au/search/search.cgi?form=simple&num_ranks=10&collection=abcall&query=Dr+Angela+Ward&meta_v=lateline&submit.x=17&submit.y=11

31 The ACT Human Rights Act 2004 is modelled on the UK *Human Rights Act 1998* and the New Zealand *Bill of Rights Act 1990 see* http://www.jcs.act.gov.au/bor/index.html The protection of fundamental rights elsewhere in Australia relies on common law presumptions and principles of statutory interpretation, which can be overridden by statute and some limited constitutional protections. See generally, ACT Government, *Submission 156*.

32 Terrorism and the Law in Australia: Legislation, Commentary and Constraints, *Research Paper No.12,* Department of Parliamentary Library, Canberra, 2002, p.41.

ancillary to the performance of the Commonwealth of its powers to protect itself, the Constitution, its institutions and to enforce its own laws.[33]

2.36 The primary heads of constitutional power which could support Commonwealth anti-terrorist legislation are the defence power;[34] external affairs power,[35] incidental power[36], executive power[37] and the implied nationhood power.[38] The States referred powers to the Commonwealth to enable the Commonwealth Criminal Code to be extended to introduce the federal terrorism offences and related provisions.

Executive imposition of punitive sanction

2.37 The constitutional separation of powers between the executive and the judiciary at the Commonwealth level prevents the executive from imposing punitive sanctions without trial or conviction by the courts.[39] Recent authority suggests the law in this area is developing and it is now unclear whether a majority of High Court justices would find that involuntary preventative detention is *per se* punitive.[40]

2.38 The committee is aware of legal opinion that both the preventative detention and control order regimes may fail a constitutional challenge.[41] That is, that preventative detention and control orders may be unconstitutional if characterised as being punitive or because the prescribed procedures are inconsistent with the exercise of the judicial power of a court subject to Chapter III of the Constitution.

Infringement of implied constitutional rights

2.39 A broader constitutional question may be whether the available heads of powers could support the Bill due to the constitutional requirement that laws be reasonably appropriate and adapted to their purpose. The High Court has made it clear that a law may fail this test if, for example, it unduly infringes upon basic rights, such as:

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33 Sir Garfield Barwick, Crimes Bill 1960, Second Reading Speech, House of Representatives, *Debates*, 8 September 1960 p. 1020 -1021 reported in *Research Paper No. 12*, p.41.

34 Section 51 (vi).

35 Section 51 (xxix).

36 Section 51 (xxxix).

37 Section 61

38 This is a controversial which has not been full explored or tested and exists in obiter statements of some High Court justices.

39 *Lim v Minister for Immigration* (1992) 176 CLR 1, 28-29; see also *Veen v the Queen* (No.2) [1988] HCA 164 CLR 465 at 47.

40 *Al Kateb v Goodwin* (2004) 189 CLR 51; *Farden v Attorney General* (Qld) (2004) 210 ALR 50.

41 Stephen Gageler SC, *In the matter of constitutional issues concerning preventative detention in the Australian Capital Territory*, Opinion, http://www.chiefminister.act.gov.au/whats.asp?title=What's%20New

- freedom of speech and political communication;[42]
- implied right to freedom of movement and association arising from the constitutional system of representative and responsible government;[43] and
- retrospective criminal sanctions.[44]

Retrospectivity

2.40 Witnesses noted that Item 22 of Schedule 1 of the Bill may also raise a constitutional issue.

2.41 Item 22 inserts clause 106.3 into the Criminal Code, which provides that the amendments made by Schedule 1 to the *Anti-Terrorism Act 2005* (Cth) apply to offences committed whether before or after the commencement of this section. Schedule 1 of that Act expanded existing terrorism offences relating to training, possessing a thing or document, and financing terrorism by providing that it is not necessary for the prosecution to identify a specific terrorist act. It will be sufficient for the prosecution to prove that the particular conduct was related to 'a' terrorist act (ie, as opposed to 'the' terrorist act).

2.42 The Bill's Explanatory Memorandum explains the rationale for the amendment in Item 22 as follows:

> This is justified because the provision merely clarifies what was originally intended. It is necessary because it will otherwise create an incorrect implication.[45]

2.43 The Senate Scrutiny of Bills Committee expressed the view that the amendment may constitute a substantive expansion of the present offences, not just a clarification.[46] That is, 'the retrospective operation of the offences would clearly trespass on personal rights and liberties' in that conduct which was not criminalised before may be now. However, that committee left it to for the Senate to determine whether it trespasses on those rights unduly. It also noted that the need for any retrospective provisions to be clearly justified.[47]

2.44 Witnesses noted the prospect of a constitutional challenge to amendments having retrospective effect. Dr Lynch of the Gilbert and Tobin Centre of Public Law advised this committee as follows:

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42 See *Davis v Commonwealth* (19988) 166 CLR 79; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR.

43 See *Kruger v Commonwealth* (1997) 190 CLR 1; *Mulholand v Australian Electoral Commission* (2004) 209 ALR 582.

44 See *Polyukhovich v Commonwealth (War Crimes Act Case*) (1991) 172 CLR 501.

45 P. 9.

46 Senate Scrutiny of Bills Committee, Alert Digest Number 13, 9 November 2005, pp 8-9.

47 Senate Scrutiny of Bills Committee, Alert Digest Number 13, 9 November 2005, p. 8.

> The final point I want to raise relates to the potential retrospective operation of the first Anti-Terrorism Act, adopted recently, in relation to the 'the' or 'a' question. We make the point that the High Court in Polyukhovich v Commonwealth in 1991 accepted that the retrospective operation of law is constitutional in some circumstances. That decision was, however, a very narrow majority of four judges to three, and the fourth judge was split in a very slim way on the question of retrospectivity. So the High Court may reopen the question.[48]

2.45 Other witnesses pointed to the potential unfairness of retrospective laws. It was put to this committee, for example, that 'it is a very basic unfairness to say that one thing is lawful at a particular stage and then later to recast the same conduct as unlawful'. [49]

2.46 In its evidence to this committee, the Department confirmed the retrospective effect of Item 22. It advised that the amendments was intended to catch 'conduct that has occurred before the commencement of this Bill about which we are not aware, which is conduct that has not yet been discovered'. It also advised that:

> The interpretive provision was put in on the recommendation of the Director of Public Prosecutions with a view to making it clear that the terrorist act offences operated in the way they were intended to operate in the first place—and that is that you could prove that the person was intending to commit *a* terrorist act, not the absolute specific details of *the* terrorist act [*emphasis added*]. This is important for them, because quite often the person may not even select a target until the last minute, particularly with suicide bombers.[50]

2.47 The Department representative therefore argued that the provision was justified.

> It is absolutely at the margins in its impact on the culpable nature of the [*proscribed*] behaviour and that it was basically what I am sure everyone would have thought was the intention of the legislation in the first place.[51]

The Government's response

2.48 The Department explained that legal advice to the Government was that the Bill would withstand any constitutional challenge and was consistent with international law.[52] The committee was advised that:

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48 Dr Andrew Lynch, *Committee Hansard*, 14 November 2005, p. 60.

49 Mr Simeon Beckett, *Committee Hansard* 14 November 2005, p. 42. See also Dr Ben Saul, *Committee Hansard*, 14 November 2005, p. 62.

50 Mr Geoff McDonald, *Committee Hansard*, 14 November 2005, p. 7.

51 Mr Geoff McDonald, *Committee Hansard*, 18 November 2005, p. 18.

52 See, for example, *Committee Hansard,* 18 November 2005, pp 2, 9. See also *Committee Hansard*, 14 November 2005, pp 6, 13.

> The Government's view is that the legislation, including the measures relating to preventative detention, control orders and sedition, are consistent with Australia's obligations under international law, including international human rights law. The Government is satisfied that not only are the measures consistent with those obligations, the legislation contains sufficient safeguards to ensure that its implementation in individual cases will also be consistent.[53]

53 *Submission 290A*, Attachment A, p.1. See also pp 1-2 and p. 21 of that submission.